

Leave for Appeal: Departure as a Requirement for Review of Deportation Orders

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INTRODUCTION

In the wake of several much-celebrated cases in which aliens had deferred deportation for years through skillful use of the appeals process,¹ Congress amended the Immigration and Nationality Act (INA)² in 1961 to reduce the possibilities for courtroom maneuvers designed to defeat the enforcement of deportation orders.³ The addition of section 106 to the INA streamlined judicial review in deportation cases. As part of new limitations on such review, in a clause subjected to little congressional scrutiny, the amendment ostensibly shut the door on all appeals of deportation once an alien has departed the United States.

More than twenty-five years later, many of the ills Congress addressed with the 1961 amendment have reemerged with a force that warrants legislative reconsideration of the issue. Through the calculated use of appeals to final deportation orders — which allow for an automatic stay of deportation in their pendency — deportable aliens may delay for months and years their expulsion from the United States. The statutory incentives to create such delay are obvious: the

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1. See *infra* notes 11-38 and accompanying text.
2. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1982) [hereinafter INA].
3. INA § 106, 8 U.S.C. § 1105a.

alien not only continues to enjoy his presence here but also keeps open the possibility for reversal of his deportable status through the review process. The consequences of departure under the pall of a deportation order are ultimate, if section 106(c) is enforced as intended; the order moves beyond the sphere of judicial challenge as the courts lose jurisdiction over its review.

Some jurisdictions, led by the Ninth Circuit and its 1977 decision in *Mendez v. INS*,⁴ have moved to soften the sharp edges of the departure rule. Under the so-called *Mendez* exception, a court may entertain petitions for review of deportation orders and motions to reopen from a deportee already departed if the deportation is not “legally executed,” or order the alien’s readmittance so that such proceedings may go forward.⁵ The exception enjoys no foundation in the legislative history of section 106(c). Indeed, as the Fifth Circuit concluded in *Umanzor v. Lambert*,⁶ the *Mendez* decision has become a potential “sinkhole” into which the departure rule could be swallowed altogether.⁷ The *Mendez* exception initially applied to only the more egregious cases of official misconduct in the execution of deportation orders, instances of kidnapping — not always proverbial — by the immigration authorities, implicating a basic infringement of the alien’s due process. As noted in *Umanzor*, it since has paved the way for courts to consider, under the guise of jurisdictional questions, the merits of all challenges filed from abroad.⁸ The alien with frivolous claims is thus permitted to burden the immigration administrators and the courts from both inside and outside the United States, exactly the problem that Congress sought to address with the passage of section 106(c).

This is not to say, however, that the *Mendez* line of decisions is entirely bereft of sound consideration. Just as the departure rule provokes dilatory maneuvers by likely deportees, it also encourages the Immigration and Naturalization Service (INS) to hasten the deportation of aliens enjoying meritorious claims in the appeal of their deportation orders. There are cases in which the immigration authorities appear to have sought to effect deportation so as to moot the administrative hearing of an alien’s motion to reconsider, to which an automatic stay does not attach.⁹ In those circuits where *Mendez* has not prevailed, an alien with valid grounds for reconsideration may never get his last day in court, departure having precluded further review of his file.

4. 563 F.2d 956 (9th Cir. 1977).

5. *Id.* at 958-59.

6. 782 F.2d 1299 (5th Cir. 1986).

7. *Id.* at 1303.

8. *Id.*

9. *See infra* notes 82-83; *see also* 8 C.F.R. § 242.22 (1987) (automatic stay).

Part I of this Article examines the legislative history of section 106, highlighting congressional consideration of the departure rule. The Article concludes that the rule was intended to prevent all appeals of deportation orders by aliens who have left the United States, regardless of the circumstances of their departure. Part II discusses the *Mendez* line of cases and the Fifth Circuit's recent criticism of the exception in *Umanzor v. Lambert*. This part also comments upon the potential for INS abuse of the departure rule. Finding that neither the rule nor its exception best serves the dual objectives of deterring manipulative delay while affording fairness to aliens seeking to challenge the finality of their deportation, Part III of this Article recommends that, with certain exceptions, deportation appeals be permitted only from abroad.¹⁰ The change, to be implemented by amending section 106, would eliminate present incentives to file frivolous appeals but would, at the same time, protect the rights of those aliens able to demonstrate their right to administrative or judicial relief.

LEGISLATIVE HISTORY OF THE DEPARTURE RULE

The late 1950s witnessed a series of cases in which reputed racketeers and "subversives" had proved able to avoid deportation by exploiting expanded rights of review recently granted to aliens.¹¹ In 1955 the United States Supreme Court ruled that the judicial review provisions of the Administrative Procedure Act¹² applied to all deportation cases.¹³ This change allowed aliens to pursue declaratory and injunctive remedies to deportation orders where, in the past,

10. The proposal is Professor Martin's. See Martin, Mandel, Cheng Fan Kwok, and Other Unappealing Cases: *The Next Frontier of Immigration Reform*, 27 VA. J. INT'L L. 803, 815-19 (1987).

11. Six or seven particularly grievous instances of successful delay were repeatedly trotted out in congressional debate to support the passage of section 106, the most notorious of which was the case of Carlos Marcello. See H.R. REP. NO. 565, 87th Cong., 1st Sess. 7-11 (1961) (litigation chronology of Marcello deportation case); *id.* at 20-26 (chronologies of other cases); *Judicial Review of Deportation and Exclusion Orders: Hearing Before Subcomm. No. 1 of the Comm. on the Judiciary*, 85th Cong., 2d Sess. 4 (1958) [hereinafter *Hearings on Judicial Review of Deportation Orders*] (testimony of Rep. Celler) (noting cases highlighted by the Commissioner of the INS).

