

## Defining “Departure” in the Context of 8 CFR § 1003.4

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### INTRODUCTION

According to federal regulation 8 CFR § 1003.4, if a noncitizen<sup>1</sup> departs the United States while his appeal of a deportation order is pending, his departure withdraws that appeal.<sup>2</sup> The regulation is seemingly uncomplicated. It sets forth a restriction that noncitizens may not leave the country while in the process of appealing a deportation order. A knowing, voluntary departure<sup>3</sup> reasonably signifies a withdrawal on the part of the noncitizen because it amounts to an act of self-deportation. But the regulation’s application to noncitizens who are involuntarily forced out of the country is less straightforward.

Circuit courts have interpreted and treated § 1003.4 differently, depending on whether they take into consideration the circumstances surrounding a given departure. The Second, Sixth, and Ninth Circuits have questioned whether § 1003.4 extends to noncitizens who depart involuntarily, while the Fifth and Tenth Circuits have maintained that the nonspecific language of the regulation demands its application to all departures, even involuntary ones. That said, all courts have indicated that departures resulting from the government’s unlawful removal of noncitizens should not constitute the withdrawal of their appeals.

This Comment aims to develop an interpretation of § 1003.4 that best resolves the tension among the courts—one that fits with the overall statutory scheme, preserving noncitizens’ statutory right of appeal, but also one that adheres to the text of the regulation. This Comment concludes that the waiver doctrine is the best framework for determining whether a given departure should withdraw a noncitizen’s pending appeal. If applied to § 1003.4, the waiver doctrine would require that a

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<sup>1</sup> This Comment uses “noncitizen” to refer to any person who is not a US citizen. The Immigration and Nationality Act, however, uses the term “alien” instead of noncitizen. See 8 USC § 1101(a)(3).

<sup>2</sup> See 8 CFR § 1003.4.

<sup>3</sup> When this Comment uses the phrase “voluntary departure,” it means that the noncitizen has intentionally and freely left the country, unless otherwise stated. The phrase does not refer to the term of art meaning a departure order granted by the Attorney General “permit[ting] an alien voluntarily to depart the United States at the alien’s own expense . . . in lieu of being subject to proceedings.” 8 USC § 1229c(a)(1).

noncitizen *intentionally and knowingly* waive his right of appeal through his act of leaving the country, thereby excluding forced or accidental departures but including all of those that are voluntary.

Part I provides context to the applicability and impact of § 1003.4, describing removal proceedings for noncitizens. Part II examines the tension among courts' interpretations of § 1003.4, as they have ascribed varying degrees of importance to the voluntariness of a departure. Part III explains why courts should take into account certain circumstances surrounding a given departure when applying § 1003.4. Finally, Part IV concludes that the waiver doctrine best addresses the concerns that are posed by courts interpreting and applying § 1003.4.

### I. SECTION 1003.4 AND APPEALING A DEPORTATION ORDER

After an immigration judge (IJ) issues a deportation order, the noncitizen has a statutory right to appeal that decision to the Board of Immigration Appeals (BIA).<sup>4</sup> While the appeal is pending, however, § 1003.4 stipulates that “departure” by the noncitizen from the United States will withdraw his appeal. In essence, the issue is one of regulatory interpretation: Should courts preserve the statutory right of appeal, understanding the regulation within the broader context of immigration law?<sup>5</sup> Or should courts consider § 1003.4 in isolation and apply it such that the general term “departure” means *any* border crossing?<sup>6</sup> Appreciating the role that § 1003.4 plays within the appeals process is essential to interpreting the regulation because of the underlying conflict

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<sup>4</sup> See 8 USC § 1101(a)(47)(B) (explaining that a deportation order becomes final upon either “a determination by the Board of Immigration Appeals affirming such order” or “the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals”).

<sup>5</sup> See, for example, *Dada v Mukasey*, 128 S Ct 2307, 2310–12 (2008) (indicating that “[r]esolution of the questions presented turns on the interaction of two statutory schemes—the statutory right to file a motion to reopen in removal proceedings; and the rules governing voluntary departure”); *William v Gonzales*, 499 F3d 329, 332 n 2, 334 (4th Cir 2007) (recognizing that “Congress codified the right to file a motion to reopen” and concluding that “it is evident that 8 C.F.R. § 1003.2(d), containing the post-departure bar on motions to reopen, conflicts with the statute by restricting the availability of motions to reopen to those aliens who remain in the United States”).

<sup>6</sup> Words used in immigration statutes, in particular, do not necessarily maintain their ordinary meaning and can assume added significance depending on the rights that they confer. See Joanna R. Mareth, Note, *New Word, Same Problems: Entry, Arrival, and the One-year Deadline for Asylum Seekers*, 82 Wash L Rev 149, 156–57 (2007). Therefore, even though the definition of “departure” may imply voluntariness in its common usage, the word could broadly refer to any border crossing upon which certain rights are lost. For example, whereas “[e]ntry” and “admission” are legally significant terms, connoting the dividing line between those aliens who may be removed from the United States in exclusion proceedings and those who are entitled to deportation hearings with additional procedural benefits,” there are no two words expressing this distinction upon crossing the border in the other direction; the statutes only refer to “departure.” Id at 157.

between the broadest potential application of the regulation and the goals and purposes of the overall statutory scheme.

A. The Regulation: 8 CFR § 1003.4

The text of § 1003.4 leaves room for varied interpretation:

*Departure* from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken.<sup>7</sup>

The regulation does not contain any subclassification of “departure” delineating its voluntary or involuntary nature within the general term. Therefore, one understanding of the regulation could be that *anytime* a noncitizen crosses the US border, for whatever reason under whatever circumstances, his departure withdraws his pending appeal to the BIA. But the word “departure” should not necessarily encompass every single border crossing in instances where enforcement could lead to unreasonable outcomes. For example, if a noncitizen is unlawfully forced out of the country by the government or by a third party, such departure surely should not constitute a departure for purposes of § 1003.4.

Because the text is unclear, or at least nonspecific, courts can look beyond the text to understand the purpose of the statute.<sup>8</sup> Although no legislative history directly discusses § 1003.4’s purpose, possible reasons for a regulation like § 1003.4 run the gamut. Congress’s purpose may have been to prevent noncitizens from leaving the country for a long period of time while an appeal is pending lest administrative issues arise before the BIA. Alternatively, the regulation could be a way to ensure that noncitizens are invested in their appeals to the extent that they forego an element of their liberty by restricting their travel to within the United States, thus demonstrating “the attachment or commitment an alien has to this country.”<sup>9</sup> Another purpose could be to impose finality on pending appeals that would be left unresolved if noncitizens depart the country without intent to return. Section 1003.4

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<sup>7</sup> 8 CFR § 1003.4 (emphasis added).

<sup>8</sup> See *Church of the Holy Trinity v United States*, 143 US 457, 459 (1892):

[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

<sup>9</sup> See *INS v Phinpathya*, 464 US 183, 197 (1984) (Brennan concurring).

provides a means of formalizing self-deportation that is recognized by the government for noncitizens who want to leave on their own accord without the stigma of deportation and at a lower cost to the government.<sup>10</sup> Given the multiple possible functions of § 1003.4, the way in which courts apply the regulation could affect its accomplishment of these varied goals.

## B. The Appeals Process for Noncitizens

Removal proceedings for most noncitizens breaks down into stages: first, the government identifies statutory grounds to deport a noncitizen and serves him a Notice to Appear; next, the noncitizen presents his case to the IJ who either issues or denies a deportation order; finally, the noncitizen or the federal government may appeal the IJ's decision to the BIA. Section 1003.4 comes into play between the last two stages during which the noncitizen's "departure" from the United States withdraws his pending appeal. If the appeal is withdrawn pursuant to § 1003.4, then the deportation order issued by the IJ becomes final.

### 1. Grounds for deportation.

The Immigration and Nationality Act<sup>11</sup> (INA) outlines the reasons for which a noncitizen can be deported, ranging from serious crimes and national security threats to relatively minor procedural violations. Consequently, noncitizens subject to the departure limitation of § 1003.4 have not all committed criminal acts of the same degree of severity.

The INA divides causes for deportation into four categories: immigration control, crime regulation, political and national security, and other deportation grounds. Specifically, noncitizens are eligible for deportation if they are convicted of a "crime involving moral turpitude," an aggravated felony, a high-speed flight from an immigration checkpoint, failure to register as a sex offender, or if they are convicted of multiple criminal offenses. Further, noncitizens can be deported if they violate immigration laws or laws relating to a controlled substance, if they commit actions perceived as a national security threat,<sup>12</sup> or for a

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<sup>10</sup> Consider *Mendez v INS*, 563 F2d 956, 959 (9th Cir 1977) (explaining that the congressional purpose of a related statute was "to make clear that an alien who had been ordered deported, and who then departed the United States at his own expense, as opposed to the expense of the government, had in fact been deported").

