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Subpoenas in Immigration Court

by Andrea Saenz

Although noncitizens in removal proceedings lack the full constitutional protections of criminal defendants or the broad discovery tools of civil litigants in Federal court, the Immigration and Nationality Act and accompanying regulations provide a number of protections related to evidence. Aliens have an explicit statutory right to present evidence and cross-examine adverse witnesses. Section 240(b)(4)(B) of the Act, 8 U.S.C. § 1229a(b)(4)(B). Evidence is not always easy to obtain, however, and parties may need the resources of the court to exercise this right or to help meet their burdens of proof and production. This article explains the Immigration Court's subpoena power, its treatment by the Board of Immigration Appeals and Federal circuit courts of appeals, and the incomplete enforcement mechanisms Immigration Judges now have.

Immigration Judges may issue subpoenas for the attendance of witnesses or the production of documents during the removal proceeding. Section 240(b)(1) of the Act; 8 C.F.R. §§ 1003.35(b), 1287.4(a)(2)(ii). They may also order depositions taken for the testimony of essential witnesses who are not reasonably available for the hearing. 8 C.F.R. § 1003.35(a). Subpoenas may be issued sua sponte or on application of either party, provided the motion for subpoena states what the party expects to prove with the requested evidence and shows there has been a diligent but unsuccessful effort to obtain it. 8 C.F.R. §§ 1003.35(b)(1)–(2), 1287.4(a)(2)(ii)(A)–(B). If those requirements are met and the Immigration Judge is satisfied that the witness will not appear or produce the requested material and that the evidence is "essential," he or she shall issue a subpoena. 8 C.F.R. §§ 1003.35(b)(3), 1287.4(a)(2)(ii)(C). The *Immigration Court Practice Manual* contains detailed instructions for filing a motion for subpoena, as well as a sample subpoena. *Immigration Court Practice Manual*, § 4.20, at 82, App. N, at N-1 (Apr. 1, 2008), http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

In practice, subpoenas are usually requested by the respondent, who generally lacks the resources of the Department of Homeland Security ("DHS") or the Department of Justice ("DOJ") to obtain documents. Respondents might request subpoenas for the testimony of hard-to-reach witnesses, or for the production of medical records, criminal records, or other materials that might make their case stronger, including documents in the DHS's possession. One common scenario involves allegations of marriage fraud in cases where the Government introduces out-of-court statements from the respondent's former spouse and the respondent seeks to cross-examine that person. In this and related fact patterns, the denial of a subpoena may be closely linked with an Immigration Judge's decision to rely on or dismiss the hearsay documents in question when ruling on the case in chief.

Immigration Court Subpoenas at the Board and in the Federal Courts

The Federal courts have reviewed requests to subpoena various categories of information, with only one real trend apparent: the courts carefully review whether the Immigration Judge faithfully applied the regulatory standards for a subpoena. The standard of review used by the circuit courts of appeals may depend on whether the Immigration Judge's action is framed as a constitutional violation or as a statutory or regulatory violation, although in most cases, the denial of a subpoena will be reviewed for an abuse of discretion. *See Guevara Flores v. INS*, 786 F.2d 1242, 1252 (5th Cir. 1986) (finding no abuse of discretion under the regulation); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 136 (3d Cir. 1983) (stating that the Immigration Judge's denial of a subpoena was "not an abuse of discretion nor a denial of due process").

Reversal of an Immigration Judge's Denial of a Subpoena

While the use of subpoenas may be rare in some Immigration Courts, the circuit courts have not been shy about reversing those Immigration Judges who dismissed valid motions without following the regulations or who made no attempt to enforce a subpoena that had been issued. The Board has been quieter on the topic of Immigration Court subpoenas and has not mentioned them in a precedent decision since 1995.

In *Malave v. Holder*, 610 F.3d 483, 487-88 (7th Cir. 2010), the United States Court of Appeals for the Seventh Circuit reversed an Immigration Judge who admitted written statements accusing Malave of marriage fraud but denied a subpoena request for her ex-husband based on the Immigration Judge's belief that the witness could not be found. Judge Richard Posner, writing for the panel, dismissed this reason as speculation, writing that "[a] prediction that a person can't be found, or that cross-examination won't be fruitful, is a poor reason to deny a litigant the statutory entitlement to cross-examine adverse witnesses." *Id.* at 488. This approach is in contrast to an early Board case where the Board upheld the Immigration Judge's denial of a subpoena, among other reasons, because the respondent did not sufficiently show that her father, a migrant worker, could be located. *Matter of Vergara*, 15 I&N Dec. 388, 389-90 (BIA 1975). Although the court in *Malave* states that it avoided the question of what constitutes proper enforcement of a subpoena, the opinion assumes that the Immigration Judge could have asked "federal agents to enforce the subpoena"—which, as discussed later, may not be such a useful assumption. *Malave*, 610 F.3d at 486. *Malave* also emphasizes that while there is no Sixth Amendment right of confrontation in removal proceedings, the rights to a fair hearing and cross-examination of adverse witnesses have been provided by statute, so the improper denial of a subpoena is still a violation of an alien's rights and therefore potential grounds for reversal. *Id.* at 487.

The Eleventh Circuit recently reversed an Immigration Judge for denying a subpoena in an unpublished but thorough decision. *Xue Tong Zou v. United States Att'y Gen.*, 367 F. App'x 36, 40 (11th Cir. 2010). The Immigration Judge denied a motion to subpoena the author of a forensic document report that found several of Zou's documents to be false, reasoning that because the DHS promised to produce the witness, a subpoena was not necessary. At several subsequent hearings, however, the DHS did not produce the witness and appeared to have made no efforts to do so. The Immigration Judge did not issue a subpoena or grant a continuance; instead she indicated that she afforded "great weight" to the forensic report and denied Zou's application for asylum. *Id.* at 39. The court found this deprived the petitioner of a fair hearing, stating that "[t]he IJ's broad authority to regulate the course of the proceeding does not trump Zou's constitutional right to a fair hearing." *Id.* at 40.

Most other cases involving Immigration Court subpoenas come from the Ninth Circuit, where Immigration Judges have been reversed for a number of

different reasons. In *Agyeman v. INS*, 296 F.3d 871, 883 (9th Cir. 2002), the Immigration Judge was found to have erred by repeatedly telling the respondent, detained thousands of miles from home, that his wife had to testify in person, instead of informing him that she could be subpoenaed to appear at a local office of the former Immigration and Naturalization Service ("INS"). In *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001), the court found error where the Immigration Judge denied a request to subpoena the country conditions documents the asylum office used to determine that the respondent was not credible, finding that they were not "essential." The court acknowledged that the Immigration Judge was required to consider the case independently of the asylum officer's assessment but stated that "there was a high probability not only that the government would challenge the Kaurs' credibility, but that the resource materials would be a cornerstone of the government's effort to impeach their testimony." *Id.* at 1101. The court concluded that the documents would enable the Kaurs to ensure that they addressed any discrepancies between their claim and the resource materials, and since an adverse credibility determination was due high deference on appeal, they had made a showing the materials were essential.

The Ninth Circuit has also criticized the Government when subpoenas were issued but not obeyed or enforced. In another marriage fraud case, the Immigration Judge's reliance on a hearsay affidavit from the petitioner's wife was found to be fundamentally unfair where the INS knew she was available to testify but chose not to call her. *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997). The fact that the Immigration Judge had issued a subpoena for the witness, who did not obey it, did not cure the unfairness. *See also Ramos de Rojas v. Gonzales*, 2007 WL 705832 (9th Cir. Mar. 6, 2007) (unpublished) (finding a violation of 8 C.F.R. § 1003.35(b) and prejudice to the petitioner where the Immigration Judge had issued a subpoena for a witness to testify in person and bring documents relating to the petitioner's daughter but allowed the witness to testify telephonically and without the documents).

