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## A Gate Forever Closed? Retiring Immigration Law's Post-departure Bar

Jonathan H. Ross

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# A GATE FOREVER CLOSED? RETIRING IMMIGRATION LAW'S POST-DEPARTURE BAR

Jonathan H. Ross\*

*Immigration law's "post-departure bar" destroys the jurisdiction of either an immigration judge or the Board of Immigration Appeals to hear a motion to reopen or reconsider filed by an alien who is no longer physically within the country. This Note examines the current conflict between the federal circuits regarding the post-departure bar and why the circuits that have decided to strike down the bar in the cases before them have ruled in line with certain trends present in recent Supreme Court immigration cases.*

*Conflict between the circuits has arisen because the governing statute, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, was enacted without reference to the bar, which had been in place before the Act's passage. In that statutory silence, the Attorney General promulgated regulations intended to reestablish the bar. In recent years, circuits have taken various positions on the bar's validity. Many have struck the bar down on the basis of either Chevron deference or the grounds outlined in Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers, which bars an agency from limiting its jurisdiction in certain situations. Still, other circuits have upheld the bar by using Chevron to conclude that deference to the agency is proper.*

*This Note suggests that the circuits that have struck down the bar are in line with prevailing trends in recent immigration cases decided by the Supreme Court. Further, this Note argues that it does not matter whether a circuit court relies upon Chevron or Union Pacific to strike down the bar, as the use of either precedent to attack the bar serves these trends, and is consistent with the overall direction of American immigration law.*

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\* J.D. Candidate, 2013, Fordham University School of Law; B.A., 2010, The Pennsylvania State University. I would like to thank Professor Joseph Landau for his guidance and advice in the writing of this Note. For my parents, in gratitude for their invaluable encouragement and support.

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#### INTRODUCTION: A TALE OF TWO IMMIGRANTS

Two aliens live and work in the United States, one in Maryland, and the other in Massachusetts. Both came to the United States illegally with their parents as young children, and both have resided in the country for several decades. Both aliens eventually married American citizens, had children, and have been working steady jobs to support those families for a number of years. However, neither alien formally completed the process to attain lawful permanent resident status and subsequent citizenship following their marriage. Both aliens became tangentially involved in schemes to receive stolen credit cards, and both were wrongfully convicted. Subsequently, while serving their jail sentence they are issued Notices to Appear before an immigration judge (IJ) in order to defend against their potential removal from the United States on the basis of their criminal conviction for fraud.

Both are resident aliens who mistakenly fell in with the wrong crowds. Because they never went through the formal citizenship process, both may now have to leave their homes and families behind in America, or uproot them to a foreign land. In each case, the IJ orders removal, and after failing to convince the Board of Immigration Appeals (BIA) to reverse the order

during their appeals process, both aliens are removed from America to their countries of origin. While overseas in their homelands, both file for vacatur of their conviction and are successful. Innocent in the eyes of the criminal justice system, both file motions to reopen with the BIA.<sup>1</sup>

Here, the fortunes of the two aliens diverge based on the jurisdiction in which each went through the removal process. The BIA may grant the motion for the alien who resided in Maryland and may even overturn the order for removal. In this scenario, the immigration court falls within the purview of the Fourth Circuit's ruling in *William v. Gonzales*,<sup>2</sup> which struck down the regulatory "post-departure" bar.<sup>3</sup> The immigrant residing in Massachusetts will not be so lucky. Instead, due to the regulatory "post-departure" bar<sup>4</sup> promulgated by the Attorney General, the BIA will be deprived of jurisdiction to even hear the motion.<sup>5</sup>

The current state of the post-departure bar is in flux, as the circuit courts have taken divergent positions on its continuing validity.<sup>6</sup> In some circuits, like the Fourth, the post-departure bar is considered invalid.<sup>7</sup> These courts invalidate the bar either through applying the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,<sup>8</sup> or the principles of *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*.<sup>9</sup> Meanwhile, in other circuits, such as the First, the bar still stands.<sup>10</sup>

Part I gives an overview of the state of the post-departure bar. Part II then examines the conflict and how the circuits have ruled on the bar's validity. Finally, Part III argues that it ultimately does not matter which ground reverses the bar, because either of the two major tools serves the norms that the Supreme Court has relied upon. This comparison shows that the lifting of the post-departure bar is in line with the overall direction of the law.

#### I. THE POST-DEPARTURE BAR AND THE REGULATORY AND STATUTORY FRAMEWORK OF DEPORTATION

Before diving into the array of cases that have been brought before the circuit courts regarding the post-departure bar's validity, this Note considers the background of the bar itself and its place in the overall context of American immigration law. This analysis begins in Part I.A by

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1. See *infra* Part I.A.1.

2. 499 F.3d 329 (4th Cir. 2007).

3. See *id.* at 333–34; *infra* notes 222–40.

4. This Note refers to the regulatory "post-departure" bar. However, some courts and other scholarship refer to this bar just as the departure bar. I have chosen to use the term "post-departure" for clarity, as the bar comes into effect after an alien's departure from the United States.

5. See *infra* Part I.A.

6. See *infra* Part II.

7. See *infra* note 3.

8. 467 U.S. 837 (1984).

9. 130 S. Ct. 584 (2009).

10. See *infra* notes 263–75.

discussing motions to reopen and reconsider in general, before moving into a discussion of the bar itself and its pre-1996 history. Next, Part I.B discusses the history of the bar as it evolved from the common law to its modern form through repeated legislation and executive interpretation of that legislation. Then, Part I.C examines how removal proceedings operate and the types of situations where the post-departure bar comes into play. Part I.D introduces the tools that the circuit courts have used to dismantle the bar: *Chevron* and *Union Pacific*. Finally, Part I.E details recent Supreme Court immigration decisions and the norms that the Court has relied on.

### A. The Post-departure Bar

The post-departure bar is a prohibition on the right of an alien to file a motion to reopen or a motion to reconsider after physically leaving the borders of the United States.<sup>11</sup> Essentially, the bar operates to deprive either the immigration court or the BIA of taking jurisdiction to consider the motion, as the alien, by having left the United States, is deemed to have “passed beyond” the agency’s control.<sup>12</sup>

#### 1. Motions to Reopen

A motion to reopen is “a form of procedural relief that ‘asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.’”<sup>13</sup> Filing such motions will not automatically stay a removal order.<sup>14</sup> An IJ will not grant a motion to reopen unless the IJ is satisfied that the evidence being offered is material, previously unavailable, and could not have been discovered or presented at the prior hearing.<sup>15</sup>

Motions to reopen were initially created by federal judges before official codification.<sup>16</sup> For example, a motion to reopen had appeared earlier in a 1916 district court case.<sup>17</sup> After much evolution, the current statutory

11. 8 C.F.R. § 1003.2(d) (2011) (applying to motions filed with the BIA). “A motion to reopen or a motion to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States.” *Id.*; 8 C.F.R. § 1003.23(b)(1) (governing motions filed with an IJ).

12. *See In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 656 (B.I.A. 2008) (“Removed aliens have, by virtue of their departure, literally passed beyond our aid.”).

13. *Dada v. Mukasey*, 128 S. Ct. 2307, 2315 (2008) (quoting 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 3.05[8][c] (rev. ed. 2012)). *See generally* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1075–77 (6th ed. 2008) (discussing motions to reopen and reconsider).

14. *See* 8 C.F.R. § 1003.2(f). An exception is if removal is ordered *in absentia*. *See* 8 C.F.R. §§ 1003.23(b)(4)(ii), 1003.23(b)(4)(iii)(A).

15. *See* 8 C.F.R. § 1003.23(b)(3). These motions are disfavored due to the strong public interest in concluding litigation. *See Tawadrous v. Holder*, 565 F.3d 35, 38 (1st Cir. 2009).

16. *See Dada*, 128 S. Ct. at 2315.

17. *See id.* (citing *Ex parte Chan Shee*, 236 F. 579 (N.D. Cal. 1916)). “The motion must state the new facts that will be proven at the hearing if the motion is granted . . . [and] must

scheme as enacted by Congress provides the right to file such motions, while placing some strict time limits on filing, along with exceptions to the rule.<sup>18</sup>

## 2. Motions to Reconsider

Alternatively, a motion to reconsider asks the BIA or an IJ to review an error made in its legal or factual analysis of a particular case.<sup>19</sup> Essentially, “[a] motion to reconsider asks that a decision be reexamined in light of additional legal arguments . . . while a motion to reopen asks for reconsideration on the basis of facts or evidence not available at the time of the original decision.”<sup>20</sup> Together, these two motions have been statutorily codified as part of our immigration adjudication and enforcement scheme, albeit with some limitations on use.

## 3. The Post-departure Bar Generally

The post-departure bar consists of two regulations promulgated by the Attorney General.<sup>21</sup> Those regulations bar motions to reopen or reconsider filed before either the IJ or the BIA where the individual has already departed from the United States.<sup>22</sup> While these two regulations have engendered a large amount of litigation in recent years,<sup>23</sup> the prospect of an alien’s motion to reopen or reconsider being barred post-departure has not always been so controversial, as the bar existed for years before the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>24</sup>

## 4. 1952–1990: Beginnings of the Bar

Regulations governing the agency’s lack of jurisdiction over post-departure motions were first promulgated in 1952, following passage of the Immigration and Naturalization Act (INA).<sup>25</sup> Shortly after these regulations were passed, the BIA determined that they were a jurisdictional limitation, thus constitutionally depriving the BIA of power to hear such

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be supported by affidavits or other evidentiary material.” 5 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE, § 64.03[4][b] (rev. ed. 2012) (citations omitted).

18. See *infra* Part I.B.

19. See 1 GORDON, MAILMAN, YALE-LOEHR & WADA, *supra* note 17, § 3.05 [8][b].

20. *Patel v. Ashcroft*, 378 F.3d 610, 612 (7th Cir. 2004).

21. 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1) (2011).

22. 8 C.F.R. §§ 1003.2(d) (applying to motions filed with the BIA), 1003.23(b)(1) (governing motions filed with an IJ).

23. See *infra* Part II.

24. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996); see also *infra* Part I.A.4–5.

25. See Pub. L. No. 82-414, 66 Stat. 173 (1952). The INA authorized the Attorney General to promulgate regulations in order to properly administer and enforce the new legislation. See generally *Zhang v. Holder*, 617 F.3d 650, 655–58 (2d Cir. 2010) (describing the history of the post-departure bar and other related regulations).

motions.<sup>26</sup> These regulations did not stay untouched for long. In 1958, Congress revised them, granting the BIA sua sponte authority to reconsider or reopen decisions on its own determination for those who had departed.<sup>27</sup> Three years later, when Congress amended the INA to create a regime for judicial review of BIA decisions,<sup>28</sup> the statute governing judicial review included a post-departure bar.<sup>29</sup> This regulatory and statutory scheme prevailed for nearly thirty years.

#### 5. 1990: The Winds of Change Begin to Blow

The Immigration Act of 1990<sup>30</sup> ordered the Attorney General to impose some limitations on the use of motions to reopen and reconsider. These included “a limitation on the number of such motions and a maximum time period for the filing of such motions.”<sup>31</sup> This was a reversal from the prior regime, which was relatively free of procedural restrictions (beyond the post-departure bar itself).<sup>32</sup>

The idea was that such limitations would help reduce excessive motion practice by aliens facing removal, who would file successive motions to delay their removal.<sup>33</sup> On this theory, it seems that it would be especially disruptive to allow such motions when an alien had already departed the country.

Ultimately, the Attorney General issued new regulations to act as a stopgap against this purported abuse.<sup>34</sup> The new rule was that “[i]n most instances, the motion to reopen must be filed not later than 90 days after the date on which the final administrative decision was rendered.”<sup>35</sup> Additionally, an alien was limited to one motion to reconsider, filed up to thirty days after a final decision.<sup>36</sup> These regulations were instituted despite

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26. See *In re G—y B—*, 6 I. & N. Dec. 159, 159–60 (B.I.A. 1954) (“We believe we are without jurisdiction to act on the motion . . . . In law there exists no decision of this Board in this case. It follows that we are without jurisdiction to entertain a motion to reconsider . . . .”).

27. See Miscellaneous Amendments to Chapter, 23 Fed. Reg. 9115, 9117–19 (Nov. 26, 1958).

28. See Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650 (1961).

29. See 8 U.S.C. § 1105a(c) (2006) (“An order of deportation or of exclusion shall not be reviewed by any court if the alien . . . has departed from the United States . . . .”) (repealed 1996).

30. See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

31. *Id.*

32. See *Zhang v. Holder*, 617 F.3d 650, 656–57 (2d Cir. 2010) (describing how in 1990 aliens were permitted to file an unlimited number of motions to reopen with no time limitations).

33. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (“[I]n a deportation proceeding . . . every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.”).

34. See Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,901, 18,905 (Apr. 29, 1996).

35. *Id.* at 18,900.

36. See *id.*

doubts expressed by the Attorney General regarding their necessity.<sup>37</sup> A prominent exception to these rules that allowed some flexibility when outside the outlined limits was the sua sponte authority of the IJ and the BIA to reopen a proceeding.<sup>38</sup>

Shortly after the Attorney General promulgated the regulations enforcing the 1990 Amendments, Congress decided to codify many of them in a new piece of legislation.<sup>39</sup> That codification is part of a broader series of immigration reforms within IIRIRA.<sup>40</sup>

### B. Opening Up a Can of Worms: IIRIRA

IIRIRA was a comprehensive change to U.S. immigration law.<sup>41</sup> At the time, there was a perceived problem of an ever-growing number of undocumented immigrants crossing into the United States and abusing the immigration system in order to stay in the country.<sup>42</sup>

IIRIRA bolstered immigration law enforcement in several ways. For example, IIRIRA's provisions included vastly increasing the number of Border Patrol agents in the Immigration and Naturalization Service (INS),<sup>43</sup>

37. See *Dada v. Mukasey*, 128 S. Ct. 2307, 2315 (2008) (“The Attorney General found little evidence of abuse . . .”). The Attorney General viewed such restrictions as an effective disincentive against the use of motions in bad faith. *Id.*

38. 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (2011); see also *Zhang v. Holder*, 617 F.3d 650, 657 (2d. Cir. 2010) (“Chief among these mechanisms were the regulations providing authority to both an IJ and the BIA to reopen, sua sponte . . .”).

39. See *infra* Part I.B.

40. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009-46, 3009-587 (1996).

41. See *supra* note 24 and accompanying text.

42. See 142 CONG. REC. 5303 (1996) (statement of Rep. Hyde). Representative Hyde stated:

Today, undocumented aliens surreptitiously cross our border with impunity. Still others enter as nonimmigrants with temporary legal status, but often stay on indefinitely and illegally. The INS administrative and adjudicatory processes are a confusing, inefficient bureaucratic maze, resulting in crippling delays in decisionmaking. The easy availability of fraudulent documents frustrates honest employers, who seek to prevent the employment of persons not authorized to work in the United States. Unfortunately, the result of illicit job prospects only serves as a magnet to further illegal immigration. Clearly, we face a multifaceted breakdown of immigration law enforcement that requires our urgent attention.

*Id.*; see also David Johnston, *Government Is Quickly Using Power of New Immigration Law*, N.Y. TIMES, Oct. 22, 1996, at A20. The article notes:

The new law limiting immigrants' access to the courts reflects a harsh reality: that the political furor in Congress and the Administration about illegal immigration and criminal aliens has found its way into law.

....

Lawmakers who supported the bill said it was necessary to unclog an immigration system swamped with lawsuits by people without citizenship or residency rights who used the Federal courts to prolong their stays in the United States or even gain a foothold on American citizenship.