12. Pub. L. No. 79-404, ch. 324, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 701-706).

13. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); see also Letter from Deputy Attorney General Byron R. White to House Judiciary Committee Chairman Emanuel Celler (Apr. 18, 1961), reprinted in H.R. REP. NO. 565, *supra* note 11, at 3-4. The Court later held that the APA also governed judicial review of exclusion orders. *Brownell v. Shung*, 352 U.S. 180 (1956).

only the route of habeas corpus had been available to them.¹⁴ Coupled with other factors, such as the existing inapplicability of *res judicata* to rulings on deportation challenges, these new opportunities were exploited by many for the obvious purpose of delay. President Eisenhower brought these cases to the attention of Congress, and requested legislative action to curb the possibilities for abuse.¹⁵ Harping on these examples,¹⁶ and spearheaded by the House Committee on the Judiciary,¹⁷ Congress responded by enacting section 106.¹⁸

Adapting the review framework of the Hobbs Act¹⁹ to the immigration context, the new law eliminated the possibility for declaratory and injunctive relief in deportation appeals and restricted judicial review of all "final orders" of deportation to the courts of appeals,²⁰ while protecting the constitutional right to petition for habeas corpus.²¹ It limited the period during which an alien could

14. See T. ALEINIKOFF & D. MARTIN, *IMMIGRATION PROCESS AND POLICY* 564-65 (1985). Review of a petition for habeas corpus was, at that time, generally available only where the petitioner was in the physical custody of enforcement authorities, i.e., in jail. This requirement since has been abandoned in cases outside the immigration area. See *Hensley v. Municipal Court*, 411 U.S. 345 (1973) (parole constitutes custody); *Jones v. Cunningham*, 371 U.S. 236 (1963) (petition for habeas corpus allowed from individual released on own recognizance); *United States ex rel. Marcello v. District Director of Immigration*, 634 F.2d 964 (5th Cir.), *cert. denied*, 452 U.S. 917 (1981) (alien subject to INS supervised parole allowed to petition under section 106(a)(9)). It seems likely that a deportation order, in itself, is insufficient to establish the custody requirement of habeas review for section 106 purposes. See *Umanzor v. Lambert*, 782 F.2d 1299, 1302 (5th Cir. 1986); *United States ex rel. Marcello*, 634 F.2d at 971 & n.11.

15. See H.R. Doc. No. 85, 85th Cong., 1st Sess. (1957) (message from President Eisenhower, Jan. 31, 1957) ("the growing frequency of . . . cases brought for purposes of delay, particularly those involving aliens found to be criminals and traffickers in narcotics and subversion, makes imperative the need for legislation limiting and carefully defining the judicial process"). See also H.R. Doc. No. 329, 84th Cong., 2d Sess. (message from President Eisenhower, Feb. 8, 1956) (advocating same).

16. See *supra* note 8; see also *Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 22 (statement of Rep. Walter); 107 CONG. REC. H18,286 (1961) (remarks of Rep. Poff). Critics of the legislative response noted that this handful of cases did not necessarily merit the comprehensive response of section 106. See *Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 3-7 (testimony of Rep. Celler); H.R. REP. NO. 565, *supra* note 11, at 28-33 (minority views on H.R. 187); 107 Cong. Rec. S19,653 (1961) (remarks of Sen. Hart). The point was not without some force: of the 15,285 administrative dispositions of deportation and exclusion cases in 1957, only 298, or 1.9%, were appealed to the courts for habeas corpus or declaratory judgment. H.R. REP. NO. 565, *supra* note 11, at 29 (minority views).

17. The House took full charge of the drafting and consideration of section 106, to the point that its version of the amendment was accepted without change by the Senate in conference. See H.R. REP. NO. 1172, 87th Cong., 1st Sess. (conference report). See also 107 CONG. REC. S19,654 (1961) (remarks of Sen. Javits noting apathy of Senate on the bill).

18. Act of Sept. 26, 1981, Pub. L. No. 87-301, § 5, 75 Stat. 651 (codified at 8 U.S.C. § 1105a).

19. 28 U.S.C. § 158.

20. See 8 U.S.C. § 1105a.

21. See *id.* § 1105a(a)(9); see also H.R. REP. NO. 565, *supra* note 11, at 15

appeal the entry of a deportation order;²² mandated the exhaustion of administrative remedies before an alien could turn to the courts;²³ and required petitions for review to include notice of previous judicial action on the claim,²⁴ thus confirming the applicability of res judicata to immigration cases.²⁵ Finally, the statute provided that “[a]n order of deportation or exclusion shall not be reviewed . . . if [the alien] has departed from the United States after the issuance of the order.”²⁶

The departure rule of section 106(c) was not subjected to extensive congressional debate. The legislative reports accompanying the legislation did no more than to restate its statutory terms.²⁷ During hearings before the Judiciary Committee on a forerunner identical to section 106, however, the Congress did confront the departure provision in the context of the case of William Heikkila, a Finnish national whose immigration history was among those repeatedly recited by supporters of section 106.²⁸ Heikkila, an alleged subversive, had been ordered deported as early as 1948, and yet had managed to stay in the United States, save for one short interval, up until the time of his death in 1960.²⁹ The course of much of his litigation against deportation was unspectacular if effective in its practical end; through a series of appeals and a petition for habeas corpus, Heikkila was successful in deferring execution of the order despite his failure to have the order actually overturned.

What distinguished Heikkila’s case, however — and makes it im-

(“aliens are not limited to courts of appeal in seeking habeas corpus”).

22. 8 U.S.C. § 1105a(a)(1) (mandating that appeal be filed within six months of effective date of final deportation order).

23. *Id.* § 1105a(c).

24. *Id.*

25. The statute also limited the venue of review petitions to the judicial circuit in which the alien resided, 8 U.S.C. § 1105a(a)(2); limited judicial consideration to the administrative record of the case, with exception for bona fide claims of nationality, 8 U.S.C. § 1105a(a)(4) & (5); and provided a limited opportunity for collateral attachment of deportation orders in the event of subsequent criminal prosecution for illegal reentry. *See* 8 U.S.C. § 1105a(a) & (a)(6). For a general consideration of the 1961 amendment, and of the judicial developments that led to its passage, see Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 *YALE L.J.* 760, 760-81 (1962).

26. 8 U.S.C. § 1105a(c).

27. *See* H.R. REP. NO. 1086, 87th Cong., 1st Sess. 28 (1961); H.R. REP. NO. 565, *supra* note 11, at 14.

28. *See, e.g.*, H.R. REP. NO. 565, *supra* note 11, at 11, 20-21; *Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 4 (testimony of Rep. Celler) (Heikkila case cited by Commissioner of INS).