Affirmance of an Immigration Judge's Denial of a Subpoena

Less colorful, but more common, are cases where the Federal courts or the Board affirmed Immigration Judges' denial of a subpoena. Several courts have found that Immigration Judges did not err in finding that the respondent did not make a diligent effort to obtain the evidence before seeking a subpoena. *Stolaj v. Holder*, 577 F.3d 651, 659 (6th Cir. 2009) (noting there is no Sixth Amendment right of confrontation in removal proceedings); *Quintanilla v. Gonzales*, 151 F. App'x 53, 55 (2d Cir. 2005); *Matter of Duran*, 20 I&N Dec. 1, 3 (BIA 1989). Other Immigration Judges have been affirmed where they found the evidence requested by the subpoena was not "essential," as required by the regulation. *See Cuadras v. United States INS*, 910 F.2d 567, 573 (9th Cir. 1990); *Marroquin-Manriquez*, 699 F.2d at 136; *Martinez-Garcia v. Holder*, 312 F. App'x 707, 708 (5th Cir. 2009) (per curiam); *Hernandez v. Mukasey*, 261 F. App'x 985, 986 (9th Cir. 2007) (noting there must be prejudice to prevail on a due process challenge); *Quintanilla*, 151 F. App'x at 55; *Matter of Linnas*, 19 I&N Dec. 302, 309 (BIA 1985). In a rare case dealing with subpoenas in the context of a bond proceeding, the Board affirmed the Immigration Judge's denial of a subpoena and admission of correspondence from the Department of State for a respondent accused of posing a threat to national security. *Matter of Khalifah*, 21 I&N Dec. 107, 110, 112 (BIA 1995). The Board agreed with the Immigration Judge that bond proceedings are informal and that the denial did not cause him prejudice since the Immigration Judge did not rely on the hearsay evidence in finding the respondent a flight risk.

For those who are both subpoena enthusiasts and Beatles fans, Immigration Court subpoenas even figured in the deportation case against John Lennon. *Matter of Lennon*, 15 I&N Dec. 9, 13-14 (BIA 1974), *vacated on other grounds by Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). The Board affirmed the Immigration Judge's denial of a subpoena for materials in support of Lennon's motion to terminate the proceedings as improvidently begun, noting that such a motion was outside the scope of the court's jurisdiction. While the Board's holding regarding Lennon's deportability for a drug conviction has been overruled by *Matter of Esqueda*, 20 I&N Dec. 850 (BIA 1994), the proposition that Immigration Judges should not issue subpoenas in support of issues outside the court's jurisdiction appears as sound as ever.

Courts have also affirmed Immigration Judges who issued a subpoena but properly declined to enforce it. In *Matter of DeVera*, 16 I&N Dec. 266, 269 (BIA

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CIRCUIT COURT DECISIONS FOR JULY 2011

by John Guendelsberger

The United States courts of appeals issued 260 decisions in July 2011 in cases appealed from the Board. The courts affirmed the Board in 232 cases and reversed or remanded in 28, for an overall reversal rate of 10.8% compared to last month's 17.5%. There were no reversals from the First, Fourth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for July 2011 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	31	29	2	6.5
Third	33	29	4	12.1
Fourth	8	8	0	0.0
Fifth	8	8	0	0.0
Sixth	10	10	0	0.0
Seventh	6	4	2	33.3
Eighth	1	1	0	0.0
Ninth	149	131	18	12.1
Tenth	0	0	0	0.0
Eleventh	14	12	2	14.3
All	260	232	28	10.8

The 260 decisions included 133 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 50 direct appeals from denials of other forms of relief from removal or from findings of removal; and 77 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	133	118	15	11.3
Other Relief	50	43	7	14.0
Motions	77	71	6	7.8

The 15 reversals or remands in asylum cases involved credibility (4 cases); past persecution (3 cases); nexus (2 cases); the 1-year filing bar (2 cases); and 1 case each to further address issues of firm resettlement, pattern and practice of persecution, disfavored group, and humanitarian asylum.

The seven reversals or remands in the "other relief" category addressed a variety of issues, including the section 212(c) waiver (two cases) and criminal grounds for removal (two cases). Three cases remanded to further address issues involving proof of alienage, a due process claim, and the basis for rejecting an appeal brief.

The six reversals in motions cases included issues involving changed country conditions, ineffective assistance of counsel, and a request for withdrawal of voluntary departure.

The chart below shows the combined numbers from January through July 2011 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
First	10	8	2	20.0
Ninth	1214	991	223	18.7
Tenth	23	20	3	13.0
Seventh	31	27	4	12.9
Eighth	19	17	2	10.5
Third	211	191	20	9.5
Eleventh	138	129	9	6.5
Sixth	64	60	4	6.3
Fourth	74	70	4	5.4
Second	355	337	18	5.1
Fifth	91	88	3	3.3
All	2230	1938	292	13.1

Last year's reversal rate at this point (January through July 2010) was 11.6%, with 2579 total decisions and 300 reversals.

The numbers by type of case on appeal for the first 7 months of 2011 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	1100	954	146	13.3
Other Relief	464	388	76	16.4
Motions	666	596	70	10.5

John Guendelsberger is a Member of the Board of Immigration Appeals.

When Cousins Are Two of a Kind:
Circuits Issue Not-Quite-Identical Paired Decisions
By Edward R. Grant and Patricia M. Allen

Among iconic 1960s sitcoms, perhaps none reflected the era better than *The Patty Duke Show*. Artfully contrived (particularly its seamless use of split-screen technique), relentlessly effervescent, and possessing of a theme song that sticks like Bazooka to the bottom of your brain, its 104 episodes sent the timeless message that for the most part, teenage angst is something to be laughed at/with, rather than wallowed in. Today, of course, the cousin from Brooklyn Heights (Patty Lane) would be just as likely to adore a crêpe suzette as her cousin from Scotland (Cathy). And her father would probably be a hedge fund manager, not a newspaper editor. But as the proud uncle of eight nieces, one author can attest that cousins still can be two (or three, or four) of a kind.

Not by contrivance, but coincidence, our Federal circuits occasionally issue decisions that can likewise be described as cousins, if not always identical. Recent months have seen several such "paired" cases, ranging from the validity of the statutory requirements for cancellation of removal to the reach of the "fugitive disentitlement" doctrine. The Ninth Circuit was also responsible for its own "two of a kind" pair of decisions and, in the process, profoundly impacted the adjudication of criminal grounds of removal.

Constitutional Challenges to Cancellation of Removal Standards

This past July, both the Third and Seventh Circuit Courts of Appeals addressed constitutional challenges to the standards applied in the adjudication of applications for cancellation of removal filed by nonpermanent resident aliens under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). *Flores-Nova v. Att'y Gen. of U.S.*, No. 10-2044, 2011 WL 2989709 (3d Cir. July 25, 2011); *Marin-Garcia v. Holder*, No. 10-3912, 2011 WL 3130273 (7th Cir. July 22, 2011). Both circuits rejected the petitioners' assertions, which concerned violations of due process, equal protection, and international law.

In *Flores-Nova*, 2011 WL 2989709, the Immigration Judge found that the petitioners, the parents of three American born children (ages 5, 10, and 11), did not maintain the requisite continuous presence in the United States because of their 176-day absence. The Board affirmed and the Third Circuit denied the petition for review. First, the Third Circuit gave short shrift to the petitioners' argument that the Board had impermissibly construed section 240A(d)(2) of the Act, thus depriving it of *Chevron* deference. Seeing no ambiguity in the provision relating to the circumstances in which continuous physical presence is considered broken, the court dismissed this argument as "meritless." *Id.* at *2.

The court also rejected the petitioners' second argument that the continuous physical presence requirement itself is a violation of their equal protection rights under the Due Process Clause. *Id.* The court stated that the petitioners, as nonpermanent resident aliens who were denied cancellation of removal based on their departure from the United States for an extended period of time, were not similarly situated to permanent resident aliens seeking naturalization, so the statute governing cancellation of removal did not violate equal protection based on disparate treatment of aliens. *Id.* The court reasoned that "[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not [mean] that all aliens are entitled to all the advantages of citizenship" and stated that the Clause does not establish that "all aliens must be placed in a single homogeneous legal classification." *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 78 (1976)) (internal quotation marks omitted). Finally, the court rejected the petitioners' assertion that the statutory provision is unconstitutional, finding that it does not involve a suspect class and there is no basis to conclude that it "is not rationally related to a legitimate government purpose." *Id.*

The petitioners also alleged that the United States must ensure their right to a meaningful hearing as directed

under a decision made by the Inter-American Commission on Human Rights ("IACHR"), certain provisions of the American Declaration of the Rights and Duties of Man, and Article 3(1) of the United Nations Convention on the Rights of the Child. The final arguments were deemed unpersuasive by the court because the petitioners did not establish that any of these laws were actually binding on the United States. *Id.* at *3-4.