*Id.*

43. See Pub. L. 104-208, div. C, §§ 101(a)-(b), 304, 110 Stat. 3009-553-54 (1996) (calling for the hiring of a minimum of 1,000 new agents every year for the next five years and a maximum of 300 new support personnel each year).

hiring more Assistant U.S. Attorneys to prosecute those who harbor or bring illegal aliens across borders,<sup>44</sup> and increasing civil penalties on those who enter the country illegally.<sup>45</sup>

More importantly for the purposes of this Note, IIRIRA also included several provisions that changed some of the opportunities for aliens to access the federal courts to defend against removal.<sup>46</sup> Essentially, IIRIRA restricted judicial review of removal orders in some cases and limited the granting of relief from a removal order.<sup>47</sup> For example, IIRIRA superseded the former codifications of the judicial review bars under prior amendments to the INA, such as the Antiterrorism and Effective Death Penalty Act (AEDPA), passed just a few months earlier.<sup>48</sup> By superseding this earlier bar, IIRIRA carried forward the rule that aliens subject to removal because of certain criminal convictions could find no relief in the courts after their BIA proceedings were complete.<sup>49</sup> Further, IIRIRA consolidated exclusion and deportation proceedings into one “removal” proceeding and simultaneously implemented a single scheme of judicial review, replacing the dual system that had existed earlier.<sup>50</sup>

Interestingly, IIRIRA replaced the prior ban on post-departure judicial review of BIA rulings.<sup>51</sup> As explained later, litigants in challenges of the post-departure bar have pointed to IIRIRA’s repeal of the bar on post-departure *judicial* review as evidence that Congress also intended to abolish post-departure *administrative* review, albeit with limited success.<sup>52</sup>

Further, the statute adopted several new limitations on the filing of motions to reopen and reconsider, unrelated to the regulatory post-departure bar. Codifying several of the Attorney General’s regulations related to the 1990 amendments, aliens who are ordered removed are now statutorily limited to one motion to reopen<sup>53</sup> within ninety days of the final order.<sup>54</sup> Similarly, they are also limited to one motion to reconsider,<sup>55</sup> which must

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44. *See id.* § 204(a)–(b), 110 Stat. at 3009–567.

45. *See id.* § 105(d), 110 Stat. at 3009–556.

46. *See* ALEINIKOFF ET AL., *supra* note 13, at 179 (“In . . . the 1996 Act, Congress streamlined and accelerated the removal of noncitizens with criminal records.”); *see also infra* notes 47–51, 53–59.

47. ALEINIKOFF ET AL., *supra* note 13, at 179.

48. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 423, 110 Stat. 1214, 1272 (repealed 1996); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 463–64 (2006).

49. Motomura, *supra* note 48, at 463–64.

50. *See id.*

51. *See* Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009-546, 3009-607 (1996); Zhang v. Holder, 617 F.3d 650, 657 (2d Cir. 2010) (“Under these revisions to the INA, an alien is no longer foreclosed from seeking *judicial* review of a BIA order after he or she departs from the country.”).

52. *See infra* notes 214, 219, 270 and accompanying text.

53. *See* 8 U.S.C. § 1229a(c)(7)(A) (2006).

54. *See id.* § 1229a(c)(7)(C)(i).

55. *See id.* § 1229a(c)(6)(A).

be filed within thirty days.<sup>56</sup> Additionally, Congress codified several exceptions to these limitations that were derived from the prior regulations. These exceptions include motions to reopen that are based on an asylum request due to changed country conditions<sup>57</sup> and, in a later amendment, motions to reopen filed by battered spouses, children, and parents.<sup>58</sup> These new limitations reflect a further move away from the past, when there were no such restrictions on an alien's right to file these motions.<sup>59</sup>

While Congress adopted these regulations in IIRIRA, it did not adopt all of the 1990 regulations promulgated by the Attorney General.<sup>60</sup> Most significantly for the purposes of this Note, IIRIRA makes no mention of either the regulatory post-departure bar or the BIA's newly promulgated sua sponte authority.<sup>61</sup> In totality, IIRIRA had actually restricted the rights of aliens in a greater fashion than had existed before, but in levying these restrictions, had not included a statutory regulatory post-departure bar. In this void, the Attorney General quickly moved to promulgate new regulations the following year to reestablish these rules.<sup>62</sup>

These most recent regulations "reinstated" the post-departure bar and the BIA's sua sponte authority.<sup>63</sup> Of course, there is the question whether these regulations were actually "reinstated" at all, or if they had simply always been present. Thus, IIRIRA's silence on these matters could be just that: silence. The Attorney General's office espoused this belief in promulgating the new regulations.<sup>64</sup> Under this view, the post-departure bar remained intact after the passage of IIRIRA.

Later in 2000, Congress tried to make it easier for some alien victims of domestic violence to move to reopen their cases by passing the Violence Against Women Act of 2000.<sup>65</sup> Then, in 2005, Congress added the caveat that the aliens filing these domestic-violence-based motions to reopen could

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56. *See id.* § 1229a(c)(6)(B).

57. *See id.* § 1229a(c)(7)(C)(ii).

58. *See id.* § 1229a(c)(7)(C)(iv); *see infra* note 65 and accompanying text.

59. *See supra* note 33 and accompanying text; *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 654 (B.I.A. 2008) ("[T]he Board has always had the *regulatory* power to entertain motions, but for the first half-century of our existence, there was no statute delineating the scope or limits of that power.").

60. *Zhang v. Holder*, 617 F.3d 650, 657 (2d Cir. 2010) ("Approximately three months later, Congress codified some—but not all—of the Attorney General's 1996 regulations regarding motions to reopen.").

61. *See* Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009-546, 3009-587 (1996); *Zhang*, 617 F.3d at 657; *Armendarez-Mendez*, 24 I. & N. Dec. at 654.

62. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997).

63. *See id.* at 10,330-31.

64. *Id.* at 10,321 ("No provision of the new section 242 of the Act supports reversing the long established rule that a motion to reopen or reconsider cannot be made in immigration proceedings by or on behalf of a person after that person's departure from the United States.").

65. *See* Pub. L. No. 106-386, div. B, § 1506(c), 114 Stat. 1464, 1528 (2000) (codified as amended at 8 U.S.C. § 1229a(c)(7)(C)(iv) (2006)).

not bring them after departing from the United States.<sup>66</sup> This stands as the most recent congressional word on the post-departure bar.

The circuit courts have differed on the issue of whether the post-departure bar is still valid following IIRIRA's omission of a bar and the subsequent regulations attempting to bring the bar back into existence.<sup>67</sup> Some courts have found that the statutory silence clearly indicates congressional intent to eliminate the bar, while others have found the statutory silence to be ambiguous, so that the Attorney General's regulations must stand, as they have been found to be reasonable.<sup>68</sup> Still other courts have applied the holding of *Union Pacific* to find that an agency cannot limit its own jurisdiction, and thus the BIA and IJ must hear post-departure motions.<sup>69</sup>

In order to understand this conflict, one must first get a sense for how removal proceedings work within the larger framework of immigration law. The following section will discuss the general procedural background for removal proceedings, and the authorities involved.

### C. Removal Proceedings in General

Before delving into the complex details of the conflict over the post-departure bar, it is important to explain the modern state of the U.S. immigration enforcement framework and the different types of situations that could lead to removal. This is important because reviewing courts have been faced with a variety of different factual scenarios when grappling with this issue.<sup>70</sup>

The executive's removal power is divided among several different government agencies. After the September 11 attacks, the INS was abolished, and its functions were mainly moved into the new Department of Homeland Security (DHS) under the guise of three separate agencies: (1) U.S. Citizenship and Immigration Services (USCIS), (2) U.S. Immigrations and Customs Enforcement (ICE), and (3) U.S. Customs and Border Protection (CBP).<sup>71</sup> The USCIS oversees the issuance of immigrations benefits, such as work permits and adjustments of status, such

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66. See Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 825(a)(2)(F), 119 Stat. 2960, 3063-64 (2006) (codified at 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV) (2006)).

67. See *infra* Part II.

68. See *infra* Part II.B-C, E-F.

69. See *infra* Part II.B, D.

70. See *infra* Part II.

71. Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291 (2006)); *Blake v. Carbone*, 489 F.3d 88, 91 n.1 (2d Cir. 2007); MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 9-10 (3d ed. 2008). Also, the Department of Justice (DOJ) takes some role in handling the INS' old functions. For example, DOJ supervises the Executive Office for Immigration Review (EOIR). See *infra* note 75.

as permanent residence and naturalization.<sup>72</sup> ICE handles enforcement of the laws and performs duties such as executing removal orders, investigating violations, and detaining violators while their removal proceedings take place.<sup>73</sup> Finally, the CBP handles security both along the borders and at transportation facilities that serve as points of entry from overseas.<sup>74</sup>

When a resident alien or illegal immigrant runs afoul of these agencies, he or she is referred to the Executive Office for Immigration Review (EOIR), which runs the U.S. immigration courts, and is under the supervision of the Department of Justice.<sup>75</sup> ICE employs the attorneys who litigate before the EOIR on behalf of the government.<sup>76</sup> Referral is made by the issuance of a Notice to Appear before a IJ.<sup>77</sup> Notices to Appear can be issued for a violation of immigration law, including being convicted of a nonimmigration crime while on American soil, or for overstaying a visa.<sup>78</sup> Once a Notice to Appear has been served, the alien must report to the one of fifty-nine immigration courts<sup>79</sup> his or her case has been assigned to at the

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72. See KRAMER, *supra* note 71, at 10; *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/> (follow “ABOUT US” hyperlink; then follow “What We Do” hyperlink) (last visited Oct. 20, 2012).

73. See KRAMER, *supra* note 71, at 10–11; *ICE Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited Oct. 20, 2012).

74. See KRAMER, *supra* note 71, at 10–11; *CBP Mission Statement and Core Values*, U.S. DEP’T HOMELAND SECURITY (Feb. 17, 2009), <http://www.cbp.gov/xp/cgov/about/mission/guardians.xml>; *See Immigration Inspection Program*, U.S. CUSTOMS & BORDER PROTECTION, [http://www.cbp.gov/xp/cgov/border\\_security/port\\_activities/overview.xml](http://www.cbp.gov/xp/cgov/border_security/port_activities/overview.xml) (last visited Oct. 20, 2012).

75. See KRAMER, *supra* note 71, at 12–14; *Executive Office for Immigration Review*, U.S. DEP’T JUST., [www.justice.gov/eoir](http://www.justice.gov/eoir) (last visited Oct. 20, 2012). “In a removal proceeding the opposing parties are the noncitizen and ICE. The immigration judges . . . are today formally independent of the immigration agencies. They are part of the Justice Department’s Executive Office for Immigration Review.” STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 504 (5th ed. 2009) (citations omitted).

76. See KRAMER, *supra* note 71, at 10. “In every case in which removability is contested, and in certain other situations, ICE must be represented by a lawyer known as a ‘trial attorney.’” LEGOMSKY & RODRÍGUEZ, *supra* note 75, at 654 (citing 8 C.F.R. §§ 1240.2(b), 1240.10(d) (2008)). These “trial attorneys” are employed in ICE’s Office of the Principal Legal Advisor. *See id.*

77. See KRAMER, *supra* note 71, at 14–15, 51–53; DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL*, 269–71 (5th ed. 2005). Notices to appear commonly include the allegations against the immigrant, including the particular statute alleged to be violated, and name an immigration court, date, and time where the alien can appear to contest the charges. Further, they include a list of rights that the respondent alien has in relation to the proceeding. *See* KRAMER, *supra* note 71, at 51–53; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 75, at 504 (describing Notices to Appear).

78. See WEISSBRODT & DANIELSON, *supra* note 77, at 235–42; *RELIEF FROM REMOVAL: A DEFINITIVE MANUAL FOR WINNING CASES* 45–47 (Jill Sheldon ed., 2007–2008).

79. *Office of the Chief Immigration Judge*, U.S. DEP’T JUST., <http://www.justice.gov/eoir/ocijinfo.htm> (last updated Apr. 2011). These courts are commonly located in major cities such as New York, Phoenix, Los Angeles, Denver, and Miami. They can also be found in smaller cities in states that may have significant immigrant populations. For example, there is a court in the small city of Harlingen, Texas. While there is not an immigration court in every state, there is a wide geographic distribution, covering each

date and time provided.<sup>80</sup> There, he or she will appear before one of the over 260 IJs on the bench.<sup>81</sup> The government carries the burden of proof in removal cases before the IJ; therefore, it must show the IJ that there is “clear and convincing evidence” that the alien is deportable before the IJ can rule in the government’s favor.<sup>82</sup>

If the government successfully proves its case, the alien will face removal.<sup>83</sup> The alien can then file a notice of appeal with the BIA within thirty days of the decision.<sup>84</sup> This filing acts as an automatic stay of the removal order, meaning that the alien cannot be removed before the BIA takes the case.<sup>85</sup> If the alien voluntarily departs the United States while the appeal is pending, the IJ’s order is then considered final and effective.<sup>86</sup> Additionally, a stay is not automatic when the alien files for a review of the agency’s final decision in the federal circuit court.<sup>87</sup>

#### D. The Post-departure Bar in Action

This subsection focuses on four common grounds that a motion to reopen can be based on, as well as examples of when a motion to reconsider can be filed. These examples illustrate factual situations that are typical in the case law. If the BIA upholds the IJ’s decision, the alien now only has a limited set of options with which to prevent final removal. One option would be to file a motion to reopen or a motion to reconsider and then appeal to a circuit court if the motion is denied and “constitutional claims or questions of law” are implicated.<sup>88</sup>

Before examining the intricacies of the motions to reopen and reconsider, this Note will briefly discuss the details of the judicial review portion of this remedy. A petition for judicial review with the circuit court must be filed within thirty days of the BIA’s final decision.<sup>89</sup> Such an appeal does not carry the automatic stay of removal that an appeal to the BIA from an IJ’s ruling does.<sup>90</sup> Further, these appeals are now limited to “constitutional

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region of the United States. See *EOIR Immigration Court Listing*, U.S. DEP’T JUST., <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last updated Sept. 2012).

80. See *supra* note 77.

81. See *Office of the Chief Immigration Judge*, U.S. DEP’T JUST., <http://www.justice.gov/eoir/ocijinfo.htm> (last updated Apr. 2011).

82. 8 U.S.C. § 1229a(c)(3) (2006); 8 C.F.R. § 1240.8 (2011).

83. See KRAMER, *supra* note 71, at 17.

84. See 8 C.F.R. § 1003.3; see also WEISSBRODT & DANIELSON, *supra* note 77, at 309–11.

85. 8 C.F.R. § 1003.6(a) (“[T]he decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal . . .”).

86. 8 C.F.R. § 1003.3(e). Essentially, this means that once the alien departs the United States prior to filing an appeal, the right to file an appeal is waived.

87. See *infra* note 90 and accompanying text.

88. See *infra* note 91.

89. 8 U.S.C. § 1252(b)(1) (2006).

90. See *id.* § 1252(b)(3)(B) (“Service of the petition on the officer or employee does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”); KRAMER, *supra* note 71, at 21 (“Note that unlike an appeal to the BIA, a

claims or questions of law”<sup>91</sup> and do not review the factual determinations of the EOIR.<sup>92</sup>

Before judicial review can be implicated to reopen or reconsider a case, and potentially lead to a reversed removal order, a motion must be filed. Motions to reopen are the more common of the two, and usually arise in four different ways: “changed country conditions with regard to asylum claims; allegations of ineffective assistance of counsel; new eligibility for relief from removal; and vacatur of a conviction that formed the basis for the order of removal.”<sup>93</sup>

Within asylum claims, “changed country conditions” refers to the situation that occurs when conditions in the alien’s country of origin have changed so that the alien now has a well-founded fear of persecution upon their return, and thus, she now seeks asylum.<sup>94</sup> These motions are sometimes not subject to the same restrictions as other motions to reopen.<sup>95</sup> There is a two-step process for the granting of asylum: first, the applicant must prove he or she is a refugee,<sup>96</sup> and second, he or she must prove that they merit a favorable exercise of discretion by the IJ.<sup>97</sup> If the initial asylum application is denied, but the conditions back home change so that the alien is now in danger of persecution, a motion to reopen the case can be granted and asylum ultimately accepted.<sup>98</sup>

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petition for review to the federal court of appeals carries no automatic stay of removal. The non-American citizen must move for a stay of the removal order.”).