<sup>11</sup> Immigration and Nationality Act of 1952 § 237(a), Pub L No 82-414, 66 Stat 163, codified at 8 USC § 1227(a).

<sup>12</sup> 8 USC § 1227(a).

variety of other reasons including becoming a public charge<sup>13</sup> and voting unlawfully.<sup>14</sup> In short, there are many situations in which a noncitizen may have to face removal proceedings.

## 2. Removal proceedings and appeals.

Removal proceedings begin with an adversarial hearing in immigration court, at which the noncitizen and the US Citizenship and Immigration Services (CIS) litigate the case.<sup>15</sup> The IJ presiding over the removal hearing<sup>16</sup> is an attorney appointed by the Attorney General "as an administrative judge within the Executive Office for Immigration Review."<sup>17</sup> The IJ ultimately issues a decision, which may order that the noncitizen be removed from the United States.<sup>18</sup>

If the IJ issues a deportation order, the noncitizen has the right to appeal that decision to the BIA.<sup>19</sup> When filing an appeal of an IJ deci-

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<sup>13</sup> 8 USC § 1227(a)(5). A noncitizen is considered a "public charge" when he is "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense." US Citizenship and Immigration Services, *Public Charge Fact Sheet*, online at [http://www.uscis.gov/files/article/public\\_cfs.pdf](http://www.uscis.gov/files/article/public_cfs.pdf) (visited Jan 11, 2009).

<sup>14</sup> 8 USC § 1227(a)(6).

<sup>15</sup> On March 1, 2003, the administrative and policymaking responsibilities of the Immigration and Naturalization Service (INS) became vested in the newly created CIS, moving under the umbrella of the Department of Homeland Security (DHS). US Citizenship and Immigration Services, *About Us*, online at <http://www.uscis.gov/aboutus> (visited Jan 11, 2009). The law enforcement capacity of the INS merged with that of the US Customs Service to form US Immigration and Customs Enforcement (ICE), also part of the DHS. See US Immigration and Customs Enforcement, *About Us*, online at <http://www.ice.gov/about/index.htm> (visited Jan 11, 2009).

<sup>16</sup> 8 USC § 1229a(a)(1).

<sup>17</sup> 8 USC § 1101(b)(4). The IJ selection process does not necessarily escape the influence of politics and has been the subject of recent criticism. Certain reports have suggested that deportation orders issued by IJs have not always be founded in immigration law expertise, in which case, noncitizens' appeals may become even more important. See Amy Goldstein and Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties: Law Forbids Practice; Courts Being Reshaped*, Wash Post A01 (June 11, 2007) (asserting that various IJs lacked substantial immigration law qualifications and were appointed because of their political connections). See also Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, NY Times A14 (Aug 10, 2006) (discussing performance reviews initiated by the Attorney General in 2006, which were directed at IJs with "high reversal rates, frequent complaints or unusual backlogs," and noting that "federal appeals courts around the country complained of a pattern of biased and incoherent decisions on asylum and rebuked some immigration judges by name for 'bullying' and 'brow-beating' people seeking refuge from persecution.").

<sup>18</sup> See 8 CFR § 1240.50. See also *Mejia-Ruiz v INS*, 51 F3d 358, 363 (2d Cir 1995) (providing an overview of removal proceedings prior to the changes ushered in by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

<sup>19</sup> See 8 USC § 1229a(c)(5) ("If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties."). See also 8 CFR § 1003.1(b).

sion, the noncitizen must complete and send Form EOIR-26<sup>20</sup> to the BIA within thirty days of the IJ's decision.<sup>21</sup> Pursuant to the form's instructions, each noncitizen must check a box indicating that he has "Read All of the General Instructions."<sup>22</sup> The final page of the form's instructions states: "If you leave the United States after filing an appeal with the Board, but before the Board decides your appeal, your appeal *may* be withdrawn and the Immigration Judge's decision put into effect as if you had never filed an appeal."<sup>23</sup> By checking the box, the noncitizen is presumed to have received notice of his rights and to have been made aware of the consequences of a departure—although arguably Form EOIR-26 does not make clear that departure necessarily leads to the automatic withdrawal of a pending appeal. Additionally, the form is available only in English and must be submitted in English.<sup>24</sup>

After the noncitizen appeals the IJ decision, the BIA reviews findings of fact only for clear error<sup>25</sup> and reviews questions of law and "all other issues in appeals" de novo.<sup>26</sup> If the BIA affirms the IJ's deportation order, the noncitizen may request that the Attorney General cancel the order of deportation,<sup>27</sup> or the noncitizen may appeal the decision to a federal court of appeals<sup>28</sup> naming the Attorney General as the respondent in the case.<sup>29</sup> The noncitizen may appeal his case to the courts of

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<sup>20</sup> See DOJ, Executive Office for Immigration Review, Form EOIR-26, *Notice of Appeal from a Decision of an Immigration Judge* ("Form EOIR-26"), online at <http://www.usdoj.gov/eoir/eoirforms/eoir26.pdf> (visited Jan 11, 2009).

<sup>21</sup> See 8 CFR § 1240.53(a) (detailing the procedure for appealing a decision of an IJ to the BIA and stating that failure to follow this procedure "may constitute a ground for dismissal of the appeal by the [BIA]").

<sup>22</sup> Form EOIR-26 at 3.

<sup>23</sup> *Id.* at General Instructions (emphasis added). Compare *id.* at 3 ("WARNING: If you do not attach the fee or a completed Fee Waiver Request (Form EOIR-26A) to this appeal, your appeal *will* be rejected or dismissed.") (emphasis added).

<sup>24</sup> See *id.* at 3 (requiring appellants to check a box confirming that they "[c]ompleted this form in English").

<sup>25</sup> 8 CFR § 1003.1(d)(3)(i).

<sup>26</sup> 8 CFR § 1003.1(d)(3)(ii).

<sup>27</sup> See 8 CFR § 1003.1(h) (allowing the Attorney General or specific individuals designated by the Secretary of Homeland Security to direct the BIA to refer cases to the Attorney General); 8 USC § 1229b(a) (listing conditions under which "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States").

<sup>28</sup> See 8 USC § 1252(a)(5) ("Notwithstanding any other provision of law (statutory or nonstatutory) . . . a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal.") See also, for example, *Gittens v Menifee*, 428 F3d 382, 385 (2d Cir 2005); *Rosales v Bureau of Immigration & Customs Enforcement*, 426 F3d 733, 736 (5th Cir 2005); *Ishak v Gonzales*, 422 F3d 22, 28–29 (1st Cir 2005); *Alvarez-Barajas v Gonzales*, 418 F3d 1050, 1053 (9th Cir 2005); *Bonhometre v Gonzalez*, 414 F3d 442, 445–46 (3d Cir 2005).

<sup>29</sup> 8 USC § 1252(b)(3)(A).

appeals only after he has exhausted all administrative remedies and the deportation order becomes final.<sup>30</sup>

### 3. The frequency and duration of immigration cases and appeals.

The deportation appeals process affects thousands of noncitizens every year, and the number is steadily increasing. Department of Homeland Security (DHS) statistics suggest that over 1.2 million deportable noncitizens<sup>31</sup> were apprehended in fiscal year 2006.<sup>32</sup> Reports show that between 2002 and 2006, filings at immigration courts increased by 31 percent,<sup>33</sup> and appeals to the BIA increased by 45 percent.<sup>34</sup> Between 2000 and 2005, appeals of BIA decisions to the circuit courts increased by 602 percent.<sup>35</sup> The frequency of these immigration cases and appeals suggests that resolving the issue of what constitutes a “departure” under § 1003.4 could have a significant impact. Furthermore, as noted by Judge Carlos Bea of the Ninth Circuit,<sup>36</sup> the “variation among the regional circuit courts on how to view the facts and apply the law in similar

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<sup>30</sup> See 8 USC § 1252(d) (“A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.”); See 8 USC § 1101(a)(47)(B) (explaining the circumstances under which a deportation order becomes final). See also *Joo v INS*, 813 F.2d 211, 212 (9th Cir. 1987) (per curiam) (holding that the court lacked jurisdiction to review the deportation order because “[a] waiver of the right to appeal is a failure to exhaust administrative remedies”).

<sup>31</sup> The DHS defines a “deportable” noncitizen as “[a]n alien in and admitted to the United States subject to any grounds of removal specified in the [INA].” US Department of Homeland Security, Office of Immigration Statistics, *Definition of Terms* (Aug. 2008), online at <http://www.dhs.gov/ximgtn/statistics/stdfdef.shtm#3> (visited Jan. 11, 2009).

