THE DANGERS OF "STREAMLINING" IMMIGRATION: WHY FEDERAL COURTS OF APPEAL SHOULD HAVE JURISDICTION TO REVIEW BIA STREAMLINING DECISIONS

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ABSTRACT

When an immigration case is appealed to the Board of Immigration Appeals, an important decision occurs: should the screening panel assign the case to a single member, who may affirm the decision without an opinion or reverse the decision, or refer the case to a three-member panel? Although this "streamlining" may not appear to be too harmful at first blush, the difference between being assigned to a single-member or a three-member panel on appeal is significant: between 2004 and 2006, seven percent of single member decisions favored the immigrant-appellant, whereas fifty-two percent of three member decisions favored the immigrant-appellant.[1] *In light of the benefits that come from three-member review, the question of whether a federal court of appeal has jurisdiction to review the Board of Immigration Appeals' streamlining decisions is clearly an important issue. The Circuits are split over whether to find jurisdiction to review these decisions.*

This Note will argue that the majority of the Circuits are correct in finding that federal courts of appeal should have such jurisdiction. The streamlining regulations serve as the meaningful standard required by Heckler v. Chaney[2] *for a court to determine whether application of streamlining was appropriate*

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[1] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 10 (2008).

[2] Heckler v. Chaney, 470 U.S. 821, 830 (1985).

in a particular case. Furthermore, the harsh penalties that come with deportation and the changing nature of deportation, as it increasingly resembles criminal punishment, weighs in favor of providing potential deportees with more rights of appeal and judicial review.

I. INTRODUCTION

When an immigration case is appealed to the Board of Immigration Appeals ("BIA")—the administrative agency charged with reviewing appealed immigration cases—an important decision occurs: should the process be "streamlined" with sole review by a single-member screening panel, or should the single member refer the case to a three-member panel for full review?[3] This "streamlining"[4] process, whereby a case on review is assigned to a single-member screening panel, may not initially appear harmful to an immigrant, and may even look to carry some administrative

[3] *See* 8 C.F.R. § 1003.1(e) (2017) (describing the BIA's case management system).

[4] Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (codified at 8 C.F.R. pt. 3).

benefits such as lightening case loads and leading to speedier dispositions.[5] However, at least in asylum cases, the difference between being assigned to a single-member and a three-member panel on appeal is significant, with seven percent of single-member decisions favoring the alien compared to fifty-two percent of three-member panel decisions favoring the alien.[6] In other words, whether an asylum seeker's appeal is assigned to a single-member or a three-member panel makes a large difference in the outcome of the appeal. This discrepancy is exacerbated by the variance in decisions among Immigration Judges ("IJs").[7]

In light of the benefits that come from having one's case referred to a three-member panel, whether a federal court of appeal has jurisdiction to review the BIA's decision to employ streamlining in a particular case is clearly an important issue. The Third, Fourth, Ninth, and Tenth Circuits have found that the decision to employ streamlining is subject to judicial review.[8] The Second and Eighth Circuits, meanwhile, have found that the decision is committed to the BIA's discretion by law.[9] The Sixth Circuit has explicitly declined to decide the issue[10], while the First, Fifth, Seventh, Eleventh, and D.C. Circuits

[5] *See* U.S. DEP'T OF JUST., BIA RESTRUCTURING AND STREAMLINING FACT SHEET 2 (2006) (noting that in the first four years of implementation, the streamlining process reduced the number of pending immigration appeals from approximately 56,000 to approximately 28,000).

[6] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1, at 10 (noting that seven percent of single-member decisions favored the alien while fifty-two percent of three-member decisions favored the alien during fiscal years 2004 through 2006). The author notes that there may be some "selection-bias" inherent in these numbers. As this Note will detail in a later section, all cases appealed to the BIA are initially assigned to a single member for review, who will make the determination if the case should be assigned to a three-member panel. The single member considers a number of factors during this initial "streamlining" screening—factors which the author argues make the streamlining subject to APA judicial review—that could lead one to conclude that only the more complex cases will be assigned to a three-member panel, thus explaining the higher rate of reversal by three-member panels. This is a possibility, but given the large discrepancy between single-member and three-member panels—three-member panels are seven times more likely to reverse—and the fact that this is a situation in which agencies are given the power to decide questions of liberty, whether streamlining in a particular case was proper remains an important issue.

[7] *See Asylum Denial Rates by Immigration Judge*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (July 31, 2006), http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html [https://perma.cc/7ZQT-XJL3] (reviewing at the asylum denial rates of over one hundred IJs between 2000 and 2005 and noting, by example, that among New York IJs, denial rates were as low as 9.8 percent and as high as 95.8 percent).

[8] Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009); Purveegiin v. Gonzales, 448 F.3d 684, 692 (3d Cir. 2006); Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087-88 (9th Cir. 2004); Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[9] Kambolli v. Gonzales, 449 F.3d 454, 464-65 (2d Cir. 2006); Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004).

[10] Lopez-Salgado v. Lynch, 618 F. App'x 828, 833-34 (6th Cir. 2015).

have not decided this issue.

Deportation has historically been viewed as civil rather than criminal punishment.[11] However, more recent Supreme Court opinions have treated deportation as a particularly severe civil penalty and stated that the standard of proof in deportation proceedings is higher than the traditional civil standard.[12] Streamlining was initially justified by the Department of Justice ("DOJ") as a necessary response to the large backlog of appeals and motions pending in front of the BIA.[13] However, some commentators have argued that streamlining is an instrumentalist approach that damages the rule of law, treating the law as simply a means to an end.[14] This approach reflects a larger view about the immigration system, where speedy and time-efficient outcomes are prioritized and valued over adherence to standards, precedents, and legal principles.[15]

This Note will argue that the majority of the circuits that have addressed this issue are correct and that federal courts of appeal should have jurisdiction to review BIA streamlining decisions. This is because the regulations governing when the BIA may employ streamlining serve as the meaningful standard required by *Heckler v. Chaney*[16] for a court to determine whether the application of streamlining was appropriate in a particular case. Additionally, although the constitutionality of the streamlining procedure is not in question, changing notions about what type of punishment deportation is weighs in favor of providing more judicial review to immigrants in deportation proceedings.

Part II of this Note details the immigration statutes and regulations

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[11] *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 a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.").

[12] *See* Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010) ("Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.") (citations omitted); Woodby v. INS, 385 U.S. 276, 286 (1966) ("We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.").

[13] Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,135-36.

[14] Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 836-37 (2009).

[15] *See id.* at 837.

[16] *See* Heckler v. Chaney, 470 U.S. 821, 828 (1985). The Court found that parties adversely affected by a federal agency's final decision are entitled to review by federal courts of appeal unless one of two exceptions in § 701 of the APA apply: "(1) statues preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id*.

governing the BIA and the streamlining procedures. Part III reviews the due process rights of immigrants, why this is a particularly important question in light of some recent Supreme Court opinions, and how constitutional due process challenges to the streamlining procedures have failed. Part IV explains the value and Supreme Court history of judicial review of administrative agency actions, the circuit split over this issue, and argues that the federal courts of appeal should have jurisdiction to review the BIA's decision to employ streamlining in a particular case. Part V briefly concludes the Note.

II. BACKGROUND ON THE BIA

The statute generally governing the administration of U.S. immigration laws is the Immigration and Nationality Act ("INA").[17] Recent updates to the INA charge the Secretary of Homeland Security "with the administration and enforcement of [the Act] and all other laws relating to the immigration and naturalization of aliens . . . ."[18] The power of the Secretary of Homeland Security is not absolute in this area, however, as the INA reserves some power for other government officials, including the Attorney General.[19] The Attorney General has the power to "establish such regulations, . . . review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as [he] determines to be necessary for carrying out this section."[20] The statutes governing judicial review under the Administrative Procedure Act ("APA") of removal proceedings were amended by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[21] Although the new statute lists several matters relating to deportation that are not subject to judicial review under the APA, it states that it should not "be construed as precluding review of constitutional claims *or questions of law raised upon a petition for review filed with an appropriate court of appeals* in accordance with this section."[22]

One of the federal agencies that deals with immigration matters is the BIA. In 1940, the Attorney General approved a regulation that established the BIA as a component of the DOJ.[23] Originally, the BIA made the initial

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[17] 8 U.S.C. § 1103 (2016).

[18] *Id.* § 1103(a)(1).

[19] *See id.* ("[E]xcept insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers . . . .").

[20] *Id.* § 1103(g)(2).

[21] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (amending 8 U.S.C. ch. 12).

[22] 8 U.S.C. § 1252 (a)(2)(D) (2016) (emphasis added).

[23] Delegation of Powers and Definition of Duties, 5 Fed. Reg. 2454 (July 1, 1940).

adjudication decisions in deportation and exclusion cases.[24] This changed in 1952, when new regulations gave the BIA appellate jurisdiction of final deportation and exclusion decisions of IJs as well as certain other decisions of immigration enforcement officials.[25] In 1983, the BIA and the IJs were placed under the authority of a new organization in the DOJ, the Executive Office for Immigration Review ("EOIR").[26] The regulations creating the EOIR established that the BIA would operate under the authority and supervision of the Attorney General.[27]

Today, the BIA is the primary appellate review venue for administrative decisions relating to immigration, particularly decisions of IJs.[28] The BIA must review the matters before it in a timely fashion, and its precedent decisions are intended to provide guidance on the proper administration and interpretation of the INA.[29] BIA members must "exercise their independent judgment and discretion in considering and determining the cases coming before [them] . . . ."[30] Additionally, the BIA has a limited scope of review. It "will not engage in *de novo* review of findings of fact determined by an immigration judge," but it "may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*."[31] Decisions of the BIA are binding on all officials administering the immigration laws of the U.S.[32] Finally, the BIA may, by majority vote, decide that decisions rendered by a three-member panel or by the BIA en banc will serve as precedent in all cases involving the same issues.[33]

One piece of the BIA's overall case management system is the streamlining system.[34] The DOJ adopted the first streamlining provision in 1999, allowing a single member of the BIA to affirm without opinion the decision of an IJ if the decision was squarely controlled by existing

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[24] Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 33-34 (1977).

