

Journal of Civil Rights and Economic Development

Volume 21
Issue 3 *Volume 21, Spring/Summer 2007, Issue*
3

Article 9

March 2007

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Nicole Abruzzo

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Available at: <https://scholarship.law.stjohns.edu/jcred/vol21/iss3/9>

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NOTES

VOLUNTARY DEPARTURE POST-IIRIRA: A STRUGGLE BETWEEN EQUITABLE CONSIDERATIONS PROMOTING CLEMENCY MEASURES, AND STATUTORY CONSIDERATIONS TENDING TOWARDS OPPRESSION

NICOLE ABRUZZO*

INTRODUCTION

As Americans, we take pride in our nation's legal system, which is generally believed to afford individuals a full and fair opportunity for review. With regard to most situations, we are probably correct in accepting this notion. Yet, should we still consider our review truly full and fair if we knew some Petitioners are effectively barred from conferring with their attorneys? Now imagine that while awaiting review, a Petitioner is sent by the court presiding over her case to a land alleged to pose severe threats to her life and liberty, and although she is ultimately granted a favorable decision, it is delivered too late, as

she has already been brutally murdered. In that scenario, was the Petitioner given full and fair review? Regrettably, these questions are not just hypothetical, but prevalent occurrences within the realm of immigration, which have arisen in the wake of a significant revision of the law.

In light of these problems, this article will define voluntary departure and discuss how recent developments in immigration law have affected its application. Subsequently, two personal accounts will illustrate the immigrant's dilemma where the circuit court has found itself incapable of tolling voluntary departure periods. Thereafter, the majority of this note will analyze the circuit split regarding whether or not to stay voluntary departure, and the various arguments for and against such equitable tolling. The penultimate section will explain that even if the present voluntary departure statute is explicit, there is a secondary, yet powerful, reason for amending the law. That is, as the Attorney General charges aliens with removability and then acts as their adversary in court, it is difficult to believe he can distance himself from his predisposition against immigrants when executing his statutorily assigned role to deliberate upon whether to extend their time to voluntarily depart. Ultimately, this article will show that voluntary departure law would be most effective if Federal Circuit Court of Appeals judges were vested with authority to stay voluntary departure, but only after having determined it is highly probable the Petitioner will suffer persecution if she voluntarily departs from the United States and returns to her country.

I. BACKGROUND

Ten years ago, Congress enacted major changes in immigration law when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").¹ IIRIRA

*J.D. Candidate, June 2007, St. John's University School of Law; B.A. Philosophy, Politics, and Law, and Italian Language and Literature, *magna cum laude*, State University of New York at Binghamton, May 2003. The author wishes to thank Professor Janice Villiers for sharing her time, guidance, extensive expertise, and insight into Immigration Law in preparation of this Note.

¹ Pub. L. No. 104-208, 110 Stat. 3009 (1996).

drastically restructured immigration law.² Since then, circuit courts have reinterpreted previously well-settled issues,³ often arriving at diametrically opposed decisions where IIRIRA is less than explicit.⁴ Particularly controversial among circuit courts, and a prime example of such disparate conclusions resulting from IIRIRA's vagueness, is whether pending judicial review they have the jurisdictional authority to stay, that is, maintain the status quo on, a voluntary departure period previously granted by an Immigration Judge ("IJ") or the Board of Immigration Appeals ("BIA").⁵ This contentious issue, which is discussed below in much further detail, is exemplified by the First Circuit's finding in *Bocova v. Gonzales*,⁶ that it maintained authority to toll voluntary departure, versus the Fourth Circuit's holding in *Ngarurih v. Ascroft*,⁷ that it lacked that precise power.

² See *Andrieu v. Ashcroft*, 253 F.3d 477, 479–80 (9th Cir. 2001) (stating previously Petitioners were entitled to automatic stays of removal, and finding under IIRIRA, stays are no longer automatic, but discretionary); see also Stanley Mailman, *Cutting Back on Hearings, Judicial Review*, N.Y. L. J., Oct. 28, 1996, at 3 (referring to IIRIRA as "major overhaul" of immigration law, and delineating some significant changes, for example, creation of removal proceedings to adjudicate both admissibility and deportability, which under the old law were two distinct types of hearings).

³ See, e.g., *Andrieu*, 253 F.3d at 478 (explaining, "[t]his case requires us to consider the application of certain 1996 amendments to the nation's immigration laws to an alien's motion for stay of removal proceedings pending the resolution of a petition for review."); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999) (recognizing IIRIRA changes old rule for staying voluntary departure).

⁴ See *Chen v. Gonzales*, 418 F.3d 110, 110–11 (1st Cir. 2005) (noting circuit split caused by IIRIRA's language regarding availability of asylum to individuals whose girlfriends have been compelled by the government to undergo abortion); see also *Ly v. Hansen*, 351 F.3d 263, 267 (6th Cir. 2003) (acknowledging circuit split regarding constitutionality of indefinite detention under Section 236 of IIRIRA).

⁵ See Chelsea Walsh, *Voluntary Departure: Stopping the Clock for Judicial Review*, 73 *FORDHAM L. REV.* 2857, 2870 (2005) (noting while most courts hold they lack authority to reinstate voluntary departure, conversely, majority found they have jurisdiction to stay departure periods due to their equitable powers); see Gary Young, *May Judges Stay Voluntary Departure?*, *NAT'L L. J.*, Sept. 27, 2004, at 19 (delineating how circuits are split).

⁶ 412 F.3d 257, 267 (1st Cir. 2005) (stating, "[w]e do not find any language in the IIRIRA itself that limits our authority to suspend the running of an unexpired voluntary departure period.").

⁷ 371 F.3d 182, 193 (4th Cir. June 10, 2004) (finding neither Immigration and Nationality Act nor regulations grant circuit courts of appeals jurisdiction to stay orders of voluntary departure).

A. *The Ins and Outs of Voluntary Departure:*

Voluntary departure is a form of discretionary relief that IJs and the BIA may grant removable aliens.⁸ This relief permits aliens to leave on their own volition within a designated period, and without suffering the stigma and/or consequences of being forcefully removed, such as ten-year banishment from the United States.⁹ Moreover, since voluntary departure also relieves the government of expenses it would have otherwise incurred from a compelled removal, and expedites the removal process, it seems to benefit all parties involved.¹⁰ In order for an alien to be eligible for this type of relief she must establish: she has demonstrated good moral character for the past five years;¹¹ she has been in the United States continuously for at least one year prior to receiving notice of her removability;¹² she is not deportable as an aggravated felon pursuant to Section 237(a)(2)(A)(iii)

⁸ See 8 U.S.C. § 1229c(f) (2005) (denying courts "jurisdiction over an appeal from denial of a request for an order of voluntary departure"); see also Walsh, *supra* note 5, at 2863 (explaining how IJs conduct hearings on matters brought by aliens regarding departure and BIA serves as the appellate body).

⁹ See Lopez-Chavez v. Ashcroft, 383 F.3d 650, 651 (7th Cir. 2004) (discussing benefits and detriments of voluntary departure from alien's perspective); see also Young, *supra* note 5 (offering reasons for which aliens may choose to depart voluntarily).

¹⁰ Lopez-Chavez, 383 F.3d at 651 (citing Rife v. Ashcroft, 374 F.3d 606, 614 (8th Cir. 2004)) (explaining how for the government voluntary departure "expedites and reduces the cost of removal"); see Walsh, *supra* note 5, at 2868 (explaining federal government's incentives for permitting and complying with voluntary departure orders).

¹¹ Compare Dows v. Gonzales, No. 03-2068, 2005 U.S. App. LEXIS 15730, at *3 (3d Cir. 2005 May 5, 2005) (explaining where Petitioner's testimony was not credible for failure to rise to level of intentional false testimony, finding good moral character was not precluded), and Charles Wheeler, *The Immigration Consequences of Using a False Social Security Number*, 8 BENDER'S IMMIG. BULL. 952 (2003) (reiterating Ninth Circuit's ruling in Beltran-Tirado v. INS, 213 F.3d 1179 (9th Cir. 2000) that criminal convictions for using false social security number does not preclude good moral character), and *Administrative Decisions BIA Decisions*, 5 BENDER'S IMMIG. BULL. 25 (2000) (explaining there may be good moral character where Petitioner had supplied false birth certificate, but had no other legal problems, and was close and supportive of his family), with Joseph Justin Rollin, *Humpty Dumpty Logic: Arguing Against the "Aggravated Misdemeanor" in Immigration Law*, 6 BENDER'S IMMIG. BULL. 445 (2001) (stating those who have been convicted of aggravated felonies cannot establish good moral character), and *Administrative Decisions BIA Decisions*, 5 BENDER'S IMMIG. BULL. 25 (2000) (explaining habitual drunkenness may preclude finding good moral character).

¹² See generally Paige L. Taylor, *Immigration Law: Still Constrained By The "Culture Of No"*, 37 TEX. TECH L. REV. 857, 868 (2005) (discussing interruptions of continuous presence); Samuel A. Yee, *Final Exit Or Administrative Exhaustion? The Deported Alien's Catch-22*, 8 ADMIN. L.J. AM. U. 605, 614 n.56 (1994) (noting requirement of continuous presence in United States).

(1227(a)(2)(A)(iii))¹³ or Section 237(a)(4) (1227(a)(4))¹⁴; and finally, she must demonstrate by clear and convincing evidence, that she has the means to depart from the United States and intends to do so.¹⁵

While voluntary departure is a well-settled alternative to removal at the IJ and BIA level, whether it is still an option at the circuit court level is questionable, and depends on the circuit in which the Petitioner's case is heard.¹⁶ This is primarily due to a struggle between equitable and statutory considerations.¹⁷

B. Dilemma: To Voluntarily Depart or Not to Voluntarily Depart? That is the Question.

In the abstract, it seems that voluntary departure is a merciful alternative to deportation.¹⁸ However, if an alien appeals the denial of her claim, this relief appears increasingly less generous, especially where the reviewing court lacks jurisdiction to stay the departure period. Those circumstances, presuming that complying with voluntary departure is a clear and effortless decision, fail to consider what the alien might be abandoning when required to leave the United States. It also ignores what the alien may be returning to in her country of origin.

¹³ 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (describing an offense under this section as an aggravated felony rendering any alien convicted of such a crime at any time after admission deportable).

¹⁴ 8 U.S.C. § 1227(a)(4) (2006) (defining serious crimes such as terrorism, espionage, and sabotage as grounds for deportation).

¹⁵ 8 U.S.C. § 1229c(b)(1)(D) (2006) (requiring that "alien has established by clear and convincing evidence that the alien has the means to depart the United States"); see *Baluyot v. Gonzales*, No. 04-15655, 2005 U.S. App. LEXIS 23981, at *3 (9th Cir. Oct. 20, 2005) (requiring passport to establish intent and means to depart fell within scope of 8 U.S.C. Section 1229c(b)(1)(D)).

