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RE-INTERPRETING POSTVILLE: A LEGAL PERSPECTIVE

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> Any [immigration] reform plan has to recognize the economic realities that bring people across sometimes deserts or oceans to come into this country in order to do work . . . . that can't be filled, and that the people who are doing that work have to be afforded a level of humanitarian protection and fairness that prevents them from being victimized . . . .
>
> I also have to say, it gives me no joy to see television images of crying children, or people who are working here illegally but otherwise not harming the country or doing anything wrong, being frightened and being removed for enforcement reasons that are completely legitimate, but nevertheless, painful on [a] human basis.[1]

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[1] Michael Chertoff, Sec'y, Dep't of Homeland Sec., Remarks at the Anti-Defamation League's 29th Annual Leadership Conference (May 1, 2007), *available at* http://www.dhs.gov/xnews/speeches/sp_1178115258693.shtm.

INTRODUCTION

The United States has seen a dramatic increase in worksite enforcement operations over the last few years.[2] One of the largest worksite enforcement operations in United States history occurred on May 12, 2008 in Postville, Iowa. United States Immigration and Customs Enforcement (ICE), the federal agency responsible for interior enforcement of immigration laws, raided Agriprocessors, Inc., the largest kosher meatpacking plant in the United States and the largest employer in Postville, Iowa. Dr. Erik Camayd-Freixas, a federally certified interpreter contracted to interpret for the court proceedings, provided a first-person account shedding light on this "man-made disaster" that fast-tracked the arrested workers into accepting criminal charges, convictions and deportation, deprived workers of meaningful access to justice, imposed criminal penalties for offenses normally viewed as civil in nature, separated parents from children, and economically devastated Postville. Collateral damages are ongoing. Dr. Camayd-Freixas's article details aspects of the proceedings, which were largely kept secret even after prosecution had begun.[3] Still, nearly a year later, some of the actions taken by parties to the proceedings remain unknown and unanswered.

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[2] ICE enforcement actions increased sevenfold between 2002 and 2006. *See* DETENTION WATCH NETWORK, TRACKING ICE'S ENFORCEMENT AGENDA 4 (2007), *available at* http://detentionwatchnetwork.org/aboutdetention. In 2005, there were 176 criminal and 1,116 administrative arrests compared to 1,103 criminal and 5,184 administrative arrests in 2008. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT WORKSITE ENFORCEMENT OVERVIEW: ANATOMY OF A WORKSITE ENFORCEMENT CASE 3 (2008), *available at* http://www.ice.gov/doclib/pi/news/factsheets/worksite.pdf.

[3] Erik Camayd-Freixas, *Interpreting After the Largest ICE Raid in US History,* N.Y. TIMES, June 13, 2008 [hereinafter Camayd-Freixas, *Interpreting*], *available at* http://graphics8.nytimes.com/packages/pdf/national/20080711IMMIG.pdf; *see also* Letter from Rockne Cole, Criminal Defense Attorney, to Zoe Lofgren, Congresswoman (July 24, 2008), *in* 2 DEPAUL J. FOR SOC. JUST. 25, 29 (2009) [hereinafter Letter from Rockne Cole].

What is known or has been reported is that the Postville worksite enforcement action was the largest worksite enforcement action in the history of the United States up until that time, targeting nearly 400 workers, including women and children.[4] Those arrested were identified as mostly being from Guatemala, with Mayan-sounding surnames,[5] and three-quarters of them were identified as being Cak'chiquel ethnic Mayans from the hills of Chimaltenango,[6] and by some accounts illiterate or not fluent in either English or Spanish.[7]

Those arrested were tried in a make-shift federal district court set up at the grounds of the National Cattle Congress in Waterloo, Iowa. Immigrant defendants filed into court in groups of ten to appear before a federal district court judge. Most pled guilty to the use of false documents.[8] Immediate deportation, following the completion of the sentence imposed, was a condition of

4 "[Three-hundred and ninety] were arrested: 314 men and 76 women; 290 Guatemalans, 93 Mexicans, four Ukranians and three Israelis who were not seen in court." Camayd-Friexas, *Interpreting, supra* note 3, at 2. "In September [2008], the plant owner and managers were charged with 9,311 misdemeanors alleging they illegally hired minors and let children younger than 16 handle dangerous equipment. The complaint filed by the Iowa attorney general's office said the violations involved 32 illegal-immigrant children younger than 18, including seven who were not yet 16." *Raided Meatpacking Plant Is Heavily Fined*, L.A. TIMES, Oct. 30, 2008.

5 Camayd-Freixas, *Interpreting, supra* note 3, at 1.

6 Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. FOR SOC. JUST. 1, 1 (2009).

7 *Working on the Railroad: Treatment of Immigrants After an Iowa Workplace Raid was an Offense to American Due Process*, HOUS. CHRON., July 21, 2008, at B8; *The Jungle Again*, N.Y. TIMES, Aug. 1, 2008 ("This worker simply had the papers filled out for him at the plant, since he could not read or write Spanish, let alone English," (quoting Camayd-Freixas, *Interpreting, supra* note 3, at 6)).

8 Press Release, United States Attorney's Office Northern District of Iowa, 297 Convicted and Sentenced Following Arrests at Meatpacking Plant (May 22, 2008), *available at* http://www.usdoj.gov/usao/ian/press/May_08/5_22_08_Agriprocessors1.html.

the plea agreement.[9] Most were sentenced within four days of being charged.[10]

Shortly after the raid, court-appointed defense attorneys were summoned to Cedar Rapids, Iowa for an orientation regarding the group criminal prosecutions. Defense attorneys were provided with handbooks that included an overview of the possible criminal charges. The handbooks also provided a script for explaining the criminal charges, waiver of rights and the options available to the workers.[11] Defense attorneys agreed to "represent up to as many as 30 immigrant defendants."[12]

The majority of those arrested were held in custody at the Cattle Congress in Waterloo, Iowa. Some women and children were released pending ongoing legal proceedings. The United States Attorney announced that 23 juveniles were turned over to responsible adults or to "specialists."[13] Some defendants were also released from detention based on humanitarian grounds. Mothers, released from detention because they were sole caregivers, were released on condition of wearing an ankle bracelet pending a hearing.[14]

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9 *See* U.S. Dep't of Justice Plea Agreement, (N.D. Iowa May 13, 2008), [hereinafter Plea Agreement], *available at* http://www.aila.org/Content/default.aspx?docid=25546. "The parties agree defendant is subject to removal from the United States. Defendant waives the right to notice and a hearing before an immigration judge and stipulates to entry of a judicial order of removal from the United States. Defendant shall not unlawfully reenter the United States." *Id.*

10 Julia Preston, *Feds give illegal workers prison time in major shift, Prosecutions of 297 in Iowa are seen as escalation of crackdown by the administration*, HOUS. CHRON., May 24, 2008, at A10 [hereinafter Preston, *Prosecutions of 297*].

11 Letter from Rockne Cole, *supra* note 3.

12 Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N. Y. TIMES, May 24, 2008, at A1 [hereinafter Preston *270 Immigrants*].

13 *See* Press Release, United States Attorney's Office Northern District of Iowa, *supra* note 8.

14 *See id.*; *Iowa Immigration Raids Threaten Town's Stability*, L. A. TIMES, May 25, 2008.

Within ten days after the raid, 297 workers had been convicted.[15] On May 22, 2008, the Department of Justice's U.S. Attorney's Office for the Northern District of Iowa announced that 305 of the 389 people detained by ICE in the Postville raid were arrested on criminal charges, and 297 of the 305 arrested pled guilty and were sentenced on federal felony charges.[16] Six cases were found to involve juveniles and were dismissed.[17] The majority (over 230) of the defendants were sentenced to five months in prison and three years of supervision for use of false identification to obtain employment.[18] Other convictions were based on false use of a social security number or card, or illegal reentry into the United States.[19]

By October 2008, many of the individuals who pled guilty had completed their sentences and were deported to their home country. As mentioned, as a part of the plea agreement, defendants had to stipulate to a judicial order of removal. An ICE spokesperson has indicated that 50 of the defendants, however, were scheduled for immigration hearings in which presumably they will finally have the opportunity to tell their stories.[20] How-

15 Preston, *Prosecutions of 297*, *supra* note 10.

16 Press Release, United States Attorney's Office Northern District of Iowa, *supra* note 8; Press Release, Convictions Come From Largest Criminal Worksite Enforcement Operation in U.S. History (May 22, 2008), *available at* http://www.usdoj.gov/usao/ian/press/May_08/5_22_08_Agriprocessors1.html.

17 *Id.*

18 *Id.*

19 *Id.*

20 Trish Mehaffey, *Deportations to begin for former meat plant workers*, CEDAR RAPIDS GAZETTE, Oct. 8, 2008. "Tim Counts, spokesman for Immigration and Customs Enforcement, said he didn't have a number of the people who will be deported. Fifty have been deported and another 50 are going through removal proceedings with an immigration judge." *Id.* Approximately 40 individuals are represented by pro bono counsel on application for immigration relief available to victims of certain crimes under I.N.A. § 101(a)(15)(U). *See* Family Violence Prevention Fund, http://www.endabuse.org/content/heroes/detail/810 (last visited Feb. 20, 2009). It appears one person may be represented on an application for political asylum. Marcelo Ballvé, NEW AM. MEDIA, Sept. 30, 2008, http://news.newamericamedia.org/news/view_article.html?article_id=CD86ca5f95c0fa93f3dbe228de3a49

ever, most of the Postville detainees' stories will never be known.

The consequences of the ICE raid in Postville have been devastating on the community.[21] Agriprocessors filed for bankruptcy.[22] Hundreds in Postville, a town of about 2,000, are without employment.[23] Local charities and religious groups have stepped in to provide assistance to feed and shelter those impacted by the raid.[24] The image of "poor immigrant men and women being dragged away in handcuffs and ankle chains as if they were killers or terrorists," and the "faces of children separated from their parents" are difficult to forget.[25]

The Postville raids are open to much critique regarding the impact they had on families, communities and economies. The same can be said of the policy considerations that led to over 900 federal officials prioritizing the criminalization of 297 workers over the investigation and prosecution of ongoing labor violations that had existed at the plant for years[26] and the current

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da (last visited Feb. 20, 2009). And presumably the minor children arrested in the workplace raid are being screened for either U visa eligibility or special immigration juvenile status under I.N.A. § 101(a)(15)(J), although nothing further has been reported. *See* Family Violence Prevention Fund, *supra.*

21 *See* Steven Greenhouse, *Shuttered Meat Plant Edges Back Into Business, but Its Town Is Still Struggling*, N. Y. TIMES, Dec. 5, 2008, at A29. "The plant, which employed more than 800 workers last spring, has long been the economic heart of Postville, a town of about 2,000 residents. Its closing created shock and despair." *Id.*

22 *Id.*

23 *Id.*

24 Henry C. Jackson, *Clergy, residents renew call for help in Postville*, ASSOC. PRESS, Dec. 11, 2008.

25 Albor Ruiz, *International Migrants Day Calls for Change*, N. Y. DAILY NEWS, Dec. 21, 2008, at 52.

26 *See, e.g., Arrest, Prosecution and Conviction of Undocumented Workers in Postville, Iowa from May 12 to 22, 2008: Hearing Before the H. Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary* (statement of David Leopold on behalf of Am. Immigration Lawyers Ass'n (AILA)) (July 24, 2008), at 7 [hereinafter *Hearings*], *available at* http://judiciary.house.gov/hearings/pdf/Leopold080724.pdf; *see also* Letters from Rep. Bruce Braley (D-IA) to Dep't of La-

and future harms the individuals arrested faced at the plant and will face if forced to leave the United States.

This article examines the failings of the legal process that was employed in Postville to convict and remove – effectively without hearing, without trial, or without counsel – 297 noncitizens from the United States within days of criminal charges being filed against them.[27] The proceedings employed to prosecute the Agriprocessors workers purported to address both criminal and administrative violations. However, these judicial removals violated both the due process required of criminal proceedings and the statutory rights to notice and opportunity to present defenses required by immigration proceedings.[28]

Part I of this article will provide a background on the policy considerations that led to the creation of the judicial removal procedures (the court procedures employed at Postville), and on the scope of those proceedings in contrast with civil immigration proceedings, which is the process typically employed to determine whether a noncitizen should be removed from the United

bor, Dep't of Justice and Dep't of Homeland Security (May 15, 2008) (questioning lack of investigation into labor violations at Agriprocessors and coordination amongst federal agencies as well as the contradictory responses sent by federal agencies in response to his inquiries), *available at* http://www.aila.org/Content/default.aspx?docid=25985 (follow "letter" and "follow-up letter" hyperlinks).

27 *See* Letter from Kathleen Campbell Walker, AILA President, and Jeanne Butterfield, AILA Executive Director, to Linda R. Reade, Chief Judge of the Northern District of Iowa (May 19, 2008) ("We understand that hundreds of people arrested pursuant to this enforcement action were denied access to immigration counsel all day Monday and until Tuesday . . . inadequate provisions were made to ensure that each individual charged is afforded meaningful access to counsel familiar with both criminal and immigration laws.") [hereinafter Letter from Kathleen Campbell Walker], *available at* http://www.aila.org/Content/default.aspx?docid=25440; *see also, Concerns over access to lawyers are raised*, DES MOINES REG., May 14, 2008.

28 For a detailed discussion of the manner in which criminal justice norms have been imported into immigration law and procedure and the shortcomings of such a model, *see generally* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms,* 64 WASH. & LEE L. REV. 469 (2007).

States. In order to understand the implications of Postville, it is important to understand what processes and protections are normally afforded to noncitizens facing removal from the United States compared to the judicial removal proceedings employed at Postville. In particular, this section will discuss the lack of notice and opportunity for workers in Postville to be able to raise defenses to deportation, including those defenses based on international human rights law and obligations, and the particular significance of the deprivation of the opportunity to be heard in the context of the workers arrested at Postville.

Part II of this article examines the judiciary's role in the Postville raid and questions whether it was able to maintain independence and impartiality. The court did not merely decide the cases that were brought before it, but coordinated with the federal prosecutors to move the entire court and its staff to a large compound in order to hear the preliminary stages of the cases. The obvious logistical barriers to full trials for the defendants gave the impression that the court had an interest in preventing trials for the defendants. Moreover, the scale of cooperation, coupled with the fact that the majority of defendants had little experience with the United States judicial system, contributed to an appearance of bias against the defendants. Additionally, the statute used by the prosecutors to induce plea agreements was an impermissible attack on the federal judiciary's ability to properly decide cases or controversies.