[25] *Id.* at 35.

[26] Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8038-39 (Feb. 25, 1983) (codified at 8 C.F.R. pts. 1, 3, 100).

[27] 8 C.F.R. § 1003.0(a) (2017).

[28] *See id.* § 1003.1(b) (detailing the matters over which the BIA has appellate jurisdiction).

[29] *Id.* § 1003.1(d)(1).

[30] *Id.* § 1003.1(d)(1)(ii).

[31] *Id.* § 1003.1(d)(3)(i)-(ii).

[32] *Id.* § 1003.1(g).

[33] *Id.*

[34] *See id.* § 1003.1(e) (detailing the BIA's case management system, including how cases on review should be managed and assigned).

precedent.[35] This change was justified as a response to the large backlog of appeals and motions filed with the BIA, and the belief that the number of such appeals and motions filed would only increase in the future.[36] The DOJ adopted further streamlining provisions in 2002 to expand the system.[37] These provisions expanded the scope of single-member review, making it the dominant mode for deciding cases on review.[38] The provisions reduced the BIA's "pending caseload from [approximately] 56,000 in August 2002 to approximately 28,000 by January 2006."[39]

These changes came under a fair amount of criticism and were characterized as an abandonment of duties by the BIA and as unduly burdensome on appellants.[40] The rate at which applicants appealed BIA decisions to the federal courts of appeal dramatically increased following the institution of the streamlining provisions—from 4,449 appeals to the federal courts of appeal in 2002 to 8,833 in 2003, right after the streamlining provisions were instituted.[41] Critics have argued that this was the result of appellants becoming dissatisfied with the quality of the BIA's adjudications.[42] Critics also argued that streamlining denies the noncitizen and the reviewing court a reasoned explanation for the BIA's decision.[43] This

[35] Falcon Carriche v. Ashcroft, 335 F.3d 1009, 1012 n.2 (9th Cir. 2003); Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,135-36.

[36] Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,135-36.

[37] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

[38] *Id.* at 54,879 ("The [DOJ] . . . in this rule, expands the single-member process to be the dominant method of adjudication for the large majority of cases before the Board.").

[39] U.S. DEP'T OF JUST., *supra* note 5, at 2.

[40] *See* Berishaj v. Ashcroft, 378 F.3d 314, 331 (3d Cir. 2004). The court stated that when the BIA summarily affirms backlogged decisions by IJs, it has possibly "shirked its role and duty of ensuring that the final agency determination in an immigration case is reasonably sound and reasonably current." *Id. See also* Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 505-08 (2005) ("The [affirmance without opinion] process fails to correct the errors made by immigration judges and adds to the burden immigrants must shoulder to protect their rights.").

[41] JAMES C. DUFF, U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl. B-3 (2006), http://www.uscourts.gov/sites/default/files/statistics_import_dir/completejudicialbusiness.pdf [https://perma.cc/UDK7-DGAB].

[42] *See* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 55-57 (2005) (citing criticisms by lawyers, scholars, members of Congress, immigration judges, and a former BIA member).

[43] *Id.* at 29-31.

speaks to a fear that the streamlining provisions would lead to less reasoned decisions that would be viewed as less legitimate by the public.[44] Whether a decision is viewed as legitimate is a due process and judicial review value as important as whether the decision is correct.[45]

The DOJ responded to these criticisms by stating that "the Board's experience with the streamlining initiative has proven that fears of procedural failures or substantive errors being overlooked are not well founded."[46] The DOJ emphasized that their internal study had not identified "an appreciable difference in the quality of the decisionmaking [sic] based on the experience of the participants."[47] However, in the same response, in fact in the very same paragraph, the DOJ conceded that "a complex study of the results of streamlining . . . ha[d] been proposed," but it had not been undertaken before the DOJ declared that "fears of procedural failures or substantive errors being overlooked are not well founded."[48] The DOJ seemed to rely on the efficiency and speediness of the streamlining adjudication process as the main factor in determining that the streamlining provisions were an effective and useful change.[49]

While efficiency is certainly important in any adjudicatory system, this efficiency argument deprioritizes a number of salient points. First, one of the functions of the BIA is to harmonize discrepant IJ decisions.[50] This is particularly important in light of the fact that the decisions of individual IJs vary so wildly.[51] When appealed, IJ decisions are assigned to single-member panels as a matter of course, and are affirmed in short, single-sentence decisions. Thus, no such reconciliation of discrepant IJ decisions takes place. Additionally, the implementation of streamlining led to a decrease in the number of BIA decisions selected as precedential, i.e., binding on all IJs and Department of Homeland Security personnel.[52] Some have argued that this

[44] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,885.

[45] *See* Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 566 (2007).

[46] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,885.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] 8 C.F.R. § 1003.1(d)(1) (2017).

[51] *See Asylum Denial Rates by Immigration Judge*, *supra* note 7.

[52] *See* AM. BAR ASS'N COMM'N ON IMMIGR., BOARD OF IMMIGRATION APPEALS: REFORMING THE IMMIGRATION SYSTEM 18 (2008) (noting that in the years preceding the streamlining provisions, the BIA would routinely designate forty or more opinions as precedent annually, whereas in the five years following the provisions the BIA labeled less than twenty-five opinions as precedent annually).

shows abandonment by the BIA of one of its main roles.[53] This point highlights one of the important functions of the BIA that is sacrificed in the name of efficiency. Moreover, all of this illustrates the way in which speediness in immigration adjudication is prioritized over other important factors such as accuracy, flexibility in decisionmaking [sic], and the rule of law.[54] The DOJ's justifications, although perhaps appealing on paper and in front of a budgetary committee, ignore vitally important considerations and show just one more way in which the considerations and rights of immigrants are subordinated by the federal government.

Regardless, the streamlining procedures are now codified at 8 C.F.R. § 1003.1(e).[55] The procedures start with a presumption that all cases on review should be assigned to a single member of the BIA for review.[56] The single member is then directed to do one of two things: (1) if he determines the decision below was correct, he will affirm it without an opinion and issue a brief order to this effect; or (2) if he determines the decision below is not appropriate for affirmance without opinion, he will issue a brief order modifying or remanding the decision.[57] The only time a case will be referred to a three-member panel for review is if the single member determines that the case presents one of six special circumstances:

(i) the need to settle inconsistencies among the rulings of different immigration judges;

(ii) the need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) the need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) the need to resolve a case or controversy of major national import;

(v) the need to review a clearly erroneous factual determination by an immigration judge; or

(vi) the need to reverse the decision of an immigration judge or the Service, other than reversal under § 1003.1(e)(5).[58]

This means that cases will only be assigned to a three-member panel if the initial single member reviews the case and makes the decision that the case is appropriate for three-member review. Whether these provisions provide a clear enough framework for a federal court of appeal to review the BIA's

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[53] *See id.* at 19; *see also* Cruz, *supra* note 40, at 505-08.

[54] *See* Rana, *supra* note 14, at 854-59 (discussing how the number of appeals to federal circuits skyrocketed after the streamlining provisions were implemented and arguing that the provisions undermine the values of judicial review).

[55] 8 C.F.R. § 1003.1(e) (2017).

[56] *Id.* (stating that unless a case meets certain exceptions, it "shall be assigned to a single [BIA] member for disposition.").

[57] *Id.* § 1003.1(e)(4)-(5).

[58] *Id.* § 1003.1(e)(6).

decision to employ streamlining is the issue at the heart of this circuit split.

III. DUE PROCESS IN IMMIGRATION

A. *Background*

The Fifth and Fourteenth Amendments provide that neither the federal nor state governments shall deprive any person "of life, liberty, or property, without due process of law . . . ."[59] Due process of law "implies that a person will receive fairness of treatment, and a procedure designed to achieve a just and equitable result" before a person is deprived of a right.[60] Some have commented that due process requires that the system in question "must produce accurate, fair decisions, as often as is reasonably possible" and that it "must be perceived as fair, so that people who lose their cases feel that there was some rational basis for the decisions against them."[61] The Supreme Court has routinely "held that some form of hearing is required before an individual is finally deprived of a property interest."[62] This is as true in the immigration and deportation context as in the context of any other statutorily-created property right.[63] Determining to what extent the Due Process Clause applies to immigrants is a question with a lengthy history in academic literature.[64]

In 1892 in *Chae Chan Ping v. United States*,[65] the Supreme Court found that Congress and the Executive have plenary power in the immigration context.[66] Justice Fields stated that the power to admit or exclude individuals of other nations was a power "incident of sovereignty belonging to the government of the United States as a part of those sovereign powers

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[59] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[60] Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, 39 CLEV. ST. L. REV. 1, 13 (1991).

[61] Benesch, *supra* note 45, at 566.

[62] *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (holding that in determining what amount of due process to insist upon before an individual can be deprived of a statutorily-created property right, the court should weigh the interests of the individual, the risk of error, and the costs and burdens of additional process) (citing Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931); Dent v. West Virginia, 129 U.S. 114, 124-25 (1889)).

[63] *See* Landon v. Plasencia, 459 U.S. 21, 34-35 (1982). The Court extended the *Mathews* test to the deportation context, recognizing that the consequences of deportation including losing the right "to stay and live and work in this land of freedom" and "the right to rejoin her immediate family." *Id.*

[64] For a detailed overview of the historical debate about immigrants' rights in the U.S., *see* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1-36 (7th ed. 2012).

[65] Chae Chan Ping v. United States, 130 U.S. 581, 608-09 (1889).