The petitioner in *Marin-Garcia*, father of three American-born children (between 10 and 15 years of age), presented the Seventh Circuit with an entirely different constitutional argument. The petitioner alleged that the Board's framework analysis of the exceptional and extremely unusual hardship standard in section 240A(b)(1)(D) of the Act, which was applied in *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), is unconstitutional because it "compares the hardship of citizen-children to the hardship of aliens in general, rather than comparing the hardship of citizen-children to the 'citizen children population at large." *Marin-Garcia*, 2011 WL 3130273, at *2 (internal quotation mark omitted). Before addressing the argument, the court recalled that it had previously indicated its skepticism about a "nearly identical argument" made in another case, *Leyva v. Ashcroft*, 380 F.3d 303, 305 (7th Cir. 2004). In that case, the petitioners argued that it was a violation of due process to compare his United States citizen children to "other similarly situated youngsters who have grown up in the United States and faced the prospect of relocating to a country abroad with their alien parents,' instead of comparing them to all citizen children." *Id.* (internal quotation mark omitted). However, the court in *Leyva* did not have jurisdiction at the time to address this issue. *Id.* at 305-06.

Having the authority to take up this argument in *Marin-Garcia*, the Seventh Circuit first observed that the petitioner's argument "is based on an erroneous reading of the Board's decision in *Matter of Monreal*." *Marin-Garcia*, 2011 WL 3130273, at *2. The court dismissed the first half of the petitioner's argument by acknowledging that the framework applied in *Matter of Monreal* is consistent with the statutory provision, is straightforward, and contained thoughtful, as well as comprehensive, analysis. *Id.* at *4. The court further recognized that the framework applied in *Matter of Monreal* does not require that the hardship of the citizen-relatives of the alien "must or could be compared to the hardship endured by the aliens themselves" or "make distinctions on the basis of race," as argued by the petitioner. *Id.* In addressing the second half of the petitioner's argument, the court, as it did in *Leyva*, expressed its confusion as to how this argument actually would aid the petitioner, where the suggested comparison group would likely greatly raise the hardship standard because "it would seem that the shorter the time period that a family has remained in the United Ststes, the stronger the cultural, familial, and economic ties to the country from which the family emigrated." *Id.*

Finally, the Seventh Circuit addressed an argument it acknowledged as the petitioner's "real (if never fully articulated) contention" concerning the due process concerns raised by the constructive removal of United States citizen children of parents who "are forced to leave." *Id.* at *5. The court recognized how the children of United States citizens "will not face the specter of being taken to a land they have never known" and quoted from a 1922 United States Supreme Court Chinese Exclusion Act case holding that "being effectively forced to leave the country may deprive a person of 'all that makes life worth living." *Id.* (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)) (internal quotation mark omitted). The court also recognized Congress' "expansive" authority over the removal of individuals who have unlawfully entered and that the constitution "does not require things which are different in fact . . . to be treated in law as though they were the same." *Id.* (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)) (internal quotation marks omitted). Taking the foregoing into account and stressing the "legitimate and long-recognized Congressional policy of protecting the integrity of the family unit" and the provisions in the Act, which allow aliens the chance to cancel removal if they have citizen relatives, the court did not find any constitutional violation. *Id.*

The court also dismissed the petitioner's assertion that his removal proceedings before the Immigration Judge did not conform to the constitutional due process requirements set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), by finding that cancellation of removal "is a discretionary form of relief, [and therefore] does not confer onto [the petitioner] a liberty or property interest." *Marin-Garcia*, 2011 WL 3130273, at *6 (quoting *Champion v. Holder*, 626 F.3d 952, 957 (7th Cir. 2010)) (internal quotation marks omitted). The court also rejected the petitioner's contention that his removal would "unconstitutionally burden the voting rights of his daughters," by observing that the petitioner's daughters are free to return to the United States upon reaching voting age or voting through absentee ballots. *Id.*

Are You a "Fugitive" if DHS Knows Your Address?

The "fugitive disentitlement" doctrine has been employed by several circuit courts to dismiss petitions for review filed by aliens who have ignored notices from the Department of Homeland Security ("DHS") to report for removal ("bag and baggage letters"). *See Gao v. Gonzales*, 481 F.3d 173 (2d Cir. 2007); *Garcia-Flores v. Gonzales*, 477 F.3d 439 (6th Cir. 2007); Edward R. Grant, *The "Fugitive Disentitlement Doctrine" and Other Limits on Circuit Court Review*, Immigration Law Advisor, Vol. 1, No. 3, at 4 (Mar. 2007). *But see Wenqin Sun v. Mukasey*, 555 F.3d 802, 805 (9th Cir. 2009) (stating that the doctrine was not applicable during a pending petition for review where the alien's whereabouts were known to the DHS, counsel, and the court).

The Second Circuit recently clarified its position in *Gao*, holding that the doctrine ought not apply where the petitioner, while the recipient of a bag-and-baggage letter, had also received two contemporaneous stays of removal from the court of appeals and had continued to reside at the address on file with the DHS. *Nen Di Wu v. Holder*, 646 F.3d 133 (2d Cir. 2011) (*Nen Di Wu II)*; *see also Nen Di Wu v. Holder*, 617 F.3d 97 (2d Cir. 2010) (*Nen Di Wu I).*

The court concluded that none of the four interests underlying the doctrine supported its imposition against Wu. First, the DHS did not establish that any action by Wu, other than his failure to respond to two bag-and-baggage letters, would make it difficult to enforce the order. He lived at the same address, and only 14 months had passed from the issuance of those letters, in contrast to the 7 years that elapsed in *Gao*. Second, there was no "disdain" of an order of the Second Circuit—particularly since the court had granted two stays of removal while Wu's petition was pending. Wu was obligated to respond to the DHS notices; but the court held this to be defiance of "executive command" rather than a court order. Conflating the two, the court reasoned, "ultimately weakens rather than protects the court's unique dignity, which is, after all, the doctrine's focus." *Nen Di Wu II*, 646 F.3d at 137.

Third, the court concluded that application of the doctrine to "simple immigration cases like this one" would not "promote the efficient operation of the courts by preserving judicial resources." *Id.* (quoting *Gao*, 481 F.3d at 177) (internal quotation marks omitted). The court's streamlined docket for resolving nonargument appeals already "minimizes the expenditure of judicial resources," and it is "unlikely that disposing of more of these cases via motions to dismiss would save any additional judicial resources." *Id.* Doing so might save Department of Justice resources by obviating the need for a brief, but the court already disposed of that claim in *Nen Di Wu I*, holding that a motion to dismiss on fugitive disentitlement should be decided only after full merits briefing of the case. *Nen Di Wu I*, 617 F.3d at 100. Interestingly, *Nen Di Wu I* suggested that the Government reissue the "bag-and-baggage" letter and see if there was any response. The DHS did so, and there was none, nor an explanation for this failure. *Nen Di Wu II*, at 646 F.3d at 134-35.

Finally, the court concluded that Wu's fugitive status had not prejudiced the Government's case. Because of the stays granted by the court of appeals, the Government would still have been compelled to brief the merits even if Wu had responded to the notices. Wu's lack of response diminished the equities in his favor, but unlike the petitioner in *Gao*, he did not abuse the system by absconding for 7 years, then filing an untimely motion to reopen based on events occurring during his fugitive status. Gao's story, the court concluded, represents "an extreme situation and Wu's the more normal case." *Id.* at 138. The court thus declined in the exercise of discretion to dismiss the petition, but in a separate summary order, it denied the petition on the merits.