Part III of this article examines the role of individual rights in the Postville proceedings. Specifically, it addresses the right to competent counsel in proceedings that merge criminal defense proceedings with civil removal proceedings. In understanding that criminal plea deals were struck to expedite removal from the United States, it is essential to determine whether the defendants were properly advised as to the propriety of defenses to removal. Additionally, this section addresses conflicts of interest by attorneys who engage in dual representation.

Part IV of this article examines the conduct of the prosecutor in the Postville proceedings. Serious questions surround the propriety of the implementation of a fast-track system at Postville. It is unclear that the United States Attorney's Office (USAO) met its burden of showing that fast-tracking was warranted, and the USAO arguably overstepped its authority and coerced plea agreements from approximately 300 non-citizens.

I. The Role of Immigration Law in the Postville Proceedings

According to the press release issued the day of the Postville raid from the USAO for the Northern District of Iowa:

> [ICE] agents executed a criminal search warrant . . . for evidence relating to aggravated identity theft, fraudulent use of Social Security numbers and other crimes, as well as a civil search warrant for people illegally in the United States . . . [The raid was] the largest operation of its type ever in Iowa. Agents and officers from federal, state, and local agencies are involved today.

The USAO further stated that:

> Anyone encountered during this operation who is discovered to be in the United States illegally eventually will be placed into *administrative removal proceedings*. So far, ICE agents have arrested more than 300 individuals for *administrative immigration violations*.
>
> All of those taken into custody during today's operation will be interviewed by ICE agents and Public Health Service officers to determine if they have health, caregiver, or other humanitarian concerns. As a result of those interviews, over 40 individuals have so far been released on humanitarian

> grounds under supervision, pending future immigration proceedings.[29]

Despite the promise of administrative removal proceedings and the emphasis by the U.S. Attorney that the workers targeted in this raid were being investigated for administrative immigration violations, the majority of noncitizens never went before an administrative law judge for a determination about civil violations, nor had the opportunity to go before an Immigration Judge to provide reasons that they should be able to remain in the United States rather than face deportation to their home country, a decision that can often be a matter of life or liberty. Rather, they were given seven days to accept a plea bargain or face an even heavier charge.[30] In some cases, plea bargains were accepted in four days.[31] Defense counsel was limited. Access to immigration counsel was all but nonexistent.[32]

In order to understand the harm to the individuals involved, it is important to understand the rights and remedies provided through administrative removal proceedings. Removal proceedings, formerly called deportation proceedings, are the process established by Congress through which noncitizens who have violated United States immigration laws are ordered deported and ultimately physically removed from the United States. While Congress's statutory scheme provides a separate administrative process for deportation determinations for noncitizens convicted of certain crimes considered more serious,[33] the deci-

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[29] *See* Press Release, U.S. Attorney's Office for the Northern District of Iowa, ICE and Department of Justice Joint Enforcement Action Initiated at Iowa Meatpacking Plant (May 12, 2008), *available at* http://www.usdoj.gov/usao/ian/press/May_08/5_12_08_Agriprocessors.html.

[30] *See* Letter from Rockne Cole, *supra* note 3.

[31] *See* Plea Agreement, *supra* note 9.

[32] *See* Letter from Kathleen Campbell Walker, *supra* note 27; *see also Hearings,* Statement of David Leopold, *supra* note 26.

[33] 8 U.S.C. § 1228(b), Immigration and Nationality Act (I.N.A.) § 238(b) (2008) (providing for the removal of persons charged with aggravated felonies (those offenses defined under 8 U.S.C. § 1101(a)(43), I.N.A. § 101(a)(43); including rape, murder, sexual abuse of a minor, theft offenses

sion of whether a noncitizen apprehended by ICE is deported is determined principally through the Immigration Courts, which are specialized courts of limited jurisdiction.[34] Under the procedures established in these removal proceedings, noncitizens have the opportunity to present defenses to deportation before an Immigration Judge.[35] The remedies or defenses available in these proceedings are provided by statute and reveal certain policy considerations regarding whose immigration or criminal violations may be forgiven.[36] Depending on the immigration charges that trigger deportability or removability, the Immigration Judge may consider the noncitizen's United States citizen or lawful permanent resident family relationships, length of residence in the United States, demonstration of rehabilitation,[37] or the harms the individual will face if returned to his or her home

with a sentence of one year or more, crimes of violence with a sentence of one year or more, fraud offenses with loss to the victim in excess of $10,000, firearms, trafficking and drug trafficking offenses) who are not lawful permanent residents of the United States. The procedure provides for notice of the charges, and if the noncitizen does not respond within 14 days to the charges, a final order of removal will be entered without hearing.)

[34] 8 U.S.C. § 1229a, I.N.A. § 240 (2008).

[35] 8 C.F.R. § 1240.1(a)(1)(i)-(iv) (2008); 8 U.S.C. § 1101(b) ("The term Immigration Judge means an attorney whom the Attorney General appoints as an administrative judge . . . .").

[36] *Id.*

[37] *E.g.*, 8 U.S.C. § 1229b, I.N.A. § 240A(b) provides that an Immigration Judge may grant lawful permanent resident (L.P.R.) status to a noncitizen who has resided in the U.S. for at least 10 years and has been a person of "good moral character" upon a showing that the noncitizen's deportation will result in exceptional and extremely unusual hardship to a U.S. citizen or L.P.R. spouse, parent and child. Under 8 U.S.C. § 1229b(a), I.N.A. § 240A(a), the Immigration Judge may cancel the removal of an L.P.R. rendered deportable for having committed certain crimes or immigration violations with 7 years of lawful status in the U.S., five of which must be as an L.P.R. Further, the Immigration Judge may consider ties to the community and family, as well as rehabilitation in determining whether to grant relief under 8 U.S.C. § 1229b(a), I.N.A. § 240A(a).

country in determining whether or not to order removal from the United States.[38]

Some of the defenses to deportation are discretionary. Even if a noncitizen demonstrates that she or he meets the statutorily enumerated elements required for relief, the Immigration Judge may still deny the application and order deportation in his or her discretion.[39] Other defenses are nondiscretionary, meaning that if a noncitizen applicant has demonstrated she or he meets the statutory elements, the Immigration Judge must grant relief and the individual may not be deported.[40] This section of the article will examine the procedures and remedies afforded to noncitizens in traditional removal proceedings and the way that the Postville proceedings prevented noncitizen respondents from raising these defenses.

Removal Proceedings: Judicial Responsibilities

The current overall structure for proceedings to remove noncitizens from the United States has been in place since 1996. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which made substantive changes to deportation procedures and created new restrictions on defenses available in removal proceedings.[41] Notwithstanding these sweeping changes, IIRIRA retained certain procedural protections, provided by statute and regulations, regarding the rights of a noncitizen in removal proceedings. Under the existing statutory scheme, the presiding Immigration

[38] Asylum (8 U.S.C. § 1158, I.N.A. § 208; 8 C.F.R. § 208), withholding of removal (8 U.S.C. § 1231, I.N.A. § 241; 8 C.F.R. § 208.16) and the Convention Against Torture (8 C.F.R. § 208.17).

[39] 8 C.F.R. § 1003.10 ("Immigration Judges exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation."); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428-29 (1987).

[40] *Cardoza-Fonseca*, 480 U.S. at 428-29.

[41] *See generally* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

Judge must advise the respondent of his or her right to counsel (at the noncitizen's expense), the right to present evidence, the right to examine and object to evidence presented and the right to cross-examine witnesses.[42] The Immigration Judge must advise of the availability of free or low-cost legal services,[43] and must read and explain the factual and legal allegations in the charging document, called a Notice to Appear for Removal Proceedings.[44] Further, and perhaps most relevant to our critique of the non-traditional judicial removal proceedings employed at Postville, the Immigration Judge has a duty to inform of potential eligibility for relief from removal[45] at a point in the proceedings so that the right is not inadvertently waived.[46] In light of the complicated nature of immigration laws, this rule "is intended to protect the alien against the risk of error by his or her lawyer."[47]

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42 I.N.A. § 240(b); 8 C.F.R. § 1240.10.

43 *See* United States v. Aguirre-Tello, 353 F.3d 1199, 1211-1213 (10th Cir. 2004) (Holloway, J., dissenting) (finding that failure to advise the immigrant respondent of the availability of free or low cost legal services may support an argument that proceedings are fundamentally unfair).

44 8 C.F.R. § 1240.10.

45 8 C.F.R. § 1240.11(a)(2) ("The Immigration Judge shall inform the alien of his or her apparent eligibility to apply for any benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing, in accordance with the provisions of 1240.8(d)."); *see also* Asani v. INS, 154 F.3d 719, 727 (7th Cir. 1998); *see also* Korsunskiy v. Gonzales, 461 F.3d 847, 849 (7th Cir. 2006) ("The immigration judge has a duty not to mislead an alien and ensure that there is good ground for removal or exclusion. The absence of counsel, in other words, is not an adequate justification for ruling against the alien; the agency still must prove its contentions in a fairly conducted proceeding.").

46 In re Cordova, 22 I. & N. Dec. 966, 970 (BIA 1999) ("To ensure all aliens are informed of this relief in a manner which allows them to timely apply, the Immigration Judge should notify any respondent who is apparently eligible for this relief no later than at the master calendar hearing at which the case is initially calendared for a merits hearing. If . . . there is no separate master calendar hearing, the information regarding [I.N.A. §] 240B(a) [voluntary departure], and the opportunity to apply for this form of voluntary departure should be provided prior to the taking of pleadings in the matter, so that the respondent will not inadvertently waive his or her right to apply for relief.").

47 *Asani*, 154 F.3d at 727.

While there may be some disagreement among the circuits regarding whether the Immigration Judge's failure to inform the respondent of potential remedies constitutes a due process violation, the disagreement is over the right to be informed of *discretionary* remedies.[48] No circuit has held that the Immigration Judge does not have a duty to inform the respondent of *nondiscretionary* remedies, which include those that prevent a noncitizen from being returned to a country where he or she faces persecution or torture.

Further, both the Immigration Judge and the attorney for the Department of Homeland Security (DHS) prosecuting the noncitizen in a removal proceeding may introduce evidence.[49] This evidence is not limited to evidence of removability, but also includes evidence relevant to eligibility for relief. It appears that during the Postville removal proceedings that followed the Agriprocessors raid, neither the federal court judges nor the prosecutors made any inquiries into eligibility for relief from deportation, much less introduced information regarding potential remedies. The lack of inquiry into remedies by either the district court judge or the prosecutor is not only inconsistent with removal proceedings procedures, it also appears to violate the DHS's own directives for the use of judicial deportation procedures.[50]

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[48] United States v. Copeland, 376 F.3d 61, 70-73 (2d Cir. 2004) (noting that "a failure to advise a potential deportee of a right to seek § 212(c) relief can, if prejudicial, be fundamentally unfair within the meaning of § 1326(d)(3). To be sure, relief under § 212(c) is not constitutionally mandated and is discretionary. It does not follow, however, that where an alien is erroneously denied information regarding the right to seek such relief, and the erroneous denial of that information results in a deportation that likely would have been avoided if the alien was properly informed, such error is not fundamentally unfair within the meaning of § 1326(d)(3)"). *But see Aguirre-Tello*, 353 F. 3d at 1205 (holding, after reviewing circuit court decisions , "there is no constitutional right to be informed of the existence of discretionary relief for which a potential deportee might be eligible.").

[49] In Re S-M-J, 21 I. & N. Dec. 722, 726 (BIA 1997).

[50] *See* Memorandum from Janet Reno, Attorney General, to All Federal Prosecutors, at 5-7 (Apr. 28, 1995), *available at* http://www.usdoj.gov/ag/read-

Immigration Remedies Related to Past or Future Harm

Defenses to deportation from the United States and claims to lawful status fall within certain general categories: defenses based on years of residence and equities,[51] remedies based on family relationships,[52] remedies based on economic interests of the United States,[53] and defenses based on certain domestic policy considerations,[54] humanitarian considerations[55] and international obligations. With regard to international obligations, three defenses to deportation are related to international human rights obligations not to return individuals to a country where they would face pain, suffering or torture. These defenses are

ingroom/deportation95.htm. The memo directs that requests for judicial deportation and stipulated deportation orders should be made in cases where the noncitizen is not a lawful permanent resident and where the criminal offense can be categorized as either an "aggravated felony," as defined in 8 U.S.C. § 1101(a)43, a "serious crime of violence" that involves moral turpitude or "two or more serious crimes of violence that indisputably involve moral turpitude—voluntary manslaughter, kidnapping, sexual abuse, arson, robbery, burglary, or aggravated assault . . .[similarly] a judicial order of deportation should not be sought if the alien has any colorable claim for relief from deportation." *Id. See Immigration Raids: Postville and Beyond, Hearing Before the H. Subcomm. Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary* (statement of the American Civil Liberties Union) (July 24, 2008), www.aclu.org/images/asset_upload_file428_36231.pdf.

51 8 U.S.C. § 1229b(A)-(B), I.N.A. § 240A(a)-(b).

52 8 U.S.C. § 1153(a), I.N.A. § 203(a); 8 U.S.C. § 1229b(A), I.N.A. § 240A(a); 8 U.S.C. § 1229b(a), (i), I.N.A. § 245(a), (i).

53 8 U.S.C. § 1153(b), I.N.A. § 203(b).

54 *See, e.g.* 8 U.S.C. § 1229b(b)(2), I.N.A. § 240A(b)(2) (survivors of domestic violence); I.N.A. § 101(a)(15)(U) (victims of certain crimes who are helpful in investigation or prosecution of the crime); I.N.A. § 101(a)(15)(T) (victims of severe forms of human trafficking who assist in providing information regarding traffickers); I.N.A. § 101(a)(15)(S) (government informants).

55 *See, e.g.* 8 U.S.C. § 1254a I.N.A. § 244, (temporary protected status for individuals from identified countries suffering from civil strife or natural disaster).

asylum, withholding of removal and the Convention Against Torture.[56]

A noncitizen of the United States who has either suffered harm or fears future harm on account of a protected characteristic may request asylum in the United States. In order to establish eligibility for asylum, the applicant must show that she or he meets the definition of a "refugee" under the Immigration and Nationality Act (INA). A refugee is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[57]

Asylum is a discretionary remedy. An Immigration Judge may decline to grant asylum in his or her discretion even where past or future persecution can be shown.[58]

A separate, *nondiscretionary* remedy, withholding of removal, is available to individuals who have suffered persecution in the past or are likely to suffer persecution in the future.[59] Consistent with international obligations, our immigration laws prevent removal to a country where the noncitizen's "life or freedom would be threatened."[60]

While asylum requires demonstrating a reasonable possibility of future persecution, withholding of removal requires that fu-

[56] I.N.A. § 208 (asylum); I.N.A. § 241 (withholding of removal); 8 C.F.R. § 208 (Convention Against Torture).
[57] 8 U.S.C. § 1101(a)(42), I.N.A. § 101(a)(42).
[58] *See* Matter of Pula, 19 I. & N. Dec. 467, 471 (BIA 1987).
[59] 8 U.S.C. § 1231, I.N.A. § 241.
[60] 8 U.S.C. § 1231(b)(3), I.N.A.§ 241(b)(3).

ture persecution be more likely than not.[61] However, for both asylum and withholding of removal, a claim based on past persecution requires the same evidentiary showing.[62]

Further, Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture or CAT) prevents the United States from returning a noncitizen to a country where there is a likelihood that the individual will be tortured.[63] The United States signed CAT on April 18, 1988, and in 1999 the Department of Justice published regulations establishing the process for raising claims for protection from torture under CAT.[64] Article 3 of CAT prohibits the expulsion, return ("refouler") or extradition of any person to a country where there are "substantial grounds for believing that he would be in danger of being subject to torture."[65] In determining whether substantial grounds exist, "the competent authorities" must con-

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[61] *See generally* INS v.Cardoza-Fonseca, 480 U.S. 421.