[66] *Id.*

delegated by the Constitution."[67] He added that such power "cannot be granted away or restrained on behalf of any one."[68] The Court added that this was especially true in cases like this, where any right of the petitioner to enter the U.S. was "held at the will of the government, revocable at any time, at its pleasure."[69]

The Court extended this plenary power to the deportation context in *Fong Yue Ting v. United States*.[70] In that case, the Court held that "[t]he right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[71] In addressing the petitioners' claims of violations of their due process rights, the Court added that an "order of deportation is not a punishment for crime."[72] Anyone who has been deported "has not, therefore, been deprived of life, liberty, or property, without due process of law, and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application."[73] In short, the Court held that someone subject to deportation should not be afforded the same due process of law as someone charged with a criminal offense.[74]

The question then becomes what amount of due process an immigrant in deportation proceedings should be afforded. In *Wong Wing v. United States*,[75] the Court invalidated an immigration law depriving Chinese citizens in the U.S. of a hearing and submitting them to criminal punishment for an alleged criminal violation as a violation of due process.[76] Crucially, the Court found that all persons within the U.S., including immigrants, were "persons" for purposes of the Fifth and Sixth Amendments, and thus they should be afforded some due process of law before they could be subject to criminal punishment.[77] In *Yamataya v. Fisher*, the Court held due process review applied in the deportation process and thus an alien subject to deportation should, at the very least, be allowed the opportunity to state her case for why she should not be deported.[78] However, the *Yamataya* Court made clear that

[67] *Id.* at 609.

[68] *Id.*

[69] *Id.*

[70] Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893).

[71] *Id.*

[72] *Id.* at 730.

[73] *Id.*

[74] *See id.*

[75] Wong Wing v. United States, 163 U.S. 228, 228 (1896)

[76] *Id.*

[77] *Id.* at 238.

[78] *Id.* at 100-01.

the type of hearing required in a deportation proceeding is not the same type of hearing required in a criminal case, holding that petitioner's insufficient knowledge of the English language and her lack of representation at the hearing did not make the hearing so inadequate as to violate her due process rights, despite her arguments to the contrary.[79] These two cases mark an important point in the history of due process in the immigration context. The holdings of *Wong Wing* and *Yamataya* reflect an understanding that immigrants, as persons for the purpose of constitutionally protected rights, deserve some amount of due process and that deportation is different from other forms of civil punishment.[80] This notion is the foundation of any argument that the severe consequences of deportation and the procedures surrounding it should be reviewed.

This idea underlies *Woodby v. INS*,[81] in which the Court concluded that Congress had not addressed the degree of proof required in deportation proceedings.[82] The petitioners urged that the appropriate burden was that applied in criminal cases, i.e., proving the essential facts beyond a reasonable doubt, while the government argued that because deportation proceedings are civil cases, the appropriate burden was a preponderance of the evidence.[83] The Court rejected the preponderance of the evidence standard, noting the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."[84] The Court next looked to denaturalization cases, where they had previously "required the Government to establish its allegations by clear, unequivocal, and convincing evidence."[85] Noting that "[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization," the Court ultimately held that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."[86] Again, while the Court may not have explicitly held deportation to be criminal punishment, this holding reflects the idea that deportation is different from other civil punishments.

The Court continued to encounter this issue. In *Reno v. Flores*,[87] the Court reiterated the holding of *Yamataya*, noting that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation

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[79] *Id.* at 101-02.

[80] *Id.* at 100-01; Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[81] Woodby v. INS, 385 U.S. 276, 284 (1966).

[82] *Id.*

[83] *Id.* at 284-85.

[84] *Id.* at 285.

[85] *Id.*

[86] *Id.* at 286.

[87] Reno v. Flores, 507 U.S. 292, 306 (1993).

proceedings."[88] In *Zadvydas v. Davis*,[89] the Court held that the fundamental requirement of due process applies to all aliens within the U.S., regardless of this immigration status, meaning that the Due Process Clause applies to lawful, unlawful, temporary, and permanent aliens.[90] *Padilla v. Kentucky*[91] further complicated the nature of deportation. In discussing the deportation consequences that arise from a criminal conviction and how that affects a deportee's rights, the Supreme Court treated "deportation [as] a particularly severe 'penalty[].'"[92] The Court also noted how the "law has enmeshed criminal convictions and the penalty of deportation,"[93] and therefore it would be "'most difficult' to divorce the penalty from the conviction in the deportation context."[94] This led the Court to determine that for immigrants in criminal proceedings, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[95]

In sum, the case history clearly shows that the government must provide immigrants in the U.S. with some due process, in particular a forum in which to state their case.[96] What this forum must look like and what rights of appeal immigrants have is, to some extent, still an open question.

B. *Failure of Due Process Challenges to BIA Streamlining*

The Supreme Court has held that aliens in deportation proceedings are entitled to some amount of due process.[97] Other courts have elaborated on this holding and found a number of specific due process rights that immigrants have in deportation proceedings, such as the right to counsel (although at the immigrant's expense), the right to a notice to appear including the challenged conduct and the charges against the immigrant, and the right to a notice of hearing.[98] The courts have not, however, found that

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[88] *Id.*

[89] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

[90] *Id.* (citing Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-98 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[91] Padilla v. Kentucky, 559 U.S. 356 (2010).

[92] *Id.* at 365 (citation omitted).

[93] *Id.* at 365-66.

[94] *Id.* at 366 (citing United States v. Russell, 686 F.2d 35, 38 (C.A.D.C. 1982)).

[95] *Id.*

[96] *See* Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Reno v. Flores, 507 U.S. 292, 306 (1993).

[97] Reno v. Flores, 507 U.S. 292, 306 (1993); Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903).

[98] *See* Hernandez-Gil v. Gonzales, 476 F.3d 803, 808 (9th Cir. 2007) ("[T]he statutory right to counsel exists so that an alien has a competent advocate acting on his or her behalf at removal proceedings."); NINTH CIR. OFF. OF STAFF ATT'Y, DUE PROCESS IN IMMIGRATION

the BIA's streamlining process violates due process.[99]

The U.S. Court of Appeals for the First Circuit was the first court to address this issue in *Albathani v. INS*.[100] Albathani petitioned for review of the summary affirmance by the BIA of an IJ's denial of his application for asylum and withholding of deportation pursuant to the streamlining regulations.[101] He raised two theories to challenge the streamlining and affirmance without opinion procedures. First, he argued that "a BIA summary affirmance does not provide a reasoned basis for review."[102] Second, he argued "that a one-line summary affirmance provides no way for courts to police the BIA to see that it is actually doing its job according to the regulations it has promulgated."[103] The court extinguished the first claim in finding that the rationale offered with a BIA summary affirmance was enough to meet the requirements of Supreme Court precedent.[104] As to the second claim, the court found that Albathani had not presented enough evidence to establish that the BIA was not engaging in the required review.[105]

In *Denko v. INS*, another asylum and withholding of deportation case, the U.S. Court of Appeals for the Sixth Circuit rejected the argument that the streamlining procedures violated the petitioner's due process rights, holding that foreign nationals are not constitutionally entitled to administrative appeals.[106] The court found that the Attorney General had discretion to allow the BIA to review some cases and not others.[107] The court stated that "the BIA's streamlining procedures do not themselves alone violate an alien's rights to due process."[108] The court also held that because affirming without an opinion makes the IJ's opinion the final agency decision, the BIA provides some "reasoned explanation" for their final decisions, and thus the

PROCEEDINGS 9-12 (2016), http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/E.pdf [https://perma.cc/J3XM-QX2C] (outlining a number of due process rights that the Ninth Circuit has found for immigrants in immigration proceedings).

[99] *See* Albathani v. INS, 318 F.3d 365, 378-79 (1st Cir. 2003) (finding that petitioner had not presented enough evidence to establish that the BIA was not engaging in the required review); *see also* Denko v. INS, 351 F.3d 717, 730 (6th Cir. 2003) ("[T]he BIA's streamlining procedures do not themselves alone violate an alien's rights to due process."); Falcon Carriche v. Ashcroft, 350 F.3d 845, 850-51 (9th Cir. 2003) (finding that appellants had received due process because they were afforded the opportunity to present arguments to the BIA).

[100] Albathani v. INS, 318 F.3d 365 (1st Cir. 2003).

[101] *Id.* at 367.

[102] *Id.* at 377.

[103] *Id.*

[104] *Id.* (citing SEC v. Chenery Corp., 332 U.S 194 (1946)).

[105] *Id.* at 379.

[106] Denko v. INS, 351 F.3d 717, 729-30 (6th Cir. 2003).

[107] *Id.* at 729.

[108] *Id.* at 730.

streamlining procedures fulfills the minimal due process requirement.[109]

In *Falcon Carriche v. Ashcroft*,[110] the U.S. Court of Appeals for the Ninth Circuit held that review of an IJ's decision by a single-member panel of the BIA does not violate the due process rights of foreign nationals.[111] On appeal to the Ninth Circuit, petitioners claimed several reasons why the BIA streamlining procedures violated their due process: "[T]he lack of transparency in the process, the increasing frequency in which the process is invoked, the speed with which appeals are decided, and a belief that the BIA may be abdicating its statutorily-mandated role of appellate review."[112] The court ultimately decided that because an IJ had heard their case and because they were given the opportunity to present arguments to the BIA, the appellants had received due process in their case.[113] Like the Sixth Circuit, the Ninth Circuit thought that the affirmance-without-opinion procedure made the IJ's decision the final decision of the agency.[114]

The U.S. Courts of Appeals for the Seventh, Eleventh, and Fifth Circuits have similarly held that the BIA's streamlining procedures do not violate the due process rights of alien immigrants.[115] They all cite the First Circuit's reasoning from *Albathani*,[116] that the streamlining and summary affirmance procedures do not violate due process on their face.[117] Importantly, these cases, along with *Denko*[118] and *Falcon Carriche*,[119] establish that foreign nationals adversely affected by a BIA decision made pursuant to the streamlining procedures may only ask a federal court of appeal to review whether the agency decision adhered to statute and not whether the decision was unconstitutional.[120] The decision of constitutionality is complicated by

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[109] *See id.* at 730-31 n.10 (citing Matthews v. Eldridge, 424 U.S. 319 (1976)). The court explained that the BIA's review process allows an appellant "the opportunity to be heard at a meaningful time and in a meaningful manner," the minimum requirement for due process, and that appellant "failed to show how more elaborate proceedings would better protect her interest in remaining in the United States, and thus failed to overcome the government's strong interest." *Id.*

[110] Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003).

[111] *Id.* at 848.

[112] *Id.* at 850.

[113] *Id.* at 850-51 (citing Albathani v. INS, 318 F.3d 365, 376 (1st Cir. 2003)).

[114] *Id.* at 851.

[115] Soadjede v. Ashcroft, 324 F.3d 830, 832-33 (5th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 967 (7th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003).