On facts somewhere between those in *Gao* and *Nen Di Wu II*, the Fifth Circuit concluded that the fugitive disentitlement doctrine *barred* its consideration of the alien's petition for review—departing considerably, it appears, from the Second Circuit's reasoning that this is a discretionary rule to be used sparingly. *Bright v. Holder*, No. 10-60300, 2011 WL 3435833 (5th Cir. Aug. 8, 2011). The petitioner, an aggravated felon, was found removable and his appeal to the Board was dismissed in December 2008. He filed no petition for review and ignored a January 2009 bag-and-baggage letter, instead filing a motion to reopen in March 2009. The DHS argued successfully to the Board that he did not merit a favorable exercise of discretion because of his failure to report; Bright unsuccessfully opposed this by claiming that he continued to live at the same address to which the notice was sent and made no attempt to evade authorities.

Citing *Gao*, but apparently unaware of the Second Circuit's clarification in *Nen Di Wu II*, the Fifth Circuit concluded that "[a]pplying the fugitive disentitlement doctrine to those who evade removal despite their address being known by DHS will encourage voluntary surrenders, the efficient operation of the courts, and respect for the judiciary and the rule of law." *Bright*, 2011 WL 3435833, at *2. Without explicitly addressing the Second Circuit's dichotomy between the "extreme" and "normal" case, *Bright* appears to adopt the view that any refusal to report to a DHS notice warrants imposition of the doctrine. The court cited the same factors underpinning the Second Circuit's analysis in *Nen Di Wu II*, also indicating that it understood the reach of its decision to include the "normal" bag-and-baggage" absconder.

The split in the circuits on fugitive disentitlement, therefore, appears to have deepened. No longer can *Gao* be described as a broad endorsement of the doctrine in immigration cases; meanwhile, the Fifth Circuit has at least implicitly rejected the limitations imposed by *Nen Di Wu II*.

Is the (Post-)Departure Bar About To Leave the Building?

We have previously chronicled the travails of the "departure bars" to motions to reopen set forth in 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1). *See* Edward R. Grant, *The Right To File a Motion To Reopen: An Intended Consequence of IIRIRA?*, Immigration Law Advisor, Vol. 4, No. 1, at 5 (Jan. 2010). The rout has continued over the past 18 months. *See Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (all invalidating the departure bar, at least in part); *see also* Edward R. Grant, *The 2010 Top Twenty: Few Easy Choices*, Immigration Law Advisor, Vol. 4, No. 10 at 1, 16 (Nov.-Dec. 2010). *But see Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010) (holding that the departure bar was properly invoked to deny sua sponte reopening of an untimely motion to reopen); *Toora v. Holder*, 603 F.3d 282, 288 (5th Cir. 2010) (finding that the departure bar to motions to reopen is mandatory and jurisdictional); *Rosillo-Puga v. Holder*, 580 F.3d 1147 (10th Cir. 2009) (finding the departure bar to be valid).

To the list must now be added the recent Third Circuit decision invalidating the "post-departure bar" and potentially the Tenth Circuit, which has granted rehearing en banc to a case decided in late 2010 that adhered to its prior upholding of the bar. *See Contreras-Bocanegra v. Holder*, 629 F.3d 1170 (10th Cir. 2010), *petition for reh'g en banc granted*, No. 10-9500, 2011 WL 3332469 (10th Cir. Aug. 2, 2011); *Prestol Espinal v. Att'y Gen. of U.S.*, No. 10-1473, 2011 WL 3314945 (3d Cir. Aug. 3, 2011).

Space does not permit a full discussion of the 2011 cases; suffice it to say that the cousins are starting to look more and more identical. As previously noted, the courts, following *Dada v. Mukasey*, 554 U.S. 1 (2008), hold that section 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-593, codified at sections 240(c)(6) and (7) of the Act, 8 U.S.C. § 1229a(c)(6) and (7), defines a "right" to file a motion to reopen that cannot be circumscribed by regulation. *See Prestol Espinal*, 2011 WL 3314945, at *3-6. The Third Circuit rejected the Government's argument that the statutory provision is ambiguous, concluding that Congress left "no gap to fill" when it enacted the statutory right to file a motion and declined to include the language of the departure bar that had been added to the regulations months earlier. *Id.* at 7-8.

The Tenth Circuit not only set *Contreras-Bocanegra* for further oral argument, but it also posed four questions for the parties to address in supplemental briefing:

(1) Could the Attorney General's regulatory decision to limit the "jurisdiction" of the BIA through the post-departure bar (8 C.F.R. § 1003.2(d)) be characterized as a "categorical exercise of discretion"?

(2) There appears to be some tension between [section 212(a)(9)(A)'s] bar on admission of previously removed aliens and [section 240(c)(6) & (7)'s] allowance for reopening or reconsideration in at least some circumstances. Could the post-departure bar be a reasonable regulatory response by the Attorney General to this apparent ambiguity?

(3) If a removed alien succeeds in a motion to reopen or reconsider, what relief can the BIA grant? How does the availability and nature of any possible relief from

the BIA inform the reasonableness of 8 C.F.R. 1003.2(d)'s post-departure bar?

(4) May a removed alien seek reconsideration or reopening directly from the Attorney General? If so, does the ability to seek reconsideration or reopening from additional sources satisfy [section 240(c)(6) and (7) of the Act]?

Contreras-Bocanegra, 2011 WL 3332469, at *1. The questions posed here do not precisely tip the court's hand, but they do signal an interest in how, as a practical matter, post-departure cases would be handled should the court abandon *Rosillo-Puga*, 580 F.3d 1147. The court will no doubt take its best stab at answering these questions; eventually, however, a statutory and regulatory "fix" may be required to clarify the contours of the "right" to file a motion to reopen, even from abroad.

Persecution: Are There Standards Enough?

One of the most noteworthy cases of the summer was the Seventh Circuit's effort to establish more precise definitions for the elusive concept of "persecution." *Stanojkova v. Holder*, 645 F.3d 943 (7th Cir. 2011), *as amended*, 2011 WL 2725850. The petitioners, ethnic Albanians from Macedonia, endured a nocturnal attack in their home by masked Macedonian nationalists (members of the paramilitary group called the "Lions") in July 2002. The pregnant wife was fondled and threatened with more severe sexual assault, and the husband was beaten on the head with the back of a gun, causing bruises and swelling. The wife's parents, living in the same house, were rendered unconscious by a chemical spray. Police informed the couple that they could not control the Lions, and the petitioners soon fled Macedonia and entered the United States illegally. They filed untimely for asylum, and their application for withholding of removal was denied by the Immigration Judge, who ruled, inter alia, that the single 10-minute assault did not rise to the level of persecution. The Board affirmed, chiefly on the issue of persecution.

The Seventh Circuit likewise focused on this question and in rather severe language, found the guidance offered by decisions of both the Board and its sister circuits to be wanting. "Nor can we find a useful definition [of persecution] in opinions by the Board (no regulation addresses the issue either) or by the courts, although the importance of distinguishing between harassment and persecution has been noted. In terms of outcome the cases are all over the lot. Both sides of the present case are able to cite cases that support their position; we will spare the reader these citations, which cancel each other out." *Id.* at *3 (citations omitted).

The criticism is a bit curious; myriad legal questions can conjure authoritative citations seemingly coming to opposite conclusions. The question whether a particular "one-off" incident rises to the level of persecution is neither novel nor entirely without sound guidance. Nevertheless, the Seventh Circuit found the Board's standard, articulated in *Matter of Acosta*, 19 I&N Dec. 211, 211 (BIA 1985), to be "vacuous," the decisions of the courts of appeals "to be of the 'I know it when I see it' variety," and the result, "well illustrated by the administrative opinions in this case," to be "capricious adjudication at both the administrative and judicial level." *Stanojkova*, 2011 WL 2725850, at *5.

