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Kucana v. Holder and Judicial Review of the Decision Not to Reopen Sua Sponte in Immigration Removal Proceedings

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KUCANA V. HOLDER AND JUDICIAL REVIEW OF THE DECISION NOT TO REOPEN SUA SPONTE IN IMMIGRATION REMOVAL PROCEEDINGS

*Michael A. Keough**

Motions to reopen allow aliens facing removal to have their case reexamined by the Board of Immigration Appeals in light of new evidence or intervening events, and are an important procedural safeguard in immigration removal proceedings. Parties may move to reopen, and the Board may also reopen removal proceedings under its sua sponte authority. Although federal courts of appeals may review final removal decisions, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) severely curtailed the ability of federal courts to review final removal decisions. Prior to 2010, circuits were split on the issue of whether motions to reopen were reviewable by federal courts in light of IIRIRA.

In Kucana v. Holder, the U.S. Supreme Court held that a decision to reopen made pursuant to a party's motion was reviewable since the discretion to grant or deny such a motion had derived from a regulation promulgated by the Attorney General. The Court held that the Executive could not use regulations alone to change the ability of the federal courts to review their decisions, but bracketed the issue of whether the decision not to reopen sua sponte could be reviewed under this same logic. Following the Court's decision in 2010, the courts of appeals are divided over whether such decisions are reviewable; some circuits have determined that they lack jurisdiction based on pre-Kucana case law, while others have urged a reconsideration of pre-Kucana decisions in light of the Supreme Court's reasoning.

This Note argues that the decision not to reopen sua sponte should be subject to judicial review under the same reasoning applied in Kucana. Review of these decisions would also be in line with the Supreme Court's movement toward greater judicial review of federal immigration decisions.

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INTRODUCTION

Samuel Adebisi Awe came to the United States from Nigeria in 1969 on a student visa, eventually earning a Ph.D. in agriculture from the University of Wisconsin.¹ Awe returned to Nigeria in 1994 to serve as that country’s Commissioner of Agriculture and Rural Development but, having been plagued by kidney disease all of his life, returned to the United States to receive medical care.² Awe began working as a teacher in Milwaukee and applied for asylum in 1998, but did not have the proper visa to remain in the United States and was ordered removed after his asylum claim was denied.³ Awe’s removal order was temporarily delayed so that he could continue to receive life-saving treatment in the United States.⁴

Awe filed a motion to reopen his case based on his medical condition, fear that he would be persecuted for his service in the Nigerian government, and fear that his daughter would be subjected to genital mutilation upon their return.⁵ When this motion failed before the Board of Immigration Appeals (BIA), Awe appealed to the Seventh Circuit.⁶ The court, bound by precedent holding that denials of motions to reopen were unreviewable, determined that it had no choice but to affirm the removal order.⁷ The circuit opinion concluded with a humanitarian plea, calling on the U.S. Citizenship and Immigration Services (USCIS) to grant a “deferred action” so that Awe could remain in the United States and receive care.⁸ Without any authority to review the BIA’s decision not to reopen, the Seventh Circuit could only hope that the “exceptional humanitarian concerns” present in Awe’s case would inspire the USCIS to act.⁹

If circuit courts had the power to review the BIA’s decision not to use its sua sponte power to reopen, the Seventh Circuit would not have been powerless to do justice in Awe’s case. Immigrants like Samuel Awe, who are trying to start a new life in America or flee persecution abroad, face serious consequences, such as forced removal from the U.S. and separation from their families, when they do not prevail in their removal proceedings.¹⁰ At the end of a removal proceeding, if new facts come to

1. *See* Awe v. Holder, 340 F. App’x 341, 343 (7th Cir. 2009).
 2. *Id.*
 3. *Id.*
 4. *Id.* at 343–44.
 5. *See id.* at 344.
 6. *Id.*
 7. *Id.* at 346.
 8. *Id.*
 9. *Id.*
 10. *See* Robert A. Katzmann, *Deepening the Legal Profession’s Pro Bono Commitment to the Immigrant Poor*, 78 *FORDHAM L. REV.* 453, 453–54 (2009) (noting the dire consequences of removal for immigrants).

light or a change in the law occurs that would have altered the outcome of the case, an alien¹¹ may file a motion to reopen the case.¹² The agency has the discretion to grant or deny the motion.¹³ Prior to the U.S. Supreme Court's decision in *Kucana v. Holder*,¹⁴ circuit courts disagreed over whether the BIA's decision to reopen was discretionary under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁵ (IIRIRA), and thus unreviewable by federal courts as part of that law's jurisdiction-stripping provisions, or made discretionary by regulation, and thus subject to review.¹⁶

Kucana settled this question by holding that decisions made discretionary by statutes were not subject to judicial review where IIRIRA's jurisdiction-stripping provisions applied, but those made discretionary solely through a regulation were subject to review.¹⁷ Some discretion, such as the BIA's ability to admit an alien despite criminal convictions that would otherwise render her inadmissible, is granted by Congress through statute and can be placed beyond the purview of the courts if Congress so desires.¹⁸ Other discretion, such as the regulation defining the power to reopen, which was at issue in *Kucana*, is created by regulations of the Attorney General and cannot be removed from the jurisdiction of the courts.¹⁹ In *Kucana*, the Court noted that Congress has the authority to limit judicial review through appropriate legislation, but allowing regulations to affect judicial review gives the Executive Branch an unconstitutional power to limit review of its own decisions.²⁰

The Court did not answer the question of whether a decision not to reopen sua sponte could be subject to judicial review.²¹ The BIA exercises its sua sponte power when it reopens a case on its own motion.²² In the wake of *Kucana*, the First, Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits have affirmed pre-*Kucana* case law and held that they do

11. The word "alien," although it is the legal term used to describe persons located within the United States who have not yet been naturalized, has also been used in a pejorative context against immigrants seeking to enter the United States. Title 8 of the U.S. Code defines "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2006). The term is used within this Note solely to describe a legal status.

12. See 18B JILL GUSTAFSON ET AL., FEDERAL PROCEDURE, LAWYERS EDITION § 45:1631 (Francis M. Dougherty ed., 2009); see also *In re X-G-W-*, 22 I. & N. Dec. 71, 74 (B.I.A. 1998) (reopening sua sponte where new statutory definition of alien's status was enacted after the initial BIA decision).

13. See 18A GUSTAFSON ET AL., *supra* note 12, § 45:1193.

14. 130 S. Ct. 827 (2010).

15. Pub. L. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

16. See *Kucana*, 130 S. Ct. at 827-28.

17. See *id.* at 839-40.

18. *Id.*

19. See *id.*

20. *Id.*

21. Cf. *id.* at 831.

22. 5 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 64.03(4)(b) (2011).

not have jurisdiction over sua sponte motions to reopen.²³ Panels in the Third, Sixth, and Ninth Circuits have urged revisiting and potentially overturning pre-*Kucana* cases in light of the Supreme Court's reasoning, or have suggested new standards by which these decisions can be reviewed.²⁴ Whether the BIA's decision not to reopen sua sponte can be reviewed by a federal court is the focus of this Note.

Part I of this Note outlines U.S. immigration law and the role of motions to reopen in removal proceedings. In Part II, this Note considers the state of the law after *Kucana*. Finally, Part III argues that the Supreme Court should allow judicial review of the BIA's decision not to reopen sua sponte, and that allowing this review is in line with the Court's broad trend toward permitting judicial review of agency decisions in the immigration realm.

I. REMOVAL PROCEEDINGS, IMMIGRATION POLICY IN THE UNITED STATES, AND IIRIRA

Part I discusses motions to reopen within the context of removal proceedings before the BIA. It also places the *Kucana* decision in the historical context of judicial review of federal immigration decisions, beginning in the late nineteenth century with the Chinese Exclusion Act and the announcement of the plenary powers doctrine. Finally, Part I outlines the passage of IIRIRA, which led to the question of jurisdiction at issue in *Kucana*.

A. Removal Proceedings and the Board of Immigration Appeals

1. Removal Procedure

Removal proceedings²⁵ begin with service of a Notice to Appear (NTA).²⁶ The NTA contains a notice of the alien's rights and the charges to which he or she must respond, as well as a brief statement of the government's reasons for bringing the action.²⁷ The Department of Homeland Security (DHS) must also then decide whether the alien will be detained during the period of the removal proceeding, which can last

23. See, e.g., *Bakanovas v. Holder*, 438 F. App'x 717, 722 (10th Cir. 2011); *Bustillo-Martinez v. Holder*, 431 F. App'x 265, 266–67 (5th Cir. 2011); *Ozeiry v. Att'y Gen.*, 400 F. App'x 647, 649–50 (3d Cir. 2010); *Gashi v. Holder*, 382 F. App'x 21, 22–23 (2d Cir. 2010); *Neves v. Holder*, 613 F.3d 30, 33 (1st Cir. 2010); *Ochoa v. Holder*, 604 F.3d 546, 549–50 (8th Cir. 2010); ; *Jaimes-Aguirre v. Att'y Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010); see also *infra* Part II.A.

24. See, e.g., *Pllumi v. Att'y Gen.*, 642 F.3d 155, 159–60 (3d Cir. 2011); *Mejia-Hernandez v. Holder*, 633 F.3d 818, 823–24 (9th Cir. 2011); *Gor v. Holder*, 607 F.3d 180, 190 (6th Cir. 2010); see also *infra* Part II.B.

25. Under IIRIRA, what were formerly known as “deportation” proceedings and “exclusion” proceedings are now collectively known as “removal” proceedings. See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 648 (5th ed. 2009).

26. 8 U.S.C. § 1229(a) (2006); LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 650.

27. RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 40–41 (2d ed. 2009).

anywhere from a few months to many years.²⁸ Although aliens in removal proceedings have a right to representation by counsel if they choose, they do not have the right to have an attorney provided to them if they cannot afford one.²⁹

An Immigration Judge (IJ) presides over the removal proceeding.³⁰ Removal proceedings may take place in person or via videoconference, and are open to the public at the discretion of the IJ.³¹ At the beginning of the proceeding, the IJ must determine if the alien is aware of his or her right to be represented by counsel.³² After this, the alien must admit or deny the facts of the allegations against him or her.³³ If he or she admits the allegations, the hearing is complete and the IJ can order removal.³⁴ If the alien denies the allegations, the IJ conducts an evidentiary hearing to establish the facts underlying the charges.³⁵ At the end of the hearing, the IJ determines whether the alien is removable based solely on the facts established in the hearing.³⁶

2. The Board of Immigration Appeals

The alien has the right to appeal the IJ's decision to the BIA. The BIA acts on behalf of the Attorney General as the highest administrative court for immigration and nationality matters.³⁷ The Board has jurisdiction over all decisions of immigration courts and certain other decisions of the DHS.³⁸ The fifteen members of the BIA sit in Falls Church, Virginia, and are appointed by the Attorney General.³⁹ The BIA is part of the Executive Office for Immigration Review, which reports directly to the Attorney

28. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 651.

29. *Id.* at 654. Whether ineffective assistance of counsel can be grounds for a motion to reopen has been the subject of disagreement among Attorneys General. In 2009, Attorney General Michael Mukasey held that ineffective assistance of counsel was not grounds for a motion to reopen because there is no constitutional right to counsel in immigration cases. *See In re Compean*, 24 I. & N. Dec. 710, 720–21 (A.G.), *vacated*, 25 I. & N. Dec. 1 (A.G. 2009); 1 GORDON ET AL., *supra* note 22, § 4.01. His successor, Eric Holder, vacated this decision, giving the BIA discretion to reopen based on ineffective assistance of counsel, and the Department of Justice solicited public comment for new regulations on ineffective assistance of counsel as grounds for a motion to reopen. *See Compean*, 25 I. & N. Dec. at 2–3; 1 GORDON ET AL., *supra* note 22, § 4.01(4).

30. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 654.

31. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 7:5.3 (2011).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. EXEC. OFFICE FOR IMMIGRATION REVIEW, BD. OF IMMIGRATION APPEALS PRACTICE MANUAL 1 (2004) [hereinafter BIA PRACTICE MANUAL], *available at* <http://www.justice.gov/eoir/vll/qapracmanual/pracmanual/tocfull.pdf>.

38. *Id.* at 1–2.

39. *See* 8 C.F.R. § 1003.1(a)(1) (2011); LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 657.