91. The REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23, changed the jurisdictional scheme by limiting jurisdiction to hear these habeas corpus appeals to the circuit courts. *See* 8 U.S.C. § 1252(a)(2)(D). Further, such review was sharply limited, including to “constitutional claims or questions of law.” *See id.* However, “questions of law” can be considered somewhat ambiguous. For example, *Ramadan v. Gonzales*, 479 F.3d 646, 650–54 (9th Cir. 2007), held that the merits of a “changed circumstances” claim could be heard under this standard, even though it was a mixed question of law and fact, because it involved the review of the application of law to undisputed facts.

92. *See* 8 U.S.C. § 1252(b)(4)(B) (stating that with limited exception, the findings of fact from the administrative hearings are conclusive “unless any reasonable adjudicator would be compelled to conclude to the contrary”).

93. POST-DEPORTATION HUMAN RIGHTS PROJECT, CTR. FOR HUMAN RIGHTS & INT’L JUSTICE AT BOS. COLL., POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER 2 (2012), available at <http://www.bc.edu/content/dam/files/centers/humanrights/pdf/MTR%20Advisory%202012%20FINAL.pdf>.

94. *See* Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006); 8 C.F.R. § 1208.16 (2011); *see* RELIEF FROM REMOVAL, *supra* note 78, at 374, 378–80.

95. *EOIR IJ Benchbook Motion to Reopen Guide*, U.S. DEP’T JUSTICE, available at [www.justice.gov/eoir/vll/benchbook/tools/Motions to Reopen Guide.htm](http://www.justice.gov/eoir/vll/benchbook/tools/Motions%20to%20Reopen%20Guide.htm) (last visited Oct. 20, 2012).

96. *See* 8 U.S.C. § 1101(a)(42)(A) (2006) (defining “refugee”); 8 C.F.R. § 208.13(b) (2011) (explaining that refugee status can be established by showing either past persecution or a well-founded fear of future persecution).

97. *See* *Ndrecaj v. Mukasey*, 522 F.3d 667, 674 (6th Cir. 2008) (describing this two-part test).

98. *See* *Guo v. Ashcroft*, 386 F.3d 556, 566 (3d Cir. 2004) (remanding for BIA to reopen the case after alien made prima facie case for asylum eligibility based on fear of being persecuted under Chinese family planning laws).

Second, mistakes made by counsel can be the source of a reopening in cases where aliens can satisfy the standard for ineffectiveness.<sup>99</sup> The requirements for granting a motion to reopen based on ineffective assistance of counsel are outlined in *In re Lozada*.<sup>100</sup> Some circuits recognize this as precedent,<sup>101</sup> while others do not recognize this doctrine in relation to removal proceedings altogether.<sup>102</sup> If an alien can successfully meet these requirements, the motion to reopen will be granted, and the appeal will again proceed before the BIA.<sup>103</sup>

Third, claims of new eligibility for relief from removal include situations where new circumstances make the alien eligible for discretionary relief. Some examples where this would be possible include when an alien files for cancellation of removal by meeting certain requirements<sup>104</sup> or for voluntary departure.<sup>105</sup> These motions will not be granted if the alien's rights to make such an application were explained to them at the initial proceeding before the IJ, and they were afforded an opportunity to apply for such relief but failed to do so.<sup>106</sup> However, they may be allowed if subsequent circumstances have arisen.<sup>107</sup>

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99. See *Lopez-Vega v. Holder*, 336 F. App'x. 622, 623–24 (9th Cir. 2009) (alien's counsel missed the deadline to file an appeal to the BIA and incorrectly filled out the necessary certificate of service); *Siong v. INS*, 376 F.3d 1030, 1035 (9th Cir. 2004) (alien's counsel missed the deadline to file an appeal to BIA by several days, causing BIA to dismiss original appeal as untimely).

100. 19 I. & N. Dec. 637, 639 (B.I.A. 1988).

101. See *Zheng v. U.S. Dep't. of Justice*, 409 F.3d 43, 46 (2d Cir. 2005); *Hernandez v. Reno*, 238 F.3d 50, 55 (1st Cir. 2001).

102. See *Rafiyev v. Mukasey*, 536 F.3d 853, 859–61 (8th Cir. 2008); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005).

103. See *Lopez-Vega*, 336 F.App'x. at 624.

104. See 5 GORDON, MAILMAN, YALE-LOEHR & WADA, *supra* note 17, § 64.04[3][a]–[b]. The Attorney General can decide to cancel removal of an alien who has “accrued ten years of continuous physical presence,” has been a person of “good moral character,” has not been convicted of certain criminal offenses, and who “establishes that removal would result in exceptional and extremely unusual hardship to his or her U.S.-citizen or LPR spouse, parent, or child.” *Id.* § 64.04[3][b] (citations omitted); see also *EOIR IJ Benchbook Motion to Reopen Guide*, *supra* note 95.

105. See KRAMER, *supra* note 71, at 340 (“[A] benefit whereby the individual avoids an order of removal and is allowed to leave . . . generally of his or her own accord . . . . Theoretically, an individual who departs . . . pursuant to a grant of voluntary departure leaves with a ‘clean record,’ and is free to return . . . with proper admission documents.”). Voluntary departure is available “(1) before the conclusion of removal proceedings; and (2) at the conclusion of removal proceedings.” 5 GORDON, MAILMAN, YALE-LOEHR & WADA, *supra* note 17, § 64.05[1]. There are more requirements for finding voluntary departure after proceedings have concluded, where the IJ can only allow for voluntary departure if the alien has been physically present for at least a year preceding service of a Notice to Appear, the applicant has been a person of “good moral character” for at least five years prior to the application, the applicant is not deportable for conviction under an aggravated felony or for participating in terrorist activities, “the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so,” the alien posts bond to ensure departure and the alien was not previously permitted to voluntarily depart after being found inadmissible. See *id.* § 64.05[3] (citations omitted).

106. See 8 C.F.R. § 1003.23(b)(3) (2011).

107. See *EOIR IJ Benchbook Motion to Reopen Guide*, *supra* note 95.

The fourth common category concerns the vacatur of a criminal conviction that was the basis for the original removal order. For the first time in the history of the INA, Congress included a definition of “conviction” in IIRIRA, as a way to clarify when an alien is eligible for removal in a variety of situations, including after pleading guilty.<sup>108</sup> However, the fact remains that underlying criminal convictions can be vacated, potentially allowing for reopening.<sup>109</sup>

For example, it is possible to be “convicted” and removed even if a state court judge does not formally declare guilt.<sup>110</sup> However, if an alien can successfully vacate his conviction, it still may not be enough to grant a reopening of the case. While, “[a]s a general rule, [the BIA gives] full faith and credit to State court actions that purport to vacate an alien’s criminal conviction[,]”<sup>111</sup> if the conviction is based solely on “immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings,”<sup>112</sup> then the conviction is still valid for the purposes of removal.<sup>113</sup> However, if this is not the case, then the alien may be able to have the case reopened and the removal order reversed.<sup>114</sup>

Finally, motions for reconsideration can also be used to try to reverse an adverse removal order. These motions are wholly separate from motions to reopen.<sup>115</sup> A motion to reconsider should include:

- (1) an allegation of material factual or legal errors in the Board’s decision that is supported by pertinent authority;
- (2) if the Board summarily affirmed the Immigration Judge’s decision, a showing that the alleged errors and legal arguments were previously raised on appeal and a statement explaining how the Board erred in affirming the Immigration Judge’s decision under the [affirmance without opinion] regulations; and
- (3) if there has been a change in law, a reference to the relevant statute, regulation, or precedent and an explanation of how the outcome of the Board’s decision is materially affected by the change.<sup>116</sup>

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108. 8 U.S.C. § 1101(a)(48) (2006); *Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 328, 331–33 (2d. Cir. 2007) (describing legislative history of this provision of IIRIRA).

109. *See infra* notes 211, 229, 265.

110. *See Uritsky v. Gonzales*, 399 F.3d 728, 735 (6th Cir. 2005) (finding “conviction” where alien had pled guilty to a low-level sexual conduct charge and been sentenced to probation and fines, with an explicit statement by the court that there was no judgment of conviction).

111. *See In re Chavez-Martinez*, 24 I. & N. Dec. 272, 273 (B.I.A. 2007).

112. *Id.*

113. *See id.*

114. *See infra* notes 222–40 and accompanying text.

115. *See supra* Part I.A.1–2.

116. *In re O-S-G-*, 24 I. & N. Dec. 56, 60 (B.I.A. 2006); *see also* 8 C.F.R. § 1003.2(b) (2011) (regulating motions to reconsider filed with the BIA).

For example, these motions can be filed in situations where the BIA did not consider an argument as to why a particular statute was inapplicable to the alien's case.<sup>117</sup>

In these five situations, aliens attempt to reverse an adverse removal order against them. Unfortunately, if they have already left the country when the motion is filed, they may come up against the post-departure bar, which theoretically deprives the BIA or IJ of jurisdiction to hear their motion. The next section generally discusses the different approaches that courts have taken in assessing the post-departure bar.

*E. Tools for Dismantling or Upholding the Bar:  
Chevron and Union Pacific*

In recent years, courts approaching the question of whether the post-departure bar is still valid following IIRIRA have mainly relied on analysis derived from two cases. The first primary tool to be deployed against the post-departure bar is the *Chevron* doctrine. In this case, the Supreme Court laid out a two-step framework for determining whether an executive agency interpretation of a possibly ambiguous congressionally enacted statute should be given judicial deference.<sup>118</sup> *Chevron* concerned the definition of "stationary source" in the amended Clean Air Act.<sup>119</sup> The Environmental Protection Agency (EPA) interpreted the statutory language to allow an entire plant to constitute a single source, making it easier for factory owners who wanted to build new pollution-emitting devices to gain state approval as long as the total emissions from the plant did not exceed the statutory threshold.<sup>120</sup> The Court applied a new framework to determine whether an agency should receive deference for their interpretation of an ambiguous statute. Ultimately, the Court found that the EPA's interpretation was permissible.<sup>121</sup>

The *Chevron* analysis proceeds as follows. First, under step one, the court must determine whether the statute is truly ambiguous, using tools of statutory interpretation<sup>122</sup>: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>123</sup> However, if the statute is ambiguous, the court must determine whether the agency's gap-filling was reasonable, meaning not "arbitrary, capricious, or manifestly contrary to the

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117. See *Mu Ju Li v. Mukasey*, 515 F.3d 575, 576–77 (6th Cir. 2008).

118. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

119. *Id.* at 840.

120. *Id.*

121. *Id.* at 866.

122. See *id.* at 842–43.

123. *Id.*

statute.”<sup>124</sup> The *Chevron* analysis has been performed many times, in many different areas of law.<sup>125</sup>

Commentators have different views regarding *Chevron*'s purpose and function,<sup>126</sup> but it appears that the basic point of the doctrine is to effectuate congressional intent.<sup>127</sup> But in the context of the post-departure bar, capturing congressional intent is no simple task.<sup>128</sup> The answer, under step one of the *Chevron* analysis, has led some courts to lift the bar.<sup>129</sup>

The main alternative ground for attacking the bar is the Court's decision in *Union Pacific*. In this case, the Court was faced with the question of whether it was appropriate for the National Railroad Adjustment Board (NRAB) to decline hearing the disciplinary arbitration claims of five railroad employees for lack of jurisdiction.<sup>130</sup> Essentially, the NRAB had taken a procedural issue and elevated it into a jurisdictional one.<sup>131</sup>

The Court distinguished a conferencing requirement as a claim-processing, administrative requirement, instead of a jurisdictional requirement.<sup>132</sup> Therefore, the NRAB could not waive its own subject matter jurisdiction to hear the cases.<sup>133</sup>

The decision in *Union Pacific* has followed a recent trend in which the Supreme Court has sought to separate jurisdictional rules from nonjurisdictional rules. Cases in which seemingly minor rules have been considered jurisdictional are known as “drive-by jurisdictional rulings.”<sup>134</sup>

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124. *Id.* at 843–44.

125. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189–90 (2006) (“*Chevron* has had a fundamental impact on areas as disparate as taxation, labor law, environmental protection, immigration, food and drug regulation, and highway safety.” (citations omitted)).

126. See Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1562 (2007) (describing the two camps that have emerged, and that some scholars think both motivations are at work). “The scholarship has settled into two roughly defined camps. One camp argues that *Chevron* is a separation of powers decision . . . to abide by and police congressional intent. The other camp believes that *Chevron* deference is driven by the greater competence and experience that agencies have relative to courts in interpreting the statutes . . .” *Id.*; see Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2077 (1990) (“[*Chevron*] embodies, in those applications, a plausible reconstruction of congressional desires and a sound understanding of the comparative advantages of agencies in administering complex statutes.”).

127. See Sunstein, *supra* note 126, at 2109–10.

128. See *infra* Part II.B, E.

129. See *infra* notes 222–40, 333–50, and Part II.F.

130. See *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584, 594 (2009) (denying jurisdiction because there was not enough proof that mandated conferencing had taken place at the internal level, even though the objection raised by the industry panel member was possibly untimely).

131. See *id.*

132. *Id.* at 597 (finding that the conferencing requirement was listed as a general duty in the statute, and not as part of the “[e]stablishment[,] . . . powers[,] and duties’ of the NRAB”).

133. See *id.* at 596–99.

134. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (“We have described such unrefined dispositions as ‘drive-by jurisdictional rulings’ that should be accorded ‘no precedential effect’ on the question whether the federal court had authority to adjudicate the

In these cases, it is common for the issue to be obscured when a case is dismissed for lack of jurisdiction, because it is unclear whether the dismissal should really be for lack of subject matter jurisdiction or for failure to state a claim.<sup>135</sup> In a string of decisions, the Court has struck down rulings that declined jurisdiction as the result of some failed precondition.<sup>136</sup> This shift in the Court's thinking was intended to cut back on overuse of the word "jurisdiction"<sup>137</sup> by delineating the line between rules that are truly "jurisdictional" and those that are not.<sup>138</sup> Therefore, only rules that explicitly grant courts the authority to hear a case will be found to be truly "jurisdictional."<sup>139</sup> This means that the absence of some fact alone might not be enough to deprive the court of subject matter jurisdiction.<sup>140</sup>

Together, *Chevron* and *Union Pacific* have both served as potential answers to the question of the post-departure bar's present validity for different circuits examining the issue.

#### F. Immigration Law in the Past Decade

In recent years, three norms have emerged that the Supreme Court has relied on in favor of immigrants: (1) the presumption that administrative actions should be subject to judicial review, even in the immigration context; (2) the use of a "clear statement rule" to prevent congressional silence from being transformed into a nonexistent legislative mandate; and (3) that immigrants should have every opportunity to fight the harsh consequences of removal.<sup>141</sup>

An important case that outlines these three principles is *INS v. St. Cyr*.<sup>142</sup> Enrico St. Cyr was admitted into the United States from Haiti in 1986 and

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claim in suit." (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91(1998)); Howard M. Wasserman, *The Demise of "Drive-By Jurisdictional Rulings,"* 105 NW. U. L. REV. 947, 948 (2011).

135. *Arbaugh*, 546 U.S. at 511.

136. See *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011) (defining a 120-day time limit for filing an appeal to the U.S. Court of Appeals for Veterans Claims from the Board of Veteran Appeals as nonjurisdictional); *Union Pacific*, 130 S. Ct. at 594; *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245–47 (2010) (finding a registration requirement of the Copyright Act nonjurisdictional for the purposes of a district court having authority to approve a plaintiff class and settlement).