In an attempt to create "minimum coherence" in the adjudication of persecution claims, *id.*, the Seventh Circuit panel distinguished three forms of oppressive behavior "toward a group despised by the government or by powerful groups that the government can't or won't control." *Id.* at *4. First is unequal treatment, exemplified by India's caste system or Jim Crow laws in the U.S. Second is harassment, which involves specific targeting of the disfavored group for adverse treatment, but without the application of significant physical force—the court offers sexual harassment, even to the level of an unwanted hug, as an example. *Id.*

The third level—persecution—involves "the use of *significant* physical force against a person's body, or the infliction of comparable physical harm without direct application of force (locking a person in a cell and starving him would be an example), or nonphysical harm of equal gravity—that last qualification is important because refusing to allow a person to practice his religion is a common form of persecution even though the only harm it causes is psychological." *Id.* A credible threat to cause grave physical harm may also constitute "persecution."

"The line between harassment and persecution," the court indicated, is that between "the nasty and the barbaric," or between "wishing you were living in another country and being so desperate that you flee without any assurance of being given refuge." *Id.* The line was crossed in this case, the court concluded, by the severity of the attack and the lead petitioner's powerlessness against the

Lions. "Why would anyone hang around in Macedonia after that if there was any way out?" *Id.*

To the extent the Seventh Circuit has broken new ground here, it is likely that the question of how much the subjective situation of a particular applicant—including, perhaps, the relative strength of the *subjective* prong of his fear of persecution—should be taken into account. The court's rhetorical question at the end of the last paragraph is more than that—it ties directly to its standard of distinguishing between individuals who merely *want* to leave their homeland, and those who feel *compelled* to do so. The court appears to be saying that the "persecution threshold" of a particular applicant must be taken into account; perhaps if the male petitioner had been an educated Albanian activist as opposed to an impecunious taxi driver, the answer to the rhetorical question, and the outcome of the case, may have been different. The concept is not entirely novel—courts have previously been solicitous to the claims of "vulnerable categories" of asylum applicants, including those who suffered persecution as children. *See Hernandez-Ortiz v. Gonzales*, 496 F.3d 1042 (9th Cir. 2007). But application of this standard to an adult who has suffered harm that resulted in no significant physical injury is less precedented.

Whether other circuits will agree with the Seventh's accusation of "capricious adjudication" remains to be seen. Meanwhile, two other recent decisions, from the First and Eighth Circuits, reached contrasting conclusions on fact patterns involving more pervasive patterns of harm than that present in *Stanojkova*. *Lopez-Amador v. Holder*, Nos. 10-2376, 10-3491, 2011 WL 3557854 (8th Cir. Aug. 15, 2011); *Precetaj v. Holder*, No. 10-1109, 2011 WL 3505540 (1st Cir. Aug. 11, 2011).

Precetaj held that a partisan of the Albanian Democratic Party suffered harm rising to the level of persecution based on a series of incidents, stretching from 1991 to 2002, that included being badly beaten in 1993, a threat of retribution in 1997, a car fire in 1998, and the kidnapping of his children in 1998. The children fled to the United States independently and were granted asylum. After this, he was beaten in 2001 and threatened (by an envelope with two bullets) in 2002.

The First Circuit had no difficulty discerning the applicable standards, which it has articulated in a line of published decisions. "'Persecution' . . . entails something more than the casual or occasional mistreatment that is common in many countries." *Precetaj*, 2011 WL 3505540, at *3 (citing *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000) (stating that a person's "experience must rise above unpleasantness, harassment, and even basic suffering"), and *Topalli v. Gonzales*, 417 F.3d 128, 133 (1st Cir. 2005) (stating that a finding of persecution depends on the "severity, duration, and frequency of physical abuse")). Based on these precedents, it easily concluded that the Immigration Judge and the Board gave no "persuasive explanation" for why the decade-long pattern of threats and violence did not constitute persecution or was not on account of his support for the political opposition and his ability, as a court officer, to reveal information about abuses he encountered through his work. *Id.* But its analysis poses a striking contrast to that of the Seventh Circuit:

> True, [the petitioner] was never jailed, none of the violence sent him to a hospital, and if this were all we could not casually reject the agency judgment. The case would fall within that gray area of sporadic and limited abuse which is the lot of many persons around the world but is not the exceptional and sustained violence or other forms of persecution that compel the agency to grant asylum.
>
> But the systematic and serious abuse of the children adds another dimension. Two kidnaping[s], three beatings, and an aggravated rape of his children—specifically designed to send a message to [the petitioner]—were clearly part of the persecution of him. . . .
>
> If there is a reason for discounting or ignoring these incidents, it is not explained in either decision. And if they are taken into account, it is not apparent why the sum total of the abuse directed against [the petitioner] would not qualify as persecution.

Precetaj, 2011 WL 3505540, at *3-4.

The court also criticized as too cursory the Board's alternate analysis, which assumed past persecution but determined that the change in country conditions (election of the Democratic Party and reduction in

political violence) rebutted any presumption of future persecution. Acknowledging that this rationale was "more powerful," *id.* at *4, the court concluded that the Board nevertheless gave insufficient consideration to local conditions (where the Socialist Party still holds power). Also, the Board failed to adequately address the option of "humanitarian asylum" based on the severity of the past attacks. *Id.* at *5.

Lopez-Amador, 2011 WL 3557854, involved a claim of past persecution based on three sets of incidents: sniper fire at an anti-Hugo Chavez rally in 2002; 10 stops at police checkpoints; and the impact of government policies on business that led the petitioner to quit her job. The petitioner also claimed harassment, including from police, on account of her sexual orientation. The court upheld the Board's determination that these incidents, individually or cumulatively, did not rise to the level of persecution. The sniper fire, the court agreed, was not specifically directed at the petitioner, and there was no evidence that the police knew that she, personally, was in the crowd of thousands, some of whom were felled by the attack. "[T]he record only shows that Ms. Lopez was caught in the same situation as thousands of members of the public who simply happened to be present in the streets of Caracas at that moment regardless of their political affiliation." *Id.* at *4. The court also rejected the claim that the petitioner was singled out at the vehicle checkpoints; the record indicated that other vehicles were also stopped and their occupants questioned. Finally, the verbal harassment did not constitute persecution, and her claim of economic harm was speculative since she was not forced to resign her position, but she chose to do so when she left the country.

Of the three cases discussed here, *Lopez* is perhaps the least consequential. However, it illustrates, as does *Precetaj*, that the standards for resolving the question of "persecution" are perhaps not so "vacuous" after all. Ms. Lopez, no less than the Stanojkova family, may have felt that there was no point to remaining in purportedly democratic Venezuela, where she had endured shooting by government snipers, been stopped at no less than 10 checkpoints, endured sneers and harassment for being lesbian, and faced (by her standards) uncertain economic prospects. Perhaps her claim fell on the safe side of the line between the "nasty and the barbaric, or perhaps she had resources to resist the *Chavezistas* that the Stanojkova family lacked in resisting the Lions. The Eighth Circuit resolved the case using more traditional analytical tools—much as did the First Circuit in *Precetaj*, albeit with a different result clearly grounded in the severity and particularity of the harm in question.

Ninth Circuit Rewrites the Playbook on Key Criminal Law Questions

Our final discussion is a "teaser"—space does not permit analysis that would do justice to the Ninth Circuit's two recent en banc decisions overruling, respectively, its precedents on application of the Federal First Offender Act ("FFOA") to expungements of State drug crimes, *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), *overruling Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), and *Romero v. Holder*, 568 F.3d 1054 (9th Cir. 2009), and on whether the modified categorical approach can be applied when the crime of conviction is missing an element of the generic crime altogether, *United States v. Aguila-Montes de Oca*, No. 05-50170, 2011 WL 3506442 (9th Cir. Aug. 11, 2011) (en banc), *overruling Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007 (en banc).

Nunez-Reyes is the more accessible of the two decisions: the court's majority (with two dissenters) surveyed the landscape and found that neither the Board nor any other circuit (a total of eight had weighed in on the subject) agreed with the holding of *Lujan-Armendariz* that a State drug conviction that had been expunged for rehabilitative purposes (such as successful completion of probation and no further offenses) did not constitute a controlled substance offense under the Immigration and Nationality Act. The reasoning in *Lujan-Armendariz*—that since the FFOA permitted expungement of analogous Federal convictions, expunged State convictions also should not be grounds for deportation—always had a strained quality. *See Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002). The *Nunez-Reyes* majority agreed, now rejecting the equal protection analysis that gave life to *Lujan-Armendariz*. Significantly, the Ninth Circuit had not extended *Lujan-Armendariz* to other types of expunged convictions—it applied only to cases where the FFOA might apply by analogy. *See de Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007); *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004); *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002).