General.⁴⁰ Since the BIA and IJs are part of the Justice Department, DHS must appear as a party to bring claims before an IJ or the Board.⁴¹

The BIA reviews factual findings of the IJ under a clearly erroneous standard.⁴² Questions of law are reviewed de novo.⁴³ Cases brought before the BIA are first evaluated by a screening panel, which refers them either to a single Board member or to a three-member panel.⁴⁴ The single Board member may issue a two-sentence “affirmance without opinion,” or write an order that includes a more detailed explanation of the ruling.⁴⁵ Three-member panels consider cases to correct inconsistencies among rulings of different IJs, establish precedent for a rule or statute, review a decision of an IJ that lacks conformity with precedent, correct clearly erroneous factual determinations of an IJ, or review any other case that would be inappropriate for a single Board member to review.⁴⁶ If a case is referred to a panel of three Board members, the panel will issue a formal written decision that becomes the final order of the BIA in that case.⁴⁷

Although the Department of Justice has developed procedures to ensure uniform application of immigration laws, circuit courts have expressed doubt about the quality of justice administered by the BIA and IJs. In *Benslimane v. Gonzales*,⁴⁸ the Seventh Circuit criticized the actions of the BIA as falling “below the minimum standards of legal justice.”⁴⁹ The Seventh Circuit also noted that when corrections must be made, the cases are returned to the Attorney General, the party who was initially responsible for the inadequate proceedings.⁵⁰ Since many IJ decisions are now affirmed by a single Board member without any formal opinion, circuit court frustration sometimes extends to failed processes at the IJ level.⁵¹ In one case, the Second Circuit went so far as to remand to “an IJ other than IJ Chase” and encouraged the Board to reexamine sua sponte all of that IJ’s recent decisions.⁵² In light of these criticisms, in 2006, Attorney General Alberto Gonzales announced twenty-two procedures aimed at increasing the

40. BIA PRACTICE MANUAL, *supra* note 37, at 2.

41. *Id.*

42. FRAGOMEN & BELL, *supra* note 31, § 8:2.2.

43. *Id.*

44. *Id.*

45. 1 GORDON ET AL., *supra* note 22, § 3.05(6)(b)(i).

46. FRAGOMEN & BELL, *supra* note 31, § 8:2.2.

47. *Id.*

48. 430 F.3d 828 (7th Cir. 2005).

49. *See id.* at 830. The Seventh Circuit noted that it was unclear whether this was caused by budget constraints or by another factor outside of the BIA’s control. *See id.*; *see also* Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. NAT’L ASS’N ADMIN. L. JUDICIARY 471, 474 (2008) (arguing that poor judicial ethics was the root cause of the crisis).

50. *See Benslimane*, 430 F.3d at 830.

51. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 748.

52. *See* *Ba v. Gonzales*, 228 F. App’x 7, 11 (2d Cir. 2007). The court noted that IJ Chase’s language and demeanor had “erode[d] the appearance of fairness and call[ed] into question the results of the proceeding. *Id.* at 11; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 748.

effectiveness and integrity of BIA decisions, including the use of affirmances without opinion and strict time limits for BIA decisions.⁵³

Criticism did not end with the addition of these procedures, however. The reduction of size from twenty-three Board members to eleven in 2002 resulted in the reassignment of many Board members that had routinely ruled in favor of aliens seeking to avoid deportation without any criteria for selecting which Board members would be reassigned.⁵⁴ Some scholars have argued that this “purge of the liberals” undermines the idea that the BIA is insulated from political pressure.⁵⁵ Others have noted that outside pressures, such as conflicting or unclear laws and the lack of robust judicial review of BIA decisions, and not political meddling, have created the “immigration adjudication crisis.”⁵⁶

3. Motions to Reopen

A motion to reopen allows an alien, on behalf of herself, or the Attorney General, on behalf of the U.S. government, to challenge a decision of the BIA.⁵⁷ If, after a final removal order, new evidence is discovered or intervening events occur (such as an event in the alien’s home country or a change in U.S. law), a party to the removal may move to reopen the proceedings so that the BIA can reconsider the case and take into account the new evidence.⁵⁸ A motion to reopen must be made within ninety days of the BIA’s decision; otherwise, the party bringing the motion must show that the delay was “reasonable and . . . beyond the control of the applicant or petitioner.”⁵⁹ When the BIA considers the motion, the alien must provide affidavits showing a prima facie case for the relief sought, or else the motion to reopen will be denied.⁶⁰ These motions may be appealed to the circuit courts,⁶¹ which were split on the scope of that review prior to the *Kucana* decision.⁶²

When the Board decides to reopen a case where the formal requirements of a motion to reopen have not been met, it does so through its *sua sponte*

53. FRAGOMEN & BELL, *supra* note 31, § 8:2.2; *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 748–49.

54. *See id.* at 750–51; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 376 (2006) (citing Peter J. Levinson, *The Facade of Quasi-judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154, 1164 (2004)). The BIA was increased to its current fifteen-member size through a 2006 interim rule that was finalized in 2008. *See* 73 Fed. Reg. 33,875 (2008); 71 Fed. Reg. 70,885 (2006).

55. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 751.

56. *See, e.g.*, Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 541–42 (2011).

57. *See* GUSTAFSON, *supra* note 12, § 45:1631.

58. BOSWELL, *supra* note 27, at 164.

59. 8 C.F.R. § 103.5(a)(1)(i) (2011); *see also* BOSWELL, *supra* note 27, at 164–65.

60. 8 C.F.R. § 1003.2; BOSWELL, *supra* note 27, at 165 (citing *INS v. Abudu*, 485 U.S. 94, 104 (1988)).

61. *See infra* note 124 and accompanying text.

62. *See infra* Part I.E.

power to reopen matters before it.⁶³ Pursuant to regulations promulgated by the Attorney General, the BIA may use its sua sponte power in “exceptional situations,” but may not use the power as “a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship.”⁶⁴ For example, when new information or a change in law occurs after the ninety-day window for filing the motion has elapsed, the requirements for the motion have not been met.⁶⁵ In this situation, however, the BIA would be able to reopen sua sponte even though a party would be precluded from moving to reopen.⁶⁶ The Department of Justice has cited sua sponte reopening as a comparable stand-in for a range of remedies. For example, following public comment on a related rule, the Department declined to adopt a proposed “good cause exception” for those cases that “[fell] beyond [the] rule’s time and number limitations,” noting that the ability to reopen sua sponte provides a comparable procedural remedy in these situations.⁶⁷

The BIA has broad discretion under 8 C.F.R. § 1003.2(a) to reopen proceedings under its sua sponte authority, just as it has broad discretion to grant or deny motions to reopen when the motion is made by the parties.⁶⁸ Two cases illustrate the breadth of the BIA’s discretion to exercise sua sponte authority to reopen. In *In re X-G-W*,⁶⁹ the BIA exercised its sua sponte authority when the statutory definition of “refugee” was changed to arguably include an alien whose situation was not contemplated under the prior definition, even though the alien’s own motion to reopen was untimely.⁷⁰ This change in the law represented an “exceptional situation” warranting reopening; upon reopening, the BIA withheld removal.⁷¹ In contrast, the BIA declined to exercise sua sponte jurisdiction in *In re G-D*.⁷² There, an alien claimed that the Board’s intervening decision in *In re O-Z- & I-Z*,⁷³ in which it found that a Ukrainian had a well-founded fear of persecution in Ukraine based on past religious persecution,⁷⁴ required

63. 8 C.F.R. § 1003.2(a); *see also* BOSWELL, *supra* note 27, at 166.

64. *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997).

65. *See* 1 GORDON ET AL., *supra* note 22, § 3.05.

66. *See id.*

67. Executive Office for Immigration Review; Motions and Appeals in Immigration Proceedings, 61 Fed. Reg. 18,900, 18,902 (Apr. 29, 1996) (codified at 8 C.F.R. § 1003.2).

68. *See* 8 C.F.R. § 1003.2(a); Anne J. Greer & Teresa L. Donovan, *Immigration Law in Motion—The Changing Landscape of Motions for Continuance, Change of Venue, Reopening, Remand, and Reconsideration Before the Immigration Judges, the Board of Immigration Appeals, and the Federal Circuit Courts*, IMMIGR. BRIEFINGS, Oct. 2007, at 1.

69. 22 I. & N. Dec. 71 (B.I.A. 1998), *overruled by In re G-C-L-*, 23 I. & N. Dec. 359 (B.I.A. 2002).

70. *See id.* at 74. The BIA’s policy of granting untimely motions for refugee status based solely on coercive population control policies, first espoused in *In re X-G-W*, was abandoned in 2002. *See In re G-C-L-*, 23 I. & N. Dec. at 359. For an example of a sua sponte reopening that is still good law (although unpublished and not precedential), see generally *In re Cuares-Tito*, No. A098 966 923, 2011 WL 3443890 (B.I.A. July 8, 2011) (reopening sua sponte where an IJ followed improper procedures in denying a motion).

71. *See In re X-G-W*, 22 I. & N. Dec. at 74.

72. 22 I. & N. Dec. 1132 (B.I.A. 1999).

73. 22 I. & N. Dec. 23 (B.I.A. 1998).

74. *See In re O-Z- & I-Z*, 22 I. & N. Dec. at 27.

reopening despite G-D-'s untimely motion.⁷⁵ The Board held that the decision in *O-Z- & I-Z-* was an application of existing law to the specific facts of that case and not a fundamental intervening change in immigration law that would require the Board to reopen G-D-'s case under its own authority.⁷⁶

B. Judicial Power in the Executive and the Courts

Kucana's complex questions about discretion arise from Congress's ability to give judicial powers to the Executive and to limit the circumstances under which courts can review those decisions. Although Article III vests the "judicial power" in the Supreme Court, Congress may create executive tribunals, such as the BIA, that have the authority to exercise judicial power. Congress may also limit the ability of federal courts to review the decisions of these executive tribunals.

1. When Congress Can Delegate Authority to an Agency

The Constitution does not give the judicial branch a "monopoly" over the power of adjudication.⁷⁷ In order to ensure effective administration of the law, Congress may grant to the Executive the power to form tribunals that have the power to adjudicate disputes.⁷⁸ The Supreme Court, in *Crowell v. Benson*,⁷⁹ rejected a challenge to the constitutionality of administrative hearings to determine admiralty compensation claims, and permitted Congress to place adjudicatory power in the hands of the Executive.⁸⁰ This power can be wielded by both administrative agencies and "Article I courts," executive tribunals given judicial power through acts of Congress.⁸¹ Congress can grant administrative tribunals discretionary

75. *See id.* at 1132–33.

76. *See id.* at 1135–36.

77. Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1969 (2000). *But see* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816) (noting that Congress must vest the "whole judicial power" in the federal courts); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) (arguing that Article III vests mandatory jurisdiction for every claim in some federal court).

78. Neuman, *supra* note 77, at 1969. Article III courts typically have greater power over "private rights" disputes between two individuals, whereas noncriminal "public rights" disputes between an individual and the government can be adjudicated by executive tribunals. *Id.* at 1969–70 (citing *Crowell v. Benson*, 285 U.S. 22, 50–52 (1932)).

79. 285 U.S. 22.

80. *See id.* at 64–65; *see also* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374–79 (1953).

81. RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 339 (6th ed. 2009).

powers by statute,⁸² or such tribunals may acquire their powers by executive regulation.⁸³

Although giving adjudicatory power to the relevant agency may make for more efficient administration of the law, the act of granting judicial power to the Executive rightly raises separation of powers concerns, since executive agencies may be performing judicial functions without the oversight of the judicial branch.⁸⁴ One method of easing this tension between efficiency and separation of powers is to allow courts to review the decisions of these executive tribunals.⁸⁵

2. When Congress Can Limit Jurisdiction of Article III Courts

The Supreme Court has long held that Congress cannot change the original jurisdiction of the Supreme Court, but does have the power to limit the appellate jurisdiction of Article III courts.⁸⁶ The “Madisonian Compromise” gave Congress the power to determine the jurisdiction of lower federal courts.⁸⁷ In *Lauf v. E.G. Shinner & Co.*,⁸⁸ the Supreme Court affirmed the principle that Congress is permitted to limit the jurisdiction of Article III courts to hear certain types of cases.⁸⁹ The *Lauf* Court rejected a constitutional challenge to the Norris-LaGuardia Act of 1932, which prevented federal courts from hearing claims related to “yellow dog” contracts, agreements that prohibited employees from unionizing as a condition of employment.⁹⁰ More recently, in *Ankenbrandt v. Richards*,⁹¹ the Court upheld Congress’s power to prevent federal courts from exercising diversity jurisdiction in cases involving “domestic relations.”⁹²

82. *See, e.g.*, 8 U.S.C. § 1229b(a)(3) (2006) (granting discretion to the Attorney General to cancel the removal of a permanent resident who has not been convicted of an aggravated felony).