137. See *Arbaugh*, 546 U.S. at 510–11 (2006) ("This Court . . . has sometimes been profligate in its use of the term.")

138. See Wasserman, *supra* note 134, at 955.

139. See *id.* This does not mean that the plaintiff cannot be defeated on the substantive claim, but that the claim at least has to be heard if jurisdiction exists. See *id.* at 949. "However merits are defined, the question of who should win under substantive law remains distinct from the court's adjudicative authority." *Id.* at 950.

140. See *Arbaugh*, 546 U.S. at 511 ("Judicial opinions, the Second Circuit incisively observed, 'often obscure the issue by stating that the court is dismissing for lack of jurisdiction when some threshold fact has not been established . . .'" (quoting *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2000) (internal quotation marks omitted))).

141. See *infra* notes 142–77 and accompanying text.

142. 533 U.S. 289 (2001).

pled guilty to selling a controlled substance a decade later.<sup>143</sup> Before the passage of AEDPA, St. Cyr would have been eligible for discretionary relief from removal.<sup>144</sup> However, because St. Cyr's removal proceedings did not begin until after both AEDPA and IIRIRA were enacted, he was considered ineligible for that relief.<sup>145</sup> St. Cyr subsequently filed a petition for habeas corpus, claiming that the new restrictions did not apply retroactively.<sup>146</sup> In 2001, the Supreme Court affirmed the ruling that jurisdiction existed to hear the petition.<sup>147</sup>

The jurisdictional analysis by the Court included two of the foregoing principles: the clear statement rule and the judicial review presumption.<sup>148</sup> The Court stated that if Congress intended to repeal something as fundamental as habeas corpus rights, the Court would require proof that Congress clearly stated that intention.<sup>149</sup> Thus, the Court reviewed four different statutes that were part of AEDPA and IIRIRA and found that none of those statutes clearly stated that they were stripping habeas corpus jurisdiction.<sup>150</sup> Further, the Court cited the first norm in support of this ruling.<sup>151</sup> Thus, jurisdiction to hear St. Cyr's petition was proper.<sup>152</sup> This ruling also indirectly serves the third principle, by enabling St. Cyr to have a further opportunity to attempt to fight his removal.<sup>153</sup>

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143. *Id.* at 293.

144. *See id.* (noting that this is the law that would have applied at the time of St. Cyr's conviction).

145. *Id.* (“[R]emoval proceedings against him were not commenced until April 10, 1997, after both AEDPA and IIRIRA became effective, and, as the Attorney General interprets those statutes, he no longer has discretion to grant such a waiver.”).

146. *Id.* The district court exercised jurisdiction over St. Cyr's petition and agreed, with the Second Circuit affirming. *Id.*

147. *See id.* at 298–314 (finding that the four statutory provisions in question from AEDPA and IIRIRA could not be found to have repealed habeas corpus jurisdiction for these cases involving “pure questions of law”). Additionally, the Court went on to find that the provisions could not apply retroactively. *See id.* at 314–26.

148. *Id.* at 298 (“For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”).

149. Before reaching this question, the Court analyzed the pre-1996 statutory scheme regarding habeas corpus jurisdiction to find that both “pure questions of law” could be raised before a judge under the Suspension Clause, and that such a practice was common in immigration law. *See id.* at 301–08.

150. The four statutes at issue were the Antiterrorism and Effective Death Penalty Act § 401(e), 110 Stat. 1214 (1996), and three provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(a)(1), § 1252(a)(2)(c), and § 1252(b)(9) (Supp. V 1999). Applying principles of statutory construction, the Court found a clear statement of repeal lacking. *See St. Cyr*, 533 U.S. at 308–14.

151. *See St. Cyr*, 533 U.S. at 298 n.9 (citing the “strong presumption in favor of judicial review of administrative action” and supporting precedent).

152. *Id.* at 314.

153. Following this ruling, a confusing framework for habeas corpus jurisdiction remained. Interestingly, those who fell under the ruling in *St. Cyr* (i.e., those who were ineligible for discretionary relief as the result of being convicted of an aggravated felony) were left with two judicial layers of review: a habeas petition in the district courts, followed by an appeal at the circuit level. This is in contrast to those who were still eligible for discretionary relief, because they could only file a petition for judicial review at the circuit

These principles have appeared repeatedly in several immigration cases over the past eleven years. For example, in another case from 2001, these norms came to the forefront of a decision to place limits on indefinite detention for aliens facing a removal order. That case, *Zadvydas v. Davis*,<sup>154</sup> involved a challenge to the potentially indefinite detention of an alien arrested for intent to distribute cocaine, who was subsequently punished with a removal order.<sup>155</sup> No other country would take him,<sup>156</sup> and he was held for years in American detention under the authority of 8 U.S.C. § 1231(a)(6).<sup>157</sup>

The Supreme Court did not accept the argument that the statute allowed for indefinite detention, and instead interpreted it so as to avoid a violation of the Fifth Amendment's Due Process Clause by reading a "reasonableness" requirement into the statute.<sup>158</sup> The Court's analysis is partly based on two of the norms described above: the clear statement rule and the judicial review presumption.

The Court refused to find grounds for such an extraordinary result as potentially indefinite detention without a clear statement of congressional intent.<sup>159</sup> Further, while the Court makes note of the strong "plenary power" of Congress in immigration, that power is not absolute, and the Court retains a role in striking down laws that violate the Constitution.<sup>160</sup>

Nine years later, the Court heavily relied on these norms again in a case involving IIRIRA. In *Kucana v. Holder*,<sup>161</sup> an alien who attempted to file several motions to reopen a denial of asylum was denied review by the Seventh Circuit because of a perceived lack of jurisdiction to review

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level, and thus receive only one possible level of judicial scrutiny. *See id.* at 334–35 (Scalia, J., dissenting); Gerald Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 139 (2006) (citing H.R. REP. NO. 109-72, at 174 (2005) (Conf. Rep.)). This schism was solved by certain provisions of the REAL ID Act, which eliminated the habeas jurisdiction of the district courts for removal orders. *See Neuman, supra* note 153, at 136–42 (describing in detail how the REAL ID Act is structured to implement this change).

154. 533 U.S. 678 (2001).

155. *Id.* at 684.

156. *Id.* at 684–85. Germany refused to take Zadvydas because under German citizenship guidelines, he was not a German citizen, despite being born in a displaced persons camp in Germany in 1948. *Id.* at 684. Further, the Dominican Republic also refused the INS's request to admit him even though he had a Dominican-born wife. *Id.* Finally, Lithuania refused to take him because he could not prove documentation of Lithuanian citizenship after he had immigrated to the United States with his Lithuanian-born parents in 1948. *Id.*

157. Under this statute, the government "may" continue to detain an alien after the ninety-day removal period if they have not yet been deported, or the alien could be granted supervised release. Further, regulations allow for a panel to decide whether to grant release within three months following the expiration of the ninety-day period or shortly after, by weighing factors such as the alien's criminal history, mental health, and family ties. 8 C.F.R. § 241.4(f) (2011). If deciding against release, the panel must review their decision again within a year, or sooner. 8 C.F.R. § 241.4(k)(2)(iii), (v) (2011).

158. *Zadvydas*, 533 U.S. at 690–99.

159. *Id.* at 697–99 ("We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention.").

160. *See id.* at 695.

161. 130 S. Ct. 827 (2010).

motions to reopen based on discretionary decisions.<sup>162</sup> The Seventh Circuit based this decision on the provision of IIRIRA that purportedly exempts discretionary decisions of the Attorney General from judicial review.<sup>163</sup> Because the Attorney General grants the BIA discretionary authority to hear a motion to reopen by regulation, the Seventh Circuit interpreted this statute to apply to regulatory discretion as well as statutory discretion.<sup>164</sup>

The Supreme Court reversed this interpretation, focusing not only on the statutory language, which was silent, but also on the statute as a whole.<sup>165</sup> Further, the Court relied upon all three of the above-mentioned immigration law norms to reach its decision.

First, the Court noted the importance of judicial oversight to protect the right to a motion to reopen, as it is an “‘important [procedural] safeguard’ designed ‘to ensure a proper and lawful disposition’ of immigration proceedings.”<sup>166</sup> This is similar to the third norm, ensuring a fair shake for immigrants facing removal. Next, the Court referred to the first norm, stating that statutory ambiguity favors judicial review of administrative action.<sup>167</sup> The Court assumed that Congress would be aware of that presumption.<sup>168</sup> Due to this assumption, the clear statement rule is implicated because it would then take “‘clear and convincing evidence’ to dislodge the presumption . . . . There is no such evidence here.”<sup>169</sup> Thus, all three of the above norms are involved in the Court’s decision favoring Kucana’s less harsh interpretation of the statute.

These norms appear in other recent immigration cases, as well. For example, in *Nken v. Holder*,<sup>170</sup> the Court resolved a disagreement over whether the traditional test for granting a stay of a removal order or IIRIRA’s more stringent test used for injunctions should apply.<sup>171</sup> The

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162. See *id.* at 832–33. Kucana filed a motion to reopen in 2006, attempting asylum relief by claiming changed country conditions in his native Albania, but the BIA denied it because conditions had improved there since Kucana’s original asylum hearing. He then filed a petition for review in the Seventh Circuit, claiming an abuse of discretion. *Id.*

163. See *id.* at 833; 8 U.S.C. § 1252(a)(2)(B)(ii) (2006).

164. See *Kucana*, 130 S. Ct. at 833.

165. *Id.* at 835–40. The government’s case was predicated on the word “under” in the statute meaning that because the BIA’s authority was pursuant to the Attorney General, it fell “under” this exception. *Id.* at 835–36. However, the Court noted how the provisions sandwiching this word only referred to statutory discretion. *Id.* at 836–37. Also, the Court noted how the exempted decisions were substantive ones made by the Attorney General, whereas the decision to deny a motion to reopen was related to procedure. *Id.* at 837–38.

166. *Id.* at 839 (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317–19 (2008)).

167. See *id.* at 839 (“Any lingering doubt about the proper interpretation . . . would be dispelled by a familiar principle of statutory construction: the presumption favoring judicial review of administrative action.”).

168. *Id.*

169. *Id.* For further analysis on *Kucana* and the related circuit split regarding judicial review over the denial of sua sponte motions to reopen by the BIA, see generally Michael A. Keough, *Kucana v. Holder and Judicial Review of the Decision Not to Reopen Sua Sponte in Immigration Removal Proceedings*, 80 *FORDHAM L. REV.* 2075 (2011).

170. 129 S. Ct. 1749 (2009).

171. See *id.* at 1756. The statute in question is 8 U.S.C. § 1252(f)(2) (2006). (“Notwithstanding any other provision of law, no court shall enjoin the removal of any alien

Court relied upon the clear statement rule in finding that IIRIRA did nothing to change the traditional test for a stay.<sup>172</sup> Also, the Court disapproved the harsher standard, partly because it made no allowance for considering the irreparable harm done to the petitioner.<sup>173</sup> This may indirectly serve the third norm, but the Court later seemed to back away from this principle by refusing to state that removal is so irreparable that it should lead to an automatic stay.<sup>174</sup>

Additionally, in *Dada v. Mukasey*,<sup>175</sup> the Court seemed to reference the clear statement rule in refusing to accept the idea that voluntary departure removes the right to file a motion to reopen.<sup>176</sup> Finally, two recent decisions do not mention these norms directly, but both were resolved in favor of the immigrant, suggesting a possible trend in the Court's rulings to favor the rights of aliens when removal is at risk.<sup>177</sup> This backdrop sets the stage for the current conflict between circuits regarding the validity of the post-departure bar.

## II. THE QUESTION OF THE POST-DEPARTURE BAR'S CURRENT VALIDITY

It appears that the current state of the post-departure bar's validity may be uncertain, as there is a definite trend towards repealing the bar in the majority of federal circuits. The Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have repealed the post-departure bar in at least some situations, relying upon a number of different bases to reach their decisions.<sup>178</sup> Additionally, the Supreme Court has weighed in on the issue in dicta, suggesting that the rule is untenable.<sup>179</sup> On the other side, the First Circuit has upheld the bar, and has not reversed course since.<sup>180</sup>

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pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.”). 8 U.S.C. § 1252(f)(2) (citation omitted).

172. See *Kucana*, 129 S. Ct. at 1760 (quoting *Scripps-Howard Radio, Inc., v. FCC*, 316 U.S. 4, 11 (1942)) (“[W]e are loath to conclude that Congress would, ‘without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review.’”).

173. See *id.*

174. See *id.* at 1761 (“Although removal is a serious burden for many aliens, it is not categorically irreparable, as some courts have said.”).

175. 128 S. Ct. 2307 (2008).

176. *Id.* at 2318 (“We must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law . . . . This is particularly so when the plain text of the statute reveals no such limitation.”).

177. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485–87 (2010) (finding that an alien’s attorney’s failure to notify his client of the deportation consequences of his guilty plea was potentially deficient under the Sixth Amendment); *Negusie v. Holder*, 129 S. Ct. 1159, 1167–68 (2009) (ruling that the BIA’s interpretation of the “persecutor bar” was not entitled to *Chevron* deference because it was based on a legal error).

178. See *infra* Part II.A–B, D–E.

179. See *infra* notes 241–43.

180. See *infra* Part II.B–C. The bar’s validity is still an open question in the Eighth and D.C. Circuits.

The analysis of this conflict proceeds in several chronological steps. First, Part II.A–B introduces the question of the bar’s validity with the Ninth Circuit’s unconventional ruling in *Lin v. Gonzales*,<sup>181</sup> followed by the subsequent rulings in *Pena-Muriel v. Gonzales*<sup>182</sup> and *William v. Gonzales*,<sup>183</sup> which were the first to bring *Chevron* analysis into the picture, albeit with different results.

Part II.C will discuss the pushback on the initial rulings in *Lin* and *William*, first discussing the BIA’s response to the attack on their lack of jurisdiction to hear these cases in *In re Armendarez-Mendez*,<sup>184</sup> followed by the Tenth Circuit in *Rosillo-Puga v. Holder*.<sup>185</sup> This section also details how the Fifth Circuit indirectly upheld the bar by failing to reach the question in *Ovalles v. Holder*.<sup>186</sup>

Part II.D examines the emergence of *Union Pacific* in 2009 as a new, powerful tool in dismantling the bar, which the Seventh Circuit and Sixth Circuit took advantage of in *Marin-Rodriguez v. Holder*<sup>187</sup> and *Pruidze v. Holder*,<sup>188</sup> respectively. Additionally, the Second Circuit’s initial reluctant upholding of the bar in *Zhang v. Holder*<sup>189</sup>, and then subsequent repeal of the bar in some situations in *Luna v. Holder*<sup>190</sup> is noted.

Finally, in Part II.E–F, the most recent rulings on the issue, including *Prestol Espinal v. Attorney General*,<sup>191</sup> *Contreras-Bocanegra v. Holder*,<sup>192</sup> and *Jian Le Lin v. U.S. Attorney General*<sup>193</sup> are discussed. These cases mark a return back to *Chevron* analysis as a way to undo the bar, possibly indicating a future trend in how other circuits may attack the bar. Thus, this section reveals the chronological history of the post-departure bar, leading to its current position on its deathbed.

#### A. Opening Salvos: Lin Opens the Door

The year 2007 marked the beginning of the end<sup>194</sup> for the stability of the post-departure bar, as change began to occur with three circuit court

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181. 473 F.3d 979 (9th Cir. 2007).

182. 489 F.3d 438 (1st Cir. 2007).

183. 499 F.3d 329 (4th Cir. 2007).

184. 24 I. & N. Dec. 646 (B.I.A. 2008).

185. 580 F.3d 1147 (10th Cir. 2009).

186. 577 F.3d 288 (5th Cir. 2009).

187. 612 F.3d 591 (7th Cir. 2010).

188. 632 F.3d 234 (6th Cir. 2011).