Significantly—very much so for Immigration Judges who will have to sort through the complexities—the Ninth Circuit made its ruling prospective, applying

only to aliens who are *convicted* of drug offenses after the date of the decision—August 11, 2011. The reasons, to be discussed in full at a later date, revolve around two principles: that of settled law, which *Lujan-Armendariz* was for more than a decade, and the reliance interest that an alien may have in pleading guilty to an offense, knowing that the possibility of expungement (and thus, no adverse immigration consequences) awaits. *Nunez-Reyes*, 2011 WL 2714159, at *4-7. In a touch of irony, the petitioner, despite having an "old" expunged conviction, still lost his case: the court concluded that since his crime was one of being under the influence of a controlled substance, and not possession, it is "qualitatively different" from any crime covered by the FFOA. *Id.* at *8.

For analysis of *Aguila-Montes de Oca*, 2011 WL 3506442, we largely borrow from a synopsis penned by Board Member John Guendelsberger:

At issue was a perennial, and difficult, question: whether California's residential burglary statute qualified as a "burglary of a dwelling" for sentencing enhancement purposes. Section 459 of the California Penal Code punishes "[e]very person who enters [various structures] . . . with intent to commit grand or petty larceny or any felony," but it lacks an element of the offense of generic burglary, namely, that the entry must have been "unlawful or unprivileged." Because the California statute covers a wider range of offenses than generic burglary, the court applied the modified categorical approach and ultimately determined, in a 7-3 split, that the record of conviction did not establish that Aguila's conviction had been based on the type of "unlawful or unprivileged" entry required for generic burglary. Therefore, the court found that the conviction could not be used to enhance his sentence.

The threshold question, however, was whether the Immigration Judge and the Board, or the court of appeals, could even reach the modified categorical approach. Here, the court departed from and overruled *Navarro-Lopez*, explaining that a statute of conviction may be "categorically broader" than a generic offense such as burglary in a number of ways. To illustrate, the court hypothesized a generic Federal offense of aggravated assault that has two elements: (1) harmful contact and (2) use of a gun. The court identified several ways in which a State assault offense may be categorically broader than the generic assault offense. First, a State statute might require (1) harmful contact and (2) use of a gun or an axe. Second, a State statute might require (1) harmful contact and (2) use of a weapon without spelling out a list of possible weapons. Third, a statute may only require harmful contact without specifying the use of any kind of weapon at all. *Aguila-Montes de Oca*, 2011 WL 3506442, at *10.

After reviewing the *Taylor*/*Shepard* line of cases and relevant circuit law, *Aguila* found that there is "no way to draw a principled distinction between a statute that contains a list of elements that includes more than what the generic statute requires, and a statute that is missing the elemental phrase altogether." *Id.* at *9. The court concluded that all three of the assault statutes described above permit resort to the modified categorical approach to determine whether the record of conviction indicates that the trier of fact was necessarily required to find use of a gun in reaching its verdict. *Id.* at *10. The court cautioned that "[a]lthough we have concluded that a missing-element statute can be examined under the modified categorical approach, a court must exercise caution in determining what facts a conviction 'necessarily rested' on. It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact; the fact must be *necessary* to convicting that defendant." *Id.* at *18.

Turning to application of the modified categorical approach, the court first found that although section 459 does not, on its face, require that entry be "unlawful or unprivileged," California burglary law contains a "nuanced definition" of "unlawful or unprivileged" entry that is broader than the common law definition. *Id.* at 23. Under California law, an entry is considered "unlawful or unprivileged" if a defendant enters a structure open to the public with the intent to commit a felony (e.g., shoplifting) or enters a home as an invitee with intent to commit theft. *Id.* at *24-25. For generic burglary, the record of conviction would have to show entry into a structure without the owner's permission or without a license or privilege. *Id.*

The felony complaint charged that Aguila "did willfully and unlawfully enter an inhabited dwelling house . . . with the intent to commit larceny and any felony." In his guilty plea Aguila admitted the factual allegations as charged. Ultimately, the court found that this record of conviction was insufficient to demonstrate conviction for generic burglary because it did not establish that Aguila entered the structure without the owner's consent. *Id.* at *26.

The majority ruling to overthrow *Navarro-Lopez* garnered the minimum six votes; five judges, led by Judge Berzon, concurred in the judgment and concluded that *Taylor v. United States*, 495 U.S. 575 (1990), mandates retention of the "missing element" bar to application of the modified categorical approach. *Id.* at *27-34. Judge Rawlinson, joined by 3 others, agreed with the reversal of *Navarro-Lopez* but not the conclusion that Aguila was not convicted of a generic burglary offense. "[T]he majority's approach to the modified categorical analysis opens the floodgates to 'nuanced' interpretations of various state defenses untethered from the basic elements of the generic crime, particularly as courts sift through state case law in search of aspects that may differ from the Model Penal Code hypotheticals." *Id*. at *57. He concludes that the majority essentially imports *Navarro-Lopez*'s rejected missing element rule into the modified categorical analysis and, in so doing, ignores the modified categorical approach, as articulated in *Taylor*, and "thwarts the intent of Congress that burglary be included as a predicate offense." *Id.* at *61.

Out of this, then, only two judges—Bybee and Rymer—fully subscribed to the twin rulings overturning *Navarro-Lopez* but finding that Aguila's conviction was not for a generic burglary offense. For that reason alone, *Aguila* cannot be the last word on this subject. Whether one's view is from Brooklyn Heights or Pacific Heights (or the heights of Falls Church), the task of applying the modified categorical approach remains treacherous.

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RECENT COURT OPINIONS

First Circuit:

Precetaj v. Holder, No. 10-1109, 2011 WL 3505540 (1st Cir. Aug. 11, 2011): The First Circuit vacated a decision of the Board denying asylum to a political activist from Albania. The Board found that the petitioner no longer had a well-founded fear of persecution because of changed country conditions and that he had not suffered past persecution. The court held that the Immigration Judge and the Board failed to provide a persuasive explanation for the latter finding. The court noted that the physical mistreatment suffered by the petitioner himself might be viewed as falling "within the gray area of sporadic and limited abuse" that would not compel a grant of asylum. However, the more serious violence directed at the petitioner's children (including kidnappings, beatings, and an aggravated rape), which were "specifically designed to send a message" to the petitioner, "were clearly part of the persecution of him." The court said that the Board failed to provide either a reason why it discounted or ignored these incidents or, if they were considered, why the sum total of the mistreatment did not constitute past persecution. Considering the Board's alternative finding that even if there was past persecution, changed country conditions rebutted the presumption of future fear, the court held that changed conditions do not automatically trump the applicant's evidence in every case. The record was therefore remanded for the Board to consider whether evidence offered by the petitioner to establish that local power continues to be exercised by the Socialist Party would sufficiently temper the changed circumstance of the Democratic Party's rule on the national level. The court did agree with the Board that if changed conditions were shown, humanitarian asylum would not be warranted on the evidence of record, based on either the severity of the past persecution or on the likelihood that the petitioner would suffer "other serious harm."