29. For a chronology of Heikkila’s fight against deportation, see H.R. REP. NO. 565, *supra* note 11, at 20-22.

portant to interpretation of the departure rule — were the circumstances surrounding his brief expulsion from the country. In April 1958, two weeks after a renewed deportation order had been issued against him, Heikkila was seized by immigration authorities outside his office in San Francisco and flown to Vancouver, Canada, where he was placed aboard a plane to Finland.³⁰ He was not permitted to phone either his wife or his attorney before the enforced departure,³¹ nor was he allowed to contact the Finnish consul.³² A federal district court judge had issued a restraining order prohibiting deportation the day *after* the expulsion, and as details of the incident came to public light, public uproar led INS Commissioner Swing to allow Heikkila's reentry on parole pending appeal.³³ Although some members of Congress saw fit to criticize the Heikkila deportation in its entirety,³⁴ others, including one who would later become a chief sponsor of section 106, were careful to condemn only an INS failure to pursue complete disclosure, as opposed to decrying the agency's methods of enforcement.³⁵

The Heikkila case could not have been far from all minds when the Judiciary Committee convened in July 1958 to consider the proposed limitations on review of deportation orders; and in fact, it emerged during an exchange between members of the committee and Assistant Attorney General Malcolm Anderson.³⁶ Confronting

30. *Heikkila v. Barber*, 164 F. Supp. 587, 590 (N.D. Cal. 1958) (denying motion to find INS District Director in contempt), *aff'd*, 308 F.2d 558 (9th Cir. 1962).

31. *Finn's Own Kidnap Story*, San Francisco News, Apr. 23, 1958, *reprinted in* 104 CONG. REC. 7095-7096 (1958) (remarks of Rep. Shelley) (Heikkila's own account as told to reporter); *Deportee Return Approved*, San Francisco Call-Bulletin, Apr. 22, 1958, *reprinted in* 104 CONG. REC. 7094-7095 (1958) (remarks of Rep. Shelley); *The Bum's Rush by Immigration*, San Francisco Chron., Apr. 22, 1958, *reprinted in* 104 CONG. REC. 7097 (1958) (Acting INS regional commissioner concedes that deportation was effected without notification of spouse or attorney); *see also* H.R. REP. NO. 565, *supra* note 13, at 20-22 (chronology of the Heikkila case).

32. *See Finn's Own Kidnap Story*, *supra* note 31, 104 CONG. REC. at 7096.

33. *See id.*

34. *See* 104 CONG. REC. 7090 (1958) (remarks of Rep. Shelley); San Francisco News, Apr. 22, 1958, *reprinted in* 104 CONG. REC. 7094 (1958) (remarks of Rep. Shelley) (noting critical comments of Rep. Moss).

35. *See* 104 CONG. REC. 8920 (1958) (extension of remarks of Rep. Hillings); 104 CONG. REC. A3855 (1958) (extension of remarks of Rep. Walter). This view was apparently supported by some editorialists. *See Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 27 (remarks of Rep. Hillings) (reprinting San Francisco Chronicle commentary concluding that had the INS "within hours of Heikkila's deportation, supplied the public with the full facts [of his case] and with legal basis for acting the storm would never have blown up."). Representative Walter later spoke in strong support of section 106 both in hearings on the bill and in the floor debate, *see Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 22 (statement of Rep. Walter), 107 CONG. REC. 18,281 (1961) (remarks of Rep. Walter, and it was he who submitted the final House and conference reports on the law. *See* H.R. REP. NO. 1086, 87th Cong., 1st Sess. (1961); H.R. REP. NO. 1172, 87th Cong., 1st Sess. (1961) (conference report).

36. *Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 27-31.

him with the extremity of the Heikkila file — both in the alien's success with dilatory legal tactics and in the facts of his attempted deportation — Congressman Hillings pressed Anderson on the meaning of the departure rule:

Mr. Hillings. This legislation would provide specifically that the deportation order would not be reviewed if the alien had actually departed from the United States — to make it clear, it would not be reviewed if he were outside the United States; is that correct?

Mr. Anderson. That is what is in the bill.

Mr. Hyde. With this in effect, if Heikkila had been deported, there would be no legal means by which he could have returned.

Mr. Anderson. It provides, if he gets a writ of habeas corpus, that he can stay until the case is disposed of.

Mr. Hillings. If he is out of the country, he could not be returned, or could not return.

Mr. Anderson. Yes.³⁷

The departure rule was to be given literal effect; a deportation order, once executed, would become unreviewable. Although Anderson went on to highlight instances in which aliens had departed voluntarily under sufferance of an order,³⁸ his hypothetical application of the law to the facts of the Heikkila case provides the best indication of the rule's intended breadth.

JUDICIAL CONSIDERATION OF SECTION 106(C)

The application of section 106 to immigration appeals launched from abroad by aliens previously deported received scant judicial attention during the first fifteen years following its enactment. The courts previously had found the Administrative Procedure Act to allow such appeals on the theory that its provision for judicial review of agency action applied except where expressly precluded by statute.³⁹ Section 106 supplied exactly that preclusion, as was recognized in at least two of the three decisions that addressed the question⁴⁰ prior to the Ninth Circuit's sweeping revision of the law in

37. *Id.* at 30-31.

38. *See id.* at 31.

39. *Estrada v. Ahrens*, 296 F.2d 690, 694 (5th Cir. 1961) (decided before effective date of section 106). *See also Kokoris v. Johnson*, 195 F.2d 518, 519 (4th Cir. 1952) (allowing appeal under the APA). *But see In re G_____ B_____*, 6 I. & N. Dec. 159 (BIA 1954) (ruling that departure precludes review of departure order).

40. *See Chen v. INS*, 418 F.2d 209 (8th Cir. 1969) (appeal of alien who had voluntarily departed under order of deportation dismissed for want of jurisdiction); *Niarchos v. INS*, 393 F.2d 509 (7th Cir. 1968) (denying petition for collateral review of deportation order previously executed). *But see Espinoza Ojeda v. INS*, 419 F.2d 183, 184 n.1 (9th Cir. 1969) (noting with approval lower court's denial of motion to dismiss an appeal by an alien already deported). That the departure rule of section 106 could

Mendez. These decisions, coupled with the plain language of the Act, perhaps accounted for the infrequency with which such appeals were filed; the possibilities for successful review were slight.