[116] Albathani v. INS, 318 F.3d 365 (1st Cir. 2003).

[117] *Id.* at 376-79.

[118] Denko v. INS, 351 F.3d 717, 730 (6th Cir. 2003).

[119] Falcon Carriche v. Ashcroft, 350 F.3d 845, 848-49 (9th Cir. 2003).

[120] Albathani v. INS, 318 F.3d 365, 378-79 (1st Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 832 (5th Cir. 2003); Denko v. INS, 351 F.3d 717, 728-30 (6th Cir. 2003); Falcon

the issue of agency discretion and questions about the appropriate scope of judicial review.

IV. APA JUDICIAL REVIEW OF BIA STREAMLINING DECISIONS

A. *Judicial Review of Administrative Agency Action*

Federal court review of BIA streamlining decisions is primarily an issue of judicial review of federal agency action.[121] As this issue is at the center of the Circuit split, this Part will briefly discuss the value of judicial review of agency actions, and how they mirror the value inherent in due process, before thoroughly reviewing the Supreme Court's interpretation of the APA, which establishes how courts should review agency actions.[122]

1. Values of Judicial Review of Administrative Decisions

The APA governs the ways in which administrative agencies may propose and establish regulations and adjudicate administrative claims.[123] Importantly, the APA grants the judiciary oversight over all agency actions.[124] Persons "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, [are] entitled to judicial review thereof."[125] However, only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[126]

The Supreme Court has held that the APA embodies a "basic presumption of judicial review."[127] This presumption of judicial reviewability embodies the notions of accountability and the rule of law.[128] Review helps "to constrain the exercise of discretionary power by administrative agencies"[129] and ensure that common law rights of individuals are infringed only if such infringement has been authorized by the legislature.[130] In this way, review of

Carriche v. Ashcroft, 350 F.3d 845, 852 (9th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003).

[121] Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1289 (11th Cir. 2003).

[122] Administrative Procedure Act §§ 1-12, 5 U.S.C. §§ 500–912 (2012).

[123] *Id.* § 500.

[124] *Id.* § 706.

[125] *Id.* § 702.

[126] *Id.* § 704.

[127] Lincoln v. Vigil, 508 U.S. 182, 190 (1993) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)).

[128] *See* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 655 (1985) [hereinafter Sunstein, *Reviewing Agency Inaction*].

[129] *Id.*

[130] Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95

agency actions promotes two values that are inherent in judicial review: "legality" and "legitimacy."[131]

Legality refers to compliance with the law.[132] Judicial review under the APA helps to "ensure[] administrative fidelity to public desires expressed in legislative commands."[133] Promoting legality works to curtail agency power and ensure that agencies only exercise the power granted to them by statute.[134] Legitimacy refers to protection against arbitrariness, adherence to procedure, and protection against factionalism and self-interest.[135] APA judicial review adds legitimacy by allowing third-parties to hold administrative agencies responsible for their actions.[136] Courts are well-positioned to play this role because they are more isolated from the self-interested justifications that could lead agencies to abuse their power.[137] Judicial review under the APA of agency actions relies on separation-of-powers principles that stretch all the way back to the Federalist papers.[138] Additionally, the actual review courts undertake—inquiring into agency procedure, agency reason-giving, adherence to statute, and the substance of agency decisions—proves just as important, if not more so, as the legitimacy this review provides.[139]

HARV. L. REV. 1193, 1203 (1982).

[131] *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 522-25 (1989) [hereinafter Sunstein, *Costs and Benefits*].

[132] *Id.* at 522.

[133] *Id.*

[134] *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983) ("[T]he judicial duty is to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.").

[135] *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 322-27 (1965) ("The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to brought into harmony with the totality of the law . . . and the ultimate guarantees associated with the Constitution.").

[136] Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 321-22 (2013); *see* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 667 (1996) ("The courts' reviewing power is the citizen's bulwark against improper and abusive agency actions.").

[137] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 468 (1987) ("[I]n light of the awkward constitutional position of the administrative agency . . . . [i.e., the lack of] electoral safeguards or the usual checks and balances, risks of factionalism and self-interested representation increase.").

[138] *Id.* at 467 n.210 (citing THE FEDERALIST NO. 78, at 525-26 (Alexander Hamilton) (Carl Van Doren ed. 1945)) ("[T]he firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of [] laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them . . . .").

[139] *See* Hammond & Markell, *supra* note 136, at 322-27.

Other commentators have suggested that an administrative system must embody "[d]ignitary [p]rocess."[140] Such a system should embody a number of process values, including equality, privacy, predictability, transparency, and rationality.[141] Coercion should be legitimized by "processes that respond to a democratic morality's demand for participation in decisions affecting individual and group interests . . . because a lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable."[142] Furthermore, the guarantee of equal opportunity to state one's case and to be heard in the administrative process is of paramount importance if fairness is the ultimate metric by which to judge an adjudicatory system.[143]

All of this is to say that administrative agencies must be subject to restrictions that consider the rights of the individuals affected by their actions. The APA's basic presumption of judicial review[144] promotes this goal. Judicial review ensures that agencies act rationally and provide individuals with insight into the adjudication of their claims. In this way, the APA is a codification of many of the administrative due process values that administrators developed as the administrative state evolved.[145] It is more than a restatement of other administrative law; it is the result of careful study and the synthesis of a number of ideals.[146] The APA embodies "[c]ommon normative threads . . . includ[ing] uniformity and consistency in the application of law, notice and hearing on contested issues, transparency of agency structures and processes, protections against agency bias, division of functions within agencies, and internal checks and balances."[147]

These are exactly the same values that due process promotes. Drawing stark delineations between due process review and APA judicial review would be faulty. Both work to ensure that an individual "will receive fairness

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[140] JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 172 (1985).

[141] *Id.* at 173-81.

[142] Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-50 (1976).

[143] *Id.* at 52.

[144] Lincoln v. Vigil, 508 U.S. 182, 190 (1993).

[145] *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1367 (2010) (citing ATT'Y GEN.'S COMM'N ON ADMIN. PROC., ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-10 (1941)) [hereinafter Mashaw, *Federal Administration*] (describing how the 1941 Attorney General's Committee provided background materials for drafting the APA that included the ways legislation structured agency organization, details of agency practices, the norms that had developed around similar functions at multiple agencies, and the approaches taken by reviewing courts).

[146] *Id.*

[147] *Id.*

of treatment, and a procedure designed to achieve a just and equitable result."[148] Due process review and APA judicial review both serve as recourse for individuals who have been deprived of rights guaranteed by the Constitution or the laws enacted under the Constitution.[149] Both "confin[e] the agents of government to their properly delegated authority under the Constitution and laws . . . ."[150] Additionally, they make sure that laws are properly applied and interpreted.[151] Perhaps most importantly, they try to guarantee that an individual will receive a comprehensible result with articulated reasoning, even if it is one they do not like.[152] Although it may not be as exacting as Constitutional due process review, APA judicial review thus works to protect the liberty and property interests of individuals; it is especially important in situations involving those rights.

2. Supreme Court Precedent on Judicial Review of Agency Action

The Supreme Court has held that any court reviewing an administrative agency's action "must judge the propriety of such action solely by the grounds invoked by the agency."[153] If the court finds that the agency's proffered rationale is "inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."[154] As a corollary to this basic rule, the Court has also held that any rationale an agency offers for an action "must be set forth with such clarity as to be understandable."[155] If a reviewing court cannot comprehend the basis behind an agency's action and is forced to guess at why an agency acted in a particular way, it will be unable to verify whether that agency's action was correct.[156]

There is a strong precedent of federal judicial deference to agency action.[157] This precedent holds true as long as the action is in line with the intent Congress expressed in the enabling statute.[158] The Supreme Court established a starting approach for reviewing agency action in *Chevron,*

[148] Re, *supra* note 60, at 13.

[149] *See id.* at 5.

[150] *Id.* at 13.

[151] *Id.*

[152] *See* MASHAW, *supra* note 140, at 176.

[153] SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

[154] *Id.* (noting that offering a basis for an agency decision is properly the role of the agency, as delegated by Congress, and not that of the judiciary).

[155] *Id.*

[156] *Id.* at 196-97 (quoting United States v. Chicago, 294 U.S. 499, 511 (1935) ("We must know what a decision means before the duty becomes ours to say whether it is right or wrong.")).

[157] *See* Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986).

[158] *See* Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 196-97 (1984).

U.S.A., Inc. v. NRDC, Inc.[159] When reviewing agency action, a court must consider whether the agency's enabling statute clearly defines the procedures the agency should follow in making decisions to use its authority.[160] If the statute clearly defines the agency's practices, Congress's explicit instructions must be followed.[161] If not, then the court must decide whether the agency's construction or interpretation of the statute is permissible.[162] When the case involves a statute in which Congress has left some ambiguity by not defining agency action with specificity, the Supreme Court has held that the federal courts of appeal must defer to the agency's reasonable interpretation of how the gap should be filled.[163] In such a situation, a court usually just asks whether the agency's construction of a statute is a permissible construction.[164]

The Supreme Court elaborated on how it defined judicial review under the APA in *Heckler v. Chaney*.[165] The Court held that parties adversely affected by a federal agency's final decision are entitled to review by a federal court of appeal unless one of two exceptions in section 701 of the APA apply: "(1) statues preclude judicial review; or (2) agency action is committed to agency discretion by law."[166] The Court found that the first exception is clear and easy to apply.[167] The Court later clarified this point, saying that unless it was presented with clear and convincing evidence to the contrary, it would assume the legislature intended to preclude judicial review.[168] The *Heckler* Court found that the second exception, precluding judicial review of a matter committed to agency discretion by law, is narrower.[169] The Court described various situations in which a decision would be committed to agency discretion, and therefore where judicial review under the APA would be inappropriate: Where there would be no meaningful standard against which a federal court of appeal could measure the agency's exercise of discretion;[170] where an agency decision "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise";[171] and where

[159] *Id.*

[160] *Id.* at 842.

[161] *Id.*

[162] *Id.* at 842-43.

[163] *Id.* at 843-44.