<sup>32</sup> See US Department of Homeland Security, Office of Immigration Statistics, *2006 Yearbook of Immigration Statistics* table 34, *Deportable Aliens Located: Fiscal Years 1925 to 2006* 91 (Sept. 2007), online at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS\\_2006\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/OIS_2006_Yearbook.pdf) (visited Jan. 11, 2009).

<sup>33</sup> See US Immigration and Customs Enforcement, *Fiscal Year 2006 Annual Report* 31, online at <http://www.ice.gov/doclib/about/ICE-06AR.pdf> (visited Jan. 11, 2009) (“Over the last five years, immigration court filings among the more than 200 immigration judges in 50 immigration courts have risen 31 percent, from more than 282,000 to almost 369,000.”). See also US Immigration and Customs Enforcement, *Fiscal Year 2007 Annual Report* 33, online at [http://www.ice.gov/doclib/about/ice07ar\\_final.pdf](http://www.ice.gov/doclib/about/ice07ar_final.pdf) (visited Jan. 11, 2009) (“In FY07, ICE attorneys were instrumental in the completion of 365,851 matters before the immigration courts.”).

<sup>34</sup> See US Immigration and Customs Enforcement, *Fiscal Year 2006 Annual Report* at 31 (cited in note 33) (reporting that appeals to the BIA have risen from roughly 27,000 to 39,000). See also, Transactional Records Access Clearing House, *Bush Administration Plan to Improve Immigration Courts Lags*, online at <http://trac.syr.edu/immigration/reports/194/> (visited Jan. 11, 2009) (“In FY 2007, EOIR received over . . . 36,000 appeals to the Board of Immigration Appeals.”).

<sup>35</sup> *Immigration Litigation Reduction*, Hearing on HR 109-537 before the Senate Judiciary Committee, 109th Cong., 2d Sess. 48, 50 (2006) (statement of the Honorable Carlos T. Bea, Circuit Judge, Ninth Circuit Court of Appeals).

<sup>36</sup> Notably, Judge Bea is a former noncitizen who was ordered deported by an IJ but successfully appealed the deportation order at the BIA. See *id.* at 48.

cases” is “especially significant in the immigration field because relatively few immigration cases are taken up by the Supreme Court.”<sup>37</sup>

The duration of an appeal to the BIA is also a relevant factor in the analysis of § 1003.4.<sup>38</sup> The incidence of “departure” may increase with the length of time that an appeal is pending and given that many non-citizens live near the border. The frequency and duration of these appeals suggests, if nothing else, that a wide variety of circumstances surrounding departures that the courts will need to consider.

## II. CONFUSION AND CONFLICT WITHIN THE COURTS

Courts have not consistently interpreted § 1003.4. While some courts have explicitly stated that they intend to adhere to the broadest meaning of the text of the regulation, they nonetheless use language in their opinions that suggests voluntariness is a relevant condition of a § 1003.4 departure. Other courts have been more upfront with their discomfort with applying § 1003.4 to all departures. To make matters more confusing, the BIA itself has failed to put forth one consistent interpretation of the regulation. Thus, although no obvious circuit split has emerged from § 1003.4, interpretations across circuits are sufficiently inconsistent that a uniform reading of § 1003.4 would help to alleviate the existing state of confusion and conflict. This Part addresses the problem of regulatory interpretation and details how courts have used voluntariness as an indication of a § 1003.4 departure.

### A. The BIA Has Not Laid Out a Clear Precedent

The BIA has fluctuated in its stance on whether involuntary departures constitute an exception to § 1003.4 and has even adopted contradictory positions in a single case that eventually reached the Fifth Circuit. The BIA first “found that the lone term ‘departure’ in [§ 1003.4] as to withdrawals of appeals is *not* meant to reach involuntary removals from the country.”<sup>39</sup> The BIA concluded that if the departure was involuntary, the appeal was not withdrawn under § 1003.4, and it remanded the case to the IJ for a factual determination of whether the

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<sup>37</sup> See *id.* at 49 (arguing for “unification of the appeals process in the Federal Circuit”).

<sup>38</sup> Some statistics show that as of September 30, 2007, a total of 28,813 cases were pending; 20,427 of these were filed in fiscal year 2007; 7,796 in fiscal year 2006; 265 in fiscal year 2005; 138 in fiscal year 2004; 96 in fiscal year 2003; and 91 filed prior to fiscal year 2003. Executive Office for Immigration Review, Office of Planning, Analysis, and Technology, *FY 2007 Statistical Year Book, BIA Pending Cases U1* (Apr 2008), online at <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf> (visited Jan 11, 2009).

<sup>39</sup> *Long v Gonzales*, 420 F3d 516, 518 (5th Cir 2005) (stating that the BIA first remanded the case to the IJ for further fact finding because the BIA deemed a finding of “involuntary or unknowing departure from the United States” to be a question of fact).

departure was involuntary.<sup>40</sup> Then, when the IJ returned a decision that the departure was in fact involuntary, the BIA abandoned its original position and concluded that the departure nonetheless withdrew the appeal under § 1003.4.<sup>41</sup> As demonstrated by the BIA’s shifting position within the same case, the BIA has not consistently expressed a single, clear interpretation of § 1003.4 that the courts can follow.<sup>42</sup> Furthermore, the fact that the BIA has at one point endorsed both positions suggests that either is a plausible interpretation of the regulation.

#### B. Circuit Courts That Suggest Voluntariness Is Relevant to a § 1003.4 Departure

The Second Circuit has indicated that § 1003.4 may contemplate a degree of voluntariness to constitute a “departure.” In *Mejia-Ruiz v INS*,<sup>43</sup> a noncitizen left the United States and visited his native Dominican Republic for twenty-seven days “about a year” after filing his appeal with the BIA.<sup>44</sup> The court repeatedly affirmed that the noncitizen’s departure was “voluntary” and dismissed the petition of the noncitizen “based on the petitioner’s voluntary departure from this country in 1994 during the pendency of his BIA appeal.”<sup>45</sup> By including the element of voluntariness when characterizing the departure and then using it to justify the withdrawal of the appeal, the court left room to deny the application of § 1003.4 to departures that are *not* voluntary.

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<sup>40</sup> *Id.* (clarifying that the BIA remanded the case because it “lacked the authority to make factual findings based on the affidavits before it”).

<sup>41</sup> *Id.* at 519:

While the BIA noted that it had previously indicated that an involuntary departure from the United States would not result in the withdrawal of an appeal and that the IJ ruled that [the noncitizen’s] departure was involuntary, it found that “[u]pon further review, we find that the respondent’s departure from the United States has resulted in a withdrawal of his appeal.

<sup>42</sup> The matter of agency deference is beyond the scope of this Comment. Yet, immigration law presents a unique challenge to traditional administrative law principles. The rule of lenity employed by Article III courts in review of immigration cases suggests that the BIA should construe the regulatory ambiguity against the deportation of noncitizens and that Congress should resolve this ambiguity. See Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U Chi L Rev 1671, 1675 (2007) (suggesting that the rule of lenity in immigration cases indicates some “concern about the harshness of deportation” but also hints that “there might be some aspect of immigration cases that implicates the kind of choices courts want to reserve to Congress”). Moreover, some federal appellate judges’ hesitation to defer to BIA decisions derives from the belief that immigration courts and the BIA are generally “incompetent, biased, or both.” *Id.* at 1679–82 (summarizing the skepticism of Judge Richard Posner, characterizing decisions by immigration courts as “arbitrary, unreasoned, irrational, inconsistent, and uninformed,” and noting that the “chorus” of like-minded federal appellate judges “has grown louder in recent years”). Nonetheless, issues concerning the regulatory interpretation of § 1003.4 merit attention because the meaning of the regulation remains unresolved—regardless of the intricacies of administrative law and the agency status of the immigration courts.

<sup>43</sup> 51 F3d 358 (2d Cir 1995).

<sup>44</sup> *Id.* at 360.