[62] 8 C.F.R. § 208.16(b)(1)(ii), 8 C.F.R. § 208.13(b)(1)(ii).

[63] 64 Fed. Reg. 8478-01 (Feb. 19, 1999) (codified at 8 C.F.R. §§ 3, 103, 208, 235, 238, 240, 241, 253, 507).

[64] 8 C.F.R. § 208.18.

[65] United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

> (1) Torture, for purposes of individuals in the United States bringing a claim before an Immigration Judge, is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
> (2) Torture is an extreme form of cruel and inhuman treatment . . . .
> (3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions . . . includ[ing] judi-

sider, among other things, the existence "of a consistent pattern of gross, flagrant or mass violations of human rights."[66]

The procedure by which a person who fears harm in his or her home country may apply for either asylum, withholding of removal or CAT is through a United States Citizenship and Immigration Services (USCIS) application form, which is used to pursue all three remedies. An application for asylum is deemed to be an application for withholding of removal as well, and an applicant can indicate on the same application his or her interest

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cially imposed sanctions and other enforcement actions authorized by law, including the death penalty . . . .

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

[66] *Id.*

in seeking protection under CAT.[67] Each remedy has different burdens of proof, and the Immigration Judge is charged with making separate determinations on each remedy.[68] As mentioned earlier, the Immigration Judge has a duty to inform the noncitizen of eligibility for withholding and CAT, and arguably for asylum as well.

For those noncitizens who are not in removal proceedings or whose prior removal from the United States precludes the initiation of removal proceedings, the law still provides avenues and certain minimal protections to identify those at risk of persecution or harm.[69] Individuals who have arguably more egregious immigration or criminal violations than those involved in Postville are eligible to raise a claim for protection for withholding of removal or CAT. For example, noncitizens who have either unlawfully re-entered the United States after a prior order of removal or individuals who were issued administrative removal orders by the agency (DHS), rather than by an Immigration Judge, for conviction of an "aggravated felony," and are therefore ineligible for traditional removal proceedings, can still raise a claim for protection under withholding of removal or CAT.[70] Even those individuals with the most serious convictions or with previous removal orders are provided with an opportunity to present their claim for protection from harm and have the opportunity for a hearing on the issue of eligibility for withholding or CAT before an Immigration Judge. No such guidance was provided for individuals subjected to the judicial removal

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67 *See* 8 C.F.R. §§ 208.1, 208.3; *see also* Form I-589, Application for Asylum and Withholding of Removal, *available at* http://www.uscis.gov/portal/site/uscis (follow "Immigration Forms" hyperlink).

68 *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 428-429; Zuh v. Mukasey, 547 F.3d 504, 512-13 (4th Cir. 2008); Ali v. Ashcroft, 394 F.3d 780, 790-91 (9th Cir. 2005).

69 *See* 8 C.F.R. § 208.31, which notably applies to I.N.A. § 238(b) expedited removal proceedings for those with aggravated felonies or I.N.A § 241(a)(5) proceedings for reinstatement of prior removal orders, but makes no reference to I.N.A. § 238(c) judicial removal proceedings.

70 8 C.F.R. § 208.31.

proceedings used against the Agriprocessors employees[71] in the forum of a federal district court, where presumably there would be more procedural protections.

Judicial Orders of Removal or Deportation

It is significant that DHS and the U.S. Attorney utilized an unfamiliar immigration law provision to pursue prosecution and deportation of hundreds of noncitizen workers, few of whom had prior criminal histories, and whose offenses could have been pursued equally through an administrative process. The district court judges at Postville had authority at the time of sentencing to enter judicial orders of removal against removable defendants.[72] However, the legislative history behind the INA reveals an intent to use judicial deportation proceedings, the precursor to judicial removal proceedings, to improve the agency's effectiveness at deporting noncitizens convicted of crimes and to reduce state costs for incarceration of noncitizens convicted of crimes.[73] The enactment of judicial deportation proceedings in

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[71] Camayd-Freixas, *Interpreting*, *supra* note 3, at 5.

[72] I.N.A. § 238(c).

[73] *See* 139 CONG. REC. S16263-01 (Nov. 18, 1993) (statement of Sen. Bryan):

> Today, I am asking the Senate to approve two immigration amendments which Senators Biden and Hatch have agreed to accept as part of their manager's amendment. . . .
>
> The first amendment has two major components which hopefully will close loopholes in immigration laws: (1) Procedures to speed up the deportation of criminal aliens convicted of aggravated felonies by combining their deportation hearing into their sentencing hearing. Instead of first releasing the alien from prison and later holding a separate hearing as is being done now, often months or even a year or more later, those who break U.S. laws could be deported immediately after serving their prison sentence. . . . A second hearing can be avoided by combining the deportation hearing with the alien sentencing. A Federal judge can enter a final order of deportation at the same time the judge sentences the alien for committing an aggravated felony. It currently costs the taxpayer an average of $60 to $70 per day to simply house convicted alien felons pend-

1994 resulted from public debate and a flurry of Congressional activity focused on noncitizen criminals.[74] Judicial deportation and removal proceedings arrived in the midst of significant legislative changes to immigration laws, marking a dramatic shift in

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> ing deportation, after completion of their prison sentence. Not to mention the cost of the immigration judges, court staff, attorneys, interpreters, and facilities necessary to institute the deportation proceedings. Such a system must come to an end. . . . To sum up, my first amendment today will streamline administrative deportation proceedings for criminal aliens who are not permanent aliens, eliminating the redundant and bureaucratic system that exists today. An alien convicted of an aggravated felony will be presumed to be deportable, and at sentencing in Federal court, the judge would have the ability to enter the final order of deportation at the same time they hand down the sentence.

See also 139 CONG. REC. S16263-01 (statement of Sen. Dole):

> Aliens-both legal and illegal-constitute an inordinately large portion of our total prison population. . . . This amendment attempts to address the criminal-alien problem . . . . The amendment would also authorize Federal trial judges to issue a deportation order at the sentencing hearing. Prior to the issuance of the order, the trial judge must obtain the concurrence of the commissioner of the INS . . . these provisions are designed to ensure that, once they have served out their sentences, criminal aliens will return to their country of origin, rather than return to the streets of our country to commit acts of violence once again.

See also 139 CONG. REC. S16263-01 (statement of Sen. Simpson):

> This amendment addresses the serious national problem of aliens who commit serious crimes in the United States. . . . It streamlines the deportation procedures for criminal aliens and allows the Federal district courts, at the request of the attorney general, to issue deportation orders at the sentencing hearing of aliens convicted of an aggravated felony . . . .

[74] *See, e.g.* U.S. COMM'N ON IMMIGRATION REFORM REPORT TO CONGRESS "BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 3, 5 (1997) ("A large number of aliens—more than 250,000 in the past eight years—have been issued removal orders, but never been removed . . . . In its 1994 report ["Restoring Credibility"] the Commission recommended that the top enforcement priority should be the removal of criminal aliens from the U.S. in such a way that their potential return to the U.S. will be minimized.").

domestic immigration law policies on prosecution and criminalization of immigrants and refugees.[75]

The 1994 Judicial Deportation Statute

An examination of the 1994 Judicial Deportation statute provides insight into the policy purposes and intended reach of earlier enacted judicial deportation proceedings, the precursor to the judicial removal proceedings employed at Postville. In 1994, Congress for the first time created judicial deportation proceedings. The statute provided federal district court judges, in the context of federal criminal proceedings, the authority to order the deportation of a defendant for certain categories of crimes only if such an order was requested by the United States Attorney.[76] In doing so, Congress departed from a "long tradition of granting the Executive Branch the sole power to institute deportation proceedings against aliens."[77]

The 1994 legislation enacted a panoply of procedures aimed at expeditiously trying and removing "criminal aliens," particularly those convicted of serious crimes, with little opportunity for presentation of defenses. This legislation followed perceived public outcry and Congressional speeches over the supposed large numbers of noncitizens in the United States convicted of

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75 *See generally* Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004) (providing a thorough examination and critique of the criminalization of immigration laws).

76 8 U.S.C. § 1252a, I.N.A. § 242A(d) ("Notwithstanding any other provision of this Act, a United States district court shall have jurisdiction to enter a judicial order of deportation at the time of sentencing against an alien whose criminal conviction causes such alien to be deportable under § 241(a)(2)(A) [crimes of moral turpitude, multiple criminal convictions, aggravated felonies], if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction.")

77 United States v. Quaye, 57 F. 3d 447, 449-450 (5th Cir. 1995).

crimes,[78] the supposed rising costs to States of incarcerating these noncitizens,[79] the apparent delay in issuing and effecting deportation orders[80] and concern over the Immigration and Naturalization Service's (INS) ability to immediately apprehend and remove "criminal aliens" following conviction and completion of incarceration.[81]

Congressional proposals particularly targeted individuals convicted of "aggravated felonies," which are considered serious crimes under the immigration statute.[82] The term "aggravated felony" has a specific meaning under the INA. The term first appeared in the INA following the Anti-Drug Abuse Act of 1988, which classified convictions of murder, weapons and con-

[78] *See, e.g.* Violent Crime Control and Law Enforcement Act of 1993, 139 CONG. REC. S16263-01 (1993) (statement of Sen. Reid on S. 1607) ("[T]he people of this country are clamoring for something to be done about the plague of violent crime throughout our nation . . . criminal aliens are a large and growing problem for our country . . . . These criminals, many of whom are illegally in the country to begin with, are responsible for inflicting unquantifiable pain and terror on law-abiding citizens.").

[79] *See* 139 CONG. REC. E749-02 (1993) (statement of Sen. McCullom) ("Our Federal, State and local prisons are crowded with large numbers of criminal aliens. About one-quarter of the Federal prison inmate population is foreign-born. . . . State and local jails have similarly large percentages of criminal aliens, many of whom are in the United States illegally. The burden on the criminal justice system, especially in high-impact States like Florida, New York, California, and Texas, is straining already overstretched budgets.").

[80] *See* 139 CONG. REC. E749-02 (statement of Sen. McCullom) ("Even when criminal aliens are turned over to INS and detained, the administrative process for deportation is time-consuming.").

[81] *See* 139 CONG. REC. E749-02 (statement of Sen. McCullom) ("Deportable criminal aliens who are released from prison may or may not be turned over to INS. . . . If INS does not detain these aliens upon their release from prison, the Government loses control over them and locating and deporting them becomes very difficult.").

[82] *See, e.g.,* 139 CONG. REC. S16232-03, S16265 (statement of Sen. Bryan) ("[U]nder current immigration law, an alien who has been convicted of an aggravated felony is presumed to be deportable from the United States. This means that in virtually every case, once an alien is convicted of an aggravated felony, a very serious crime, and the alien has served his or her prison time, they should be deported. This is not happening.").

trolled substance trafficking and other weapons violations as aggravated felonies and expanded the consequences which flowed from such convictions.[83] Congress expanded the categories of crimes considered "aggravated felonies" in 1990 and again in 1994, when it also implemented judicial deportation orders and again in 1996, when the judicial deportation orders were amended and reclassified as judicial removal orders.[84] Currently, there are 21 categories of aggravated felonies.[85]

For those convicted of an aggravated felony as defined in the 1994 statute as amended, the law provided for special deportation hearings to be held "at certain federal, state, and local correctional facilities" to "eliminat[e] the need for additional detention" and assure expeditious deportation immediately following the end of "incarceration for the underlying sentence."[86] These expedited proceedings prioritized the initiation and completion of deportation proceedings "of any alien convicted of an aggravated felony before the alien's release from incarceration."[87] The statute also provided special provisions for issuance of an administrative order of deportation after 30 days notice for noncitizens convicted of aggravated felonies who were not lawful permanent residents and not eligible for any type of immigration relief. All of these proceedings contemplated a separate immigration proceeding following a completed and final criminal proceeding. This section of the statute, entitled "expedited deportation of aliens convicted of committing *aggravated felonies*" also included the provisions for judicial orders of deportation.[88] It was initially intended that judicial deportation

[83] *See generally*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[84] Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009, Div. C (1996).

[85] *See* 8 U.S.C. § 1101(a)(43), I.N.A. § 101(a)(43).

[86] I.N.A. § 242A.

[87] I.N.A. § 242A(b)-(c).

[88] I.N.A. § 242A (emphasis added).

would be an additional tool for ensuring the prompt removal of aggravated felons.[89]

The procedure set forth in the 1994 statute required the U.S. Attorney to file "a notice of intent to request judicial deportation" to both the court and the defendant before either entering a guilty plea or beginning trial.[90] Notice of the factual charges regarding alienage and identification of the crime or crimes rendering the defendant deportable had to be filed by the U.S. Attorney, with the concurrence of the Commissioner of INS,[91] at least 30 days before the sentencing date.[92] Under the judicial deportation procedure, if the court determined that the defendant presented "substantial evidence to establish prima facie eligibility for relief from deportation," the INS Commissioner had to provide the court "with a recommendation and report regarding the alien's eligibility for relief" for the court to "either grant or deny the relief sought."[93] If the court denied a request for a judicial order of deportation without a decision on the merits, the Attorney General could still initiate deportation proceedings pursuant to former INA § 242 on the same or other grounds of deportability.