[164] *Id.* at 845 (citing United States v. Shimer, 367 U.S. 374, 382-83 (1961)).

[165] Heckler v. Chaney, 470 U.S. 821, 828 (1985).

[166] *Id.* (quoting 5 U.S.C. § 701(a)).

[167] *Id.*

[168] Reno v. Catholic Soc. Servs., 509 U.S. 43, 64 (1993) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967)).

[169] Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[170] *Id.*

[171] *Id.* at 831.

an agency simply refuses to take action.[172]

The Supreme Court has decided that agency regulations play a role in determining whether an action is committed to agency discretion by law.[173] The Court has acknowledged that duly enacted regulations have the force and effect of law.[174] Agencies' "regulations prescribe the procedure[s] to be followed," detailing how a particular agency should act in a particular situation.[175] While agencies are not required to adopt regulations that "impose upon [them] more rigorous substantive and procedural standards,"[176] they are also not prevented from doing so, and once they have done so, they cannot "proceed without [adhering] to them."[177] The Supreme Court has rooted this requirement in due process, holding that "[w]here individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged."[178]

The Supreme Court specifically addressed the role of BIA regulations in *INS v. Yueh-Shaio Yang*.[179] The respondent was a native and citizen of China involved in marriage fraud and fraudulent entry into the U.S. to gain U.S. citizenship.[180] When the former Immigration and Naturalization Service ("INS") charged him as deportable from the U.S. for being excludable at the time of entry, he requested a waiver of deportation.[181] The IJ denied his request.[182] The BIA affirmed the denial as a matter of discretion.[183] The BIA considered the respondent's fraudulent immigration acts that helped his wife to obtain an immigrant visa under her real name.[184] The U.S. Court of Appeals for the Ninth Circuit vacated the BIA's decision and remanded the case.[185] The Ninth Circuit held that the BIA abused its discretion by considering the respondent's participation in his wife's fraudulent entry and

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[172] *Id*. at 832.

[173] *See* United States v. Caceres, 440 U.S. 741, 758 (1979); Service v. Dulles, 354 U.S. 363, 388 (1957); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954).

[174] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954).

[175] *Id.*

[176] Service v. Dulles, 354 U.S. 363, 388 (1957).

[177] *Id.*

[178] United States v. Caceres, 440 U.S. 741, 758 (1979); *see also* SEC v. Chenery Corp., 318 U.S. 80, 87-89 (1943) (holding that an agency may be judged against the standards to which it purports to hold itself).

[179] INS v. Yueh-Shaio Yang, 519 U.S. 26, 28-29 (1996).

[180] *Id.*

[181] *Id.* at 28.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

his own fraudulent application for naturalization as adverse factors because those acts were "inextricably intertwined with [respondent's] own efforts to secure entry into the country and must be considered part of the initial fraud."[186]

On appeal, the Supreme Court engaged in an analysis of the relevant statutory language—"entry fraud"—and how the INS interpreted it.[187] The Court noted that the respondent asserted, and the U.S. acknowledged, that the INS had a settled policy of disregarding entry fraud or misrepresentation in making a waiver of deportability determination.[188] The Court stated that

> [t]hough the [BIA's] discretion is unfettered at the outset, if [an agency] announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act . . . .[189]

Ultimately, however, the Court interpreted the agency's action narrowly and decided that action was in line with the BIA's established policy.[190] In sum, agencies' regulations can limit their discretion, and thus actions under those regulations may become subject to judicial review under the APA.[191] In the context of immigration and the BIA, "regulations delegate to the [BIA] discretionary authority as broad as the [INA] confers on the Attorney General; the scope of the Attorney General's discretion bec[omes] the yardstick of the [BIA]'s."[192]

In *American Farm Lines v. Black Ball Freight Service*, the Supreme Court distinguished between procedural agency regulations and agency regulations creating substantive rights for the parties involved.[193] At issue in the case was an Interstate Commerce Commission ("ICC") regulation requiring motor carriers to include certain information and statements in applications for temporary authority to provide service to the Department of Defense.[194] The particular statement in question described the Department's need for faster

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[186] *Id.* at 28-29 (quoting Yang v. INS, 58 F.3d 452, 453 (9th Cir. 1995) (internal quotation marks omitted)).

[187] *Id.* at 28-32.

[188] *Id.* at 31 (citing Delmundo v. INS, 43 F.3d 436, 440 (9th Cir. 1994)).

[189] *Id.* at 32 (quoting 5 U.S.C. § 706(2)(A)).

[190] *Id.*

[191] *See* Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363, 372 (1957).

[192] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266 (1954).

[193] Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970).

[194] *Id.* at 537.

carriers to meets its transportation needs.[195] Complaining that the statement was contrary to the governing ICC regulations, a group of motor carriers brought suit.[196] The Court viewed the regulations as "tools to aid" the ICC, not inflexible requirements, and since they were promulgated for the ICC's benefit, the Court upheld them.[197]

In short, Supreme Court precedent emphasizes the APA's presumption of judicial review.[198] Exceptions to that assumption apply when a statute states that judicial review under the APA of a particular agency decision is inappropriate or when a particular decision is committed to agency discretion by law.[199] This latter exception can seem nebulous at times, but the Supreme Court has decided a number of cases containing useful illustrations of when a decision is committed to agency discretion by law.[200] Finally, because agency policy can itself become binding on the agency, courts can review a decision to determine whether the agency complied with its own clear regulations.[201]

B. *Circuit Split*

The Circuits are split over whether to find jurisdiction under the APA to review the BIA's decision to employ streamlining, with the Third, Fourth, Ninth, and Tenth Circuits finding jurisdiction,[202] the Second and Eighth Circuits not finding jurisdiction,[203] and the Sixth Circuit explicitly declining to decide the issue.[204] The First, Fifth, Seventh, Eleventh, and D.C. Circuits have not decided this issue.

1. Courts in Support of Review

The first circuit to find jurisdiction under the APA to review BIA

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[195] *Id.*

[196] *Id.*

[197] *Id.* at 538-39.

[198] Lincoln v. Vigil, 508 U.S. 182, 190 (1993) (citing Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967)).

[199] Heckler v. Chaney, 470 U.S. 821, 828 (1985) (citing 5 U.S.C. § 701(a)).

[200] *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182, 191-93 (1993) (providing a review of several administrative actions the Court previously determined were "committed to agency discretion.").

[201] *See* INS v. Yueh-Shaio Yang, 519 U.S. 26, 31-32 (1996).

[202] Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009); Purveegiin v. Gonzales, 448 F.3d 684, 692 (3d Cir. 2006); Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087-88 (9th Cir. 2004); Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[203] Kambolli v. Gonzales, 449 F.3d 454, 465 (2d Cir. 2006); Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004).

[204] Lopez-Salgado v. Lynch, 618 F. App'x 828, 833-34 (6th Cir. 2015).

streamlining decisions was the Tenth Circuit in *Batalova v. Ashcroft*.[205] Petitioners, natives and citizens of Russia, entered the U.S. in 1999 as tourists with permission to stay for six months.[206] One year later, they filed petitions for asylum and alternatively for cancellation of removal under the Convention Against Torture ("CAT").[207] The petitions were denied and referred to an IJ for review.[208] After a hearing, the IJ determined that the petitioners had demonstrated neither past persecution nor a well-founded fear of future persecution, nor that they would likely be tortured if returned to Russia, and accordingly denied their petitions.[209] A single member of the BIA affirmed the order without opinion.[210] The petitioners appealed the BIA's decision, arguing that the BIA failed to comply with its regulations in not assigning the case to a three-member panel.[211]

The court noted that review by a three-member panel is only permissible under § 1003.1(e)(6) if the case met certain regulatory criteria.[212] The court went on to look at the individual criteria in the regulation and determined that they were "all well within [the court's] capability to review and assess."[213] The court even added that these were "the kinds of issues [it] routinely consider[s] in reviewing cases, and they have *nothing to do* with the BIA's caseload or other internal circumstances."[214] Thus, the court determined that it had jurisdiction to review the single member's decision to review the case rather than refer it to a three-member panel.[215]

The Ninth Circuit, operating under similar logic, also found jurisdiction to review BIA streamlining decisions in *Chen v. Ashcroft*.[216] The court saw two alternative justifications for assigning a case to a single member rather than a three-member panel: the controlling issue in the case being "squarely controlled by existing [BIA] or federal court precedent" or being "so insubstantial that three-Member review is not warranted."[217] The court found that the appeal was not squarely controlled by existing precedent and that it raised issues warranting three-member review.[218] As a result, the court

[205] Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[206] *Id.* at 1248.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 1250-51.

[210] *Id.* at 1251.

[211] *Id.*

[212] *Id.*

[213] *Id.* at 1252-53.

[214] *Id.* at 1253 (emphasis added).

[215] *Id.*

[216] Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087-88 (9th Cir. 2004).

[217] *Id.* at 1086 (citing 8 C.F.R. § 1003.1(a)(7)(ii) (2003)).

[218] *Id.* at 1086-87 (finding that the situation was substantial and important because there

deemed that the BIA had incorrectly interpreted its own regulation and had inappropriately assigned the case to a single member; therefore, review of the BIA's decision was appropriate.[219] The court explained that when an agency makes a decision under the constraints of detailed regulations, a court can more readily determine if the agency deviated from such regulations.[220] The court saw the streamlining procedures as straightforward.[221] Accordingly, BIA decisions under 8 C.F.R. § 1003.1 were reviewable against the standards established in that regulation.[222]

The Third Circuit also found such jurisdiction in *Purveegiin v. Gonzales*.[223] The court noted that the correct way to address the question of whether the decision to employ streamlining was committed to agency discretion by law was the "no meaningful standard" test presented in *Vigil*.[224] It also noted that a court can only assess the validity of an agency action if the statute or regulation constrains the agency in some defined way.[225] The court determined the language "that a single member 'shall' resolve a case 'unless' it falls within the categories of paragraph (e)(6)," implied that a single member should not resolve the case and refer it to a three-member panel if the case fell within one of the specific categories.[226] The court held that these two "provisions offer[ed] concrete . . . standards by which a court may determine whether single-member disposition is permissible in a given case."[227] The court also briefly mentioned that judicial review under the APA of single-member or three-member panel assignment affords "important procedural benefits" to individuals in immigration proceedings.[228] The BIA specifically acknowledged "that panel review is necessary in cases presenting difficult or important questions of fact or law to ensure that adequate attention is given to complex issues" when it promulgated the provisions creating single-member review.[229] The court said that this helps not only the agency by assuring adjudicative consistency, but also the parties involved by

were, at the time, many Chinese nationals who had entered the country illegally but, like Chen, were allowed to stay per the President's order).