83. *See, e.g.*, 8 C.F.R. § 1003.2(a) (2011) (granting the BIA discretion to reopen a removal proceeding, through a regulation promulgated by the Attorney General).

84. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 938 (1988) (“The underlying constitutional conception is that wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary.”).

85. *See* Neuman, *supra* note 77, at 1969–70.

86. *See Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513–14 (1868) (holding that when Congress removes jurisdiction from the federal courts through statute, the Supreme Court is prevented from hearing a related claim); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–76 (1803) (holding that Congress cannot alter the original jurisdiction of the Supreme Court).

87. *See* FALLON ET AL., *supra* note 81, at 288.

88. 303 U.S. 323 (1938).

89. *See id.* at 330.

90. *See id.* at 325–27; FALLON ET AL., *supra* note 81, at 292–93.

91. 504 U.S. 689 (1992).

92. *See id.* at 697–702; FALLON ET AL., *supra* note 81, at 294. A separate controversy exists over whether Article III courts can be denied jurisdiction over a particular claim if state courts are unable to hear that claim. *See id.* at 290–92. Because the power to remove is vested solely in the federal government, however, this Note will not address the availability of relief through state courts.

The jurisdiction-stripping provisions of IIRIRA were another example of Congress's power to alter the jurisdiction of Article III courts.⁹³

C. Immigration Policy in the United States and the Rise and Fall of the Plenary Power Doctrine

The decision in *Kucana* was made against the background of more than 100 years of Supreme Court immigration jurisprudence. This section first discusses the plenary power doctrine and the great deference that courts have shown the Executive in immigration matters. It then discusses the more recent trend of finding room within this doctrine for judicial review of some immigration decisions.

Although the Constitution gives Congress the power to regulate immigration matters,⁹⁴ American immigration regulations mostly originated at the state and local level until after the Civil War.⁹⁵ Early American immigration policy has been described as “immigration as a transition,” because prevailing attitudes assumed that all immigrants would become naturalized citizens and that the status of being a new immigrant was merely a stepping-stone to inevitable naturalization.⁹⁶ This attitude changed in the late nineteenth century, as the demographics and size of the immigrant population increased; once permissive views of immigration changed as well.⁹⁷ As a response, the Page Act⁹⁸ became the first modern immigration law in 1875, restricting entry of Chinese women under the pretense of regulating prostitution.⁹⁹ The Chinese Exclusion Act followed in 1882, imposing a ten-year moratorium on the entry of Chinese laborers into the United States.¹⁰⁰

Conflict between the federal judiciary and Congress over the federal courts' proper jurisdiction over immigration matters dates back to the period of the Page Act and the Chinese Exclusion Act. In 1891, Congress passed a law to make agency removal decisions “final” and prevent appeals

93. *See infra* Part I.D.

94. The Constitution expressly authorizes Congress “to establish a uniform Rule of Naturalization,” but is otherwise silent on the subject of immigration policy. U.S. CONST. art. I, § 8; *see also* An Act to Establish a Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (repealed 1795).

95. Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1729 (2010) (noting that because regulating migration would have required the federal government to answer questions about the movement of slaves and free blacks, the federal government did little in the area of immigration law until the Civil War had settled the slavery question).

96. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 8–9 (2006).

97. *See id.* at 19–21. Prior to 1830, most immigration to the United States came from Great Britain and Western Europe. *Id.* at 19. In the mid- and late nineteenth century, the immigrant population exploded and included immigrants from Ireland, Germany, and Asia. *Id.* at 19–20.

98. ch. 141, 18 Stat. 477 (1875).

99. *Id.* at 25.

100. *Id.* at 25–26.

of these decisions to the federal courts.¹⁰¹ Supreme Court decisions of this period also reflected non-citizens' limited ability to challenge immigration proceedings in court because of the plenary power doctrine—the Court's strong deference to the power of the Executive and Congress in the immigration realm.¹⁰² The Court continued to give deference to Congress and the Executive under the plenary power doctrine well into the twentieth century.¹⁰³

Beginning in 1953, the Court began to rule that, notwithstanding the plenary power doctrine, non-citizens facing removal are entitled to minimal due process even if, as a substantive matter, the Court cannot address policies set by Congress and the Executive.¹⁰⁴ The Court held that immigrants who chose to affiliate themselves with the United States have a right to receive basic due process in the procedures that decide whether they will be removed or allowed to stay.¹⁰⁵

Two cases—*Mathews v. Eldridge*¹⁰⁶ in 1976 and *Landon v. Plasencia*¹⁰⁷ in 1982—affirmed that judicial review of administrative procedures is an important due process concern and, in doing so, staked out space for judicial review as an exception to the plenary power doctrine.¹⁰⁸ In *Mathews*, a case concerning Social Security benefits, the Court created a three-factor balancing test to determine whether administrative hearings meet due process standards: (1) the individual's interest in process, (2) the government's interest in fewer procedures, and (3) the costs and benefits of mandating additional procedures.¹⁰⁹ Although *Mathews* did not address immigration proceedings, it held that any administrative proceeding must

101. *Id.* at 32. At the time, final orders of removal could only be reviewed by the Superintendent of Immigration and the Secretary of the Treasury, because the modern Board of Immigration Appeals would not be created until 1940. See Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502 (Sept. 4, 1940).

102. MOTOMURA, *supra* note 96, at 27. See *Fong Yue Ting v. United States*, 149 U.S. 698, 731–32 (1893) (holding that immigration proceedings were political decisions not subject to due process claims), *Ekiu v. United States*, 142 U.S. 651, 663–64 (1892) (holding that immigrants seeking admission for the first time cannot claim due process protections), *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889) (upholding the Chinese Exclusion Act's provision that Chinese laborers who had left the United States before the act was passed would not be allowed to reenter if they returned).

103. See, e.g., *United States ex rel. Knauff v. Shaughnessy* 338 U.S. 537, 542 (1950) (rejecting an immigrant's due process challenge and affirming that the ability to exclude noncitizens was a fundamental sovereign act).

104. See *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (establishing a higher standard of proof in a removal proceeding); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 603 (1953) (holding that an immigrant with ties to the United States was entitled to a hearing); see also MOTOMURA, *supra* note 96, at 102. Neither of these cases actually reached the underlying constitutional issue and were decided on the facts of each case. See MOTOMURA, *supra* note 96, at 104. The Court had previously required a constitutional minimum due process in *Yamataya v. Fisher*, 189 U.S. 86 (1903), but “found that the procedures in question were sufficient.” *Id.* at 101–02; see also MOTOMURA, *supra* note 96, at 104.

105. See MOTOMURA, *supra* note 96, at 102–05.

106. 424 U.S. 319 (1976).

107. 459 U.S. 21 (1982).

108. See MOTOMURA, *supra* note 96, at 104–05.

109. See *Mathews*, 424 U.S. at 335; MOTOMURA, *supra* note 96, at 104.

meet minimum due process standards.¹¹⁰ In *Plasencia*, the Court held that returning lawful immigrants are entitled to procedural due process in immigration proceedings, even if they are outside the country when they challenge their removal.¹¹¹ Although the Executive retains power over immigrants seeking to enter the country for the first time, those that have spent time in the United States are treated differently and executive actions toward them must meet minimum due process requirements.¹¹² Taken together, the broad affirmation of judicial review in *Mathews* and the specific application of judicial review to immigration removal proceedings in *Plasencia* make clear that the Executive's immigration-related decisions are not categorically excluded from judicial review.¹¹³

D. IIRIRA

One of the central conflicts in the debate over judicial review of immigration proceedings is the question of how much discretion should be given to the BIA in removal proceedings. This conflict peaked in 1996 with the passage of the IIRIRA,¹¹⁴ the statute at issue in *Kucana*.¹¹⁵

Through IIRIRA, Congress sought to curtail the jurisdiction of federal courts to review removal decisions of the BIA.¹¹⁶ Prior to 1996, Congress had repeatedly made "empty threats" against the jurisdiction of federal courts over controversial issues but had declined to curtail that jurisdiction.¹¹⁷ In 1996, however, the passage of both IIRIRA and the Antiterrorism and Effective Death Penalty Act of 1996¹¹⁸ (AEDPA) limited the ability of federal courts to review various forms of executive action in removal proceedings.¹¹⁹ Judicial review of removal orders had arguably reduced the speed by which these orders could be carried out, and Congress sought to expedite this process by limiting judicial review.¹²⁰ For

110. MOTOMURA, *supra* note 96, at 104.

111. *See Plasencia*, 459 U.S. at 32 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)).

112. *See id.* at 38–41; MOTOMURA, *supra* note 96, at 104–05.

113. *See supra* notes 108–12 and accompanying text.

114. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 756 (characterizing the passage of IIRIRA as an "all out war" in the field of immigration law); *cf.* Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 TEX. L. REV. 1405, 1407–09 (2000) (arguing that the Supreme Court, and not Congress, is the primary source of limits on the jurisdiction of federal courts).

115. *Kucana v. Holder*, 130 S. Ct. 827, 831 (2010); *see infra* Part I.E.

116. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 756–57.

117. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2482 (1998).

118. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28 and 42 U.S.C.)

119. Cole, *supra* note 117, at 2482–83.

120. Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 234 n.6 (1998) [hereinafter Benson, *New World*] (citing Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1439–43 (1997)) (observing that Congress "apparently believed" that removals were being delayed due to the availability of judicial review).

“disfavored groups,” such as certain criminals and those lacking medical certification, Congress eliminated the express right of judicial review in the INA and sought to “insulate” expedited review processes from review.¹²¹ Although the statute intended to increase the speed at which claims were processed and to encourage immigrants to follow established procedures, IIRIRA’s goals have been criticized as “draconian” and “the culmination of over a decade of a progressively and increasingly unkind, ungenerous, and corrosive isolationist mentality wholly at odds with the vision of an utopic America.”¹²²

IIRIRA’s new provisions eliminated the previous distinction between exclusion orders and deportation orders, consolidating these under the heading of removal orders.¹²³ An alien can file a petition for review before a court of appeals when there is a “final order” in his or her case.¹²⁴ Within thirty days, the alien must file the petition for review in the court of appeals that sits in the location where the removal hearing was held.¹²⁵ When a removal order is entered in absentia, the alien must file a motion to reopen within 180 days, which is the only relief available to prevent removal.¹²⁶

IIRIRA also sought to preclude judicial review of discretionary decisions made by the BIA and the Attorney General.¹²⁷ In some areas, such as IIRIRA’s provisions for granting waivers, Congress specifically precluded all review by federal courts.¹²⁸ In other areas, such as IIRIRA’s provisions for motions to reopen, Congress noted specific instances where federal courts do not have jurisdiction to review BIA removal orders.¹²⁹

Under IIRIRA, service of the petition for review no longer automatically stays a removal proceeding, as it had done previously; thus, most petitions for review are coupled with a motion for a stay of removal pending

121. *Id.* at 244, 246.

122. Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare “Reform,”* 71 S. CAL. L. REV. 547, 550 (1998).

123. Benson, *New World*, *supra* note 120, at 235. Prior to IIRIRA’s passage, the government initiated exclusion proceedings to keep an alien from entering the country, and deportation proceedings to remove an alien already present in the United States. *See* 1 GORDON ET AL., *supra* note 22, § 1.03(2)(b).

124. Benson, *New World*, *supra* note 120, at 236.

125. 8 U.S.C. § 1252(b) (2006); *see also* LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 761 (citing 8 U.S.C. § 1252(b)(2)); Benson, *New World*, *supra* note 120, at 236–37 (citing 8 U.S.C. § 1252(b)(1)).

126. 8 U.S.C. § 1229a(b)(5)(C); *see also* Benson, *New World*, *supra* note 120, at 250.

127. 8 U.S.C. § 1252(a)(2)(B)(ii); *see also* Benson, *New World*, *supra* note 120, at 240–41. Grants of asylum were not included in the types of discretionary relief that were no longer subject to judicial review. *See id.* at 240.

128. The waiver provision reads in pertinent part: “No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this paragraph.” 8 U.S.C. § 1182(d)(12)(A); *see also* Benson, *New World*, *supra* note 120, at 241.