Most instructive of the three cases was the Seventh Circuit's opinion in *Niarchos v. INS*,⁴¹ insofar as it involved a forced expulsion rather than a voluntary departure. Accepting his present deportability, the petitioner instead challenged the validity of an earlier order which had revoked a conditional crewman's landing permit.⁴² The INS had failed to provide the alien with an interpreter during the official inquiry that resulted in the revocation — a failure which *Niarchos* claimed a violation of due process in light of his inability to speak or understand English.⁴³ The court decried the "shocking circumstances" of the hearing, noting that the hearing was "contrary to the aim of our law to provide fundamental fairness in administrative proceedings";⁴⁴ yet the decision upheld the letter of section 106(c) and denied the petition for review.⁴⁵ The *Niarchos* case demonstrated the harshness of the departure rule, but conceded that the courts had no choice but to effect it even in the face of INS misbehavior.

Mendez and Progeny

The Ninth Circuit ruled otherwise in *Mendez v. INS* in 1977. Considering the appeal of an alien whose counsel had not been notified of his client's imminent deportation, the court held that, in the context of section 106, "departure" could only be read to include deportations legally executed.⁴⁶ Without discussion of the legislative history of section 106(c), the court concluded that to foreclose review of illegal deportations would be to arrive at a "captious interpretation" of the provision.⁴⁷ The court accordingly ordered the INS

reverse previous rulings was recognized by at least one witness before the House Judiciary Committee during its consideration of the measure. See *Hearings on Judicial Review of Deportation Orders*, *supra* note 11, at 53 (statement of N. Rosenfield). None of the three pre-*Mendez* decisions discussed the legislative history of the act.

41. 393 F.2d 509 (7th Cir. 1968).

42. The order had been issued under 8 U.S.C. § 1282(b). See 393 F.2d at 510. Although the court found otherwise, revocation of landing permits arguably are not subject to the constraints of section 106, which apply only to proceedings under 8 U.S.C. § 1252. See 8 U.S.C. § 1105a(a). For present purposes, however, the distinction, and the possible error, are of little significance.

43. The court highlighted the contrast to his deportation hearing five years later, in which an interpreter was provided. See *Niarchos*, 393 F.2d at 510.

44. *Id.* at 511.

45. See *id.* The court did express its hope that the Attorney General would take into account the context of the earlier deportation in any consideration of the alien's petition for reentry. *Id.*

46. *Mendez*, 563 F.2d at 958.

47. *Id.* at 959 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388 (1947)).

to readmit Mendez so that he might pursue appeal in the case.⁴⁸

The critical question created by the *Mendez* ruling was, of course, what findings would constitute illegality sufficient to defeat the departure rule. The opinion in *Mendez* seemed to find — without saying so in plain terms — that deportation without notice to counsel contravened constitutional requirements of procedural due process.⁴⁹ But, as the court itself noted, it was not “necessary to invoke constitutional grounds in order to dispose of this appeal”;⁵⁰ the decision relied more clearly upon violations by the INS of immigration statutes and of its own regulations.⁵¹ The court did not speculate whether its new exception to section 106(c) would apply to procedural irregularities unrelated to the execution of a deportation order, or where an appeal went to the merits of the order itself. In no way, however, did it preclude resort to its holding in situations beyond that considered in the case. If anything, the *Mendez* decision seemed to require the assumption of jurisdiction, despite the dictates of section 106(c), upon successful allegation of any infraction of the law or administrative rules occurring during the deportation process.

Most courts have interpreted *Mendez* expansively, although some decisions have, in dicta, ostensibly narrowed the exception to apply only where the alien’s challenge rises to a constitutional level.⁵² First of all, the exception has been held potentially to apply where the official infraction is slight. Considering a collateral attack on a deportation order under which petitioner previously had left the country, the Ninth Circuit in *United States v. Calderon-Medina*⁵³ paved

48. *Id.* at 959. After deportation, Mendez had petitioned for reconsideration on the grounds that the criminal conviction prompting the underlying order had since been vacated. *Id.* at 957. See 8 U.S.C. § 1251(a)(4).

49. The opinion did conclude that the Mendez deportation had transpired “in derogation of procedural due process,” *id.* at 959, and that the petitioner’s “right to . . . procedural due process became meaningless when he was deported without notice to his counsel.” *Id.* at 958 n.1. At no point, however, did the decision specifically assert that notification of counsel in such cases is constitutionally required.

50. *Id.* at 959.

51. Notification to counsel was, as the INS itself conceded, required by 8 C.F.R. § 292.5(a) (1987). See *Mendez*, 563 F.2d at 958 n.1. The court also found the failure to notify a violation of an alien’s right to counsel in deportation proceedings. See *id.* at 959; see also 8 U.S.C. § 1252(b).

52. See *Juarez v. INS*, 732 F.2d 58, 60 (6th Cir. 1984) (denying judicial review where petitioner had failed to exhaust his administrative remedies); *Newton v. INS*, 622 F.2d 1193, 1195 (3rd Cir. 1980) (disallowing *Mendez* exception where constructive notice to counsel had been effected). In neither case, however, did the holding rest on the distinction between constitutional violations and those implicating statutory or regulatory requirements.

53. 591 F.2d 529 (9th Cir. 1979).

the way for reversal of a deportation order on the grounds that the INS had not allowed the aliens to contact consular officials prior to their expulsion.⁵⁴ The decision denied the government's contention that section 106(c) stripped the court of jurisdiction,⁵⁵ and went further to suggest that an alleged violation need not be "concerned with the integrity of the fact finding process" in order to defuse the departure rule.⁵⁶

Perhaps more significantly, one court has broadened the *Mendez* rule to permit reconsideration of the *merits* of a deportation order itself, rather than limiting inquiry to the means of the order's execution.⁵⁷ In *Estrada-Rosales v. INS*⁵⁸ an alien was ordered readmitted to the United States to pursue a motion to reopen where the criminal conviction underlying his deportation order subsequently was vacated.⁵⁹ Furthermore, the courts not only have remedied alleged infractions with readmission and contingent permission to appeal, but also have heard and ruled on the appeals in full while the alien remained abroad.⁶⁰ Finally, decisions have ordered the Board of Immigration Appeals (BIA) to respect the *Mendez* exception despite regulations imposing the departure rule on administrative proceedings.⁶¹

Since its establishment in *Mendez*, the requirement of legal execu-

54. See *id.* In *Calderon-Medina*, the INS was alleged to have violated a regulation, 8 C.F.R. section 242.2(e), providing that "[e]very detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality." *Id.* at 530.