[219] *Id.*

[220] *Id.* at 1087-88.

[221] *Id.* at 1088.

[222] *Id.*

[223] Purveegiin v. Gonzales, 448 F.3d 684, 692 (3d Cir. 2006).

[224] *Id.* at 689 (quoting Lincoln v. Vigil, 508 U.S. 182, 190-91 (1993)).

[225] *Id.*

[226] *Id.* (quoting 8 C.F.R. § 1003.1(e)(5), (6) (2003)).

[227] *Id.* at 690 (citing Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004)).

[228] *Id.* (citing Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538-39 (1970)).

[229] *Id.* (citing Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,887-88).

providing a more considered decision in significant cases.[230]

Finally, the Fourth Circuit found jurisdiction to review BIA streamlining decisions in *Quinteros-Mendoza v. Holder*.[231] The court noted that precedent required "clear and convincing congressional intent to commit BIA streamlining decisions to that agency's discretion by law."[232] The streamlining procedures are merely creatures of agency regulation authorized by the Secretary of Homeland Security.[233] The court analyzed those regulations and stated that the regulations do not provide the BIA with its claimed unreviewable discretion.[234] Furthermore, the court found that the language in the six factors are exactly the kinds of questions a federal court of appeal regularly considers.[235]

2. Courts Denying Review

The first circuit to deny jurisdiction to review BIA streamlining decisions was the Eighth Circuit in *Ngure v. Ashcroft*.[236] Ngure, a native and citizen of Kenya, had participated in pro-democracy demonstrations and been arrested on several occasions in Kenya.[237] He entered the U.S. in 1995 on a student visa, and soon thereafter the Kenyan police issued a warrant for his arrest due to his involvement in political activities.[238] Ngure overstayed his visa, but applied for asylum, withholding of removal, and relief from removal under the CAT.[239] An IJ denied his application for asylum because he had filed it more than one year after entering the U.S., and failed to satisfy the exceptions to the one-year deadline.[240] The IJ also found that Ngure had not suffered past persecution in Kenya and that he had not established a well-founded fear of further persecution if returned to Kenya.[241] A single member of the BIA affirmed the IJ's decision without an opinion.[242] Ngure appealed, arguing that the single member of the BIA should have referred the case to a three-

[230] *Id.* at 691.

[231] Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009).

[232] *Id.* at 162 (citing Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 63-64 (1993)).

[233] *Id.*

[234] *Id.*

[235] *Id.* at 163 (citing Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004)) ("[T]he six factors . . . 'are the kinds of issues [federal courts of appeal] routinely consider in reviewing cases, and they have nothing to do with the BIA's caseload or other internal circumstances' . . .") (citation omitted)).

[236] Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004).

[237] *Id.* at 979.

[238] *Id.* at 979-80.

[239] *Id.* at 979.

[240] *Id.* at 980.

[241] *Id.*

[242] *Id.*

member panel rather than affirming the IJ's decision without an opinion.[243]

The Eighth Circuit began by acknowledging the "'basic presumption of judicial review' of agency action."[244] However, the court also noted that the Supreme Court has held that certain actions are committed to agency discretion by law and should not be reviewed by federal courts of appeal.[245] The court determined that there are a number of reasons why a streamlining decision is such an action.[246] First, the court said that notions about separation of powers lead to deference in situations regarding "an administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission . . . ."[247] Second, the court noted that there has traditionally been judicial deference to agencies in the immigration context.[248] Third, the court read the history, structure, and text of the regulations the Attorney General promulgated to create the streamlining procedure as creating only procedural rights.[249] Finally, the court said that the ways in which it could determine whether a particular affirmance without opinion was wrong could not be made by "a meaningful and adequate standard of review . . . ."[250] The court explained that whether the issues in a case are "so substantial" that the case "warrants the issuance of a written opinion" depends on the determination of the BIA members, at a particular point in time, about how best to allocate their limited resources.[251] Accordingly, the court held that the streamlining decision was committed to agency discretion by law and a federal court of appeal has no jurisdiction to review it.[252]

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[243] *Id.* at 979, 981.

[244] *Id.* at 982 (citing Lincoln v. Vigil, 508 U.S. 182, 190 (1993)).

[245] *Id.*

[246] *Id.* at 983.

[247] *Id.* (citing Vt. Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519, 543 (1978)).

[248] *Id.* (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context . . . .")).

[249] *Id.* at 983-84.

[250] *Id.* at 985. The federal court of appeal

> would have to conclude either (1) that the result reached by the IJ was incorrect (including any errors made by the IJ were not harmless), or (2) that the BIA was wrong to find that "factual or legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case."

Id. (citing 8 C.F.R. § 1003.1(e)(4)(i) (2003)).

[251] *Id.* at 986 (internal quotation marks omitted). The court explicitly disagreed with *dictum* from the Sixth Circuit that this question is irrelevant to deciding which cases are appropriate for summary affirmance. *Id.* (citing Denko v. INS, 351 F.3d 717, 732 (6th Cir. 2003)).

[252] *Id.* at 988.

The Second Circuit similarly held that it did not have jurisdiction to review BIA streamlining decisions in *Kambolli v. Gonzales*.[253] The court began by considering the history of the streamlining procedures, noting that the procedures serve some administrative purposes and that they have routinely survived due process challenges.[254] To answer the "no meaningful standard" question, the court mentioned how a single BIA member acting pursuant to the streamlining procedure "is prohibited from making any record whatsoever of his reasoning when deciding to act alone and affirm an IJ's decision without opinion."[255] As a result, a federal court of appeal "has no knowledge—and can have no knowledge" of the single member's decision-making process, and would be unable to determine whether the single member's decision comported with any other standard the court wished to compare it against.[256] The court rejected the petitioner's argument that 8 C.F.R. § 1003.1(e) provided such a standard because it would undermine the BIA's streamlining scheme.[257] The court also said that the BIA is in a better position to determine whether particular cases meet the three-member criteria than a federal court of appeal.[258]

3. Courts That Have Not Decided

The Sixth Circuit has repeatedly encountered the question of whether it has jurisdiction to review BIA streamlining decisions, and has declined to decide the issue each time.[259] Although not citing the circuit split as a reason for declining to decide the issue, the court did note it in each decision.[260] How much the split influenced the court in each case is difficult to discern, but the fact that it noted it at all shows that it considered it. As long as the split continues, more circuits could continue to decline to decide whether federal courts of appeal should have jurisdiction to review the BIA's decision to employ streamlining. By doing so, those circuits would not only be in dereliction of their duties, but they would also be refusing to examine an issue

[253] Kambolli v. Gonzales, 449 F.3d 454, 465 (2d Cir. 2006).

[254] *Id.* at 458-60.

[255] *Id.* at 461.

[256] *Id.* at 462.

[257] *Id.* at 462-63.

[258] *See id.* at 464. The court noted that the BIA reviews thousands of IJ decisions and that finding jurisdiction to review would "cripple the streamlining process by assuming authority to review these routine BIA procedural decisions." *Id.*

[259] *See* Lopez-Salgado v. Lynch, 618 F. App'x 828, 833-34 (6th Cir. 2015); Nabhani v. Holder, 382 F. App'x 487, 491 (6th Cir. 2010); Balliu v. Gonzales, 192 F. App'x 427, 435-36 (6th Cir. 2006).

[260] Lopez-Salgado v. Lynch, 618 F. App'x 828, 834 (6th Cir. 2015); Nabhani v. Holder, 382 F. App'x 487, 491 (6th Cir. 2010); Balliu v. Gonzales, 192 F. App'x 427, 435-36 (6th Cir. 2006).

with important ramifications, namely whether or not deportees have another avenue to prevent their deportation. In effect, those circuits that do not weigh in on this issue—the Sixth along with the First, Fifth, Seventh, Eleventh, and D.C. Circuits—condone streamlining and the deprivation of rights that it leads to.

C. *APA Judicial Review of BIA Streamlining Decisions is Proper*

Federal courts of appeal should have jurisdiction to review BIA decisions to employ streamlining in a particular case. Contrary to the holdings of the Second and Eighth Circuits,[261] there is a meaningful standard against which a reviewing court could judge these decisions. Furthermore, deportation proceedings' increasing resemblance to criminal proceedings weighs in favor of affording potential deportees more rights of appeal.

1. There is a Meaningful Standard Against Which to Judge

At the outset, it is important to remember that the APA embodies a "basic presumption of judicial review."[262] This presumption reflects notions of accountability and the rule of law underlining the administrative state.[263] Accordingly, courts should generally be reluctant in deciding that they do not have jurisdiction to review agency action.

The first question to answer in determining whether a federal court of appeal can review an agency's action is whether an agency's procedure is defined in the relevant statue.[264] With regard to streamlining, the only statutes involved are the INA and the one creating the EOIR.[265] Neither of these statutes specify the procedures the EOIR and the BIA should follow in adjudicating immigration cases. Those procedures are set out in regulations written by the respective agencies.[266]

The next question is whether the statute leaves the requirements for an agency's actions undefined or ambiguous.[267] If yes, the agency has the discretion to fill the gap in the statute with the actions and procedures it decides are necessary to fulfill its duties, and federal courts of appeal are supposed to defer to these decisions.[268] If *Chevron*[269] was the end of the

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[261] Kambolli v. Gonzales, 449 F.3d 454, 461-62 (2d Cir. 2006); Ngure v. Ashcroft, 367 F.3d 975, 985 (8th Cir. 2004).

[262] Lincoln v. Vigil, 508 U.S. 182, 190 (1993).

[263] Sunstein, *Reviewing Agency Inaction*, *supra* note 128, at 655.

[264] Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984).