<sup>45</sup> *Id.*

Over a decade later, the Second Circuit reiterated its position in a situation where an IJ had denied a noncitizen's motion to reopen and the noncitizen's subsequent deportation by the government served to withdraw his pending BIA appeal of the IJ order. The court held that the motion to reopen was correctly denied pursuant to the "far less ambiguous regulatory language" of 8 CFR § 1003.2(d), which explicitly states that government deportation constitutes a withdrawal of such motion.<sup>46</sup> But, with regard to § 1003.4 withdrawing the appeal generally, the Second Circuit again asserted that "[i]t is unclear whether this regulation properly applies where an alien does not voluntarily depart but instead is deported" but declined to make a judgment on the matter given that the motion to reopen was rightfully denied.<sup>47</sup>

The Ninth Circuit similarly underscored the voluntary nature of a departure for purposes of § 1003.4 in *Aguilera-Ruiz v Ashcroft*.<sup>48</sup> The court decided that the noncitizen—who had traveled to Tijuana, Mexico for a brief shopping trip to buy tequila, candies, and piñatas for a party—had violated § 1003.4 and consequently forgone his appeal.<sup>49</sup> Particularly, the court held that the departure constituted a withdrawal of the appeal because "when a person who is under a deportation order, from which he has appealed to the BIA, voluntarily leaves the United States, he has been deported, the deportation is final, and the appeal to the BIA has been withdrawn by virtue of 8 C.F.R. § 1003.4."<sup>50</sup>

The Ninth Circuit affirmed *Aguilera-Ruiz* a year later and reiterated that even a "temporary" departure could qualify as a "voluntary departure."<sup>51</sup> The court determined that the noncitizen withdrew his appeal under § 1003.4 simply by "[v]oluntarily leaving the country under an order of deportation."<sup>52</sup> Again, in considering and noting the voluntary

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<sup>46</sup> See *Ahmad v Gonzales*, 2006 WL 3228809, \*1 (2d Cir). See also 8 CFR § 1003.2(d) ("Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."). At least one circuit court has held that § 1003.2(d) is invalid. See *William v Gonzalez*, 499 F3d 329, 333 (4th Cir 2007).

<sup>47</sup> *Ahmad*, 2006 WL 3228809 at \*1.

<sup>48</sup> 348 F3d 835 (9th Cir 2003).

<sup>49</sup> See *id* at 836–37.

<sup>50</sup> *Id* at 837 (emphasis added). See also *United States v Blaize*, 959 F2d 850, 852 (9th Cir 1992) (holding that for the purposes of the United States Sentencing Guidelines, a noncitizen who "voluntarily left this country" before his appeal was heard by the BIA was "deported" because his voluntary departure withdrew the appeal).

<sup>51</sup> *Villalvaso-Lugo v Ashcroft*, 2004 WL 2203628, \*1 (9th Cir) (referencing *Aguilera-Ruiz* and using its "voluntary" language). See also *Moreno-Aguilar v INS*, 2002 WL 31685768, \*1 (9th Cir) (affirming the BIA's decision that "because [the noncitizen] had voluntarily departed the United States while his appeal was pending, . . . the BIA lacked jurisdiction to reopen the case") (emphasis added); *Medina v Fasano*, 2002 WL 463325, \*1 (9th Cir) (holding that the noncitizen's "self-deportation effectively withdrew his BIA appeal").

<sup>52</sup> *Villalvaso-Lugo*, 2004 WL 2203628 at \*1.

nature of the departure that withdraws an appeal, the Ninth Circuit has hinted that an *involuntary* border crossing may not constitute a “departure” for purposes of § 1003.4.

Similarly, the Sixth Circuit relied on *Aguilera-Ruiz* as persuasive authority in *Mansour v Gonzales*,<sup>53</sup> where a noncitizen had been intoxicated when crossing the border but nonetheless “[did] not dispute that he *voluntarily*, if unwittingly, entered Mexico.”<sup>54</sup> The court approvingly cited the holding in *Aguilera-Ruiz* that a noncitizen who “voluntarily leaves” the United States withdraws his appeal under § 1003.4.<sup>55</sup> The Sixth Circuit thus has upheld the *Aguilera-Ruiz* reading of § 1003.4 and has recognized the Second and Ninth Circuits’ emphasis that voluntary departures are clear violations of § 1003.4.

### C. Circuit Courts That Do Not Limit § 1003.4 to Voluntary Departures

The Fifth and Tenth Circuits have taken a stricter approach, declining to limit the application of § 1003.4 to voluntary departures. The Fifth Circuit has asserted that a noncitizen’s “‘departure,’ voluntary or otherwise, result[s] in both a finalization of the deportation order and its effectuation.”<sup>56</sup> The Tenth Circuit has also rejected the element of voluntariness, stating up front that “cases holding appeals withdrawn under § 1003.4 typically involve instances where aliens voluntarily left the country” but that “[n]othing in the language of § 1003.4 restricts its operation to such departures.”<sup>57</sup>

Early on, the Fifth Circuit explained that in cases of voluntary departures, application of § 1003.4 is particularly justified. Where a noncitizen left the United States for a day trip to visit his wife, the court explained that “[t]he effect of the regulation [is] automatically to impute an intent to withdraw the appeal to one who has left the country under such burden. . . . [W]e cannot say that such inference [is] unreasonable when the departure [is], as here, strictly voluntary.”<sup>58</sup> Over two decades later, the Fifth Circuit refined its approach in *Long v Gonzales*,<sup>59</sup> declining to read earlier cases “so liberally as to provide an exception to § 1003.4 for ‘involuntary’ departures. To do so would require us to read into § 1003.4 an exception that it neither expressly or implicitly provides.”<sup>60</sup>

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<sup>53</sup> 470 F3d 1194 (6th Cir 2006).

<sup>54</sup> Id at 1199 (emphasis added) (remarking that the instant case was “indistinguishable” from *Aguilera-Ruiz* given that the noncitizen admitted to the voluntariness of the departure).

<sup>55</sup> Id at 1198.

<sup>56</sup> *Solis-Davila v INS*, 456 F2d 424, 427 (5th Cir 1972).

<sup>57</sup> *Moreno v Gonzales*, 2006 WL 3462177, \*2 (10th Cir).

<sup>58</sup> *Aleman-Fiero v INS*, 481 F2d 601, 601–02 (5th Cir 1973).

<sup>59</sup> 420 F3d 516 (5th Cir 2005).

<sup>60</sup> Id at 520–21 (mentioning specifically *Aguilera-Ruiz*, *Mejia-Ruiz*, and *Aleman-Fiero*).

The *Long* court addressed a departure that was accidental and unintentional. The noncitizen, who was in the process of appealing his deportation order to the BIA, went sightseeing with a friend near the border between the United States and Mexico.<sup>61</sup> The noncitizen explicitly told the driver of the vehicle that he could not leave the United States. But the driver was unfamiliar with the area, and “in attempting to drive to a park that he thought he remembered frequenting eighteen years ago,” the driver inadvertently drove the noncitizen across a bridge to Mexico.<sup>62</sup> The noncitizen later claimed that he did not even know that he was departing the country because he could not read the signs that were written in English, and the driver had promised him that they would not leave the United States.<sup>63</sup>

The Fifth Circuit’s opinion contained a two-part holding. First, the court clarified its approach to interpreting § 1003.4, denying any implicit exemption from the regulation for involuntary departures.<sup>64</sup> Second, the court concluded that the noncitizen’s affirmative act further merited withdrawal of the appeal because “[b]y his own free will, [the noncitizen] put himself in a position, during the Friday night Brownsville sightseeing trip, where he . . . ended up in another country.”<sup>65</sup> The court then used the waiver doctrine to rationalize the noncitizen’s departure as a withdrawal of his appeal, concluding that the noncitizen’s deliberate acts, taken as a whole, amounted to a waiver by the noncitizen of his right to appeal.<sup>66</sup> Again, the court declared that the withdrawal of the appeal was all the more justified because the noncitizen enabled his own departure or at least could have prevented it to some degree.

The Tenth Circuit has affirmed *Long*’s interpretation of § 1003.4, “agree[ing] with the Fifth Circuit that the mere fact that the alien’s departure may be characterized as involuntary does not preclude application of § 1003.4.”<sup>67</sup> But, while the Tenth Circuit disavowed an exception to § 1003.4 for involuntary departures, it has expressed discomfort with the idea of the government forcibly removing a noncitizen and thereby withdrawing his appeal.<sup>68</sup>

The court considered a case in which the BIA declared a noncitizen’s original appeal untimely and thus invalid due to procedural errors. Before the noncitizen was able to file a second notice of appeal, the gov-

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<sup>61</sup> *Id.* at 518.

<sup>62</sup> *Id.*

<sup>63</sup> *Long*, 420 F3d at 519.

<sup>64</sup> *Id.* at 520.

<sup>65</sup> *Id.* (emphasizing that the noncitizen knew he was going to the border, yet failed to pay attention or “make sure that others were paying attention to what was happening”).

<sup>66</sup> *Id.*

<sup>67</sup> *Moreno*, 2006 WL 3462177 at \*2.

<sup>68</sup> *Id.*

ernment deported the noncitizen back to Mexico. Consequently, § 1003.4 withdrew the noncitizen’s second appeal because of the departure.<sup>69</sup> Upon further review, the BIA ultimately determined that the initial appeal in the case was *not* untimely but rather “fatally deficient and without effect [ ] ‘as though no appeal had been taken.’”<sup>70</sup> Thus, the Tenth Circuit concluded that the question of improper government removal was moot.<sup>71</sup> Nonetheless, the court noted its concern.