129. The motion to reopen provision reads in pertinent part: “No court shall have jurisdiction to review . . . any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter.” 8 U.S.C. § 1252(a)(2)(B); *see also* Benson, *New World*, *supra* note 120, at 241. From this discrepancy, Professor Benson concluded, “[I]f Congress intended to preclude all review, including statutory eligibility, it should have just done so with stronger language, as it had in other provisions of the Act.” *Id.*

decision.¹³⁰ This provision, coupled with BIA reforms enacted by the Attorney General in 2002,¹³¹ caused a large increase in the number of cases decided by the BIA each year.¹³² The 2002 streamlining procedures allowed for one member of the BIA to issue a summary affirmance to dispose of a case instead of hearing the case before a panel of BIA members.¹³³

With many post-IIRIRA cases involving novel legal issues that are inadequately addressed in a short, single-member opinion, the only avenue of review was to a federal court.¹³⁴ This increase in immigration cases before the appellate courts has been described as a “surge” that represents a “backfir[ing]” of the goals of IIRIRA, since the increase in appeals lengthens the time it takes to resolve a case instead of shortening it.¹³⁵ Despite the increased number of appeals filed, most immigration cases arguably involve a discretionary form of relief for which review was closed by IIRIRA. This spike in BIA decisions, coupled with a large decrease in the types of cases that the courts of appeals could actually review, represented a notable shift of adjudicatory power from the judiciary to the Executive.¹³⁶ Thus, perhaps the most important consequence of IIRIRA’s jurisdiction-stripping provisions was courts’ determinations of what types

130. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 761. Professors Legomsky and Rodríguez also note that the increase in motions before the courts of appeals poses “difficult questions of judicial administration,” because coupling a petition for removal with a motion for stay of a removal proceeding, in most cases, increases the number of motions that a court must consider. *Id.*

131. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 44 (2007) (noting that the 2002 reforms were intended to reduce backlog and streamline case management procedures at the BIA).

132. LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 758–59. In the Ninth Circuit, 896 immigration cases were filed in 2001 before the BIA reforms were implemented; in 2002 and 2003, there were 3,578 cases and 4,206 cases, respectively. *Id.* at 758. Legomsky and Rodríguez also note that the larger volume of BIA dispositions, coupled with the possibility for lower quality BIA jurisprudence as a result of this volume, has led to a marked increase in the number of petitions for review before the courts of appeals. *Id.* at 759–60 (citing John R.B. Palmer, Stephen W. Yale-Loehr, & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005)).

133. See Benson, *supra* note 131, at 46.

134. *Id.* at 46–47 (noting that the reforms heightened the complexity of legal issues arising in removal proceedings and thus increased the need for review by the courts of appeals).

135. *Id.* at 47–48.

136. Benson, *New World*, *supra* note 120, at 240 (“Although no formal statistics are available, my own calculations establish that the vast majority of immigration cases involved review of a discretionary form of relief.”). After passage of the REAL ID Act of 2005, aliens were no longer able to challenge their removals through a habeas petition; petitions for review to the courts of appeals became the sole form of relief. See 8 U.S.C. § 1252(a)(5); see also 1 GORDON ET AL., *supra* note 22, § 2.04(22)(a).

of discretionary decisions could be reviewed by federal courts in the wake of IIRIRA.¹³⁷

E. *Kucana v. Holder*

In 2010, the Supreme Court's decision in *Kucana v. Holder*¹³⁸ resolved the circuit split over whether a regulation promulgated by the Attorney General can remove discretionary decisions by the BIA from the review of a federal court.

1. Factual Background of *Kucana*

Agron Kucana came to the United States from Albania in 1995 and remained in the country after his business visa expired.¹³⁹ Kucana subsequently applied for asylum and withholding of removal.¹⁴⁰ When Kucana failed to appear for his removal hearing before an IJ, the judge ordered him removed in absentia.¹⁴¹ Kucana filed a motion to reopen, which was denied by the IJ and affirmed by the BIA in 2002.¹⁴²

The BIA denied a second motion to reopen in 2006, and Kucana filed a petition for review with the Seventh Circuit.¹⁴³ The Seventh Circuit panel split on whether it could exercise jurisdiction over the petition, with the majority holding that it could not.¹⁴⁴ While the majority conceded that the discretion to grant or deny a motion to reopen was conferred on the BIA through a regulation, it noted that this regulation drew its power "from provisions in the Act allowing immigration officials to govern their own

137. See Benson, *New World*, *supra* note 120, at 255–56 (noting that jurisdiction would be unclear both due to ambiguity in the statute and the question of whether habeas jurisdiction provided a separate avenue for courts to review removal orders regardless of Congress's attempts to strip jurisdiction through IIRIRA). IIRIRA's original provisions prevented habeas review of removal proceedings, but the Supreme Court held that habeas review survived IIRIRA. See *INS v. St. Cyr*, 533 U.S. 289, 297–98 (2001). After *St. Cyr*, Congress passed the REAL ID Act of 2005, which eliminated habeas review. See generally 8 GORDON ET AL., *supra* note 22, § 104.04. As a result, habeas review will not be considered in this Note. For an example of a rare case in which habeas review was allowed, see *Chehazeh v. Attorney General*, 666 F.3d 118 (3d Cir. 2012).

138. 130 S. Ct. 827 (2010).

139. *Kucana v. Mukasey*, 533 F.3d 534, 535 (7th Cir. 2008).

140. *Id.*

141. *Id.* Kucana claimed that he had missed his hearing because he overslept. See *id.*

142. *Id.* At that time, Kucana did not seek judicial review, or leave the United States. See *id.*

143. *Kucana*, 130 S. Ct. at 832–33; see also *Kucana*, 533 F.3d at 534. Kucana argued in his second motion to reopen that conditions had worsened in Albania since his first hearing before the IJ, but the BIA found that conditions in that country had actually improved since 1997. *Kucana*, 130 S. Ct. at 832–33. In a footnote, the Court noted that each alien is guaranteed one motion to reopen by statute. See *id.* at 832 n.5 (citing *Dada v. Mukasey*, 128 S. Ct. 2307, 2308 (2008)). The Court further noted that additional motions are permitted by regulation based on changed conditions in the country of nationality or removal. See *id.* (citing 8 C.F.R. § 1003.2(c)(3)(ii) (2009)).

144. *Kucana*, 130 S. Ct. at 833; see also *Kucana*, 533 F.3d at 539. Justice Ruth Bader Ginsburg noted that the split panel below had created a circuit split between the Seventh Circuit and all other circuits, which had held that these motions were reviewable under 8 U.S.C. § 1252. See *Kucana*, 130 S. Ct. at 833.

proceedings.”¹⁴⁵ Judge Kenneth Ripple concurred and acknowledged that the circuit’s precedent in *Ali v. Gonzales*¹⁴⁶ compelled the court’s judgment, but believed that the court should reconsider both *Ali* and *Kucana* en banc to reevaluate whether Congress actually intended to deprive the courts of the ability to review motions to reopen.¹⁴⁷ Judge Richard Cudahy dissented, noting that, without any clear language denying judicial review of motions to reopen, the court should follow the “strong presumption” in favor of judicial review of administrative proceedings.¹⁴⁸ The Seventh Circuit denied the petition for rehearing en banc.¹⁴⁹ The Supreme Court granted certiorari on April 27, 2009.¹⁵⁰

2. The Court’s Statutory Interpretation

Justice Ruth Bader Ginsburg, writing for a unanimous Court, held that the authority to grant or deny a motion to reopen was made discretionary by a regulation, 8 C.F.R. § 1003.2(a), and not 8 U.S.C. § 1252(a)(2)(B)(ii), the statute limiting judicial review of “any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General.”¹⁵¹ Justice Ginsburg specifically rejected the Seventh Circuit’s argument that the regulation “[drew] force” from statute because the regulation was enacted

145. *Kucana*, 533 F.3d at 536.

146. 502 F.3d 659 (7th Cir. 2007).

147. *See Kucana*, 533 F.3d at 539–40 (Ripple, J., concurring).

148. *See id.* at 541 (Cudahy, J., dissenting) (quoting *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)).

149. *See id.* at 541–42 (Ripple, J., dissenting as to denial of rehearing en banc).

150. *Kucana v. Holder*, 129 S. Ct. 2075 (2009). Once certiorari was granted, the Department of Justice abandoned the government’s position and declined to argue against judicial review of motions to reopen. *See Kucana*, 130 S. Ct. 872, 833 (2010). The Court appointed Amanda C. Leiter, a Professor at Catholic University of America’s Columbus School of Law, to argue this side instead. *See id.*

151. *Kucana v. Holder*, 130 S. Ct. 827, 834 (2010). The statute reads in pertinent part:

No court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii) (2006). The regulation reads in pertinent part:

The Board [of Immigration Appeals] may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

8 C.F.R. § 1003.2(a) (2011). A separate controversy exists over whether the “post-departure bar” preventing appeals after removal is valid, but these cases have questioned 8 C.F.R. § 1003.2(d), a separate provision. *See, e.g., Prestol Espinal v. Att’y Gen.*, 653 F.3d 213, 213 (3d Cir. 2011).

prior to the passage of IIRIRA.¹⁵² Counsel for the government argued that the jurisdiction-stripping provision refers to “authority . . . specified under this subchapter,” and that this provision could be read to say “pursuant to” or “subordinate to,” a reading that would include regulations made by the Attorney General during the course of carrying out § 1252’s requirements.¹⁵³ The Court rejected this position in favor of the petitioner’s view that § 1252(a)(2)(B)(ii) precludes judicial review when the statute itself explicitly grants discretionary authority to the Attorney General, and not when a decision is made discretionary by a regulation alone.¹⁵⁴

The Court found the petitioner’s reading of § 1252 persuasive in light of the other jurisdictional limitations found in § 1252(a)(2)(A) and (C).¹⁵⁵ Each of these relied solely on its own definitions and not on any external regulation.¹⁵⁶ Because § 1252(a)(2)(B) was “sandwiched” between these two other provisions, the Court read it within that context.¹⁵⁷ The Court also considered that clause (i) of § 1252(a)(2)(B) specifically enumerated five sections of the statute under which no court could review a final judgment of the Attorney General—sections 1182(h), 1182(i), 1229b, 1229c, and 1255.¹⁵⁸ Each of these sections addresses a different form of discretionary relief from removal.¹⁵⁹ The Court reasoned that these specific statutory grants of discretion indicate that Congress intended to limit judicial review under the immediately following clause (ii)—the question before the Court—only in those cases specified in the statute.¹⁶⁰ The Court rejected a broader reading under which the use of the word “any” expanded clause (ii) to exclude review of decisions made discretionary through regulation.¹⁶¹

Finally, the Court looked to the nature of the discretion granted in the statute and the nature of motions to reopen to aid its interpretation of § 1252. The government asserted that the discretionary bases for decision enumerated in the statute—waivers of inadmissibility based on criminal offenses or fraud, cancellation of removal, permission for voluntary departure, or adjustment of status—were “substantive decisions . . . made by the Executive in the immigration context as a matter of grace, things that involve whether aliens can stay in the country or not.”¹⁶² The government argued that these decisions, made through the “grace” of the Attorney General, are discretionary immigration powers of the kind that are typically

152. See *Kucana*, 130 S. Ct. at 834 & n.9. Justice Ginsburg noted that 8 C.F.R. § 1003.2(a) was published on April 29, 1996, while 8 U.S.C. § 1229 was enacted on September 30, 1996. *Id.*

153. See *Kucana*, 130 S. Ct. at 835.

154. See *id.* at 835–36.

155. See *id.* at 836.

156. *Kucana*, 130 S. Ct. at 836.

