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## IMMIGRATION DEFENSE WAIVERS IN FEDERAL CRIMINAL PLEA AGREEMENTS

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# Immigration Defense Waivers in Federal Criminal Plea Agreements

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INTRODUCTION

Immigration policy is back on the American public's radar screen. The fields of immigration—a civil-law subject—and criminal law—a public-law subject—are quite distinct in both litigation practice and law school curricula.<sup>1</sup> With exceptions along the U.S.-Mexican border, only in a small minority of federal cases do criminal attorneys need to know more than some very basic premises of immigration law. Aside from some very general information necessary for defense attorneys to provide adequate advisements according to *Padilla v. Kentucky*<sup>2</sup> to their clients before entering guilty pleas and Continued Legal Education (CLE) training regarding what offenses have severe immigration consequences,<sup>3</sup> the

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1. For example, at the University of Texas, where two of the Authors teach, there has historically been little, if any, cross-pollination among those professors teaching criminal law and procedure courses and those running immigration clinics. Immigration is not mentioned in any of the scores of major first-year criminal law casebooks. *See, e.g.*, GEORGE DIX, *CRIMINAL LAW* (7th ed. 2015); SAMFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* (10th ed. 2017); JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* (2016). Moreover, many law schools now offer “Federal Criminal Law” as a relatively new subject (such courses have perhaps been offered for a decade at most), but none of the Federal Criminal Law casebooks include a chapter (or even a mention) of immigration. *See, e.g.*, PETER W. LOW, *FEDERAL CRIMINAL LAW* (2d ed. 2003); JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME* (5th ed. 2012). Professor Klein’s casebook will have a brief section on immigration for the first time in the 2019 Supplement and will include a full chapter on immigration in the seventh edition. *See* NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* (6th ed. 2015)

2. 559 U.S. 356 (2010).

3. In 2010, the Supreme Court of the United States upset years of federal criminal plea practice by holding that counsel is ineffective when misadvising their clients regarding the immigration consequences of guilty plea or failing to warn them that their pleas “may carry a risk of adverse immigration consequences” where “the law is not succinct and straightforward.” *Id.* at 369. These immigration advisements are now part of the Federal Rules of Criminal Procedure Rule 11 colloquy. FED. R. CRIM. P. 11(b)(1)(O) (amended 2013). With well over 90% of federal convictions resolved through plea agreements, defense attorneys routinely counsel clients on the impact of waiving rights, and federal district courts depend upon defendants giving up a myriad of constitutional rights in the name of expediency. Indeed, the federal courts could not function in their current size and limited resources if more defendants went to trial. U.S. DEP’T OF JUSTICE, *FEDERAL JUSTICE STATISTICS 2009* (2011), <https://www.bjs.gov/content/pub/pdf/fjs09.pdf> (noting that the

body of criminal practitioners have very little knowledge of the labyrinthine immigration law and its even more impenetrable regulations.

It is not surprising, then, that law schools similarly segregate the two areas of law. Criminal law is considered a core subject, and the vast majority of law professors who teach this are tenured or tenure-track professors. Immigration law, on the other hand, is a subject that may not yet be considered sophisticated by the academic elite and is not given the same level of attention.<sup>4</sup> More law schools now offer immigration as a separate course, in addition (or separate) from an immigration clinic. While this divide is a topic for another day, it does help explain why criminal law practitioners and academics are not fully versed in immigration law, and vice-versa.<sup>5</sup>

The distinction is becoming increasingly problematic as the subjects continue to intertwine in very practical ways: federal criminal prosecution is now routinely used as part of border enforcement strategy, and interior immigration enforcement is done largely in cooperation with state and local policing.<sup>6</sup> The Department of Justice (DOJ), under a new

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percentage of federal felony convictions obtained by plea soared to 97% by 2009); Santobello v. New York, 404 U.S. 257, 260 (1971) (describing plea bargaining as “an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”).

4. Over the last decade, we have seen more top-tier law schools, such as Yale and the University of California, Los Angeles, hire tenure and tenure-track professors who specialize in immigration law, though this is not yet universal.

5. We are not the first scholars to note the sharp divide between the fields, despite their commonalities. See, e.g., Jennifer M. Chacon, *Producing Liminal Legality*, 92 DENVER U. L. REV. 709 (2015); Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 396 (2006) (noting the nominally separate parallel systems of immigration law and the criminal justice system and suggesting a unifying theory based upon “membership theory”); Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 617 (2003) (noting the intersection); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1894 (2000) (describing deportation as serving the same goals as criminal punishment: incapacitation, deterrence, and retribution).

6. Criminal immigration violations are now one of the largest single categories of federal criminal offenses filed. U.S. SENTENCING COMM’N, 2016 ANNUAL REPORT (2017), <https://www.ussc.gov/about/annual-report-2016>. The first federal statute restricting immigration in 1882 barred the entry of foreigners with certain serious criminal convictions. In 1929, unlawful entry itself became a federal misdemeanor, and unlawful re-entry became a felony, and “[i]n 1988 Congress vastly expanded the range of crimes leading to deportation by creating the category of ‘aggravated felon[y].’” Stumpf, *supra* note 5, at 383. Finally, the events of September 11 had a huge impact on immigration control.

administration whose goal is to expand and accelerate removal of non-citizens,<sup>7</sup> is taking advantage of this historical division.<sup>8</sup> Intending to have its cake and eat it too, the Trump administration wants to retain the civil aspects of immigration law that most benefit the government (primarily that a non-citizen has no Sixth Amendment<sup>9</sup> right to an attorney at the government's expense in deportation<sup>10</sup> proceedings), while retaining the aspects of criminal law where the government holds all the cards (namely the coercive aspect of plea bargains that can include waivers of most of the defendant's substantive and procedural rights).<sup>11</sup>

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Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550 (2004).

7. *Non-citizens* and *immigrants* refer to individuals who are not United States citizens. These individuals include both non-nationals lacking immigration status and those with status, including lawful permanent residents. Citations to federal statute may use the term *alien*. For additional discussion on terminology, see STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 533 (6th ed. 2015). In this Article, *non-citizen defendant* or *non-citizen* will be used.

8. See Memorandum from Attorney General Jefferson Sessions on Renewed Commitment to Criminal Immigration Enforcement to All Federal Prosecutors (Apr. 11, 2017) [hereinafter AG Sessions Memorandum], <https://www.justice.gov/opa/press-release/file/956841/download> [<https://perma.cc/SJ4Q-MB56>] (providing that criminal cases charging violations of 8 U.S.C. § 1324 (bringing and harboring aliens), 8 U.S.C. § 1325 (improper entry by alien), 8 U.S.C. § 1326 (reentry of removed alien), 18 U.S.C. § 1028A (aggravated identify theft), 18 U.S.C. § 1546 (fraud and misuse of visas, permits, and other documents), and 18 U.S.C. § 111 (assaulting, resisting, or impeding officers) are to be "higher priorities" in deportation proceedings). Moreover, the AG Sessions Memorandum asks that at sentencing, prosecutors should "seek, to the extent practicable, judicial orders of removal." *Id.*; see also Sarah Sherman-Stokes, *Immigration Judges Were Always Overworked. Now They'll Be Untrained, Too*, WASH. POST (July 11, 2017), [https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644\\_story.html?utm\\_term=.ae1f72c2faca](https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644_story.html?utm_term=.ae1f72c2faca) (noting that immigration judges have more than 1500 cases per year with one law clerk shared by four judges, compared with federal district court judges who have 400 cases per year with three law clerks for each judge, and lamenting that the Trump administration is both dramatically increasing their caseloads, while at the same time canceling their annual week-long training conference). This acceleration started with President Obama; there was a then-all-time high of 267,752 cases pending in 2010 and more than 542,000 pending cases in 2016. Sherman-Stokes, *supra* note 8.

9. U.S. CONST. amend. VI.

10. While the law since 1996 uses the term "removal" to refer to the process of deportation, the term "deportation" persists in general use and understanding. See LEGOMSKY & RODRIGUEZ, *supra* note 7, at 1. The terms "removal" and "deportation" could be used interchangeably for this Article. Thus, we will refer to the various means of an immigration authority returning non-citizens to their home countries simply as "removal."

11. See generally Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015) (documenting the expansion of government requested waivers, both of trial rights and non-trial rights, as a condition of entering into a plea deal).

By combining the greatest pro-government interests of both fields, prosecutors are best positioned to reach the current administration's goal to deport as many immigrants as possible.<sup>12</sup> Although the Authors do not comment on the propriety of this goal, we do take issue with the government's illegitimate means of achieving it by including waivers of immigration relief and challenges to deportability in criminal plea agreements.

This Article focuses on DOJ's inclusion of waivers of immigration relief in plea agreements for non-citizen federal defendants and proposes some challenges to these waivers. Federal district and appellate judges, immigration judges (IJs), and the Board of Immigration Appeals (BIA) members will find below legal grounds to decline to accept these waivers. Such tools are critical to combat this new federal immigration waiver propensity—which is especially disturbing in light of Attorney General Sessions' April 11, 2017 Memorandum requiring federal prosecutors to substantially broaden immigration prosecutions, and limiting discretion on whom not to deport.<sup>13</sup> The government seeks waivers of critical rights without giving non-citizen defendants access to the tools and knowledge to make fully informed decisions.

In Part I, we review the language of immigration waivers, which widely varies by jurisdiction, and include an appended chart tracking waivers from each U.S. Attorney's Office that presently requests waivers as part of their standard plea agreements. In Part II, we briefly describe how removal orders are imposed by immigration judges, Department of Homeland Security (DHS) officers, and by federal district court judges, and discuss the effect these waivers will have in those proceedings. The

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12. See, e.g., AG Sessions Memorandum, *supra* note 8; Memorandum from Charles D. Luckey, Department of the Army, on Certification on Honorable Service Pursuant to 8 U.S.C. § 1440 to Operational Commands (Aug. 17, 2017) (describing new Army policy prohibiting reservists from naturalizing under INA § 329); Denise Gilman, *The U.S. Deportation System is Verging on Lawlessness*, THE GUARDIAN (Aug. 23, 2017), <https://www.theguardian.com/commentisfree/2017/aug/23/immigration-crisis-us-deportation-system-lawlessness-trump-administration> (suggesting that the Trump administration has taken an aggressive stance on immigration enforcement, detaining and seeking to deport in large numbers, yet has allocated only a fraction of the \$1.5 billion promised to immigration enforcement to the immigration courts).

13. See AG Sessions Memorandum, *supra* note 8; see also Exec. Order No. 13768, 82 Fed. Reg. 8799 § 8 (Jan. 25, 2017) (withdrawing all previous Obama memos outlining prosecutorial discretion priorities); Memorandum from Secretary of the Department of Homeland Security John Kelly on Enforcement of the Immigration Laws to Serve the National Interest to Kevin McAleenan, et al. (Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) (expanding enforcement priorities and reducing application of prosecutorial discretion).

Authors also include a discussion of the potential grounds of relief from removal, such as asylum, withholding of removal, and protection under the Convention Against Torture in conjunction with challenging the grounds for the deportation. Finally, we spend some time on the renewed use of a 1994 judicial removal statute,<sup>14</sup> 8 U.S.C. § 1228.<sup>15</sup>

In Part III, we identify five methods for challenging these waivers. We first urge immigrants to demand hearings and to challenge the factual statements contained in the plea waivers. Next, we question the constitutionality of the judicial removal statute. Moving on, we suggest that defense attorneys who advise clients to sign these waivers may be providing ineffective assistance of counsel. Additionally, we note that ethics rules regarding competency prohibit most criminal defense attorneys from advising their clients regarding what immigration rights they are ceding, and similarly, prohibit prosecutors from seeking such waivers. Finally, we argue that public policy and international law obligations may prohibit enforcement of these waivers.

#### I. CURRENT FEDERAL IMMIGRATION WAIVER TERMS

Although federal prosecutors have sporadically included waivers of immigration relief in their plea agreements for many years (sometimes in “Fast-Track”<sup>16</sup> sentencing agreements for immigrants in the country unlawfully), those will be used with increasing frequency and greater substantive breadth now. Given the present administration’s

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14. “Judicial removal” refers to when a district court judge orders removal as part of a sentencing hearing. It is distinguished from removal ordered by an IJ as part of immigration proceedings in her court or administrative removal provided by ICE.

15. 8 U.S.C. § 1228 (2018).

16. Fast-Track was a DOJ program developed in the 1990s that offered a significantly reduced (approximately 50%) sentence for an Illegal Entry or Re-Entry defendant who, very early in the case, accepted a plea agreement and did not contest matters. It was originally deployed along the border states, which would otherwise have been overwhelmed with full prosecutions of the vast number of these defendants. Non-border districts were allowed to use it as well when they had a large number of these cases. *See* Memorandum from John Ashcroft, Attorney General, on Department Principles for Implementing on Expedited Disposition or “Fast-Track” Prosecution Program in a District to all U.S. Attorneys (Sept. 22, 2003), <http://www.lb7.uscourts.gov/documents/09-39321.pdf>; *see also* Memorandum from James M. Cole, Deputy Attorney General, on Department Policy of Early Disposition or “Fast-Track” Programs to all U.S. Attorneys (Jan. 31, 2012), <http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf> [hereinafter DAG Cole Memorandum]; U.S.S.G. § 5K3.1 (Nov. 1, 2015) (authorizing a downward departure of not more than four levels, on motion of the government, pursuant to an early disposition “fast-track” program within certain districts, promulgated pursuant to section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) [hereinafter the PROTECT Act]).

prioritization of immigration prosecution,<sup>17</sup> it is reasonable to anticipate a greater proliferation not only of prosecutions but also of these waivers in the near future.

Nevertheless, the DOJ has not offered its prosecutors any standard language for immigration waivers as of this writing.<sup>18</sup> The most recent policy pronouncements regarding Fast-Track, like the PROTECT Act<sup>19</sup> and DOJ's Sentencing Manual,<sup>20</sup> do not address immigration waiver language; rather, it only requires that the defendant agree to the factual basis and waive the right to ask for a variance, appeal, and collateral attack.<sup>21</sup> This relatively recent Fast-Track memorandum does not speak to removal at all, let alone stipulated removal. In fact, most jurisdictions do not include any immigration waivers in plea agreements.<sup>22</sup> In those districts incorporating immigration waivers, a variety of terms are employed. However, the effect of all these versions is the same: to circumvent immigration relief from removal, deportation, and exclusion.

A couple of districts use only general terms. For instance, in the Northern District of Alabama, plea agreements provide: "The defendant agrees to . . . waive any right he might otherwise have to contest his deportation and removal to [country of origin]."<sup>23</sup> This is similar to the

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17. AG Sessions Memorandum, *supra* note 8.

18. The Chart (appended to the end of this article) summarizes waiver language by district.

19. Pub. L. No. 108-21 (2003).

20. U.S.S.G. ch. 5 (2018).

21. See DAG Cole Memorandum, *supra* note 16. *But see* Plea Agreement at 17 para. H, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595) (agreeing to appear before IJ and stipulate to entry of an order of removal).

22. At this time, the following districts have not included immigration waivers in their criminal plea agreement boilerplate: Middle District of Alabama, District of Alaska; Eastern and Western Districts of Arkansas; Central, Eastern, and Southern Districts of California; District of Colorado; District of Connecticut; District of Delaware; District of Columbia; Northern and Southern Districts of Florida; Middle and Northern Districts of Georgia; District of Hawaii; District of Idaho; Northern and Southern Districts of Indiana; District of Kansas; Middle and Western Districts of Louisiana; District of Maine; District of Maryland; District of Minnesota; Northern District of Mississippi; Western District of Missouri; District of New Hampshire; District of New Jersey; Eastern, Northern, Southern, and Western Districts of New York; District of Nevada; Middle and Western Districts of North Carolina; District of North Dakota; Northern and Western District of Oklahoma; Eastern, Middle, and Western District of Pennsylvania; District of Puerto Rico; District of Rhode Island; District of South Carolina; District of South Dakota; Western District of Tennessee; Eastern, Northern, and Western Districts of Texas; District of Virgin Islands; Eastern and Western Districts of Virginia; Western District of Washington; and District of Wyoming.

23. These plea agreements are summarized in the Chart at the end of this Article. Complete plea agreements are on file with Author Donna Elm.



language used in the Eastern District of Tennessee: “The defendant waives any and all forms of relief from removal or exclusion, and agrees to abandon any pending applications for such relief and to cooperate with the Department of Homeland Security during removal proceedings.”<sup>24</sup>

Most districts, however, particularize their waivers. Three districts require defendants to explicitly agree to removal.<sup>25</sup> But even when that is absent, most districts with waivers require defendants to agree or admit that they are removable.<sup>26</sup> For example, in the District of Arizona, Eastern District of Louisiana, District of Nebraska, and the Southern District of Ohio, the “defendant admits that the defendant was the subject of a previous order of removal, deportation, or exclusion.”<sup>27</sup> Similarly, in the United States District Court for the Eastern District of Michigan, a defendant “agrees to” be subject to removal.<sup>28</sup>

When there are previous or existing removal orders, some U.S. Attorney’s Offices require defendants to agree to the reinstatement or otherwise not oppose the execution of those orders.<sup>29</sup> Thus, five districts feature agreement terminology: “defendant agrees to the reinstatement of that previous order of removal, deportation, or exclusion.”<sup>30</sup> Taking a converse approach, three districts feature language such that defendants may not contest their prior orders; the United States District Court for the Eastern District of Michigan has “defendant agrees not to contest, obstruct, or hinder in any way, such reinstatement at the end of the term of imprisonment imposed pursuant to this plea agreement,”<sup>31</sup> and the United States District Court for the Southern District of Alabama has “defendant agrees not to contest, either directly or by collateral attack,

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24. Plea agreements on file with Author.

25. The agreements in the Middle District of Florida provide, “[D]efendant agrees and consents to removal.” The agreements in the Northern District of Illinois and the Southern District of Alabama have virtually identical wording.

26. These terms appear in agreements in the Southern District of Alabama, District of Arizona, Middle District of Florida, Northern District of Illinois, Eastern District of Louisiana, Eastern District of Michigan, District of Nebraska, Southern District of Ohio, and Eastern District of Tennessee.