The Fifth and Tenth Circuits have plainly stated that voluntariness is not relevant to § 1003.4 departures, but nonetheless *some* language in the circuits’ decisions still makes reference to the nature of departures and even the “free will” of noncitizens.<sup>72</sup> No opinion has applied the regulation without even looking at the facts of the case, which suggests that that no court actually treats § 1003.4 as a blanket regulation even if some courts do not outright acknowledge the voluntariness distinction to the extent that the Second, Sixth, and Ninth Circuits do.

#### D. Supreme Court Jurisprudence Has Added to the Confusion

Although the Supreme Court has yet to rule on the meaning of “departure” within the context of § 1003.4, it has determined the scope of the word “entry” as it relates to “departure” for other provisions of the INA. In *Rosenberg v Fleuti*,<sup>73</sup> a noncitizen visited Mexico for “about a couple hours” and later faced exclusion proceedings upon his return. At issue during these proceedings was whether the noncitizen had been “permanently and continuously” a resident despite the excursion to Mexico. Specifically, the Court had to determine “whether [the noncitizen’s] short visit to Mexico [could] possibly be regarded as a ‘departure to a foreign port or place . . . [that] was not intended,’ within the meaning of the exception to the term ‘entry’ created by the statute.”<sup>74</sup>

The Court concluded that the trip to Mexico *did* fall under the statutory exception, ultimately resolving that Congress intended to exclude any trips that were not “meaningfully interruptive of the alien’s permanent residence.”<sup>75</sup> The Court specifically looked to the nature of

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<sup>69</sup> Id at \*1.

<sup>70</sup> Id at \*2.

<sup>71</sup> *Moreno*, 2006 WL 3462177 at \*2 (“We do not have to resolve that question here.”).

<sup>72</sup> See, for example, *Long*, 420 F3d at 520 (“By his own free will, [a noncitizen] put himself in a position . . . where he departed the United States.”).

<sup>73</sup> 374 US 449 (1963).

<sup>74</sup> Id at 452. The text of the statute, 8 USC § 1101(a)(13), addressing the exception states:

[A]n alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves . . . that his departure . . . was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.

<sup>75</sup> *Fleuti*, 374 US at 462.

the noncitizen's trip and concluded that "[c]ertainly if [a] trip is *innocent, casual, and brief*, it is consistent with all the discernible signs of congressional purpose to hold that the 'departure ... was not intended.'" <sup>76</sup> Furthermore, the Court noted that Congress likely did not want noncitizens to have to bear the consequences of fortuity in cases involving their deportation, particularly when the consequences are so severe. <sup>77</sup> As such, the short trip in this case did not qualify as a departure such that the noncitizen's reentry did not constitute an "entry."

The Court outlined three factors for consideration when determining the nature of a departure: the length of time of the visit, the purpose of the trip, and the extent to which the noncitizen considered "the implications involved in his leaving the country" as evidenced by the procurement of travel documents. <sup>78</sup> By considering the circumstances surrounding the departure, the Court implied that the intent of the noncitizen in departing the country could have an effect on how the departure is interpreted under certain federal immigration law.

Noncitizens have tried to argue that the *Fleuti* rationale should apply to § 1003.4 departures, but courts have distinguished *Fleuti* for a variety of reasons. The Sixth and Ninth Circuits have rejected the notion that *Fleuti* applies to § 1003.4, focusing on the differing legal statuses of the noncitizens. <sup>79</sup> The Second Circuit has explained that *Fleuti* considered "whether an alien's permanent residence was interrupted by his wholly lawful and brief departure so as to make his return an 'entry' for purposes of exclusion proceedings," whereas § 1003.4 addresses instances where noncitizens "depart[] after a deportation order [has] already been issued."<sup>80</sup>

The text and legislative history of the statute at issue in *Fleuti* also differ significantly from that of § 1003.4. The text of the statute in *Fleuti* calls for an inquiry of intent, explicitly excluding departures that are

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<sup>76</sup> Id at 461 (emphasis added).

<sup>77</sup> See id at 455.

<sup>78</sup> *Fleuti*, 374 US at 462 (describing some of the relevant factors that indicate that a noncitizen did not intend "to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence").

<sup>79</sup> *Mansour*, 470 F3d at 1199 ("[The noncitizen in *Fleuti*] was simply an excludable alien, not a deportable one."). See also *Aguilera-Ruiz*, 348 F3d at 837:

*Fleuti*'s situation was, however, significantly different from *Aguilera-Ruiz*'s. While both were legal permanent residents with a good deal at stake, the alien in *Fleuti* was not deportable, just excludable. *Aguilera-Ruiz* was inadmissible *and* removable. *Fleuti* was not in immigration proceedings when he left the country, whereas *Aguilera-Ruiz* was subject to an order of deportation. And *Fleuti* had no pending appeal, so there was no occasion for the Court to consider the effect of 8 C.F.R. § 1003.4.

<sup>80</sup> *Mejia-Ruiz*, 51 F3d at 365 (rejecting the relevance of petitioner's argument that his trip, like *Fleuti*'s, was "brief, casual, and innocent").

“not intended or reasonably to be expected by [the noncitizen].”<sup>81</sup> The Fifth Circuit in particular has emphasized this aspect of the distinction between *Fleuti* and § 1003.4 cases.<sup>82</sup> Furthermore, the Ninth Circuit pointed out that “*Fleuti* was based in large part on the legislative history behind 8 U.S.C. § 1101(a)(13), which the Court held evidenced an intent to ‘ameliorate the severe effects of the strict “entry” doctrine,’” whereas § 1003.4 “possesses no parallel legislative history.”<sup>83</sup> Therefore, although *Fleuti* is instructive in that it demonstrates how the Court has taken a totality of circumstances approach to classifying certain noncitizen departures, courts have formed a reasonable consensus in denying the application of *Fleuti*’s rationale to § 1003.4.

### III. THE LEGAL REASONS WHY § 1003.4 ANALYSIS SHOULD TAKE CIRCUMSTANCES INTO ACCOUNT

Section 1003.4 affects noncitizens who have already had one chance to present their cases at removal proceedings and who have been ordered deported by an IJ. As a result, these noncitizens represent a relatively unsympathetic group. But the law nonetheless confers a statutory right of appeal to these noncitizens,<sup>84</sup> so courts should not interpret § 1003.4 in a way that arbitrarily undermines that right.<sup>85</sup> Therefore, the inquiry underlying the analysis of § 1003.4 is, not how best to protect these noncitizens, but rather how best to avoid a legal inconsistency between § 1003.4 and the broader statutory scheme,<sup>86</sup> thereby preserving the integrity of the congressionally created structure of agency re-

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<sup>81</sup> 8 USC § 1101(a)(13).

<sup>82</sup> See *Aleman-Fiero*, 481 F2d at 602 (concluding that despite the “temporary nature” of the noncitizen’s departure, the *Fleuti* statute “expressly provides” for an exemption whereas § 1003.4 does not).

<sup>83</sup> *Chow v United States INS*, 2003 WL 21949803, \*1 (9th Cir) (“Absent congressional intent on the matter, we may not extend the *Fleuti* exception to cases to which its rationale does not apply.”), quoting *Fleuti*, 374 US at 462.

<sup>84</sup> See 8 USC § 1101(a)(47)(B).

<sup>85</sup> Consider *United States v Witkovich*, 353 US 194, 199 (1957) (refusing to read the text of an immigration statute “in isolation and literally” in favor of looking to “the [INA] as a whole” because “once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative”). The issue of how regulations should be read together with statutes is not unique to § 1003.4 nor to the realm of immigration law. For an example relating to veterans’ rights, see *King v St Vincent’s Hospital*, 502 US 215, 218, 221 (1991) (asserting that “the meaning of statutory language, plain or not, depends on context”).

<sup>86</sup> The Court has in the past even refused to enforce statutes when their application undermines the system of immigration law at large. See *Delgadillo v Carmichael*, 332 US 388, 391 (1947) (“The hazards to which we are now asked to subject the [noncitizen] are too irrational to square with the statutory scheme.”). Therefore, it seems implausible that the Court would enforce regulations that did so.

view in immigration cases.<sup>87</sup> This Part addresses the legal tensions at the core of applying § 1003.4 to all departures and explains why § 1003.4 analysis should take the circumstances surrounding a noncitizen's departure into account.

#### A. Courts Do Not Want to Apply § 1003.4 to Forced Departures

Even the courts that have interpreted "departure" in the broadest sense have acknowledged that the withdrawal of an appeal under § 1003.4 could lead to an intolerable result in some instances. Specifically, the Fifth Circuit has expressed concern with the idea that a noncitizen who is "forcibly removed from the country" could then "be held to have withdrawn his appeal when he departs the United States."<sup>88</sup> If the regulation were to apply to noncitizens who are physically forced across the border, the incentive for strategic behavior could arise on the part of third parties, which could lead to abuse of the regulation.