While the judicial deportation provisions set forth some of the same rights for the noncitizen found in traditional INA § 242 deportation proceedings, including "an opportunity to examine evidence against him or her, to present evidence on his or her own behalf, and to cross-examine witnesses presented by the Government," the judicial deportation provisions made no reference to the duty to inform the noncitizen of potential eligibility for relief.[94] Nor were any regulations promulgated providing

89 139 CONG. REC. S16232-03, S16265 (1993) (statement of Sen. Reid).
90 8 U.S.C. § 1252a, I.N.A. § 242A(d)(2) (1996).
91 The term "Commissioner" refers to the old I.N.S. Commissioner. The Commissioner's duties now fall on district directors of U.S. Citizenship and Immigration Services, part of the Dep't of Homeland Security.
92 8 U.S.C. § 1252a, I.N.A. § 242A(d)(2).
93 *Id.*
94 *Id.*

guidance for how determinations were to be made under these proceedings. This essentially created a parallel proceeding by which a determination of deportability could be made (including all the penalties that attach to such a determination) that did not provide the safeguard under INA § 242 that requires that a noncitizen be advised of any defenses to deportation.[95]

The 1996 Judicial Deportation Statute

In 1996, the Illegal Immigration and Immigrant Responsibility Act (IIRIRA) made sweeping changes to U.S. immigration laws. IIRIRA changed the structure of deportation proceedings, expanded the bars to lawful permanent residence and grounds for deportation, imposed a statute of limitations and additional restrictions on the granting of asylum or withholding of removal, and also amended the judicial deportation provisions.[96]

With regard to judicial deportation, the provision was renamed Judicial Removal. Now the district courts had "jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is *deportable*," making no reference to the criminal grounds of deportability articulated in the 1994 statute.[97] Under this revision to judicial deportation, the courts now had authority to order removal on the basis of deportation

[95] While we recognize that Congress has plenary power over immigration laws, *see, e.g,*. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), and limited ability to challenge selective prosecution claims, *see* Reno v. American-Arab Anti-Discrimination Committee, 525 US 471, 510 (1999) (Souter, J., dissenting), the facts surrounding Postville, with a majority of defendants of one nationality, raise questions regarding equal protection. If I.N.A. § 238(c) proceedings are criminal proceedings, unlike Congress' authority over immigration law, the Constitution does limit the authority of the executive branch and prosecutors in criminal proceedings, and in the case of Postville, these criminal proceedings were brought in a manner that effectively precluded groups of people from defenses to deportation and may have been intended to prevent defendants from applying for immigration relief.

[96] Pub. L. No. 104-208, 110 Stat. 3009, 3009-46 (1996)

[97] 8 U.S.C. § 1228, I.N.A. § 238 ("Expedited Removal of Aliens Convicted of Committing Aggravated Felonies." (emphasis added)).

grounds *unrelated* to criminal charges.[98] The statute nevertheless still seems to presume that deportability grounds will be criminal, as the U.S. Attorney and INS Commissioner are required to file "a charge containing factual allegations regarding the alienage of the defendant and identifying the *crime or crimes which make the defendant deportable*" at least 30 days prior to the date set for sentencing.[99] The 1996 statute further amended judicial deportation proceedings by allowing the Attorney General to initiate proceedings under separate, traditional removal procedures even where the district court had denied a request for a judicial deportation on the merits.[100] Thus the statute allows the

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[98] Gerald L. Neuman, *Admissions and Denials: A Dialogic Introduction to the Immigration Law Symposium,* 29 CONN. L. REV. 1395, 1408 n.63 (1997). "Now that IIRIRA has expanded judicial deportation to include *any* grounds of deportation against the convicted alien . . . the court may have additional reason for unfamiliarity with the issues." *Id.*

[99] 8 U.S.C. § 1228(c)(2)(B), I.N.A. § 238(c)(2)(B) (emphasis added).

[100] *Compare* the language of former 8 U.S.C. § 1252(c)(4), I.N.A. § 242(c)(4) (1996):

> Denial without a decision on the merits of a request for a judicial order of deportation shall not preclude the Attorney General from initiating deportation proceedings pursuant to section 1252 of this title upon the same ground of deportability or upon any other ground of deportability provided under section 1251(a) of this title.

with the language of 8 U.S.C. 1228(c)(4), I.N.A. § 238(c)(4):

> Denial of Judicial Order-Denial of a request for a judicial order of removal shall not preclude the Attorney General from initiating removal proceedings pursuant to § 240 upon the same ground of deportability or upon any other ground of deportability provided under § 241(a).

For a succinct overview of the judicial removal proceedings enacted by IIRIRA, *see* Neuman, *supra* note 98, at 1408 ("The judicial deportation procedures were modified by § 374 of IIRIRA. . . . One amendment expands the scope of application of the judicial deportation procedures to all federal convictions of deportable aliens, making the courts available for deportation of convicted aliens on grounds unrelated to their convictions. But another strikes the phrase italicized above, 'without a decision on the merits.' Read literally, this means that a federal district court's holding that an alien is not deportable does not preclude the Attorney General from deporting the alien on the same ground. In other words, it would allow the court to rule against

government a second chance at a finding of deportability through the administrative removal procedures, whereas the immigrant respondent has no such opportunity to appeal if the federal court judge rules against him or her.

The statutory framework used to deport the vast majority of the people arrested in the Postville raids comes from 8 U.S.C. § 1228(c). Before we can examine why the deportation orders that resulted from Postville are suspect, we must first understand how a federal district court, rather than an Immigration Judge, could order removal from the United States at all.

The statute used by the prosecution, and ultimately by the federal judiciary to issue removal orders of the Agriprocessors employees, lays out a procedural roadmap that begins with a criminal prosecution but ends with an order that removes a person from the United States. This roadmap is an unusual one.

In order for a district court to assert jurisdiction and order removal from the United States, Congress requires that certain steps be followed.[101] First, the U.S. Attorney must file a notice prior to trial with the Court and DHS indicating a desire to request a judicial removal following criminal conviction. After the notice has been given, the Commissioner files an outline of facts that alleges alienage and identifies the crimes that may cause the person to be deportable. At this point, if and only if the defendant has managed to bring substantial evidence of prima facie relief from removal, the Commissioner will provide the federal court with a recommendation and give a report stating eligibility for relief. Upon receiving the recommendation, the court "shall either grant or deny the relief sought."[102] The "court may order the alien deported if the Attorney General demonstrates that the alien is deportable under this Act."[103] Finally, even if the

the alien, but would deny res judicata effect to a ruling in the alien's favor." (citations omitted)).

101 8 U.S.C. § 1228(c).

102 § 1228(c)(2)(C).

103 § 1228(c)(2)(C)(iv).

court declines to order removal, it does not prevent the "Attorney General from initiating removal proceedings" based on the exact same grounds of deportability.[104]

Further, the 1996 statute provides for stipulated judicial orders of removal, a provision not found in the 1994 Act, which allow someone who is deportable "to waive the right to notice" and a hearing and be deported as part of a criminal plea agreement.[105]

The 1996 statutory scheme lacks the same procedural guidance as the 1994 statute. While it contains the same opportunity to examine evidence, to present evidence, and to cross-examine witnesses presented by the government, the language of the federal statute makes no reference to an affirmative duty to inform the noncitizen of potential eligibility for relief.[106] As with the 1994 statute, no regulations were promulgated that would have provided the district court, the agency or the defendant with guidance regarding considerations for denying a request for judicial deportation, or that explained how determinations regarding deportability or eligibility for relief from deportation would be made.[107]

Additional IIRIRA provisions, which included continued authorization of federal criminal court judges to enter orders of removal, reflect a legislative intent to expand the number of crimes rendering a noncitizen deportable, including expanding the definition of aggravated felony, restricting the remedies

104 § 1228(c)(4).

105 8 U.S.C. § 1228(c)(5), I.N.A. § 238(c)(5).

106 8 U.S.C. § 1228(c)(2)(ii), I.N.A. 238(c)(2)(ii).

107 While agency regulations binding the federal district court may have been impermissible, *see* authors' further discussion of separation of powers, *infra* pp. 71-74, the judicial removal proceedings are arguably a strange hybrid of administrative and criminal proceedings in which the statute incorporates by reference other agency regulations that are binding on the federal district court (e.g., regarding evidence that may be introduced). Further, regulations not only aid the trier of fact and the agency in making determinations, but they also notify the parties of the standards to be adhered to.

available in removal proceedings, in particular for those with criminal convictions and limiting review of deportability determinations based on crimes.[108]

The Current Legal Landscape and Realities of Immigration Challenge the Objectives of Judicial Removal

The 1996 IIRIRA amendments to the INA affecting removal proceedings, deportability and inadmissibility grounds, including those expanding the scope of judicial removal proceedings, reflect an intent to limit defenses to removal for noncitizens with criminal convictions, ensuring the effective removal of noncitizens with criminal convictions from the United States and limiting the costs of incarceration of noncitizens. However, using judicial removal proceedings as a way of addressing those concerns is misplaced today given the current statutory scheme and the current realities of the noncitizen population in the United States.

The existing statutory scheme contains a plethora of provisions ensuring the speedy and effective deportation of noncitizens with criminal convictions. To begin with, under the current statute, most noncitizens with criminal convictions are ineligible for release from custody, deterring them from prolonging proceedings and preventing them from being released into communities prior to completion of removal proceedings. With the advent of mandatory detention in 1996, nearly all noncitizens with criminal convictions are held in DHS custody without the possibility of bond,[109] alleviating Congressional concerns about "criminal aliens" being released back into society before removal can be effected.

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[108] *See, e.g.,* expanded definition of aggravated felony under 8 U.S.C. § 1101(a)(43), I.N.A. § 101(a)(43) (1996); additional grounds of deportability under 8 U.S.C. § 1227, I.N.A. § 237(a)(2)(E) (1996); limitation on judicial review under 8 U.S.C. § 1252(e), I.N.A. § 242(e) (1996).

[109] 8 U.S.C. § 1226, I.N.A. § 236.

Similarly, the use of expedited procedures, including judicial removal, to address the exploding numbers of noncitizen criminals in the United States is also misplaced. The perception that the commission of crimes by noncitizens is escalating, and can be addressed through immigration laws like judicial orders of removal to speed up their removal, is simply not supported by the facts.[110] Further, use of judicial removal to address concerns over the costs for government to house noncitizens who have committed crimes is similarly inapposite.[111]

A review of the legislative record regarding judicial deportation or removal proceedings reveals Congress's belief in effective use of judicial resources by allowing the federal court judge, familiar with the underlying criminal proceedings, to make a determination about deportability as well. However, because the statute currently provides for judicial removal proceedings for a broad array of removable offenses (including noncriminal), the federal court judge in judicial removal proceedings is in the position of determining significant immigration issues, not just criminal issues.[112] In judicial removal proceedings, a federal court judge may now be asked to examine any ground of deportability having nothing to do with criminal charges. When the charge is criminal, examination and analysis of the criminal charge is only the beginning of the inquiry when determining whether a noncitizen will be deported from the United States. Even if the criminal charge of deportability can be sustained, deportation is not an inevitable consequence. The noncitizen

110 *See* IMMIGRATION POLICY CTR., FROM ANECDOTES TO EVIDENCE: SETTING THE RECORD STRAIGHT ON IMMIGRANTS AND CRIME 1 (2008) [hereinafter ANECDOTES] (citing RICHARD NADLER, AMERICAS MAJORITY FOUND., IMMIGRATION AND THE WEALTH OF STATES 9 (2008)), *available at* http://www.immigrationpolicy.org/images/File/factcheck/SettingtheRecordStraightonImmigrantsandCrime9-10-08.pdf.

111 Trish Mehaffey, *ICE Releases Raid Costs to Rep. Bruce Braley*, CEDAR RAPIDS GAZETTE, Oct. 16, 2008, *available at* http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20081017/NEWS/710179993/1006/news (last visited Jan. 16, 2009).

112 *See* Neuman, *supra* note 98, at 1407 n.63.

may still have a number of remedies available. In the case of the criminal charges brought in Postville, even if the federal district court judges were in a position to make determinations about the elements required to support a criminal charge, the facts surrounding Postville undercut this justification for judicial removal. The ultimate disposition of the majority of the cases came through stipulated plea agreements, and with as many as 95 defendants rushed through in a day, it is unlikely that the goal of ensuring that a federal court judge had an appreciation of the particular facts involved in an individual case was a consideration. Finally, the public statement by the Chief Judge Linda R. Reade indicates a lack of appreciation for the intersection between criminal and immigration law.[113]

Judicial Removal in Postville was Misplaced

The language of the judicial removal statute provides jurisdiction to federal district courts in cases where the noncitizen is deportable. Immigration laws distinguish between noncitizens that have made an "admission" into the United States, defined as a lawful entry with inspection, from those who have not made an admission into the United States.[114] The latter group is considered seeking an admission into the United States, notwithstanding their physical presence in the United States and the grounds of inadmissibility (qualitative bars to entry), including criminal grounds of inadmissibility.[115] For noncitizens with criminal convictions that have made an admission into the United States, they are classified as "deportable."[116] It appears from the reported facts that a significant number of defendants in the Postville case would have never made an admission into the United States, so rather than being considered deportable, they

[113] Preston, *270 Immigrants*, *supra* note 12 (Immigration lawyers "do not understand the federal criminal process as it relates to immigration charges.").
[114] 8 U.S.C. § 1101(a)(13), I.N.A. § 101(a)(13).
[115] *See* 8 U.S.C. § 1182(a)(2), I.N.A § 212(a)(2).
[116] 8 U.S.C. § 1227(a)(2), I.N.A. § 237(a)(2).

would be classified as seeking admission.[117] Therefore, the federal court, under the judicial removal proceedings provisions, had no jurisdiction over them.[118] In the area of immigration, the difference between those who have made an admission from those who have not is more than a technical distinction, it is a distinction with a difference implicating rights and remedies.[119]

Further, the use of judicial removal proceedings to pursue individuals whose crimes involve the use of false documents is similarly misplaced. Although the statutory language proscribing judicial deportation or removal proceedings solely for aggravated felonies was ultimately left out of the 1994 statute, and the 1996 statute may allow broad use of judicial removal proceedings for various grounds of removability, the Congressional record indicates an intent to focus on expeditious removal of noncitizens who have been convicted of aggravated felonies—e.g. drug and firearm trafficking crimes, crimes of violence, fraud with loss to the victim in excess of $10,000 and theft offenses.[120] The name of the caption of the section of the statute, "Expedited deportation of aliens convicted of committing aggravated felonies," further substantiates that argument.[121] The use of fraudulent employment documents, the criminal charge for which most were convicted, does not constitute an aggravated felony[122] and, therefore, judicial removal proceedings should never have been used in Postville.

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117 8 U.S.C. § 1101(a)(13), I.N.A. § 101(a)(13)(A).

118 *See, e.g., Hearings*, *supra* note 26 (statement of David Leopold).

119 *E.g.,* an applicant for admission has some substantive due process protections, whereas someone who is deportable is provided with full due process and equal protection. *See, e.g.,* Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

120 *See* 139 CONG. REC. S16263-01, *supra* note 73.

121 8 U.S.C. § 1228, I.N.A. § 238.