[265] 6 U.S.C. § 521 (2012); 8 U.S.C. § 1103 (2012).

[266] *See* 8 C.F.R. §§ 1003.0, 1003.1 (2017).

[267] Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984).

[268] *Id.* at 843-44.

[269] *Id.* at 842-43.

administrative-review story, then the procedures governing immigration case adjudication the Attorney General developed for the BIA would fill the gap in 6 U.S.C. § 521(a). Of course, *Chevron* is not the only Supreme Court case governing judicial review of agency actions under the APA. The Court in *Heckler* identified two situations in which the basic presumption of judicial review of agency action can be overcome: "(1) [the relevant] statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."[270] As no statute under the APA precludes judicial review of BIA decisions, the first exception is inapplicable.

The second exception is the relevant one, and so we must decide whether a reviewing court would have a "meaningful standard against which to judge the [BIA]'s exercise of discretion."[271] The regulation governing the BIA does set out some standards for determining whether a case should be assigned to a single member of the BIA instead of a three-member panel.[272] Although those standards are set out in a regulation rather than in a statute, the Supreme Court has held that when an agency sets out and adopts as policy a standard course of action under its regulations, that policy can become binding on the agency, and courts can review a decision to determine whether the agency complied with its own clear regulations.[273] With the regulations standing as potential meaningful standards against which to judge the BIA's decision to employ streamlining, do they serve as "judicially manageable standards . . . available for judging how and when an agency should exercise its discretion . . . [?]"[274]

Six circuits have weighed in on this issue. The Third, Fourth, Ninth, and Tenth Circuits have held that the regulations do provide a meaningful standard,[275] while the Second and Eighth Circuit have held the opposite, and the Sixth Circuit has declined to decide.[276] As to the middle group, their arguments reflect a deference to agency action and an assumption that, due to their expertise, agencies are in the best position to decide how to allocate their limited resources, i.e., determine which cases to assign to single members or refer to three-member panels.[277] Notably, these courts did not

[270] Heckler v. Chaney, 470 U.S. 821, 828 (1985) (quoting 5 U.S.C. § 701(a)(2)).

[271] *Id.* at 830.

[272] *See* 8 C.F.R. § 1003.1(e)(6) (2017) (setting out six triggers for when to assign a case to a three-member panel).

[273] INS v. Yueh-Shaio Yang, 519 U.S. 28, 32 (1996).

[274] Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[275] Quinteros-Mendoza v. Holder, 556 F.3d 159, 164 (4th Cir. 2009); Purveegiin v. Gonzales, 448 F.3d 684, 692 (3d Cir. 2006); Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087-88 (9th Cir. 2004); Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[276] Kambolli v. Gonzales, 449 F.3d 454, 465 (2d Cir. 2006); Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004).

[277] Kambolli v. Gonzales, 449 F.3d 454, 464 (2d Cir. 2006) (stating that the BIA's

engage in much analysis or discussion about the regulations. Rather, their arguments against allowing review routinely mention the administrative benefits of the streamlining procedures—handling the large backlog of immigration appeals[278]—and a fear of "undermin[ing] the BIA's streamlining scheme . . . ."[279]

The Second Circuit does look at the regulations themselves, but it focuses on a few provisions in the abstract rather than concrete facts. In particular, it looks at 8 C.F.R. § 1003.1(e)(6)(i) and (iv), which direct a single member to refer the case to a three-member panel if the case presents the "need to establish a precedent construing the meanings of laws, regulations, or procedures" or the need to resolve "a case or controversy of major national import," respectively.[280] In discussing these two provisions, the Second Circuit does not say it would be completely unable to review whether a particular situation fit into one of these categories. Rather, the Second Circuit stated that the BIA is well situated to do so and it would be time-consuming for a federal court of appeal to review the national immigration landscape and make a determination about the correctness of the BIA's decision.[281] The Second Circuit thus put a lot of stock in the BIA's expert position.

In contrast, the Third, Fourth, Ninth, and Tenth Circuits have held that the regulations do provide a meaningful standard against which to judge the BIA's decision to employ streamlining, and thus federal courts of appeal can review those decisions.[282] These courts found that the language in 8 C.F.R. § 1003.1(e)(5) "that a single member 'shall' resolve a case 'unless' it falls within the categories of paragraph (e)(6)"[283] meant that the provisions in (e)(6) act as a guide for when to assign a case to a three-member panel.[284]

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position and expertise puts them in a much better position than an appellate court to make streamlining decisions); Ngure v. Ashcroft, 367 F.3d 975, 983-86 (8th Cir. 2004). The Court noted that separation of powers lead to deference in situations regarding "an administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission . . . ." *Id*. at 983.

278 Ngure v. Ashcroft, 367 F.3d 975, 986-87 ("The streamlining system will allow the [BIA] to manage its caseload in a more timely manner . . . .") (quoting Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,138).

279 Kambolli v. Gonzales, 449 F.3d 454, 463 (2d Cir. 2006).

280 *Id.* at 459 (citing 8 C.F.R. § 1003.1(e)(6)(i), (iv) (2017)).

281 *Id.* at 464.

282 Quinteros-Mendoza v. Holder, 556 F.3d 159, 162-64 (4th Cir. 2009); Purveegiin v. Gonzales, 448 F.3d 684, 691-92 (3d Cir. 2006); Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087-88 (9th Cir. 2004); Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004).

283 Purveegiin v. Gonzales, 448 F.3d 684, 689 (3d Cir. 2006) (citing 8 C.F.R. § 1003.1(e)(5) (2017)).

284 *See id.* at 689 (finding that a single member should not decide a case and should instead refer it to a three-member panel if the case falls within the specific categories mentioned in paragraphs (e)(6)); *see also* Quinteros-Mendoza v. Holder, 556 F.3d 159, 163

Furthermore, the courts found that the language of the six factors that trigger assignment to a three-member panel was relatively straightforward and that an appellate court would be able to review their application.[285] The Fourth and Tenth Circuits went even further to look at several of the factors individually, finding that federal courts of appeal could handily resolve whether a particular immigration appeals case presented the need to settle inconsistencies between IJs,[286] the need to establish precedent construing immigration laws, regulations or procedures,[287] the need to review a decision not in conformity with the law or precedent,[288] the need to resolve a case of national importance,[289] or the need to review a clearly erroneous factual finding of an IJ.[290] In sum, the Third, Fourth, Ninth, and Tenth Circuits found that they can review the BIA's decision to use streamlining in a particular case because the action employs the types of considerations federal courts of appeal routinely review.

The majority of circuits that have weighed in on this issue seem to be correct, and not just because they comprise the majority. Their analysis reflects a considered study of the language of the streamlining regulations, rather than blanket deference to the BIA in all matters related to immigration. They look to the individual triggers for assignment to a three-member panel, and note that they are all situations which federal courts of appeal routinely review.

2. Public Policy Favors More Rights of Appeal and Judicial Review for Potential Deportees

There are two public policy arguments in favor of affording immigrants in deportation proceedings more rights of appeal and judicial review under the APA: (1) the prejudice rendered by an improper streamlining decision

(4th Cir. 2009); Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[285] Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004) ("Those criteria . . . are well within our capability to review and assess. Indeed, they are the kinds of issues we routinely consider in reviewing cases, and they have nothing to do with the BIA's caseload or other internal circumstances."); *see also* Quinteros-Mendoza v. Holder, 556 F.3d 159, 163 (4th Cir. 2009); Purveegiin v. Gonzales, 448 F.3d 684, 690 (3d Cir. 2006); Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1088 (9th Cir. 2004).

[286] Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[287] Quinteros-Mendoza v. Holder, 556 F.3d 159, 161 (4th Cir. 2009) (citing Li Fang Lin v. Mukasey, 517 F.3d 685, 693-94 (4th Cir. 2008)); Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004).

[288] Quinteros-Mendoza v. Holder, 556 F.3d 159, 163 (4th Cir. 2009); Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004).

[289] Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004).

[290] Quinteros-Mendoza v. Holder, 556 F.3d 159, 163 (4th Cir. 2009); Batalova v. Ashcroft, 355 F.3d 1246, 1253 (10th Cir. 2004).

undermines judicial review under the APA,[291] and (2) deportation and deportation proceedings increasingly resemble criminal punishment and criminal proceedings.[292]

The streamlining regulations "intertwine[] legal decisions, such as whether a case should be affirmed or reversed, with decisions as to form, such as whether a case should receive a full opinion or not."[293] This intertwining leads to a deprivation of a full review of the merits in a streamlined case because a reviewing court will be presented with a record that consists only of a short order affirming a case.[294] An immigrant is thus prejudiced by streamlining "because an improper [BIA] affirmance without opinion will be affirmed, resulting in either the denial of a meritorious claim or the loss of the [BIA]'s interpretation of and expertise regarding the claim."[295] The lack of a written opinion from the BIA enhances the risk that a court will usurp the BIA's role and substitute its own judicial determination for the agency while reviewing a BIA case.[296] The federal courts of appeal are impaired by not having access to a fully reasoned opinion and record upon which to potentially make decisions about the merits of cases.[297] This also weakens the courts' ability to oversee agencies and correct any abuses of discretion.[298]

Full and fair judicial review under the APA helps to "constrain the exercise of discretionary power by administrative agencies"[299] and ensure that agencies comply with the law.[300] Moreover, APA review of agency action legitimizes agency action.[301] Both the courts' position as independent examiners of agency actions and the actual review courts undertake work to legitimize agencies as lawful and fair wielders of power.[302] Prejudice to any party involved in the judicial review process undermines the value of judicial

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[291] *See* Rana, *supra* note 14, at 889-90 (discussing how an improper streamlining decision prejudices the petitioner, the BIA, and the courts).

[292] *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 489-500 (2007) (detailing how elements and strategies of criminal law enforcement such as preventive detention, plea-bargaining, state and local criminal enforcement, and federal sentencing judges have been integrated into deportation enforcement and proceedings).

[293] Rana, *supra* note 14, at 889.

[294] *Id.* at 889-90.

[295] *Id.*

[296] *Id.* at 890.

[297] *Id.*

[298] *Id.*

[299] Sunstein, *Reviewing Agency Inaction*, *supra* note 128, at 655; Stewart & Sunstein, *supra* note 130, at 1203.