157. See *id.*

158. See *id.*

159. See *id.*

160. See *id.* at 836–37.

161. See *id.* at 837 n.14.

162. See *id.* at 837 (citing Transcript of Oral Argument at 14, *Kucana*, 130 S. Ct. 827 (2010) (No. 08-911)).

unreviewable by the courts.¹⁶³ The Court rejected this position, noting that when a court reviews a denial of a motion to reopen, it does not ask the BIA and the Attorney General to exercise any “grace,” but instead requires them to provide a fair hearing.¹⁶⁴ The Court observed that had Congress wished to extend the statutory discretion to include regulatory discretion, it “could have easily said so.”¹⁶⁵

3. The Court’s Interpretation of IIRIRA’s Legislative History

The Court also considered the legislative history of IIRIRA in holding that motions to reopen were not meant to fall outside of judicial review.¹⁶⁶ The Court noted that IIRIRA affected motions to reopen in two separate ways: first, by codifying the requirements for a motion to reopen, and second, by barring judicial review of many types of removal decisions.¹⁶⁷ What Congress did not do, the Court held, was codify the regulation granting the BIA discretion to grant or deny motions to reopen.¹⁶⁸ The Court in *Kucana* saw this inaction as Congress’s intent to leave motions to reopen in their pre-IIRIRA state—a broad discretion derived from regulation, to grant or deny motions to reopen, with such discretion subject to judicial review.¹⁶⁹ A decision to the contrary would give “the Executive . . . a free hand to shelter its own decisions from abuse-of-discretion appellate court review.”¹⁷⁰ According to the Court, even the subsequent amendment to the statute—the REAL ID Act of 2005¹⁷¹—did not change the source of authority in discretion over motions to reopen.¹⁷²

Finally, the Court specifically reserved the question of whether sua sponte motions to reopen are governed by this same reasoning.¹⁷³ In doing so, the Court noted that the overwhelming pre-*Kucana* circuit authority weighed against allowing judicial review of sua sponte motions to reopen

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 838–39.

167. *See id.* at 838; *see also* 8 U.S.C. § 1229(a)(c)(7) (2006) (codifying requirements for a motion to reopen); *Id.* § 1252(a)(2) (limiting judicial review of certain discretionary BIA decisions).

168. *See Kucana*, 130 S. Ct. at 838.

169. *See id.* at 838–39 (“It is unsurprising that Congress would leave in place judicial oversight of this ‘important [procedural] safeguard’ designed ‘to ensure a proper and lawful disposition’ of immigration proceedings, where, as here, the alien’s underlying claim (for asylum) would itself be reviewable.” (quoting *Dada v. Mukasey*, 128 S. Ct. 2307, 2317–19 (2008))).

170. *See id.* at 840; *see also* Bryan Clark & Amanda C. Leiter, *Regulatory Hide and Seek: What Agencies Can (and Can’t) Do to Limit Judicial Review*, 52 B.C. L. REV. 1687, 1692–93 (2011) (arguing that when an agency uses regulations to clarify broad statutory language, the agency may be attempting to immunize itself from judicial review).

171. Pub. L. 109-13, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 and 49 U.S.C.).

172. *See Kucana*, 130 S. Ct. at 839.

173. *See id.* at 839 n.18.

because the decision not to reopen “[was] committed to agency discretion by law.”¹⁷⁴

4. The Presumption in Favor of Judicial Review of Administrative Decisions

In its final salvo in favor of review of decisions made discretionary by regulation, the Court noted the presumption in favor of such review in the administrative context.¹⁷⁵ When a statute is susceptible to divergent readings, the Court favors the interpretation that allows for judicial review.¹⁷⁶ Because this presumption is “well-settled,” the Court presumed that Congress wrote IIRIRA knowing that the Court would allow judicial review if the statute was silent or ambiguous in regard to review of administrative decisions.¹⁷⁷ It takes “clear and convincing evidence” to overcome this presumption, which the Court did not find in this case.¹⁷⁸ By not clearly delegating final authority to the Attorney General, the Court instead found that Congress intended for motions to reopen to remain subject to judicial review.¹⁷⁹

II. CIRCUIT COURT DECISIONS ON SUA SPONTE REVIEW AFTER *KUCANA*

The Court did not answer the question of whether sua sponte motions to reopen were subject to judicial review, under the same reasoning applied in *Kucana* to motions brought by the parties. Since *Kucana*, some circuits have deferred to pre-*Kucana* holdings regarding jurisdiction to review sua sponte motions, concluding that they lack jurisdiction and noting that evaluation of the decision not to reopen sua sponte would be hollow without a meaningful standard of review. Other circuits have noted that, in light of *Kucana*, it may be time to reconsider circuit holdings that denied

174. *Id.* The Court cited *Tamenut v. Mukasey*, 521 F.3d 1000 (8th Cir. 2008), as an example. *See id.* The ambiguity of the phrase “by law” and whether it can include the regulation granting sua sponte authority will be discussed in Part II, *infra*.

175. *See Kucana*, 130 S. Ct. at 839 (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)).

176. *See id.*

177. *See id.* (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993)).

178. *See id.*

179. *See id.* at 839–40 (“Congress ensured that it, and only it, would limit the federal courts’ jurisdiction While Congress pared back judicial review in IIRIRA, it did not delegate to the Executive authority to do so.”). Justice Samuel Alito filed an opinion concurring in the result but noting that the case could have been decided on narrower statutory interpretation grounds. *See id.* at 840–41 (Alito, J., concurring). Justice Alito argued that the language of 8 U.S.C. § 1252(a)(2)(B)(ii)—which refers to authority “under this subchapter”—refers to subchapter II of Title 8, chapter 12, which consists of §§ 1151–1381. *See Kucana*, 130 S. Ct. at 840. Subchapter II does not grant the Attorney General the authority to make decisions discretionary through regulation. *Id.* Instead, as Justice Alito noted, subchapter I grants this authority. *See id.*; *see also* 8 U.S.C. §§ 1101–1107. Because the authority to make motions to reopen discretionary through statute stems from subchapter I, Justice Alito argued that subchapter II’s limiting provisions cannot be said to circumvent judicial review of motions to reopen. *See Kucana*, 130 S. Ct. at 841.

jurisdiction over sua sponte motions, and to exercise jurisdiction over these discretionary decisions.¹⁸⁰

A. Circuits Denying Jurisdiction After *Kucana*

The First, Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits have rejected jurisdiction over sua sponte motions to reopen, even after *Kucana*. These circuits have relied on pre-*Kucana* case law to hold that the decision to reopen sua sponte is purely discretionary and thus unreviewable for two principal reasons: (1) *Kucana* did not overrule previous circuit decisions on the issue of sua sponte reviewability, and (2) no meaningful standard of review exists by which courts can review the decision not to reopen sua sponte.¹⁸¹

1. Circuits Using *Kucana*'s Bracketing of Sua Sponte Motions to Deny Jurisdiction

In *Neves v. Holder*,¹⁸² the First Circuit affirmed that pre-*Kucana* precedent on sua sponte motions was still good law after the *Kucana* Court declined to rule on the sua sponte issue, and thus the panel held that it did not have jurisdiction.¹⁸³ The First Circuit had already ruled on Neves's case in 2009, but the Supreme Court vacated the First Circuit's original decision and remanded in the wake of *Kucana*.¹⁸⁴ Neves, a Brazilian citizen, had been found ineligible for asylum and withholding of removal in 2000.¹⁸⁵ Represented by a new attorney, Neves filed his first unsuccessful motion to reopen in 2003, arguing that ineffective assistance of counsel had led to his first unfavorable judgment.¹⁸⁶ The BIA denied this motion.¹⁸⁷ In 2006, Neves filed a second motion to reopen based on another ineffective assistance of counsel claim.¹⁸⁸ Finding that Neves had not shown diligence in pursuing his claim, the BIA denied the motion and declined to reopen sua sponte.¹⁸⁹

The First Circuit held that its first opinion in Neves's case, where the court found no jurisdiction over motions to reopen when brought by the parties, was clearly erroneous after *Kucana*, because the Supreme Court's

180. The Fourth Circuit has not addressed reviewability of the BIA's decision not to reopen sua sponte since the *Kucana* decision. For the pre-*Kucana* rule on review of the decision not to reopen sua sponte, see *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006).

181. See, e.g., *Neves v. Holder*, 613 F.3d 30, 34–35 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 3025 (2011); *Ochoa v. Holder*, 604 F.3d 546, 549–50 (8th Cir. 2010).

182. 613 F.3d 30.

183. See *id.* at 34–35.

184. See *Neves v. Holder*, 130 S. Ct. 3273, 3273 (2010); see also *Neves v. Holder*, 568 F.3d 41, 42–43 (1st Cir. 2009), *vacated by Neves*, 130 S. Ct. 3273. In that case, the First Circuit had held that it lacked jurisdiction over a sua sponte motion to reopen. See *id.*

185. *Neves*, 613 F.3d at 33.

186. *Id.* at 33–34.

187. *Id.* at 34.

188. *Id.*; see *supra* note 29 and accompanying text.

189. *Neves*, 613 F.3d at 34.

holding was directly contrary to the First Circuit's earlier ruling.¹⁹⁰ The First Circuit observed, however, that the *Kucana* decision did not upset circuit precedent on whether sua sponte motions to reopen were subject to this same line of reasoning.¹⁹¹ The court noted that sua sponte decisions were made discretionary through regulation, but cited to its earlier holding in *Luis v. INS*¹⁹² in concluding that it lacked jurisdiction.¹⁹³ In *Luis*, the court had held that because motions to reopen were "committed to [the] unfettered discretion" of the BIA through regulation, it could not exercise jurisdiction.¹⁹⁴ *Luis* relied on *Heckler v. Chaney*,¹⁹⁵ a case where the Supreme Court held that section 701(a)(2) of the Administrative Procedure Act¹⁹⁶ (APA) places an agency decision beyond judicial review when Congress grants the agency discretionary power and prescribes no "meaningful manageable standards" for the authority.¹⁹⁷

In *Gashi v. Holder*,¹⁹⁸ the Second Circuit held that its pre-*Kucana* case law on review of sua sponte motions to reopen was still binding precedent.¹⁹⁹ Mustafe Gashi, a citizen of Yugoslavia, appealed the BIA's denial of his motion to reopen to the Second Circuit in 2009.²⁰⁰ In a brief summary order, the court held that its previous rule in *Ali v. Gonzales*²⁰¹ still governed sua sponte motions to reopen, and thus the court could not review Gashi's case.²⁰²

In *Ali*, a citizen of Bangladesh petitioned the Second Circuit to review the BIA's decision denying his untimely motion to reopen—filed eleven years after the BIA originally dismissed his case—and the decision to decline to reopen sua sponte.²⁰³ *Ali* argued that, although his motion was untimely, his case presented "compelling and exceptional circumstances" that

190. *See id.* at 35.

191. *See id.*

192. 196 F.3d 36 (1st Cir. 1999).

193. *See Neves*, 613 F.3d at 35 (citing *Luis*, 196 F.3d at 40).

194. *Luis*, 196 F.3d at 40.

195. 470 U.S. 821 (1985).

196. 5 U.S.C. § 701 (2006).

197. *See Heckler*, 470 U.S. at 830; *see also Luis*, 196 F.3d at 40–41. Section 701(a)(2) of the APA reads in pertinent part: "This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)–(2) (2006). *Luis* applied *Heckler*'s analysis to an agency inaction—the decision not to reopen sua sponte. *See Luis*, 196 F.3d at 40–41. For an argument that *Heckler*'s analysis should not apply to agency inaction and that agency inaction should not be exempted from judicial review, see Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1667–69 (2004).

198. 382 F. App'x 21 (2d Cir. 2010).

199. *See id.* at 22–23.

200. *Id.* at 22.

201. 448 F.3d 515 (2d Cir. 2006).

202. *Gashi*, 382 F. App'x at 23; *see also Ali*, 448 F.3d at 517. In *Ali*, the Second Circuit noted that because sua sponte motions to reopen were committed to the BIA's discretion by regulation, these motions could not be reviewed by the court of appeals. *See id.* at 517–18. This view was also expressed in *Tavarez v. Holder*, 422 F. App'x 19, 20–21 (2d Cir. 2011); *Hodzic v. Holder*, 373 F. App'x 126, 128 (2d Cir. 2010); and *Ruiz v. Holder*, 374 F. App'x 170, 172–73 (2d Cir. 2010).