122 While the definition of aggravated felony at 8 U.S.C. § 1101(a)(43)(P), I.N.A. § 101(a)(43)(P) does include "an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18, or is described in section 1546(a) of such title and (ii) for which the term of imprisonment is at least 12 months." A violation of 1546(a) that is a first offense and for which the

Judicial Removal Proceedings Deprived Postville Defendants the Opportunity to Pursue Relief

The availability of any meaningful relief for noncitizens convicted of criminal convictions must also be discussed in examining the propriety of judicial removal proceedings at Postville. The 1994 and 1996 statutes reflect a desire to funnel noncitizens convicted of aggravated felonies into proceedings that provide expeditious adjudication and removal, and little opportunity to present a defense to deportation. In 1994, an individual with an aggravated felony conviction was presumed deportable.[123] In 1996, IIRIRA amendments to the INA eliminated most defenses to deportation for those with aggravated felonies and severely limited avenues of relief for those convicted of crimes of moral turpitude.

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noncitizen can affirmatively show that the offense was committed to aid, assist or abet the spouse, parent or child, is not considered an aggravated felony. I.N.A. § 101(a)(43)(P)(ii). All but five of the defendants involved in Postville who accepted a plea agreement received a sentence of five months for use of false documents (the sentence received by the defendants in Postville reflects that the offense was not of sufficient severity to constitute an aggravated felony) and certainly the reports from Postville support that defendants had used false documents in order to support family members. (*See* Camayd-Freixas, *Interpreting, supra* note 3, at 5; *see also* Preston, *270 Immigrants, supra* note 12.) Further, no reported circuit court decision has specifically found that a violation of 1546(a) constitutes an aggravated felony as defined at 8 U.S.C. § 1101(a)(43)(P), I.N.A. § 101(a)(43)(P). A violation of 1546(a) does appear to constitute a crime of "moral turpitude." *See* Omagah v. Ashcroft, 288 F.3d 254, 259 (5th Cir. 2002). *But see* In re Serna, 20 I. & N. Dec. 579, 586 (BIA 1992) (holding possession of an altered immigration document without intent to use it unlawfully is not a crime involving moral turpitude). A crime of moral turpitude may render a noncitizen inadmissible under 8 U.S.C. § 1182(a)(2)(a)(i), I.N.A. § 212(a)(2)(a)(i) or deportable under 8 U.S.C. § 1227(a)(2), I.N.A. § 237(a)(2). However, this ground of inadmissibility or deportability would not preclude eligibility for asylum, withholding of removal or CAT, or adjustment of status through a lawful permanent resident or U.S. citizen family member, which is a remedy for which some of the Postville defendants may have been eligible.

123 *See* 8 U.S.C. § 1252a, I.N.A. § 242A.

However, while conviction of an aggravated felony[124] certainly limits relief in immigration proceedings, it does not preclude relief. Specifically, withholding of removal and CAT protections are still available. Additionally, significant relief from removal from the United States is available through remedies that have been enacted since the passage of the 1996 judicial removal provisions, including CAT and the U nonimmigrant visa for victims of certain crimes.[125] As a practical matter, noncitizens who might benefit from CAT were not provided with a formal process for applying until 1999.[126] Certainly, in 1996, Congress could not have contemplated the ability of a federal court sentencing judge to be able to make determinations about CAT or the U nonimmigrant visa, nor could Congress have contemplated that a respondent would be precluded from raising these claims in judicial removal proceedings.

Finally, multiple provisions in the INA, designed to streamline the process by which noncitizens with significant criminal convictions or those with prior immigration violations are removed from the United States by precluding access to administrative hearing, nevertheless provide some clear regulatory mechanisms through which noncitizens can apply for relief under withholding of removal or CAT.[127] In contrast, judicial deportation pro-

124 It should be noted also that whether a crime constitutes an aggravated felony involves complex analysis and has been the subject of much litigation. A search of law review articles addressing "aggravated felony" yields over one thousand results addressing immigration consequences of crimes considered aggravated felonies, to availability of judicial review, eligibility for immigration remedies, violations of human rights norms in preventing noncitizens from seeking protection based on characterization of a crime as an aggravated felony. *See also* Gonzalez-Gomez v. Achim, 441 F.3d 532, 535 (7th Cir. 2006) (discussing whether a state drug charge constitutes a felony drug charge, the Seventh Circuit characterized the government's analysis as follows: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses.")

125 8 U.S.C. § 1101(a)(15)(U), I.N.A. § 101(a)(15)(U).

126 64 C.F.R. § 8478 (1999).

127 Non-lawful permanent residents with aggravated felonies subject to 8 U.S.C. § 1228(b), I.N.A. § 238(b) proceedings may request a reasonable fear

vides no rules by which a person at risk of persecution or torture can raise their claim.

Access to information about relief under asylum, withholding of removal or CAT was particularly relevant for those detained during the Postville raids. In the Postville proceedings, there was no examination by the court or the prosecutor regarding whether the detainees might face a significant possibility of persecution or torture if returned to their home country. A number of defendants arrested in Postville were citizens of Guatemala.[128] Between 2005 to 2007, Guatemala was among the top ten countries whose citizens sought asylum.[129] Amnesty International reports a grave public security situation, negligible police accountability, high levels of violence against women, little effort "to bring to justice former military officers accused of human rights violations, including genocide, committed during the years of internal armed conflict (1960-1996)," and threats and intimidation against human rights defenders.[130] According

interview. Individuals who reenter unlawfully after a final order of removal are also allowed a reasonable fear interview with an Asylum Officer to determine eligibility for withholding of removal and CAT. 8 C.F.R. § 208.31.

128 Lorena Lopez & Douglas Burns, *After Postville raid, mystery advertiser in Guatemala sought meatpackers: Agriprocessors denies any role in ads touting "excellent opportunity" in Iowa*, IOWA INDEP., July 28, 2008 ("'Of the 389 people caught in the U.S. Immigration Enforcement and Customs (ICE) raid, 295 were Guatemalans working at the facility,' said Tim Counts, an ICE spokesperson.").

129 KELLY J. JEFFREYS & DANIEL C. MARTIN, ANNUAL FLOW REPORT ON REFUGEES AND ASYLEES 2007 5 (2008) (citing U.S. Dep't of State, Bureau of Population, Refugees and Migration (PRM), Worldwide Refugee Admissions Processing System (WRAPS)). Further, citizens from Guatemala who are members of a class action lawsuit brought on behalf of Guatemalan and Salvadoran asylum seekers are entitled to an initial or de novo asylum interview and adjudication of their claim and freedom from detention. *See generally* Am. Baptist Churches v. Thornborough, 712 F. Supp. 756 (N.D. Cal. 1989). It is possible that defendants in the Postville proceedings were deprived of this class protection.

130 AMNESTY INTERNATIONAL, REPORTS OF 2008: HUMAN RIGHTS IN REPUBLIC OF GUATEMALA (2008), *available at* http://www.amnesty.org/en/region/guatemala/report-2008.

to the State Department, serious human rights violations remain in Guatemala, including:

> [T]he government's failure to investigate and punish unlawful killings committed by members of the security forces; widespread societal violence, including numerous killings; corruption and substantial inadequacies in the police and judicial sectors; police involvement in kidnappings; impunity for criminal activity; harsh and dangerous prison conditions; arbitrary arrest and detention; failure of the judicial system to ensure full and timely investigations and fair trials; failure to protect judicial sector officials, witnesses, and civil society representatives from intimidation; threats and intimidation against journalists; discrimination and violence against women; trafficking in persons; *discrimination against indigenous communities*; discrimination and violence against gay, transvestite, and transgender persons; and ineffective enforcement of labor laws, including child labor provisions.[131]

Had ICE pursued traditional removal proceedings under INA § 240, rather than judicial removal orders, the Postville detainees would have had to be informed of the potential for protection from harm consistent with U.S. international obligations. This did not happen. In fact, in the plea agreement, which contains a stipulated order of removal and a waiver of the right to pursue a removal hearing before an Immigration Judge, no mention is made of what remedies are available through removal proceedings.[132] No mention is made of asylum, withholding of removal or CAT. No mention is made of the duty of the govern-

[131] *See* DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007 (2008), *available at* http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm (emphasis added).

[132] *See* Plea Agreement, *supra* note 9.

ment not to return an individual to a country where there is the possibility of harm or likelihood of persecution or torture.[133]

For a defendant with a genuine fear of returning to the home country, it is difficult to fathom how, in the course of less than ten days between apprehension by ICE and entry of the plea, this fear could have realistically been raised by a defendant who was handcuffed or shackled, guarded and shuffled between the makeshift court to other areas of the heavily secured fairgrounds where they were being held. Those seeking asylum, withholding or CAT may be survivors of trauma or torture with attendant psychological symptoms. Common psychological responses include "distress at exposure to cues that symbolize or resemble the trauma. This may include the lack of trust and fear of persons of authority" and may include avoidance or denial of painful topics and problems with memory and functioning.[134]

Given the immigrant's experience in coming to the United States, the symptoms of any past torture or trauma, and the fear of revealing information when there are individuals in the United States that may seek to harm the applicant or his or her family members,[135] it is difficult to imagine to whom the noncitizen defendant would present his fears or concerns in this situation. To the court-appointed defense attorney who represented ten or 20 of his fellow countrymen and women and was principally charged with explaining the criminal charges and options for a plea agreement? To the U.S. Attorney concerned with the swift execution of plea agreements? To the federal district court judge who held mass hearings ushering in ten defendants at a time and entered as many as 85 pleas in one day? Even if a defendant had articulated a fear of returning to the home country before the federal district court judge, as set forth above, it is

133 *Id.*

134 *See* PHYSICIANS FOR HUMAN RIGHTS, EXAMINING ASYLUM SEEKERS 66 (2001).

135 *See, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1497 (C.D. Cal. 1988).

unclear how the court would make a determination that there was "substantial evidence to establish prima facie eligibility for relief from removal."[136] Did the federal court judge have the expertise to recognize prima facie eligibility for relief from removal? Based on Chief Judge Linda Reade's statement that immigration lawyers "do not understand the federal criminal process as it relates to immigration charges,"[137] it would seem that the federal court judges were concerned with the criminal rather than the immigration aspects of the proceedings.

Finally, even if the federal court judge determined that there was some evidence presented establishing a defense to deportation, the inquiry under the judicial removal provisions is not complete. DHS would be required to provide the court with a report and recommendation regarding eligibility for relief.[138] Notwithstanding a prosecutor's duty to seek justice, the statutory requirement that DHS provide a report and recommendation of eligibility for relief seems to present a conflict. It seems unlikely that DHS, the party who first has sought the judicial removal order, and in the case of Postville, worked with the U.S. Attorney to fast-track the proceedings to ensure a speedy conviction and stipulated removal order, would present a report or recommendation establishing eligibility for relief from removal.

Postville marks yet another chapter in agency history of coercing or otherwise preventing noncitizens from Central America from pursuing asylum or other legal protections in the United States. ICE's predecessor, INS, was found to have engaged in discriminatory and coercive practices in preventing Guatemalans and Salvadorans from pursuing asylum in the past. In 1989, Guatemalans and Salvadorans brought forth a class action lawsuit in part based on the discriminatory practices in adjudicating asylum applications resulting in approval rates for

136 8 U.S.C. § 1228, I.N.A. § 238.

137 Preston, *270 Immigrants*, *supra* note 12.

138 I.N.A. § 238, 8 U.S.C. § 1228.

only 3% for Salvadorans and under 1% for Guatemalans.[139] Beginning in 1982, and as recently as 2007, a federal district court in California upheld provisions of a permanent injunction against legacy INS because INS officers "regularly pressured Salvadorans to return to El Salvador" and mistreated, pressured and intimidated Salvadorans "into giving up their asylum claims."[140] In *Orantes-Hernandez v. Gonzales*, the court found that there was not sufficient evidence that coercive practices had been remedied by DHS.[141] The comparisons between the conditions and practices enjoined in *Orantes* and the practices used in Postville are apparent. In *Orantes*, the court recognized the particular egregiousness of the practice of encouraging Salvadorans in detention centers to waive their rights to a hearing and application for asylum, given the limited access to counsel.[142] Similarly, the Agriprocessors employees detained at the National Cattle Congress also had extremely limited access to immigration attorneys. While it has not been established that the prosecutors, DHS or the judiciary intended to preclude individuals from pursuing protection in the United States, by all accounts the legal proceedings at Postville contained no consideration of the United States's obligations under the U.N. Convention Relating to the Status of Refugees or CAT and the proceedings echoed of past practices that prevented bona fide asylum seekers from a hearing and an opportunity to be provided with safe haven.

139 *Am. Baptist Churches*, 712 F. Supp. at 765.
140 *See* Orantes-Hernandez v. Gonzalez, 504 F. Supp. 2d 825, 833 (C.D. Cal. 2007).
141 *Id. See* Orantes-Hernandez v. Meese, 685 F. Supp. at 1504, *aff'd by* Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990).
142 *See* Orantes-Hernandez v. Gonzales, 504 F. Supp. 2d at 860-61.

II. The Role of the Federal Judiciary in the Postville Proceedings

Notwithstanding international obligations, by turning criminal proceedings into a hybrid immigration proceeding, the raids in Postville set a dangerous precedent with respect to the role of the federal judiciary. Descriptions of the judicial process employed at Postville raise difficult constitutional questions, especially regarding whether the judiciary maintained its impartiality and independence.

The federal statute creating the hybrid criminal/immigration proceeding used in Postville undermines the federal judiciary's independence and caused the federal courts to act more as an arm for enforcement than as an adjudicative body tasked with deciding a case or controversy. This problem was magnified by the court's extraordinarily close cooperation with the FBI and ICE, which played a crucial role in the administration of the raid. The close cooperation with the U.S. Attorney's Office and subsequent decisions to move the court and its personnel to a detention compound also seriously undermined the judiciary's obligation to remain impartial.

Separation of Powers Issues

The importance of an independent judiciary is not restricted to concerns over the due process rights of individuals who go before a judge or adjudicator. A strong independent judiciary was one of the core concepts adopted by the Framers of the United States Constitution, and a key component in balancing the three separate branches of government. When an individual is tried by a judge or adjudicator who has an individual interest or perceived bias in how a case will turn out, the fairness of the individual proceeding is threatened. However, if the federal judiciary is forced to side with one party (especially the Government) via legislative fiat, and is given no effective power to

decide a case or controversy before it, then the legitimacy of the entire judicial branch is threatened. The statute authorizing the transformation of a criminal trial into a quasi-immigration proceeding represents an unconstitutional attempt by Congress to undermine the independence and legitimacy of the federal judiciary.