Third Circuit:

Prestol Espinal v. Att'y Gen. of U.S., No. 10-1473, 2011 WL 3314945 (3d Cir. Aug. 3, 2011): The Third Circuit reversed the Board's denial of a motion to reconsider filed by a petitioner who had been removed from the United States based on the post-departure bar provisions of 8 C.F.R. § 1003.2(d). The court found the post-departure bar regulation to be inconsistent with the statutory right under section 240(c)(6) of the Act to file one motion to reconsider within 30 days of the entry of a final administrative order (and one motion to reopen within 90 days). The court noted that the plain language of the statute "makes no exception for aliens who are no longer in this country." After discussing the approaches taken by the Second, Fourth, Sixth, Seventh, and Ninth Circuits to reach the same conclusion, the Third Circuit also found support for its conclusion in the Supreme Court's decision in *Dada v. Mukasey*, 554 U.S. 1 (2008). There, the Supreme Court found the applicable statute (which was part of the Illegal Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546) transformed the motion to reopen "from a regulatory procedure to a statutory form of relief available to the alien." *Id.* at 14. The Supreme Court therefore stated its hesitancy to adopt a statutory construction that would nullify that right for an entire class of aliens. The

Third Circuit was not persuaded by the Government's argument that the statute did not specifically preclude the agency from imposing a post-departure bar on motions. Rather, it agreed with the Fourth Circuit's conclusion that the statutory language *does* speak to the class of departed aliens by including them as a subset of the group (i.e., "aliens") who are entitled to file such motions. The Third Circuit further noted that if (as the Government seemed to suggest) an ambiguity could be read into a statute's failure to foreclose all imaginable exceptions, then nearly all statutes would be ambiguous and thus require deference to nearly all agency determinations.

Brandao v. Att'y Gen. of the U.S., No. 09-3550, 2011 WL 3584317 (3d Cir. Aug. 16, 2011): The Third Circuit denied a petition for review of the Board's decision affirming an Immigration Judge's order of removal. Specifically, the petitioner challenged the Immigration Judge's rejection of his claim to derivative U.S. citizenship based on the naturalization of his mother prior to his 18th birthday. The petitioner argued that because he was born out of wedlock, he qualifies for derivative citizenship under former section 321(a) of the Act (repealed in 2000), which conferred citizenship on a child born outside of the U.S. upon "the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation." Relying on the Board's decision in *Matter of Cardoso*, 19 I&N Dec. 5 (BIA 1983), the court upheld the Immigration Judge's conclusion that the petitioner is considered legitimated because he was born in Cape Verde subsequent to that country's enactment of legislation in 1976 granting all children equal rights vis-à-vis their parents regardless of the latter's civil status. Since the petitioner failed to refute that interpretation of Cape Verde's Decree Law, he was found ineligible for derivative citizenship.

Fourth Circuit:

United States v. Simmons, No. 08-4475, 2011 WL 3607266 (4th Cir. Aug. 17, 2011) (en banc): In a case arising in the criminal sentencing context, the Fourth Circuit, by an 8-6 split, vacated a decision holding that the petitioner's prior State marijuana possession conviction (for which he faced no possibility of jail time) was for an offense punishable by more than 1 year of imprisonment. The circuit court originally affirmed the district court ruling, which doubled the minimum sentence the petitioner would face based on a finding of recidivism. The record was remanded by the Supreme Court for consideration of the issue in light of its decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). After a panel determined that no change to the prior holding was required by *Carachuri-Rosendo*, the court voted to rehear the matter en banc. The Fourth Circuit noted that under North Carolina law, the respondent's 1996 offense (a class I felony) is punishable by more than 1 year of imprisonment only where there were aggravating factors, which were not shown in the instant case (in fact, the petitioner was sentenced to 6-8 months of community punishment, with no prison time). The Fourth Circuit had held in *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005), that it would determine whether a conviction is punishable by a prison term exceeding 1 year under North Carolina law by considering the maximum aggravated sentence that could be imposed on a defendant with the worst possible criminal history. However, in light of *Carachuri-Rosendo*, the Fourth Circuit ruled that *Harp* is no longer good law. Since the petitioner had no prior convictions, the State court had not made a recidivist finding, as required by *Carachuri-Rosendo*. Under North Carolina's Structured Sentencing Act, the petitioner faced a maximum sentence of 8 months of community punishment for his State conviction. The court rejected the Government's argument that it could not rely on the North Carolina Structured Sentencing Act's "guidelines system" to "decrease" the maximum term the petitioner could have served, because the court concluded that the Act (which does not allow State judges to impose sentences exceeding the top of the statutory range) constitutes a legislative mandate and not a "guidelines system." The court also rejected the Government's attempt to distinguish the facts from those in *Carachuri-Rosendo* by arguing that the petitioner's prior conviction was for conduct that would be expected to be punishable by more than 1 year of imprisonment. The court held that "well-established federalism principles do not permit a federal court to reject North Carolina's judgment as to the seriousness of a North Carolina crime, prosecuted in a North Carolina court and adjudicated by a North Carolina judge, merely because the federal court might 'expect' a more serious punishment." There were two dissenting opinions.

Ninth Circuit:

United States v. Aguila-Montes de Oca, No. 05-50170, 2011 WL 3506442 (9th Cir. Aug. 11, 2011) (en banc): The Ninth Circuit, by a 6-5 split, vacated the district court's order and remanded the record in a case arising in the criminal sentencing context. The petitioner was convicted by the district court of attempting to reenter the United States after deportation. In the circuit court's

decision, one six-judge majority overruled the circuit's prior holding in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007), that the modified categorical approach does not apply "[w]hen the crime of conviction is missing an element of the generic crime altogether." A different six-judge majority overruled the circuit's prior decisions to the extent they held that a conviction under section 459 of the California Penal Code qualifies as a conviction for generic burglary (and thus for a crime of violence) if either a defendant pleaded guilty to, or a jury found him/her guilty of, entering a building "unlawfully." The matter was remanded to the original three-judge panel for consideration of the remaining issues on appeal.

Soriano-Vino v. Holder, No. 06-73345, 2011 WL 3487026 (9th Cir. Aug. 10, 2011): The Ninth Circuit denied a petition for review of an Immigration Judge's order of removal that was affirmed by the Board. Proceedings arose from questioning of the petitioner by an airport inspector of the former Immigration and Naturalization Service ("INS"). After noticing a notation on the petitioner's resident alien card indicating that she had obtained lawful permanent resident ("LPR") status under the special agricultural worker ("SAW") program, the inspector found the information to be at odds with the petitioner's answers regarding her prior work experience. The petitioner was therefore questioned under oath, during which time she admitted to not having worked on a farm. As a result, an Immigration Judge ruled that because the petitioner obtained her status through fraud, she was not an LPR and was therefore ineligible for cancellation of removal. On appeal, the petitioner argued that INS inspectors violated the confidentiality provisions of the SAW program, which prohibits the use of information obtained during the SAW application process. The court found the issue to be one of first impression in the circuit. Agreeing that Congress was as concerned with fraud in the SAW application process as it was with protecting applicants from unauthorized disclosure of the application's contents, the court chose to follow the reasoning in *Lopez v. Ezell*, 716 F. Supp. 443 (S.D. Cal. 1989), in which the district court interpreted the confidentiality provisions to apply only to information obtained directly from the application itself. The court stated that accepting the broader interpretation proposed by the petitioner would prevent any investigation of fraud that referenced any information contained in the SAW application. Because the investigators did not access the petitioner's SAW application in the course of their questioning, the court found no violation of the confidentiality provisions.

BIA PRECEDENT DECISIONS

In *Matter of Henriquez Rivera*, 25 I&N Dec. 575 (BIA 2011), the Board addressed the responsibilities of the parties when an application for Temporary Protected Status ("TPS") is renewed in Immigration Court. The Board first held that the applicant is not required to file a new application and supporting documentation. Where the respondent cannot provide the application and documents previously filed with the Department of Homeland Security ("DHS"), the Immigration Judge may require the DHS to provide those documents. The Board found that the DHS does not need to provide the complete administrative record, however. In this case, the Immigration Judge had terminated proceedings because the DHS did not produce the administrative record. The Board found that termination was not appropriate and remanded the record.