203. *See Ali*, 448 F.3d at 516.

required the BIA to exercise its sua sponte authority.²⁰⁴ The Second Circuit, noting that this was a matter of first impression, looked to the First, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, which had determined that they lacked jurisdiction in such cases.²⁰⁵ Among other cases, the Second Circuit relied heavily on the Fifth Circuit's decision in *Enriquez-Alvarado v. Ashcroft*,²⁰⁶ which held that the decision not to reopen sua sponte was outside of the authority of courts to review, regardless of whether discretion came from regulation or statute, because no meaningful standard existed for courts to conduct a review of sua sponte decisions.²⁰⁷

In *Ozeiry v. Attorney General*,²⁰⁸ the Third Circuit also applied pre-*Kucana* precedent to conclude that it lacked jurisdiction over sua sponte motions to reopen.²⁰⁹ Hatem El Ozeiry, a citizen of Egypt, filed a motion to reopen after an IJ found him removable.²¹⁰ The BIA denied this motion in 2008, as well as a second motion to reopen that Ozeiry filed in 2009.²¹¹ In refusing jurisdiction over Ozeiry's claim, the Third Circuit noted that the Supreme Court in *Kucana* declined to rule on the sua sponte issue, and thus did not affect the controlling pre-*Kucana* precedent holding that such decisions were not reviewable.²¹²

The Third Circuit's recent decision in *Chehazeh v. Attorney General*²¹³ concerned an unusual situation in which a district court, and not a circuit, reviewed the BIA's decision to reopen sua sponte.²¹⁴ Daoud Chehazeh appealed the BIA's decision to reopen sua sponte and reverse a 2001 decision to grant him asylum under 8 U.S.C. § 1158.²¹⁵ He initially appealed to the U.S. District Court for the District of New Jersey to review under habeas jurisdiction, and this application was denied.²¹⁶ On appeal, the Third Circuit held that, under the particular facts of Chehazeh's case, the district court was entitled to review the decision to reopen sua sponte under its habeas jurisdiction.²¹⁷ Since no removal order had been entered in

204. *See id.* at 517.

205. *See id.* at 518.

206. 371 F.3d 246 (5th Cir. 2004).

207. *See Ali*, 448 F.3d at 518; *Enriquez-Alvarado*, 371 F.3d at 249–50.

208. 400 F. App'x 647 (3d Cir. 2010).

209. *See id.* at 649–50.

210. *Id.* at 648. The motion to reopen was based on Ozeiry's new marriage to a U.S. citizen. *See id.* The Fifth and Tenth Circuits have determined that they lack such jurisdiction using similar reasoning. *See Bustillo-Martinez v. Holder*, 431 F. App'x 265, 266–67 (5th Cir. 2011) (holding that the decision not to reopen sua sponte is unreviewable because it lacks a corresponding standard of review); *Bakanovas v. Holder*, 438 F. App'x 717, 722 (10th Cir. 2011) (citing *Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004)) (refusing to review the BIA's decision not to reopen sua sponte).

211. *Ozeiry*, 400 F. App'x at 648–49.

212. *See id.* at 649–50 (citing *Cruz v. Att'y Gen.*, 452 F.3d 240, 249 (3d Cir. 2006)); *see also Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003). This view was affirmed in *Jia Ying Lin v. Att'y Gen.*, 421 F. App'x 241, 242 (3d Cir. 2011).

213. 666 F.3d 118 (3d Cir. 2012).

214. *Id.* at 125.

215. *Id.* at 122.

216. *Id.* at 124.

217. *Id.* at 125.

the case, IIRIRA's jurisdiction-stripping provisions did not apply, and thus habeas jurisdiction remained intact.²¹⁸ Four factors informed the court's decision: the BIA's decision was not committed to agency discretion by law, no statute precluded review, the action was a final agency action, and no "special statutory review" provision required that it be brought in another forum.²¹⁹

The Third Circuit noted that review of a decision *not* to reopen would be precluded under the Supreme Court's analysis in *Heckler v. Chaney*, since the decision not to reopen sua sponte was committed to agency discretion by law and the BIA exercised no coercive power by deciding not to act.²²⁰ Taking action to open a case sua sponte, however, was not subject to this same analysis, and thus could be reviewed by the circuit court.²²¹

2. Circuits Finding No Meaningful Standard by Which to Review the BIA's Decision Not to Reopen Sua Sponte

In *Ochoa v. Holder*,²²² the Eighth Circuit reaffirmed its sua sponte precedent in light of *Kucana* and denied jurisdiction over a BIA decision not to reopen sua sponte.²²³ In 2006, an IJ denied Ana Rosa Ochoa, a Mexican citizen, her application for cancellation of removal.²²⁴ In 2007, Ochoa appealed on the basis of ineffective assistance of counsel and asked the BIA to reopen the case through its sua sponte authority.²²⁵ On appeal, the Eighth Circuit refused jurisdiction, noting that its decision in *Tamenut v. Mukasey*²²⁶ remained good law following *Kucana* and thus precluded review.²²⁷ In *Tamenut*, the Eighth Circuit panel had considered the lack of a standard by which to review the sua sponte motion as evidence that this decision was under the "unfettered authority" of the BIA and not subject to judicial review.²²⁸ Without a clear standard from Congress, the Eighth Circuit had noted that any standard of review would have to be created by the court without the guidance of the legislature.²²⁹ Thus, the decision to

218. *Id.* at 133.

219. *Id.* at 127.

220. *Id.* at 129 (citing *Heckler*, 470 U.S. at 832; *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 473–75 (3d Cir. 2003)).

221. *Id.* at 129.

222. 604 F.3d 546 (8th Cir. 2010).

223. *See id.* at 550.

224. *Id.* at 546–47.

225. *Id.* at 547–48. When Ochoa petitioned the Eighth Circuit, her petition did not clearly specify whether it was a party's motion to reopen or whether it was a request for the BIA to exercise its sua sponte authority. Because Ochoa petitioned the BIA "pursuant to 8 C.F.R. § 1003.2(a)" to reopen "on their own [sic] motion," the Eighth Circuit found that Ochoa had petitioned the BIA to use its sua sponte authority. *See id.* at 549.

226. 521 F.3d 1000 (8th Cir. 2008).

227. *See Ochoa*, 604 F.3d at 549. Judge Clarence Arlen Beam, author of the dissent in *Tamenut*, wrote for the majority in *Ochoa*. *See id.* at 546.

228. *See Tamenut*, 521 F.3d at 1004.

229. *See id.* ("The regulation itself, 8 C.F.R. § 1003.2(a), provides no guidance as to the BIA's appropriate course of action, sets forth no factors for the BIA to consider in deciding whether to reopen *sua sponte*, places no constraints on the BIA's discretion, and specifies no standards for a court to use to cabin the BIA's discretion.")

reopen sua sponte was committed to the agency “by law” and was out of the reach of judicial review.²³⁰ Relying on this argument, the *Ochoa* court also noted that under the Supreme Court’s holding in *Heckler v. Chaney* and the APA, a court could not review the BIA’s decision not to invoke its sua sponte authority because there was no law to apply.²³¹

In *Jaimés-Aguirre v. U.S. Attorney General*,²³² the Eleventh Circuit affirmed *Lenis v. U.S. Attorney General*,²³³ its pre-*Kucana* precedent on sua sponte motions to reopen.²³⁴ The opinion in *Jaimés-Aguirre* did not analyze the jurisdictional question at length, deferring instead to *Lenis*.²³⁵ *Lenis* had relied on the APA, which prevents judicial review when a decision is committed to agency discretion by law.²³⁶ The court in *Lenis* relied on *Heckler* to hold that without a meaningful statutory standard by which to review sua sponte motions to reopen, a court could not consider whether the BIA had properly applied its discretion.²³⁷ The permissive language of 5 C.F.R. § 1003.2(a), which grants the BIA the choice to exercise sua sponte authority, also hindered the finding of a standard for courts to use when reviewing.²³⁸

B. Circuits Amenable to Reviewing Sua Sponte Motions to Reopen

Following *Kucana*, the Second, Third, Sixth, Seventh, and Ninth Circuits have also denied jurisdiction over the BIA’s decision not to reopen sua sponte, but have noted their willingness to find jurisdiction over these decisions in various ways. These circuits have urged rehearing cases en banc or exercised review over the BIA’s decision not to reopen sua sponte when the BIA’s decision is based on a clearly erroneous interpretation of the law.

1. Jurisdiction Based on Separation of Powers and *Kucana*’s Reasoning

Some circuit panels have used *Kucana*’s reasoning and separation of powers arguments to urge circuits to adopt jurisdiction over the decision not to reopen sua sponte. For example, in *Gor v. Holder*,²³⁹ a Sixth Circuit panel urged the circuit to reconsider its pre-*Kucana* precedent precluding

230. *See id.* at 1005. The court in *Tamenut* also addressed a due process claim under the Fourteenth Amendment (which it found within its power to do), but found that *Tamenut* had not brought a colorable claim. *See id.*

231. *See Ochoa*, 604 F.3d at 549–50.

232. 369 F. App’x 101 (11th Cir. 2010).

233. 525 F.3d 1291 (11th Cir. 2008).

234. *See Jaimés-Aguirre*, 369 F. App’x at 103. The Eleventh Circuit also followed this view in *Qing Yun Lin v. U.S. Att’y Gen.*, 429 F. App’x 889, 891–92 (11th Cir. 2011).

235. *See Jaimés-Aguirre*, 369 F. App’x at 103.

236. *See Lenis*, 525 F.3d at 1293 (citing 5 U.S.C. § 701(a)(2) (2006)).

237. *See id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)); *see also Tamenut v. Mukasey*, 521 F.3d 1000, 1004 (8th Cir. 2008).

238. *See Lenis*, 525 F.3d at 1293–94.

239. 607 F.3d 180 (6th Cir. 2010).

review of sua sponte motions to reopen.²⁴⁰ Tushar Gor, a citizen of India, was convicted of child abandonment under Ohio state law and was scheduled for removal.²⁴¹ Gor filed an untimely petition for review and appealed to the Sixth Circuit when the BIA declined to reopen his case under its sua sponte authority.²⁴² Although the panel cited *Kucana* in rejecting the government's contention that 8 C.F.R. § 1003.2 could place review of Gor's motion to reopen outside of the purview of an Article III court, it concluded that the circuit's precedent still placed sua sponte decisions not to reopen outside of its review.²⁴³

The panel believed that the circuit's pre-*Kucana* decisions should be revisited.²⁴⁴ The Sixth Circuit stated that *Heckler* should not be construed to hold that an agency can strip an Article III court of jurisdiction through regulation, as the government had argued.²⁴⁵ *Kucana* had "soundly rejected" that line of reasoning,²⁴⁶ and affirmed *Heckler* so far as it held that curtailment of judicial review of agency decisions must emanate from Congress, and not the agency itself.²⁴⁷ The Sixth Circuit also noted that another line of reasoning drawn from *Heckler*'s holding—that without a meaningful standard of review for the decision set by Congress, there can be no judicial review—would mean that no agency decision could be reviewable.²⁴⁸ This would directly contradict *Kucana*'s holding.²⁴⁹

The majority concluded by noting that Gor's case provided a perfect example of why discretionary BIA decisions should be reviewable and, more generally, why all agency decisions should be reviewable.²⁵⁰ In Gor's original hearing, the IJ failed to provide him with a "list of free legal service-providers" which, the Sixth Circuit noted, might have led to a different outcome in his case.²⁵¹ The court also noted that the BIA misunderstood the law regarding removals for those convicted of child

240. *See id.* at 182 ("[We] must conclude that we have no jurisdiction to review the denial of the motion to reopen *sua sponte*, although the Supreme Court's recent decision in *Kucana* . . . casts considerable doubt on our circuit precedent that dictates that result [We] urge the *en banc* court to reexamine the validity of our prior cases in this area."). In the Sixth Circuit, a panel decision remains controlling authority unless it is overturned *en banc* or a Supreme Court decision renders it invalid. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

241. *Gor*, 607 F.3d at 181.

242. *Id.* at 182. Gor argued in his petition to the Sixth Circuit that his actions amounted to "non-support" instead of child abandonment, but failed to raise this and other claims during the original appeal to the BIA. *See id.*

243. *See id.* at 186–87.

244. *See id.* at 187–88 (citing *Barry v. Mukasey*, 524 F.3d 721, 723–24 (6th Cir. 2008); *Harchenko v. INS*, 379 F.3d 405, 410–11 (6th Cir. 2004)).

245. *See id.* at 188–89.

246. *Id.*

247. *See id.* at 189.

248. *See id.* at 189–90; *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999) (noting that discretionary decisions were unreviewable where Congress had created no meaningful standard by which the court could review the decision).

249. *Gor*, 607 F.3d at 190.

250. *See id.* at 193.