189. 617 F.3d 650 (2d Cir. 2010).

190. 637 F.3d 85 (2d Cir. 2011).

191. 653 F.3d 213 (3d Cir. 2011).

192. 678 F.3d 811 (10th Cir. 2012).

193. 681 F.3d 1236 (11th Cir. 2012).

194. There was a somewhat relevant post-departure bar case decided in 2006. In *Contreras-Rodriguez v. U.S. Attorney General*, 462 F.3d 1314 (11th Cir. 2006), the Eleventh Circuit did not directly address the question of the departure bar’s validity; rather the court stated that if petitioner had not received adequate notice of the proceeding, the BIA and IJ retain jurisdiction to reopen at any time to consider whether notice was received, even post-departure. *See id.* at 1317.

decisions. In 2007, the Ninth Circuit ruled that the BIA could not decline jurisdiction to reopen a denial of asylum post-departure because removal proceedings had concluded.<sup>195</sup> Zi-Xing Lin, a Chinese national, attempted to enter the United States on a flight from Russia with a fraudulent Japanese passport.<sup>196</sup> He was detained and placed in removal proceedings, where he attempted to secure asylum, which the IJ refused.<sup>197</sup> Lin illegally returned to the United States and filed a new petition for asylum, which was again denied.<sup>198</sup> However, he remained in the United States and filed a motion to reopen in 2004 based on changed circumstances.<sup>199</sup> The IJ rejected the motion for lack of jurisdiction to reopen the case, and the BIA affirmed this decision.<sup>200</sup>

While the decisions of the IJ and BIA were largely based on an interpretation of 8 U.S.C. § 1231(a)(5), which subjects aliens illegally re-entering to their prior removal order, the government's main argument in the circuit court was that the post-departure bar applied.<sup>201</sup> This argument was somewhat unusual compared to later cases, because the motion in question was not filed outside of the United States. Rather, the government was simply arguing that because Lin had previously departed subject to a removal order, he could no longer bring a motion to reopen, even after returning to the United States.<sup>202</sup>

The Ninth Circuit did not accept this argument, issuing a new reading of the regulation instead. The court stated, "The regulation is phrased in the *present* tense and so by its terms applies only to a person who departs the United States while he or she 'is the subject of removal . . . proceedings.'"<sup>203</sup> Since Lin's removal proceedings were long over, the ambiguous language, which the court construed in his favor, suggested that the bar no longer applied to him.<sup>204</sup> This reading has not picked up much support in later cases,<sup>205</sup> but does seem to be one of the first cracks in the wall of the post-departure bar.

While *Lin* may have only scratched the armor of the post-departure bar, two subsequent cases threatened to do far more damage to its continued existence.

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195. *Lin v. Gonzales*, 473 F.3d 979, 982 (9th Cir. 2007).

196. *See id.* at 980.

197. *See id.*

198. *See id.* at 981.

199. *See id.*

200. *See id.*

201. *Id.* at 981–82; *see also* 8 C.F.R. § 1003.23(b)(1) (2011).

202. *See Lin*, 473 F.3d at 982.

203. *Id.* (citing 8 C.F.R. § 1003.23(b)(1)).

204. *See id.* Additionally, the court found that the motion was improperly denied because the DHS did not comply with the requirements of 8 C.F.R. § 241.8. *Id.* at 982–83.

205. *See Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009); *Ovalles v. Holder*, 577 F.3d 288 (5th Cir. 2009); *In re Armendarez-Mendez*, 24 I. & N. Dec. 646 (B.I.A. 2008). Also, there is no significant case following *Lin* that relies on its reasoning as a ground to dismantle the bar. Interestingly, in a later case, the Ninth Circuit uses a straightforward *Chevron* analysis to dismantle an aspect of the BIA post-departure bar. *See infra* note 304.

*B. Pena-Muriel and William: Chevron Arrives on the Scene*

Also in 2007, the First Circuit upheld the post-departure bar through the use of *Chevron* analysis.<sup>206</sup> Fredy Hugo Pena-Muriel was admitted to the United States from Bolivia in 1970, when he was less than two years old.<sup>207</sup> In 1997, he was convicted of domestic assault under Rhode Island law, receiving a one-year suspended sentence plus probation.<sup>208</sup> Because he never attained citizenship, he was subsequently placed into removal proceedings following the conviction.<sup>209</sup> The IJ ordered removal, and Pena-Muriel was removed to Bolivia without attempting to fight the order.<sup>210</sup> In 2002, the conviction was vacated based on a brief affidavit filed by the victim “stating that Pena-Muriel ‘should not have been charged.’”<sup>211</sup> Pena-Muriel then moved to reopen his case, which the IJ denied on the basis of the post-departure bar, and the BIA summarily affirmed.<sup>212</sup>

Pena-Muriel then filed a writ of habeas corpus in the District of Massachusetts, which was transferred to the First Circuit under the provisions of the REAL ID Act.<sup>213</sup> Pena-Muriel’s main argument was that IIRIRA’s removal of the post-departure bar on judicial review of removal orders<sup>214</sup> indicated that the regulatory post-departure bar should also no longer be enforced by the Attorney General.<sup>215</sup>

Using a *Chevron* analysis, the court found that IIRIRA was silent on whether the administrative post-departure bar was still active.<sup>216</sup> Unlike some later courts,<sup>217</sup> the First Circuit interpreted this silence as pure ambiguity, rather than a reflection of congressional intent.<sup>218</sup> Moving to step two of *Chevron*, the court rejected Pena-Muriel’s argument that if Congress was concerned enough with due process to reinstate post-departure judicial review, it would have similar concerns about administrative action.<sup>219</sup> Finding the Attorney General’s interpretation

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206. *Pena-Muriel v. Gonzales*, 489 F.3d 438, 441–42 (1st Cir. 2007).

207. *Id.* at 440.

208. *Id.*

209. *Id.* (on the bases of either committing an aggravated felony, 8 U.S.C. § 1227 (a)(2)(A)(iii) (2006), or a crime of domestic violence, 8 U.S.C. § 1227 (a)(2)(E)(i)).

210. *See Pena-Muriel*, 489 F.3d at 440.

211. *Id.*

212. *See id.* The IJ cited 8 C.F.R. § 1003.23(b)(1), which is the post-departure bar regulation pertaining specifically to IJs. This situation appears less commonly than when the BIA must invoke its own regulation, 8 C.F.R. § 1003.2(d).

213. *See id.* at 440–41.

214. *See id.* at 441. IIRIRA amended the INA through the deletion of 8 U.S.C. § 1105a(c), which banned judicial review of removal orders filed post-departure. *See* 8 U.S.C. § 1252 (instituting a new judicial review scheme).

215. *See Pena-Muriel*, 489 F.3d at 441.

216. *Id.* at 441–42.

217. *See infra* notes 222–40; Part II.E–F.

218. *See Pena-Muriel*, 489 F.3d at 441–42.

219. *See id.* (citing *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration &

reasonable, the court upheld the post-departure bar.<sup>220</sup> The First Circuit's ruling still stands.

While *Chevron* analysis had been used as a tool to uphold the bar in *Pena-Muriel*, it would serve the opposite purpose in a case decided by the Fourth Circuit, just a few months later. This subsequent decision seems to have staying power, as the most recent decisions have followed its approach.<sup>221</sup>

Tunbosun Olawale William immigrated to the United States in 1996 and became a permanent legal resident.<sup>222</sup> The following year, he was arrested for receiving a stolen credit card, a violation of Maryland law.<sup>223</sup> Soon after, INS initiated removal proceedings for committing an aggravated felony<sup>224</sup> and for committing a crime of moral turpitude.<sup>225</sup> The IJ found him removable on the moral turpitude charge, and the BIA affirmed.<sup>226</sup> In July 2005, William was removed from the country.<sup>227</sup> In October 2005, William filed a writ of *coram nobis*<sup>228</sup> in state court seeking to vacate his conviction, which was approved, and in December he filed a motion to reopen with the BIA.<sup>229</sup> The BIA denied this motion, disclaiming jurisdiction under the post-departure bar.<sup>230</sup>

A divided Fourth Circuit used *Chevron* to dismantle the bar, relying on three significant grounds. First, it is noted that the statutory language of IIRIRA was silent as to whether departure should bar a motion to reopen. For the court, this silence was deafening.<sup>231</sup> The statute only says that “[a]n alien may file” the motions in question, without making any distinction between whether that alien is inside the country or not.<sup>232</sup> For the court,

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Naturalization Service)). The court found that *Pena-Muriel* had misunderstood this testimony, finding that IIRIRA had instead instituted a more restrictive judicial review scheme than had existed previously, by making it more difficult for an alien to receive a stay while appealing to the courts. *See Pena-Muriel*, 489 F.3d at 442. As an offset to the fact that more aliens would be deported while awaiting judicial review, Congress repealed 8 U.S.C. § 1105a(c) to allow the removed aliens to continue to pursue their cases. *See id.* at 442.

220. *Id.* at 442–44.

221. *See infra* Part II.E.

222. *William v. Gonzales*, 499 F.3d 329, 331 (4th Cir. 2007).

223. *Id.*

224. *See* 8 U.S.C. §§ 1101(a)(43)(M), 1227(a)(2)(A)(iii) (2006) (committing an offense involving fraud or deceit causing a loss to the victim over \$10,000).

225. *See* 8 U.S.C. § 1227(a)(2)(A)(i); *William*, 499 F.3d at 331.

226. *See William*, 499 F.3d at 331.

227. *Id.*

228. “A writ of error *coram nobis* traditionally has been brought for an alleged error of fact not appearing on the record and lies to the same court that tried the underlying action in order that it may correct such error.” Deborah F. Harris, Annotation, *Application of Civil or Criminal Procedural Rules in Federal Court Proceeding on Motion in Nature of Writ of Error Coram Nobis*, 53 A.L.R. FED. 762 § 2 (1981) (citation omitted). *See also* *Skok v. State*, 760 A.2d 647, 656 (Md. 2000) (citing *Bernard v. State*, 65 A.2d 297, 298 (Md. 1949)) (describing the Maryland standard for when a writ of *coram nobis* may be used).

229. *See William*, 499 F.3d at 331.

230. *See id.*

231. *See id.* at 332.

232. 8 U.S.C. § 1229a(c)(7)(A) (2006).

this was an unambiguous announcement that physical location does not matter.<sup>233</sup>

The Fourth Circuit bolstered its analysis with two additional considerations. First, IIRIRA provided for specific restrictions on the right to file motions to reopen in other ways,<sup>234</sup> but was silent as to whether departure mattered. Thus, the court reasoned that Congress had considered imposing such restrictions and decided against it.<sup>235</sup>

Secondly, in the 2005 amendments to the INA protecting alien victims of domestic violence,<sup>236</sup> Congress had added the caveat that for such an alien to take advantage of the looser filing restrictions, they would have to be physically present.<sup>237</sup> This led the court to draw a “negative inference”: because the physical presence requirement is present in one part of the statute and not the other, it must be true that Congress decided not to include it.<sup>238</sup> Further, if physical presence was required anyway, specifically writing it into the 2005 amendments would render the language surplusage, a result the court found impermissible.<sup>239</sup> For these reasons, the regulation improperly conflicts with the intent of Congress, and thus, the BIA cannot rely on it as grounds for their denial to reopen.<sup>240</sup>

After these initial rulings, the Supreme Court negatively discussed the bar, albeit in dicta. In *Dada*, the court was faced with a conflict between two portions of IIRIRA.<sup>241</sup> In resolving the conflict to allow aliens to withdraw a grant of voluntary departure in order to file a motion to reopen instead, the court explained that “[a] more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture.”<sup>242</sup> While the bar was not directly challenged in *Dada*, Chief Justice Roberts took notice of the problem

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233. See William, 499 F.3d at 332.

234. See *supra* notes 53–58.

235. See William, 499 F.3d at 333 (citing *United States v. Johnson*, 529 U.S. 53, 58 (2000)).

236. See *supra* notes 65–66.

237. See William, 499 F.3d at 333.

238. See *id.*

239. See *id.* (citing *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

240. See *id.* at 334.

241. See *id.* at 2313–16 (describing how when an alien is granted voluntary departure within sixty days following an adverse removal order, they are barred from seeking further administrative recourse to reverse the order, but they are also barred from withdrawing the voluntary departure grant in order to file a motion to reopen within ninety days).

242. *Id.* at 2320.

during oral argument.<sup>243</sup> Perhaps this is an indication that the Court may find the bar invalid in the future.<sup>244</sup>

### C. *The Post-departure Bar Strikes Back*

After the decisions in *Lin* and *William*, the BIA was faced with the problem of how to reconcile these decisions with the long history of the post-departure bar. The BIA expressed strong disagreement with the holdings of the Ninth and Fourth Circuits in its own subsequent opinion.<sup>245</sup> Andres Armendarez-Mendez was removed to Mexico in 2000 following a 1995 cocaine possession and distribution conviction.<sup>246</sup> He filed a petition for review with the Fifth Circuit, which quickly remanded to the BIA in the wake of the holding in *Lin*.<sup>247</sup> Subsequently, the BIA decided to address both *Lin* and *William*.

In response to *Lin*, the BIA found that while the ambiguity that the *Lin* court found might be present, the context of the rule as a whole forecloses the Ninth Circuit's interpretation of that ambiguity.<sup>248</sup> A motion to reopen, by its very nature, deals with a proceeding that has been closed, and this is reflected by the short time deadline after a final order to file such a motion<sup>249</sup>: "Because the completion of proceedings is a condition precedent to the filing of a motion to reopen . . . we cannot reasonably interpret 8 C.F.R. § 1003.2(d) as applying only to motions filed by aliens in *ongoing* proceedings."<sup>250</sup> Finally, while the *Lin* court construed the ambiguity in favor of the alien,<sup>251</sup> the BIA argued that this should only be used as a principle of "last resort", and thus, traditional *Chevron* analysis would control.<sup>252</sup>

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243. See Transcript of Oral Argument at 8, *Dada v. Mukasey*, 128 S. Ct. 2307 (2008) (No. 06-1181) ("[I]f I thought it important to reconcile the two [statutes], I would be much more concerned about that interpretation—that the motion to reopen is automatically withdrawn [upon departure] than I would suggest we start incorporating equitable tolling rules . . . ."); Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 176 n.201 (2010).

244. See Rosenbloom, *supra* note 243, at 176–77 (noting the parallel between the successful repeal of the post-departure judicial review bar and a possible repeal of the post-departure administrative review bar, and the Court's notice of this parallel in *Dada*).

245. *In re Armendarez-Mendez*, 24 I. & N. Dec. 646 (B.I.A. 2008). This means that the post-departure bar theoretically has been repealed only when IJs sit in circuits that have lifted the bar at the appellate level. However, in some instances the BIA has continued to resist lifting of the bar even in circuits where it has been invalidated at the appellate level through alternative means. This led to the creation of what one writer termed a "phantom departure bar." See Rosenbloom, *supra* note 243, at 159–64.

246. *Armendarez-Mendez*, 24 I. & N. Dec. at 646–47.

247. *Id.* at 646.

248. *Id.* at 651.

249. *Id.*

250. *Id.* This situation can rarely arise in immigration court, however, where aliens who have not yet appealed to the BIA file a motion to reopen. See *id.* at 651–52.

251. *Id.* at 652; *Lin v. Gonzales*, 473 F.3d 979, 981–82 (9th Cir. 2007) (citing *INS v. St. Cyr*, 533 U.S. 289, 320 (2001)).