Even more controversial is the government's illegal deportation of a noncitizen that withdraws a pending appeal. Consequently, although the Tenth Circuit has repeatedly maintained that voluntariness should *not* be a factor in applying § 1003.4, the court did concede that "an involuntary departure *by removal* raises a potential complication" in the application of § 1003.4 because the government would be "responsible" for the noncitizen's departure.<sup>89</sup> The government is prohibited from executing an IJ decision while an appeal is pending through an automatic stay provision, 8 CFR § 1003.6.<sup>90</sup> While the Tenth Circuit did not have to rule decisively on the matter, the court pointed out the potential complication of "affording the government the benefit of one regulation based on its violation of another."<sup>91</sup> The Sixth Circuit has also held

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<sup>87</sup> The Court has noted, "It is true that [noncitizens] who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law," which may in fact be the reason for granting a statutory right of appeal in the first place. *Shaughnessy v Mezei*, 345 US 206, 212 (1953) (distinguishing between the rights of noncitizens who are already in the United States with those who are at the border and have not yet entered).

<sup>88</sup> *Long*, 420 F3d at 520 n 6. This conflict between government-forced departures and § 1003.4 somewhat parallels the relationship between voluntary departure orders and motions to reopen, in which the government requires the noncitizen to leave "in accordance with the voluntary departure order; but pursuant to the regulation, the motion to reopen will be deemed withdrawn" as a consequence. *Dada v Mukasey*, 128 S Ct 2307, 2318 (2008). The Supreme Court referred to this dilemma as placing the noncitizen "between Scylla and Charybdis." *Id.* (concluding that "[i]t is necessary, then, to read the Act to preserve the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement").

<sup>89</sup> *Moreno*, 2006 WL 3462177 at \*2.

<sup>90</sup> *Id.* (holding that involuntariness alone "does not preclude application of § 1003.4," but leaving open the possibility that removal "in violation of the automatic stay in § 1003.6(a)" might create a situation where § 1003.4 does not apply).

<sup>91</sup> *Id.*

that the term “departure” means a “legally executed departure that does not violate due process”<sup>92</sup> and that a noncitizen’s “deportation from the United States, if unlawful, does *not* bar the reopening of his exclusion proceedings.”<sup>93</sup>

Therefore, although the courts may not agree on *which* circumstances should be taken into account and to what extent, there is some consensus that the regulation should be interpreted to exempt at least some departures. Even the Fifth and Tenth Circuits, which have most strongly rejected consideration of voluntariness when assessing § 1003.4 departures, have expressed their discomfort with applying the regulation to government-forced departures. The fear is that interpreting § 1003.4 as a blanket regulation encompassing all departures, as advocated, would not exempt departures compelled by improper government action. This concern indicates that interpreting § 1003.4—even to include all departures—is not straightforward and requires a harder look at the nature of the departure than the regulation’s text may suggest.

#### B. Courts Generally Recognize Implicit Reasonableness in Immigration Law

Particularly in the realm of immigration law, courts are faced with varied, unforeseeable circumstances that can give rise to arbitrary outcomes. Judge Learned Hand, writing for the Second Circuit, explained the need for a degree of reasonableness in interpreting and applying immigration statutes. The court considered a situation in which a noncitizen fell asleep on a train from Buffalo to Detroit not knowing that the route passed through Canada and consequently was deemed to have made an “entry” into the United States upon his arrival in Detroit.<sup>94</sup> Judge Hand concluded that this legal determination was incorrect:

If the word “entry,” in the statute extends to the mere physical passage of an alien across the boundaries of the United States, regardless of any intent, the order was right; but, if so, an alien who is arrested or abducted, and carried against his will out of the country and then back again into it, makes an “entry.” We do not understand that the Director of Immigration takes this extreme position.<sup>95</sup>

In large part this conclusion stems from a reasonable conception of congressional intent, as Judge Hand reasoned, “We cannot believe that

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<sup>92</sup> *Dutchievici v INS*, 2004 WL 385578, \*1 n 2 (6th Cir).

<sup>93</sup> *Id.* at \*5 (emphasis added) (drawing from Sixth and Ninth Circuit case law the principle that an unlawfully executed departure should be treated differently than a departure that was consistent with due process).

<sup>94</sup> See *Di Pasquale v Karnuth*, 158 F.2d 878, 878 (2d Cir 1947).

<sup>95</sup> *Id.* (noting that no court had found an “entry” without voluntary action).

Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous.”<sup>96</sup>

The Supreme Court has also expressed unease with the idea of penalizing noncitizens for unforeseen and unusual circumstances, reiterating that Congress, and likewise agencies, would not make the deportation of noncitizens contingent on “fortuitous and capricious” circumstances.<sup>97</sup> The most representative of these cases is *Delgadillo v Carmichael*,<sup>98</sup> in which the Court had to decide whether a noncitizen who had technically left the United States and returned, should be deported under the relevant provisions of the INA. The noncitizen had departed the country while making an intercoastal trip from Los Angeles to New York aboard a merchant ship. After passing through the Panama Canal, the ship was torpedoed, and the noncitizen was taken to the nearby US Consulate in Cuba for medical treatment before he could return to the United States.<sup>99</sup> The noncitizen would have been deported if his return to the United States from Cuba qualified as an “entry” under the INA.<sup>100</sup> The Court stressed, however, that “[d]eportation can be the equivalent of banishment or exile. . . . The stakes are indeed high and momentous for the alien who has acquired his residence here.”<sup>101</sup> The Court concluded that applying the statute to deport the noncitizen because of such arbitrary circumstances would itself undermine the gravity of the law.<sup>102</sup>

More recently, in *Dada v Mukasey*,<sup>103</sup> the Court held that noncitizens could withdraw requests for voluntary departure before the expiration of the departure period while motions to reopen removal proceedings were pending. The Court recognized that “[w]hether an alien’s motion will be adjudicated within the 60-day statutory period in all likelihood will depend on pure happenstance—namely, the backlog of the particular Board member to whom the motion is assigned” and that the arbitrary delay could dictate whether noncitizens violate their

<sup>96</sup> Id at 879 (“[C]aprice in the incidence of punishment is one of the indicia of tyranny.”).

<sup>97</sup> See *Delgadillo*, 332 US at 391. See also *Fleuti*, 374 US at 456 (describing *Delgadillo* as bringing about “increased protection of returning resident aliens”); *Di Pasquale*, 158 F2d at 879 (“It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards.”).

<sup>98</sup> 332 US 388 (1947).

<sup>99</sup> Id at 391 (explaining the sequence of events by which “the exigencies of war, not his voluntary act, put him on foreign soil”).

<sup>100</sup> Subsequent to the trip, the noncitizen was convicted of robbery, and a noncitizen can be deported if convicted of a crime “committed within five years after the *entry* of the alien to the United States.” 8 USC § 155(a) (emphasis added). The question therefore was whether the trip from Los Angeles to New York by way of Cuba constituted an “entry.” *Delgadillo*, 332 US at 389–90.

<sup>101</sup> *Delgadillo*, 332 US at 391.

<sup>102</sup> Id (“It would indeed be harsh to read the statute so as to add the peril of deportation to such perils of the sea. . . . Respect for law does not thrive on captious interpretations.”).

<sup>103</sup> 128 S Ct 2307 (2008).

voluntary departure orders.<sup>104</sup> Again, the Court promoted the ideal of reasonableness when interpreting statutes, especially ones that have severe consequences for noncitizens.

In the context of § 1003.4, courts might look to the voluntariness of a departure as an indication of reasonableness as well. For example, the Ninth Circuit concluded that an “entirely voluntary” departure should withdraw the appeal because it so clearly falls under the meaning of the regulation.<sup>105</sup> But this implicit presumption of reasonableness is not sufficient to guide courts in how to apply the regulation consistently given the inevitable disagreement over what constitutes “reasonableness.” Courts that do not take voluntariness into account clearly believe that an involuntary departure reasonably triggers § 1003.4, whereas other courts disagree. Thus, while application of § 1003.4 requires some recognition of the Court’s aversion to penalties being imposed arbitrarily or by chance, a general test of reasonableness does not adequately address the conflict between the courts because it begs the question of what is reasonable.

### C. A § 1003.4 Withdrawal of an Appeal Amounts to Self-deportation

Existing Supreme Court case law has also looked to the noncitizen’s control over circumstances as a proxy for whether courts should uphold and enforce certain immigration statutes.<sup>106</sup> Above all, in cases involving the rights of noncitizens or the bureaucracy of the government, the Court has allowed flexibility when applying immigration statutes in certain situations that are beyond the control of the noncitizen.