55. *Id.* at 530 n.4.

56. *Id.* at 531 (quoting argument presented by prosecuting counsel). The opinion did, however, conclude that the violation needed to have "harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceedings." *Id.* at 532. The case was remanded to the district court for decision of the issue. *Id.*

57. See *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); see also *Thorsteinsson v. INS*, 724 F.2d 1365 (9th Cir.) (denying motion to reopen brought by deported aliens where claim of ineffective counsel during deportation hearings was found groundless), *cert. denied*, 467 U.S. 1205 (1984). The dissent in *Umanzor*, while praising the *Mendez* exception as originally formulated, argued that it should be restricted to situations in which "the alleged illegality intimately touches the departure itself." 782 F.2d 1299, 1306 (5th Cir. 1986). For a discussion of *Umanzor*, see *infra* notes 66-70 and accompanying text.

58. 645 F.2d 819 (9th Cir. 1981).

59. *Id.* at 821.

60. See *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984) (asserting jurisdiction on *Mendez* grounds but denying petition for review of deportation order); see also *Juarez v. INS*, 732 F.2d 58 (6th Cir. 1984) (ordering the BIA to consider an appeal filed from Mexico). Most courts entertaining *Mendez* attacks on the departure rule, while ostensibly ruling on jurisdictional grounds alone, have in fact ruled on the merits of petitioners' claims. See *Thorsteinsson v. INS*, 724 F.2d 1365 (9th Cir. 1984) (examining claim of ineffective counsel); *Newton v. INS*, 622 F.2d 1193 (3rd Cir. 1980) (finding no failure to notify counsel prior to petitioner's deportation). See also *infra* notes 71-74 and accompanying text.

61. See *Juarez*, 732 F.2d 58 (ordering administrative review despite departure of petitioner); *Estrada-Rosales*, 645 F.2d at 822.

tion has emerged firmly established in the Ninth Circuit;⁶² it also has been accepted by the Sixth Circuit;⁶³ and the Third Circuit has indicated a willingness to follow suit.⁶⁴ The exception, however, was subjected to strong criticism in the Fifth Circuit's recent decision in *Umanzor v. Lambert*.⁶⁵

Defrocking Mendez: Umanzor v. Lambert

The *Umanzor* court considered a petition for review by an alien who had been deported less than a week after the BIA affirmed a denial of political asylum; the deportation occurred before the alien filed an appeal of the ruling in federal court. The decision found it unnecessary to confront directly the validity of the *Mendez* exception, holding that the deportation had been legally executed.⁶⁶ In dictum, however, the court strongly opposed any dilution of section 106's departure rule:

We entertain serious reservations regarding the "*Mendez* exception" for, if the exception is taken to its logical conclusion, any error or procedural defect at any point in the alien's deportation saga (from his arrest, hearing, BIA hearing, habeas proceeding in district court or appeal to the appropriate circuit court, to his final departure from the United States) would render the departure illegal. This being so, the later *allegation* of procedural error by a deported alien would force the district court and the circuit courts to review the entire matter. . . .⁶⁷

If applied in this expansive fashion, the opinion concluded, the *Mendez* exception becomes a "sinkhole that has swallowed the rule" of section 106(c).⁶⁸

The *Umanzor* court's analysis of the *Mendez* exception enjoys some merit. Granted, the exception has not, in practice, proved as fatal to the departure rule as the Fifth Circuit would have it, at least not yet: to date, only a handful of cases have entertained appeals from abroad on the basis of deportations not "legally executed."⁶⁹

62. See, e.g., *Thorsteinsson*, 724 F.2d at 1367; *Estrada-Rosales*, 645 F.2d at 820.

63. See *Juarez*, 732 F.2d 58.

64. See *Newton*, 622 F.2d at 1195 (noting that "there would be force" to a *Mendez* objection, if one were present).

65. 782 F.2d 1299, 1303 (5th Cir. 1986).

66. See *id.* at 1303 (concluding that "[w]e need not cross that Rubicon today"). *Umanzor* apparently claimed that notice to counsel of his deportation had been insufficient. The court disagreed, noting that *Umanzor's* attorney had been informed of the pending execution of the order some 22 hours before the actual departure. *Id.*

67. *Id.* (emphasis original).

68. *Id.* at 1303 n.5.

69. See cases discussed *supra*, notes 53-61 and accompanying text. See also *Umanzor*, 782 F.2d at 1306 (Brown, J., dissenting) (contending that "this *Mendez* 'sinkhole' apparently consists of only four cases"); 2 C. GORDON & H. ROSENFELD, IMMIGRA-

But the exception's potential swath could cut deeply into section 106(c), to the point where no appeal by an absent alien would be subjected to the summary dismissal Congress evidently intended. Were this to happen, whatever merit Congress saw in the original departure rule, and its object of facilitating judicial finality in immigration cases, would be utterly undone.⁷⁰

The Ninth Circuit's decision in *Thorsteinsson v. INS*⁷¹ well illustrates the possible difficulties presaged by the *Umanzor* critique. The Thorsteinssons claimed a lack of effective counsel tainted the proceedings that resulted in their deportation; their attorney had failed to invoke a defense to deportation which was known to him.⁷² Invoking *Mendez*, the court considered the facts of the challenge despite the aliens' subsequent departure under the order. The decision found no grounds for the alleged infirmity and dismissed the petition for want of jurisdiction.⁷³ In practical terms, however, the court had gone to the merits; the appeal had been handled just as if the petitioners had never left the country or, alternatively, as if there were no such provision as section 106(c). Any deported alien could presumably win appellate review with "mere allegations" of similar procedural irregularities alleged to have occurred at any point during the deportation process. The ruling in *Estrada-Rosales* would seem, moreover, to permit the hearing of all substantive claims as well.⁷⁴ "Legally executed" would come to define only those deportations that might withstand appeals filed by resident aliens. The result: a judicial gutting of the legislatively mandated rule.