27. Plea agreements on file with Author.

28. Plea agreements on file with Author.

29. The immigration statute permits previously issued removal orders to be re-used or “reinstated” against individuals who have reentered the United States unlawfully after having been removed, without requiring any additional review by the immigration court. INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2018).

30. Plea agreements on file with Author. The Southern District of Alabama, District of Arizona, Eastern District of Louisiana, and District of Nebraska have the same precise language. The Southern District of Ohio and the District of Utah have similar wording.

31. Plea agreements on file with Author.

the reinstatement of the prior order of removal.”<sup>32</sup> Finally, plea agreements in six districts indicate that the previously mentioned “not contest” waiver specifically applies to any appeal, collateral attack, or other review of a prior removal order, referring, for example, to “defendant will not collaterally attack or contest in any manner reinstatement of the defendant’s prior deportation or removal order.”<sup>33</sup>

Although several districts use general language to require defendants not to litigate immigration matters,<sup>34</sup> one of the minutiae that occasionally arises is waiving particular litigation behavior within immigration proceedings. The Massachusetts waiver thus particularizes that a defendant waives “his rights in connection with any administrative or judicial removal proceeding to examine the evidence against him, to present evidence on his own behalf, to cross-examine any witnesses presented by the government, and to appeal from a determination of deportability or removability.”<sup>35</sup>

A few districts include a requirement to abandon immigration cases that have already been opened and remain unresolved. In the Middle District of Florida, a defendant must agree to “abandon any pending applications for relief from removal or exclusion.”<sup>36</sup> This is almost identical to terminology used in the Northern District of Illinois and the Eastern District of Tennessee.

Massachusetts’s plea agreements have additional specific waivers. Defendants there must agree to forego “any judicial or administrative stay of execution of the order of removal.”<sup>37</sup> Additionally, they also waive “any right to seek release from the custody of Immigration and Customs Enforcement when ICE assumes such custody after conviction.”<sup>38</sup>

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32. Plea agreements on file with Author.

33. Plea agreements on file with Author. This is the waiver term found in agreements in the Eastern District of Louisiana, the District of Nebraska, the District of New Mexico, and the District of Utah, and is similar to that in District of Arizona and the District of Massachusetts.

34. This language is present in agreements in the Middle District of Florida, the Northern District of Illinois, the Southern District of Mississippi, the District of Nebraska, and the Eastern District of Tennessee agreements. In fact, the waiver in the Southern District of Mississippi clarifies a number of forms of relief the general waiver of litigation is geared to “(a) voluntary departure; (b) asylum; (c) withholding of deportation or removal; (d) cancellation of removal; (e) suspension of deportation; (f) adjustment of status; and (g) protection under Article 3 of the Convention Against Torture.” Plea agreements on file with Author.

35. Plea agreements on file with Author.

36. Plea agreements on file with Author.

37. Plea agreements on file with Author.

38. Plea agreements on file with Author.

The waivers discussed thus far require foregoing challenges to which defendants may be entitled. There are also a handful of districts that offer plea agreements demanding affirmative cooperation with deportation. Hence, waivers in the Middle District of Florida, the Northern District of Illinois, and the Eastern District of Tennessee provide that a defendant must “cooperate with the Department of Homeland Security during removal proceedings.”<sup>39</sup> The Massachusetts version of affirmative cooperation, though, has an additional variant prescribing “surrendering of or not applying for travel documents.”<sup>40</sup>

Finally, five districts seek to prevent defendants from specifically invoking asylum or related non-refoulement protections.<sup>41</sup> Four of those ask the defendants to admit that they do not fear persecution: “defendant admits that he does not have a fear of returning to the country designated in the previous order.”<sup>42</sup> In the Southern District of Mississippi, defendants are instead asked to agree that they “[have] not been tortured in, and [have] no present fear of torture in” their country of origin.<sup>43</sup> Additionally, all of the “not contest” waivers to reinstatement orders may be understood as waiving rights to persecution and torture-based protections, given the normal ability to seek relief from removal on those grounds, even where there is an existing prior order of removal.<sup>44</sup>

## II. REMOVAL DECISIONS AND IMMIGRATION RELIEF OPTIONS

Why demand immigration waivers? Whether they are effective at streamlining the process and increasing the number of persons deported—the express goal of the current administration—depends upon whether these waivers will result in less immigration court litigation.<sup>45</sup> To understand why the waivers should not be enforced, it is helpful first to understand what is at stake for non-citizen defendants, the mechanics of these civil immigration proceedings and their historical context. This

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39. Plea agreements on file with Author.

40. The necessity of these provisions is questionable given the non-cooperation penalties in the immigration statute. INA § 243(a)(1), 8 U.S.C. § 1253(a)(1) (2018).

41. *Non-refoulement* protections refer to withholding of removal and protection under the Convention Against Torture.

42. Plea agreements on file with Author. This term is found in agreements in the Southern District of Alabama, the District of Arizona, the Eastern District of Louisiana, and the District of Nebraska.

43. Plea agreements on file with Author.

44. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2018) (prohibiting removal to a country where a non-citizen’s life or freedom would be threatened); 8 C.F.R. § 208.31(a) (2018) (providing for a “reasonable fear” interview and, if successful, referral to the immigration court for adjudication of the protection claim).

45. AG Sessions Memorandum, *supra* note 8.

section starts with a brief overview of the most common grounds for deportation, especially the deportation of federal criminal defendants, and the available defenses to removal. It will discuss how removal decisions are made—both in court and in summary administrative proceedings. It will also explain the limited rights of non-citizens in removal proceedings, and how the immigration waivers may impact the exercise of those rights.

The Immigration and Nationality Act of 1952 (INA)<sup>46</sup> and a smattering of additional special legislation establish limited categories of non-citizens who are able to acquire lawful status in the United States, either on a temporary or permanent basis.<sup>47</sup> In addition to satisfying criteria of one of these categories, non-citizens generally must show that they do not meet the criteria of any of the categories of immigrants whom Congress deemed unwelcome, or inadmissible.<sup>48</sup> The INA also identified deportable immigrants,<sup>49</sup> including non-citizen lawful permanent residents (LPRs) who have been convicted of certain crimes such as an “aggravated felony.”<sup>50</sup> Inadmissible and deportable non-citizens are vulnerable to removal from the United States to their home countries.

Importantly, removal is a civil, not criminal, proceeding.<sup>51</sup> Non-citizens may be removed under the INA because they were not lawfully admitted,<sup>52</sup> have overstayed their period of lawful status,<sup>53</sup> or have violated the terms of their admission.<sup>54</sup> Non-citizens can also be removed because they are a security threat<sup>55</sup> or for a wide variety of criminal convictions.<sup>56</sup> Non-citizen defendants most affected by criminal

46. The Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1503 (2018)).

47. *See id.*

48. INA § 212, 8 U.S.C. § 1182 (2018) (listing grounds of inadmissibility, based primarily upon health, prior criminal history, or security concerns).

49. INA § 237, 8 U.S.C. § 1227 (2018) (listing deportability grounds).

50. This term is defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2018); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (providing for deportability for single aggravated felony). Definitions of aggravated felony have been changing rapidly in the federal criminal context given important rulings from appellate courts. *See, e.g.*, *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

51. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594–95 (1952) (finding no *ex post facto* clause application because deportation is a civil procedure).

52. INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (2018).

53. INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2018).

54. INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (2018).

55. INA §§ 212(a)(3), 237(a)(4), 8 U.S.C. §§ 1182(a)(3), 1227(a)(4) (2018).

56. INA §§ 212(a)(2), 237(a)(2), 8 U.S.C. §§ 1182(a)(2), 1227(a)(2) (2018).

immigration waivers are those facing removal based on criminal conduct and convictions, lack of status, or previous immigration violations.

Although the INA grants the Attorney General and DHS broad statutory discretion to admit inadmissible non-citizens and to grant discretionary waivers from deportation to those otherwise deportable, there are statutory limits.<sup>57</sup> In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)<sup>58</sup> and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>59</sup> Those expanded the definition of aggravated felony to include most serious state and federal crimes (and arguably many not so serious)<sup>60</sup> and prevented the AG (and now the Secretary of DHS) from granting most relief to anyone who has been convicted of an aggravated felony.<sup>61</sup>

While the INA establishes a limited number of procedures to decide removability, it provides significant flexibility to the government as to whether to pursue deportation in the first place, consistent with executive branch prosecutorial discretion in its law enforcement functions.<sup>62</sup> Nothing in the INA mandates that the DOJ or DHS initiate

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57. INA § 212, 8 U.S.C. § 1182 (2018). The Supreme Court noted that between 1989 and 1995, § 212(c) discretionary relief had been granted to over 10,000 non-citizens. *INS v. St. Cyr*, 533 U.S. 289, 296 (2001).

58. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

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

60. There is much debate in the federal circuit courts as to exactly which crimes fit into one of the twenty categories described in 8 U.S.C. § 1101(a)(43) as aggravated felonies. That provision defines aggravated felony to include state or federal murder, rape or sexual abuse of a minor, serious drug trafficking offenses, money laundering (over \$10,000), firearms offenses, explosives, gambling, violation of RICO (Racketeer Influence and Corrupt Organizations Act), child pornography, kidnapping, unlawful entry or reentry (after deportation for an aggravated felony), disclosure of classified information, tax evasion (over \$10,000), felony “crimes of violence,” felony theft or burglary, fraud (resulting in loss over \$10,000), failure to appear (when the underlying offense was punishable by five years or more), felony commercial bribery, perjury, bribery, or conspiracy to commit any of the above offenses. Prior to 1996, only three crimes were specified as aggravated felonies: murder, drug trafficking, and illegal trafficking of destructive devices. Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1844 n.83 (2007).

61. *St. Cyr*, 533 U.S. at 297; INA § 240(a); 8 U.S.C. § 1229b (2018).

62. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–90 (1999) (affirming that prosecutorial discretion applies to ICE enforcement activities, such as whether to place an individual in deportation proceedings); *Arizona v. United States*, 567 U.S. 387, 396 (2012) (highlighting role of discretion in deportation matters, and noting that “[r]eturning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission”); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 3 (2014) (noting that ICE attorneys have enormous prosecutorial discretion in choosing the 400,000 deportations of non-citizens per year that congressional funding levels permit from the 11

a removal proceeding against any particular non-citizen.<sup>63</sup> For example, the Obama administration established enforcement priorities, discouraging enforcement against up to five million non-citizens, including immigrant parents with U.S. citizen children.<sup>64</sup> Favorable exercise of discretion in the current administration, however, is expected to be exceptional.<sup>65</sup>

Non-citizens facing removal have very limited statutory relief options—even less if they have any criminal history. Statutory relief from deportation, as opposed to the government exercising its discretion not to initiate or prosecute a removal, may depend on factors such as hardship to an immigrant's U.S. citizen or LPR spouse, parents, or children,<sup>66</sup> length of residence in the United States,<sup>67</sup> demonstration of

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million estimated unauthorized population in the U.S., plus the millions of additional lawfully present non-citizens who are potentially removable on the basis of criminal history and immigration violation; and further suggesting that the ICE officers employ their discretion more uniformly and frequently).

63. DHS trial attorneys have considerable discretion. They may decline to pursue cases against particular non-citizens, screen and dismiss cases before they are brought to the IJ, decline to file the charging document with the court, close or terminate proceedings administratively and consent to relief, or decline to appeal an IJ decision in favor of the non-citizen. 8 C.F.R. § 239.2(a) (2018) (providing authority to cancel Notice To Appear (NTA) for legal insufficiency); 8 C.F.R. § 239.2(c) (2018) (providing authority to close or terminate proceeding administratively); Memorandum from John Morton, ICE Director, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens to all ICE Employees (Mar. 2, 2011), <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (guidelines for exercising prosecutorial discretion in light of the fact that the immigration system can process only about 400,000 of the estimated 11 million undocumented persons in the United States per year).

64. Unfortunately, the Supreme Court, in a curt, one-sentence ruling, halted that particular measure of prosecutorial discretion. *See United States v. Texas*, 136 S. Ct. 2271 (2016).

65. Exec. Order No. 13768, 82 Fed. Reg. 8799 § 8 (Jan. 25, 2017) (withdrawing all previous Obama memoranda outlining prosecutorial discretion priorities); Memorandum from John Kelly, DHS Secretary, on Recession of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful> (announcing rescission of the DAPA memorandum).

66. One type of relief is cancellation of removal for certain non-permanent residents, providing discretionary cancellation of removal where a non-citizen satisfies the hardship requirement plus has avoided criminal authorities, has good moral character, and ten years of continuous physical presence in this country. INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2018). A second is called cancellation of removal for certain permanent residents, which provides discretionary cancellation of removal where a LPR has had some minor offenses, so long as she has not been convicted of an aggravated felony. INA § 240(a), 8 U.S.C. § 1229b(a) (2018).

67. INA § 240A(a)–(b), 8 U.S.C. § 1229b(a)–(b) (2018).

rehabilitation,<sup>68</sup> service in the U.S. military,<sup>69</sup> status as a victim of domestic violence<sup>70</sup> or human trafficking,<sup>71</sup> or cooperation with law enforcement as a crime victim.<sup>72</sup> An existing petition from a U.S. citizen or LPR close family member or employer may also provide relief from deportation.<sup>73</sup> Eligibility for relief, in general, is extremely dependent on the unique facts of each case and their interplay with the statutory requirements.

Three forms of relief are available to non-citizens who fear persecution, harm, or torture in their home country: asylum,<sup>74</sup> withholding of removal,<sup>75</sup> and relief under the Convention Against Torture (CAT).<sup>76</sup> As will be discussed in Section III.F., these protections from deportation are grounded in international legal obligations.

Asylum requires that non-citizens prove that they have a “well-founded” fear of persecution if returned to their native country.<sup>77</sup> The persecution must be on account of one of five statutory grounds: (1) race; (2) religion; (3) nationality; (4) political opinion; or (5) membership in a particular social group.<sup>78</sup> The persecution must be committed by the government or by a non-state actor that the government is “unable or unwilling” to control.<sup>79</sup> A grant of asylum is discretionary and

68. INA § 240A(a), 8 U.S.C. § 1229a(a) (2018). *Matter of C-V-T-*, 22 I&N Dec. 7, 14 (B.I.A. 1998).

69. INA § 328, 8 U.S.C. § 1439 (2018).

70. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006); INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2018).

71. INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T) (2018).

72. INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U) (2018).

73. INA § 245(a), 8 U.S.C. § 1255 (2018).

74. INA § 208, 8 U.S.C. § 1158 (2018). A year after being granted asylum, a non-citizen can apply for LPR status. INA § 209(b), 8 U.S.C. § 1159 (2018).

75. INA §§ 241, 243, 8 U.S.C. §§ 1231(b)(3), 1253 (2018). Withholding of removal does not provide a path to LPR status, and the immigrant can be deported to an alternate country. *See Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004) (indicating that unlike an application for asylum, a grant of a non-citizen’s application for withholding is not a basis for adjustment to lawful permanent resident status and only prohibits removal of the alien to the country of risk but not to another country); 8 C.F.R. § 1208.16(f) (2007); *see also Huang v. Ashcroft*, 390 F.3d 1118, 1121 n.2 (9th Cir. 2004) (noting that neither withholding nor deferral of removal prevents the government from removing an alien to a third country other than the country to which removal was withheld or deferred).

76. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 8 C.F.R. § 208.17 (1984) (adopted by the U.S. Senate via resolution on Oct. 27, 1990, and President Clinton deposited final ratification with the U.N. Secretary General on Nov. 20, 1994).

77. INA § 208, 8 U.S.C. § 1158 (2018).

78. *Id.*

79. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1982).

unavailable to most non-citizens with criminal histories. A person who has been convicted of a “particularly serious crime” is barred from asylum protection,<sup>80</sup> as are persecutors of others,<sup>81</sup> those who have committed serious nonpolitical crimes abroad,<sup>82</sup> individuals shown to be a danger to the United States,<sup>83</sup> and individuals who meet the federal definition of a “terrorist” or have engaged in “terrorist activity.”<sup>84</sup>

Withholding removal is similar to asylum but carries a higher burden of proof. The non-citizens must show that it is “more likely than not” that their lives or freedom will be threatened if returned. Unlike asylum, withholding of removal is non-discretionary and must be granted to non-citizens who demonstrate that they will face persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group if returned to their home country.<sup>85</sup> Nevertheless, withholding of removal is unavailable to non-citizens who have been convicted of most serious crimes.<sup>86</sup>

Finally, if non-citizens show that they are more likely than not to be tortured in their home country, the government must grant CAT relief from deportation to that country.<sup>87</sup> CAT relief requires that the non-citizen prove the clear probability of torture by, or with the acquiescence of, the government or a public official acting under color of law.<sup>88</sup>

In addition to the ordinary factual disputes that must be resolved in any immigration case, there is serious legal dispute over numerous aspects of the interpretation of these protections, such as the proper definition of “persecution” in an asylum or withholding claim,<sup>89</sup> and

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80. INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2018). The Attorney General or Secretary of DHS has no discretion to grant asylum to a non-citizen convicted of an aggravated felony. INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2018); *see also* 8 C.F.R. §§ 208.13, 1208.13(c) (2018).

81. INA § 208(b)(2)(A)(i), 8 U.S.C. § 1158(b)(2)(A)(i) (2018).

82. INA § 208(b)(2)(A)(iii), 8 U.S.C. § 1158(b)(2)(A)(iii) (2018).

83. INA § 208(b)(2)(A)(iv), 8 U.S.C. § 1158(b)(2)(A)(iv) (2018).

84. INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v) (2018).

85. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2018); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419–20 (1999); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.7 (1987).

86. INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2018).

87. 8 C.F.R. §§ 208.17(a), 1208.17(a) (2018); *Matter of G-A*, 23 I&N Dec. 36, 367–68 (B.I.A. 2002).

88. 8 C.F.R. §§ 208.18(a)(1), 1208.18(a)(1) (2018); *Matter of Y-L- et al.*, 23 I&N Dec. 270, 285 (A.G. 2002).