¹⁶ See *Walsh*, *supra* note 5, at 2870 (summarizing most circuits' holdings that they lack authority to reinstate departure, but have jurisdiction to stay departure periods pending judicial review); see also *Young*, *supra* note 5, at 19 (categorizing circuits according to whether they stay and/or reinstate voluntary departure).

¹⁷ See *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004) (describing possibly disastrous ramifications of sending petitioners back to their countries while awaiting decisions on their appeals); see also *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 280 (3d Cir. 2004) (explaining government's 8 C.F.R. § 1240.26(f) argument).

¹⁸ See *Taylor*, *supra* note 12, at 868 (proffering voluntary departure is clement regardless of when granted); see also *Mireles-Valdez v. Ashcroft*, 5th Circuit Court of Appeals; *Immigration Law*, TEXAS LAWYER, Nov. 10, 2003, at 500 (quoting "voluntary departure is granted an alien as a form of clemency . . . in return for his agreeing to relinquish his illegal presence.").

One readily imaginable and heartbreaking scenario is that an alien might be forced to leave her children behind.¹⁹ This situation is distressing enough when speaking hypothetically or acknowledging it as an occasional occurrence. Alarming, however, reports indicate that tens of thousands of children were left behind in 2003 by the 887,000 aliens compelled to voluntarily depart that year.²⁰ As a paradigm for this crisis, one particular article recounts the story of the ironically named Feliz family.²¹ Their saga began when Berly, the mother, on an otherwise routine trip to renew her work-authorization at the immigration office, was handcuffed and promptly expelled from the country due to a resurfaced deportation order.²² Fortunately, Virginia, Berly's American born daughter, who was only six when her mother was deported, was not left behind alone, but with her United States citizen father, Carlos Feliz.²³ Thus, unlike some other children whose parents were ordered removed or granted voluntary departure, Virginia was not effectively orphaned.²⁴ Nevertheless, it is painfully obvious from Virginia's statement that, "it's not fair that everybody else has their mom except me," and her diagnosis of major depression, that being separated from

¹⁹ See Nina Bernstein, *A Mother Deported, and a Child Left Behind*, N.Y. TIMES, Nov. 24, 2004, at A1 (discussing immigration law's disastrous effect on family ties); see also *Impact of Illegal Immigration, Hearings Before the Subcomm. on Immigration, Border Security, and Claims and the H. Comm. on the Judiciary*, 109th Cong. 56-57 (2005) (testimony of Rep. Gutierrez) (suggesting government should act on illegal immigration because current laws cause egregious results such as children's separation from their parents).

²⁰ Bernstein, *supra* note 19, at A1 (basing figures on immigration experts' contentions); see also *Migration Information Source and Independent Task Force on Immigration and America's Future Briefing Sept. 6 in Washington*, U.S. NEWSWIRE, Sept. 1, 2005 (stating "voluntary departure accounted for four of every five removals in FY 2003. . .").

²¹ Bernstein, *supra* note 19, at A1 (translating Spanish word "feliz" into English word "happy").

²² *Id.* (explaining immigration services did not afford Berly Feliz any time to make arrangements for her family due to rapid and unexpected deportation); see Suzanne Travers, *Deported Teen Misses U.S., Manchester Student, Denied Asylum, Was to Graduate*, THE RECORD, June 21, 2004, at A03 (recounting story of Elias Attie, a Lebanese teenager, who upon reporting to immigration for registration pursuant to an anti-terrorism program, was detained, deported, and deprived graduation from high school).

²³ See Bernstein, *supra* note 19, at A1 (discussing Mr. Feliz' struggle to support Virginia since Berly's deportation).

²⁴ *Id.* (describing Virginia's life with her unemployed, disabled father); see also Caitlin Kelly, *Heartbreak Hotel. Queens House is Home to Children in Country Illegally*, DAILY NEWS, Sept. 4, 2005, at 22 (stating immigrant children live in "heartbreak hotel" for various reasons, one of which being that their parents were deported).

her mother has severely disrupted her life.²⁵ Equally distraught, a tearful Berly Feliz described her turmoil over missing her daughter: "I don't eat. I don't sleep. I can't be without her. I have no life."²⁶ In spite of having retained an attorney to challenge her deportation, Mrs. Feliz and her family, like many others, can only suffer while waiting for a hopefully favorable decision on her appeal.²⁷

Even more disconcerting than what an alien may be leaving behind in the United States is what she may be returning to, particularly if she is an asylum-seeker. In essence, if an asylum-seeker wishes to appeal the denial of her claim to the circuit court that lacks authority to stay voluntary departure, she will be forced to choose between two equally oppressive options.²⁸ Twenty-six-year-old Filipino nurse Shirley Manas, who came to America when she was twelve after witnessing the communists ambush her mother with sixteen bullets, exemplifies the first option.²⁹ Like Ms. Manas, an asylum-seeker could comply with her order of voluntary departure in hope that the circuit will grant her asylum, allowing her one day, to finally enter the United States lawfully.³⁰ Fortunately for Ms. Manas, the Philippines she returned to while waiting for the Third Circuit's

²⁵ See Bernstein, *supra* note 19, at A1 (expressing Virginia Feliz's intense sadness, frustration, and resentment caused by her mother's absence).

²⁶ *Id.* (explaining parental guilt resulting from having to leave the United States without one's child).

²⁷ See *id.* (explaining governmental delays in processing Mrs. Feliz's claim, and quoting her attorney, Jeffrey A. Feinbloom as commenting, "[t]he interest of the government in removing this woman pales in comparison with her suffering and her family's. And this child is a citizen, this husband is a citizen. What about their rights?").

²⁸ See Walsh, *supra* note 5, at 2858 (proposing aliens seeking asylum will have to choose between having their appeals heard or enjoying the benefits of voluntary departure if their appeal filed is in a circuit that does not reinstate or stay such relief); see also Young, *supra* note 5, at 19 (addressing voluntary departure dilemma that aliens denied asylum, but granted voluntary departure, may not be able to appeal because of the impracticability of doing so while overseas).

²⁹ See generally Elizabeth Llorrente, *Green Card Blues; Nurse, 26 Facing Deportation to Philippines*, THE RECORD, Apr. 27, 1997, at L01 (discussing Manas's traumatizing experience as a young girl in the Philippines).

³⁰ *Id.* (explaining harsh choice Manas was compelled to make); see Scott Baldauf, *Elian's Peers Treated Differently*, CHRISTIAN SCIENCE MONITOR, Jan. 18, 2000, at USA 1 (raising awareness about South American children who illegally enter the United States alone, commenting that while some when discovered by immigration officials elect to voluntarily depart so as to avoid denial of legal entry in the future, others apply for asylum "on the grounds that forcible return will lead to a life on the streets, at the mercy of roving gangs, and renegade police officers.").

decision on appeal, was no longer the violent place it had been when her mother was murdered.³¹

Another asylum-seeker, however, may not be as lucky as Ms. Manas. Consequently, to reap the potential benefit of re-entering the United States lawfully, the unlucky asylum-seeker is compelled to return to her still quite dangerous country. In doing so, the unlucky asylum-seeker risks such grave irreversible perils as female genital mutilation, torture, and/or assassination, which may be the very persecution she sought to avoid by applying for asylum.³² Even if an asylum-seeker is fortunate enough to elude her persecutors, perhaps by designating a departure destination other than her own country, her right to review may still be thwarted due to difficulties in carrying out litigation from abroad.³³ In light of these problems, in the alternative, the asylum-seeker may decide to contravene her voluntary departure order, fearing what may happen to her upon return to her native land.³⁴ However, while waiting for the circuit court's ruling, her voluntary departure period will run, rendering her removable, and accountable for various penalties associated with transgressing the order, such as fines up to \$5,000, and a up to a ten-year ban on further relief.³⁵

³¹ See Lorrente, *supra* note 29, at L01 (explaining unlikelihood that Shirley Manas would be granted political asylum since conditions had vastly improved); see generally *Andreu v. Ashcroft*, 253 F.3d 477, 479 (9th Cir. 2001) (suggesting that political asylum is not granted when conditions at asylants home country have improved).

³² See *Nwaokolo v. INS*, 314 F.3d 303, 304, 310 (7th Cir. 2002) (staying voluntary departure pending review where Petitioner's four year old daughter would be forced to undergo female genital mutilation if she returned to Nigeria); see also *Andreu*, 253 F.3d at 478–79 (9th Cir. 2001) (describing Petitioner's alleged vulnerability to communist attempted murderers if forced to return to Romania on account of his National Liberal Party activism).

³³ See Walsh, *supra* note 5, at 2881 (commenting that “while aliens in these situations may formally retain their right to appeal under the post-IIRIRA statute after leaving this country, their purpose in seeking an appeal is arguably thwarted.”) (footnote omitted); see also Young, *supra* note 5, at 19 (asserting that “aliens who are in the midst of appealing . . . a denial of asylum may have to drop those appeals if they accept voluntary departure, because of the practical difficulties of carrying on litigation from abroad.”).

³⁴ See *Khalil v. Ashcroft*, 370 F.3d 176, 180–81 (1st Cir. 2004) (arguing that absent ability to reinstate voluntary departure aliens will be forced to choose between judicial review and departing within the allotted period); see also Walsh, *supra* note 5, at 2881 (summarizing circuits' rationale for staying and reinstating voluntary departure asylum-seekers who are forced to return to countries where they are unsafe).

³⁵ See Honorable John F. Gossart, Jr., *Lady Liberty Blows out her Torch: New Immigration Law is Unforgiving and Far More Restrictive*, 27 U. BALT. L.F. 25, 28 (1997) (warning about failure to depart within designated period); see also Michael D. Patrick,

Clearly, the Feliz's story exemplifies the emotional struggle immigrant families may endure where their circuit court failed to stay a family member's voluntary departure period. Similarly, Shirley Manas's narrative typifies the dilemma the asylum-seeker who appeals her claim faces when her time to voluntarily depart cannot be suspended. But, further still, these accounts illustrate the urgent need for reformation of the actual statutory language defining and relating to voluntary departure, and/or the manner in which the law is interpreted and applied. Altering the law to prevent families, like the Felizes, from being torn apart, and innocent people, such as Ms. Manas, from being returned to countries where they were previously persecuted or are likely to suffer future persecution, would render voluntary departure merciful, as it was intended to be, rather than cruel and oppressive, as it has become since IIRIRA.

However, perhaps it is hasty to call voluntary departure cruel and oppressive just because it has some negative effects such as familial separation and the asylum-seeker's dilemma. It is possible that there is a rational justification for these adverse effects of voluntary departure. For example, there might be a legitimate concern that illegal aliens will extend their stay in the United States indefinitely by continuously filing appeals from denials of their claims. Alternatively, these seemingly severe predicaments caused by voluntary departure may have feasible solutions. These questions are best answered by analyzing the circuit split.