At bottom, however, attacks on the possible breadth of the *Mendez* exception are unnecessary because even in the most limited application it violates the letter and intent of section 106. As the *Umanzor* court noted in looking to the plain language of the measure, "[t]he statute's command is unequivocal" in proscribing review of deportation orders after the affected alien's departure.⁷⁵ As this Article suggests above in examining the legislative history of the 1961 Act in the context of the Heikkila case, Congress apparently

TION LAW & PROCEDURE 8-59 & n.33 (1986) (listing cases involving *Mendez*).

70. No court considering a *Mendez* challenge has disavowed jurisdiction where it has found an infraction of law or regulatory measures to have occurred. *But cf.* *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979) (in collateral attack of prior deportation order, remanding case for determination of whether regulatory violation affected outcome of deportation proceedings).

71. 724 F.2d 1365 (9th Cir. 1984).

72. *Id.* at 1367.

73. *Id.* at 1367-68. The court found that counsel's failure to raise the defense of equitable estoppel constituted a tactical decision, however unwise, that did not rise to the plane of ineffective counsel from a due process perspective. *Id.* at 1368.

74. *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981). *See supra* notes 58-59 and accompanying text.

75. 782 F.2d at 1302.

intended absolute application of the departure rule — even when an alien is deported by means not far short of kidnapping.⁷⁶

Official Exploitation of the Departure Rule

The *Mendez* decision and its progeny thus have, strictly speaking, no basis in law; these cases present classic examples of the courts subverting the legislative will. And yet, in most of the cases where deported aliens have successfully invoked the exception to win appellate review — and in some cases where its applicability has been denied — the result seems to soundly strike a chord of basic legal fairness.⁷⁷ Government-sponsored abduction is presumably one practice that should not be statutorily encouraged; faithful implementation of the departure rule could have exactly that effect.⁷⁸ Other constraints on the immigration authorities do, of course, act to restrain immigration authorities from standardizing such extreme methods, and so proper judicial respect for section 106(c) is not likely to lead the INS regularly to exploit the arguably intolerable limits of the rule.⁷⁹ But there are other situations in which the dictates of fairness

76. See *supra* notes 28-38 and accompanying text.

77. In *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), appellants collaterally attacked a previous deportation in which they had not been permitted to contact consular authorities. *Calderon-Medina* seems to be the only case in which the exception was, from the perspective of fairness, pushed too far. Perhaps not coincidentally, however, *Calderon-Medina* has emerged as the only post-*Mendez* decision in which the court required a showing of prejudice, to be determined on remand. *Id.* at 532. *Umanzor*, on the other hand, perhaps presents an instance in which some general standard of fairness might have demanded application of the exception. Counsel in that case was notified of the execution of the deportation order less than two hours before the alien's scheduled departure, even though delays stretched that period to almost a day. See 782 F.2d at 1300-01; *id.* at 1306 (Brown, J., dissenting). The deportation was effected, moreover, well before the expiration of the six month period during which aliens are given leave to appeal final deportation orders resulting from administrative proceedings. See *id.* at 1305 (Brown, J., dissenting); see also 8 U.S.C. § 1105a(a)(1).

78. See *Umanzor*, 782 F.2d at 1305 (Brown, J., dissenting).

79. Persistent and blatant misbehavior on the part of the INS undoubtedly would result in wide tolerance of the *Mendez* exception, particularly where it counts the most, *viz.*, in Congress itself. Some courts have suggested that review jurisdiction in such cases, which might otherwise be defeated by the alien's departure, could be asserted under the All Writs Act, 28 U.S.C. 1651(a) (1982). See *Reid v. INS*, 766 F.2d 113, 117 n.9 (3d Cir. 1985); *Dabone v. Karn*, 763 F.2d 593, 597 n.2 (3rd Cir. 1985). INS conduct also may be subject to some basic constitutional limitations, although the *Mendez* decision itself made clear that the exception it established is not primarily grounded in constitutional necessities. See *supra* notes 46-49 and accompanying text. Finally, the immigration authorities appear willing to correct without judicial intervention clear errors in the execution of deportation orders, even where the departure rule would seem to immunize the infraction from subsequent review. See *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985) (alien erroneously deported after filing an appeal of deportation order re-

are compromised by the system, albeit in a less glaring manner. The departure rule, combined with other statutory measures, creates the possibility that aliens with valid deportation order appeals will never have their claims heard by the courts or administrative review boards.

This possibility emerges, for example, where a deportable alien is not able to procure a stay of deportation during the pendency of a petition for review. The stay is automatic upon appeal of an initial administrative determination of deportability or of any other "final order."⁸⁰ It is, however, a matter of discretion upon the filing of subsequent petitions, most notably, a motion to reopen deportation proceedings.⁸¹ Because a merits hearing of an alien's motion to reopen may be delayed at the same time as his accompanying request for stay is denied,⁸² the alien might suffer deportation before the motion to reopen is considered.⁸³ The departure rule would, in turn, preclude

turned to the United States at government expense). *Cf.* J. EVANS, IMMIGRATION LAW 333 (2d ed. 1983) (in reference to British law, concluding that "the effectiveness of a legislative programme, particularly in an area such as immigration where fundamental liberties are at stake . . . , may be seriously undermined if its administration is widely perceived to be unfair").

80. *See* 8 U.S.C. § 1105a(a)(3).

81. *See* 8 C.F.R. § 242.22 (1987) (filing of motion to reopen before immigration judge will not serve to stay the execution of outstanding deportation order); 8 C.F.R. § 3.8(a) (1987).

82. *See, e.g.,* *Bothyo v. Moyer*, 772 F.2d 353 (7th Cir. 1985); *Kayani v. Sava*, 634 F. Supp. 948 (S.D.N.Y. 1986). *But cf. Dabone v. Karn*, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (holding that an eleven month administrative delay in considering motion to reopen amounted to effective denial of the motion, subject to judicial review under section 106 as a "final order of deportation").