89. For example, rape and physical mistreatment have been classified as persecution, but discrimination and expulsion of Palestinians were not. *Compare* *Matter of D-V-*, 21 I&N Dec. 77 (B.I.A. 1993), *with* *De Souza v. INS*, 999 F.2d 1156, 1159 (7th Cir. 1993), *and* *Matter of Sanchez & Escobar*, 19 I&N Dec. 276, 284 (B.I.A. 1985).



under what circumstances the torture is sufficiently connected to the government in a CAT claim.<sup>90</sup>

Assessment of both removability and eligibility for relief is enormously complex, particularly in the examination of the consequences of a criminal conviction. Courts have struggled to consistently describe and apply the INA's various terms of art, including "aggravated felony,"<sup>91</sup> "crime of violence,"<sup>92</sup> "persecution,"<sup>93</sup> and "crime involving moral turpitude."<sup>94</sup>

The INA authorizes limited ways for the government to remove a non-citizen once she has physically arrived in the United States. Three are relevant to our discussion.<sup>95</sup> Most commonly, an IJ will hold a hearing

90. *Matter of Y-L- et al.*, 23 I&N Dec. at 279–85.

91. *See supra* note 50. The Supreme Court's latest pronouncement on whether a particular state offense constitutes an aggravated felony is in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (holding that conviction under one of the seven state statutes criminalizing consensual sexual intercourse between a twenty-one-year-old and an almost eighteen-year-old did not constitute the aggravated felony of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A) of the INA because under the categorical approach, sexual abuse of a minor requires that the victim be under sixteen years of age).

92. *Id.*; *see Dimaya*, 138 S. Ct. 1204 (finding "crime of violence" as defined by 18 U.S.C. § 16(b) unconstitutionally vague in the immigration context).

93. *See, e.g., Sahi v. Gonzales*, 416 F.3d 587, 588–89 (7th Cir. 2005) (commenting that "[this court has not] a clue as to what [the agency] thinks religious persecution is").

94. *See* Brief of Amici Curiae Immigration Law Professors in Support of Petitioner in *Garcia-Martinez v. Jefferson B. Sessions, III*, No. 16-72940, Agency No. 091-071-827, Petition for Review of B.I.A. order to United States Court of Appeals for the Ninth Circuit (July 27, 2017) (arguing by analogy to the residual clause of the ACCA that had been held unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015)). The argument was based on the fact that crime involving moral turpitude (CIMT) in the INA lacks a generic offense containing settled and identifiable elements, and that therefore, it should likewise be declared unconstitutionally vague. *See also* *Arias v. Lynch*, 834 F.3d 823, 835 (7th Cir. 2016) (Posner, J., concurring) (suggesting that the Court's holding in *Jordan v. DeGeorge*, 341 U.S. 223, 232 (1951), that all fraud offenses were crimes of moral turpitude, was incorrect); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127, 1171–75, 1177–79 (2016) (arguing that CIMT and crime of violence under 18 U.S.C. § 16(b) are both unconstitutionally vague).

95. Expedited removal proceedings, another major change stemming from IIRIRA, will not be addressed in this Article. If an immigrant attempts admission into the country and an immigration officer determines that the immigrant is inadmissible for lack of visa documents or misrepresentation, "the officer shall order the alien removed from the United States without further hearing or review." INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2018). As of this writing, expedited removal generally applies to non-citizens at ports of entry and non-citizens apprehended within 100 miles of the U.S. border who cannot show that they have been in the United States for more than fourteen days. Notice Designating Aliens for Expedited Removal, 69 FR 48877 (Aug. 11, 2004). The current administration may well expand expedited removal to apply nationwide to non-citizens who have been in the United States for less than two years. *See* Exec. Order No. 13767, 82 Fed. Reg. 8793, at

in immigration court to determine removability.<sup>96</sup> The IJ may also be asked to adjudicate applications for relief. In this situation, assuming non-citizens have already signed a waiver as part of their criminal plea deal, the government attorney has several arguments to make: the waiver is dispositive on the issue of removal; it is at the very least probative evidence of grounds for removal; the non-citizen has no defense to deportation; or the non-citizen has no grounds for relief. Alternatively, ICE officers may use the waiver to pressure the non-citizen to sign a stipulation of removal requesting the entry of a deportation order without an appearance before a judge.<sup>97</sup>

A second option, becoming more popular, is administrative removal,<sup>98</sup> where ICE orders deported non-LPR immigrants who have been convicted of aggravated felonies after a summary proceeding, without a hearing before an IJ. This process has also been referred to as “ministerial removal.”<sup>99</sup> Under this scenario, if non-citizens sign plea agreements, including an agreement to be deported, ICE may take the position that they can be removed with no additional process, meaning no hearing before an IJ or a federal district judge. ICE may use the non-citizens’ waivers of relief, or stipulations that they do not fear persecution or torture in their home countries, to avoid providing them with access to protection hearings.

Third, and still relatively rare, federal district court judges can issue judicial removal orders as part of criminal sentencing.<sup>100</sup> In the few situations where this is allowed, prosecutors may use the immigration

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§ 11(c) (Jan. 25, 2017) (directing to fully apply expedited removal per INA § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii) (2017)). Removal under the Visa Waiver Program will also not be addressed. INA § 217, 8 U.S.C. § 1187 (2018).

96. INA § 240, 8 U.S.C. § 1229 (2018).

97. INA § 240(d), 8 U.S.C. § 1229a(d) (2018). Some refer to this pressure as the “chilling effect” on the immigrant’s ability to challenge deportation. *See* sources cited *supra* note 5. Substantial due process concerns have been raised against this practice. *See* Jennifer Lee Koh et al., *Deportation Without Due Process*, NILC (2011), <https://www.nilc.org/2011/09/08/report-finds-due-process-abuses/>.

98. INA § 238(b), 8 U.S.C. § 1228(b) (2018) (providing for summary deportation of aggravated felons who are not lawful permanent residents); INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (2018) (providing for summary deportation for individuals who have reentered illegally after having previously been removed).

99. *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1446 n.167 (1997) (coining term ministerial removal to describe streamlined procedures to avoid confusion with other “administrative” and “expedited” removal proceedings under the INA); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1156–57 (2002).

100. INA § 238(d)(5), 8 U.S.C. § 1228(d)(5) (2018).

waivers to encourage federal district judges to sign orders mandating removal without hearing evidence regarding whether the immigrant is, in fact, deportable or has available relief from deportation. In these circumstances, the judge may hear no argument about whether the crime constituted a removable offense, if that is what DHS would have charged, and also does not hear evidence on defenses, such as relief under CAT or withholding of removal, or one of the discretionary grounds for relief.

#### A. *Immigration Court Proceedings*

Most removal proceedings take place in a hearing before an IJ.<sup>101</sup> The hearings are civil in nature, and immigration courts fall within the DOJ. IJs are not Article III judges and are technically DOJ attorneys, but they are sworn to uphold immigration law and exercise their judgment accordingly.<sup>102</sup> While civil, these proceedings seem like criminal ones in many ways. Only DHS can initiate proceedings, asking the IJ to find a non-citizen removable based on alleged facts and charged violations of the immigration law. Lower level ICE officers and low-level officers from other agencies within DHS (like Customs and Border Protection and U.S. Citizenship and Immigration Services (USCIS)) are authorized to initiate such proceedings.<sup>103</sup> Moreover, they sometimes initiate these cases without any attorney's prior review, leaving ICE counsel to prosecute cases in immigration court that, in the exercise of prosecutorial discretion, might have been more appropriately dismissed.<sup>104</sup> In many cases, the non-citizen does not contest her removability, instead asking the IJ to rule on her defensive claim of relief.<sup>105</sup> Certain forms of relief are outside the court's jurisdiction, and the non-citizen may ask for the

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101. INA § 240, 8 U.S.C. §§ 1229, 1229a (2018).

102. *Ethics and Professionalism Guide for Immigration Judges*, EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf> (last visited Mar. 17, 2018). These courts are extremely under-resourced, and would be almost unrecognizable to practitioners used to federal criminal court proceedings. While the 333 federal IJs have 600,000 cases, there are no court reporters or law clerks, few bailiffs in the courtroom, no PACER system for tracking cases, and rarely written opinions. Bob Garfield, *The Slow Crisis in American's Immigration Courts*, WNYC (Aug. 11, 2017), <http://www.wnyc.org/story/crisis-americas-immigration-courts/>. Proceedings are audio recorded. A large portion (40%) of non-citizens there have no attorney, and of those detained, only 15% have attorneys present. *Id.*

103. 8 C.F.R. § 239.1 (2018) (listing officers authorized to issue NTAs); Cade, *supra* note 62, at 6.

104. Cade, *supra* note 62, at 16–18 (suggesting that DHS trial attorneys fail to exercise such discretion because of enforcement bias and excessive workloads).

105. *EOIR at a Glance*, DOJ, <https://web.archive.org/web/20150509002653/https://www.justice.gov/eoir/eoir-at-a-glance> (last visited Sept. 9, 2010) (“In most removal proceedings, individuals admit that they are removable, but then apply for one or more forms of relief.”).

proceedings to be adjourned, closed, or terminated to allow USCIS to adjudicate the application.<sup>106</sup>

Immigration court hearings are most analogous to criminal prosecutions in the detention of non-citizens during the course of the proceedings. The immigration statute, like the Bail Reform Act<sup>107</sup> in criminal proceedings, permits the detention of non-citizens charged with civil immigration violations, and in fact, requires detention without the possibility of release until the conclusion of proceedings for many immigrants.<sup>108</sup> Courts have limited the duration of some forms of mandatory detention to avoid constitutional concerns.<sup>109</sup> Nevertheless, detention has significant impacts on both the ability to defend against DHS's assertions and to advance claims of relief. Over the past two decades, IJs have been conducting an increasing number of hearings via video-conferencing for immigrants detained in remote facilities.<sup>110</sup>

Counsel is not guaranteed by statute or constitution for a non-citizen in immigration court. The INA provides a right to counsel but not at government expense.<sup>111</sup> Low income immigrants and non-citizens detained far from cities rely exclusively on *pro bono* service providers who may have extremely limited resources.<sup>112</sup> Hearings themselves must be fundamentally fair and comport with due process principles.<sup>113</sup> The IJ must advise individuals of their right to counsel (at their own expense), their right to present evidence, and their right to examine and object to evidence presented and cross-examine witnesses.<sup>114</sup> The judge must read and explain the factual and legal allegations in the charging document and inform the non-citizen of potential eligibility for relief from removal

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106. See, e.g., *Matter of Acosta-Hidalgo*, 24 I&N Dec. 103 (B.I.A. 2007) (noting that the immigration court does not have jurisdiction over naturalization applications, and that under certain circumstances, termination of proceedings would be appropriate).

107. 18 U.S.C. §§ 3141–56 (2018).

108. INA § 236(a), (c), 8 U.S.C. § 1226(a), (c) (2018).

109. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (limiting detention of non-citizens with a removal order); *Clark v. Suarez Martinez*, 543 U.S. 371, 385 (2005) (limiting detention of inadmissible non-citizens).

110. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933, 944–45 (2015).

111. INA §§ 240(b)(4)(A), 292, 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2018).

112. The IJ is required to inform the non-citizen before the court about *pro bono* service providers. 8 C.F.R. § 1240.10(a)(2) (2018).

113. *Reno v. Flores*, 507 U.S. 292, 306 (1993).

114. INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2018); 8 C.F.R. § 1240.15 (2018). The Federal Rules of Evidence do not apply, there is little discovery beyond FOIA, and the non-citizen may ask the IJ to issue subpoenas and order depositions but has no entitlement to them.

(including asylum, withholding of removal, and CAT protection).<sup>115</sup> Immigration courts provide interpreters to non-English speakers.<sup>116</sup>

Non-citizens have the right to appeal IJ decisions to the BIA, which is an administrative review body within DOJ.<sup>117</sup> The non-citizen may then pursue further appeal directly to the court of appeals for that circuit but only to raise questions of law and constitutional issues.<sup>118</sup> Congress eliminated habeas corpus as a means to review removal decisions from an IJ or the BIA through the REAL ID Act of 2005.<sup>119</sup>

The Authors have not yet found any IJ decisions holding that immigrants cannot challenge the grounds of removal or defenses to deportation during a removal hearing because they signed a waiver of such right in a criminal plea agreement.<sup>120</sup>

### *B. Administrative Removal*

Since 1996, the government has enjoyed the ability to use summary removal proceedings against non-citizens who have been convicted of an aggravated felony and are not LPRs.<sup>121</sup> This administrative removal is a “paper process,” absent any hearing before an IJ or other independent arbiter. In 2013, DHS issued 9,217 administrative removal orders; use of this process is expected to increase under the current administration.<sup>122</sup>

In the administrative removal process, a non-citizen’s due-process rights are significantly limited. They have no judge or neutral arbiter to hear and review arguments, no right to call witnesses, and—as in immigration court—no right to government-paid counsel.<sup>123</sup> Thus, they

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115. 8 C.F.R. § 1240.10(a) (2018). The United States Court of Appeals for the Ninth Circuit has held that the IJ has a duty to inform the non-citizen of a “plausible ground of relief which might have been available.” *United States v. Corrales-Beltran*, 192 F.3d 1311, 1318 (9th Cir. 1999) (quoting *United States v. Zarate-Martinez*, 133 F.3d 1194, 1198 (9th Cir. 1998)). In comparison, several circuit courts have found that non-citizens have no constitutional right to be informed of the existence of discretionary relief. *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002); see *Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002); *Oguejiofor v. Att’y Gen.*, 277 F.3d 1305, 1309 (11th Cir. 2002); *Escudero-Corona v. Bd. of Immigr. Appeals*, 244 F.3d 608, 615 (8th Cir. 2001).

116. 8 C.F.R. § 1240.5 (2018).

117. INA § 240(b)(5)(C); 8 C.F.R. § 1003.1(b) (2018).

118. INA § 242, 8 U.S.C. § 1252 (2018).

119. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2018).

120. There are a few federal district court decisions on similar matters. See discussion *infra* Part C.

121. INA § 238(b)(1), 8 U.S.C. § 1228(b)(1) (2018).

122. *Practice Advisory: Administrative Removal Under 238(b): Questions and Answers*, NAT’L IMMIGR. PROJECT (Feb. 16, 2017), [https://nationalimmigrationproject.org/PDFs/practioners/practice\\_advisories/gen/2017\\_16Feb\\_admin-removal-QA-full.pdf](https://nationalimmigrationproject.org/PDFs/practioners/practice_advisories/gen/2017_16Feb_admin-removal-QA-full.pdf).

123. INA § 238(b)(4), 8 U.S.C. § 1228(b)(4) (2018); 8 C.F.R. § 238.1(b)(2) (2018).

may have difficulty establishing that they are a citizen, that they have other lawful status, or that they were not convicted of a crime meeting the aggravated felony definition.<sup>124</sup> A low-level DHS officer initiates the administrative removal and issues the decision.<sup>125</sup> A non-citizen may respond to the notice of intent to remove, which contains the factual allegations and the removability grounds, in writing.<sup>126</sup> Of course, non-citizens without counsel may not even realize that they have the right to contest administrative deportation, and they may not speak English well enough to take advantage of the opportunity. Only if the DHS officer finds a genuine issue of material fact, after the immigrant objects, will the question whether the non-citizen is in fact removable be referred to an IJ for a full hearing.<sup>127</sup> The statute bars all discretionary relief from removal, including adjustment of status.<sup>128</sup>

Importantly, DHS must provide a “reasonable fear” interview to non-citizens who communicate a fear of persecution or torture in their home countries.<sup>129</sup> Again, non-citizens may not appreciate that they have this right and may not be capable of articulating it without counsel. The DHS Asylum Office conducts these interviews, screening for likelihood of torture or persecution upon deportation. If non-citizens demonstrate a real risk of harm, DHS will refer them to the IJ for a full hearing on their eligibility for withholding of removal and protection under CAT.<sup>130</sup>

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124. There are serious due process concerns with this process, as non-lawyer ICE officers regularly make erroneous determinations whether the convicted offense constitutes an aggravated felony. *Practice Advisory: Administrative Removal Under 238(b): Questions and Answers*, *supra* note 122, at 6–7. This is a legally challenging determination, one that federal courts have struggled with for decades, involving close scrutiny of the elements of the crime. *See, e.g.*, *Rodriguez-Celaya v. Att’y Gen.*, 597 F. App’x 79, 81–82 (3d Cir. 2015) (finding that neither of petitioner’s two convictions qualified as aggravated felonies); *Esquivel-Quintana*, 137 S. Ct. at 1572–73 (2017) (holding that conviction under one of the seven state statutes criminalizing consensual sexual intercourse between a twenty-one-year-old and someone almost eighteen did not constitute the aggravated felony of “sexual abuse of a minor”); *see also* Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 325–26 (2017) (developing a general jurisprudence of *Chevron* and deportation for a crime, arguing for an expansive principle of non-deference in cases involving ambiguity in the scope of crime-based removal statutes).

125. DHS initiates this procedure by serving Form I-851, Notice of Intent to Issue a Final Administrative Removal Order, which contains the factual and legal allegations against the individual.

126. 8 C.F.R. § 238.1(c)(1)–(2) (2018).

127. 8 C.F.R. § 238.1(d)(2) (2018).

128. INA § 238(b)(5); 8 U.S.C. § 1228(b)(5).

129. 8 C.F.R. § 238.1(f)(3) (2018).

130. If the asylum officer finds reasonable fear, the officer will refer the case to an IJ for adjudication only of the withholding or CAT claim, which may then be further appealed to the BIA. 8 C.F.R. § 208.31(e) (2018).

In administrative removal before DHS, legal arguments challenging citizenship status or whether a crime qualifies as an aggravated felony often fall on deaf ears.<sup>131</sup> Non-citizens may have to resort to federal courts of appeals to resolve these issues.<sup>132</sup> Absent counsel, these challenges are almost impossible to pursue.

Given the lack of judicial involvement in the administrative removal process, the potentially harmful impact of immigration waivers in plea agreements is enormous. DHS very likely will regard the waivers as binding and may ignore any protest that a non-citizen files against the notice of administrative removal. Even where non-citizens claim fear of torture, the DHS officer may find that their fear is not credible, especially given their waiver of that relief or stipulation that they are not afraid to return home in their criminal plea. In these rushed proceedings, mistakes are inevitable,<sup>133</sup> and the cost to the non-citizen is significant.