252. See *In re Armendarez-Mendez*, 24 I. & N. Dec. at 652–53.

The BIA went on to attempt to undermine *William* as well. In the BIA's view, departure "is a transformative event that fundamentally alters the alien's posture under the law."<sup>253</sup> Once this "transformative event" occurs, the alien has the same legal status as any other alien beyond our borders.<sup>254</sup> Thus under immigration law, the duty to protect the borders lies with the DHS and not the BIA, as the BIA is not responsible for dealing with aliens beyond our borders.<sup>255</sup>

Additionally, the BIA rejected the *William* holding of a negative inference dismantling the bar. IIRIRA section 304(a) was a limited statute, only placing restrictions on when such motions can be filed.<sup>256</sup> In the BIA's view, there was nothing here suggesting that the existing regulatory scheme was to be overridden.<sup>257</sup>

While there is some tension between the physical presence requirement for motions filed by battered aliens<sup>258</sup> and IIRIRA's silence, the BIA rejects the notion that this tension would be enough to repeal the post-departure bar.<sup>259</sup> Instead, this later requirement is much narrower than the bar as a whole, and operates only within the specific context of motions filed by battered aliens.<sup>260</sup> However, as noted below, many circuits have declined to follow the BIA's reasoning in this case.<sup>261</sup>

In a subsequent case, the Tenth Circuit landed on the side of the BIA, albeit for different reasons, by using *Chevron* analysis to find that the bar still stood.<sup>262</sup> Martin Rosillo-Puga was admitted to the United States from Mexico in 1995, and was convicted of battery in Indiana in 1997.<sup>263</sup> In 2003, he was removed to Mexico upon the ruling of an IJ in Colorado, on the dual bases of committing an aggravated felony and a crime of domestic violence.<sup>264</sup> Following his removal, the Seventh Circuit issued an opinion that battery under Indiana law was not an aggravated felony or a crime of domestic violence under immigration law.<sup>265</sup> Rosillo-Puga filed a "Motion to Reconsider and Rescind Removal Order, or in the Alternative to Reopen Proceedings" three and a half years later, under the IJ's *sua sponte*

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253. *Id.* at 656.

254. *See id.* In fact, a deported alien's legal status may be even worse, because he or she is now inadmissible, and if reentering illegally, faces even more onerous criminal sanctions than a regular illegal immigrant.

255. *See id.* ("Thus, our inability to entertain motions filed by aliens who have departed the United States is not just a matter of administrative convenience . . . . Removed aliens have, by virtue of their departure, literally passed beyond our aid.").

256. *Id.* at 657.

257. *Id.*

258. *See supra* note 66.

259. *See In re Armendarez-Mendez*, 24 I. & N. Dec. at 658–59.

260. *See id.* at 659.

261. *See infra* Part II.D–E.

262. *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

263. *See id.* at 1149.

264. *See id.*; 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (aggravated felony); 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence).

265. *See generally Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003).

authority.<sup>266</sup> The IJ refused, and the BIA affirmed, citing a lack of jurisdiction under the post-departure bar.<sup>267</sup>

The court ultimately sided with the vociferous dissent in *William*. Performing its own *Chevron* analysis, the Tenth Circuit found that the statute was ambiguous for several reasons.<sup>268</sup> First, the statute was silent about the departure bar. The court took this to be just that: silence, and not proof of congressional intent.<sup>269</sup> Accordingly, because the fact that the judicial post-departure bar was repealed by IIRIRA was not enough to find that the regulatory post-departure bar was repealed, as the First Circuit had previously found.<sup>270</sup> Additionally, because the physical presence requirement in domestic violence cases came after the passage of IIRIRA, it revealed nothing about what Congress was thinking at the time IIRIRA was enacted.<sup>271</sup> Thus, the statute was ambiguous as to congressional intent.

Under the second step of *Chevron*, the Tenth Circuit agreed with the *William* dissent that the agency's answer was reasonable, meaning it was not "arbitrary, capricious, or manifestly contrary to the statute."<sup>272</sup> The regulations addressed the agency's power of review, not the judiciary's.<sup>273</sup> Further, it was "inconceivable that Congress would repeal the post-departure bar, without doing or even saying anything about the forty-year history of the [bar]."<sup>274</sup> This long history is evidence that the agency's interpretation was indeed the one favored by Congress at the time of IIRIRA.<sup>275</sup>

The Tenth Circuit would not be the only court to go against *William*, but it provided the most developed analysis of the bar's validity at that time.<sup>276</sup> However, even the Tenth Circuit would ultimately reverse course a few years later.<sup>277</sup>

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266. *Rosillo-Puga*, 580 F.3d at 1149.

267. *See id.* at 1150–51.

268. *Id.* at 1155–58.

269. *See id.* at 1155 (citing *William v. Gonzales*, 499 F.3d 329, 341 (4th Cir. 2007) (Williams, J., dissenting)) ("Congress often expressly repeals both statutory provisions and regulations, and it is reasonable to expect that Congress will speak with greater clarity in overruling long-held agency interpretations like the departure bar . . .").

270. *See Pena-Muriel v. Gonzales*, 489 F.3d 438, 441–43 (1st Cir. 2007).

271. *Rosillo-Puga*, 580 F.3d at 1155.

272. *Id.* at 1157 (citing *William v. Gonzales*, 499 F.3d 329, 335 (4th Cir. 2007)).

273. *See id.*

274. *Id.*

275. *See id.* (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986)).

276. Compare *Rosillo-Puga*, 580 F.3d at 1156–57, with *Ovalles v. Holder*, 577 F.3d 288, 297–98 (5th Cir. 2009) (agreeing, but deciding the case on procedural grounds), and *Zhang v. Holder*, 617 F.3d 650, 660 (2d Cir. 2010) (agreeing, but expressing reservations). *See also Mendiola v. Holder*, 585 F.3d 1303 (10th Cir. 2009). In *Mendiola*, the 10th Circuit cited *Rosillo-Puga* to extend the application of the bar to a factual situation where 8 C.F.R. § 1003.2(d) was involved, and where the petitioner's motion to reopen was based on prior ineffective assistance of counsel. *See id.* at 1309–11.

277. *See infra* notes 353–58.

Finally, another possible avenue for the bar's survival could be a circuit decision resting entirely on procedural grounds. For example, the Fifth Circuit indirectly upheld the bar by failing to reach the question at hand. Ruben Ovalles immigrated to the United States from the Dominican Republic in 1985 and was convicted of attempted possession of drugs under Ohio law in 2003.<sup>278</sup> The IJ determined that while Ovalles was statutorily removable<sup>279</sup> for a controlled substance conviction, a separate statute did not provide an additional ground for removal because Ovalles did not serve jail time.<sup>280</sup> Therefore, Ovalles was eligible for cancellation of removal, which was granted partly as a result of his long work history and family connections.<sup>281</sup> DHS appealed, and the BIA overturned, finding that the conviction was indeed an aggravated felony, resulting in removal in 2004.<sup>282</sup>

Shortly after, the Supreme Court held that a "first-time conviction for simple possession of drugs that is neither an illicit trafficking offense nor a federal felony does not constitute an aggravated felony for immigration purposes."<sup>283</sup> Ovalles subsequently filed a motion to reconsider, or alternatively, a motion to reopen sua sponte in 2007, which the BIA noted as untimely.<sup>284</sup> However, the BIA based its decision on the post-departure bar itself.<sup>285</sup>

Upon review, the Fifth Circuit did not explicitly reach the question of the bar's validity, finding that Ovalles' motion had clearly been filed too late.<sup>286</sup> In dicta, the court went on to affirm its support for the bar's validity, finding that the BIA had not acted arbitrarily or capriciously in applying it.<sup>287</sup>

Another example of a circuit declining to rule on the validity of the bar because of procedural issues is the Eighth Circuit's ruling in *Ortega-Marroquin v. Holder*.<sup>288</sup> In a decision somewhat similar to *Ovalles*, the court remanded to the BIA to consider the alien's claim for equitable

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278. *Ovalles v. Holder*, 577 F.3d 288, 291 (5th Cir. 2009).

279. See 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (conviction of a controlled substance violation); *Ovalles*, 577 F.3d at 291.

280. See 8 U.S.C. § 1227(a)(2)(A)(iii). This provision deals with an immigrant's conviction for an aggravated felony. Because Ovalles did not actually serve any jail time, this provision could not apply. See *Ovalles*, 577 F.3d at 291.

281. See *Ovalles*, 577 F.3d at 291.

282. *Id.*

283. *Id.* (citing *Lopez v. Gonzales*, 549 U.S. 47 (2006)).

284. *Id.* at 291.

285. *Id.*

286. See *id.* at 295 (finding that a motion to reopen had not been filed until more than three years after the final order of removal had been issued, well outside the thirty-day limit for motions to reconsider and the ninety-day limit for motions to reopen).

287. See *id.* at 297–98 (rejecting the Ninth Circuit's analysis in *Lin* and instead finding the BIA's ruling in *Armendarez-Mendez* as the correct analysis of the question). See generally Emma Rebhorn, Note, *Ovalles v. Holder: Better Late than . . . On Time? The Fifth Circuit Avoids Ruling on the Validity of the Postdeparture Bar*, 84 TUL. L. REV. 1347 (2010) (discussing the details of the case).

288. 640 F.3d 814 (8th Cir. 2011).

tolling, as he had missed the ninety-day deadline for filing a motion to reopen.<sup>289</sup>

The Fifth Circuit ultimately confirmed *Ovalles's* foreshadowing dicta with its ruling in *Toora v. Holder*.<sup>290</sup> However, the bar did not survive for very long in the Fifth Circuit; it was ultimately struck down in 2012 using *Chevron* analysis.<sup>291</sup>

Following the Tenth Circuit's decision in *Rosillo-Puga*,<sup>292</sup> another new base of attack against the post-departure bar emerged, setting the stage for further invalidations of the post-departure bar, in contrast with some of the previous decisions.

#### D. Union Pacific: *A New Weapon Against the Bar*

The Seventh Circuit took the post-departure bar analysis in a new direction with its ruling in *Marin-Rodriguez*. While ultimately agreeing with the Fourth Circuit against the bar, the court reached that result by a very different path.<sup>293</sup>

Jose Concepcion Marin-Rodriguez entered the United States illegally in 1988 and stayed out of trouble until being convicted for using fake documents to obtain employment under a pretense of citizenship in 2005.<sup>294</sup> He moved for cancellation of removal before the IJ, who demanded that he submit his fingerprints to be eligible for that relief in accordance with federal regulations.<sup>295</sup> Marin-Rodriguez failed to comply, and the IJ ordered his removal.<sup>296</sup> While his appeal to the BIA was pending, Marin-Rodriguez finally submitted his fingerprints and asked for a remand to the IJ for reconsideration, which was denied.<sup>297</sup> He then filed a motion for reconsideration, stating that a motion for remand filed during a pending appeal cannot be untimely.<sup>298</sup> The BIA agreed and remanded, but the DHS asked the BIA to reconsider because Marin-Rodriguez had already been removed.<sup>299</sup> The BIA granted the DHS's motion and cancelled the remand.<sup>300</sup>

The Seventh Circuit overturned this decision, but not because of *Chevron*. Instead, the court found that the BIA based its decision on a lack

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289. *See id.* at 819–21.

290. 603 F.3d 282 (5th Cir. 2010). In *Toora*, the Fifth Circuit upheld the post-departure bar in a case where the alien had departed the United States after the initiation of removal proceedings, but before a deportation order was issued. *See id.* at 283, 286–87.

291. *Garcia Carias v. Holder*, No. 11-60550, 2012 WL 4458228, at \*6 (5th Cir. Sept. 27, 2012).

292. *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009).

293. *Marin-Rodriguez v. Holder*, 612 F.3d 591, 591–92 (7th Cir. 2010).

294. *Id.*

295. *Id.* at 592 (citing 8 C.F.R. § 1003.47(d) (2011)).

296. *Id.*

297. *See id.*

298. *See id.*

299. *See id.*

300. *See id.*

of jurisdiction, and “[a]s a rule about subject-matter jurisdiction, § 1003.2(d) is untenable.”<sup>301</sup>

The court found that nothing passed since 1996 allows the BIA to say that it lacks jurisdiction to rule on cases that can affect the legal rights of those who have been removed.<sup>302</sup> First, under the new ruling in *Union Pacific*, the court noted that an agency is unable to contract its own jurisdiction.<sup>303</sup> Second, the court agreed with the holdings in *Coyt v. Holder*<sup>304</sup> and *Madrigal v. Holder*<sup>305</sup> that the post-departure bar should not apply when the alien is removed involuntarily.<sup>306</sup> Under *Union Pacific*, if the BIA believes that the regulation limits its jurisdiction it would be inconsistent to allow the BIA to limit its own jurisdiction by taking an action to involuntarily remove an alien.<sup>307</sup>

The logic in *Marin-Rodriguez* has proven powerful, as it was soon accepted by the Sixth Circuit in *Pruidze* and later the Second Circuit in *Luna*. The Sixth Circuit held that Pruidze’s post-departure motion to reopen could not be dismissed for lack of jurisdiction by the BIA following the redocketing of his criminal conviction.<sup>308</sup> The court relied upon *Marin-Rodriguez* in finding that *Union Pacific* barred a waiving of an agency’s own jurisdiction.<sup>309</sup>

Further, in dicta, the Sixth Circuit seemed to move away from using *Chevron* to solve this problem. While first noting the historic debate between Justices Brennan and Scalia about whether *Chevron* deference applies to an agency’s self-determination of its jurisdiction,<sup>310</sup> the court

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301. *Id.* at 593.

302. *See id.* at 594.

303. *See Marin-Rodriguez*, 612 F.3d at 594; *supra* notes 130–40 and accompanying text.

304. 593 F.3d 902, 905–07 (9th Cir. 2010). Another point to note about *Coyt* is that the Ninth Circuit used a different analysis from *Lin*, instead relying on *Chevron*. *See id.* at 905–07. The court held that it would be counter to the statutory scheme of IIRIRA to allow the government to cut off a pending motion to reopen by forcibly removing the immigrant. *See id.* at 907. The court reasoned that allowing the government to do this would undo the idea of granting a statutory right to file these motions in the first place. *See id.*

305. 572 F.3d 239, 243–45 (6th Cir. 2009).

306. *See Marin-Rodriguez*, 612 F.3d at 594.

307. *See id.*

308. *Pruidze v. Holder*, 632 F.3d 239, 245 (6th Cir. 2009).

309. *See id.* at 239 (“On this statutory slate, the agency may not disclaim jurisdiction to handle a motion to reopen that Congress empowered it to resolve.”).

310. *See id.* at 237 (noting that the question first arose in *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and has yet to be resolved). Justice Scalia, in his concurrence, took the view that an agency should receive *Chevron* deference when interpreting its own jurisdiction for three reasons: they have general expertise; Congress would expect agencies to exercise their expertise to answer these questions; and courts find difficulty in separating jurisdictional issues from nonjurisdictional ones. *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1507–08 (2009) (citing *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 381–82 (1988) (Scalia, J., concurring)). Meanwhile, in dissent in the same case, Justice Brennan argued for a more moderate approach, only allowing for deference when an agency’s interpretation confines the scope of authority “to the areas Congress intended it to occupy.” *Id.* at 1509–10 (quoting

declined to answer this question, as it was unnecessary following *Union Pacific*.<sup>311</sup> The court went on to say that even under *Chevron*, the BIA would not be able to do this.<sup>312</sup> Essentially, *Chevron* is used to defer to an agency when it fills statutory gaps, not when it creates new ones, “and in this instance Congress left no gap to fill when it empowered the agency to consider all motions to reopen filed by an alien.”<sup>313</sup>

An example of a circuit holding differently after *Union Pacific* is the Second Circuit in *Zhang*, where the court upheld the BIA’s position supporting the post-departure bar.<sup>314</sup> The IJ found the asylum claim of an immigrant frivolous, with the BIA summarily affirming.<sup>315</sup> *Zhang* was ultimately removed following denial of a stay of removal, but the BIA—seemingly unaware of this—granted his motion to reopen shortly after.<sup>316</sup> After this fact came to light, the IJ terminated the case, with the BIA affirming and vacating its earlier order.<sup>317</sup>

The court did not apply *Chevron* to this question, and instead rested on the framework that legal questions decided by the BIA are reviewed de novo, and its regulatory interpretations are owed deference unless plainly erroneous.<sup>318</sup> Because the framework is different in this example, the jurisdictional problems raised in the cases following *Union Pacific* were not in play for the court.<sup>319</sup> Essentially, the court found that the interpretation was not erroneous but not without expressing some serious misgivings.<sup>320</sup> Some of these misgivings include the Seventh Circuit’s concern with how forcible removal can constitute a withdrawal of any pending motions made

Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 386 (1988) (Brennan, J., dissenting)).