A motion to reopen and accompanying request for stay of deportation need not be considered by the same administrative body. A motion to reopen must be made to the forum in which the deportation order was last heard, i.e., before either an immigration judge or the BIA. By contrast, a request for stay may be, and often is, heard by a District Director of the INS. *See, e.g., Kayani*, 634 F. Supp. at 949.

83. Denial of a stay of deportation is reviewable on petition for habeas corpus. *See, e.g., Lopez-Alegria v. Ilchert*, 632 F. Supp. 932 (N.D. Cal. 1986). Such consideration, however, is governed by an abuse of discretion or rational basis standard, under which it is difficult to win reversal of the administrative ruling. *See, e.g., Betrand v. Sava*, 684 F.2d 204 (2d Cir. 1982); *Kayani*, 634 F. Supp. 948. *But see Anyanwu v. INS*, 645 F. Supp. 266 (D.N.J. 1986) (narrowing the standard where life is at stake); *Bazrafshan v. Pomeroy*, 587 F. Supp. 498 (D.N.J. 1984) (same). By contrast, administrative rulings on motions to reopen, which are considered "final orders" under the ambit of the INA, are subject upon appeal to the test of substantial evidence. *See* 8 U.S.C. § 1105a(a)(4). This standard allows a reviewing court to examine the factual support of the administrative determination, and heightens the possibility for reversal. *See Verkuil, A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1182-84 (1984). One circuit court recently went so far as to equate consideration of motions to reopen with that of motions for summary judgment, commanding that the BIA accept the petitioning alien's statements as true. *See Abudu v. INS*, 802 F.2d 1096, 1101 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 1564 (1987). This disparity between treatment of motions to reopen and petitions for stay of deportation provides an alternative explanation for administrative delay in deciding motions to reopen where a stay of deportation is denied. Even though consideration of both petitions may turn on the same facts, the administrative decision is less likely to be

the opportunity for any future hearing of the petition, however valid it might be. This scenario is not merely academic; at least one court has noted that the statutory scheme allows for the suffocation of such appeals.⁸⁴

The existing statutory scheme cannot avoid the possibilities for such injustice. Were stays of deportation contingent to motions to reopen automatically granted, a deportable alien could forestall indefinitely his expulsion, since new grounds for these petitions may be produced indefinitely.⁸⁵ This would hardly be tolerable given Congress' general purpose to expedite the deportation of aliens lacking meritorious appeals of administrative orders,⁸⁶ a purpose which also rationalizes proper enforcement of section 106(c). The problem is not, however, insoluble: Congress could serve the ends of both fairness to aliens and efficient enforcement of restrictive immigration measures by abandoning the departure rule altogether. In fact, these objectives would best be obtained by implementing a new departure rule opposite to the one that now prevails. With certain exceptions, review of deportation orders should be permitted only *after* the petitioning alien has left the United States. Such an overhaul of appellate procedure in immigration cases must be set in place by legislative action; *Mendez, Umanzor*, and the other decisions helpful in highlighting the practical quandaries created by section 106(c) simply should be swept aside.

TOWARD STATUTORY REVISION OF THE DEPARTURE RULE

The departure rule not only allows for unfairness against aliens who may enjoy tenable defenses against deportation — thus subverting the fairness prong of immigration law — but also creates strong incentive for aliens without such defenses to delay expulsion,

overturned if it is disguised in form as a ruling on the stay.

84. See *Reid v. INS*, 766 F.2d 113, 116 n.9 (3d Cir. 1985) (dismissing appeal of administrative denial of deportation stay for want of jurisdiction). The *Reid* court concluded that the possibility of preclusion of review in such cases was not a sufficient basis upon which to assert jurisdiction, "given the relevant statute [section 106], legislative history, and precedent." *Id.*

85. See *Bothyo v. Mayer*, 772 F.2d 353, 356 n.2 (7th Cir. 1985). Alien litigants have successfully exploited the mechanism of motions to reopen to the point where they are, in the phrase of one INS official, often only "motions to buy time." 62 INTERPRETER RELEASES 506, 507 (1985) (memorandum of INS General Counsel Maurice Inman). See also *Sang Seup Shin v. INS*, 750 F.2d 122, 130 (D.C. Cir. 1984) (Starr, J., dissenting) (criticizing motions to reopen as creatures of regulatory creation without explicit statutory foundation).

86. See *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1970).

thus undermining the efficiency of enforcement. The consequences of departure after issuance of a deportation order remain severe, even in light of the expansion of the *Mendez* exception;⁸⁷ clearly the decisions do not give an *advantage* to those appealing from abroad. The alien's possibilities for review are, at best, the same whether or not he delays expulsion and, at worst, greatly diminished by his departure. The alien presumably will prefer to extend his stay in the United States, both because he seeks the benefits of residence and because some intervening event or circumstance could give rise to reversal. To this end, all available legal means will be exploited. Despite the general intention of section 106 to hasten the expulsion of aliens without plausible defense to deportation, some are still successful in resisting its execution.⁸⁸ The number of immigration appeals before both the BIA and the courts has, meanwhile, grown considerably.⁸⁹ The low rate of reversal indicates that many of these actions are filed only for purposes of delay.⁹⁰

Given this continuing abuse, it would be desirable to adopt a statutory framework in which aliens are encouraged to leave the country pending review of deportation. Congressional adoption of the *Mendez* exception would not achieve this objective. Such a move would only allow aliens one more route of appeal after they have exhausted those available while resident in the United States, and would increase the burdens on the agencies and courts correspondingly. A rule requiring immigration appeals to be filed exclusively from abroad, by contrast, would serve to replace existing mechanisms of

87. A majority of courts have yet to recognize the *Mendez* exception. See *supra* notes 62-76 and accompanying text.

88. See, e.g., *Der-Rong Chour v. INS*, 578 F.2d 464 (2d Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). Upholding an administrative denial of a motion to reopen, *Der-Rong Chour* considered the case of an alien who had delayed deportation five years through a series of petitions for habeas corpus, for reconsideration, and for political asylum. The court characterized the appeal as "one more step in an outrageous abuse of civil process through persistent pursuit of frivolous and completely meritless claims in an effort to stall a deportation that has been repeatedly ordered by the [BIA] and has been affirmed by us." *Id.* at 467-68. Damages of \$1,000 were assessed against the petitioner and his attorney. *Id.* at 469.