Significant Changes Take Place in April, N.Y.L.J., Mar. 24, 1997, at 3 (discussing IIRIRA's effect on voluntary departure). See generally 8 U.S.C. § 1229c(a)(3), (b)(3), (d) (2005) (providing that aliens who fail to leave within allotted departure period face forfeiture of required bond, fines up to \$ 5,000, and ten-year period of ineligibility for certain forms of relief).

II. ONE VOLUNTARY DEPARTURE LAW—TWO EXTREMELY DIVERGENT OPINIONS:

A. *The Circuit Split:*

A majority of circuits addressing whether they have authority to stay voluntary departure have determined they do.³⁶ These are the First, Second, Third, Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeals.³⁷ Their principal argument is that IIRIRA has not foreclosed circuit courts' equitable powers.³⁸ Conversely, the minority, which has only been steadfastly represented by the Fourth Circuit, though quite convincingly, argues that the plain text of IIRIRA expressly precludes circuit courts from suspending voluntary departure.³⁹

B. *Up in Interpretive Arms:*

i. Equity is Victorious:

Recently, in *Bocova v. Gonzales*,⁴⁰ an Albanian national, Artur Bocova appealed from the denial of his claims for asylum and withholding of removal.⁴¹ Although the BIA granted Bocova voluntary departure, by the time the First Circuit reviewed his case, his period to leave the United States without repercussions had expired.⁴² Consequently, not only did the court have to

³⁶ See *Bocova v. Gonzales*, 412 F.3d 257, 266 (1st Cir. 2005) (retaining the power to toll voluntary departure); see also Walsh, *supra* note 5, at 2885 (clarifying reason for which most circuits find they may grant stays).

³⁷ See *Thapa v. Gonzales*, 2006 U.S. App. LEXIS 21046, at *14 (2d Cir. Aug. 16, 2006); see also Young, *supra* note 5, at 19.

³⁸ See *Barroso v. Gonzales*, 429 F.3d 1195, 1206 (9th Cir. 2005) (announcing that court retains equitable powers to toll voluntary departure); see also Walsh, *supra* note 5, at 2870 (highlighting rationale for tolling periods at circuit level).

³⁹ See *Ngarurih v. Ascroft*, 371 F.3d 182, 193 (4th Cir. June 10, 2004) (finding it lacks any statutory or regulatory power to stay voluntary departure periods); see also *Thapa*, 2006 U.S. App. LEXIS 21046, at *14 (stating Fourth Circuit rejects argument that circuit courts of appeals have authority to suspend voluntary departure).

⁴⁰ 412 F.3d 257 (1st Cir. 2005).

⁴¹ See *id.* at 260–61 (positing procedural history); see generally Posting of S. Cotus to Appellate Law & Practice to http://appellate.typepad.com/appellate/2005/06/ca1_suspending_.html (June 24, 2005, 16:39 EST) (affirming on appeal suspension of voluntary departure).

⁴² See *Bocova*, 412 F.3d at 260 (finding that issues of staying, reinstating, and fashioning new voluntary departure periods were raised); see also Posting of S. Cotus,

examine the merits of Bocova's asylum claim, but also, how IIRIRA affected its own powers and procedures concerning voluntary departure.⁴³ In particular, the court analyzed whether it had authority to suspend the running of an unexpired period, which was an issue of first impression.⁴⁴

Bocova's asylum application was predicated on his claim that he was subjected to persecution on account of his political affiliations with, and avid support of the Albanian Democratic Party ("ADP").⁴⁵ Similar to many other ADP members, Bocova alleged that because of his participation in political rallies, he was once arrested, detained without charges, beaten, and threatened that if he would not sever ties with the ADP he would be killed.⁴⁶ As if Bocova had not suffered enough from that first encounter, his second run was even more egregious because the police, apparently remembering him as an ADP sympathizer from the prior rally, considered him a recidivist.⁴⁷ Thus, the police thought Bocova's political opinion might be changed if they beat him with metal chains until he required hospitalization.⁴⁸ Nevertheless, Bocova, always steadfast in his views, "continued to participate overtly in the ADP," and hired a lawyer to bring suit against the police.⁴⁹ However, upon his lawyer's warning

supra note 41 (noting that defendant did not show that "he was entitled to such a suspension because the alien must make a timeous motion, that is, he must so move before the voluntary departure period expires.").

⁴³ See *Bocova v. Gonzalez*, 412 F.3d 257, 260 (1st Cir. 2005) (synergizing court's holding on various questions presented); see also Posting of S. Cotus, *supra* note 41 (stating that Congress did not strip court of jurisdiction).

⁴⁴ See *Bocova*, 412 F.3d at 260 (defining relevant issues); see also Posting of S. Cotus, *supra* note 41 (proposing that court lacked authority to fashion or reinstate voluntary departure periods "as a matter of first impression").

⁴⁵ See *Bocova*, 412 F.3d at 261 (describing Bocova's involvement with ADP); see generally David Ashenfelter, *Albanians See Hope for Asylum*, DETROIT FREE PRESS, July 25, 2005 (noting how police repeatedly detained, beat and threatened members of ADP).

⁴⁶ *Bocova v. Gonzales*, 412 F.3d 257, 261 (1st Cir. 2005) (defining violence and threats against Bocova); see David Ashenfelter, *Albanians See Hope for Asylum*, DETROIT FREE PRESS, July 25, 2005 (recounting the many persecutions of Mimi Mece, who was repeatedly beaten and whose life was threatened because he was politically active in ADP).

⁴⁷ *Bocova*, 412 F.3d at 261 (explaining why second encounter with police was worse).

⁴⁸ *Id.* (noting the police remarked that Bocova had not learned his lesson and beat him with chains attached to plastic pipes).

⁴⁹ *Id.* (explaining Bocova remained in Albania, participated in ADP activities and consulted a lawyer about filing charges).

that an action against the police would only lead to Bocova becoming even more of a target, Bocova fled from Albania.⁵⁰

Surprisingly, despite finding Bocova's version of the facts was credible, the IJ denied his claim because the two incidents, over an eight-year span, were insufficient to suggest that Bocova was systematically targeted for abuse on account of his political beliefs.⁵¹ However, the IJ did grant Bocova a voluntary departure period of sixty-days.⁵² On appeal, the BIA affirmed the IJ's decision and permitted him an additional thirty-days within which to leave the United States voluntarily, which subsequently was extended due to a re-issuing of the decision.⁵³ Afterwards, on the day before his voluntary departure period was to expire, Bocova filed a petition for review with the First Circuit Court of Appeals, which was affirmed in an analysis highly deferential to the BIA.⁵⁴

Having decided the asylum question, the court proceeded to examine the voluntary departure issues.⁵⁵ Since Bocova moved to stay the running of his expired voluntary departure period pending appeal, the court issued a provisional stay until it had concluded upon its own authority on the matter.⁵⁶ To aid in its decision, the First Circuit directed the parties to address in their appellate briefs whether courts of appeals possess the authority to fashion, reinstate, or stay periods of voluntary departure, and if so, under what conditions.⁵⁷ In addition to the parties' briefs, the court also had the assistance of the American Immigration

⁵⁰ *Id.* (stating Bocova ultimately fled from Albania).

⁵¹ *Bocova v. Gonzales*, 412 F.3d 257, 262–63 (1st Cir. 2005) (providing reason for denial of Bocova's asylum application despite his credibility).

⁵² *Id.* at 261 (providing procedural history of Bocova's claim).

⁵³ *Id.* (describing BIA's affirmance of IJ's decision and how Bocova's voluntary departure period was extended because of "technical snafu").

⁵⁴ *Id.* at 261–63 (explaining while asylum-seekers must show either past persecution, or a well-founded fear of future persecution, "persecution is a protean word," and circuit is bound by BIA's interpretation unless it is an "unreasonable reading of the statute or inexplicably departs from the BIA's earlier pronouncements."); see *Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 37 (1st Cir. 2005) (citing *Bocova* in that persecution requires more than "episodic violence or sporadic abuse," it must be systematic).

⁵⁵ *Bocova*, 412 F.3d at 264 (delving into third section entitled "III. Voluntary Departure").

⁵⁶ *Id.* at 262 (stating Bocova moved to stay his voluntary departure time two months after it had expired).

⁵⁷ *Id.* (asking parties write briefs regarding validity of voluntary departure issues at the circuit court of appeals level).

Law Foundation, which filed an amicus brief on the issues in contention.⁵⁸

Preliminarily, noting that fashioning a new period for voluntary departure and reinstatement are functionally equivalent, the court dealt with their validity simultaneously.⁵⁹ Asserting that all courts of appeals having reviewed these “issues thus far have concluded that they no longer may reinstate expired periods of voluntary departure,” the court found the matter “open and shut.”⁶⁰ Thus, the court concluded it could no longer reinstate or fashion new periods of voluntary departure.⁶¹

Finally, the court turned to Bocova’s argument that circuit courts of appeals may stay previously granted voluntary departure periods pending review.⁶² Acknowledging that most circuits have determined they retain authority to stay voluntary departure, the First Circuit readily subscribed to this view.⁶³ The court explained that the Hobbs Act provides for courts’ equitable powers to “restrain or suspend” an order’s operation prior to making a final determination.⁶⁴ Thus, asserting the sixty-day maximum period the BIA may grant is simply insufficient for “docketing, briefing, argument, and decision of a petition for judicial review,” the court justified suspending voluntary departure until the conclusion of a case.⁶⁵ While the court was equivocal, presumably the need for sufficient time to appeal warranted tolling the voluntary departure period because the

⁵⁸ *Id.* (stating court ultimately had three briefs on relevant issues).

⁵⁹ *Id.* at 266 (explaining, “[r]einstituting an expired voluntary departure period is functionally equivalent to fashioning a new voluntary departure period; doing so would require the court to dictate both the length of the period and the time when it would begin to run . . .”).

⁶⁰ *Id.* (asserting no circuit court having addressed reinstatement has found it had authority to do so).

⁶¹ *Id.* (disclaiming existence of authority to reinstate voluntary departure, and thus abrogating previous decision finding otherwise).

⁶² *Id.* (addressing Bocova’s request for a stay).

⁶³ *Id.* (stating four circuits have concluded they may stop the clock on voluntary departure granted by BIA).

⁶⁴ *Id.* at 266–67 (explaining 8 U.S.C. Section 1252 renders final orders of removal subject to the Hobbs Act); see 28 U.S.C. § 2349(b) (2005) (stating filing petition for review alone does not stay or suspend operation of order, but court of appeals has discretion to restrain or suspend, in whole or in part, operation of order pending the final hearing and determination of petition).