[300] Sunstein, *Costs and Benefits*, *supra* note 131, at 522-23.

[301] *Id.* at 525-26.

[302] *See* Hammond & Markell, *supra* note 136, at 322-27.

review and the benefits that flow from judicial review under the APA because it diminishes a reviewing courts' ability to potentially make a fully informed decision.

Undermining the efficacy of APA review would be bad in any context, but it is especially detrimental in the context of streamlining and deportation. Deportation is not criminal punishment,[303] but the Court has said that the consequences of deportation resemble those of criminal punishment in many ways.[304] Additionally, deportation proceedings increasingly resemble criminal proceedings.[305] Furthermore, an individual who is deported from the U.S. is deprived of the life, liberty, and property interests they had in the U.S.[306] Deportees are prevented from returning to the U.S. for a variable length of time based on the reason for their deportation.[307]

A situation such as this one, where an administrative agency—the BIA—has been given the power to decide questions of liberty, should be looked at through a critical lens. The deprivation of liberty and property, the consequences of being suspected of deportability and of deportation, sound strikingly similar to the kinds of deprivations that the Due Process Clauses in the Fifth and Fourteenth Amendments protect against.[308] State and local law enforcement officials investigate, apprehend, and detain noncitizens suspected of being deportable.[309] Detention is mandatory in several categories of cases for immigrants suspected of being deportable.[310] The facilities and conditions immigrants are detained in are comparable to, if not exactly the same as, those for housing pre-trial and sentenced felons,[311] and

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[303] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

[304] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 373-74 (2010) ("[D]eportation [is] 'the equivalent of banishment or exile[]' . . . .") (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390-91 (1947)); Jordan v. De George, 341 U.S. 233, 243 (1951) (Jackson, J., dissenting) ("Deportation proceedings . . . [are] practically [criminal] . . . for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. . . . This is a savage penalty."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). The Court stated that deportation deprives individuals of liberty, property and life, "or of all that makes life worth living." *Id.*

[305] *See* Legomsky, *supra* note 292, at 489-500.

[306] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[307] *See* 8 U.S.C. § 1182 (2012) (listing length of time previously deported aliens remain inadmissible to the U.S.).

[308] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[309] *See* 8 U.S.C. § 1357(g) (2012) (describing how state officers and employees can perform immigration officer functions).

[310] *See* Legomsky, *supra* note 292, at 489-91.

[311] DORA SCHRIRO, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION: OVERVIEW AND RECOMMENDATIONS 2 (2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/AR5B-VGUA] ("With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and

the two populations are linked in the minds of the general public.[312] IJs "offer applicants withholding of removal in return for withdrawing their applications for asylum" in a kind of plea-bargaining.[313] In short, then, the conditions immigrants in deportation proceedings find themselves in are almost identical to those criminal defendants face.

Complicating this issue even further is the way in which deportation is "intimately related to the criminal process."[314] Noncitizens who commit any number of crimes are subject to deportation under current law.[315] IIRIRA drastically increased this number, altering the crucial "aggravated felony" definition so that any noncitizen who is convicted of a crime punishable by a term of imprisonment of at least one year is deportable.[316] Deportation has become "nearly an automatic result for a broad class of noncitizen offenders."[317] The Supreme Court has had great difficulty in separating the penalty of deportation from a criminal conviction when reviewing deportation cases to determine what rights potential deportees have.[318] Although not definitively stating that deportation is criminal punishment, the Court's willingness to extend the Sixth Amendment right to counsel, to include a right to information about immigration consequences for criminal sentences in *Padilla*, should support reconsideration of whether deportation is a criminal punishment.[319]

Streamlining, and by extension deportation, thus raises the stakes when considering what type of review is appropriate. An improper streamlining decision could lead to an improper order of deportation, which would lead to an improper deprivation of rights. Does this mean a federal court of appeal review of the BIA's decision to employ streamlining in a particular case is a due process right of immigrants in deportation proceedings? The Second and Eighth Circuits would say no, arguing that the BIA is in the best position to make decisions about which cases to assign to a single member and which to

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prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control.").

312 *Id.* at 4 ("Immigration Detention and Criminal Incarceration detainees tend to be seen by the public as comparable, and both confined populations are typically managed in similar ways.").

313 Legomsky, *supra* note 292, at 495.

314 Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

315 *See* 8 U.S.C. § 1227(a)(2) (2012).

316 Illegal Immigration Reform and Immigrant Responsibility Act § 321.

317 Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

318 *Id.*; *see also* INS v. St. Cyr, 533 U.S. 289, 322 (2001) ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.").

319 Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

refer to three-member panels.[320] There is some value to deferring to agency decisions, as their power is delegated by Congress, and they possess some expertise in their field.[321]

That said, why should due process values and review be subject to a binary, on-off switch which says that issues regarding deprivations of liberty will be considered in some cases and not others? Due process is meant to ensure that a system produces "accurate, fair decisions, as often as is reasonably possible. . . . [that are] perceived as fair, so that people who lose their cases feel that there was some rational basis for the decisions against them."[322] Due process confines the powers of the government to constitutional limits,[323] makes sure that laws are properly applied and interpreted,[324] and serves as recourse for individuals who have been deprived of rights.[325] APA review ensures protection of many of the same values; it is not an entirely different form of review but an embodiment and restatement of the values at the core of due process.[326]

APA review is appropriate in the streamlining context, then, as a way to protect individuals' liberties. It is not just the proper way to examine the BIA's streamlining decisions because there is a meaningful standard against which to review those decisions, it is the proper way to examine the BIA's streamlining decisions because of the consequences of those decisions. When a three-member panel of the BIA is seven times more likely to decide in favor of an immigrant-appellee than a single member is,[327] and thus not deprive an immigrant of liberty, it should be clear that there are significant benefits to an immigrant if his or her case is referred to a three-member panel. Accordingly, APA review of streamlining decisions is proper.

Streamlining is endemic of a general instrumentalist view in the federal government towards the immigration system.[328] Streamlining has led to more

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[320] *See* Kambolli v. Gonzales, 449 F.3d 454, 464 (2d Cir. 2006) (stating that the BIA's position and expertise puts them in a much better position than an appellate court to make streamlining decisions); Ngure v. Ashcroft, 367 F.3d 975, 983-86 (8th Cir. 2004).

[321] *See* Kent Barnett, *Symposium: Chevron at 30: Looking Back and Looking Forward: Improving Agencies' Preemption Expertise with Chevmore Codification*, 83 FORDHAM L. REV. 587, 589-92 (2014) (discussing how deference to agencies is proper when the agency truly possesses expertise and Congress intended to delegate power).

[322] *See* Benesch, *supra* note 45, at 566.

[323] Re, *supra* note 60, at 13.

[324] *Id.*

[325] *Id.* at 5.

[326] *See* Mashaw, *Federal Administration*, *supra* note 145, at 1367.

[327] *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1 at 10 (noting that during fiscal years 2004 through 2006, seven percent of single-member decisions favored the alien while fifty-two percent of three-member decisions favored the alien).

[328] Rana, *supra* note 14, at 837.

appeals to federal courts of appeal.[329] This burden-shifting to the federal courts highlights not only a lack of focus on accuracy and acceptability at the BIA, but also an abandonment of the guiding principle of the administrative state: the rule of law.[330] The very notion of streamlining the immigration process, of speeding up the system by employing simpler procedures, necessarily leads to less attention paid to each case at the BIA. This in turn leads to the issuance of shorter, terser opinions that do not fully detail the BIA's rationale. Without insistence on full, considered opinions, the BIA runs the risk of not only shortchanging immigrants and deportees of a reasoned explanation for the ultimate decision in their case, but also of deciding a case incorrectly due to lack of attention. Whatever metrics the DOJ and the BIA use to determine efficiency—which apparently consist solely of asking how many appeals are decided in a year—should not trump basic considerations of fundamental fairness.

V. CONCLUSION

The Supreme Court has conceded that immigrants in deportation proceedings have some due process rights.[331] One right they do not have is the right to challenge the constitutionality of the BIA's streamlining procedures; thus, an immigrant's only recourse to challenging the BIA's decision to employ streamlining in a particular case is APA judicial review of agency action.[332] The circuits are split on whether the streamlining regulations provide a meaningful standard against which to judge the streamlining decision, but the weight of authority is in favor of allowing review.[333] Furthermore, the due process rights inherent in judicial review of agency actions—namely ensuring that an individual "will receive fairness of

[329] *Id.* at 854.

[330] *Id.* at 892-93.

[331] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903) (holding that due process review applies in the deportation process and that immigrants in deportation proceedings have a right to state their case).

[332] *See, e.g.*, Albathani v. INS, 318 F.3d 365, 376-79 (1st Cir. 2003); Denko v. INS, 351 F.3d 717, 730 (6th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 850-51 (9th Cir. 2003).

[333] *Compare* Quinteros-Mendoza v. Holder, 556 F.3d 159, 161-64 (4th Cir. 2009) (finding jurisdiction to review BIA streamlining decisions), *and* Purveegiin v. Gonzales, 448 F.3d 684, 690-92 (3d Cir. 2006), *and* Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1087-88 (9th Cir. 2004), *and* Batalova v. Ashcroft, 355 F.3d 1246, 1252-53 (10th Cir. 2004), *with* Kambolli v. Gonzales, 449 F.3d 454, 465 (2d Cir. 2006) (declining to find jurisdiction to review BIA streamlining decisions); *and* Ngure v. Ashcroft, 367 F.3d 975, 983 (8th Cir. 2004).

treatment, and a procedure designed to achieve a just and equitable result"[334] —cuts in favor of allowing more judicial review under the APA of BIA decisions, including streamlining decisions. This is especially true in light of recent Supreme Court cases like *Padilla*[335] and *Woodby*,[336] which treat deportation as severe civil punishment. In short, federal courts of appeal should have jurisdiction to review the BIA's decision to employ streamlining in a particular case based on the foregoing reasons.

[334] Re, *supra* note 60, at 13.

[335] Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010).

[336] Woodby v. INS, 385 U.S. 277, 286 (1966).