### C. Judicial Removal

Since 1941, Congress has arguably provided deportation authority to federal judges on three separate occasions: (1) 1917 Judicial Recommendations against Deportation (JRAD);<sup>134</sup> (2) the Sentencing Act of 1984;<sup>135</sup> and (3) the Immigration and Nationality Technical Corrections Act of 1994 (amended in 1996).<sup>136</sup> In addition, and during this same time frame, DOJ has promulgated policies for federal plea agreements that contain stipulations to either administrative or judicial removal and Fast-Track plea agreements. We will discuss each below.

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131. In fact, courts disagree as to whether a non-citizen can even raise legal challenges in the administrative removal process before DHS. *Cf. Malu v. Att’y Gen.*, 764 F.3d 1282, 1287–89 (11th Cir. 2014) (holding that a non-citizen must have exhausted administrative remedies and argued the legal issue before DHS); *but see Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013) (holding that only factual issues may be challenged in administrative removal).

132. *See, e.g., Rodriguez-Celaya*, 597 F. App’x at 82 (finding neither of non-citizen’s two convictions to be aggravated felonies).

133. *See, e.g., United States v. Cisneros-Rodriguez*, 813 F.3d 748, 762 (9th Cir. 2015) (reversing illegal reentry conviction and finding underlying administrative removal order “fundamentally unfair” where DHS officer obtained invalid waiver of defendant’s right to counsel, and defendant was thereby wrongly deprived of the opportunity to apply for a U Visa before an immigration judge); *United States v. Reyes*, 907 F. Supp. 2d 1068, 1071–72, 1080 (N.D. Cal. 2012) (finding in the context of an illegal reentry prosecution that defendant had been erroneously charged with and deported under § 1228(b) for possession of a short-barreled shotgun, and wrongly deprived of the opportunity to apply for voluntary departure).

134. INA § 241(b), 8 U.S.C. § 1251(b) (1982).

135. 18 U.S.C. § 3551 (enacted in 1984).

136. 103 Pub. L. No. 416, 108 Stat. 4305 (1994).

Between 1917 and 1990, state and federal sentencing judges could recommend that offenders not be deported despite a conviction for a CIMT.<sup>137</sup> These JRADs were binding on the Immigration and Naturalization Service (INS) (though it was given notice and the opportunity to respond) so that INS could not use that particular conviction as a basis for deportation.<sup>138</sup> Recommendations from judges were considered an amelioration of criminal punishment and were based upon their usual considerations of the defendant's criminal record, evidence of rehabilitation and remorse, and ties to the community; they were not based upon the complexities of immigration law. JRAD was repealed in 1990.<sup>139</sup> JRADs were infrequently, or at least inconsistently used,<sup>140</sup> in part because the overall level of deportations was very low at that time and in part because defense attorneys decided not to request a JRAD from the sentencing judge for fear of flagging their client for INS. INS opposed JRADs, believing that sentencing judges did not know enough about immigration law to make deportation decisions.

The Sentencing Reform Act of 1984 (SRA) provided in part that a court may impose, as a condition of supervised release after imprisonment, that a non-citizen defendant be deported.<sup>141</sup> This soon generated a circuit split regarding whether this language simply allowed the sentencing judge to order that a non-citizen defendant be transferred after his sentence is completed to the custody of the INS for traditional immigration proceedings or whether it further supplanted deportation proceedings by an IJ.<sup>142</sup> The majority of circuits agreed with the first

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137. Former 8 U.S.C. § 1251 (2018). In 1956, Congress excluded convictions for narcotics offenses from the scope of JRAD authority.

138. 8 U.S.C. § 1227(a)(4) (2018); *see also* *Velez-Lozano v. INS*, 463 F.2d 1305, 1307–08 (D.C. Cir. 1972) (holding that a JRAD, when timely issued, is absolutely binding on the Attorney General).

139. Immigration Act of 1990, Pub. L. No. 101-649, § 505(b), 104 Stat. 4978 (1990) (codified at 8 U.S.C. § 1251).

140. In many districts, JRADs were not used at all. On the other hand, in the United States Court of Appeals for the Second Circuit, it was considered ineffective assistance of counsel not to ask for a JRAD. *Janvier v. United States*, 793 F.2d 449, 455–56 (2d Cir. 1986) (holding that it may constitute a Sixth Amendment violation not to request a JRAD); *but see id.* at 456 (Bartels, J., concurring) (“[I]n my experience as a district court judge, such requests for a recommendation . . . very seldom have been made in the past.”).

141. 18 U.S.C. § 3583(d) (2018) (providing that “[i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation”).

142. See breakdown of circuit split in *Martin Arms*, *Judicial Deportation Under 18 U.S.C. § 3583(d): A Partial Solution to Immigration Woes*, 64 U. CHI. L. REV. 653, 664 (1997) (arguing that the minority position is correct).



option: the SRA allowed the sentencing judge to order that non-citizen defendants be transferred to the custody of the INS after serving their sentence, but it did not supplant deportation proceedings before an IJ.<sup>143</sup> Only a minority of courts held that the statute implied authority for the sentencing judge to order deportation as a condition of supervised release after imprisonment.<sup>144</sup> The DOJ responded with its Criminal Resource Manual, Section 1922,<sup>145</sup> agreeing with the majority that the SRA “does not authorize a sentencing judge to enter a judicial order of deportation, and thus does not deprive an alien defendant of his right to an administrative hearing provided by the Immigration and Nationality Act (INA).”<sup>146</sup>

Despite § 3583(d) still being in the United States Code, its use as a method of removal is no longer valid. First, the circuit split regarding whether it authorized deportation, and the DOJ decision that it does not, means that federal prosecutors ceased asking district court judges to enter removal orders as conditions of supervised release at sentencing. Second, the statute was essentially supplanted in 1994 when Congress amended the INA to explicitly grant jurisdiction to federal district judges to directly issue removal orders.<sup>147</sup> It was amended again in 1996 to provide that the removal procedures in the INA “shall be the sole and exclusive procedure” for determining removal, and to allow an alien defendant to stipulate to the entry of a judicial removal order (JRO) as a condition of a plea arrangement.<sup>148</sup> Federal judges, thus, were no longer

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143. These courts reasoned that the minority interpretation contradicted the statutory language (that a provision of supervised release could provide only that the non-citizen be delivered to the INS) contradicts Congress’s long tradition of granting the Executive Branch sole power to instate deportation proceedings, and finally, the minority interpretation would undermine the procedural protections enshrined in administrative deportation proceedings and would deprive non-citizens of the opportunity to seek relief from deportation.

144. *Supra* note 142.

145. U.S. DEP’T JUST., CRIMINAL RESOURCE MANUAL § 1922.

146. *Id.* (emphasis in original). DOJ accepted the majority position, as explained in *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991), and rejected the minority position as held in *United States v. Chukwura*, 5 F.3d 1420, 1423–24 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 102 (1994). DOJ has expressly asked its prosecutors to oppose a sentencing court’s entering of an order providing for deportation as a condition of supervised release. U.S. DEP’T JUST., CRIM. RESOURCE MANUAL § 1925. Both these Resource Manuals are now labeled “Outdated—pending revision.”

147. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322 (2018) (originally codified as 8 U.S.C. § 1252a(d), and now codified at INA § 238(d), 8 U.S.C. § 1228(d) (2018)).

148. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1229a(a)(3) (2018) and providing that INA is the sole procedure for removal; re-codifying former 8 U.S.C. § 1242a(d) to

authorized to add deportation to their standard federal sentencing orders. However, some judges order a condition of supervised release, where if the defendant is deported under the terms of the INA and returns to the United States without lawful permission, then the defendant is in violation of the supervised release.<sup>149</sup>

DOJ's plea and deportation policies were shaped by two critical events in the late 1980s: the SRA mandate to eliminate unwarranted sentencing disparities for similarly situated defendants;<sup>150</sup> and the tidal wave of federal criminal prosecutions of immigration cases in the border districts brought on by the congressional expansion of the substantive grounds for criminal removal and restriction of grounds for discretionary relief.<sup>151</sup> One way to curb the takeover of the criminal docket with immigration matters (to the exclusion of regulatory, corruption, drug, firearms, and other offenses) was to offer favorable plea agreements. However, offering better terms to defendants in the southwestern border districts (where the dockets were overwhelmingly immigration matters) than to defendants apprehended elsewhere arguably led to unjust sentencing disparities, and plea agreements in general had little effect in combatting unlawful immigration. Over time, DOJ issued formal guidance regarding (1) plea agreements that included "voluntary" deportation of non-citizen defendants through stipulated removal orders, and (2) Fast-Track plea policies. In the first instances, prosecutors could offer favorable sentences in exchange for an agreement to removal. Unlike Fast-Track pleas, these agreements did not involve an immigration-related offense. In the second scenario, prosecutors could offer non-citizen defendants a lower sentence

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current 8 U.S.C. § 1228; and adding subsection (d)(5), which provides for stipulated judicial removal).

149. See, e.g., *United States v. Vasquez-Soto*, No. 99-4241, 2000 LEXIS 19142, at \*1 (10th Cir. Aug. 10, 2000) (Criminal judge may punish defendant for contempt of court for violating terms of Supervisory Release, and government need not file new criminal reentry action.). See also U.S. DEP'T JUST., CRIM. RESOURCE MANUAL §§ 1923, 1924 (providing that where final deportation order has not been entered by the time non-citizens' term of imprisonment ends and their period of supervised release is scheduled to begin, or where non-citizens have obtained relief from deportation prior to the beginning of their period of supervised release, federal prosecutors should consent to a modification of the terms of supervised release after consultation with INS District Counsel).

150. See, e.g., Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial Leniency, the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519 (2009); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223 (2003).

151. Susan R. Klein & Ingrid Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 83–88 (2012) (noting that immigration offenses comprised 7% of the total federal criminal caseload in 1980, but rose to 29% of the total federal criminal caseload by 2011).

in exchange for an agreement to plead guilty very early to an immigration offense. These latter pleas may or may not have a provision requiring stipulation to deportation.

We offer here a brief description of these arrangements and a word or two about their chronology and current status. On April 28, 1995, AG Janet Reno initially directed federal prosecutors to give a one or two-level downward departure from the guideline range in exchange for stipulated administrative deportation—that is, an agreement by defendants to waive their right to an administrative hearing before an IJ, administrative appeal, and judicial review of the final order of deportation.<sup>152</sup> This memorandum met a chilly reception from most federal prosecutors and INS. Its guidance was essentially repealed in a November 1997 memorandum from John C. Keeney, Acting Assistant Attorney General.<sup>153</sup> DOJ stated that this revocation was based primarily on a case called *United States v. Clase-Espinal*,<sup>154</sup> which stated that a sentencing judge has no authority to depart downward under the sentencing guidelines in exchange for stipulated administrative deportation, unless the defendant can demonstrate a “non-frivolous” immigration defense that she proposes to waive.<sup>155</sup> DOJ also based it upon the 1996 IIRIRA, providing for reinstatement of prior deportation and the administrative removal without a hearing of non-LPRs who are convicted of aggravated felonies. Moreover, federal prosecutors seemed to prefer to leave the matter of deportations to INS.<sup>156</sup> In fact, since 1996, federal regulation has provided that INS (now DHS) is not bound by plea agreements unless the agency authorizes them in writing first.<sup>157</sup>

The DOJ had more success with Fast-Track pleas. The sheer number of immigration cases in border jurisdictions required early disposition of these cases. Nevertheless, Fast-Track programs fostered sentencing disparity between those living within and without such districts. By enacting § 401(m)(2)(B) of the PROTECT Act of 2003,<sup>158</sup> Congress attempted to harmonize the sentencing guidelines with these programs. It instructed the Sentencing Commission to promulgate a downward

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152. U.S. DEP'T JUST., CRIM. RESOURCE MANUAL § 1921 (containing Memorandum from Attorney General Janet Reno issued in 1995 directing federal prosecutors not to pursue contested judicial removal orders.).

153. U.S. DEP'T JUST., CRIM. RESOURCE MANUAL § 1999.

154. 115 F.3d 1054 (1st Cir. 1997).

155. *Id.* at 1059.

156. Professors Taylor and Wright noted in 2002 that the INS and the DOJ “remain content to process their cases on separate tracks, where each maintains full control.” Taylor & Wright, *supra* note 99, at 1168.

157. 28 C.F.R. § 0.197 (1996).

158. PROTECT Act, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

departure for any “early disposition program authorized by the Attorney General.”<sup>159</sup> On September 22, 2003, AG John Ashcroft issued a memorandum authorizing a Fast-Track program where the district confronts an exceptionally large number of a specific class of offenses that are highly repetitive and present substantially similar fact scenarios, and do not involve a crime of violence.<sup>160</sup> The current United States Sentencing Guidelines<sup>161</sup> grants up to four levels of departure in base offense level for agreeing to plead guilty very early in the process, and waiving both direct appeal and collateral attack. Neither the Ashcroft memorandum nor an affirming 2012 memorandum drafted by Deputy AG James M. Cole<sup>162</sup> mention removal as a necessary (or even optional) requirement of a Fast-Track plea.<sup>163</sup>

Judicial removal was authorized pursuant to the 1994 amendment to the INA, now codified in 8 U.S.C. § 1228(d), giving federal district judges jurisdiction to enter removal orders against deportable non-citizens at the time of sentencing.<sup>164</sup> It authorizes—but does not mandate—this procedure.<sup>165</sup> However, that authorization applies only when the order is: (1) requested by the U.S. Attorney; (2) the U.S. Attorney has the concurrence of the “Commissioner;”<sup>166</sup> and (3) the judge chooses to exercise such jurisdiction.<sup>167</sup> Judicial removal orders may not be imposed

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159. *Id.*

160. Memorandum from John Ashcroft, Attorney General, on Department Principles for Implementing on Expedited Disposition or “Fast-Track” Prosecution Program in a District to all U.S. Attorneys (Sept. 22, 2003), <http://www.lb7.uscourts.gov/documents/09-39321.pdf>.

161. U.S.S.G. § 5K3.1 (2015).

162. DAJ Cole Memorandum, *supra* note 16. The only revision was to establish uniform requirements for Fast-Track treatment wherever defendants are prosecuted so they are not being treated differently depending upon where they are sentenced.

163. Fast-Track requirements in the Cole and Ashcroft Memoranda included that non-citizen defendants agree to the factual basis in their plea, that they agree not to file Rule 12(b)(3) motions, and that they waive the opportunity to file a direct appeal or collateral attack. The memoranda offered nothing concerning stipulated judicial or administrative removal orders. *But see Ruiz Plea, supra* note 21, (combining Fast-Track and administrative deportation provisions. Ruiz did not object to the deportation provision, and the Supreme Court did not discuss it).

164. 8 U.S.C. § 1228(d) (2018).

165. *Id.*

166. In 1994, when this statute was enacted, there was a Commissioner of the Immigration and Naturalization Service. However, in 2003, in response to the September 11 terrorist attacks, Congress created the DHS and dissolved the INS, distributing immigration enforcement functions to ICE. Because DHS is a cabinet-level agency, the head is the “Secretary,” not the “Commissioner.” Presumably, prosecutors would now seek permission from the Secretary of DHS rather than the Commissioner of the INS.

167. INA § 238(d), 8 U.S.C. § 1228(d) (2018).

unless the U.S. Attorney files a notice to request judicial removal before commencement of the trial or entry of the plea,<sup>168</sup> files a charge containing the factual allegations regarding the alienage of the defendant, and identifies the crime rendering the defendant deportable.<sup>169</sup> Once these procedures are followed, if the judge determines that the defendant presents “substantial evidence . . . for relief from removal under this [chapter], the Commissioner shall provide the court with a recommendation and report regarding the alien’s eligibility for relief.”<sup>170</sup> Then, the judge will grant or deny the relief sought.<sup>171</sup> A judicial order to that effect may be appealed to the court of appeals.<sup>172</sup> Further, the 1996 amendment to this statute contained in the IIRIRA permits the U.S. Attorney, with the concurrence of the INS Commissioner, to enter into a plea agreement that includes a provision by which defendants will waive their right to notice and a hearing under this section, and “stipulate to the entry of a judicial order of removal from the United States as a condition of the plea agreement or as a condition of probation or supervised release, or both.”<sup>173</sup>

From the outset, there was little executive branch or judicial enthusiasm for this statute.<sup>174</sup> INS authorized very limited use of judicial deportation procedures only in “the least complicated cases.”<sup>175</sup> Likewise, DOJ issued a memorandum warning against judicial removal. It noted that ambiguities in 8 U.S.C. § 1228(c) “may make implementation problematic, and that the Department would propose corrective legislation as needed.”<sup>176</sup> Such legislation was, however, never enacted. In light of these concerns, and “[i]n order to maintain a consistent national immigration policy,” the DOJ’s guidance provides that “close

168. INA § 238(d)(2)(A), 8 U.S.C. § 1228(d)(2)(A) (2018).

169. INA § 238(d)(2)(B), 8 U.S.C. § 1228(d)(2)(B) (2018).

170. INA § 238(e)(2)(C), 8 U.S.C. § 1228(d)(2)(C) (2018).

171. *Id.*

172. INA § 238(d)(3)(A)(i), 8 U.S.C. § 1228(d)(3)(A)(i) (2018).

173. INA § 238(d)(5), 8 U.S.C. § 1228(d)(5) (2018).

174. See Taylor & Wright, *supra* note 99; U.S. DEP’T JUST., CRIM. RESOURCE MANUAL § 1921. The 1995 version of this memorandum from Attorney General Janet Reno directed federal prosecutors not to pursue contested judicial removal orders.

175. Memorandum from Doris Meissner, INS Commissioner, to District Directors, Guidance re: Judicial Orders of Deportation (Feb. 22, 1995).