⁶⁵ See *Bocova*, 412 F.3d at 269 (justifying its use of equitable powers); see also Young, *supra* note 5 (commenting aliens may have to abandon appeals if they wish to accept voluntary departure).

alien would otherwise have to choose between full and fair review and avoiding removability.

Having found it could stay voluntary departure, the court's final inquiry dealt with what its procedure would be for doing so.⁶⁶ First, the court decided that an alien requesting a stay of voluntary departure must file a motion explicitly requesting this form of relief prior to the expiration of the period.⁶⁷ Rejecting persuasive authority, the court found it unnecessary for the alien to first exhaust administrative remedies, as it asserted no such remedies actually existed.⁶⁸ Next, addressing its own procedure for evaluating whether a particular asylum-seeker's voluntary departure ought to be stayed, the court articulated the following four-part test: (1) that the asylum seeker must be likely to succeed on the merits of his case; (2) that without the stay, he will suffer irreparable harm; (3) that any potential harm derived by staying the voluntary departure is outweighed by the harm to the alien; and (4) granting a stay is not against public interest.⁶⁹ Unfortunately for Bocova, because he moved to stay voluntary departure once it had already expired, the court denied his motion.⁷⁰

ii. Strict Construction Prevails:

By contrast, in *Ngarurih v. Ascroft*,⁷¹ the Fourth Circuit considered the same questions as in *Bocova*, but arrived at the opposite conclusion.⁷² However, because the arguments against affording the Circuit Courts of Appeals authority to suspend

⁶⁶ *Id.* at 268 (articulating disagreement regarding procedure for a Petitioner to move for a stay of voluntary departure).

⁶⁷ *Id.* (declaring motion requesting a stay of removal would be insufficient to qualify also as a motion for a stay of voluntary departure).

⁶⁸ *Id.* at 269 (explaining its reason for rejecting the seventh circuits requirement that aliens seeking stays of voluntary departure exhaust all administrative remedies prior to requesting such relief from presiding court).

⁶⁹ *Id.* at 270 (adopting criteria delineated for assessing stays of removal and applying it to stays of voluntary departure); *accord* *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999) (articulating standard for reviewing motion to stay voluntary departure).

⁷⁰ *Bocova*, 412 F.3d at 270 (denying Bocova's motion for stay of voluntary departure, but explaining because his stay of removal had been granted earlier, he still had an interval in which he could depart without consequence).

⁷¹ 371 F.3d 182, 193 (4th Cir. June 10, 2004).

⁷² *Id.* at *15-*17 (adhering to *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275 where third circuit decided it could not reinstate voluntary departure and explaining extending voluntary departure also usurps Attorney General's power).

voluntary departure were best articulated by the Third Circuit in *Hadi v. Attorney General of the United States*,⁷³ that decision shall be discussed herein. Yet, it is important to keep in mind that *Hadi's* holding was recently disregarded by the Third Circuit in *Obale v. Atty Gen'l*,⁷⁴ which found that the Circuit Courts of Appeals may, in fact, stay voluntary departure.⁷⁵

In that case, Susi Nursanti Hadi, an Indonesian citizen allegedly suffered multiple assaults and repeated vandalism on and thievery from her family's store.⁷⁶ She claimed she was targeted on account of her Chinese ethnicity and Christian religion, and that despite attempts to seek help, the police were unresponsive.⁷⁷ Finding Hadi's testimony incredible, the IJ denied Hadi's claims of asylum, withholding of removal, and Article Three of the United Nations Convention against Torture ("CAT") relief.⁷⁸ However, the IJ granted Hadi voluntary departure.⁷⁹ Subsequently, upon affirming the denial of asylum, withholding of removal, and CAT relief without opinion, the BIA extended her time to depart by thirty-days.⁸⁰

On appeal, the Third Circuit first reviewed and denied Hadi's asylum claim.⁸¹ The court reasoned that although Hadi had been a victim of criminal conduct which was motivated by her ethnicity and religion, none of the incidents included severe threats to her life or liberty, which are required to establish past persecution.⁸² Moreover, the fact that Hadi's entire family, including her young son, still lived in Indonesia, led the court to

⁷³ No. 04-3343, 2005 U.S. App. LEXIS 23301 (3d Cir. Oct. 27, 2005).

⁷⁴ 453 F.3d 151 (3d Cir. 2006).

⁷⁵ 156 (3d Cir. 2006) (dismissing *Hadi* as "non-precedential").

⁷⁶ *Id.* at *3 (describing Hadi's persecution).

⁷⁷ *Id.* at *3-*4 (providing basis for Hadi's asylum, withholding of removal, and Convention Against Torture claims).

⁷⁸ *Id.* at *3-*4, *6 (reiterating some of Hadi's implausible statements, such as that no Indonesian Catholic's attended her church, and mentioning that Hadi admitted lying at her asylum interview).

⁷⁹ *Id.* at *3-*6 (explaining procedural context).

⁸⁰ *Id.* at *4 (providing background as to how voluntary departure issue came before court).

⁸¹ *See id.* at *5-*9 (analyzing Hadi's asylum claim).

⁸² *Id.* at *8 (explaining why facts in this case did not fall within scope of past persecution); *see Lin v. INS*, 238 F.3d 239, 243-44 (3d Cir. 2001) (defining persecution by government as "more than generally harsh conditions shared by many other persons", which includes "threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom.").

believe they could not be so discriminated against as to find Hadi had a well-founded fear of future persecution.⁸³ Next, the court quickly denied Hadi's withholding of removal claim explaining, "if a petitioner is unable to satisfy the standard for asylum, he necessarily fails to meet the standard for withholding of removal."⁸⁴ Thirdly, Hadi was not entitled relief under CAT because neither her testimony, nor her documentary evidence provided any objective evidence that if she were to return to Indonesia she would be tortured.⁸⁵

Subsequently, the court addressed whether it had jurisdiction to hear Hadi's motion to stay voluntary departure.⁸⁶ In finding it could not stay voluntary departure, the court relied heavily on *Reynoso-Lopez v. Ashcroft*,⁸⁷ a recent precedential decision in which the court held that its power to reinstate voluntary departure had been eradicated by IIRIRA.⁸⁸ In that decision, the Third Circuit explained IIRIRA lacked explicit language permitting the circuit courts of appeals to exercise authority over motions for stays of voluntary departure, and further, that it vested exclusive authority to reinstate voluntary departure in the Attorney General.⁸⁹ Though unlike the petitioner in *Reynoso-*

⁸³ See *Hadi*, 2005 U.S. App. LEXIS 23301, at *9 (using Hadi's leaving her own son behind in Indonesia as proof that she could not, or should not, have been that fearful of persecution upon return to her country); see also *Lie v. Ashcroft*, 396 F.3d 530, 534 (3d Cir. 2005) (holding that one factor in determining that petitioner lacked a "well-founded fear of future persecution" was the fact that all of petitioner's and her husband's siblings still lived in Indonesia and had been unharmed during period in question).

⁸⁴ *Hadi*, 2005 U.S. App. LEXIS 23301, at *10 (denying Hadi withholding of removal); see *Shardar v. Ashcroft*, 382 F.3d 318, 324 (3d Cir. 2004) (stating standard for withholding removal is higher than asylum, so that if Petitioner is unable to establish standard for asylum, he definitely cannot establish claim for withholding of removal).

⁸⁵ *Hadi*, 2005 U.S. App. LEXIS 23301, at *10-*11 (3d Cir. Oct. 27, 2005) (finding there was insufficient evidence to entitle Hadi to relief under CAT); see, e.g., *Berishaj v. Ashcroft*, 378 F.3d 314, 332 (3d Cir. 2004) (explaining alien seeking relief under CAT must prove that it is more likely than not that she would be tortured upon removal to a certain country).

⁸⁶ *Hadi*, 2005 U.S. App. LEXIS 23301, at *12 (assessing its own authority to suspend voluntary departure).

⁸⁷ 369 F.3d 275 (3d Cir. 2004).

⁸⁸ See *Hadi*, 2005 U.S. App. LEXIS 23301, at *13 (examining how court's holding in *Reynoso-Lopez* that Third Circuit may not reinstate voluntary departure affects decision in *Hadi*); see *Federal Decisions In Brief*, N.J. LAW., at 19 (reiterating court's holding that it "lacked jurisdictional authority to reinstate the immigration judge's grant of voluntary departure and extend the petitioner's departure date" in *Reynoso-Lopez*).

⁸⁹ *Hadi*, 2005 U.S. App. LEXIS 23301, at *13 (explaining *Reynoso-Lopez's* statutorily based rationale); see *Federal Decision*, *supra* note 88, at 19 (commenting Third Circuit found IIRIRA clearly granted authority to reinstate or extend voluntary departure to Attorney General and his delegates).

Lopez, Hadi filed her motion to stay prior to the expiration of her voluntary departure period, the court found this difference “legally insignificant,” stating that just like reinstatement, tolling would permit her additional time within which to depart.⁹⁰ Lastly, the court noted that even with this holding, asylum-seekers will not sacrifice their rights to petition for review, as they maintain their rights after departure.⁹¹

C. Debate: Which Side Ultimately Triumphs?

i. Circuit Courts of Appeals Have the Power to Suspend Voluntary Departure:

As previously mentioned, proponents of staying voluntary departure tend to argue that doing so falls within the courts’ discretionary equitable powers.⁹² The most compelling reasons for employing equity when dealing with voluntary departure are threefold: fear of imminent persecution upon the alien’s departure from the United States;⁹³ concern that litigating from

⁹⁰ *Hadi*, 2005 U.S. App. LEXIS 23301, at *15, *17–*18 (concluding *Reynoso-Lopez* holding applies equally to staying voluntary departure as it does to reinstatement); see *Reynoso-Lopez*, 369 F.3d at 277 (denying petitioner reinstatement of expired voluntary departure date).

⁹¹ See *Hadi*, 2005 U.S. App. LEXIS 23301, at *18 (addressing concern about losing due process rights to full and fair review upon departure from the United States); see also 8 U.S.C. § 1252(a)(2)(D) (2006) (declaring in pertinent part: Judicial review of certain legal claims. Nothing . . . in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section. *Id.*).

⁹² See *Bocova v. Gonzales*, 412 F.3d 257, 266-68 (1st Cir. 2005) (explaining that since Hobbs Act permits courts to exercise discretion, and a petition for review cannot feasibly be completed within even the maximum possible voluntary departure period, courts must retain equitable power to stay voluntary departure); see also *Rife v. Ashcroft*, 374 F.3d 606, 615 (8th Cir. 2004) (stating “the grant or denial of a stay pending appeal is a customary part of the judicial function.”).