Judicial independence has been enshrined in many different forms in the Constitution. The lifetime tenure and salary clauses are obvious constitutional examples that prevent either Congress or the President from interfering with the role of the judiciary. However, the structure of Article III, and the power of judicial review also serve as powerful examples of separation of powers and the importance of judicial independence.[143] The connection between an immigration raid in Iowa and a threat against Article III independence is not obvious at first glance. However, an examination of the procedural and statutory framework used in the raid brings into focus why Postville may impact more than the rights of potential defendants and expose a constitutional dilemma.

Judicial independence can mean many things. It can refer to institutional independence, such as lifetime tenure, or independence from political forces, such as public opinion or elections. However, one type of independence that is rarely mentioned but which goes to the heart of the judiciary can be referred to as "decisional independence."[144] Decisional independence stems from Article III's "cases and controversies" clause.[145] Neither

[143] Academia is replete with discussions of judicial independence and no reference would do the subject justice. Nevertheless, the following articles may help the reader understand the issues of judicial independence and separation of powers. *See generally* Michael G. Collins, *Judicial Independence and the Scope of Article III—A view from the Federalist*, 38 U. RICH. L. REV. 675 (2003); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995).

[144] *See generally* Redish, *supra* note 143.

[145] U.S. CONST. art. III, § 2.

the legislative nor executive branch can interfere with the judiciary's duty to decide a particular case or controversy that is before the judge.

The principle of decisional independence was first articulated by the Supreme Court in *United States v. Klein*.[146] In *Klein*, the Court held that whatever broad powers Congress has, it may not directly dictate a result for a case that is before the federal judiciary.[147] So how can we recognize when Congress has turned the federal judiciary into a rubber stamp court?

There are two obvious, though certainly not exhaustive means to gauge whether a legislative action has improperly decided a case or prevented the judiciary from deciding a case before it. Congress cannot give jurisdiction to a federal court and then prevent that same court from deciding factual or legal issues that go to the heart of deciding the case before it. Secondly, the judiciary's decision in a case must have some actual effect. The decision must, in fact, *decide* a case or controversy, and the judiciary is not to be used as an advisory panel. The statute that Agriprocessors employees were prosecuted under in Postville arguably violates both such principles and therefore jeopardized federal judicial decision-making independence.

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146 United States v. Klein, 80 U.S. 128 (1871). This post Civil War case had to do with how to treat presidential pardons. Despite a previous ruling that interpreted a presidential pardon as forcing the government to treat the pardoned as if they never committed a crime, Congress passed a law that stated that presidential pardons were "proof of prior disloyalty" and required the federal courts to dismiss for lack of jurisdiction any claims to property that had been seized during the war. In a confusing decision, the Supreme Court ruled Congress had violated separation of powers, both by forcing the Supreme Court to reinterpret the effect of presidential pardons, and by using Congress' power over jurisdiction to dictate the results of individual cases. Congress was allowed to prevent all recovery of seized properties and could have prevented jurisdiction for any claim on seized property, but could not do either if it interfered with the court's ability to decide the specific case or controversy.

147 *Id.* at 146.

The statutory framework used to deport the vast majority of the people arrested in the Postville raids comes from 8 U.S.C. § 1228(c). As noted earlier, this statutory framework was never intended to be used against people who had not been convicted of serious crimes as it was in Postville. However, even if Congress *did* intend the statute to be used in a raid such as Postville, Congress nevertheless overstepped its legislative role and improperly interfered with the judiciary's ability to independently decide cases.

Preventing the Federal Judiciary from Deciding Many Forms of Relief From Removal Unconstitutionally Restricts Key Legal Issues from Consideration

Has Congress interfered with the Judiciary's ability to decide cases? Keeping in mind the legal principles established in *Klein*, if a federal judge is restricted from deciding essential facts or legal issues necessary for issuing a removal order, then Congress has impermissibly affected the judiciary's constitutional duty to properly decide a case. The statute allows for a hearing and evidence to be presented to show whether or not a person may be deportable. Arguably, the federal judge's fact-finding function seems unrestricted. But are there restrictions in determining key legal issues? The answer may depend entirely on the phrase in the statute that allows the federal judge to "either grant or deny the relief sought."[148]

Reading 8 U.S.C. § 1228 without reference to any other immigration sections might give the impression that the only substantive determination that is needed to decide whether someone should be ordered removed from the United States is a ruling on whether or not a person is deportable. However, a finding of deportability is only the first step and does not always lead to a deportation or removal order, and in some circumstances a deportable person can gain lawful permanent status in the United

[148] 8 U.S.C. § 1228(c)(2)(C).

States.[149] Because eligibility for relief is essential in deciding whether an order of removal should ultimately be issued, the question becomes, does the federal judiciary have the jurisdiction to decide questions of relief from removal?

As relief from removal is essential to determining whether or not a person should be ordered deported, a reading consistent with the judiciary's constitutional role would imply that a federal judge has the power to decide eligibility for forms of relief, such as asylum, cancellation of removal and adjustment of status. However, despite the seemingly broad grant of power by "shall grant or deny the relief sought,"[150] the nature of immigration relief in general makes it highly unlikely that Congress intended to give the federal judiciary any ability to grant or deny many, if not most, forms of relief from removal.

Many forms of relief, such as cancellation of removal, adjustment of status, and asylum, are statutorily defined as within the discretion of the Attorney General.[151] Relief cannot normally be granted without the Attorney General's (or his delegates') approval, and it is not clear whether the phrase "shall grant" confers enough authority for a federal judge to bypass entire procedures (and in some cases entire agency bodies) to grant relief if a defendant warrants it. Bolstering the argument that Congress did not intend for a federal judge to have the ability to grant or deny discretionary forms of relief is the fact that Congress made the Attorney General's decisions to grant or deny relief immune from judicial review.[152] It would be odd for Congress to protect the Attorney General's discretion from review by federal courts, but then allow a federal judge to grant relief independent from any approval from the Attorney General.

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149 Some forms of relief such as asylum, cancellation of removal (for LPRs and non-LPRs), adjustment of status, VAWA cancellation, and U-Visa are all forms of relief that can be used to prevent an order of removal being entered, even if the person is found to be deportable.

150 8 U.S.C. § 1228(c)(2)(C).

151 *See* 8 U.S.C. §§ 1229b(b), 1255, 1158(b)(1)(A).

152 8 U.S.C § 1252(a)(2)(B).

This is not to say that the relief portion of the statute has no teeth whatsoever. As noted earlier, there are forms of relief that fall outside of the discretion of the Attorney General, including protections under CAT. However, the fact that a federal judge can grant *some* form of relief from removal does not cure the deficiency that the court is prevented from deciding key legal questions necessary in the context of a person's ability to stay in the United States.

The Commissioner's involvement does not cure this difficulty. The judicial removal statute requires input from the Commissioner,[153] but does not detail how a federal judge is to treat the Commissioner's advice. If read as advisory, the federal judge's decision to grant relief could conceivably be done in contravention of the Attorney General's discretion, which would directly contradict the plain language of the statute defining the relief available as under the Attorney General's complete discretion. However, if the advice is read as mandatory, then the federal judge is restricted from independently deciding important legal issues, thus violating separation of powers.

If a federal judge is not allowed to independently grant or decide many forms of relief from removal, then the court is prevented from deciding a key legal issue essential to the case or controversy the court has jurisdiction to decide. Asking a federal judge to order removal but preventing the same judge from considering bases of relief from removal that a person may be otherwise eligible for renders the process nearly meaningless and unconstitutionally abrogates the judiciary's decision-making authority.

[153] 8 U.S.C. § 1228(c)(2)(C).

Rendering the Federal Judge's Decision Without Effect Violates the Case or Controversy Clause.

Aside from preventing a federal judge from deciding a key legal issue, Congress acts unconstitutionally if it renders a federal judge's decision meaningless or without effect.[154] But that may be exactly what happens when a federal judge declines to issue an order of removal. If a federal judge finds a defendant deportable and consequently issues an order of removal, the court's decision has considerable weight and effect. After serving his or her criminal sentence, the defendant will have an order of removal entered against him or her and be physically removed from the United States. But what happens if the federal judge, after considering all the evidence, decides that the defendant is not deportable and thus not subject to a judicial order of removal? Under 8 U.S.C. § 1228, the Attorney General is not precluded from re-deciding the exact same issues in a separate hearing, and does not appear to be restricted in any way by the federal judge's decision.[155] Essentially, if a federal judge finds in favor of the defendant, the Attorney General can ignore the decision, find the person deportable and issue a removal order. Moreover, because of the restrictions on both injunctive relief and appellate jurisdiction, no federal court may have the chance to review the Attorney General's decision. Essentially, Congress has allowed a scenario which renders a federal court's decision without meaning.[156] Such action violates the heart of the Case or Controversy Clause and relegates the federal judici-

154 *See generally* United States v. Klein, 80 U.S. 128.

155 8 U.S.C. § 1228(c)(4).

156 Professor Gerald Neuman makes a similar observation: "Read literally, this means that a federal district court's holding that an alien is not deportable does not preclude the Attorney General from deporting the alien on the same ground. In other words, it would allow the court to rule against the alien, but would deny res judicata effect to a ruling in the alien's favor. This would not only be a biased enforcement procedure, but would probably violate Article III of the Constitution." Neuman, *supra* note 98, at 1408.

ary to the role of an advisor or, even worse, only gives effect to the judge's ruling when the ruling is against the defendant.

What role did these statutes play in the deportation of the Agriprocessors defendants? By the authority granted under 8 U.S.C. § 1228(c)(5), the federal prosecutors offered plea deals that asked the defendants to waive their hearing on deportability by the federal judge and to agree to a removal order from the United States.[157] The defendants were all presented with a choice.[158] They could either reject the plea offer and take a chance on the procedures as outlined earlier in this section, or they could accept the removal offer with the hopes of shortening their time in federal confinement.[159] But if the process that the defendants were asked to waive offered no avenue of relief, then it is no wonder that none of the defendants rejected the plea offers and took their chances in front of a judge.

Imagine an Agriprocessors defendant from Guatemala who is married to a United States citizen and who may have a chance for relief from removal if he was brought before an immigration judge under the normal deportation proceedings. The federal prosecutor offers a plea deal and tells the defendant, "If you want a hearing in front of the federal judge on your deportation you can have it. But if you sign this deal, you can skip all that and probably get out six months faster." The defense attorney would have to tell the defendant (1) the federal judge may not have the power to grant any relief from removal even though the defendant may be eligible, and (2) even if the federal judge decides the case in the defendant's favor, immigration authorities can ignore the judge and bring the defendant to another immigration hearing and decide again if the defendant should be deported. When facing this type of choice, there is little doubt that there is no choice at all. By asking the federal judiciary to oversee a process that offered defendants no reasonable avenue

157 Camayd-Freixas, *Interpreting*, *supra* note 3, at 5.
158 *Id.*
159 *Id.*

of relief, Congress and the federal prosecutors undermined the judiciary's role in making independent rulings on the cases before the court.

Impartial Judiciary

One of the backbones of the modern judicial system is the notion that adjudicators and judges should be impartial and independent. This bedrock principle has been part of the American and British Common Law tradition for centuries and dates back to the Magna Carta and to the original state constitutions.[160] It became ensconced into the Constitution as part of the due process rights granted under the Fifth and Fourteenth Amendments.[161] The principle of judicial independence applies to both criminal and civil proceedings and the Supreme Court has continually held that an "impartial adjudicator" is an essential part of procedural due process.[162]

That an adjudicator cannot be biased for or against the parties before him or her, or have a direct interest in how a case is decided, is fairly uncontroversial. However, the Supreme Court has also made clear that even the *mere appearance* of bias or party allegiance is a violation of due process.[163] In some cases, it is the appearance of bias that is most problematic, as it has the

160 *See, e.g.,* MASS. CONST. of 1780, art. XXIX ("It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.").

161 Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that, under the 5th and 14th Amendments, due process requires that adjudicators acting in judicial or quasi-judicial capacity must not have an interest in conviction).

162 Goldberg v. Kelly, 397 U.S. 254, 267, 271 (1970); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.").

163 In re Murchison, 349 U.S. 133, 136-38 (1955).

potential to "cast doubt on the integrity of the whole process."[164]

The Constitution protects against the appearance of bias in many different ways. For instance, the prohibition on *ex parte* communication, or communication between the adjudicator and only one party in the controversy, is designed to prevent the suggestion that one party is being favored in secret.[165] Other examples of deprivations of due process because of the appearance of bias have come in the forms of prejudicial jury selections,[166] violations of ethical codes that prevented judges from speaking publicly on disputed or controversial political issues,[167] and perhaps relevant to the Postville proceedings, due process violations that occur when a judge acts as both the judge and the prosecutor.[168]

Judicial Interest in Defendants Taking Pleas for Postville

The appearance of impartiality is essential to the integrity and stability of all judicial proceedings. In trying the Postville detainees, the Northern District of Iowa made some unusual decisions that gave the appearance that the judiciary preferred plea deals to adjudicating over 300 criminal trials.

One of the most striking facts of the Postville raid is that the Northern District Court of Iowa did not hold the proceedings in their normal courtrooms in Cedar Rapids or Sioux City, but instead took the judges, magistrates, and judicial staff to the National Cattle Congress, a giant compound used to host fairs and large events, in Waterloo, Iowa.[169] Setting aside for the moment

164 Peters v. Kiff, 407 U.S. 493, 502 (1972).
165 Rushen v. Spain, 464 U.S. 114, 120 (1984); United States. v. U.S. Gypsum Co., 438 U.S. 422, 459 (1978).
166 *Peters*, 407 U.S. at 502.
167 Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002).
168 *In re Murchison*, 349 U.S. at 136.
169 *See* Lynda Waddington, *Postville Aftermath: 302 Detainees Charged Criminally, 297 Plead Guilty*, IOWA INDEP., May 22, 2008, http://iowaindependent.

the impropriety of moving the judiciary miles away from its home location in order to expedite prosecution, the massive amount of preparation and logistical hurdles involved in making this move can create a sense of impropriety and improper interest in the results of the raid. In fact, in describing the "success" of the Postville raid, U.S. Attorney for the Northern District of Iowa Matt Dummermuth credited "the dedication, expertise and around-the-clock work during the last two weeks of the people involved, including employees from my office, from all of the participating law enforcement agencies and *from the federal court.*"[170]

Preserving the appearance of impartiality becomes difficult when the judiciary makes logistical concessions and coordinates directly with the federal prosecution long before the defendants are even aware that prosecution may be taking place. Interpreters were hired for the Postville raid a month before the actual raid.[171] It is also certainly clear that in order to move the judges and the personnel and rent the space required for the judicial staff, extensive preparation was needed and required coordination between the government prosecutors and the judiciary. While normally logistical cooperation may not rise to create a sense of partiality or bias, what occurred at Postville went far beyond mere logistics. The district court moved personnel more than 50 miles away from the courthouse, ratified plea deals

com/2366/postville-aftermath-302-detainees-charged-criminally-297-plead-guilty (last visited Jan. 8, 2009); Nat'l Cattle Congress, http://www.nationalcattlecongress.com/ncc_bldg/ncc_bldg_layout.asp (last visited Dec. 18, 2008).