251. *See id.* at 191.

abuse or neglect crimes when it reviewed Gor's claim.²⁵² According to the Sixth Circuit panel, a lack of review of these discretionary decisions would allow erroneous legal conclusions of the BIA to stand without any oversight by the judiciary.²⁵³

In *Mejia-Hernandez v. Holder*,²⁵⁴ the Ninth Circuit also grudgingly affirmed its pre-*Kucana* precedent of *Ekimian v. INS*,²⁵⁵ and determined that it lacked jurisdiction over a denial of a motion to reopen sua sponte.²⁵⁶ Bernardino Eduardo Mejia-Hernandez, a citizen of Guatemala, applied for asylum in 1993 but was ordered deported in absentia.²⁵⁷ Mejia-Hernandez and his wife had employed Bryan Ramos, who falsely represented himself as an attorney, for seven years.²⁵⁸ Once Mejia-Hernandez and his wife discovered that Ramos was not an attorney, they retained new counsel and Mejia-Hernandez filed a motion to reopen in 2005.²⁵⁹ The IJ reopened sua sponte and granted relief under section 203(c) of the Nicaraguan Adjustment and Central American Relief Act²⁶⁰ (NACARA). The BIA overturned the IJ's decision to review sua sponte, and Mejia appealed to the Ninth Circuit.²⁶¹

Although bound by precedent, the Ninth Circuit panel noted that “[t]he overall thrust of *Kucana* suggests that sua sponte reopening should be subject to review” and noted that if the question were one of first impression, the court might be open to finding jurisdiction over the question.²⁶² Under *Ekimian*, sua sponte decisions were not reviewable because they lacked any clear standard by which to review them—meaning that they had been committed to agency discretion by law.²⁶³ The panel noted that this was at odds with *Kucana*'s reasoning; where the *Ekimian* court was searching for an affirmative standard by which to review sua sponte authority, the *Kucana* Court sought clear statutory language that placed motions to reopen outside of judicial review.²⁶⁴ However, without

252. *See id.* at 192–93.

253. *See id.* at 193.

254. 633 F.3d 818 (9th Cir. 2011).

255. 303 F.3d 1153 (9th Cir. 2002).

256. *Mejia-Hernandez*, 633 F.3d at 823–24.

257. *Id.* at 820–21.

258. *Id.* at 821.

259. *Id.*

260. *Id.* NACARA allows for special dispensation of removal claims for aliens seeking asylum from civil wars and political events in Nicaragua, Guatemala, El Salvador, and the former Soviet Republics. *See* Pub. L. No. 105-100, tit. II, 111 Stat. 2160 (1997) (codified as amended in scattered sections of 8 U.S.C.); LEGOMSKY & RODRÍGUEZ, *supra* note 25, at 624.

261. *Mejia-Hernandez*, 633 F.3d at 822. The Ninth Circuit considered whether it had jurisdiction over the BIA's decision to overturn the IJ's sua sponte motion to reopen in light of *Kucana* and prior circuit precedent. *See id.* at 823.

262. *Id.* (“There is a longstanding tradition of judicial review of reopenings in immigration cases; there is no statute suggesting review is not available; there is a presumption favoring review; and there is a separation-of-powers concern against giving the Executive authority to withhold cases from judicial review.”)

263. *Id.*; *see also* *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

264. *See Mejia-Hernandez*, 633 F.3d at 823.

any changes in the law since *Ekimian*, the *Mejia-Hernandez* court ruled that it could not review the BIA's decision not to reopen sua sponte.²⁶⁵

Other Ninth Circuit decisions lend support to the call to reconsider *Ekimian*'s holding. In *ANA International, Inc. v. Way*,²⁶⁶ the court held that analysis of judicial review through the APA is inapplicable where IIRIRA's more specific provisions govern.²⁶⁷ The court also noted that only in "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply" would analysis through the APA be necessary.²⁶⁸ The Ninth Circuit also noted in *Spencer Enterprises v. United States*²⁶⁹ that analysis under the APA can be avoided when agency practice and regulations create a standard for reviewing an agency's decisions for which Congress has not provided a meaningful standard of review through statute.²⁷⁰

2. Jurisdiction Because a Standard Exists by Which to Review the Decision Not to Reopen

Some circuits have found jurisdiction where the BIA's decision not to reopen sua sponte is based on a misinterpretation of law. In *Mahmood v. Holder*,²⁷¹ the Second Circuit reviewed the BIA's decision not to review sua sponte and remanded the case to the BIA for further proceedings due to the BIA's misinterpretation of the relevant law.²⁷² Tahir Mohammad Mahmood, a citizen of Pakistan, moved to reopen his removal proceedings based on his marriage to a U.S. citizen.²⁷³ The BIA denied his motion, and declined to reopen under its sua sponte authority.²⁷⁴ The Second Circuit held that while *Ali*'s precedent prevented the court from reviewing the decision not to reopen sua sponte, sua sponte decisions were reviewable where the BIA relied on a misinterpretation of the relevant law in making its decision.²⁷⁵ The Second Circuit noted that, on remand, the BIA would still be free to ignore the Second Circuit's urging to reopen sua sponte, and that such a decision would then be unreviewable.²⁷⁶

In *Pllumi v. Attorney General*,²⁷⁷ the Third Circuit likewise held that where the BIA's decision not to grant a sua sponte motion to reopen was based on a fundamental misunderstanding of law, the court of appeals had

265. *See id.* at 823–24.

266. 393 F.3d 886 (9th Cir. 2004).

267. *Id.* at 890.

268. *Id.* at 890–91 (citing *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

269. 345 F.3d 683 (9th Cir. 2003).

270. *Id.* at 691.

271. 570 F.3d 466 (2d Cir. 2009).

272. *See id.* at 471.

273. *Id.* at 467.

274. *Id.*

275. *See id.* at 469. The BIA had incorrectly interpreted whether the filing of a motion to reopen automatically tolled the period for voluntary departure, in part because the Supreme Court had not yet decided *Dada v. Mukasey*, 128 S. Ct. 2307 (2008). *See Mahmood*, 570 F.3d at 469–71.

276. *See id.* at 471.

277. 642 F.3d 155 (3d Cir. 2011).

the authority to review the BIA's decision.²⁷⁸ An IJ had denied Tonin Pllumi, a citizen of Albania, withholding of removal in 2002.²⁷⁹ The BIA upheld the ruling in 2007, and declined to grant Pllumi's motion to reopen or exercise its own sua sponte authority in 2009.²⁸⁰ Pllumi claimed that he would be subject to persecution if returned to Albania because of his religious and political beliefs.²⁸¹ His motion to reopen also cited the inability of the Albanian healthcare system to treat injuries that he sustained in a hit-and-run accident.²⁸²

The *Pllumi* court noted that the sua sponte authority, made discretionary by regulation, lies solely with the BIA and is usually unreviewable.²⁸³ In this case, however, the Third Circuit adopted the Second Circuit's rule in *Mahmood*: when the BIA has declined to exercise sua sponte authority based on a misunderstanding of the law, the court of appeals has the authority to review the decision and remand back to the BIA, which would still possess discretion over whether to exercise its sua sponte authority.²⁸⁴ The Third Circuit vacated the BIA's order and remanded Pllumi's case, holding that the BIA had mistakenly believed that the quality of healthcare in Albania was not "other serious harm" under 8 C.F.R. § 1208.13(b)(1)(iii)(B).²⁸⁵

Prior to *Kucana*, one circuit judge had also proposed review based on "exceptional circumstances." In response to the argument that the lack of a standard precluded review of the decision not to reopen sua sponte, Judge Clarence Arlen Beam, dissenting from the Eighth Circuit's decision in *Tamenut*, argued that administrative law recognizing sua sponte review in "exceptional circumstances" and case law explaining when "exceptional circumstances" occur could provide a meaningful standard of review for courts to utilize.²⁸⁶ Judge Beam conceded that this deferential standard might lead federal courts to affirm the BIA in most cases, but noted that "[t]he critical factor . . . is that review is proper."²⁸⁷

III. JUDICIAL REVIEW OF SUA SPONTE MOTIONS TO REOPEN THROUGH *KUCANA*'S REASONING

The Supreme Court's holding in *Kucana* specifically reserved the issue of whether the decision not to reopen sua sponte was subject to judicial

278. *See id.* at 159–60.

279. *Id.* at 157.

280. *Id.* at 157–58.

281. *Id.* at 157.

282. *Id.* at 158.

283. *See id.* at 159–60 (citing *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474–75 (3d Cir. 2003)).

284. *See id.*; *see also* *Mahmood v. Holder*, 570 F.3d 466, 469 (2d Cir. 2009).

285. *See Pllumi*, 642 F.3d at 163. Had this been "other serious harm," there would have been grounds for relief from his removal, making Pllumi's inability to seek treatment for his injuries if removed a factor worthy of consideration by the BIA. *Id.*

286. *See Tamenut v. Mukasey*, 521 F.3d 1000, 1006 (8th Cir. 2008) (Beam, J., dissenting).

287. *Id.* at 1006–07.

review.²⁸⁸ The circuit courts have subsequently shown division on this issue, with some circuits holding fast to pre-*Kucana* case law, while others call for these cases to be revisited in light of *Kucana*. This Note argues that *Kucana*'s analysis should allow for judicial review of the BIA's decision not to reopen sua sponte.

Part III.A argues that courts should review the BIA's decision not to reopen sua sponte, both because this power is granted to the BIA through regulation and because the courts can apply a meaningful standard of review to these cases. Part III.B argues that judicial review of the decision not to reopen sua sponte is in line with the Court's historical move toward greater review of executive immigration decisions within the plenary power doctrine.

A. Review of Sua Sponte Motions to Reopen Follows from Kucana's Reasoning

Because the BIA's sua sponte power is derived from regulation,²⁸⁹ it should be subject to the same review as party motions to reopen. Circuit courts should use the BIA's own "exceptional circumstances" standard to review the decision not to review sua sponte in order to ensure fair hearings for aliens before the BIA.

1. Sua Sponte Power Should Be Subject to Review by the Courts

In *Kucana*, the Supreme Court held that when a decision of the Attorney General (or the BIA) is made discretionary by statute, courts may not review that decision.²⁹⁰ Sua sponte authority is not granted by statute, but by the same regulation at issue in *Kucana*.²⁹¹ Without explicit statutory language granting the power to reopen sua sponte, the decision not to reopen should not evade *Kucana*'s reasoning: a power made discretionary by regulation alone cannot be removed from review of the courts.

The authority to reopen, whether on motion by the parties or sua sponte power, is an important discretionary power used to ensure a fair proceeding. Unlike most substantive immigration powers, which are reserved for Congress and the Executive under the plenary power doctrine, sua sponte motions to reopen represent a power exercised as part of the due process required during an immigration proceeding.²⁹² In this sense, the decision not to reopen sua sponte is the same as the decision not to reopen on a motion brought by a party in the case. As a result, under *Kucana*'s reasoning, both should be reviewable. When new facts or evidence become available, and the strict ninety-day window imposed by IIRIRA for filing a motion to reopen has passed, asking the BIA to exercise its sua sponte power fills the same role as a motion to reopen during the ninety-day

288. *Kucana v. Holder*, 130 S. Ct. 827, 839 n.18 (2010); see also *supra* Part I.E.

289. See *supra* note 63–64 and accompanying text.

290. See *supra* note 154 and accompanying text.

291. See 8 C.F.R. § 1003.2(a) (2011).

292. See *supra* notes 162–65 and accompanying text.

window: to correct the record and evaluate the original decision in the light of this new evidence.²⁹³

The distinction between agency action and inaction should not preclude review of the decision not to reopen sua sponte. When the BIA decides not to reopen sua sponte, its decision still has major consequences for an alien seeking to remain in this country, and is an exercise of “coercive power” in the sense that the *Heckler* Court held would merit judicial review.²⁹⁴ The Court in *Kucana* made no distinction between agency action and inaction, considering the decision not to grant Kucana’s motion to reopen as an example of agency action.²⁹⁵ Thus, even if the decision not to reopen sua sponte is deemed agency inaction, this status alone should not preclude review under *Kucana*’s reasoning.

Review of the decision not to reopen sua sponte is also in line with the Court’s interpretation of congressional intent in IIRIRA. The Court found that Congress codified the requirements of the motion to reopen, but did not codify the Attorney General’s power to grant or deny these motions.²⁹⁶ The Court found that IIRIRA’s silence on motions to reopen, in the midst of specific carve-outs and limits on judicial review, meant that Congress did not intend to exclude motions to reopen from judicial review.²⁹⁷ Similarly, Congress could have chosen to codify the Attorney General’s discretion over sua sponte motions to reopen or specifically shield these decisions from judicial review.²⁹⁸ Such language in the statute would have shown Congress’s clear intent to place the decision not to reopen sua sponte outside of the purview of the courts. Congress’s silence should not be construed to allow the Executive Branch the power to declare itself beyond judicial oversight.²⁹⁹ Doing so would equate congressional silence with the delegation to the Executive of the authority to alter the jurisdiction of the federal judiciary.³⁰⁰ In the face of Congress’s silence, sua sponte motions should also be subject to judicial review.