311. See *Pruidze*, 632 F.3d at 237–41.

312. *Id.* at 240 (“Whatever powers of interpretation *Chevron* gives agencies, it does not allow them to alchemize the authority to pass a mandatory rule into the authority to pass a jurisdictional one.”).

313. *Id.*

314. *Zhang v. Holder*, 617 F.3d 650, 655 (2d Cir. 2010).

315. See *id.* at 653.

316. See *id.* at 654 (noting how the BIA exercised its sua sponte authority to reopen the case just two days after *Zhang* had been removed to China).

317. *Id.*

318. *Id.* at 660. The court cited Second Circuit cases that are derivative of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), for this framework. *Zhang*, 617 F.3d at 660. While the court noted later that they were not using a *Chevron* analysis “[a]nd petitioner has not argued that the manner in which the Attorney General has chosen to define the BIA’s jurisdiction conflicts with the INA or leads to some sort of interpretive problem under [*Chevron*],” this analysis bears some clear similarities to a *Chevron* analysis, mainly in applying the erroneous standard to the agency’s interpretation. See *id.* at 665. This difference arose because, in other cases, petitioners are challenging the denial of jurisdiction over a motion explicitly granted by the INA (for example, in *Marin-Rodriguez*, a motion for reconsideration), while here, *Zhang*’s challenge came under the regulation promulgated by the Attorney General that granted the BIA sua sponte authority to reopen. See *id.* at 663–64.

319. *Id.* at 664 (explaining how these facts do not deal with the jurisdiction granted by the IIRIRA, but rather by regulations promulgated by the Attorney General).

320. See *id.* at 660 (“To be sure, the BIA’s construction is anything but airtight . . . . Were we writing on a blank slate, we might reach a different conclusion . . . .”). However, the court found that the slate was not blank, and instead relied on *Armendarez-Mendez*. *Id.*

by an alien<sup>321</sup> and questions about whether such a withdrawal is truly “jurisdictional.”<sup>322</sup> The court’s clear discomfort with the BIA’s stance possibly set the stage for the Second Circuit’s later decision in *Luna*. In *Luna*, the Second Circuit somewhat changed course by applying the reasoning of *Union Pacific* to strike down the post-departure bar.<sup>323</sup>

The court found that the BIA could not “contract” its given jurisdiction to hear a motion to reopen, because “the power to establish jurisdictional bars resides with Congress.”<sup>324</sup> Further, “every indication points to the fact that Congress did not intend to create a jurisdictional bar for motions to reopen filed by an alien in the United States who is later removed from the United States.”<sup>325</sup> Thus, “[t]he BIA must exercise its full jurisdiction to adjudicate a statutory motion to reopen by an alien who is removed or otherwise departs the United States before or after filing the motion.”<sup>326</sup> While declining to repeal the bar in every possible factual context,<sup>327</sup> the *Luna* decision represents another strong attack on the bar’s national acceptance, as the Second Circuit now seems to have made a strong statement for abandoning it.

Even the BIA has backed off their stance in *Armendarez-Mendez*, albeit only in very limited circumstances. In *In re Bulnes-Nolasco*,<sup>328</sup> the BIA found that the application of the IJ post-departure bar would be unfair in cases of *in absentia* deportations.<sup>329</sup> Essentially, this would give the bar “greater force than it is entitled to by law”<sup>330</sup> because the alien would be unfairly denied notice.<sup>331</sup> Therefore, it appears that even the BIA may be backing off, at least in rare circumstances.

Following these holdings, it is unclear which tool is more powerful in dismantling the bar: *Chevron* or *Union Pacific*. Recent rulings by the Third, Tenth, Eleventh and Fifth Circuits may provide an answer.

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321. *Id.*

322. *See id.*

323. *See Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011).

324. *Id.* (quoting *Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000)).

325. *Id.* The court draws this conclusion from several sources. First, it points to Congress’s failure to codify a physical presence requirement in IIRIRA, especially in light of the fact that IIRIRA repealed the post-departure bar for judicial review of BIA decisions. *See id.* at 101. Further, an apparent intent of IIRIRA is “prompt removal and speedy government action. *See id.* This intent is served by removal of the post-departure bar, along with requiring removal within ninety days of a removal order. 8 U.S.C. § 1231(a)(1)(A) (2006) (ninety day deadline); *Luna*, 637 F.3d at 101. Finally, the court pointed to the subsequent REAL ID Act to show “no indication that an alien’s departure after filing a motion to reopen is a jurisdictional bar. *See id.*

326. *Luna*, 637 F.3d at 102.

327. *See id.*

328. 25 I. & N. Dec. 57 (B.I.A. 2009).

329. *See id.* at 59–60.

330. *Id.* at 60.

331. *See id.* at 59.

*E. Prestol Espinal: A Return to Chevron?*

When the Third Circuit finally heard a post-departure bar challenge in 2011, it decided to break course from the more recent decisions in *Marin-Rodriguez* and *Pruidze* by centering its analysis on *Chevron* as opposed to *Union Pacific*. *Prestol Espinal* was the first case since *Union Pacific* to choose the *Chevron* route as its primary line of attack.<sup>332</sup> Ramon Prestol Espinal, after being born in the Dominican Republic, lived in the United States from 1982–2009.<sup>333</sup> In 2009, he was entered into removal proceedings following convictions in 2004 for controlled substance possession and violation of a protective order.<sup>334</sup> Prestol Espinal admitted the charges, but he filed for asylum and withholding of removal.<sup>335</sup> The IJ denied these applications for relief, and the BIA affirmed, with Prestol Espinal being removed shortly after.<sup>336</sup> Once he was removed, Prestol Espinal filed a motion to reconsider, which was denied based on lack of jurisdiction under the post-departure bar.<sup>337</sup>

The Third Circuit expressly adopted the *Chevron*-based conclusions of *William*<sup>338</sup> and gave support to similar findings by the Sixth<sup>339</sup> and Ninth Circuits.<sup>340</sup> Essentially, the Third Circuit found that Congress spoke clearly in IIRIRA, by failing to distinguish between the rights of aliens who were inside the country and those that were outside.<sup>341</sup> Additionally, the court noted the holdings in *Pruidze* and *Marin-Rodriguez* based on *Union Pacific*, but because the court used *Chevron*, they were not dispositive in this case.<sup>342</sup> Finally, the Third Circuit referred back to the Supreme Court's seeming disapproval of the bar in dicta.<sup>343</sup> The court went further, using language that could have implications for future *Chevron* analysis. It asserted that the government “manufactures” an ambiguity from congressional failure to specifically enumerate each possible exception<sup>344</sup>: “That approach would create an ‘ambiguity’ in almost all statutes,

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332. *Prestol Espinal v. Att’y Gen.*, 653 F.3d 213, 217 (3d Cir. 2011). *Zhang* used *Chevron* as well, but as a way to uphold the bar, rather than to dismantle it.

333. *Id.* at 214–15.

334. *Id.* at 215.

335. *See id.*

336. *Id.*

337. *Id.*

338. *See id.* at 217 (agreeing that IIRIRA says “an alien may file,” without a distinction between aliens inside and outside of the country).

339. *See id.* (finding that IIRIRA does not lend support to an interpretation that aliens lose the right to file once outside of the country).

340. *See id.*

341. *See id.* at 220–24 (explaining the multiple reasons why the Third Circuit determined Congress spoke clearly on the issue).

342. *See id.* at 218 n.4 (“Because we decide the case based on *Chevron*, we need not definitively resolve whether *Union Pacific* presents a distinct question.”).

343. *Id.* at 219 (“Significantly, the Court noted that ‘[a] more expeditious solution to the untenable conflict . . . might be to permit an alien who has departed the United States to pursue a motion to reopen postdeparture.’” (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2320 (2008))).

344. *See id.* at 220.

necessitating deference to nearly all agency determinations.”<sup>345</sup> Ultimately, the Third Circuit came down on the side of the dicta analysis in *Pruidze*, ruling that there was no statutory gap that needed to be filled by the Attorney General.<sup>346</sup>

Finally, the court examined the statutory scheme of IIRIRA as a whole to find no basis for the post-departure bar. Citing the same principle as *William*, the Third Circuit found that the presence of other provisions in the statute, such as the new procedural requirements, indicated that Congress considered the idea of a post-departure bar and decided not to include it.<sup>347</sup> This was bolstered by the fact that Congress had been aware of the post-departure limitations and decided not to include them in IIRIRA.<sup>348</sup> Next, the court pointed to the repeal of judicial review in IIRIRA and the codification of the right to reopen as evidence that Congress intended IIRIRA to possibly allow aliens who deserved to stay under the law more opportunities for review.<sup>349</sup> Finally, as other courts have mentioned, the existence of a physical presence requirement in extended-time motions filed by victims of domestic violence, indicates that the post-departure bar was not a background rule under IIRIRA.<sup>350</sup> For these reasons, the court found that the post-departure bar was invalid in this situation for conflicting with IIRIRA.<sup>351</sup>

*Prestol Espinal* thus illustrates a return to a *Chevron*-based analysis for evaluating the post-departure bar. The Tenth, Eleventh, and Fifth Circuits would soon follow suit.

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345. *Id.*

346. *See id.* at 221.

347. *See id.* at 222; *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007) (citing *United States v. Johnson*, 529 U.S. 53, 58 (2000)).

348. *See Prestol Espinal*, 653 F.3d at 222.

349. *Id.* at 222–23. The court wrote:

By repealing the post-departure bar to petitions for review before courts of appeals, IIRIRA gave aliens greater opportunity for review of deportation orders than they had previously. This is consistent with IIRIRA’s dual objectives ‘to expedite the physical removal of those aliens not entitled to admission to the United States, while at the same time increasing the accuracy of such determinations.’

*Id.* (quoting *Coyt v. Holder*, 593 F.3d 902, 906 (9th Cir. 2010)).

350. *Id.* at 223–24.

351. *Id.* at 224. In a subsequent case, the Third Circuit upheld the validity of the post-departure bar when the BIA refused to hear a motion to reopen under its sua sponte authority. *See Desai v. Att’y Gen. of the U.S.*, No. 11-3229, 2012 WL 3570718 (3d Cir. Aug. 21, 2012). The Third Circuit distinguished this case from *Prestol Espinal* because *Prestol Espinal* involved the nullification of a statutory right to reopen, while the BIA’s right to reopen sua sponte is derived only from a regulation. *See id.* at \*2–3 (citing 8 C.F.R. § 1003.2(a) (2011)). Thus, in the Third Circuit, the BIA can still deny sua sponte jurisdiction to hear post-departure motions. *See id.* at \*3.

*F. 2012: A Year of Further Steps for Chevron*

In 2012, the Tenth Circuit reversed and repealed its previously strong stance that the post-departure bar was valid.<sup>352</sup> Jesus Contreras-Bocanegra, a lawful permanent resident originally from Mexico, was convicted of attempted possession of a controlled substance in 1991, receiving a suspended jail sentence.<sup>353</sup> In 2004, he was detained by DHS after reentering the United States following a visit to his native Mexico and placed in removal proceedings.<sup>354</sup> The IJ directed that he be removed, with the BIA affirming.<sup>355</sup> After being removed to Mexico, Contreras-Bocanegra promptly filed a motion to reopen grounded in ineffective assistance of counsel.<sup>356</sup> This motion was denied by the BIA because of the post-departure bar, and Contreras-Bocanegra's subsequent petition for review to the Tenth Circuit was also denied by relying on the circuit's strong precedent in favor of the bar.<sup>357</sup>

Upon rehearing the case en banc, the Tenth Circuit drastically reversed course from its prior decisions. Employing the *Chevron* analysis, the court found that Congress spoke clearly in the plain language of the statute, the structure of the statute, and the overall structure and purpose of IIRIRA, so that the post-departure bar could not stand.<sup>358</sup>

This decision may well have been the biggest blow yet to the post-departure bar, as the Tenth Circuit previously had a strong stance in favor of keeping it.<sup>359</sup> Further, this represented another "victory" for *Chevron* analysis over *Union Pacific*. A few months later, the Eleventh Circuit would join the fray, also using *Chevron* to disable the bar.<sup>360</sup>

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352. See *supra* notes 262–76.

353. *Contreras-Bocanegra v. Holder*, 678 F. 3d 811, 813 (10th Cir. 2012).

354. *Id.*

355. *Id.*

356. *Id.*

357. See *id.* at 814 (citing *Contreras-Bocanegra v. Holder*, 629 F.3d 1170, 1172 (10th Cir. 2010)). The earlier *Contreras-Bocanegra* decision relied on *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1156 (10th Cir. 2009).

358. The court reached this ruling by looking to the plain language of 8 U.S.C. § 1229a(c)(7)(a) (2006), the structure of the statute, and the overall structure of IIRIRA. See *Contreras-Bocanegra*, 678 F.3d at 816–18. Finding that the language of the statute refers only to an "alien," without regard to that alien's physical location, the court ruled that "[d]eparted noncitizens are accordingly 'a subset of the group.'" *Id.* at 817 (citing *William v. Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007)). Further, the structure of the statute itself does not include a geographic limitation, even while Congress was codifying other limitations, such as numeric limitations in 8 U.S.C. § 1229a(c)(7)(A). See *id.* Thus, the court concluded that Congress "deliberately omitt[ed]" the bar. *Id.* Finally, the court found that IIRIRA was designed to simultaneously accomplish prompt removal while keeping legal options open, as shown by IIRIRA's repeal of the departure bar for judicial review. See *id.* Therefore, the only way to reconcile a removal deadline with a deadline for filing motions to reopen was to allow the filing of post-departure motions. See *id.* (citing *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010)).

359. See *supra* notes 262–76 and accompanying text.

360. *Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012).

Jian Le Lin illegally immigrated to the United States from China in 1992 and was placed into removal proceedings for that illegal entry in 1998.<sup>361</sup> His asylum request was denied, and he was ordered removed by an IJ, with the BIA affirming in 2002.<sup>362</sup> In 2010, he was still in the United States when he filed a motion to reopen based on a new request for asylum, involving changed country conditions.<sup>363</sup> He also requested that the BIA reopen proceedings via its sua sponte authority.<sup>364</sup> Lin's requests were denied, and he was removed in April 2011, with the BIA deciding that his motion to reopen was withdrawn because of the post-departure bar.<sup>365</sup> Lin then filed a petition for review with the Eleventh Circuit.<sup>366</sup>

The Eleventh Circuit relied on *Chevron* analysis to find that Congress spoke clearly in IIRIRA, so that the post-departure bar was invalid.<sup>367</sup> Similar to the analysis in *Contreras-Bocanegra*, the court reasoned that “the plain language of the statute, the statutory structure, and the amendment scheme . . . point to one conclusion: IIRIRA guarantees an alien the right to file one motion to reopen, and the departure bar impermissibly undercuts that right.”<sup>368</sup>

Finally, in the most recent word on the bar, the Fifth Circuit held the bar invalid under *Chevron*, albeit with a slightly different analysis than that used by the Tenth and Eleventh Circuits.<sup>369</sup> This represents another

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361. *Id.* at 1238.

362. *Id.*

363. *Id.*

364. *Id.*

365. *See id.*

366. *Id.*

367. *Id.* at 1241.