[170] *Id.* (emphasis added). We recognize that every court and adjudicator has an interest in a smooth-running docket. However, it should also be true that the courts should be prepared and at least have the actual capacity to have heard each and every case if all the defendants had insisted on a trial. Given the logistical nightmare of moving an entire federal district court far from its home, and the housing situation, it is not clear that the court *could* have heard these cases at trial, and the question has to be asked whether the court's own knowledge of its capacities gave rise to an appearance that the court itself had no interest in having criminal trials go forward.

[171] Camayd-Freixas, *Interpreting, supra* note 3, at 1.

before defense attorneys even spoke to their clients, and participated in the very plea deals that the judges would later have to accept or reject for each individual case.[172] The impression that the federal court had an interest in the timely completion of the proceedings and in pleas rather than trials can hardly be disputed.

The amount of resources, including time, money and personnel involved in the operation of the raids reflected the prosecution's preference that the adjudications and removal of more than 300 detainees move quickly and without disruption. Plea deals were prepared beforehand with the participation of the federal court and a system was worked out to coordinate how best to expedite the cases involved.[173] Most of the detainees were threatened or charged with aggravated identity theft, a federal crime that carries serious penalties.[174] Time was a huge factor in these cases, and it became clear that the federal prosecutors needed the majority of cases to be settled in pleas. The DOJ and ICE were both on the hook for the continued detention of the defendants, and the mere prospect of going to trial on nearly 300 cases, with very little actual evidence of "intent," a requirement of the crime, was a daunting prospect. But the motivations of the DOJ and ICE do not give rise in this case to constitutional concerns about due process.

What is of constitutional importance is that the Northern District of Iowa had an interest, and a clear preference, in not holding 300 criminal trials that would stymie the operations of the entire judiciary in the area. The Northern District of Iowa had

172 *See* Letter from Rockne Cole, *supra* note 3, at 28-29.

173 *Id.*

174 18 U.S.C. § 1028A(a)(1). This particular crime is under scrutiny as there is a circuit split over the level and type of intent that needs to be shown to support the conviction. *See* Flores-Figueroa v. United States, 274 Fed. Appx. 501 (8th Cir. 2008) (*cert. granted* Oct. 8, 2008, No. 08-108). The U.S. Supreme Court granted certiorari to decide whether a conviction under the aggravated identity theft statute requires knowledge that the document belonged to another person.

enormous short-term dockets following the raid, and according to one report, court sessions went from 7 a.m. until midnight.[175] Moreover, the trailers used for the courthouse and for the detention of the defendants cost money. It is likely that the regular routine of the Northern District Court of Iowa itself was disrupted.[176] It is not clear how the court's normal dockets were being handled during this time, but it is unlikely that other litigants were asked to come to the National Cattle Congress to have their cases heard. While a press release by the District Court attempted to reassure the public that relocation would not substantially affect normal relations, it is difficult to see how that could be true if in fact the cases went to trial.[177] This single immigration raid required not only a vast amount of resources from the DOJ and ICE, but also from the federal judiciary. The court had enormous incentives to not have a substantial number of defendants pursue their right to a criminal trial.

Did the judicial staff have another plan in place if all 300 plus defendants decided to go forward to trial? Where and how would those trials have taken place? If logistics compelled the court to move the personnel over 50 miles away from their home courtrooms for preliminary hearings, what would have been required of the court had each of the Agriprocessors workers insisted on trial? While judicial economy is a valid consideration, due process rights cannot be sacrificed in the name of judicial efficiency.[178] Even if the judiciary acted without any bias or self-interest, it is difficult to argue that at least the appearance of impropriety was not created.

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175 Camayd-Freixas, *Interpreting, supra* note 3, at 2.

176 A press release from the U.S. Attorney's office indicates that the court appearances stopped at 6 p.m. and resumed again at 10 p.m. Press Release, U.S. Attorney's Office, Northern District of Iowa, Postville Criminal Arrests Rise to 154 (May 14, 2008), *available at* http://www.usdoj.gov/usao/ian/press/May_08/5_14_08_Agriprocessors.html.

177 Press Release, U.S. District Court for the Northern District of Iowa (May 12, 2008) [hereinafter Press Release, U.S. District Court], *available at* http://www.aila.org/Content/default.aspx?docid=25440.

178 *See* author's discussion, *supra* note 170.

Further creating the appearance of bias was the level of communication between the judiciary and the prosecution. As reported by the press and Dr. Camayd-Freixas, the prosecution and the enforcement agencies were in communication with the Northern District Court for the coordination of the raids and the housing of the detainees.[179] Notably, it has been alleged that Chief Judge Linda Reade approved plea deals arranged by the federal prosecutors even before criminal defense attorneys had a chance to review the documents with their clients, and even attended plea deal meetings in contravention of Federal Rule 11.[180] The simple presence of Judge Reade at any of the plea conferences causes the appearance of bias in favor of settlement. Additionally, the U.S. Attorney's acknowledgment that the District Court played a role in the success of the operation further creates the impression that the court was not impartial at all.

One clear example of how close cooperation in the administration of the raid created unintended impressions of bias can be found in the press release that was issued by the Northern District of Iowa shortly following the raid.[181] The press release was intended to announce that many of the court personnel were to be moved to Waterloo. Despite using convenience to the detainees' families as a reason to move the court personnel, the clerk of the court acknowledged the "inadequate space in the Cedar Rapids and Sioux City courthouses to hold and process those arrested."[182] Moreover, the language used in the press release showed that at least some members of the judicial staff, including the Chief Judge, had preconceived notions of some of the

179 *See generally* Camayd-Freixas, *Interpreting, supra* note 3, at 1; Letter from Rockne Cole, *supra* note 3.

180 Letter from Rockne Cole, *supra* note 3 ("What I find most astonishing is that *apparently* Chief Judge Linda Reade *had already ratified these deals prior to* one lawyer talking to his or her client. Judge Reade's presence at the meeting seemed to confirm as much.").

181 Press Release, U.S. District Court, *supra* note 178.

182 *Id.*

key facts that were at issue in the cases before the court. The press release states that the move to Waterloo was "in response to the anticipated arrest and prosecution of numerous *illegal aliens*."[183] Obviously, the legal status of those arrested was an issue that should not have been assumed prior to any arrest or hearing. This press release, which acknowledges a concession to logistics and assumes a material fact prior to hearing, creates an impression of bias and judicial interest in how the cases would be heard and decided.[184] While seemingly innocuous, any impression that causes the legitimacy of the process to be called into question makes it much more difficult to evaluate whether due process was afforded to those arrested in Postville.

What cannot be forgotten is the fact that many of the people forced to go through this process did not speak English and likely had only passing familiarity with the U.S. judicial system.[185] It was likely difficult for some defendants, many who were native Guatemalans, to distinguish the judicial staff from the enforcement and prosecution staff. In order to function properly, the judiciary has an obligation to make reasonable efforts to ensure that defendants understand that the court is independent from the prosecution and will approach the case in an impartial manner. If the defendants were under the impression that the judiciary was neither impartial nor independent, then any decision to accept plea deals was not a valid waiver of constitutional rights.

183 *Id.* (emphasis added).

184 The attorney for one of the Postville defendants filed a motion for recusal of Chief Judge Diane Reade based on this press release and other statements made by the District Court and Chief Judge Diane Reade that tend to show bias. Amy Lorentzen, *Judge Declines to Step Down from Immigration Case*, CHI. TRIB., Oct. 1, 2008.

185 Camayd-Freixas, *Interpreting, supra* note 3, at 2, 4.

III. The Role of Individual Rights in Criminal/ Removal Proceedings

In addition to the behavior of the federal district court during the Postville proceedings, serious questions regarding the basic procedural rights of individuals similarly need to be addressed in light of Postville. In the criminal context, the Sixth Amendment guarantees an individual the right to counsel, and, inherent in that right, competent and conflict-free counsel.[186] This section will highlight the lack of protections afforded to the Postville detainees who were subjected to removal as part of an inept and coercive criminal proceeding.

The Right to Competent Counsel

The Sixth Amendment of the Constitution of the United States provides, in relevant part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have *the Assistance of Counsel for his defence.*"[187] The Constitutional right to "assistance of counsel" has been interpreted by the Supreme Court as "the right to the effective assistance of counsel."[188] In *Strickland v. Washington*, the Court reasoned "[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the Constitutional [requirement]."[189] Specifically, the Court has concluded that the right to counsel includes the right to "competent" counsel.[190] In recognizing the importance of the right to effective assistance of counsel, the Court noted that the Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial sys-

186 Strickland v. Washington, 466 U.S. 688, 685-86 (1984); Holloway v. Arkansas, 425 U.S. 475 (1978).
187 U.S. Const. amend VI (emphasis added).
188 McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).
189 *Strickland*, 466 U.S. at 685.
190 *Id.*

tem to produce just results . . . who plays the role necessary to ensure that the trial is fair."[191]

So, what can be discerned of the competence of counsel in the Postville proceedings? It has been revealed that during the course of the jail interviews, the criminal defense attorneys had no choice but to recommend the plea being offered by the U.S. Attorney, counseling their clients that:

> If you plead not guilty, you could wait in jail 6 to 8 months for a trial (without right of bail since you are on an immigration detainer). *Even if you win at trial, you will still be deported* and could end up waiting longer in jail than if you just pled guilty.[192]

However, most of these criminal defense attorneys were unfamiliar with immigration laws, and immigration attorneys were denied access to the makeshift detention camp.[193] An understanding of immigration laws indicates that an individual will not necessarily "still be deported" at the end of a trial. While criminal convictions make obtaining relief more difficult, they do not preclude relief from deportation. Could the detainees' decision to plead guilty have been based on immigration advice that couldn't possibly have been rendered with any degree of competence?

One specific case referenced by Dr. Camayd-Freixas in his essay, "*Interpreting after the Largest ICE Raid in US History: A Personal Account*," highlights the extent to which these clients may have been ill-advised.

> Another client, a young Mexican . . . had worked at the plant for ten years and had two American born daughters, a 2-year-old and a newborn. He had a good case with Immigration for an adjustment of status which would allow him to stay. But

191 *Id.*
192 Camayd-Freixas, *Interpreting* (emphasis added), *supra* note 3, at 5.
193 *Id.* at 7.

> if he took the Plea Agreement, he would lose that chance and face deportation as a felon convicted of a crime of 'moral turpitude.' On the other hand, if he pled 'not guilty' he had to wait several months in jail for trial, and risk getting a 2-year sentence. After an agonizing decision, he concluded that he had to take the 5-month deal and deportation, because as he put it, 'I cannot be away from my children for so long.' His case was complicated; it needed research in immigration law, a change in the Plea Agreement, and above all, more time.[194]

This man's decision to take the plea agreement has clearly established immigration consequences. The plea is a criminal conviction, which renders this young man inadmissible to the United States. This means that he cannot return to become a lawful permanent resident without a waiver of inadmissibility, which is a complicated and difficult "pardon" to obtain, especially in light of the fact that he must apply through the U.S. Consulate abroad where there is no independent judicial review.[195] More importantly, however, the plea agreement entailed a stipulation to summary deportation. Consequently, this man must wait outside the United States for at least ten years before he can apply for legal permanent resident status with this difficult waiver.[196] This single decision will forcibly separate this young man from his family for a period of at least ten years, potentially forcing his family to return to Mexico with him. Was

194 *Id.* at 6-7.

195 I.N.A. § 212(h).

196 I.N.A. § 212 indicates that "any alien who (I) has been ordered removed under section 240 or any other provision of law, and who seeks admission within 10 years of the date of such alien's departure or removal . . . is inadmissible." I.N.A. § 212(a)(9)(A)(ii)(I). The same statute section renders permanently inadmissible "any alien convicted of . . . a crime involving moral turpitude" unless they can qualify for an extreme hardship waiver. I.N.A. §§ 212(a)(2)(A)(ii)(I), 212(h).

he apprised of these consequences in the course of his legal "advice?" Was his counsel competent to advise him of the full ramifications of his legal plea? Would the client have accepted the criminal plea bargain had the consequences of the entirety of the plea been properly explained to him—namely, that he and his United States citizen family face indefinite separation?

A guilty plea cannot be attacked based on inadequate legal advice without a showing of serious attorney error and prejudice.[197] But what about in criminal proceedings that hinge on the defendants' understanding of their immigration case? Further, the American Bar Association's Standard for Criminal Justice advises that "if a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the client of these consequences.' "[198] While deportation is said to be merely a collateral consequence of criminal proceedings, courts have nonetheless held that affirmative misadvice concerning immigration consequences that induces a criminal plea is ineffective assistance of counsel under the Sixth Amendment.[199] A plea under these circumstances can be characterized as involuntary or unintelligent under the *Strickland* standard.[200] These decisions are all the more salient in light of the fact that criminal counsel in Postville engaged in direct immigration counseling as compelled by the nature of these combined proceedings.[201]

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197 Nix v. Whiteside, 475 U.S. 157, 165 (1986).

198 I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001) (citing ABA Standards for Criminal Justice, 14-3.2, Comment 75 (2d ed. 1982)).

199 *See generally* United States v. Cuoto, 311 F.3d 179 (2nd Cir. 2002); United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985).

200 *Cuoto*, 311 F.3d at 188 (stating, "We believe an affirmative misrepresentation by counsel as to deportation consequences of a guilty plea is . . . objectively unreasonable. We therefore hold that such a misrepresentation meets the first prong of the *Strickland* test. It follows that if the defendant can also establish that 'there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial,' . . . then, the guilty plea is invalid.").

201 Much has been made of the Attorney General's (AG) recent decision in *Matter of Compean*, 24 I & N Dec. 710, 710 (A.G. 2009) wherein the AG

Moreover, what can be made of the government's behavior in denying defendants proper immigration counsel at Postville? The Court has held that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[202] By denying immigration attorneys access to the Postville detainees, did the government interfere with appointed counsel's ability to make an independent and *competent* decision regarding how to conduct the defense? In his letter to Congresswoman Lofgren, Rockne Cole, a criminal defense attorney who declined an appointment as defense counsel to the Postville detainees, explained that the seven days that the prosecution gave defendants to accept the guilty pleas did not give the defendants sufficient time to determine if the plea was in their best interest.[203] While a typical plea offer remains available for approximately two weeks, under the fast-track program the offer was only available for one week.[204] By allowing only seven days to accept the terms of the plea, and denying competent immigration counsel access to the facility, did the government interfere with court-appointed counsel's ability to effectively

determined that "[a]liens in removal proceedings also have no right to counsel, including Government-appointed counsel, under the Fifth Amendment. Although the Fifth Amendment applies to removal proceedings, its guarantee of due process does not include a general right to counsel, or a specific right to effective assistance of counsel, and is violated only by state action, namely, action that can be legally attributed to the Government." *Compean*, however, references exclusively proceedings "before an immigration judge" under I.N.A. § 240 and defined under I.N.A. § 292. *Id.* at 731. The Postville proceedings were criminal proceedings that employed immigration consequences as a means of expediting plea agreements. Moreover, the authority for such plea agreements can be found at I.N.A. § 238, a provision not referenced in the *Compean* decision.