89. The number of appeals received annually by the BIA increased from 4,911 to 8,608 between 1985 and 1986 alone. Interview with Gerald Hurwitz, Counsel to the Director, Executive Office for Imm. Reviews, Department of Justice, Apr. 11, 1988. Although there has been a drop recently in the number of immigration cases heard by the courts of appeals in the wake of IRCA, the general trend has been toward a similar increase in such appeals. Interview with Robert Bombaugh, Director of the Office of Imm. Litigation, Department of Justice, Apr. 11, 1988. See also Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1334-43 (1986).

90. Although the Justice Department apparently keeps no statistics on reversals in immigration cases, the reversal rate on issues of deportability before the BIA has been termed "infinitesimal." Interview with Gerald Hurwitz, *supra* note 89. In the courts of appeals, the overall reversal rate for immigration cases currently stands at approximately 13%. Interview with Robert Bombaugh, *supra* note 89.

review and would undoubtedly result in fewer petitions for review. The change would eliminate all incentive to file appeals, enjoying no chance of success on the merits.⁹¹

Certain limitations would have to be attached to this revised departure rule to render it legislatively palatable; this new scheme would create, in undiluted form, far greater hardships than has the old in practice. Most obviously, humanitarianism if not international law would demand relief for refugees and those seeking political asylum, who would receive some measure of review before deportation. Such an allowance would invite, of course, meritless claims of asylum as a new dilatory tactic. But there is already regulatory precedent in place to expedite the dispatch of frivolous motions, and reviewing bodies could refine standards for dismissal in order to discourage unfounded petitions for asylum. Maintaining a high threshold of proof for this exception would keep the extra burdens presented by the increased asylum claims to a minimum; in any case, the extra burdens would be outweighed by overall judicial economies resulting from the new framework.

Other categories of aliens might also be allowed to appeal adverse orders, for instance, those aliens with demonstrated ties to family or business, including most notably those who have established permanent residence. The classifications could be determined during congressional formulation of the package; lessons undoubtedly could be learned from the British immigration system, with its provisions requiring departure before appeal in some cases.⁹² Immigration judges and the BIA would be delegated the power to give leave for any appeal at their discretion, thus providing for cases with exceptional circumstances and cases in which unsettled questions of law give rise to appeals of clear potential merit. Finally, incentives for official action could be created with budgetary weapons by making the INS

91. This observation explains, perhaps, why the *Mendez* exception has been resorted to so infrequently. Successful invocation of the exception does allow a reviewing forum to assert jurisdiction over the appeal. It does not, however, necessarily lead to a reversal on the merits of a deportation order. See *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984) (while finding jurisdiction to entertain appeal from abroad under *Mendez*, the court denied petitioner's motion to withhold deportation for failure to demonstrate a clear probability of persecution).

92. See J. EVANS, *supra* note 79, at 343-44, 359-60; Sturtivant, *UK-Immigration Control: An Overview of British Law and Categories of Stay*, IMMIGR. J., Oct.-Dec. 1985, at 7. Under United Kingdom Law, aliens who have entered the country without proper clearance may appeal deportation only from abroad. J. EVANS, *supra* note 79, at 359. The same holds true for individuals who have been denied requests for upgrade to a more favorable status, for example, from a student status to a work permit. See Sturtivant, *supra* at 7.

liable for return costs when appeal from abroad results in reversal of a deportation order.⁹³

The revised framework would not necessarily reduce the probability of reversal of deportation for aliens with valid appeals,⁹⁴ nor would it make petitions from abroad unreviewable for failure to meet constitutional requirements of standing.⁹⁵ To the extent that the framework does not mandate departure in all cases prior to appeal, it might require statutory and judicial refinement in order to ensure efficient and fair implementation. The possibility of complications should not, however, deter the initiative, for it is rare indeed that such comprehensive change can be achieved with perfect legislative strokes. The revised departure rule would, in the long run, answer the difficulties now presented by section 106.

CONCLUSION

Acting to combat the legal maneuvers calculated to defeat the execution of deportation orders, Congress amended the INA to limit judicial review in the area. The addition of section 106 prohibited the appeal of deportation orders under which an alien had already departed the United States. The legislative history of the provision, in highlighting the Heikkila case, demonstrated that Congress intended this departure rule to apply even in more egregious cases of INS misbehavior. As led by the Ninth Circuit, however, the courts have diluted section 106 to the extent that it may not preclude the hearing of petitions filed when a departed alien alleges an infraction of immigration laws or regulations. Despite strong criticism of it by the Fifth Circuit's decision in *Umanzor v. Lambert*, the so-called *Mendez* exception has served to highlight the unfairness and injustice inherent in section 106. Only by replacing the present scheme with one designed to encourage appeals from abroad will this injustice be addressed, while at the same time furthering the objective of

93. There already seems to be an informal INS policy to pay for return fare when the INS has made an outright mistake in execution of an order. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 512 (9th Cir. 1985) (INS arranged and paid for return trip to the U.S. from El Salvador). The immigration authorities also apparently picked up the tab when William Heikkila was allowed to return from Helsinki. See *supra* notes 27-29 and accompanying text.

94. Under the British scheme, appeals from abroad enjoy a higher success rate than those filed from within the country. See J. EVANS, *supra* note 79, at 341.

95. See *Constructores Civiles de Centroamerica v. Hannah*, 459 F.2d 1183 (D.C. Cir. 1972) (concluding that nonresidents have standing where the statutory scheme so intends); *Kukatush Mining Corp. v. SEC*, 309 F.2d 647, 650 (D.C. Cir. 1962) (same); *Estrada v. Ahrens*, 296 F.2d 290, 695 (5th Cir. 1961) (finding nonresidence of petitioning aliens immaterial to standing inquiry). Under the Supreme Court's zone of interest test, a congressionally enacted statute plainly intended to allow appeals by nonresident aliens would overcome any prudential rationale for otherwise denying them standing for purposes of reviewing deportation.

effectively enforcing deportation orders against aliens who enjoy no tenable defenses to expulsion.