⁹³ See *Rife*, 374 F.3d at 615 (describing courts fear that compelling petitioners to voluntarily depart prior to final decision on merits of their asylum claim may cause them to become vulnerable to persecution in interim); see also *Nwaokolo v. INS*, 314 F.3d 303, 310 (7th Cir. 2002) (holding a stay was necessary to ensure that petitioner’s daughters were not forcibly subjected to female genital mutilation).

abroad is not feasible;⁹⁴ and that such relief is not statutorily precluded, and may actually be authorized.⁹⁵

First and foremost, is the grave concern that compelling an asylum-seeker to await review of her petition while abroad may lead to dire consequences, that no court, however powerful, just, and compassionate can ameliorate, for example, assassination.⁹⁶ Such was the Eighth Circuit's apprehension, in *Rife v. Ashcroft*.⁹⁷ In that case, a religiously mixed Russian-Orthodox/Jewish family's home had been shot at and damaged during religious and ethnic strife in Azerbaijan.⁹⁸ Additionally, the father, a cameraman, was jailed and beaten for filming an anti-Soviet demonstration.⁹⁹ To escape persecution, the Rifés sought refuge in Israel, but once their originally friendly neighbors discovered the Rifés were Christian, they began not only insulting them, but also demonstrating such cruelty and hatred as casting stones at them.¹⁰⁰

With regard to voluntary departure, the court conceded that IIRIRA eliminated the dilemma of choosing between judicial review and voluntary departure, as it repealed the statute prohibiting courts from reviewing petitions of aliens who had departed from the United States.¹⁰¹ In spite of this, the Eighth Circuit still found inability to stay voluntary departure unjust in situations where an asylum-seeker complying with his order of

⁹⁴ See *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 653 (7th Cir. 2004) (asserting difficulty in appealing one's case from outside of United States); see also *Young*, *supra* note 5 (describing practical difficulties in pursuing litigation from abroad).

⁹⁵ See *Bocova*, 412 F.3d at 267 (1st Cir. 2005) (suggesting that had Congress meant to rescind judiciary of authority to stay voluntary departure, it would have expressed its intention less obscurely); see also *Azarte v. Ashcroft*, 394 F.3d 1278, 1285–89 (9th Cir. 2005) (construing court's power to stay voluntary departure using various techniques).

⁹⁶ See *Walsh*, *supra* note 5, at 2881 (worrying that by compelling voluntary departure pending review an asylum-seeker might become vulnerable to further persecution); see also *Andreju v. Ashcroft*, 253 F.3d 477, 478–79 (9th Cir. 2001) (describing the potentially fatal vulnerability of the petitioner if forced to return to Romania on account of his activism in the National Liberal Party).

⁹⁷ 374 F.3d 606 (8th Cir. 2004).

⁹⁸ *Id.* at 608–09 (providing factual basis for claim).

⁹⁹ *Id.* at 613 (explaining how the father believed that the perpetrators were members of the "KGB").

¹⁰⁰ *Id.* at 609 (detailing the cruel treatment the Rifés received because of their faith).

¹⁰¹ *Id.* at 615 (admitting IIRIRA allows for review from abroad); see 8 U.S.C. § 1252(b)(3)(B) (stating in pertinent part. "With respect to review of an order of removal . . . [s]ervice of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

voluntary departure “suffer[s] the very persecution being litigated before the appeal has been completed.”¹⁰² Accordingly, pursuant to the holding that stays pending appeal may be granted upon the alien making a proper showing, the Rife’s voluntary departure periods did not begin running until the court issued its mandate.¹⁰³

Interestingly, as in *Rife*, many courts staying voluntary departure do so fearing the asylum-seeker will be prevented from ever re-entering the United States upon returning to her homeland;¹⁰⁴ voluntary departure does not compel the Petitioner to return to her country of origin.¹⁰⁵ Instead, a person accepting such relief may designate any country that will accept her as her departure destination.¹⁰⁶ Still, assuming a country other than her own is willing to take the asylum-seeker in, it appears as if it would be too difficult for an individual who has already faced and fled persecution, and is thereafter forced to leave the United States, a country representing her freedom and safety, to carry out her appeal from yet another unfamiliar place.

While in *Rife* the Eighth Circuit declared that IIRIRA did away with the complications associated with pursuing appeals upon voluntarily departing,¹⁰⁷ other circuits have not dismissed this claim so hastily.¹⁰⁸ As explained in *Bocova*, it is impossible to

¹⁰² *Rife*, 374 F.3d at 615 (explaining problems remaining under IIRIRA, that courts should be able prevent by staying voluntary departure).

¹⁰³ *Id.* at 615 n.3 (defining factors for a “proper showing” and granting stay of removal); see *Bocova v. Gonzales*, 412 F.3d 257, 270 (1st Cir. 2005) (utilizing same four-part standard for determining whether to toll voluntary departure).

¹⁰⁴ *Rife*, 374 F.3d at 615 (fearing asylum-seekers will face persecution when voluntarily departing to their countries); see also *Andrieu v. Ashcroft*, 253 F.3d 477, 478–79 (9th Cir. 2005) (explaining the potential vulnerability of the petitioner being persecuted by communist loyalists if forced to return to her homeland of Romania).

¹⁰⁵ See 8 C.F.R. § 1240.26(3)(A) (inferring permission to depart to a country other than Petitioner’s native land from the following: “travel document is not necessary to return to his or her native country or to which country the alien is departing”).

¹⁰⁶ See *Falaja v. Gonzales*, 418 F.3d 889, 892 (8th Cir. 2005) (stating Falaja family failed to designate a country of removal); see also *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 337–38 (2005) (explaining because Jama did not designate a country to which he wanted to be removed, the immigration judge designated Somalia).

¹⁰⁷ *Rife*, 374 F.3d at 615 (stating IIRIRA resolved prior injustice of either forfeiting review or forfeiting opportunity to depart without consequence).

¹⁰⁸ See, e.g., *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 653 (7th Cir. 2004) (countering argument that there is no longer a reason for staying voluntary departure); see also *Nwakanma v. Ashcroft*, 352 F.3d 325, 327 (6th Cir. 2003) (agreeing with the proposition that “the equitable power of the courts of appeals extends to stays of voluntary departure.”).

perform all the tasks necessary for review within the allotted departure period.¹⁰⁹ Thus, if the circuit does not stay voluntary departure, the asylum-seeker desiring to retain the benefits of his voluntary departure period, will undoubtedly have to continue his appeal from overseas. While this initially seems to cause no conflict, the court in *Lopez-Chavez v. Ashcroft*¹¹⁰ commented, "this analysis underestimates the difficulty that aliens will likely encounter in pursuing appeals from afar."¹¹¹ One practical roadblock in continuing one's petition for review while outside American borders is communicating with one's lawyer, which is imperative to successful litigation.¹¹² Another realistic barrier to litigating from abroad is that since many immigrants enter the United States due to economic hardship in their home countries, they may not be financially capable of returning to America upon a favorable decision.¹¹³ Consequently, the asylum-seeker might still be forced to forfeit review in order to retain the benefits of voluntary departure.

Finally, advocates for staying voluntary departure have asserted that granting this type of relief must still be within the courts' jurisdiction, as IIRIRA did not expressly divest the judiciary of this power.¹¹⁴ Correlated, is the notion, most

¹⁰⁹ *Bocova v. Gonzales*, 412 F.3d 257, 269 (1st Cir. 2005) (asserting that inability to complete review, even within a maximum period to depart, warrants use of equitable powers in staying voluntary departure).

¹¹⁰ 383 F.3d 650 (7th Cir. 2004) (discussing courts ability to issue stays under IIRIRA).

¹¹¹ *Id.* at 653 (proffering difficulties in litigating from abroad are sufficient to necessitate court's use of discretionary power); see Young, *supra* note 5, at 19 (reiterating Seventh Circuit's rationale in *Lopez-Chavez*).

¹¹² See The Legal Serv. Corp., *The Erlenborn Commission Report*, 15 GEO. IMMIGR. L. J. 99, 128 (2000) (discussing migrant Mexican farmers' difficulty obtaining H-2A contracts because they cannot confer enough with their lawyers); Laura K. Abel & Risa E. Kaufman, *21st Annual Edward V. Sparer Symposium Suing the Government: Velazquez and Beyond: Preserving Aliens' and Migrant Workers' Access To Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 495 (2003) (noting problems with migrant and alien workers' access to legal services).

¹¹³ See Yee, *supra* note 12, at 606 (asserting most immigrants enter the United States hoping to obtain economic opportunities); see also *Akhtar v. Gonzales*, 406 F.3d 399, 405 (6th Cir. 2005) (reviewing claim that as a Mohajir, Petitioner was subjected to economic deprivation).

¹¹⁴ See *Bocova*, 412 F.3d at 267 ("[w]e do not find any language in the IIRIRA itself that limits our authority to suspend the running of an unexpired voluntary departure period."); Walsh, *supra* note 5, at 2883-84 (cataloging cases involving stays of departure periods).

comprehensively pronounced by the *Azarte v. Ashcroft* court,¹¹⁵ that statutory construction suggests IIRIRA provides for the circuit courts of appeals' capacity to suspend time within which to voluntarily depart.¹¹⁶ The court began its discussion by stating pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹¹⁷ when reviewing an administrative agency's statutory interpretation, the reviewing court must begin its inquiry by considering whether the language of the statute is ambiguous.¹¹⁸ Utilizing this method of review, the court then examined provisions enabling aliens to file motions to reopen their cases within ninety-days of their prior decision.¹¹⁹ The court noted that the Attorney General is vested with the unequivocal authority to grant aliens voluntary departure periods of up to sixty-days.¹²⁰ Nonetheless, how these provisions could be reconciled still remained vague, thereby requiring the court to proceed one step further in order to arrive at a viable reading of the law.¹²¹

Accordingly, the Ninth Circuit applied the rule that statutes are interpreted as a whole, which encompasses the idea that no

¹¹⁵ 394 F.3d 1278, 1287-88 (9th Cir. 2005) (explaining the court's way of interrupting statutes).

¹¹⁶ See *id.* (noting this approach is more consistent with the statute as a whole); see also Walsh, *supra* note 5, at 2886 (noting the Ninth Circuit's rationale that IIRIRA does not specify the issue of stays with voluntary departure).

¹¹⁷ 467 U.S. 837, 842-43 (1984) (discussing statutory interpretation).

¹¹⁸ See *Azarte*, 394 F.3d at 1285 (exercising *Chevron* deference); see also *Chevron, U.S.A., Inc.*, 467 U.S. at 842-43 (stating first step is to ascertain whether Congress has spoken on the issue).