176. U.S. DEP’T JUST., CRIM. RESOURCE MANUAL § 1919. DOJ noted that these ambiguities included “(1) uncertainty as to the scope of the court’s authority to order judicial deportation, (2) uncertainty as to whether Congress intended an appeal of a judicial deportation order to be separate from the underlying criminal appeal, and (3) uncertainty as to whether a denial of a request for judicial deportation, on the merits, precludes further administrative deportation proceedings against the alien based on principles of *res judicata/collateral estoppel.*” *Id.*

questions” should be decided before IJs, and judicial “deportation should not be sought if the alien has any colorable claim for relief from deportation.”<sup>177</sup> INS wanted to retain jurisdiction over deportation; federal prosecutors wanted uniform national policy on immigration decided by a single agency. Neither INS nor federal prosecutors wanted the responsibility to educate district court judges on the intricacies of immigration law and policy.<sup>178</sup> Furthermore, DOJ did not want non-citizen defendants to have attorneys, which they do have in criminal sentencing. Thus, very few judicial removal orders have been imposed.<sup>179</sup> As a government bulletin authored by ICE legal counsel recently noted, even among veteran prosecutors and immigration attorneys, judicial removal orders are so rare that “[m]any attorneys have never heard of them.”<sup>180</sup> This same government report notes that every one of the few judicial orders of deportation the Authors located are stipulated judicial orders, rather than what they term “unilateral judicial removal orders” where the defendant receives notice, an evidentiary hearing, and a decision on the merits.<sup>181</sup>

Just as plea agreements with stipulated administrative removal were essentially rejected by DOJ policy, so too were plea agreements with stipulated judicial deportation orders originally disfavored. The DOJ, in the same Criminal Resource Manual mentioned above, indicated that stipulated judicial removal should be sought, under its interpretation of the removal statute, only if the offense the defendant pled to is the one that caused the defendant to be deportable, and then only with close coordination with INS.<sup>182</sup> However, also as mentioned above, ICE has very recently begun to encourage the use of stipulated judicial removal orders as one method for avoiding the “arduous requirements for prosecutors seeking unilateral JROs, including proving the defendant is subject to deportation, addressing whether the alien is eligible for ‘relief from deportation,’ and certain specialized evidentiary parameters.”<sup>183</sup>

DOJ should have stuck to its guns, or more precisely, its guidance. We have found one older and one recent instance of judicial removal, both

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177. U.S. DEP’T JUST., CRIM. RESOURCE MANUAL § 1928.

178. Taylor & Wright, *supra* note 99, at 1157.

179. For example, in 1998, only 130 out of 160,000 criminal removals were by judicial order. This decreased to sixty-eight in 2001. *Id.* at 1156 n.98.

180. See Marty D. Ryan & Jonathan S. Needle, *Stipulated Judicial Removal Orders*, U.S. ATT’YS BULL., July 2017, at 111.

181. *Id.* at 113 n.13.

182. U.S. DEP’T JUST., CRIM. RESOURCE MANUAL § 1929.

183. See Ryan & Needle, *supra* note 180, at 111–12 (noting that a stipulated judicial removal order “provides enormous value to the Department of Homeland Security (DHS) and furthers new Department of Justice policy”).

rendered prior to the recent ICE publication we mention above and both involving stipulated rather than contested judicial removal. These cases give us serious pause. The government infamously used judicial deportation after a May 12, 2008, ICE raid on a kosher meatpacking plant in Postville, Iowa.<sup>184</sup> Prosecutors from the United States District Court for the Northern District of Iowa entered into plea agreements to aggravated identity theft<sup>185</sup> or use of false employment documents<sup>186</sup> with almost 300 Guatemalan workers.<sup>187</sup> Those agreements included three things: (1) a waiver of the right to a hearing before an IJ concerning removal; (2) stipulation to entry of a judicial order of removal in accordance with 8 U.S.C. § 1228(c); and (3) a promise never to unlawfully reenter the United States.<sup>188</sup> Most of these defendants received a five-month sentence<sup>189</sup> and were then immediately deported to Guatemala.<sup>190</sup> This generated a huge amount of adverse publicity,<sup>191</sup> and the Obama administration has since cut back on mass raids on workplaces.<sup>192</sup>

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184. See generally Sioban Albiol, R. Linus Chan & Sarah J. Diaz, *Re-Interpreting Postville: A Legal Perspective*, 2 DEPAUL J. SOC. JUST. 31, 32–39 (2008).

185. 18 U.S.C. § 1028A(a)(1) (2018).

186. 18 U.S.C. § 1546(a) (2018).

187. This was prior to the Court's holding in *Flores-Figueroa v. United States* that a conviction for aggravated identity theft requires proof that the defendant knew that the document belonged to another person. 556 U.S. 646, 647 (2009).

188. Albiol et al., *supra* note 184, at 34 n.9; see also Julia Preston, *270 Illegal Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A-10; *Iowa Immigration Raids Threaten Town's Stability*, L.A. TIMES, May 25, 2008. Though the plea agreements were sealed, one redacted agreement can be found online. *Postville Raid Plea Agreement*, AM. IMMIGR. LAWYERS ASS'N, <http://www.aiala.org/infonet/postville-raid-plea-agreement> (last visited Mar. 18, 2018).

189. With such a brief sentence, they likely were all sentenced to "time served" by the time they got to sentencing.

190. Albiol et al., *supra* note 184, at 35.

191. Congress not only investigated this "cattle call" system of justice, but the judge in charge of all of these judicial removal proceedings may have erroneously failed to recuse herself. See Samantha Michaels, *A Federal Judge Put Hundreds of Immigrants Behind Bars While her Husband Invested in Private Prisons*, MOTHER JONES MAG. (Aug. 24, 2017), <https://www.motherjones.com/crime-justice/2017/08/a-federal-judge-put-hundreds-of-immigrants-behind-bars-while-her-husband-invested-in-private-prisons/> (noting there was an independent investigation initiated by former DAG Philip Heymann, in which ethical experts from the DOJ and the FBI commented upon the impropriety of the judge for failing to recuse herself because her husband had purchased additional stock in two private prison companies shortly before the Postville raids).

192. In contrast to large-scale workplace raids, the Obama administration used company audits to enforce immigration policies. Julie Preston, *Illegal Workers Swept From Jobs in 'Silent Raids'*, N.Y. TIMES (July 9, 2010), <http://www.nytimes.com/2010/07/10/us/10enforce.html>.

A very recent resort to judicial deportation took place in the wake of Sessions' April 2017 memorandum prioritizing immigration prosecutions. This memorandum, for the first time, instructed federal prosecutors to "seek, to the extent practicable, judicial orders of removal" at sentencing.<sup>193</sup> Since this policy change, there have been a few Miami judges who have ordered removal at sentencing when the underlying criminal charge was smuggling, and the non-citizen defendants had been living outside the United States.<sup>194</sup> However, rather than following the "arduous" procedures mandated by 8 U.S.C. § 1228(c), the government either bypassed such requirements, notably the requirement of early notice of judicial removal that is supposed to occur before any plea or trial, or obtained later blanket waivers of all such requirements from the defendant. In *United States v. Hernandez*,<sup>195</sup> Hernandez was charged with smuggling goods in violation of 18 U.S.C. § 554. He signed a plea agreement with a standard *Padilla* warning on January 27, admitting guilt and agreeing to a reduced sentence.<sup>196</sup> On April 9, he signed a new statement in support of judicial removal, waiving all rights, waiving all future forms of relief, and stipulating to the entry of judicial removal order.<sup>197</sup> The sentencing judge, citing 8 U.S.C. § 1228(c), ordered Hernandez "removed from the United States to Venezuela promptly upon his sentencing, which removal is to be effected upon completion of his term of incarceration."<sup>198</sup> Moreover, that removal order stated the non-citizen defendant "waived his right to notice and a hearing under 8 U.S.C. § 1228(c)," though no such waiver was in his original written plea agreement.<sup>199</sup> The Assistant U.S. Attorney filed a notice and motion to

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193. See AG Sessions Memorandum, *supra* note 8. Finally, it directs every U.S. Attorney's Office to designate a Border Security Coordinator responsible for convening meetings with representatives from the Department of Homeland Security—including Immigration and Customs Enforcement—to accomplish this new criminal enforcement effort.

194. See *United States v. Hernandez*, Case No. 1:16-cr-20904-RNS (S.D. Fla. Apr. 10, 2017).

195. Case No. 1:16-cr-20904-RNS (S.D. Fla. Apr. 10, 2017).

196. *Id.* PACER at document 41, entered on FLSD Docket 1/27/17, at 10–11 ("Removal and other immigration consequences are the subject of a separate proceeding, however, and defendant understands that no one, including the defendant's attorney or the Court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status . . ."). Similar plea agreements were signed by Hernandez' co-defendants, Sanchez and Morales, which were followed by identical judicial deportation orders against them.

197. *Id.* PACER on April 9, 2017, stating that "I will accept a written order issued by this court for my removal from the United States to Venezuela, and I waive any and all rights to challenge any provision of this agreement in any U.S. or foreign court or tribunal."

198. *Montilla Hernandez*, Removal Order (Apr. 10, 2017).

199. *Id.*



request judicial removal, together with a notice of the factual allegation, on April 10, 2017, dated April 9, 2017.<sup>200</sup> The judge's previous orders typically ordered foreign defendants to surrender to immigration authorities for deportation proceedings after completion of their prison terms.<sup>201</sup> That type of order would have sent the non-citizen defendant to an immigration detention center to await proceedings in immigration court; it would have allowed the non-citizen defendant to contest the grounds for removability and to offer grounds for relief. The judge's April 10, 2017 order in the *Hernandez* case was a marked change, completely circumventing the immigration court. The defendant's waiver, coupled with the government's backdating of a document, avoided compliance with all formal notice and hearing requirements of 8 U.S.C. § 1228(d).

ICE now suggests that stipulated removal orders can be used to avoid the time and resources necessary to secure removal orders through immigration proceedings, to reduce detention costs, and to avoid future habeas litigation related to prolonged immigration detention.<sup>202</sup> A Government Accountability Office report issued in June 2017 showed that backlogs (more than 500,000 cases pending) in immigration court are now so long that it takes years for a deportable immigrant to receive a decision from an IJ.<sup>203</sup> On the other hand, the Department may just wish to send a message. Nevertheless, expediency is no substitute for following the statutory requirements in a country priding itself on its reliance on the rule of law. But even if a district court judge issues removal orders to facilitate prompt removal, it remains to be seen whether non-citizen defendants will actually be deported with no additional process, especially if they attempt to contest these orders on the grounds that they did not receive due process; that the process was defective for violating the statute; that the judicial removal statute was unconstitutional; that the waivers were involuntary or not intelligently entered; that they are the product of ineffective assistance of counsel; and

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200. *Id.* PACER on Apr. 10, 2017.

201. Alfonso Chardy, *Federal Prosecutors Inaugurate 'Express' Deportations*, MIAMI HERALD (June 19, 2017), <http://www.miamiherald.com/news/local/immigration/article156656224.html>.

202. See Ryan & Needle, *supra* note 180, at 118; Taylor & Wright, *supra* note 99 (suggesting that a merger of immigration deportation and criminal sentencing proceedings will better identify deportable non-citizens, yield less duplication or resources, and lead to quicker deportations and lower detention costs).

203. U.S. Gov't Accountability Office, *Immigration Courts, Actions Needed to Reduce Case Backlog and Address Long-standing Management and Operational Challenges*, Report No. GAO-17-438 (2017), <https://www.gao.gov/assets/690/685022.pdf>.

that they violate public policy. We advance these grounds further in Part III of this Article.

### III. SECURING IMMIGRATION RELIEF DESPITE PLEA WAIVER

There are numerous sound reasons for ICE officers, IJs, and federal district judges to not enforce federal immigration waivers and for the BIA and the federal courts of appeals to review the waivers critically. We offer six primary challenges that non-citizens may be able to raise against these waivers: (1) the immigrant has a right to a hearing, despite the waiver, and can marshal evidence against its reliability; (2) the judicial removal statute was not properly followed and is constitutionally questionable; (3) the defense attorney who advised signing the plea agreement provided ineffective assistance of counsel, a corollary to a *Padilla* advisement failure; (4) the waiver violates public policy; (5) ethical obligations prevent prosecutors from introducing waivers and defense counsel from advising on waivers; and (6) the waiver violates international law obligations. Which type of challenge a non-citizen defendant (hopefully with the aid of an immigration or defense attorney) will use may depend in part upon the forum in which the waiver is being challenged—before an IJ during a removal hearing, before a federal district judge in a collateral attack on the order or upon sentencing, before an appellate judge after a judicial removal order, or before an ICE officer in an administrative removal—as well as the immigration relief sought.

#### *A. Non-citizen Defendants Should Insist on their Hearing in Immigration Court Despite the Waiver*

Non-citizen defendants have tools to fight these waivers. Non-citizens who have a federal criminal conviction for a misdemeanor or non-aggravated felony are generally transferred into ICE custody per a detainer after their sentences.<sup>204</sup> ICE cannot deport a non-citizen without a removal order.<sup>205</sup> This order may be issued by an IJ in a removal proceeding.<sup>206</sup> During the hearing, the non-citizen can contest the removal grounds and, if eligible, apply for relief. The ICE attorney prosecuting the case may argue before the court that the signed immigration waiver in the federal plea agreement is dispositive on the

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204. 8 C.F.R. § 287.7 (2018).

205. INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A) (2018).

206. INA § 240(a)(1), 8 U.S.C. § 1229a(a)(1).

issues of removability and relief. Immigrants and their counsel, if any, can respond with several arguments.

As with any waiver, the non-citizen defendant can challenge any presumption that it was knowingly and voluntarily entered.<sup>207</sup> Most significantly, the limited or lack of access to competent immigration counsel to advise on the consequences of the plea terms raises a potential challenge to voluntariness in almost every case. Moreover, criminal defense attorneys should ensure that objections to the plea terms are made on the record to support their client's later arguments in removal proceedings.

As a question of evidence, the waiver is not dispositive and represents no more than a prior inconsistent statement—one, incidentally, that may have been made upon deficient advice. Assessing the reliability of prior statements is a routine matter for an IJ. Courts regularly review statements made by non-citizens seeking entry into the United States at airports and other border entries as well as from previous administrative interviews. The reliability of these prior statements—even those denying any fear of persecution or torture—is often very low.<sup>208</sup>

Certainly, the waiver's language (for example, the non-citizen defendant will not contest deportation or has no reasonable fear of persecution in home country) may influence the outcome. It is merely "some evidence" of the issues that must be decided in removal proceedings.<sup>209</sup> Guilty pleas should not foreclose matters collateral to the

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207. We are aware of one case where a plea-based immigration waiver was challenged in subsequent immigration court proceedings. The IJ found that the non-citizen lacked competency to understand the nature of the civil hearings following *Matter of MAM*, 25 I&N Dec. 474, 484 (B.I.A. 2011), which requires IJs to screen for competency and provide safeguards to ensure due process in the proceedings, where competency is deficient. Due to the findings of mental impairment, the court ignored the waiver.

208. See, e.g., *Balasubramaniam v. INS*, 143 F.3d 157, 161 (3d Cir. 1998) (finding airport statement unreliable); *Zubeda v. Ashcroft*, 333 F.3d 463, 476–77 (3d Cir. 2003); *Matter of H-*, 21 I&N Dec. 337, 341 n.3 (B.I.A. 1996) (giving no significant weight to interview statement taken in English when English was limited). See also ALLEN KELLER ET AL., STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, AS AUTHORIZED BY SECTION 605 OF THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998: EVALUATION OF CREDIBLE FEAR REFERRAL IN EXPEDITED REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES 30 (Feb. 2005) (describing a pattern of incomplete or erroneous transcription of interviews).

209. See ALLEN WRIGHT ET AL., 18B FED. PRAC. & PROC. JURIS. § 4474.1 (2d ed. Apr. 2017) (noting that a guilty plea does not rest on actual adjudication or determination of any issue, so it cannot act as issue preclusion); *FDIC v. Oldenburg*, 34 F.3d 1529, 1539–40 (10th Cir. 1994) (admissions regarding intent at plea hearing were relevant though not conclusive); *Chavez-Reyes v. Holder*, 741 F.3d 1, 3 (9th Cir. 2014) (BIA properly considered plea to possession of cocaine where conviction was reversed based on illegal traffic stop). The Court in *Chavez-Reyes* held that "[a]s a general rule, a voluntary guilty plea to criminal

elements of the offense of conviction. So, claims such as ones about persecution in an immigrant's home country, which do not concern the criminal offense to which the immigrant pled guilty, should not be relied upon at the later deportation proceedings.<sup>210</sup> Immigrants and their attorneys must not hesitate to challenge the "facts" from their plea agreements.

Non-citizen defendants who otherwise have the opportunity to be heard in an immigration court proceeding may certainly be "chilled" from pursuing it by ICE agents who can point to their plea agreement immigration waiver. Indeed, non-citizen defendants' understanding of their plea agreement may lead them to believe that they must agree to a quick removal, despite their entitlement to contest removal. Our hope lies first with IJs who refuse to issue stipulated removal orders without the non-citizens' appearance to ensure that they made a knowing, intelligent, and voluntary waiver; and with legal service providers who advise immigrants against waiving their rights to pursuing immigration relief.

Even in the context of administrative removal or reinstatement, non-citizens who fear that they will be tortured or persecuted on account of their race, religion, nationality, political opinion, or membership in a particular social group have the right to seek relief from removal.<sup>211</sup> Here, too, non-citizens' plea agreement waivers of the right to contest removal, depending upon its language and whether it was entered voluntarily, might be evidence against their claims presented to DHS or the IJ. However, the waiver does not preclude them from being heard.

*B. Non-citizen Defendants Subject to Judicial Removal Orders Should Contest the Procedure*

An expedited judicial removal, like the ones done in these recent Miami cases, creates other problems as well. First, the judicial removal provision may not withstand constitutional scrutiny. Second, those immediately deported after judicial removal may not have their asylum, withholding of removal, or CAT claims heard. Third, federal district judges are not immigration experts, and thus, may not be able to

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charges is probative evidence that the petitioner did, in fact, engage in the charged activity," though the court did not decide whether the plea alone would support such a finding. *Id.*

210. See *Haring v. Prosise*, 462 U.S. 306, 317–18 (1983) (where the defendant pled guilty to manufacturing phencyclidine and then brought a civil rights suit against the police officers, he was not precluded from the litigation because the Fourth Amendment issues had not been litigated and were not necessary to the decision to accept the plea offer).

211. INA § 238(b), 8 U.S.C § 1228(b) (2018); 8 C.F.R. § 238.1(f)(3) (2018) (referral to Asylum Officer for "reasonable fear" interview); 8 C.F.R. §§ 208.31, 241.8(e) (2018).

sufficiently and accurately review the rights being waived. Finally, the statutory prerequisites for judicial removal may not have been satisfied so as to authorize judicial removal.