The *Kucana* Court’s final argument in favor of judicial review, the broad presumption in favor of review of administrative decisions, should also apply to sua sponte motions to reopen. The Court’s well-settled policy of favoring judicial review where a jurisdiction-stripping provision is ambiguous puts Congress on notice that its silence will be construed, wherever possible, as allowing for judicial review of an agency decision.³⁰¹ In *Kucana*, the Court construed Congress’s silence in IIRIRA to find judicial review of these decisions proper.³⁰² A similar analysis of

293. See *supra* notes 58–66 and accompanying text.

294. See *supra* note 220 and accompanying text. See generally Bressman, *supra* note 197.

295. See *Kucana v. Holder*, 130 S. Ct. 827, 840 (2010).

296. *Id.* at 838; see also *supra* note 168 and accompanying text.

297. See *Kucana*, 130 S. Ct. at 837–38.

298. See *supra* note 165 and accompanying text.

299. See *supra* notes 169–69 and accompanying text.

300. See Clark & Leiter, *supra* note 170, at 1698–1704 (discussing nondelegation and judicial review of agency discretion).

301. See *supra* note 177 and accompanying text.

302. See *supra* notes 175–79 and accompanying text.

Congress's silence on sua sponte motions to reopen also invites the presumption that judicial review of these decisions should be allowed. This distinction should apply regardless of whether a court is reviewing an exercise of discretion or the decision not to exercise that discretion.³⁰³ The important distinction is whether discretion has been granted through statute or regulation, not whether the court is reviewing an action or lack of action.

2. Courts Can Find a Meaningful Standard by which to Review Sua Sponte Decisions

While the question of whether the decision to reopen sua sponte is made discretionary by statute or by regulation may appear to be a simple one, the question of whether a meaningful standard of review exists by which to evaluate this decision is more complex. Some circuit courts denying review—the Eighth and Eleventh Circuits—have relied on both the APA and the Supreme Court's decision in *Heckler v. Chaney* to find that the BIA's decision not to reopen sua sponte is “committed to agency discretion by law” because Congress has supplied no meaningful standard by which to review these decisions, making any review of the decision not to reopen sua sponte meaningless.³⁰⁴ In *Tamenut*, for example, the Eighth Circuit held that, under *Heckler*, any standard of review would be meaningless because courts would create it without guidance from Congress.³⁰⁵

The *Heckler*-APA line of reasoning should not apply for two reasons. First, the APA's general provisions precluding judicial review are superseded by IIRIRA's specific provisions that either strip judicial review or leave it intact.³⁰⁶ The Ninth Circuit in *ANA International*, in finding the APA inapplicable where more specific IIRIRA provisions governed, noted that the APA only applied in “rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.”³⁰⁷ Motions to reopen are not drawn so broadly as to have no law to apply, because case law created by the BIA and statutory provisions for motions to reopen brought by the parties can provide standards by which to review the decision not to reopen sua sponte.³⁰⁸ The Ninth Circuit also noted in *Spencer Enterprises* that agency practice and regulations can inform judicial review of an agency decision where Congress has not provided a meaningful standard of review through statute.³⁰⁹ Because IIRIRA's guidelines provide the analysis for motions to reopen, the APA should be inapplicable. Even if 8 C.F.R. § 1003.2(a), the regulation granting sua sponte authority, were so broad as to make review less meaningful, BIA

303. See Bressman, *supra* note 197, at 1697 (arguing that a decision by an agency not to act should be reviewable unless there is clear statutory language to the contrary).

304. See *Ochoa v. Holder*, 604 F.3d 546, 549 (8th Cir. 2010); *James-Aguirre v. Att'y Gen.*, 369 F. App'x 101, 103 (11th Cir. 2010).

305. See *supra* note 229 and accompanying text.

306. See *supra* note 268 and accompanying text.

307. *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 890–91 (9th Cir. 2004).

308. See *supra* notes 270, 282–87 and accompanying text.

309. See *supra* note 270 and accompanying text.

practices could inform the standards that courts use to review these decisions.³¹⁰

Second, the Court in *Kucana* squarely rejected the inference from *Heckler* that agencies could place themselves outside the purview of the courts through regulation where Congress had not acted.³¹¹ In *Gor*, the Sixth Circuit noted that its precedential case on sua sponte motions to reopen—*Harchenko*—relied on *Heckler*, the APA, and the now flawed premise that an agency could use *Heckler* to justify removing itself from the jurisdiction of the federal courts without an act of Congress.³¹² Chief Judge Alice Batchelder, in her concurring opinion in *Gor*, justified continued adherence to that premise on the basis that sua sponte authority was created by regulation alone and not codified in statute; thus, she argued that an alien had no right to a sua sponte reopening and no right to have this decision reviewed by a court.³¹³ This argument fails because motions to reopen by the parties were not created by regulation either. IIRIRA merely codified a pre-existing procedural remedy.³¹⁴ Creation by regulation alone does not distinguish the power to reopen upon a party's motion from the power to do so sua sponte. Therefore, *Kucana* and its reasoning should be the applicable standard for determining jurisdiction to review sua sponte motions to reopen, not *Heckler* and the APA.

Although courts sympathetic to *Heckler's* analysis point to the lack of a meaningful standard, a few potential standards can be gleaned from relevant case law. One standard that courts could apply is to review sua sponte denials when the BIA misinterprets the relevant law.³¹⁵ In *Mahmood*, the Second Circuit noted that the BIA's decision would be reviewable when it was based on a misunderstanding of the applicable law, regardless of circuit precedent prohibiting review of the decision not to reopen sua sponte.³¹⁶ In *Pllumi*, the Third Circuit adopted the *Mahmood* standard and vacated the BIA's order declining to review sua sponte based on an erroneous interpretation of the law.³¹⁷ This standard focuses on the issue of whether the BIA has correctly interpreted the law that it is charged with applying, an issue that is tangentially related to the exercise of sua sponte power itself. A mistake of law standard, however, would still not allow for review of a decision not to reopen sua sponte where the BIA had applied the correct interpretation of law in a manner that led to an unjust outcome.

Therefore, the strongest standard would be one that reviews sua sponte motions to reopen for the existence of "exceptional circumstances" under an abuse of discretion standard. The BIA uses "exceptional circumstances" as its own test for when to exercise its sua sponte power, and the body of law

310. See *supra* notes 286–87 and accompanying text.

311. See *supra* note 246 and accompanying text.

312. See *id.*

313. *Gor v. Holder*, 607 F.3d 180, 194–95 (6th Cir. 2010) (Batchelder, C.J., concurring).

314. See *supra* note 167 and accompanying text.

315. See *supra* notes 271–85 and accompanying text.

316. See *supra* notes 271–76 and accompanying text.

317. See *supra* notes 277–82 and accompanying text.

created by the BIA can inform courts as to its meaning.³¹⁸ In fact, Congress has defined “exceptional circumstances” for removal proceedings in IIRIRA at 8 U.S.C. § 1229a, although not specifically in the section governing motions to reopen.³¹⁹ Although an exceptional circumstances test applied through an abuse of discretion standard might lead to affirmation of the BIA’s decision not to reopen in most cases, judicial review of this decision still provides an important procedural safeguard that ensures a fair proceeding before the BIA.³²⁰

Some may argue that reviewing the decision not to reopen sua sponte under such lenient standards requires precious judicial resources that are better spent elsewhere. Yet in their study of the large increase in petitions for review to the courts of appeals in the early 2000s, John Palmer, Stephen Yale-Loehr, and Elizabeth Cronin noted that denial of a motion to reopen or reconsider was “likely to be appealed at a much lower rate than decisions in appeals directly from IJs.”³²¹ Reviews of decisions not to reopen sua sponte most likely represent a small subset of the petitions for review filed each year, in part because the courts of appeals would apply an “abuse of discretion” standard that makes review of the decision not to reopen potentially less fruitful than a petition for review of the underlying BIA decision itself.³²² Adding a relatively small proportion of all removal cases to the federal docket will not create a drag on the efficiency of the judicial system, and review in these cases ensures a fair proceeding for all aliens facing removal.

*B. Review of Sua Sponte Motions to Reopen as Part of the Court’s Move
Toward Judicial Review of Immigration Proceedings*

Until the 1950s, the plenary power doctrine and its demand of deference to the Executive in immigration matters limited the Supreme Court’s reach into immigration policy.³²³ Since then, the Supreme Court has moved toward finding room within the plenary powers doctrine for due process and fair hearings in immigration proceedings.³²⁴ In *Mathews*, the case that created the due process standard for administrative proceedings, one of the factors put forward by the Court was the risk of mistake due to inadequate procedures.³²⁵ The *Mathews* Court was concerned that an overemphasis on speed and efficiency was leading to unjust decisions in administrative

318. See *supra* note 64 and accompanying text.

319. 8 U.S.C. § 1229a(e) (2006).

320. See Palmer, Yale-Loehr, & Cronin, *supra* note 132, at 38 n.202 (citing *Oh v. Gonzales*, 406 F.3d 611, 612 (9th Cir. 2005); *Khouzam v. Ashcroft*, 361 F.3d 161, 165 (2d Cir. 2004)) (noting that circuits may use an “abuse of discretion” standard when reviewing the decision to reopen, but will utilize a higher standard when reviewing the decision on the merits).

321. Palmer et al., *supra* note 132, at 38–39.

322. *Id.*

323. See *supra* notes 102–03 and accompanying text.

324. See *supra* notes 104–12 and accompanying text.

325. See *supra* note 109 and accompanying text.

hearings.³²⁶ With increased judicial criticism of the BIA and a swell of appeals to the circuit courts,³²⁷ review of sua sponte decisions would create a deterrent against inadequate and unjust proceedings before the BIA. An increasing number of petitions for review creates the risk that fast decisions will trump the right ones. Even if judicial review only occurs in a small number of cases, the threat of this review would provide the impetus for the BIA to ensure fair and thorough decisions if it wishes to avoid the watchful eye of the courts.

In *Plasencia*, the Court required procedural due process in proceedings for returning immigrants, and opened the door for review of immigration proceedings that did not meet this due process standard.³²⁸ The *Plasencia* Court recognized that when an alien is present in the United States, his relationship with the United States is fundamentally different from an immigrant who has not yet entered, and thus he is entitled to due process in the hearing to remove him.³²⁹ As noted in *Kucana*, motions to reopen for aliens in the United States are an important part of ensuring a “reasonable hearing.”³³⁰ Without review of sua sponte motions to reopen, aliens could be subject to removal orders even where exceptional circumstances exist, potentially leading to an outcome in conflict with the procedural due process required by *Plasencia*. *Kucana* represented another step in the progression toward greater judicial review by allowing review of motions to reopen when brought by the parties. Without any clear statutory prohibition from Congress, judicial review of the decisions not to reopen sua sponte follows from the Court’s established policy of favoring basic due process for aliens in immigration proceedings.

CONCLUSION

The federal immigration apparatus is meant to provide for fair and speedy adjudications when an alien is subject to removal. Although they are not beneficiaries of all of the Constitution’s protections, these potential Americans are entitled to basic due process rights when their ability to remain in this country is being decided. While judicial review of BIA decisions certainly adds time to the process of removal, the speed of a decision does not make it right. In passing IIRIRA, Congress set out certain categories of decisions that were not subject to review in an attempt to speed up the removal process. Where Congress was silent, however, the strong presumption in favor of judicial review should apply.

In *Kucana*, the Court applied that presumption to allow for judicial review of motions to reopen brought by the parties. The Court held that an agency could not unilaterally declare itself insulated from judicial review through a regulation. The BIA’s decision not to reopen sua sponte should be subject to the same reasoning. Even under a lenient standard, courts can

326. *See Mathews v. Eldridge*, 424 U.S. 319, 341–42 (1976).

327. *See supra* notes 104–08 and accompanying text.

328. *See supra* note 111 and accompanying text.

329. *See id.*

330. *Kucana v. Holder*, 130 S. Ct. 827, 837 (2010).

and should be able to provide a meaningful review of this decision. Judicial review of the decision not to reopen sua sponte would be an important tool for the circuit courts to ensure that proceedings before the BIA are fair. Using review to give potential Americans a fair decision, and not just a fast one, is an ideal worthy of the place that they hope to call home.