¹¹⁹ See *Azarte*, 394 F.3d at 1285-86 (reading 8 U.S.C. Section 1229a(c)(6)(A) with 8 U.S.C. Section 1229a(c)(6)(C)(i) (note that the court cited 1229a(c)(6)(C)(i) however, the correct provision is 1229a(c)(7)(C)(i)), and 8 U.S.C. Section 1229c(a)(1) with 8 U.S.C. Section 1229c(b)(2)); see also 8 U.S.C. § 1229a(c)(6)(A) (2005) (stating in pertinent part, "[a]n alien may file one motion to reconsider . . ."); 8 U.S.C. § 1229a(c)(7)(C)(i) (2005) (providing, "[t]he motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.").

¹²⁰ See *Azarte*, 394 F.3d at 1286 (highlighting United States Code sections designating power to grant voluntary departure to Attorney General); see also 8 U.S.C. § 1229c(a)(1) (2005) (giving Attorney General authority to "permit an alien voluntarily to depart . . ."); 8 U.S.C. § 1229c(b)(2) (2005) (limiting voluntary departure period to sixty-days).

¹²¹ See *Azarte*, 394 F.3d at 1286 (commenting that while interaction among IIRIRA's provisions was questionable, "traditional canons of statutory construction provide sufficient guidance to enable us to answer that question."); see generally *Sidikhouya v. Gonzales*, 407 F.3d 950, 952 (8th Cir. 2005) (noting that the *Azarte* court tried to give effect to both the voluntary departure and motion to reopen statutes).

provision ought to detract from the force of another.¹²² Therefore, the court contended that in order to effectuate both provisions, IIRIRA must be read to permit the tolling of voluntary departure where aliens file timely motions to reopen prior to the expiration of their departure periods.¹²³ Moreover, in light of the principle that statutory interpretation should avoid leading to absurd results,¹²⁴ the Ninth Circuit concluded that because it would be nonsensical for Congress to have intended appeals to be filed, but not heard, tolling voluntary departure pending review must be authorized.¹²⁵ Lastly, as the holding in *Azarte* facilitated aliens' ability to redress previous adverse decisions, it comported with the constructional canon that removal statutes must be interpreted in the Petitioner's favor.¹²⁶ Thus, tolling voluntary departure withstands statutory interpretation.

ii. Circuit Courts of Appeals Lack Power to Suspend
Voluntary Departure:

Conversely, courts that oppose tolling voluntary departure at the circuit court of appeals level tend to emphasize a single, yet highly persuasive, argument against its implementation. The reason for which anti-suspension circuits' main assertion is so convincing, is because it implicates the plain language of the text. The statute most focused on in this context is found in the Code of Federal Regulations and is entitled "Voluntary departure—authority of the Executive Office for Immigration

¹²² See *Azarte*, 394 F.3d at 1287–88 (describing "Whole Act Rule"); see also *United States v. Cooper*, 396 F.3d 308, 313 (3d Cir. 2005) (explaining Whole Act Rule directs statutes' subsections to be interpreted in context of entire enactment).

¹²³ See *Azarte*, 394 F.3d at 1288 (asserting most rational interaction of relevant statutory provisions); *Sidikhouya*, 407 F.3d at 952 (agreeing with the *Azarte* court).

¹²⁴ See *Azarte*, 394 F.3d at 1288 (declaring "[a]nother traditional canon of statutory construction that necessitates tolling the voluntary departure period is that we must avoid interpretations that would produce absurd results."); see, e.g., *United States v. Turkette*, 452 U.S. 576, 580 (1981) (stating, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with.").

¹²⁵ *Azarte*, 394 F.3d at 1289 (explaining it would be absurd for Congress while allowing for motions to reopen to intend to preclude their availability by not allowing for staying voluntary departure pending review).

¹²⁶ *Id.* (applying construction in favor of aliens); see *Bocova v. Gonzalez*, 412 F.3d 257, 267 (1st Cir. 2005) (explaining statutory ambiguities should be construed in favor of aliens); see also *Wong v. U.S. INS*, 373 F.3d 952, 960 (9th Cir. 2004) (explaining must consider facts in light most favorable to plaintiff to determine if facts show violation).

Review.”¹²⁷ Secondly, courts have also argued that staying voluntary departure contradicts the very policy Congress aimed to advance by allowing aliens to depart on their own volition.¹²⁸ A final reason for forbidding circuit courts from suspending voluntary departure periods is the concern that aliens might file claims just to prolong their time in the United States.¹²⁹

The most scrupulous summary of how this statute strips courts of appeals of the power to stay voluntary departure, and the reasons for which rivaling contentions fail, is found in *Reynoso-Lopez v. Ashcroft*.¹³⁰ While the Third Circuit was contemplating solely whether voluntary departure may be reinstated in *Reynoso-Lopez*, it intimated that its rationale would equally apply to tolling.¹³¹ Subsequently, *Reynoso-Lopez*'s rationale was in fact, formally adopted as the reasoning against tolling in *Hadi*.¹³²

Reynoso-Lopez came before the Third Circuit when the Guatemalan Petitioner appealed from the denial of his asylum, withholding of removal, and protection under CAT claims.¹³³ Demetrio Reynoso-Lopez claimed he had been confined by guerillas when he was ten-years-old, and upon escape fled by himself to Mexico, where he worked for six years, and ultimately, at the age of sixteen, entered the United States illegally.¹³⁴ Although the BIA affirmed the IJ in denying each of Reynoso-Lopez's claims, it granted him thirty days within which to leave

¹²⁷ 8 C.F.R. § 1240.26 (2005).

¹²⁸ See *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1173–74 (9th Cir. 2003) (stating public policy behind voluntary departure is to promote expeditious departure from the United States); see also Walsh, *supra* note 5, at 2857-58 (noting how due to the circuit split, many aliens decide whether or not to accept voluntary departure as relief based on their geographic location).

¹²⁹ See *Zazueta-Carrillo*, 322 F.3d at 1174 (suggesting aliens avoiding return to their countries might file frivolous petitions so that their voluntary departure would be stayed); see also Walsh, *supra* note 5, at 2870 (discussing the circuit split with regard to stays after appeal for aliens in voluntary departure cases).

¹³⁰ 369 F.3d 275 (3d Cir. 2004).

¹³¹ *Id.* at 277 (defining relevant issue).

¹³² *Hadi v. Att'y Gen.*, No. 04-3343, 2005 U.S. App. LEXIS 23301, at *13–*15 (3d Cir. Oct. 27, 2005) (applying *Reynoso-Lopez* to staying voluntary departure because difference between them is “legally insignificant.”).

¹³³ *Reynoso-Lopez*, 369 F.3d at 277 (providing procedural history); see *Federal Decisions*, *supra* note 88, at 19 (explaining *Reynoso-Lopez* was before the third circuit seeking review of BIA's decision).

¹³⁴ *Reynoso-Lopez*, 369 F.3d at 277 (explaining facts of *Reynoso-Lopez*'s case).

the United States voluntarily.¹³⁵ However, Reynoso-Lopez overstayed his voluntary departure period claiming that he remained in the United States so as to appeal the BIA's decision.¹³⁶ In the alternative to a reversal on his claims, Reynoso-Lopez sought reinstatement of his voluntary departure period.¹³⁷

The court acknowledged that the authority to reinstate voluntary departure pending review was an issue of first impression in the Third Circuit.¹³⁸ The court began its inquiry by strictly construing the voluntary departure statute, which states that only specified officers, including the district director, can extend voluntary departure.¹³⁹ Consequently, the court concluded that because Congress had not expressly granted appellate courts jurisdiction to reinstate voluntary departure, they lacked such power.¹⁴⁰

Furthermore, the Third Circuit noted Reynoso-Lopez's remedies were not exhausted just because of the court's inability to reinstate his voluntary departure.¹⁴¹ Under IIRIRA, aliens desiring further relief request such relief from the district director, who has been vested with sole authority to set, extend, and stay voluntary departure.¹⁴² Additionally, the court declared Reynoso-Lopez would not be deprived of due process under this statutory scheme, because even if an alien must voluntarily depart prior to receiving a final judgment on his appeal, the court

¹³⁵ *Id.* at 277–78 (stating IJ granted Petitioner voluntary departure).

¹³⁶ *Id.* (offering reason why Reynoso-Lopez failed to comply with his order to voluntarily depart).

¹³⁷ *Id.* at 277 (defining basis for exploring circuit's jurisdiction to reinstate voluntary departure).

¹³⁸ *Id.* at 280 (beginning reinstatement discussion).

¹³⁹ *Id.* (quoting 8 C.F.R. Section 1240.26(f); 8 C.F.R. 1240.26(f) (2005) (stating, "authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of Juvenile Affairs . . .").

¹⁴⁰ *Id.* at 277 (concluding on issue after strictly construing statute and hearing Government's and Reynoso-Lopez's arguments).

¹⁴¹ *Id.* at 281 (explaining Reynoso-Lopez may be granted relief through application to executive branch).

¹⁴² See *Hadi v. Att'y Gen.*, No. 04-3343, 2005 U.S. App. LEXIS 23301, at *17–*18 (3d Cir. Oct. 27, 2005) (applying Third Circuit's reasoning and holding to issue of staying voluntary departure); see also *Reynoso-Lopez*, 369 F.3d at 281 (construing IIRIRA strictly to direct Petitioners seeking stays and reinstatements of their voluntary departure periods to request such relief from their respective district directors).

retains jurisdiction to review his claim.¹⁴³ Being that the law was amended to permit aliens to pursue appeals from abroad, the Third Circuit announced that the aliens' dilemma had been solved, as they no longer had to decide between complying with voluntary departure, thus taking advantage of its benefits, and going forth with their petitions.¹⁴⁴

Also noteworthy, the Ninth Circuit in *Zazueta-Carrillo v. Ashcroft*,¹⁴⁵ highlighted two potential problems associated with allowing courts to stay voluntary departure. Primarily, the court explained that the public policy underlying voluntary departure is to encourage and effectuate aliens' expeditious departure from the United States.¹⁴⁶ Therefore, suspending voluntary departure, which grants aliens more time on American soil, would nullify voluntary departure's very purpose.¹⁴⁷

Additionally, the *Zazueta-Carrillo* court expressed its concern about the possibility that if courts could suspend voluntary departure during the course of aliens' appeals, aliens seeking to extend their penalty-free time in the United States would file countless frivolous petitions for review.¹⁴⁸ However, as courts have adopted inflexible standards that must be met prior to stopping the clock on a particular individual's voluntary departure, the Ninth Circuit worried unnecessarily.¹⁴⁹ In fact,

¹⁴³ See 8 U.S.C. § 1252(b)(3)(B) (2005).

Requirements for review of orders of removal. With respect to review of an order of removal under subsection (a)(1), the following requirements apply. Service. Stay of order. Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

See also *Reynoso-Lopez*, 369 F.3d at 281, which interpreted 8 U.S.C. § 1252(b)(3)(B) to provide for a court's ability to adjudicate an alien's appeal even after he/she has voluntarily departed.