Judicial removal ultimately may not be legal. First, scholars have noted for years that Congress, in the judicial removal statute, provided for “one-way *res judicata*.” That is, under 8 U.S.C. § 1228(d)(4), the government can initiate removal proceedings in immigration court or the administrative removal process if the request for a judicial order of removal is denied, regardless of the reason for the denial.<sup>212</sup> On the other hand, the immigrant-defendant cannot argue in that later immigration court hearing or administrative removal process that the federal district judge’s denial of the government’s removal request be given preclusive effect against the government. Creating *res judicata* arguably violates Article III of the U.S. Constitution<sup>213</sup> when it only benefits the government.<sup>214</sup> In essence, it provides the judge’s decision to order removal *res judicata* effect, binding both parties to a decision unfavorable to the defendant, whereas a decision favorable to the defendant enjoys no such effect.<sup>215</sup> As Professor Neuman has noted, “If judicial orders of removal are exercises of Article III judicial power, then that interference with their preclusive effect violates ‘the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.’”<sup>216</sup> By failing to give the judicial denial preclusive effect, and allowing the government to reconsider and perhaps reverse a judicial ruling, the statute permits the executive branch to review the judicial one, in direct violation of Article III.<sup>217</sup> The judicial removal statute consequently may be constitutionally flawed at its core.

Second, once a judicial removal order has been entered, non-citizen defendants may be deported without an opportunity to raise new CAT claims or address relief options that may have developed while they

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212. As originally enacted, the denial of a removal request without a decision on the merits of a request for a judicial order of removal would not preclude the Attorney General from initiating an administrative removal request on the same ground. The statute was amended in 1996, so that no denial by the judge is given preclusive effect, regardless of whether that denial was on the merits or simply because the judge declined to exercise jurisdiction over the request.

213. U.S. CONST. art. III.

214. Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1688–94 (2000).

215. *Id.* Both parties can appeal the district judge’s decision to the court of appeals, but that is a separate point from *res judicata*.

216. *Id.* at 1690.

217. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). In analogous JRAD cases, discussed *supra* section II.C., rulings regarding deportation were judicial acts with preclusive effect. *See, e.g.*, *United States v. Yacoubian*, 24 F.3d 1, 6–8 (9th Cir. 1994).

served their criminal sentence. Depending on the length of the sentence, it is conceivable that personal circumstances or changes in home country may generate new forms of relief. The situation for Venezuelans, for example, went from distressing to dire at the end of July 2017, with targeted, state-sponsored violence against opposition political candidates.<sup>218</sup> A defendant who had a low risk of harm upon return to Venezuela a few months before, and either stipulated to judicial removal or declined to seek any relief, may now have viable concerns of individualized violence. The judicial removal statute, however, provides no mechanism to vacate the order and reopen the judicial proceedings to pursue protection.

Third, both DOJ and district court judges have long avoided judicial removals precisely because the lawyers and judges generally have insufficient expertise to navigate the immigration code and regulations. Explaining the rights that are being waived alone is daunting to the non-expert. Moreover, full evidentiary hearings are available to defendants during judicial removal proceedings, and few criminal practitioners and judges grasp the standards, legal issues, discretionary authority, and many options available for full and meaningful hearings. In short: IJs know this field, district court judges often do not. Thus, judicial removal is ripe for reversal.

Fourth, there are a number of prerequisites to judicial removal.<sup>219</sup> Certainly in the Miami cases discussed above, those were not followed. Judges are not authorized to *sua sponte* proceed with removal; prosecutors must request it.<sup>220</sup> Additionally, the government must file a written notice of its intent to request judicial removal, either before trial or change of plea. Those notices must also contain a recitation of facts establishing that the non-citizens have no legal status in this country and have been convicted of crimes that qualify for removal. This is basic “notice pleading.”

Finally, the “INS Commissioner” must approve, in consultation with the AG, of using judicial removal in each case.<sup>221</sup> There was no revision of the removal statute when the INS was eliminated by the Homeland

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218. Chris Kraul & Mery Mogollon, *Nine Reported Dead, Including One Candidate, as Violence Erupts over Venezuela’s Constitutional Vote*, L.A. TIMES, July 30, 2017.

219. See INA § 238(d), 8 U.S.C. § 1228(d) (2018).

220. There is one contrary decision to note. In 2001, the United States Court of Appeals for the Eleventh Circuit found harmless error where the court had overstepped its authority and failed to follow all prerequisites of the statute. See *United States v. Nguyen*, 255 F.3d 1335, 1346 (11th Cir. 2001) (“Because the defendants have not demonstrated that the Government’s failure to comply with 8 U.S.C. § 1228(c)(2)(B) affected their substantial rights, we reject the defendants’ challenges to the orders of deportation.”).

221. INA § 238(d), 8 U.S.C. § 1228(d) (2018).

Security Act (HSA) in 2002.<sup>222</sup> Thus, there is currently no INS Commissioner to offer the necessary pre-approval that the statute requires.<sup>223</sup> While the HSA does provide that references to an agency that is transferred to the DHS shall be deemed to refer to the Department,<sup>224</sup> and that “function[s] transferred by or under this [Act] . . . shall be deemed to refer to the Secretary, other official, or component of the Department to which such function is so transferred,”<sup>225</sup> this is general language, and none of it is targeted to the separate judicial removal statute. Did Congress intend to transfer authority to approve requests for judicial removal from the Commissioner of the INS, an agency head, to the Secretary of DHS, a cabinet-level position, and, if so, did it do so clearly enough? We could find no case law concerning substituting the Secretary of DHS for the Commissioner of the INS, nor any DOJ guidelines explaining the change.<sup>226</sup>

*C. Non-citizen Defendants Should Contest Waivers in Plea Agreements  
Due to Ineffective Assistance of Counsel*

In *Padilla v. Kentucky*, the Supreme Court of the United States held that Sixth Amendment rights to effective assistance of counsel apply to advice given regarding whether a plea to a given offense would affect the non-citizen defendant’s deportation potential.<sup>227</sup> Noting that immigration consequences are intimately related to criminal punishment consequences,<sup>228</sup> the Court held that current norms require counsel to give accurate advice regarding deportation in light of a guilty plea to a given offense.<sup>229</sup> In the end, the Court in *Padilla* required limited expertise from criminal defense counsel: to inform her client if the offense of conviction would lead to mandatory deportation, and if that issue was

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222. Pub. L. No. 107-296, § 471, 116 Stat. 2135 (2002) (codified at 6 U.S.C. § 291).

223. *Id.*

224. HSA § 1512, 6 U.S.C. § 552 (2018).

225. HSA § 1517, Pub. L. No. 107-296, title XV, § 1517, 116 Stat. 2311 (2002) (codified at 6 U.S.C. § 557).

226. The only DOJ guidance on judicial removal concerns the Commissioner, and it attaches a national contact list of INS agents. The Authors did find a case where the defendant had asked the court to issue a judicial removal order, and the court denied the motion and referred to the necessary agreement between the U.S. Attorney’s Office and the “Commissioner of Immigration and Customs Enforcement” without citation beyond 8 U.S.C. § 1228(c). *United States v. Camacho*, 738 F. Supp. 2d 240, 242 (D. Mass. 2010).

227. 559 U.S. at 364–66; *see also* *Lee v. United States*, 137 S. Ct. 1958 (2017).

228. *Padilla*, 559 U.S. at 364.

229. *Id.* at 369.

unclear, to simply inform the defendant that the charges may carry adverse deportation consequences.<sup>230</sup>

Importantly, the decision in *Padilla* rested on a truly limited inquiry (whether the federal Controlled Substances Act<sup>231</sup> offense was an aggravated felony). The current crop of immigration waivers, however, touch on far more. Defendants are asked to waive, for instance, rights to collateral attack, to appeal of standing orders of removal, to assert that they have no fear of persecution or torture, to forego relief such as withholding of removal, to challenge the basis for a prior erroneous deportation, and to forego any right to release pending the decision. This far exceeds the scope of expertise contemplated in *Padilla*.

The Court in *Padilla* acknowledged that most criminal practitioners were not well-versed in the intricacies of the immigration code and regulations.<sup>232</sup> Surely, the confusing array of matters being waived in plea agreements now is well beyond the safe scope of *Padilla*. Most criminal practitioners and district court judges would not be able to give adequate advice as to defenses, litigation practices, and the bevy of other immigration issues being waived.<sup>233</sup> Moreover, simply saying the offense of conviction may lead to deportation—*Padilla*'s apparent fallback position for gray area immigration issues—would not satisfy the waivers' concerns, as *Padilla* did not touch on procedures, defenses, and alternative options at all. As a result, there is grave potential for another ineffective assistance claim in the *Padilla* line based upon advice rendered about the instant plea waivers.

Note that asking non-citizen defendants to waive their defenses in a future, unspecified civil action is not the same as advising them that their removability is clear. If the prosecutor asked them to sign a plea agreement pleading guilty to the charges in the indictment and any unnamed other crimes that might be charged in the future, counsel could not meaningfully assist them in making that decision. Likewise, the non-citizen defendants and their lawyer cannot decide whether to waive defenses in future removal proceedings unless they understand the grounds for removability and defenses to removal, including any asylum, withholding of removal, and CAT claims they might possess. Without a full understanding of facts of the case and the law surrounding

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230. *Id.*

231. Pub. L. No. 91-513, 84 Stat. 1236 (1970).

232. *Padilla*, 559 U.S. at 369.

233. The public defender appointed for the criminal case has no obligation, and normally is barred from, separate civil litigation. Even privately retained defense attorneys normally have insufficient expertise to assist on this civil immigration litigation.



deportability and defenses, a non-citizen defendant can neither intelligently nor voluntarily decide to sign these waivers.

We conclude that this whole dilemma is largely obviated by allowing an IJ to conduct hearings and make appropriate findings and orders. The IJ is a subject-matter expert in the field. If non-citizen defendants waived immigration challenges per one of these plea agreements, they may seek to raise a *Padilla*-type claim before an IJ, arguing that they entered the plea based upon a failure to advise or giving incorrect advice about options available to them.

#### *D. Ethics Rules Prohibit Enforcement of Waivers*

Most criminal defense practitioners are not also immigration experts. Indeed, learning the intricacies of the federal immigration statute, as well as its profusion of regulations, differing practices between jurisdictions, and varying case law between circuits, is a truly challenging mastery. Courts have referred to immigration law as “labyrinth.”<sup>234</sup> The United States District for the Ninth Circuit commented that “[w]ith only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’”<sup>235</sup> Moreover, the Supreme Court fashioned its *Padilla* decision in recognition of the complexity of immigration law:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in

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234. *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008). Indeed, because it is such a demanding field to master, courts took the unusual step of developing an ineffective assistance of counsel doctrine (under the Fifth Amendment) in the civil context, applying it to immigration practitioners. *Id.* See *Iturribarria v. INS*, 321 F.3d 889 (9th Cir. 2003); *Ponce-Leiva v. Ashcroft*, 331 F.3d 369 (3d Cir. 2003); *Granada v. Att’y Gen.*, 317 F. App’x 925 (11th Cir. 2009); *but see Manalansan Cruz v. Holder*, 321 F. App’x 280 (4th Cir. 2009); *Lopez v. Holder*, 390 F. App’x 623 (8th Cir. 2010); *Rafiyev v. Mukasey*, 536 F.3d 853 (8th Cir. 2008). See also Emmanuel S. Tipon & Jill M. Marks, Comment Note, *Ineffective Assistance of Counsel in Removal Proceedings—Legal Bases of Entitlement to Representation and Requisites to Establish Prima Facie Case of Ineffectiveness*, 58 A.L.R. Fed. 2d 363 (2011). Thus, inadequate or incorrect advice regarding these waivers could potentially implicate ineffective assistance both under the Sixth and Fifth Amendments in some jurisdictions. Further, ineffective assistance regarding removal proceedings could constitute an exceptional circumstance warranting reopening. 8 U.S.C. § 1229a(b)(5)(C)(i) (2018); 8 C.F.R. § 1003.23(b)(v)(4)(iii)(1) (2018); *Murillo-Robles v. Lynch*, 839 F.3d 88 (1st Cir. 2016).

235. *United States v. Ahumada-Aguilar*, 295 F.3d 943, 950 (9th Cir. 2002).

which the deportation consequences of a particular plea are unclear or uncertain.<sup>236</sup>

Because of the difficulty in mastering immigration, the Court limited its *Padilla* effectiveness of counsel holding to simply identifying whether the offense or conviction statutorily mandated deportation.<sup>237</sup>

Although *Padilla* set a low bar standard for effective criminal representation regarding immigration consequences, the expertise required to properly advise a non-citizen defendant to waive rights to removal relief is far more demanding.<sup>238</sup> Whether an offense mandates deportation is determined by consulting established law; on the other hand, whether there may be any of a myriad of potential defenses to removal, asylum, reopening, and the like, requires intimate familiarity with much of immigration law and practice in addition to facts well beyond the scope of the criminal defense representation. Therein lies the ethics competency issue.

Bedrock ethics principles prohibit lawyers from providing legal representation in a field where they are not competent to practice. The American Bar Association Model Rules of Professional Conduct Rule 1.1 (Rule 1.1) states that lawyers must “provide competent representation to a client,” defined as “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”<sup>239</sup> Rule 1.1 requires a lawyer to meet the standard of care of practitioners in the field.<sup>240</sup> Factors include not only the complexity of the subject matter but also lawyers’ relevant training and experience.<sup>241</sup> That means more than knowing what to do—the lawyer must also be able to apply that knowledge to the client’s problem to give effective advice.<sup>242</sup> When the client must consider waivers, the lawyer may not simply decline to explain those waivers and what effect they can have.<sup>243</sup> Specifically, causing a client to abandon a potentially viable claim of relief violates the

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236. *Padilla*, 559 U.S. at 369.

237. *Id.* at 374.

238. The Court in *Padilla* found that mandatory deportation was clear from the statute, hence the *Strickland* ineffective assistance of counsel standard is applied to advising criminal defendants of this collateral consequence of guilt. This leaves open the possibility of a second line of *Padilla* case law addressing when defense attorneys have to advise their clients regarding unclear and far more abstruse impacts of waiving immigration relief.

239. MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2010).

240. D.C. Ct. of App. Bd. on Prof’l Responsibility, Formal Op. 101-01 (2005).

241. MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS’N 2010).

242. Att’y Griev. Comm’n of Md. v. Narasimhan, 92 A.3d 512, 519 (Md. 2014).

243. Ala. Ethics Comm’n, Formal Op. 2011-02 (2011) (reference plea agreement waivers of ineffective assistance of counsel claims).

competency rule.<sup>244</sup> Discipline is demanded where a lawyer “plunges into a field in which he or she is not competent, and as a consequence makes mistakes that demonstrate incompetence.”<sup>245</sup>

Given the complexity of immigration law, it should come as little surprise that a number of state bar discipline cases involve lawyers who are incompetent in immigration matters. In *Narasimhan*, for example, the lawyer took on numerous complicated immigration cases—failing and prejudicing her clients miserably—leading to a suspension from practice. She had never worked in the field, though she had twice applied for naturalization for friends and had provided some clerical support to a lawyer filing a family’s petition.<sup>246</sup> In *In re Handy*,<sup>247</sup> the attorney attempted to help clients obtain permanent residency in this country, represented two individuals in removal proceedings, and was to secure work permits for a company’s employees. Her training was no more than taking some immigration CLE classes and two hours of Lexis courses. She was suspended from practice for one year.<sup>248</sup> In *In re Howe*,<sup>249</sup> the lawyer represented a couple (who had lived in this country twenty years, had four children born here, one with severe disabilities) in removal proceedings. His representation was so dismal, that despite specific direction by the IJ, he failed to marshal needed evidence, resulting in removal orders. Bar counsel asked for the attorney’s suspension.<sup>250</sup> In *Disciplinary Counsel v. Sporn*,<sup>251</sup> the lawyer undertook naturalization for an immigrant married to a citizen and appeal of an asylum denial. Despite being an active member of the American Immigration Lawyers Association and handling immigration matters for decades, she still did not competently represent these individuals. As a result, she was suspended from practice for two years.<sup>252</sup>

Note that most criminal defense attorneys have had even less immigration exposure than the first three disciplinary cases cited above, and precious few have the experience of the fourth example. These bar complaint cases demonstrate that the field is far too complex for

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244. D.C. Ct. of App. Bd. on Prof'l Responsibility, Formal Op. 378-04 (2007).

245. *Narasimhan*, 92 A.3d at 519. Notably, *Narasimhan* was a case where the lawyer tried to represent clients in immigration matters when she was not skilled in it.

246. *Id.* at 519–20.

247. *In re Handy*, Il. Disp. Op. 01 SH 124 (Ill. Att’y Reg. & Disp. Comm’n), 2004 WL 964743 (2004).

248. *Id.*

249. *In re Howe*, Petitioner’s Brief, 2013 WL 9924178 (N.D. 2013).

250. *Id.*

251. *Disciplinary Counsel v. Sporn*, No. FSTCV146024035S, 2015 LEXIS 2418 (Conn. Super. Ct. 2015).

252. *Id.*

neophytes to hazard providing legal advice. Moreover, ethics disciplinary counsels clearly do pursue cases where lawyers provide inadequate representation in immigration, resulting in suspensions from practice. As a result, unless criminal defenders are truly experienced immigration experts, they should not venture advice on immigration waivers.

Furthermore, prosecutors who require defendants to sign such waivers (when counsel is not competent to advise about the impact the waivers have) also transgress ethic rules. Rule 8.4(a)<sup>253</sup> prohibits lawyers from inducing others to violate the Rules of Professional Conduct.<sup>254</sup> Additionally, Rule 8.4(d) bars conduct “prejudicial to the administration of justice.”<sup>255</sup> A number of state bar opinions found that prosecutors who included certain waivers (of raising ineffective assistance of counsel and prosecutorial misconduct) in plea agreements were in violation of both sections of Rule 8.4.<sup>256</sup> Since prosecutors insist on including these terms in the plea agreements—and because defense counsel is required to explain the effect of any waiver terms in a plea agreement<sup>257</sup>—prosecutors demanding immigration waivers also violate ethics rules.<sup>258</sup>

#### *E. Public Policy Prevents Enforcement of Immigration Waivers*

Numerous problems and defects inherent in the plea-based immigration waivers exist that should lead federal courts and IJs to ignore, or attribute little weight, to them. Similar to assessing the enforceability of civil rights release-dismissal agreements and other plea-based waivers, the courts should consider the voluntariness of the waiver alongside the public interests at play.