In *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011), the Board considered when an alien must be advised that he has a right to counsel and that his statements can be used against him, as required by 8 C.F.R. § 287.3(c). The respondent was charged and found removable under section 212(a)(6)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(E)(i), for knowingly assisting another alien to enter the United States in violation of the law. The Form I-213 (Record of Deportable/Inadmissible Alien) indicated that the respondent was referred to secondary inspection, where he admitted that he knowingly used his son's birth certificate to try to smuggle his nephew into the United States. The record reflected that the respondent was arrested 8½ hours after applying for admission, but it did not show that he was advised of his rights. The respondent sought suppression of the Form I-213. The Board found that under the plain language of 8 C.F.R. § 287.3(c), an alien who is arrested without a warrant is not entitled to advisals until he or she is "placed in formal proceedings," which begin when the Notice to Appear is filed with the Immigration Court. Therefore, formal proceedings must be initiated before the advisals required by regulation are required. The Board found support for this conclusion in the history of the regulations, which were changed from requiring advisals at the time when an officer determines that proceedings "will be instituted" to when the alien is actually placed in formal proceedings. The Board distinguished *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008), where the court found that because the alien's overnight detention at the border qualified as an arrest, the general

provisions in 8 C.F.R. § 287.3(c) applied, but it remanded for the Board to decide if the regulation required advisals to be given prior to interrogation. The Board affirmed the Immigration Judge's decision regarding the charges of removal and the denial of the respondent's applications for asylum and withholding of removal.

Subpoenas in Immigration Court *continued*

1977), the Immigration Judge was affirmed where he admitted hearsay evidence after finding that the INS had made a reasonable but unsuccessful attempt to produce a subpoenaed witness. More recently, the Seventh Circuit affirmed an Immigration Judge's finding that a subpoena only required the DHS to produce evidence in its possession, so there was no statutory obligation to continue the proceedings for the DHS to produce a video that was actually in the FBI's possession. *Skorusa v. Gonzales*, 482 F.3d 939, 942-43 (7th Cir. 2007).

Enforcement Power and Problems

The central challenge to Immigration Court subpoena power, as judges who have issued subpoenas know, is enforcement. In an Article III court, a person who fails to comply with a subpoena may be found in contempt of court and subject to fines or imprisonment. *See* Fed. R. Civ. P. 45(e); 18 U.S.C. § 401(3) (giving Federal courts the power to punish disobedience of lawful court orders with fines, imprisonment, or both). This is not the case in Immigration Court. All the same, Immigration Judges cannot ignore the issue of enforcement because there is a statutory right to present evidence and because, even with the incomplete enforcement scheme that exists, courts have resources that respondents lack. *See Malave*, 610 F.3d at 487; *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004); *Saidane*, 129 F.3d at 1065.

In practice, the official nature of a subpoena probably induces compliance by the majority of those who are served with a subpoena. For those who resist, however, Immigration Judges do not currently have a working contempt authority or the power to issue civil money penalties. On paper, contempt authority is explicit in the Act and was added as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. Section 240(b)(1) of the Act ("The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act.") But pending the publication of regulations for the contempt power, Immigration Judges still lack the ability to issue formal sanctions. Rulemaking in this regard was initially delayed because the law was enacted during the period when attorneys for the former INS and Immigration Judges were both DOJ employees, raising some concerns about allowing the latter to sanction the former.[1] Following the creation of the Department of Homeland Security, that concern no longer exists. EOIR Director Juan Osuna testified before Congress in May 2011 that EOIR intends to submit proposed regulations on sanction authority and civil money penalties to the Office of Management and Budget for interagency review in the near future.[2]

Even without the contempt power, there remains one explicit enforcement mechanism for subpoenas: the regulations provide that Immigration Judges may refer cases of noncompliance to the United States Attorney's Office to request a subpoena for the same materials from the United States District Court. 8 C.F.R. §§ 1003.35(b)(6), 1287.4(d). This is essentially a way for Immigration Judges to access the contempt power of the Federal court. This process, however, seems to be little, if ever, used. *See, e.g.*, *Ocasio*, 375 F.3d at 107 (stating that the INS filed a motion asking the Immigration Judge to seek district court assistance in enforcing the subpoena, but not indicating whether the Immigration Judge did so). Research uncovered a very small number of petitions for subpoenas filed in district courts, and exactly one subpoena actually issued under the regulation, so it has worked at least once. *United States v. Moran-Gutierrez*, 2009 WL 4975264 (N.D. Tex. Dec. 18, 2009) (ordering the Immigration Judge's subpoena for a witness to be enforced).

These challenges do not mean that violation of an Immigration Court subpoena is without consequences. A violation of a subpoena may result in adverse rulings that can have a significant impact on the outcome of a removal case.[3] For example, several Immigration Judges have found the DHS's decision not to produce witnesses to be of great significance in suppression cases alleging egregious Fourth Amendment violations. This kind of case could easily implicate subpoena issues, as in *Xue Tong Zou*, 367 F. App'x at 40, where the DHS avoided a subpoena by promising to produce a witness and then did not produce her. *See also Navia-Duran v. INS*, 568 F.2d 803,

807 (1st Cir. 1977) (finding the petitioner's admissions involuntary and reversing the finding of deportability, because although the petitioner had moved to subpoena INS officers, the Immigration Judge denied the motions and improperly held that the circumstances of her arrest were immaterial); *cf. Matter of Escobar*, 16 I&N Dec. 52, 53 (BIA 1976) (finding that a subpoena for information about the respondent's alleged illegal arrest was properly denied where the evidence of deportability was obtained independently of the arrest); *Matter of Gonzales*, 16 I&N Dec. 44, 46 (BIA 1976) (holding, in a suppression case, that subpoenas were properly denied where there was no showing they were necessary and it appeared that "counsel wished to go on a fishing expedition in his questioning").

Additionally, if an alien tried to subpoena evidence in an asylum case, it could affect the analysis of whether he or she met the requirement to show that corroborating evidence could not reasonably be obtained. *See* section 208(b)(1)(B)(ii) of the Act; 8 U.S.C. § 1158(b)(1)(B)(ii); REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 302, 303; *cf. Qiao Zhen Jiang v. Holder*, 341 F. App'x 126, 128 (6th Cir. 2009) (stating that the petitioner's *failure* to attempt to subpoena witnesses "cements the soundness of the IJ's availability determination"); *Matter of Y-L, A-G- & R-S-R-*, 23 I&N Dec. 270, 284 (A.G. 2002), *disapproved of on other grounds*, *Zheng v. Ashcroft*, 332 F.3d 1186, 1196-97 (9th Cir. 2003), and *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (finding that R-S-R- failed to corroborate his claim after the Immigration Judge "pointedly invited" him to subpoena witnesses and he did not do so).

Immigration Judges' ability to use noncompliance with court orders as the basis for rulings on substantive matters flows reasonably from the Immigration Judge's broad powers to issue subpoenas, admit and weigh evidence, rule on removability and relief, and "otherwise regulate the course of the hearing." *See* 8 C.F.R. § 1240.1(c). These powers suggest that Immigration Judges may take actions analogous to what a Federal district court judge may do in imposing nonmonetary sanctions that are short of a contempt order on disobedient parties. These include taking certain facts as established, prohibiting disobedient parties from advancing certain claims or introducing certain evidence, staying proceedings until the order is obeyed, or striking pleadings in whole or in part. Fed. R. Civ. P. 37(b)(2)(A).

Conclusion

Subpoenas can be a useful tool in Immigration Court to build the record and ensure that the parties have a full opportunity to present their cases and cross-examine witnesses. The regulatory requirements for issuing a subpoena are straightforward and are closely enforced in the Federal courts. Although the current enforcement scheme for Immigration Court subpoenas is a work in progress, Immigration Judges are not without recourse and may use noncompliance with a subpoena as support for rulings on evidence, removability, and relief, or, for the more adventurous judge, for a referral to the local U.S. Attorney's Office. What the circuit courts caution, however, is that Immigration Judges should not let potential enforcement problems get in the way of deciding whether a subpoena should properly be issued in the first place. As Judge Posner encouraged, "The best way to find out if a subpoena will work is to issue one." *Malave*, 610 F.3d at 488.

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1. *See* American Bar Association Commission on Immigration, *Reforming the Immigration System* 5-16 to -17 (2010), *available at* http://www.americanbar.org/aba.html.

2. *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 7 (2011) (statement of Juan P. Osuna, Director, Exec. Office for Immigration Review), *available at* http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf.

3. Additionally, attorneys who violate court orders might be subject to disciplinary complaints with various internal and external authorities.