*Zadvydas v Davis*<sup>107</sup> involved two noncitizens, one of whom—Zadvydas—was a noncitizen born to Lithuanian parents in a displaced persons camp in Germany in 1948. Zadvydas had been ordered deported, but neither Germany nor Lithuania would take him back because he was not regarded as either a German or Lithuanian citizen.<sup>108</sup> The US government then detained Zadvydas beyond the standard ninety-day

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<sup>104</sup> Id at 2318, citing *United States v Wilson*, 503 US 329, 334 (1992) (explaining that arbitrary results are “not to be presumed lightly”).

<sup>105</sup> See *Aguilera-Ruiz*, 348 F3d at 839 (“However infelicitous this may seem . . . [a]n alien against whom a deportation order has been issued cannot afford to become an international traveler if he hopes to maintain his status in this country.”), quoting *United States v Blaize*, 959 F2d 850, 852 (8th Cir 1992).

<sup>106</sup> See, for example, *Gastelum-Quinones v Kennedy*, 374 US 469, 479–80 (1963) (holding that a noncitizen could not be deported absent a showing of *voluntary*, meaningful membership in the Communist Party under 8 USC § 1251(a)(6)(C)); *Mitsugi Nishikawa v Dulles*, 356 US 129, 133–35 (1958) (holding that a national could not be expatriated absent a showing of *voluntary* service in the Japanese army under 8 USC § 1481(a)(3)).

<sup>107</sup> 533 US 678 (2001).

<sup>108</sup> Id at 684.

removal period designated by the authorizing statute, leading to “not limited, but potentially permanent” confinement.<sup>109</sup> The Court determined that the reasonableness of a given detention should be considered “primarily in terms of the statute’s basic purpose, namely, assuring the alien’s presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”<sup>110</sup> Zadvydas’s extended detention was the consequence of both international government action and national government delay, neither of which were within Zadvydas’s control. As a consequence, the Court established that the review of his detainment must be reasonable regardless of the fact that the confinement itself was based on valid statutory grounds.<sup>111</sup>

Courts applying § 1003.4 have also considered the control of the noncitizen. The Ninth Circuit asserted that “[v]oluntarily leaving the country under an order of deportation amounts to self-deportation because it executes the order,”<sup>112</sup> a recognition that the regulation presumes that the noncitizen finalizes his own deportation. The Fifth Circuit also stressed that where “[b]y his own free will, [a noncitizen] put himself in a position . . . where he departed the United States,” his departure sufficiently indicates his withdrawal of his appeal.<sup>113</sup> Again, a distinct attribute of § 1003.4 is that it applies to noncitizens who have already been ordered deported so that the affirmative act of leaving the United States not only withdraws the pending appeal but also amounts to the noncitizen actually deporting himself.<sup>114</sup> The flip side of this analysis, therefore, is that understanding § 1003.4 as a mechanism for *self*-deportation in some sense implies that the noncitizen *should* have control over the departure.

#### IV. THE WAIVER DOCTRINE FITS THE SCOPE OF DEPARTURES THAT SHOULD BE COVERED BY § 1003.4

Part III outlined three main legal concerns raised by § 1003.4, and the waiver doctrine addresses each. A waiver has been defined by the Supreme Court as “an intentional relinquishment or abandonment of a known right or privilege.”<sup>115</sup> The waiver doctrine thus includes two di-

<sup>109</sup> *Id.* at 691.

<sup>110</sup> *Id.* at 699–700.

<sup>111</sup> *Zadvydas*, 533 US at 699–700. See also *Shaughnessy v Mezei*, 345 US 206, 213, 216 (1953) (appreciating that the noncitizen’s “movements are restrained by authority of the United States” and further recognizing that “exclusion by the United States plus other nations’ inhospitality results in present hardship cannot be ignored”).

<sup>112</sup> *Aguilera-Ruiz*, 348 F3d at 838.

<sup>113</sup> *Long*, 420 F3d at 520.

<sup>114</sup> See *Mejia-Ruiz*, 51 F3d at 360.

<sup>115</sup> *Johnson v Zerbst*, 304 US 458, 464 (1938).

mensions: intent and knowledge. Part IV.A explains that the “intentional” aspect of the waiver doctrine would prevent § 1003.4 from applying to government-forced departures. The Court has further explained that “[t]he determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the [actor waiving his rights].”<sup>116</sup> Part IV.B maps the consideration of “the particular facts and circumstances” in the § 1003.4 context, explaining that the waiver doctrine would appropriately not exempt a *Fleuti*-like “innocent, casual, or brief” departure but would nonetheless provide a degree of reasonableness. Finally, Part IV.C makes clear that understanding a waiver as “relinquishment or abandonment of a known right” fits with the idea of noncitizen self-deportation—departures which unquestionably should be covered by § 1003.4.

#### A. The Waiver Doctrine Exempts Forced Departures

Use of the waiver doctrine eliminates the primary concern of courts that § 1003.4 should not apply to forced or illegal departures, properly excluding them by requiring intent. An effective waiver must be voluntary “in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and it “must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”<sup>117</sup> Thus, the waiver doctrine ensures that a departure does not trigger § 1003.4 when it is not intended.

Specifically, the waiver doctrine will prevent application of the regulation to government-forced departures because noncitizens do *not* act knowingly and intentionally when they are removed from the country against their will. The waiver doctrine would require that a noncitizen be solely accountable for the withdrawal of his appeal, thus easing the concern of the Tenth Circuit that the government could be “responsible” for a noncitizen’s departure and consequent withdrawal of appeal.<sup>118</sup> Therefore, by using the waiver doctrine, no perverse incentive would exist for either the government or third parties to remove a noncitizen unlawfully because such forced departures would not constitute a waiver.

Analysis of § 1003.4 case law suggests that unforeseen and bizarre circumstances inevitably arise that lead to involuntary departures. The courts have failed to develop a uniform way of assessing § 1003.4 de-

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<sup>116</sup> *Id.*

<sup>117</sup> *Moran v Burbine*, 475 US 412, 421 (1986).

<sup>118</sup> See *Moreno*, 2006 WL 3462177 at \*2.

partures that gives enough weight to situational considerations in order to prevent arbitrary applications of the regulation, while still maintaining a rule-like application of § 1003.4.

This Part explains how the waiver doctrine presents an improvement over other analyses by preventing deportation from resting on the “sport of chance.” At the same time, the waiver doctrine is not a vague standard, like that in *Fleuti*, nor is it a bright-line rule that overreaches in its application to all departures. The waiver doctrine would add a degree of reasonableness to the prohibition of noncitizen departures while eliminating confusion as to the scope of § 1003.4.

1. The *Fleuti* standard is too broad for § 1003.4 purposes.

Given the fact that *Fleuti* addressed a noncitizen departure under different circumstances than § 1003.4,<sup>119</sup> *Fleuti*’s exception for “innocent, casual, and brief” departures would be an overinclusive exception in the context of § 1003.4. In *Fleuti*, the Court looked at whether a given departure was disruptive of the noncitizen’s permanent resident status. But the question in § 1003.4 is simply whether a departure falls under the regulation.

In practical terms, applying the *Fleuti* standard to § 1003.4 would create unintended exceptions within the category of voluntary departures. For example, in *Aguilera-Ruiz*, the purpose of the noncitizen’s trip to Mexico was to buy tequila, candies, and piñatas.<sup>120</sup> The Ninth Circuit could have construed this departure as “innocent, casual, or brief,” and therefore exempted the departure pursuant to the *Fleuti* standard, which takes into account the duration of and reason for the visit.<sup>121</sup> But circuit courts have all agreed that § 1003.4 applies to such voluntary departures. Unlike the *Fleuti* standard, the waiver doctrine would ignore the purpose of the departure and instead focus on whether the noncitizen acted knowingly and intentionally.<sup>122</sup> Thus, applying the waiver doctrine to a shopping trip to Mexico would lead a court to conclude that the departure violated the regulation, consistent with what all courts would decide.

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<sup>119</sup> See *Aleman-Fiero v INS*, 481 F2d 601, 602 (5th Cir 1973) (distinguishing *Fleuti* as a case in which the noncitizen “left the country free of any sanctions imposed by the immigration laws” and thus was more entitled to relief than a noncitizen already ordered deported).

<sup>120</sup> *Aguilera-Ruiz*, 348 F3d at 836.

<sup>121</sup> *Fleuti*, 374 US at 462.

<sup>122</sup> See Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich L Rev 1214, 1254–55 (1977) (explaining that the justification for waiver doctrine rests on the idea that “once [an individual] has made a free and informed decision to forgo his [right], he may [ ] be held to the consequences of his election”).

Furthermore, the *Fleuti* conception of departures could create even more ambiguity as to what type of voluntary departures is permitted by § 1003.4, and therefore could lead to even less uniformity among the courts. The waiver doctrine, on the other hand, minimizes this confusion by including all voluntary departures that constitute a noncitizen’s knowing and intentional waiver of his right of appeal. With more clarity as to what constitutes the withdrawal of an appeal, courts can better preserve the statutory right.