*Newton v. Rumery*<sup>259</sup> offers guideposts to adjudicators asked to evaluate the enforceability of plea-based immigration waivers. In *Rumery*, the Supreme Court turned to contract law principles to consider

253. MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2010).

254. *Id.*

255. *Id.*

256. *E.g.*, State Bar of Ariz., Formal Op. 15-01 (2015); Prof'l Ethics of the Fla. Bar, Formal Op. 12-01 (2012); Advisory Comm. of the Sup. Ct. of Mo., Formal Op. 126 (2009); N.C. State Bar, Formal Op. 129 (1993); Sup. Ct. of Ohio: Bd. of Comm'rs on Grievances & Discipline, Formal Op. 2001-6 (2001).

257. Ala. Ethics Comm'n, Formal Op. 2011-02 (2011).

258. The ethics issues provide a clear basis to refuse plea agreements with immigration waivers, to demand that U.S. Attorney's Offices remove those terms from their boilerplate, and to pursue bar ethics opinions to stop this practice. What is not as clear is to what extent prosecutors may have a Brady-type obligation to disclose to any defendant asked to sign such waivers all information available to the prosecution and its agencies that would tend to negate, mitigate, or create a defense to removal.

259. 480 U.S. 386 (1987).

whether a defendant should be held to a waiver of civil rights claims given in exchange for the dismissal of the criminal charges against him.<sup>260</sup> The case presented a question of whether “the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.”<sup>261</sup> The voluntariness of the agreement was the first inquiry.<sup>262</sup> Key factors in this analysis included: the sophistication of the defendant; whether he was in custody; whether his counsel drafted the agreement terms; and whether he had ample time to consider the deal.<sup>263</sup> Justice O’Connor also added to that list the nature of the criminal charges and whether the court supervised the agreement.<sup>264</sup> Assuming the agreement was voluntary, a court must turn to the public interests benefitting from and compromised by the agreement. Importantly, the prosecutor must be able to articulate a legitimate reason why the waiver is necessary.<sup>265</sup>

As argued above, the voluntariness of any immigration waiver must be questioned.<sup>266</sup> An immigration waiver cannot be voluntarily and intelligently entered unless there has been an assessment as to the validity of the removal charges and any defenses being waived. The clients in such cases are being asked to waive their right to fight deportation in a future civil action, in addition to pleading guilty to criminal charges. Given the limitations on defense counsel we have already discussed, an IJ or federal court would be right to find the waiver void on that ground alone. An involuntary waiver contravenes public policy.

The public policy interests also point to waivers’ unenforceability. Until recently, DOJ found little prosecutorial interest in resolving a non-citizen defendant’s deportability as a part of the criminal case.<sup>267</sup> Both the administration’s Executive Order and the AG Sessions Memorandum have changed that position,<sup>268</sup> but neither offers clear

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260. *Id.* at 392.

261. *Id.*

262. *Id.* at 393.

263. *Id.* at 394. These factors are standard considerations for assessing voluntariness. See, e.g., *Tillman v. Macy’s, Inc.*, 735 F.3d 453, 461 (6th Cir. 2013) (enumerating factors the court looks to in assessing whether a waiver of civil rights was entered into voluntarily).

264. *Newton*, 480 U.S. at 401–02 (O’Connor, J., concurring).

265. *Id.* at 398.

266. As noted by the Deputy Chief Counsel of the Los Angeles Division of ICE, stipulated deportation waivers can be inserted into federal plea agreements at a time when a defendant “is less interested in fighting removal than in litigating the prison sentence.” Ryan & Needle, *supra* note 180, at 112.

267. U.S. DEP’T JUST., CRIM. RESOURCE MANUAL § 1929.

268. See *supra* note 8.

public interest goals aside from indiscriminately utilizing all means available to deport millions of residents.

On the criminal side, prosecutors will be hard-pressed to identify a criminal justice interest basis for immigration waivers. Plea waivers of constitutional and other statutory rights have long been supported by goals of case finality.<sup>269</sup> Immigration waivers, however, do not address the criminal charge or sentence at all. In fact, their inclusion in standard plea agreements make the plea itself vulnerable to future challenge, on ineffective assistance grounds among others, that may ultimately frustrate the goal of case resolution. DOJ may argue cost savings, but the expenditures related to immigration adjudication is negligible.<sup>270</sup> Not every non-citizen defendant is going to have a claim for relief—in fact, it may be a small percentage. The immigration waiver terms do not save the government the cost of actual deportation. Neither does it save on detention costs, given the availability of the Institutional Hearing Program, which allows non-citizen defendants to have their immigration court proceedings while they serve their criminal sentence.<sup>271</sup>

Conversely, the public interest against the waivers is significant. The United States' international treaty obligations bind the government not to deport non-citizens to countries where they are likely to be tortured or persecuted. The United States assumed these treaty obligations, particularly CAT, as much to ensure the safety of United States citizens abroad as to signal the nation's general commitments to human life and safety.<sup>272</sup> Those responsibilities fall to every government actor, including prosecutors. For a concern as important as immigration, public policy supports having experts in that field to decide these tricky legal analyses. In practice, should DOJ continue with these waivers, prosecutors and judges will have to be certain that they are not violating their highest duties. We doubt that the waivers, as currently employed, will be able to give the government the assurances it needs.

In addition, there is public interest in upholding all aspects of the immigration act, including when discretionary relief to non-citizens is

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269. See, e.g., *United States v. Ruiz*, 536 U.S. 622 (2002); *Santobello v. New York*, 404 U.S. 257, 260–61 (1971); *United States v. Mezzanatto*, 513 U.S. 196 (1995).

270. In fiscal year 2016, Congress provided only \$420 million to the Department of Justice for the immigration courts as compared to \$18.5 billion to DHS for immigration enforcement. *FY 2017 Budget Request At-a-Glance*, DOJ, <https://www.justice.gov/jmd/file/821961/download> (last visited Mar. 19, 2018); *Reducing the Immigration Court Backlog and Delays*, HUMAN RIGHTS FIRST, <https://www.humanrightsfirst.org/sites/default/files/HRF-Backgrounder-Immigration-Courts.pdf> (last visited Mar. 19, 2018).

271. *The Immigration Court's Institutional Hearing Program: How Will it Be Affected*, TRAC IMMIGR. (Feb. 2017), <http://trac.syr.edu/immigration/reports/461/>.

272. See discussion *supra* note 76.

granted. Efforts to expedite removal through plea-based immigration waivers risk removing non-citizen defendants who may qualify for relief. Congress, in creating the U Visa for victims of violent crime who have cooperated in a criminal investigation or prosecution, specifically granted DHS the ability to waive most criminal history (even aggravated felonies) where granting protection is in the public or national interest.<sup>273</sup> A push for an immigration waiver in a plea for an unlawful reentrant, for example, may have the direct impact of frustrating a separate criminal investigation and justice goals there. DHS has also been found to err repeatedly in its assessment of removability; thus, in a not insignificant number of cases, DHS has wrongfully deported American citizens!<sup>274</sup> In cases like those, public interest squarely falls on the need for a full hearing before an IJ to determine relief and to verify the validity of DHS's charges. The IJs must further be free to conduct their inquiry into both removability and relief broadly, without immigration waivers limiting (or even suggesting a limit on) their task.<sup>275</sup>

U.S. Attorneys' current practice of including boilerplate immigration waiver terms in plea agreements (regardless of individual circumstances) is additionally problematic. Later circuit courts in the *Rumery* line agreed that blanket civil rights releases could not be enforced.<sup>276</sup> As a result, even where the voluntariness of the plea and waiver is shown and a prosecutor can articulate some important public interest at stake, the prosecutor must individually assess the factual merits of each defendant's potential immigration claims before balancing its interest with the defendant's interests.<sup>277</sup> Likewise, a judge deciding to enforce a federal immigration waiver must consider, in a case-by-case fashion, whether the prosecutor (at the time of the waiver request) had investigated the defendant's immigration defenses. At both stages, the inquiry would be substantial. Public policy speaks strongly in favor of not

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273. INA § 212(d)(14), 8 U.S.C. § 1182(d)(14) (2018).

274. Meredith Hoffman, *The US Keeps Mistakenly Deporting Its Own Citizens*, VICE NEWS (Mar. 8, 2016), <https://news.vice.com/article/the-us-keeps-mistakenly-deporting-its-own-citizens>; see also Caitlin Dickerson, *US Citizen Detained by Mistake Sues Miami-Dade Over Immigration Enforcement*, N.Y. TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/us/immigration-sanctuary-lawsuit-miami.html>.

275. *United States v. Maldonado-Ramirez*, 216 F.3d 940, 944–45 (11th Cir. 2000) (holding the district court could not bar a non-citizen defendant from seeking relief from removal as part of his criminal sentence).

276. See, e.g., *Cain v. Darby Borough*, 7 F.3d 377, 383 (3d Cir. 1993) (finding blanket policy requiring all defendants participating in an alternative sentencing program to waive civil rights claims unenforceable); *Kinney v. City of Cleveland*, 144 F. Supp. 2d 908, 918–19 (N.D. Ohio 2001) (concluding release-dismissal agreement court not be enforced).

277. See *Garcia v. Lynch*, 786 F.3d 789, 792 (9th Cir. 2015) (“As DHS recognizes, it bears the burden to establish a valid waiver by clear and convincing evidence.”).

enforcing immigration waivers. DOJ should return to its previous and well-reasoned positions that immigration matters are best left to the immigration courts.

#### *F. Waivers Violate International Law Obligations*

A few critical removal defenses— asylum, withholding of removal, and protection under CAT— derive from international law and the United States’ treaty obligations. As discussed above, withholding of removal and protection under CAT may prevent deportation for individuals who will be tortured or killed upon returning to their homeland. The international law source of those protections—the United Nations (U.N.) CAT and the U.N. Convention Relating to the Status of Refugees (Refugee Convention)— may both invalidate immigration waivers that limit the ability of non-citizens to access the treaty provisions.

The United States has signed and ratified both the Protocol Relating to the Status of Refugees, through which the United States is bound to follow the Refugee Convention, and the CAT.<sup>278</sup> The conventions’ respective non-refoulement obligations not to return non-citizens to countries where they will be harmed appear in immigration law and regulation.<sup>279</sup> The government cannot return a non-citizen to a country to face certain torture or persecution. These protections are non-discretionary.<sup>280</sup>

The non-refoulement protections are of fundamental importance. The prohibition against torture has reached the status of *jus cogens* in international law, regulating conduct of all nations regardless of treaty membership.<sup>281</sup> Scholars argue that the non-refoulement provisions in both CAT and the Refugee Convention have almost reached, if not already obtained, similar *jus cogens* status.<sup>282</sup>

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278. Convention Relating to the Status of Refugees, U.N., July 28, 1951, 189 U.N.T.S. 150, acceded to by United States when it signed the 1967 Protocol Relating to the Status of Refugees art. I, U.N., Jan. 31, 1967, 606 U.N.T.S. 267. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N., Dec. 10, 1984, 1465 U.N.T.S. 85; Signed in 1988, adopted by the Senate in 1990, and deposited by President Clinton with the U.N. Secretary General in 1994. U.N. Doc. 571 Leg./SER. E/13, IV.9 (1995); 8 C.F.R. §§ 208.16–18 (2018).

279. Bill Frelick, “Abundantly Clear”: *Refoulement*, 19 GEO. IMMIGR. L.J. 245, 248 (2004).

280. *Aguirre-Aguirre*, 526 U.S. at 419–20; *Cardoza-Fonseca*, 480 U.S. at 428 n.7.

281. MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 8 (2008).

282. Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L. J. 1 (2008). *But see* Aoife Duffy,



The commitment to protect non-citizens in the United States against the severe harm they may face in their home countries is clearest under CAT. The United States signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, with Congress ratifying it in 1994. Its purpose is “to promote universal respect for, and observance of, human rights and fundamental freedoms.”<sup>283</sup> It provides that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>284</sup> Following ratification, DOJ issued regulations to implement the non-refoulement.<sup>285</sup>

In *Khouzam v. AG of the United States*,<sup>286</sup> the United States Court of Appeals for the Third Circuit examined DHS’s ability to act in light of the treaty obligations.<sup>287</sup> Having established past torture and a likelihood of being tortured in the future by Egyptian police, Mr. Khouzam had been granted deferral of removal under CAT.<sup>288</sup> One year later, DHS detained Mr. Khouzam and prepared to deport him to Egypt on assurances from the Egyptian government that he would not be tortured. Mr. Khouzam challenged DHS’s summary removal in federal court and secured the right to examine and challenge the so-called “assurance” and to be heard as to his continued fear of torture if forcibly returned to Egypt.<sup>289</sup>

*Khouzam* makes clear that the United States cannot abrogate non-citizens’ right to challenge removal when they face torture or death in their home country.<sup>290</sup> The state can also not engage in practices that limit treaty protections. The U.N. Committee Against Torture, which monitors the implementation of the CAT, has drafted guidance to state parties on the treaty’s non-refoulement provisions. Relevant here are two comments—one prohibiting collective denials of protection without affording an individualized assessment of the risk of torture to an individual; the second prohibits use of strategies to limit protection, such

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*Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT’L J. REFUGEE L. 373 (2008).

283. CAT, opening paragraph 3.

284. CAT, article 3, paragraph 1.

285. 8 C.F.R. §§ 208.18, 1208.18 (2018).

286. 549 F.3d 235 (3d Cir. 2008).

287. *Id.* at 239.

288. *Id.* at 238.

289. *Id.* at 239, 259.

290. Other state parties to the CAT have similarly interpreted the convention. *See, e.g.*, *A (FC) et al. v. Sec’y of State for the Home Dep’t* (2004) UKHL 56; *Norris v. Gov’t of the U.S.* (2010) UKSC 9 (appeal taken from [2009] EWHC 995 (Admin)) (UKHL); *Att’y Gen. v. Zaoui et al.* [2005] NZSC 38 at [16].

as prolonged detention of protection-seekers or limiting support services which may force a non-citizen home.<sup>291</sup> Consequently, plea agreements that deny a defendant the opportunity to raise her reasonable fear of torture, if returned home, violate the CAT and should be treated as void.

In 1967, the United States acceded to the 1951 Convention Relating to the Status of Refugees through its Protocol, which mandates withholding of removal for non-citizens whose “life or freedom would be threatened” in their home countries.<sup>292</sup> Congress implemented the Convention’s non-refoulement provisions in the Refugee Act of 1980.<sup>293</sup> Similar to the CAT, the legal obligations to implement the treaty protection are squarely on the state. Federal prosecutors cannot use the heavy threat of enhanced criminal punishment to secure waivers of these international protections.

Both conventions are treaties between countries, and the non-citizen defendant is not in a position to relieve the government of that international obligation. It is particularly troubling that through the use of immigration waivers in plea agreements, an officer of the United States seeks to contract away the United States’ agreements under both conventions.<sup>294</sup> The waiver policy makes clear that the United States fails to honor its obligations with regard to non-citizen defendants by asking them to waive any claims they could have under the Refugee Convention and the CAT.

In the immigration field, withholding of removal and CAT protections are constantly evolving and fiercely litigated. For that reason, only those truly steeped in this field should handle assessments of relief. For instance, how does a federal district court judge, prosecutor, or defense attorney involved in plea negotiations know if a particular withholding or CAT ground is viable? Each claim is intensely fact specific, often requiring consultation of experts in other fields. Moreover, definitions of critical terminology are not always clear. What may constitute torture in

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291. UN Committee Against Torture, Draft Revised General Comment on the implementation of article 3 of the Convention in the context of article 22 (Feb. 2, 2017), at ¶¶ 13–14.

292. *Article 33: Prohibition of Expulsion or Return (“Refoulement”)*, UNHCR, <http://www.unhcr.org/3b66c2aa10.pdf> (last visited Mar. 19, 2018).

293. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat.101 (Mar. 17, 1980). See INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2018) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”).

294. Obligations of the “contracting state” includes all sub-divisions of the state and anyone exercising governmental authority. Sir Elihu Lauterpacht & Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* UNHCR, <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf> (last visited Mar. 19, 2018).

one circuit may differ in another.<sup>295</sup> There are many factual disputes involved, along with the numerous legal uncertainties in definition. It took the courts over a decade to reach a decision on whether domestic violence can be sufficient basis for asylum and withholding.<sup>296</sup> The definition of “particular social group” has also plagued agency adjudicators and the courts since the passage of the Refugee Act in 1980.<sup>297</sup> The subject is ever evolving. Even the understanding of “family” as a particular social group has been disputed and is applied differently in the circuits.<sup>298</sup> The lists of difficult issues go on and on, and sensibly should be made by an IJ after a hearing, not by a blanket, often inadequately informed, waiver.

In recognition of Torture Convention obligations, a federal judge recently halted the deportations of more than 1,400 Iraqi nationals (including all Iraqis with final orders of removal nationwide) who were to be returned to Baghdad.<sup>299</sup> He did so because of changed circumstances, Iraq having become too dangerous recently.<sup>300</sup> He thus allowed those Iraqis the opportunity to reopen their cases in immigration court and make claims based upon asylum or protection under the CAT.<sup>301</sup> This held true even for those Iraqis with prior criminal convictions despite an INA provision against habeas corpus relief.<sup>302</sup> This decision confirms that the United States’ affirmative commitment to not

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295. Compare *Matter of S-V*, 22 I&N Dec. 1306, 1311–12 (B.I.A. 2000), with *Afriyie v. Holder*, 613 F.3d 924, 937 (9th Cir. 2010).

296. See *Matter of A-R-C-G- et al.*, 26 I&N Dec. 388, 395 (B.I.A. 2014).

297. Compare *Matter of Acosta*, 19 I&N Dec. 211, 232–34 (B.I.A. 1985), with *Matter of M-E-V-G-*, 26 I&N Dec. 227, 227 (B.I.A. 2014).

298. Compare *Crespin-Valladares v. Holder*, 632 F.3d 117, 124–25 (4th Cir. 2011), with *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 492–93 (5th Cir. 2015). See also *Matter of L-E-A-*, 27 I&N Dec. 40 (B.I.A. 2017).