202 *See Strickland*, 466 U.S. at 686.

203 Letter from Rockne Cole, *supra* note 3.

204 *See generally Implementing the Requirements of the PROTECT Act: Hearing Before the U.S. Sentencing Comm'n*, 108th Cong. 9 (2003) (statement of Paul Charlton) [hereinafter *PROTECT Act U.S.S.C. Hearings*], *available at* http://www.ussc.gov/hearings.htm; Camayd-Freixas, *Interpreting*, *supra* note 3, at 7.

investigate appropriate criminal or immigration defenses to the criminal and removal issues?

The Right to Conflict-free Counsel

The right to effective assistance of counsel is also implicated when attorneys engage in dual representation and a conflict may arise. The Supreme Court has reasoned that dual representation is constitutionally suspect because it prevents the attorney from fully representing the interests of his or her client.[205] The Court has held that this conflict can deprive a defendant of his or her Sixth Amendment right to effective assistance of counsel.[206] In Postville, on average, court-appointed counsel was required to represent 17 detainees brought up on charges arising out of the same criminal investigation.[207] The plea agreements signed by the Postville detainees stipulated that the "defendant agrees to fully and completely cooperate in the investigation and prosecution of criminal activity. The defendant will truthfully answer all questions, provide all evidence in defendant's control and will not withhold any information."[208] Each detainee was required to cooperate fully with the investigation in providing information against the employer and, quite likely, against each other. Yet there was no complaint from counsel that a conflict might exist. Moreover, there is no way of knowing whether a conflict of interest existed in the immigration context because, as mentioned previously, appointed counsel had no understanding of immigration law to determine the context in which these conflicts arise.

The Eighth Circuit, the circuit under which this makeshift district court operated, sets out a very high standard to which both court and counsel are accountable for conflicts.[209] Recognizing

205 Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978).
206 *See generally* Glasser v. United States, 315 U.S. 60 (1978).
207 Camayd-Freixas, *Interpreting, supra* note 3, at 7.
208 Plea Agreement, *supra* note 9.
209 United States v. Lawriw, 568 F.2d 98, 111 (8th Cir. 1977) (emphasis added).

that "dual representation is fraught with the risk of conflict and should be approached with caution by the parties and by counsel," in *United States v. Lawriw* the Eighth Circuit held that "responsibility for avoiding such risks lies heavily *both with the trial court and with counsel.*"[210] Moreover, the Federal Rules of Criminal Procedure are clear as to the duty of the Court under such circumstances.

> The Court must promptly inquire about the propriety of joint representation and *must* personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.[211]

Were the Postville detainees apprised of their right to have conflict-free, competent counsel? In his letter to Congresswoman Lofgren, Rockne Cole articulated that under the circumstances, "it would have been impossible to meaningfully assess conflict of interest issues in seven days."[212] Yet, under the facts that we have, it seems clear the district court never inquired as to the possibility of a conflict in not simply "dual" representation, but in the representation of approximately 17 defendants in the same criminal prosecution.

IV. The Role of the Prosecutor in the Postville Proceedings

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all;

210 *Id.*
211 Fed. R. Crim. P. 44(c)(2)(emphasis added).
212 Letter from Rockne Cole, *supra* note 3.

> and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . [the United States Attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[213]

The Impropriety of Fast-Tracking

In order to enable the expeditious processing of over 300 detainees, federal prosecutors utilized a process called "fast-tracking," among other inappropriate discretionary measures. Fast-tracking is designed to be a unique process wherein prosecutors may opt for a less severe sentence or less severe charge, thereby departing from the United States Sentencing Guidelines and agency policy, so long as the defendant agrees to expeditiously plead guilty. The program was presented to the Unites States Sentencing Committee as one that is "properly reserved for *exceptional circumstances*, such as where the resources of a district would otherwise be significantly strained by a persistently large volume of a particular category of cases."[214] It was never contemplated to have been utilized as it was in Postville.

Fast-tracking was officially sanctioned by Congress with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), which gave the Attorney General unfettered discretion in implementing a fast-tracking program.[215] Pursuant to this statute, former Attorney General Ashcroft issued two policy memoranda from the Office

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213 Berger v. United States, 295 U.S. 78, 88 (1935).

214 *PROTECT Act U.S. Sentencing Comm. (USSC) Hearings* (emphasis added), *supra* note 204, at 14.

215 *PROTECT Act* § 401(m)(2)(B) (stating that "the United States Sentencing Commission shall . . . promulgate . . . a policy statement authorizing a downward departure of not more than 4 levels if the Government files a mo-

of the Attorney General.[216] The first memorandum delineates the responsibility of the prosecutor to "charge and to pursue the most serious, readily provable offense."[217] The latter memorandum laid out both the criteria sufficient to warrant the authorization of a "fast-track" program as well as the procedural requirements necessary for a grant from the Attorney General himself.[218] Specifically, in order to obtain Attorney General authorization to implement a "fast-track" program, the U.S. Attorney must submit a proposal that demonstrates the following:

> (A) (1) the district confronts an exceptionally large number of a specific class of offenses within the district, and failure to handle such cases on an expedited or "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district; or
> (2) the district confronts some other exceptional local circumstance with respect to a specific class of cases that justifies expedited disposition of such cases;

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tion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney . . . .").

[216] Memorandum from the Office of the Attorney General on Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing to All United States Attorneys (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm; Memorandum from the Office of the Attorney General on Dep't Principles for Implementing an Expedited Disposition on "Fast-Track" Prosecution Program in a District to All United States Attorneys (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

[217] Memorandum from the Office of the Attorney General on Dep't Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing to All United States Attorneys (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

[218] Memorandum from the Office of the Attorney General on Dep't Principles for Implementing an Expedited Disposition on "Fast-Track" Prosecution Program in a District to All United States Attorneys (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

(B) declination of such cases in favor of state prosecution is either unavailable or clearly unwarranted;
(C) the specific class of cases consists of ones that are highly repetitive and present substantially similar fact scenarios; and
(D) the cases do not involve an offense that has been designated by the Attorney General as a "crime of violence."[219]

The practice of fast-tracking began along the southwest border where certain drug or "alien" smuggling crimes and recidivist unlawful reentry crimes had a high incidence of prosecution.[220] Initially, the practice was only authorized to expeditiously dispose of criminal cases when the defendant engaged in recidivist illegal reentry with "prior serious criminal conviction or a significant history of immigration apprehensions and removals."[221] Alternatively, fast-tracking could be utilized in "alien" or drug smuggling sentencing after a finding of a felony conviction or an "aggravated felony." Noteworthy in the recidivist cases is that the defendant has already been ordered removed from the United States, presumably pursuant to an administrative procedure delineated in the INA. So the hearing strictly functions as a criminal hearing and a reinstatement of the prior order of removal. With respect to the drug and alien smuggling cases, it is important to note that the conviction will render the defendants "aggravated felons" under the INA, thereby sharply curtailing the right to relief from removal in an immigration proceeding.[222]

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219 *Id.*
220 *PROTECT Act U.S.S.C. Hearings*, *supra* note 204, at 3.
221 *Id.*
222 *See* I.N.A. § 101(a)(43) ("The term 'aggravated felony' means- (B) illicit trafficking in a controlled substance, (as defined in section 802 of Title 21), including a drug trafficking crime, (as defined in section 924(c) of Title 18) . . . (N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling).").

What is striking about the use of fast-tracking against the Postville detainees is that the vast majority of detainees were neither recidivist immigration violators nor convicted of aggravated felonies. Fast-track proceedings were never contemplated to include the type of prosecutions that occurred in Postville. When the United States Attorney argued the Attorney General's proposition for fast-tracking to the United States Sentencing Commission, he specifically advised that the DOJ would use careful discretion to prevent against broad or arbitrary use of the program.[223] Far from the intent behind the fast-track program, it appears that in Postville, fast-tracking facilitated the abridgement of the rights of undocumented laborers who had a right to have their cases heard in criminal proceedings (or at least execute their own properly advised plea agreements) and the right to a separate, procedurally protected hearing on their immigration case.

As the Ashcroft Memorandum articulates, the USAO must provide a detailed explanation of why the criteria mentioned above were satisfied with respect to such offenses. What was the USAO's justification for fast-tracking the Agriprocessors workers in Postville? Was the district confronting a *persistent* or *highly repetitive* and exceptionally large number of a specific class of offenses as required by the Ashcroft Memorandum? Moreover, rather than a downward departure in sentencing, the USAO appears to have utilized charge bargaining to justify the fast-track program; but was the charge bargaining really made in good faith?

In the experience of a former Assistant U.S. Attorney, the use of fast-track plea bargaining has historically been limited to those charged with the most serious, *readily provable* offenses

223 *PROTECT Act U.S.S.C. Hearings*, *supra* note 205, at 2 ("Nonetheless, we recognize that there is reason for some concern about these programs, both in terms of their expansion beyond immigration and the other types of cases that create an extraordinary burden on the southwest border, and also in relation to sentencing disparities that result from them.").

under well-settled law.[224] The use of well-settled statutes allows the government and defendant's attorney to negotiate an even exchange. Namely, the defendant receives a lesser charge or sentence and the prosecution obtains expediency. The charging statute invoked by the USAO in Postville, however, was neither old nor well-settled. In Postville, the USAO threatened to prosecute under the federal aggravated identity theft statute.[225] That statute, implemented in July of 2004, provides a mandatory two year sentence and requires a "knowing" violation.[226] At the time of the Postville proceedings, the proof required to sustain this charge was not well-settled law. At issue among the split in the circuits was whether or not the "knowingly" requirement extends through the charge, requiring the government to show that the defendant knew that the identification he used belonged to another person.[227] The Circuit split on this very issue has become so onerous that the United States Supreme Court granted certiorari to settle the issue on October 20, 2008.[228] While the Eighth Circuit case law may have supported the threat of aggravated felony charges at the time of the Postville proceedings,[229] it is questionable whether the USAO really acted in good faith by employing charges to which the provability remains highly contested.

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224 Telephone Interview with Ricardo Meza, Midwest Regional Counsel, MALDEF (Jan. 9, 2009); *see also* Ricardo Meza, MALDEF, Panel Presentation at DePaul University College of Law Vincentian Conference, Immigration Raids, Due Process and the Separation of Powers: Implications from Postville and Beyond – Role of the U.S. Attorney's Office (Nov. 18, 2008), video presentation [hereinafter Meza, Panel Presentation], *available at* http://www.illinoislegaladvocate.org/index.cfm?fuseaction=Home.dsp_Content&contentID=6569.

225 Camayd-Freixas, *Interpreting, supra* note 3, at 2, 5, 9-10.

226 Identity Theft Penalty Enhancement Act, 18 U.S.C. § 1028A(a)(1) (2004).

227 Meza, Panel Presentation, *supra* note 224.

228 Flores-Figueroa v. United States, 274 Fed. Appx. 501 (8th Cir. 2008) (*cert. granted* Oct. 8, 2008, No. 08-108).

229 *Id.* at 502.

On December 19, 2008, the Office of the Director with the Executive Office for the United States Attorney issued a memorandum to the Administrative Office of the United States Courts indicating that the USAO has been improperly charging felony identify theft under the Identification Fraud Statute.[230] The memo indicates "some [USAOs] have charged violations [of the identity fraud statute] as felonies . . . . [S]ome offenses charged . . . were incorrectly designated as felonies, and erroneous sentences may have been imposed in these cases."[231] Of critical importance to the Postville context, the memo notes that a conviction under the aggravated identity theft statute "requires the commission of an underlying 'felony' offense. Where the underlying 'felony' specified in the charging document was actually a misdemeanor violation . . . the conviction is erroneous."[232] This memo clearly indicates that simple possession crimes under the identification theft statute are not felony offenses. Had this memo been released prior to the Postville raid, the USAO would have been strictly precluded from threatening the Postville detainees with a two year sentence for aggravated identity theft. A mere seven months after the Postville proceedings were concluded, the USAO itself acknowledged that it was improper to threaten the use of aggravated identity theft to coerce the Postville detainees into pleading guilty under the fast-track system.

Taken as a whole, it seems that the fast-tracking process was not employed to save government resources (the direct cost of the Postville raid to the people is in excess of $10 million),[233] but rather, in a comprehensive failure to protect the integrity of our judicial system, the government employed this discretionary tac-

230 Memorandum from James C. Duff, Director of the Administrative Office of the United States Courts on Prosecution of Fraudulent Document Possession Crimes Under the Identification Fraud Statute (Jan. 22, 2009) (on file with DePaul Journal for Social Justice).

231 *Id.*

232 *Id.*

233 Camayd-Freixas, *Raids, supra* note 6, at 2.

tic to coerce guilty pleas and removal orders – thereby boosting their funding numbers – while circumventing the individuals' rights to due process of law.

Conclusion

Looking back, Postville begins to look like a comprehensive failure on the part of this great "nation of laws." A domestic police agency with an over-inflated budget teamed up with over-zealous prosecution and failed our nation of immigrants. Rather than protecting the individuals being subjected to inhumane and illegal labor conditions, the Department of Homeland Security arrested them. The Department of Justice rapidly prosecuted the migrant workers by bringing questionable charges to coerce faster pleas. Most shockingly, perhaps, the federal judiciary, rather than preserving due process, judicial integrity and impartiality, facilitated the Executive's cause by sitting as federal judges in trailers in Iowa. In the process, the federal district court convicted and deported hundreds of Mexicans, Guatemalans and Ukrainians in violation of the most basic principles of the separation of powers and in violation of international and domestic laws against the repatriation of those facing persecution and torture. And the court-appointed attorneys – the officers of the court – never made mention that the entire process simply abandoned the rule of law.

The Postville raid represents more than just the tragedy of the separation of families and the economic devastation of a rural community. Its significance should resonate regardless of any ideological stance on immigration law and policy. The Postville proceedings represent what an imbalance of power can look like when one branch of the government proceeds unchecked. Most importantly, the Postville proceedings should compel the legislative branch to make the appropriate amendments to the Immigration and Nationality Act by repealing INA § 238 in order to prevent this usurpation of Congressional intent from harming others in the future.

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