## 2. Forfeiture is too narrow for § 1003.4 purposes.

While applying a *Fleuti*-like standard would exempt too many departures from the reach of § 1003.4, using forfeiture—an alternative to waiver—to assess § 1003.4 would disregard the need for any exemption; thus, the difference between forfeiture and waiver is notable.<sup>123</sup> Forfeiture of a right occurs when an individual has “fail[ed] to make the timely assertion of a right.”<sup>124</sup> For example, a noncitizen would forfeit his right to appeal if he failed to file an appeal with the BIA within thirty days, as stipulated.<sup>125</sup> Forfeiture does not entail an affirmative act, and lack of action can cause the loss of the right. Waiver, conversely, requires “the intentional relinquishment or abandonment of a known right.”<sup>126</sup> Unlike forfeiture, waiver *does* require an affirmative act and, even more importantly, the noncitizen must have the knowledge and intent that his action signifies the loss of the right.<sup>127</sup>

This distinction is significant because of the relative levels of volition required for forfeiture and waiver. Whereas waiver requires a particular mental state—that of intent—forfeiture occurs as a function of limitations set by law and not necessarily because of any conscious action on the part of the individual who is giving up his rights.<sup>128</sup> Consequently, waiver presents a more complex analysis in that courts must consider the noncitizen’s state of mind with regard to his knowledge and intent. Professor Peter Westen argued that the distinction between rights that can be forfeited and those that must be waived rests on the

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<sup>123</sup> See *Kontrick v Ryan*, 540 US 443, 458 n 13 (2004) (explaining how forfeiture and waiver differ “[a]lthough jurists often use the words interchangeably”).

<sup>124</sup> *United States v Olano*, 507 US 725, 733 (1993).

<sup>125</sup> See 8 CFR § 1003.38(b); Form EOIR-26 at 1.

<sup>126</sup> *Zerbst*, 304 US at 464.

<sup>127</sup> See Michael E. Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 Harv L Rev 1, 8 (1970) (emphasizing that the waiver doctrine, as articulated in *Zerbst*, “stresses the consensual, ‘free choice’ character of waiver and its ultimate reliance upon the individual’s freedom to forgo benefits or safeguards through the uncoerced exercise of his rational faculties”).

<sup>128</sup> See Westen, 75 Mich L Rev at 1214 (cited in note 122) (“The significant difference between waiver and forfeiture is that a defendant can forfeit his defenses . . . without ever having been in a position to make a cost-free decision to assert them.”).

difficulty in determining an individual's mental state, the material effect of the loss of the right, and the government's interest in finality, as forfeiture of a right generally occurs after a definite time period passes as predefined by law.<sup>129</sup>

Ultimately, forfeiture does not correspond well to the needs of § 1003.4 analysis. Deportation resulting from a departure that irreversibly withdraws an appeal presents a "material effect." Further, the government's interest in finality is less relevant since the BIA determines when the appeal is heard, and thus the right ceases to exist after the BIA makes a judgment. The inquiry into the noncitizen's mental state also does not have to be difficult: if the noncitizen has notice of § 1003.4 upon filing his appeal forms and voluntarily departs the country, then he has waived his right of appeal. Furthermore, the use of forfeiture, as opposed to waiver, in the § 1003.4 context would allow government-forced departures to withdraw a pending appeal under § 1003.4. This possibility, as discussed, raises significant fairness concerns. For these reasons, waiver better fits the complexities of § 1003.4 departures than forfeiture does.

#### B. The Waiver Doctrine Appropriately Considers Volition

More than any other form of analysis, the waiver doctrine would consider the volition of the noncitizen in departing the country. Courts must examine all of the factors affecting an individual's "ability to exercise his free will" when conducting a waiver analysis.<sup>130</sup> For § 1003.4 purposes, this evaluation would include the extent to which a noncitizen knows that he is departing the country and is aware of the consequential waiver of his right to appeal per § 1003.4.

Immigration cases present an interesting forum for waiver doctrine analysis in that noncitizens in particular may not be familiar with the US legal process, may not understand how immigration laws relate to each other, may not be able to afford or have access to legal advice, or may confront language barriers—all of which courts should assess when determining whether a noncitizen has waived certain rights. Therefore, although the scope of the waiver doctrine's knowledge requirement cannot be defined precisely, the Court has held that when a defendant waives his right to counsel, for example, "[t]he information a defendant must possess in order to make an intelligent election depends on

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<sup>129</sup> *Id.* at 1227 (assessing the distinction between waiver and forfeiture in the context of criminal law and explaining how the former is generally associated with cases in which the loss of the right would have a "material effect").

<sup>130</sup> *Oregon v Elstad*, 470 US 298, 309 (1985) (rejecting a mechanical application of the waiver doctrine and instead asserting that the validity of waiver rests on "whether it is knowingly and voluntarily made").

a range of case-specific factors, including the defendant’s education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding.”<sup>131</sup> If a noncitizen misunderstands his status or is misled to believe that he can legally depart the country without withdrawing his appeal, his actions do not symbolize self-deportation, even though the regulation could have that consequence if applied to all departures. In this way, the waiver doctrine works with the idea of self-deportation by preventing a noncitizen from involuntarily or accidentally deporting himself because of lack of notice.

That said, courts should not always have to assess a noncitizen’s knowledge of § 1003.4 if noncitizens receive adequate notice of the regulatory restriction when filing their appeals. Ignorance of the law should not be a means for noncitizens to skirt immigration regulations, but failure to inform noncitizens of their rights likewise should not enable the government to enforce regulations. For this reason, the notice provided to noncitizens of the consequences of a departure should be clear enough to ensure that courts can reasonably assume that noncitizens have knowledge of § 1003.4 when departing the country. For example, the existing Form EOIR-26 is arguably inadequate in that its language is ambiguous and it is not offered in any other language besides English.<sup>132</sup>

Just as knowledge cannot always be presumed, intent to depart should not be inferred where it does not exist. Although this Comment’s argument for waiver doctrine is based on the Fifth Circuit’s opinion in *Long*, the *Long* court misapplied the waiver doctrine by mistakenly inferring the noncitizen’s intent to depart. The court understood the noncitizen’s “free will” in taking the sightseeing trip as evidence of a waiver; but the court did not adequately recognize the fact that the noncitizen *did not intend* to leave the country, let alone waive his right of appeal.<sup>133</sup> The court incorrectly concluded that “via his own actions, [the noncitizen] ended up in another country.”<sup>134</sup> But the noncitizen did not intend to depart and took affirmative steps to express that intent, even if those steps were ineffective in the end. Thus, the court misconstrued its emphasis on free will by allowing an absolutely unintentional departure, caused by circumstances beyond the noncitizen’s free will, to amount to a waiver.

Instead, the Fifth Circuit should have considered whether the departure itself was knowing and intentional, not whether the noncitizen’s isolated actions leading up to the departure were knowing and intentional. The concept of self-deportation implies that the departure must be considered as a whole, as an indication that the noncitizen has

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<sup>131</sup> *Iowa v Tovar*, 541 US 77, 88 (2004).

<sup>132</sup> See notes 20–24 and accompanying text.

<sup>133</sup> See Part II.C.2.

<sup>134</sup> *Long*, 420 F3d at 520.

taken action to execute his deportation order. In this sense, the Fifth Circuit's decision in *Long* remains an important guidepost to using the waiver doctrine in the context of § 1003.4 because it provides a clear example of how *not* to apply the knowing and intentional standard.

#### CONCLUSION

The tension between the courts of appeals over the relevance of voluntariness to § 1003.4 departures suggests that there are weaknesses with the understanding of § 1003.4 as applying to *all* departures. Even the courts that advocate the broadest application of the regulation have expressed unease with the idea that § 1003.4 could apply when unlawful government intervention causes a departure. That said, the *Fleuti* standard of exempting “innocent, casual, or brief” departures seems too lenient because it excuses certain voluntary departures that fall squarely within the meaning of the regulation. Thus, interpretation of § 1003.4 requires considering the circumstances surrounding a departure—but not to the extent that the regulation becomes meaningless.

The waiver doctrine presents the most fitting legal framework to apply § 1003.4 to the complexities of immigration cases. In practice, the waiver doctrine boils down to two findings and one condition: the non-citizen must know that he is leaving the country; he must intend to leave the country; and he must all the while have notice that his departure from the country will result in the withdrawal of his appeal and the finalization of his deportation. The waiver doctrine ensures that noncitizens are not arbitrarily stripped of their right to appeal and provides a reliable legal tool for doing so. As a result, the waiver doctrine eases the strain between § 1003.4 and the broader statutory scheme by allowing for some exception to the regulation in instances where a blanket application of § 1003.4 would undermine the importance of the statutory right of appeal. In short, the waiver doctrine is an approach that is resolute yet reasonable.