¹⁴⁴ See *id.* at 281 (explaining 8 U.S.C. § 1105a(c), which stripped appellate courts of jurisdiction once petitioner departed from the United States, was eradicated by IIRIRA); see also *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1171 (9th Cir. 2003) (declaring IIRIRA overruled previous jurisdictional bar on carrying on petition once alien voluntarily departed, and eliminated dilemma).

¹⁴⁵ 322 F.3d 1166 (9th Cir. 2003).

¹⁴⁶ See *id.* at 1173 (citing *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976)) ("The purpose of authorizing voluntary departure in lieu of deportation is to effect the alien's prompt departure without further trouble to the Service.").

¹⁴⁷ See *id.* at 1173-74 (using public policy to demonstrate absurdity of staying voluntary departure).

¹⁴⁸ See *id.* at 1174 (worrying aliens will file meritless claims with the circuit courts in order to tack on a great deal of time to their life in America).

¹⁴⁹ See, e.g., *Bocova v. Gonzalez*, 412 F.3d 257, 264-66 (1st Cir. 2005) (delineating requirements for tolling voluntary departure); *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir.

the Ninth Circuit itself had previously applied such a formulation for stays of removal *Andrieu v. Ashcroft*, which it thereafter applied to stays of voluntary departure in *El Himri v. Ashcroft*.¹⁵⁰ Thus, it is highly dubious that the same court, when adjudicating *Zazueta-Carrillo*, was actually troubled that aliens might profit from their fraudulent claims.¹⁵¹

III. THE ATTORNEY GENERAL: A NEUTRAL DECISION MAKER, OR AN OVERLY INTERESTED PARTY?

Admittedly, the Third Circuit's argument is cogent, as it focuses on the clear text of the statutes.¹⁵² Moreover, the *Hadi* court emphasized strict construction in finding that it could no longer stay voluntary departure.¹⁵³ Hence, its interpretation of IIRIRA seems to defeat the First Circuit's contention that if Congress had intended to divest the judiciary of its authority to stay voluntary departure it would have "expressed its intention in a much more direct and pointed fashion."¹⁵⁴ Furthermore, *Hadi's* adoption of *Reynoso-Lopez's* textually exacting approach equally seems to trump the rigmarole the Ninth Circuit in *Azarte* went through to prove Congress intended circuit courts of appeals to retain authority to stay voluntary departure.¹⁵⁵

However, while under the *Reynoso-Lopez* analysis, circuits concluding they lack authority to stay voluntary departure may

1999) (laying out criteria implemented when reviewing motion to stay voluntary departure).

¹⁵⁰ 344 F.3d 1261 (9th Cir. 2003).

¹⁵¹ See *id.* at 1262 (adopting standard for stays of removal for stays of voluntary departure); see also *Andrieu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (stating aliens desiring to have their removal periods stayed must show "either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the Petitioner's favor.").

¹⁵² See *Hadi v. Att'y Gen.*, No. 04-3343, 2005 U.S. App. LEXIS 23301, at *16-*18 (3d Cir. Oct. 27, 2005) (noting that the statutory language is clear); see also *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 280-81 (3d Cir. 2004) (highlighting that IIRIRA is specific in its language and directives, enabling a strict construction of the statute).

¹⁵³ See *Hadi*, 2005 U.S. App. LEXIS 23301, at *17-*18 (stating *Reynoso-Lopez* made clear statutes pertaining to voluntary departure vest authority to stay such relief exclusively in Attorney General's delegates, such as district director).

¹⁵⁴ *Bocova v. Gonzales*, 412 F.3d 257, 267 (1st Cir. 2005).

¹⁵⁵ See *Hadi*, 2005 U.S. App. LEXIS 23301, at *13-*14, *17-*18 (adopting *Reynoso-Lopez's* plain meaning of text argument); see also *Azarte v. Ashcroft*, 394 F.3d 1278, 1288 (9th Cir. 2005) (reading voluntary departure statutes according to various constructional rules, such as "Whole Act" rule, to prove circuit courts still have power to suspend voluntary departure pending review).

have the plain meaning of the text on their side, this construction effectuates a number of fundamental problems. The most egregious of these is where the asylum-seeker, although having complied with her order of voluntary departure and having been granted asylum while abroad, is unable to return to America because of her government's torturous tactics, or inability, or unwillingness to protect her from her persecutors. Another alarming consequence of employing rationale like that of the Third Circuit is that it indirectly prevents appeals due to the difficulties of pursuing litigation in United States courts while residing in a foreign country.

Moreover, even assuming *arguendo* that no such tragedies or denials of due process have ever, or will ever occur, there is still another compelling reason for permitting the courts to stay voluntary departure. That is, the current law, on which strict constructionist courts base their arguments, vest in the Attorney General and his delegates the sole authority to suspend voluntary departure.¹⁵⁶ As is obvious from even the most rudimentary reading of immigration cases, the Attorney General, and the agencies under him, are interested parties to the proceedings.¹⁵⁷ Additionally, not only are the Attorney General and his delegates interested parties, but they are the adverse parties responsible for charging the aliens with removability, and thereafter, presenting evidence against them at trial.¹⁵⁸ Thus, it

¹⁵⁶ See 8 C.F.R. § 1240.26(f) (2005) (stating, "[a]uthority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs"); see also *Hadi*, 2005 U.S. App. LEXIS 23301, at *17-*18 (affirming that *Reynoso-Lopez* made clear statutes pertaining to voluntary departure vest authority to stay such relief exclusively in district director).

¹⁵⁷ See, e.g., *Bocova*, 412 F.3d at 265 n.1 (noting "[a]n alien who has departed the United States while under an outstanding order of removal is ineligible for readmission to the United States for a period of either five or ten years, depending on the circumstances, without the Attorney General's consent."); *Lopez-Chavez v. Ashcroft*, 383 F.3d 650, 651-53 (7th Cir. 2004) (citing numerous decisions involving voluntary departures which former Attorney General John Ashcroft was a party to); *Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 277 (3d Cir. 2004) (ruling that given Attorney General's exclusive power "to reinstate or extend voluntary departure[s]" the court has no jurisdictional authority on that issue); *Sofinet v. INS*, 188 F.3d 703, 704 (7th Cir. 1999) (noting Department of Justice, a Government agency guided by Attorney General, as counsel for INS).

¹⁵⁸ See *Perez v. Bureau of Immigration*, No. 04-CV-901F, 2005 U.S. Dist. LEXIS 38151, at *3-*4 (W.D.N.Y. June 16, 2005) (noting 8 U.S.C.S. § 1252(g), which provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence

is counterintuitive that at the appellate level they should be empowered with exclusive authority to deliberate on whether to toll an alien's voluntary departure, as they clearly have a conflict of interest.¹⁵⁹ Since there ought to be a disinterested third party presiding over an alien's request for voluntary departure, this responsibility is best placed in the judiciary. Furthermore, prior to IIRIRA's enactment, it was evident from the text of the United States Code, that judges, equipped with the requisite neutrality, are most appropriately situated to decide on motions to stay voluntary departure.¹⁶⁰ Far from novel, this notion was generally accepted among the courts.¹⁶¹

Yet another reason for accepting that circuit courts of appeals should hear requests to stay voluntarily departure is that many of them have implemented reasonable criteria for adjudicating such requests on an individual basis.¹⁶² The creation of standards demonstrates that judges are disposed to deliberating on such claims, and will not do so indiscriminately.¹⁶³ Thus,

proceedings, adjudicate cases or execute removal orders against any alien under this chapter"); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (acknowledging Attorney General's power to commence proceedings, adjudicate cases, and execute removal orders).

¹⁵⁹ Just as there are several sources doubting whether the state is capable of transforming into a neutral party for the purpose of plea-bargaining against criminal defendants, it is doubtful that the governmental officials and agencies charging immigrants with removability and litigating against them can be unbiased when deliberating on their request for suspended voluntary departure. See Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1322 n.61 (2002). Additionally, similar to the belief that prosecutors' quasi-judicial role during certain proceedings does not guarantee that these proceedings are fair, there is severe uncertainty as to whether there is neutrality and fairness when the Attorney General and his delegates decide whether or not to extend an alien's voluntary departure period. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2128 (1998).

¹⁶⁰ See 8 U.S.C.S. § 1254(e)(1) (1995) (repealed 1996) (granting Attorney General discretion, but not sole authority, to extend voluntary departure periods); Richard Cameron Blake, Note, *Nkacoang v. INS: A Complementary Theory for Denying Reinstatement of Voluntary Departure*, 1997 B.Y.U.L. REV. 169, 181 (1997) (noting Attorney General's "discretionary authority to permit eligible aliens to depart voluntarily").

¹⁶¹ See, e.g., *Chan v. Gonzales*, 413 F.3d 161, 164 (1st Cir. 2005) (stating pre-IIRIRA voluntary departure was automatically granted by statute and courts had power to stay voluntary departure pending review); *Arevalo v. Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003) (noting court grant of deportation stay pending judicial review).

¹⁶² See *Bocova*, 412 F.3d at 266 (providing analysis for when it might be appropriate to stay voluntary departure); see also *El Himri v. Ashcroft*, 344 F.3d 1261, 1262-63 (9th Cir. 2003) (adopting *Abbassi* test); *Sofinet*, 188 F.3d at 706 (delineating requirements for suspending voluntary departure periods).

¹⁶³ Various courts, including the First Circuit in *Bocova v. Gonzales*, and the Seventh Circuit in *Sofinet v. INS*, have defined standards for judging whether to suspend the

authority to suspend voluntary departure in the interim prior to a court's final determination should be conferred upon the courts, as that is the most effective way to prevent biased decisions.

Nonetheless, as noted at the beginning of this article, the foremost criticism of and reason for frustration with present-day immigration law stems from the great inconsistency in its interpretation and application.¹⁶⁴ Consequently, because divergent tests for when it is proper to stay voluntary departure have already emerged,¹⁶⁵ simply declaring that courts should be vested with such authority, without specifying a standard by which they may execute that power, would only be perpetuating the law's arbitrariness.

IV. MOVING FORWARD: CRAFTING WORKABLE CRITERIA

One possibly viable standard, as mentioned earlier, was proposed by the Court of Appeals for the Ninth Circuit in *El Himri*.¹⁶⁶ In that decision the court applied a test that had traditionally been used to adjudicate stays of removal to stays of voluntary departure.¹⁶⁷ The court noted that to succeed on a motion for a stay of voluntary departure a Petitioner must establish either that: (1) his case had a probability of success on the merits and a possibility of irreparable injury; or, (2) that he was raising serious legal questions and the balance of hardships tipped sharply in his favor.¹⁶⁸ Fortunately for Haifa Saleh El

running of a voluntary departure period. *See supra* text accompanying notes 153–54. The Supreme Court announced in *Baker v. Carr*, that where there is a lack of judicially discoverable and manageable standards for adjudicating a case, the issue may be a non-justiciable political question designated to a coordinate branch. Accordingly, it can be inferred that where such standards have been developed, as with voluntary departure, the judiciary is vested with authority over the matter. *See Baker v. Carr*, 369 U.S. 186, 210–211 (1962).