299. See *infra* notes 301, 302.

300. *Id.*

301. Samantha Schmidt & Abigail Hauslohner, *Detroit Judge Halts Deportations of More Than 1,400 Iraqi Nationals Nationwide*, WASH. POST (June 28, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/06/27/detroit-judge-halts-deportations-of-more-than-1400-iraqi-nationals-nationwide/?utm\\_term=.209bfc9218cf](https://www.washingtonpost.com/news/morning-mix/wp/2017/06/27/detroit-judge-halts-deportations-of-more-than-1400-iraqi-nationals-nationwide/?utm_term=.209bfc9218cf).

302. *Hamama v. Adducci*, 261 F. Supp. 3d 820 (E.D. Mich. 2017). Most of these non-citizens were subject to final orders of removal resulting from criminal convictions and overstaying visas. The federal district judge noted that the REAL ID Act, 8 U.S.C. § 1252, divested him of jurisdiction but held that the Act was unconstitutional as applied to petitioners in the extraordinary circumstances of the case at bar. *Id.* at 825. Relegating petitioners to motions to reopen before the IJ, and then appeal of those motions to the courts of appeal, would act as a suspension of the right to habeas corpus in violation of *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (characterizing right to file and prosecute motions to reopen is an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings).

send persons to their death, rape, slavery, or other persecution because of their religious or political beliefs overrides an agency's desire to swiftly execute a removal order. In the same vein, a prosecutor's interest in imposing a federal immigration waiver seeking to bypass any opportunity for a non-citizen to present a claim for protection must yield.

Consequently, the Refugee Convention and the CAT both bar the United States from prohibiting non-citizens from raising their legitimate protection claims. In particular, those international laws directly prohibit the practice in at least five U.S. Attorney's offices of requiring non-citizen defendants to admit that "he does not have a fear of returning to the country designated in the previous order" or is not in fear of persecution.<sup>303</sup> Attorneys in those districts should remove that language; if contained in a plea agreement, any adjudicator (asylum officer, ICE officer, IJ, or federal judge) should give the waiver term no effect whatsoever.

#### CONCLUSION

An essential problem with immigration waivers in criminal cases lies in hybridizing the two fields without having practitioners (defense counsel, prosecutors, and federal district judges) sufficiently knowledgeable to manage it.

The Supreme Court of the United States has repeatedly held that deportation is not a punishment for having committed a crime, but it is a civil penalty.<sup>304</sup> Perhaps it is time to rethink that notion. At least where non-citizen defendants are subject to discretionary judicial removal at their criminal sentencing and receive a sentencing discount for acquiescing in the removal, it is difficult to maintain with a straight face that this is not part of their criminal punishment. Some have suggested merging the two systems in part and making the decisions of the federal sentencing judge the exclusive route for resolving the immigration status of non-citizen criminals.<sup>305</sup> As discussed above, there are a myriad of serious problems with resorting to judicial removal, particularly where the immigration defense and relief options require careful and nuanced assessment of the immigration law. This is not federal judges' area of expertise, and of course, such a resolution will not account for those non-citizen immigrants who become "eligible" for deportation upon a state criminal conviction.

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303. See *supra* notes 42–43 and accompanying text.

304. *Galvan v. Press*, 347 U.S. 522, 531 (1954).

305. See, e.g., Taylor & Wright, *supra* note 99.

Alternatively, leaving the civil immigration system intact but modeling it more closely on the criminal system, as some experts suggest,<sup>306</sup> could be productive. On the prosecution side, ICE officers and attorneys petitioning for removal could accept the role of “ministers of justice,” rather than law enforcement officers or removal advocates. On the defense side, failure to provide immigration counsel to non-citizen federal criminal defendants, in light of criminal defense counsel who are handicapped in their ability to provide effective immigration advice about removal relief to their non-citizen clients, could produce a *Gideon* case for non-citizen defendants.<sup>307</sup> Finally, on the judicial side, we could “remove” IJs from the DOJ and place them in a separate agency to assure impartiality and eliminate the appearance of impropriety.<sup>308</sup>

Regardless of whether we accept the civil model of immigration enforcement or move towards a hybrid or fully criminal model, the current system should give us pause. Despite the staggering cost of retained counsel and limited access to *pro bono* counsel, non-citizens, in fact, win the right to remain in the United States in roughly 50% of the cases in which ICE officers seek a removal order!<sup>309</sup> Additionally, a fair number ordered removed eventually win their case on appeal.<sup>310</sup> The fact that the federal government is able to prevail in over 90% of its criminal prosecutions despite facing defense counsel and the beyond a reasonable

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306. Cade, *supra* note 62, at 5 (suggesting that DHS attorneys embrace disclosure obligation, accept the responsibility and authority to screen and decline removal cases, and initiate prehearing conferences).

307. *Gideon v. Wainwright*, 372 U.S. 235, 343 (1963) (holding that the Sixth Amendment requires that counsel be appointed at no cost to the criminal defendant if he cannot afford it). According to federal district court Judge Goldsmith in Detroit, in *Hamama*, 261 F. Supp. 3d at 827, motions to reopen an adverse deportation decision or to stay removal costs a client somewhere between \$5,000 and \$10,000; if the motion is granted and a merits hearing scheduled, the non-citizen can expect to pay additional fees of \$10,000 to \$30,000. The case can reach up to \$80,000. That fee is obviously out of reach of most non-citizens, and if they have signed waivers of the right to contest removal, the cost of their fight will certainly increase.

308. Bob Garfield, *The Slow Crisis in America's Immigration Courts*, WNYC, <https://www.wnyc.org/story/crisis-americas-immigration-courts/> (last visited Mar. 19, 2018) (quoting Dana Keigh Marks, President of the National Association of Immigration Judges).

309. *ICE Targeting: Odds Noncitizens Ordered Deported by Immigration Judge*, TRAC (Aug. 2014), [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_outcome\\_leave.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_outcome_leave.php). This figure is up from the 25% figure of cases in which ICE was unable to convince an IJ to order removal between FY 2001 and FY 2010. See also *ICE Seeks to Deport the Wrong People*, TRAC, <http://trac.syr.edu/immigration/reports/243/> (last visited Mar. 19, 2018) (noting that the rejection rate for ICE removal requests increased to 31%).

310. Cade, *supra* note 62, at 37 n.186.

doubt standard of proof,<sup>311</sup> while it loses almost half of its civil immigration matters facing individuals without counsel in a proceeding that requires only proof by a preponderance of evidence, tells us that something may be amiss. These sobering statistics suggest that ICE and federal prosecutors perhaps seek deportation orders when they should be exercising greater discretion. Until some reform of the immigration system is attained, the Department should refrain from forcing non-citizen defendants to agree to immigration waivers in order to receive lesser sentences in their criminal cases.

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311. In 2010, 91.3% of people charged with a federal felony offense were convicted, either by guilty plea or at trial, and 8.7% were acquitted or had their cases dismissed. *See Sourcebook of Criminal Justice Statistics, Online* tbl. 5.22.2010, ALBANY, <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (last visited Mar. 19, 2018).

Waiver Terms	M.D. Ala.	N.D. Ala.	S.D. Ala.	Alaska	Ariz.	Ariz.	E.D. Ark.	W.D. Ark.	C.D. Cal.	E.D. Cal.	N.D. Cal.
Agree to Remove	•	•	X	•	•	•	•	•	•	•	-
Agree or admit deportability or removability	•	•	X	•	•	X	•	•	•	•	-
Agree reinstate deportation order	•	•	X	•	•	X	•	•	•	•	-
Not challenge reinstatement deportation order	•	•	X	•	•	•	•	•	•	•	-
Waive immigration appeal, collateral attack, any reconsideration	•	•	•	•		X	•	•	•	•	-
Waive rights in or for hearing	•	X	•	•		•	•	•	•	•	-
No stay of deportation	•	•	•	•		•	•	•	•	•	-
No release from ICE	•	•	•	•		•	•	•	•	•	-
Abandon pending immigration case	•	•	•	•		•	•	•	•	•	-
Cooperate w/ removal	•	•	•	•		•	•	•	•	•	-
Obtain travel documents	•	•	•	•		•	•	•	•	•	-
No fear of return to country of origin	•	•	X	•	*Benefit	•	•	•	•	•	-

Key: "•" means "No waiver"; "X" means "Waiver language"; "-" means "No information"

\*Government agrees to recommend no reinstatement or order and can go before an immigration judge to decide citizenship

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Waiver Terms	S.D. Cal.	Colo.	Conn.	Del.	D.C.	M.D. Fla.	N.D. Fla.	S.D. Fla.	M.D. Ga.	N.D. Ga.	S.D. Ga.
Agree to Remove	•	•	•	•	•	X	•	•	•	•	–
Agree or admit deportability or removability	•	•	•	•	•	•	•	•	•	•	–
Agree reinstate deportation order	•	•	•	•	•	•	•	•	•	•	–
Not challenge reinstatement deportation order	•	•	•	•	•	•	•	•	•	•	–
Waive immigration appeal, collateral attack, any reconsideration	•	•	•	•	•	•	•	•	•	•	–
Waive rights in or for hearing	•	•	•	•	•	X	•	•	•	•	–
No stay of deportation	•	•	•	•	•	•	•	•	•	•	–
No release from ICE	•	•	•	•	•	•	•	•	•	•	–
Abandon pending immigration case	•	•	•	•	•	X	•	•	•	•	–
Cooperate w/ removal	•	•	•	•	•	X	•	•	•	•	–
Obtain travel documents	•	•	•	•	•	•	•	•	•	•	–
No fear of return to country of origin	•	•	•	•	•	•	•	•	•	•	–

Key: “•” means “No waiver”; “X” means “Waiver language”; “–” means “No information”



Waiver Terms	Guam	Haw.	Idaho	C.D. Ill.	N.D. Ill.	S.D. Ill.	N.D. Ind.	S.D. Ind.	N.D. Iowa	S.D. Iowa	Kan.
Agree to Remove	-	•	•	-	X	-	•	•	-	-	•
Agree or admit deportability or removability	-	•	•	-	X	-	•	•	-	-	•
Agree reinstate deportation order	-	•	•	-	•	-	•	•	-	-	•
Not challenge reinstatement deportation order	-	•	•	-	•	-	•	•	-	-	•
Waive immigration appeal, collateral attack, any reconsideration	-	•	•	-	•	-	•	•	-	-	•
Waive rights in or for hearing	-	•	•	-	X	-	•	•	-	-	•
No stay of deportation	-	•	•	-	•	-	•	•	-	-	•
No release from ICE	-	•	•	-	•	-	•	•	-	-	•
Abandon pending immigration case	-	•	•	-	X	-	•	•	-	-	•
Cooperate w/ removal	-	•	•	-	X	-	•	•	-	-	•
Obtain travel documents	-	•	•	-	•	-	•	•	-	-	•
No fear of return to country of origin	-	•	•	-	•	-	•	•	-	-	•

Key: “•” means “No waiver”; “X” means “Waiver language”; “-” means “No information”

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## IMMIGRATION DEFENSE WAIVERS

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Waiver Terms	E.D. Ky.	W.D. Ky.	E.D. La.	M.D. La.	W.D. La.	Me.	Md.	Mass.	E.D. Mich.	W.D. Mich.	Minn.
Agree to Remove	•	-	-	•	•	•	•	•	•	-	•
Agree or admit deportability or removability	X	-	-	•	•	•	•	•	X	-	•
Agree reinstate deportation order	X	-	-	•	•	•	•	•	•	-	•
Not challenge reinstatement deportation order	X	-	-	•	•	•	•	•	X	-	•
Waive immigration appeal, collateral attack, any reconsideration	•	-	-	•	•	•	•	X	•	-	•
Waive rights in or for hearing	•	-	-	•	•	•	•	X	•	-	•
No stay of deportation	•	-	-	•	•	•	•	X	•	-	•
No release from ICE	•	-	-	•	•	•	•	X	•	-	•
Abandon pending immigration case	•	-	-	•	•	•	•	•	•	-	•
Cooperate w/ removal	•	-	-	•	•	•	•	X	•	-	•
Obtain travel documents	X	-	-	•	•	•	•	•	•	-	•
No fear of return to country of origin	X	-	-	•	•	•	•	•	•	-	•

Key: “•” means “No waiver”; “X” means “Waiver language”; “-” means “No information”

Waiver Terms	N.D. Miss.	S.D. Miss.	E.D. Mo.	W.D. Mo.	Mont.	Neb.	Nev.	N.H.	N.J.	N.M.	E.D. N.Y.
Agree to Remove	•	•	–	•	–	•	•	•	•	•	•
Agree or admit deportability or removability	•	•	–	•	–	X	•	•	•	•	•
Agree reinstate deportation order	•	•	–	•	–	X	•	•	•	•	•
Not challenge reinstatement deportation order	•	•	–	•	–	X	•	•	•	X	•
Waive immigration appeal, collateral attack, any reconsideration	•	•	–	•	–	•	•	•	•	•	•
Waive rights in or for hearing	•	X	–	•	–	•	•	•	•	•	•
No stay of deportation	•	•	–	•	–	•	•	•	•	•	•
No release from ICE	•	•	–	•	–	•	•	•	•	•	•
Abandon pending immigration case	•	•	–	•	–	•	•	•	•	•	•
Cooperate w/ removal	•	•	–	•	–	•	•	•	•	•	•
Obtain travel documents	•	X	–	•	–	X	•	•	•	•	•
No fear of return to country of origin	•	X	–	•	–	X	•	•	•	•	•

Key: “•” means “No waiver”; “X” means “Waiver language”; “–” means “No information”

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Waiver Terms	N.D. N.Y.	S.D. N.Y.	W.D. N.Y.	E.D. N.C.	M.D. N.C.	W.D. N.C.	N.D.	N.D. Ohio	S.D. Ohio	E.D. Okla.	N.D. Okla.
Agree to Remove	•	•	•	-	•	•	•	-	•	-	•
Agree or admit deportability or removability	•	•	•	-	•	•	•	-	X	-	•
Agree reinstate deportation order	•	•	•	-	•	•	•	-	X	-	•
Not challenge reinstatement deportation order	•	•	•	-	•	•	•	-	•	-	•
Waive immigration appeal, collateral attack, any reconsideration	•	•	•	-	•	•	•	-	•	-	•
Waive rights in or for hearing	•	•	•	-	•	•	•	-	•	-	•
No stay of deportation	•	•	•	-	•	•	•	-	•	-	•
No release from ICE	•	•	•	-	•	•	•	-	•	-	•
Abandon pending immigration case	•	•	•	-	•	•	•	-	•	-	•
Cooperate w/ removal	•	•	•	-	•	•	•	-	•	-	•
Obtain travel documents	•	•	•	-	•	•	•	-	•	-	•
No fear of return to country of origin	•	•	•	-	•	•	•	-	•	-	•

Key: “•” means “No waiver”; “X” means “Waiver language”; “-” means “No information”

Waiver Terms	W.D. Okla.	Or.	E.D. Pa.	M.D. Pa.	W.D. Pa.	P.R.	R.I.	S.C.	S.D.	E.D. Tenn.	M.D. Tenn.
Agree to Remove	•	•	•	•	•	•	•	•	•	•	–
Agree or admit deportability or removability	•	•	•	•	•	•	•	•	•	X	–
Agree reinstate deportation order	•	•	•	•	•	•	•	•	•	•	–
Not challenge reinstatement deportation order	•	X	•	•	•	•	•	•	•	•	–
Waive immigration appeal, collateral attack, any reconsideration	•	•	•	•	•	•	•	•	•	•	–
Waive rights in or for hearing	•	•	•	•	•	•	•	•	•	X	–
No stay of deportation	•	•	•	•	•	•	•	•	•	•	–
No release from ICE	•	•	•	•	•	•	•	•	•	•	–
Abandon pending immigration case	•	•	•	•	•	•	•	•	•	X	–
Cooperate w/ removal	•	•	•	•	•	•	•	•	•	X	–
Obtain travel documents	•	•	•	•	•	•	•	•	•	X	–
No fear of return to country of origin	•	•	•	•	•	•	•	•	•	•	–

Key: “•” means “No waiver”; “X” means “Waiver language”; “–” means “No information”

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Waiver Terms	W.D. Tenn.	E.D. Tex.	N.D. Tex.	S.D. Tex.	W.D. Tex.	Utah	Vt.	V.I.	E.D. Va.	W.D. Va.	E.D. Wash.
Agree to Remove	•	•	•	•	•	•	-	•	•	•	-
Agree or admit deportability or removability	•	•	•	•	•	•	-	•	•	•	-
Agree reinstate deportation order	•	•	•	•	•	X	-	•	•	•	-
Not challenge reinstatement deportation order	•	•	•	•	•	X	-	•	•	•	-
Waive immigration appeal, collateral attack, any reconsideration	•	•	•	•	•	•	-	•	•	•	-
Waive rights in or for hearing	•	•	•	•	•	•	-	•	•	•	-
No stay of deportation	•	•	•	•	•	•	-	•	•	•	-
No release from ICE	•	•	•	•	•	•	-	•	•	•	-
Abandon pending immigration case	•	•	•	•	•	•	-	•	•	•	-
Cooperate w/ removal	•	•	•	•	•	•	-	•	•	•	-
Obtain travel documents	•	•	•	•	•	•	-	•	•	•	-
No fear of return to country of origin	•	•	•	•	•	•	-	•	•	•	-

Key: “•” means “No waiver”; “X” means “Waiver language”; “-” means “No information”

Waiver Terms	W.D. Wash.	N.D. W. Va.	S.D. W. Va.	E.D. Wis.	W.D. Wis.	Wyo.	
Agree to Remove	•	-	-	-	-	•	
Agree or admit deportability or removability	•	-	-	-	-	•	
Agree reinstate deportation order	•	-	-	-	-	•	
Not challenge reinstatement deportation order	•	-	-	-	-	•	
Waive immigration appeal, collateral attack, any reconsideration	•	-	-	-	-	•	
Waive rights in or for hearing	•	-	-	-	-	•	
No stay of deportation	•	-	-	-	-	•	
No release from ICE	•	-	-	-	-	•	
Abandon pending immigration case	•	-	-	-	-	•	
Cooperate w/ removal	•	-	-	-	-	•	
Obtain travel documents	•	-	-	-	-	•	
No fear of return to country of origin	•	-	-	-	-	•	

Key: “•” means “No waiver”; “X” means “Waiver language”; “-” means “No information”