368. *Id.* Like the Tenth Circuit, the Eleventh Circuit found that the plain language of the statute makes no mention of a geographic restriction. *See id.* at 1239; *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 817 (10th Cir. 2012). Secondly, the court pointed to the fact that domestic violence victims do not have a ninety-day deadline to file a motion to reopen as long as they were physically present in the United States at filing. *See Lin*, 681 F.3d at 1240 (citing 8 U.S.C. § 1229a(c)(7)(C)(iv)(IV) (2006)). Therefore, Congress intentionally did not require physical presence, except in those circumstances relating to domestic violence victims. *See id.* Finally, the court pointed to IIRIRA's overall scheme to conclude that because IIRIRA removed the judicial departure bar, it also made the same choice to remove the administrative departure bar. *See id.* at 1240–41. *See also supra* note 358 for a similar analysis by the Tenth Circuit.

369. *Garcia Carias v. Holder*, No. 11-60550, 2012 WL 4458228, at \*4–6 (5th Cir. Sept. 27, 2012). Here, the Fifth Circuit found that the bar was invalid under the first step of *Chevron* analysis, because Congress spoke unambiguously. *See id.* at \*5 (citing 8 U.S.C. § 1229a(c)(7) (2006)). The court cited three reasons for this decision. First, the statute does not mention a geographic restriction on an alien's statutory right to file a motion to reopen in the governing statute. *See id.* (citing 8 U.S.C. § 1229a(c)(7)(A)). Next, the court noted that while omitting a geographic restriction, Congress placed other restrictions on this statutory right, such as limitations on time. *See id.* (citing 8 U.S.C. § 1229a(c)(7)(B)–(C)). Finally, the court pointed to the geographic restriction on untimely motions filed by domestic violence victims as evidence that Congress did not intend for such a restriction to be placed on an alien's regular statutory motion to reopen. *See id.* at \*6. This analysis is very similar to that of the Tenth and Eleventh Circuits. *See supra* notes 358, 368 and accompanying text. However, it differs slightly in that it does not specifically mention the previous repeal of the post-departure judicial review bar in IIRIRA as evidence that the administrative post-

important change in the status of the bar, as the Fifth Circuit had previously upheld its validity in certain factual circumstances.<sup>370</sup> Yet again, in 2012, *Chevron* prevailed over both the post-departure bar, and *Union Pacific*.

In summary, the number of circuits that have repealed the bar, at least in the factual circumstances that have been presented to them, is nine. Of these nine, those primarily relying on the *Chevron* analysis are the Third,<sup>371</sup> Fourth,<sup>372</sup> Fifth,<sup>373</sup> Tenth,<sup>374</sup> Ninth<sup>375</sup> and Eleventh Circuits.<sup>376</sup> Those circuits relying primarily on the *Union Pacific* reasoning are the Second,<sup>377</sup> Sixth,<sup>378</sup> and Seventh.<sup>379</sup> Additionally, the Supreme Court wrote in favor of repeal in dicta.<sup>380</sup> Meanwhile, the First Circuit continues to uphold the bar,<sup>381</sup> while this issue remains open in the Eighth<sup>382</sup> and D.C. Circuits.<sup>383</sup>

As time marches on, it seems likely that the post-departure bar will continue to come closer to its death, as the recent trend has been for circuits to invalidate the bar. This has been the case even when one circuit, the Tenth, had previously issued two strong rulings in favor of the bar's validity.<sup>384</sup>

### III. WHERE TWO FORKS OF THE ROAD MEET AGAIN

The issue of how exactly the bar may ultimately be struck down is beyond the scope of this Note. How the bar will meet its end—whether the circuits ultimately reach agreement, the Supreme Court finally decides the issue, or Congress amends the statutory language to either codify the regulatory post-departure bar or eliminate it once and for all—is unclear.<sup>385</sup>

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departure bar should be struck down. *See Garcia Carias*, 2012 WL 4458228, at \*5–6; *supra* notes 358, 368 and accompanying text. Additionally, in a companion case, the Fifth Circuit considered whether this reasoning applies in cases involving an alien's statutory right to file a motion to reconsider. *See Lari v. Holder*, Nos. 11-60549, 11-60706, 2012 WL 4458213 (5th Cir. Sept. 27, 2012). Again, the court applied *Chevron* to strike down the bar. *See id.* at \*4–5.

370. *See supra* notes 278–87, 290 and accompanying text.

371. *See supra* Part II–E.

372. *See supra* notes 222–40 and accompanying text.

373. *See supra* note 369 and accompanying text.

374. *See supra* notes 352–58 and accompanying text.

375. *See supra* note 304 and accompanying text.

376. *See supra* notes 361–68 and accompanying text.

377. *See supra* notes 323–27 and accompanying text.

378. *See supra* notes 308–13 and accompanying text.

379. *See supra* notes 293–307 and accompanying text.

380. *See supra* notes 241–43 and accompanying text.

381. *See supra* notes 206–20 and accompanying text.

382. *See supra* notes 288–89 and accompanying text.

383. It appears that the D.C. Circuit has yet to broach the validity of the post-departure bar.

384. *See supra* notes 262–76 and accompanying text.

385. For a thorough discussion on specific resolutions for the conflict surrounding the post-departure bar, see Daniel E. Bonilla, Comment, *Dearly Departed: An Analysis of the Departure Bar under Mendiola v. Holder and William v. Gonzales*, 42 SETON HALL L. REV. 275, 306–15 (2012). First, Bonilla argues that the Supreme Court should take the case to resolve concerns such as potential forum-shopping, lack of predictability and uniformity, and

However, Part III frames a resolution in terms of a possible Supreme Court ruling or agreement among all the circuits. This Part will argue that it ultimately does not matter whether the circuits or the Supreme Court use *Chevron* or *Union Pacific* to overturn the post-departure bar, because using either base of reasoning to strike the bar is in line with three recent and prevalent norms in immigration law.

Parts III.A and III.B of this Note examine the two primary bases for overturning the post-departure bar that have been applied by the circuits: *Chevron* and *Union Pacific*, respectively. Next, Part III.C explains why it does not matter which base emerges as the dominant reasoning for eliminating the bar, as either base would help satisfy three prevalent norms in immigration cases decided by the Supreme Court.

#### A. Anti-Chevron: An Agency Denied

Currently, it seems evident that the overwhelming trend among circuit courts is to lift the bar. As detailed in Parts I and II, this is indicated by the number of courts that have chosen to remove the bar, either through the use of *Chevron* analysis or an application of *Union Pacific*.

A more open question than whether or not the bar will be lifted is what basis the courts will use to ground their reasoning. Two main bases have emerged for the invalidation of the bar.<sup>386</sup> The first is *Chevron* analysis, where the silence of IIRIRA clearly indicates congressional intent for the bar to be repealed. One might call this an “anti-*Chevron*” analysis because the doctrine is invoked as a reason not to defer to the agency. The other basis is the application of *Union Pacific*, which is part of a line of cases where the Supreme Court has attempted to clearly delineate between “jurisdictional” and “claim-processing” rules, as a way to avoid “drive-by jurisdictional rulings.”<sup>387</sup>

These two bases, while producing the same result of repealing the bar,<sup>388</sup> could arguably be seen as being in some tension. While both bases technically deal with the idea that an agency should take jurisdiction over some matter,<sup>389</sup> *Chevron* is actually applied in this case to take a decision away from an agency by approximating congressional intent, whereas *Union Pacific* is being used to protect a quasi-judicial function that the BIA is trying to relinquish.<sup>390</sup> While application of *Chevron* forces the BIA and IJ to at least consider motions filed post-departure, it does so by going against regulations promulgated by the technical supervisor of the EOIR,

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judicial inefficiency over this circuit conflict. *See id.* at 307–08. Second, Bonilla argues that if the Supreme Court does not issue a ruling, Congress can amend IIRIRA to either banish the bar or preserve it, and provides specific examples of amending language that could possibly accomplish either of those ends. *See id.* at 309–14.

386. *See supra* Part I.E.

387. Wasserman, *supra* note 134, at 948–50.

388. *See supra* Part II.

389. *See supra* Part I.E.

390. *See supra* Part II.

the Attorney General.<sup>391</sup> In this way, *Chevron* functions opposite to how it was intended, by overriding an agency's own regulations. Thus, perhaps it could be described as an anti-*Chevron* application.

The application of *Chevron* to undermine an administrative regulation that explicitly declines jurisdiction seems to fly in the face of what *Chevron* was intended to do. There are two views as to *Chevron*'s motivating purpose. First, that *Chevron* is designed to enforce the intent of Congress by preventing judicial interference with statutes that delegate power to the agencies.<sup>392</sup> Second, *Chevron* is a way to funnel complicated matters to the agencies who have the best expertise in interpreting complex statutes.<sup>393</sup> *Chevron* appears to work differently in this context. The agency has already decided to interpret the statute to decline jurisdiction over these motions,<sup>394</sup> but courts are using *Chevron* to dismantle these statutory interpretations, rather than giving deference to the agency.<sup>395</sup> In this way, the normal presumption of *Chevron* is flipped on its head within the context of the post-departure bar.

#### B. Union Pacific: Another Means to the Same End

The ruling of *Union Pacific* is not in tension with the anti-*Chevron* analysis in the post-departure bar context. *Union Pacific* fits into a line of cases where the Supreme Court is attempting to eliminate the problem of "drive-by jurisdictional rulings."<sup>396</sup> It may be arguable that *Union Pacific* and traditional *Chevron* analysis are in some tension, because the *Union Pacific* line of cases deals with reversing an agency's attempt to decline its own jurisdiction,<sup>397</sup> while *Chevron* is seemingly intended to give rise to an agency's interpretation, as opposed to that of the courts.<sup>398</sup>

However, when *Chevron* analysis in this context is viewed as a kind of anti-*Chevron*, the use of the two bases seems more logical. Both are applied in order to undo an agency's decision not to take jurisdiction over the case.<sup>399</sup> Both are also applied to better effectuate the perceived intent of Congress in passing IIRIRA.<sup>400</sup> Most importantly, these two bases fit within the overarching norms that are at the forefront of several recent Supreme Court immigration cases.<sup>401</sup>

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391. See *supra* Part II.A–B.

392. See *supra* note 126 and accompanying text.

393. See *supra* note 126 and accompanying text.

394. See *supra* Part I.A.

395. See *supra* Part II.

396. See *supra* notes 134–40 and accompanying text.

397. See *supra* notes 134–40 and accompanying text.

398. See *supra* notes 118–26 and accompanying text.

399. See *supra* Part II.

400. See *supra* notes 240, 302, 348 and accompanying text.

401. See *supra* Part I.F.

*C. Why Either Answer is Correct*

Ultimately, it does not matter whether *Chevron* or *Union Pacific* emerges as the primary reason for invalidation of the post-departure bar. Both bases provide the same favorable outcome to immigrants seeking to file post-departure motions.<sup>402</sup> More importantly, either basis satisfies a number of norms that have emerged in recent cases, suggesting that invalidation of the post-departure bar is the correct result, when compared to the rest of immigration law. These three principles are: (1) the strong presumption in favor of judicial review of administrative action; (2) the “clear statement rule”; and (3) that immigrants should have a robust opportunity to fight the harsh consequences of deportation.<sup>403</sup>

Together, these three principles are served by both the anti-*Chevron* application and the precedential power of *Union Pacific*. The *Chevron* application here serves the principle in favor of judicial review by reversing the Attorney General, and using the power of judicial review to force at least some consideration of the proffered motions.<sup>404</sup> While the review here is administrative instead of judicial, it does constitute one further bite at the apple for immigrants, even if they have already departed the American borders. In this way, the third principle is also served, as immigrants receive that extra bite at the apple.

Additionally, the clear statement rule is served by this anti-*Chevron* application. The circuits reach this outcome by determining at the first step of *Chevron* that IIRIRA’s silence on the post-departure bar indicates that Congress did not intend for it to exist anymore.<sup>405</sup> This seems to be a derivation of the clear statement rule as described in *St. Cyr*.<sup>406</sup> Essentially, if Congress did not clearly state that such a restrictive provision were to exist, the administrative agencies would be violating congressional intent by promulgating and implementing one. Thus, a “clear statement” of the post-departure bar would be necessary in the eyes of several circuits.<sup>407</sup>

*Union Pacific* also serves these three principles in reaching the same result as the *Chevron* circuits. The first principle is met by use of judicial power to force the EOIR to exercise jurisdiction to the full extent allowed by Congress.<sup>408</sup> Again, while this outcome results in more administrative, as opposed to judicial, review the court is using judicial review as an administrative decision in a manner that is beneficial to immigrants.

Additionally, *Union Pacific* serves the clear statement rule. In finding that Congress clearly delegated power to hear these cases, the circuits lend support to the rule. After all, if Congress had wanted to strip the circuits of

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402. See *supra* notes 217–34 and accompanying text; see also Part II.D–E.

403. See *supra* Part I.F.

404. See *supra* notes 222–40 and accompanying text; see also Part II.E.

405. See *supra* notes 222–40 and accompanying text; see also Part II.E.

406. See *supra* notes 148–50 and accompanying text.

407. See *supra* notes 222–40 and accompanying text; see also Part II.D–E.

408. See *supra* Part II.D.

their jurisdiction here, it would have clearly stated so.<sup>409</sup> By requiring a clear statement that such jurisdiction does not exist, the *Union Pacific* circuits have enforced this norm in favor of immigrant rights.

Finally, the third principle is met by the holdings of the *Union Pacific* circuits. By blocking the BIA and IJs from shirking their own congressionally-granted jurisdiction, removed aliens are given another shot at possible reopening or reconsideration of an adverse ruling against them.<sup>410</sup> In this way, every opportunity to avoid the harsh consequences of removal is explored.

These two bases can work together to properly dismantle the post-departure bar forever. As these three principles have been reinforced by the Supreme Court in the last decade,<sup>411</sup> the recent majority of rulings at the circuit level in favor of dismantling the bar also serve these trends, albeit indirectly.<sup>412</sup> In this way, our immigration adjudicative authorities can properly serve both congressional intent and the rights of removed immigrants.

#### CONCLUSION

The post-departure bar serves to prevent the filing of motions to reopen or reconsider by aliens who have already been physically removed from the United States.<sup>413</sup> After years of standing unchallenged, the bar's validity has been questioned by multiple circuit courts in recent years.<sup>414</sup>

There are three main outcomes that the circuits have relied upon in ruling on the bar's validity. First, there is the use of *Chevron* analysis to dismantle the bar.<sup>415</sup> Second, there is the use of *Chevron* analysis to reach the opposite conclusion that the bar should stand.<sup>416</sup> Finally, the ruling in *Union Pacific* has been cited for the principle that an agency such as the EOIR cannot limit its own jurisdiction by refusing to hear a motion.<sup>417</sup>

When looking at the "scorecard" of circuit rulings, the majority of circuits have decided to invalidate the post-departure bar.<sup>418</sup> This trend seems likely to continue because of three norms that are prevalent in recent Supreme Court immigration cases: (1) the idea that administrative action should be subject to judicial review, even in the immigration context; (2) the "clear statement rule"; and (3) the idea that immigrants should have every opportunity to fight the harsh consequences of removal.<sup>419</sup>

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409. See *supra* note 313 and accompanying text.

410. See *supra* Part II.D.

411. See *supra* Part II.F.

412. See *supra* Part III.

413. See *supra* Part I.A–B.

414. See *supra* Part II.

415. See *supra* notes 221–34 and accompanying text; see also Part II.A–E.

416. See *supra* notes 207–21 and accompanying text.

417. See *supra* Part II.D.

418. See *supra* Part II.

419. See *supra* Part I.F.

Ultimately, it does not matter whether circuits rely on *Chevron* or *Union Pacific* to strike down the bar. Both sets of reasoning can operate to serve the three norms above.<sup>420</sup> Thus, the post-departure bar's invalidation is consistent with the direction of the rest of immigration law.<sup>421</sup>

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420. *See supra* Part II.A–C.

421. *See supra* Part II.A–C.