¹⁶⁴ *See Andreiu v. Ashcroft*, 253 F.3d 477, 478 (9th Cir. 2001) (expressing that 1996 amendments require court to reinterpret its authority to stay removal); *see also* *Chen v. Gonzales*, 418 F.3d 110, 111 n.2 (1st Cir. 2005) (explaining IIRIRA caused circuit split).

¹⁶⁵ *See* cases cited *supra* note 162; Walsh, *supra* note 5, at 2873–74 (discussing different fourth and ninth circuit approaches to voluntary departure).

¹⁶⁶ *El Himri*, 344 F.3d at 1262 (applying standard applied in *Abbassi v. INS*).

¹⁶⁷ *Id.* at 1262 (holding criteria for obtaining stay of removal shall also apply to stays of voluntary departure).

¹⁶⁸ *Id.* (listing requirements for stay of voluntary departure).

Himri, the Ninth Circuit found that he had established the second alternative of this test, and thus granted his motion.¹⁶⁹

At first glance, it appears as if this test would solve the asylum-seeker's dilemma, as it is concerned with those aliens who would suffer "irreparable injury" and whose "hardships" are weighty enough to shift the balance in their favor.¹⁷⁰ However, in practice, this standard can lead to unpredictable decisions. With respect to the first option, the "probability of success on the merits," cannot be known prior to making a final determination on the case, and so, would allow judges to decide on their instincts about the case, rather than facts and evidence.¹⁷¹ Also, the alternative, that the alien is "raising serious legal questions," allows for excessive subjectivity as to what qualifies as a "serious legal question."¹⁷² Furthermore, the very fact that there are alternatives creates two separate opportunities for an alien to have her voluntary departure period tolled. Thus, the extent of the *El Himri* test's malleability would lead to further incongruous decisions.

By contrast, in *Sofinet v. INS*,¹⁷³ the Seventh Circuit used an analysis with four elements, all of which needed to be met prior to suspending voluntary departure.¹⁷⁴ Similar to the origins of the *El Himri* test, the *Sofinet* analysis was not invented by the court hearing the case, but had been previously developed and used for stays of removal and injunctions pending appeal.¹⁷⁵ Fortunately for Sofinet, his discretionary stay of voluntary departure was granted because he demonstrated: (1) that he was

¹⁶⁹ *Id.* at 1263 (granting *El Himri*'s motion to stay voluntary departure because he raised serious legal questions).

¹⁷⁰ *Id.* at 1262 (setting out criteria).

¹⁷¹ *Id.* at 1262 (providing first way in which a petitioner might prove his voluntary departure period should be suspended); see *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998) (stating courts "evaluate stay requests under the same standards employed by district courts in evaluating motions for preliminary injunctive relief").

¹⁷² *El Himri*, 344 F.3d at 1262 (identifying second reason alien voluntary departure periods should be stayed); *Abbassi*, 143 F.3d at 514 (stating that these evaluation standards for preliminary injunctive relief were adopted from the district courts); see Jeffrey R. Babbitt et al., *Developments in the Second Circuit: 2002-2003*, 36 CONN. L. REV. 1187, 1276 n.686 (2004) (noting "serious legal questions" part of judicial inquiry).

¹⁷³ 188 F.3d 703 (7th Cir. 1999).

¹⁷⁴ *Id.* at 706 (listing criteria used by *Sofinet* court and other courts of appeals).

¹⁷⁵ See *id.* (citing Rules 8 and 18 of the Federal Rules of Appellate Procedure and *Lucacela v. Reno*, 161 F.3d 1055, 1058 (7th Cir. 1998) as the sources of its four-part analysis).

likely to succeed on the merits; (2) that irreparable harm would occur if his stay were not granted; (3) that the potential harm to him would outweigh the harm to the opposing party if a stay were not granted; and (4) that the granting of the stay would serve the public interest.¹⁷⁶

Undoubtedly, this type of analysis is more concrete than the two-option, overly flexible *El Himri* test, as there are four clear requirements for granting a stay.¹⁷⁷ However, the *Sofinet* standard, while apparently disallowing subjectivity, poses the problem of being overly stringent. First, the requirement that “irreparable harm would occur if a stay is not granted,”¹⁷⁸ sets an almost unreachable standard that the alien will definitely be harmed if she returns to her country. Therefore, that requirement precludes the period of voluntary departure from being suspended for asylum-seekers who are likely but not certain to suffer upon return to their homelands. Similarly, it seems that a minimal number of immigrants would be able to demonstrate that granting their stay would actually “serve the public interest.”¹⁷⁹ Thus, under the *Sofinet* analysis, the asylum-seeker’s dilemma would persist for the vast majority of aliens with legitimate claims.

Yet another criteria, as discussed in depth above, was recently expounded in *Bocova v. Gonzales*.¹⁸⁰ The four-part *Bocova* test is almost identical to the *Sofinet* analysis. However, the *Bocova* requirement that “the stay would not disserve the public interest,” seems to be a more attainable standard than “serving the public interest,” and thus, it is a significant improvement.¹⁸¹ However, the standard is still unduly restrictive because as in *Sofinet*, the *Bocova* analysis requires the asylum-seeker to show she “will suffer irreparable harm absent the stay.”¹⁸²

¹⁷⁶ *Id.* at 706, 709 (noting that *Sofinet*’s case was substantial based on the test).

¹⁷⁷ *Id.* at 706 (citing *Lucacela v. Reno*, 161, F.3d 1055, 1057 (7th Cir. 1998)).

¹⁷⁸ *Sofinet v. INS*, 188 F.3d 703, 706 (7th Cir. 1999).

¹⁷⁹ *Id.*

¹⁸⁰ 412 F.3d 257 (1st Cir. 2005).

¹⁸¹ Compare *id.* at 270 (implementing a four-part analysis that only requires an alien to show “that the stay would not disserve the public interest”) with *Sofinet*, 188 F.3d at 706 (providing that an alien must show that “the granting of the stay would serve the public interest”).

¹⁸² Compare *Bocova*, 412 F.3d at 270 (listing as an element of the four-part analysis that the alien show “that she will suffer irreparable harm absent the stay”) with *Sofinet*,

While *Bocova* appears to be a more effective standard, like *Sofinet* it would incorporate elements rather than alternatives in order to adequately control which alien's periods of voluntary departure are stayed. Yet, unlike the standards in the above named cases, the ideal analysis would permit greater protection of a wider array of asylum-seekers with genuine claims. Preliminarily, as proposed by *Bocova* and *Sofinet*, there should be a likelihood of success on the merits in order to ensure that all aliens will not be able to extend their time in the United States by simply filing frivolous petitions.¹⁸³ Secondly, aliens moving for suspension of voluntary departure should establish they are more likely than not to suffer irreparable harm if the period in which they have to voluntarily depart is not stayed. Unlike the standard in *Bocova* and *Sofinet*, this language encompasses those claims in which there is at least a fifty-one percent chance that the immigrant would be harmed if he or she departs from America.¹⁸⁴ With this modification, less asylum-seekers would be faced with the dilemma of having to either wait for decisions on their appeals in countries where there are severe threats against their lives and liberties, or forfeit the benefits given to them through voluntary departure. Thirdly, the requirement put forth in both *Bocova* and *Sofinet* that the potential harm to the asylum-seeker outweighs such injury to the government, should be implemented with some further clarification.¹⁸⁵ The problem with the way this criterion is presently worded, is that "injury to the government" is left completely unqualified. Since this proposed analysis would require that the alien have already established that she is more likely than not to suffer irreparable harm if her motion is not granted, the governmental interest weighed against the likelihood of such severe injury must be

188 F.3d at 706 (requiring that an alien demonstrate "that irreparable harm would occur if a stay is not granted").

¹⁸³ Compare *Bocova*, 412 F.3d at 270 (requiring a showing that the alien is "likely to succeed on the merits of her underlying objection") with *Sofinet*, 188 F.3d at 706 (requesting a demonstration of "a likelihood of success on the merits" before allowing a discretionary stay of deportation).

¹⁸⁴ The tests of *Bocova* and *Sofinet* demand that the alien definitively show that she will suffer irreparable harm absent the stay, instead of allowing for a showing of likelihood. See *Bocova*, 412 F.3d at 270; *Sofinet*, 188 F.3d at 706.

¹⁸⁵ *Bocova* and *Sofinet* share the requirement that the potential harm to the alien must outweigh the harm to the government, rather than simply offset it. See *Bocova*, 412 F.3d at 270; *Sofinet*, 188 F.3d at 706.

great. For example, the “injury” an alien causes by simply remaining in the United States, without contributing to or detracting anything from society, would not be outweighed the grave perils she is likely to face if forced to voluntarily depart. Suppose a notorious terrorist could have initially made out his eligibility for voluntary departure, which includes a showing of good moral character.¹⁸⁶ Although this notorious terrorist may be able to prove he is truly despised in his own country and is extremely likely to face grave danger once he leaves American soil, the threat he poses to our government by remaining in our country is so serious as to warrant his departure. Thus, narrowing the meaning of “government interest,” to include any time an alien’s presence is more likely than not to be detrimental to our country in more than just a pecuniary fashion. Such an interest would be strong enough to weigh against any potential harm to an alien. Finally, as in *Bocova*, a determination that staying a particular alien’s voluntary departure will not disserve the public interest keeps the American citizens’ best interests in mind, without disqualifying most seriously endangered aliens’ voluntary departure periods from being suspended.

CONCLUSION

As a result of the current lack of uniformity among circuits regarding the suspension of voluntary departure, the Supreme Court will inevitably have to make a final ruling about whether such discretionary relief may be stayed, and under what circumstances. When the Court is finally faced with this issue, the Justices should consider the ramifications of prohibiting circuit courts to grant this discretionary relief. In this regard, the best result would be for the Supreme Court to hold that circuit courts have authority to stay voluntary departure so as to avoid the tragedy of ultimately finding an asylum-seeker has a valid claim when it is too late. To prevent aliens from bringing frivolous claims just to extend their stay in the United States, however, the Court should set some restrictions upon the Circuit Courts of Appeals’ suspension ability, perhaps even, as explained

¹⁸⁶ See *supra* note 11 and accompanying text.

above, adopting some of the courts' self imposed limitations. Finally, the Supreme Court Justices should render the pernicious 8 Code of Federal Regulations Section 1240.26(f), which essentially delegates the Plaintiff with the sole authority to decide the Defendant's voluntary departure, and thus fate, partially, if not completely void.