Appellate Jurisdiction over the Board of Immigration Appeals's Affirmance Without Opinion Procedure

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INTRODUCTION

The Board of Immigration Appeals (BIA) is the highest administrative tribunal responsible for deciding immigration and nationality matters in the United States.[1] In 2002, the Department of Justice issued administrative reforms that dramatically altered the procedures governing appeals before the BIA. This controversial restructuring changed the traditional system of review by a three-member panel to permit review by a single Board member. This member may now issue an Affirmance Without Opinion (AWO) if he or she finds that the initial factfinder—the Immigration Judge (IJ)—reached the correct result.[2] The Board member may issue an AWO even if there are shortcomings in the IJ's reasoning, provided that any errors are considered to be harmless or immaterial.[3]

Following the implementation of these reforms, a circuit split developed regarding whether the courts may review the BIA's decision to issue an AWO. The First, Third, and Ninth circuits hold that judicial review is proper because the BIA's decision to affirm without opinion is not committed to agency discretion by law.[4] Under the Administrative

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1 See Executive Office for Immigration Review Practice Manual § 1.2, online at http://www.usdoj.gov/eoir/vll/qapracmanual/pracmanual/chap1.pdf (visited June 7, 2006).

2 See 8 CFR § 1003.1(e)(4)(i) (2006). Administrative immigration proceedings are adjudicated by individual IJs and are reviewed by the BIA under the authority of the Attorney General. See John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 Georgetown Immig L J 605, 612 (2004). For a more general overview, see Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, 8 *Immigration Law and Procedure* §§ 104.05, 104.13 (Matthew Bender rev ed 2005).

3 See 8 CFR § 1003.1(e)(4)(i).

4 See, for example, *Haoud v Ashcroft*, 350 F3d 201, 206 (1st Cir 2003) (holding that "the Board's own regulation provides more than enough 'law' by which a court could review the Board's decision to streamline"); *Smriko v Ashcroft*, 387 F3d 279, 294 (3d Cir 2004) ("We hold that the issues addressed by single BIA members under § 1003.1(e)(4)(i) of the streamlining regulations are not committed to agency discretion and that the resolutions of those issues are judicially reviewable."); *Falcon Carriche v Ashcroft*, 350 F3d 845, 852–53 (9th Cir 2003) (rejecting "the government's argument that the streamlining decision is inherently discretionary" and

Procedure Act's (APA) judicial review scheme,[5] the action is therefore presumptively reviewable. The Eighth and Tenth circuits disagree, finding that the BIA's employment of the AWO procedure is discretionary and thus exempt from the APA's general presumption of review.[6]

This Comment attempts to resolve the circuit split by considering the binding strength of the regulations allowing a single Board member to issue an AWO decision. The Comment argues that because these regulations are legislative rules and therefore binding on the agency and the courts, a Board member's decision to affirm without opinion is not committed to agency discretion by law. Accordingly, the courts may review the agency action at issue in the split.

Part I briefly outlines the BIA's governing procedures and its function as an appellate body. Part II explores the circuit split and presents the arguments on each side. Part III concludes that the Supreme Court's decision in *Heckler v Chaney*[7] is not dispositive on the issue at bar in the circuit split. Instead, this Part proposes that review of AWO decisions should be analyzed in light of the regulation's characteristics as a legislative rule.

I. THE BOARD OF IMMIGRATION APPEALS

The BIA is the senior administrative body responsible for the adjudication of immigration issues. The agency's form and regulations have undergone multiple restructurings since its inception. This Part traces the evolution of the BIA to its current state, addressing its primary duties, responsibilities, and governing procedures.

A. Duties and Responsibilities of the BIA

Since its creation in 1940, the BIA's primary task has been to act in an appellate role and to provide a standardized reading of immigration and nationality laws.[8] Consequently, the BIA has nationwide jurisdiction to review the orders of IJs and the immigration-related deci-

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concluding instead that the decision to affirm without opinion is a nondiscretionary determination that is subject to ordinary judicial review).

5 See 5 USC §§ 701–06 (2000).

6 See, for example, *Ngure v Ashcroft*, 367 F3d 975, 983 (8th Cir 2004) (holding that "the BIA's decision whether to employ the AWO procedure in a particular case is committed to agency discretion and not subject to judicial review"); *Tsegay v Ashcroft*, 386 F3d 1347, 1355–56 (10th Cir 2004) (agreeing with the Eighth Circuit's decision in *Ngure*).

7 470 US 821 (1985).

8 See Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 Stan L & Policy Rev 481, 499–500 (2005).

sions made by the Department of Homeland Security.[9] The BIA's findings are binding on all respective parties and, through the process of individual adjudication, the agency creates legal precedent by which to guide IJs, the Department of Homeland Security, and the general public.[10]

Prior to 1999, a three-member panel conducted the reviews of IJ and Immigration and Naturalization Service decisions. These members were authorized to carry out a de novo review of the record and to make their own conclusions as to facts and law, as well as whether discretionary relief should be granted.[11] In 1999, however, the Attorney General radically revised the BIA's process of review through the promulgation of regulations intended to cope with a growing backlog of the agency's cases. These regulations sought to reduce the agency's caseload by "streamlining" the appellate review process. This meant that in certain circumstances the regulations enabled a single Board member to affirm an IJ's order without opinion. The effect of these regulations, as well as the additional round of reforms issued in 2002, will be discussed below.

As a final note, all BIA decisions are subject to the discretion of the Attorney General.[12] The Immigration and Nationality Act[13] (INA) made explicit that the Attorney General's decisions on "all questions of law" relating to immigration and naturalization were "controlling."[14] In turn, the Attorney General has used the immigration courts and the BIA to carry out this function.[15] And, although the hierarchical rela-

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9 In March 2003, the functions of the former immigration enforcement agency—the Immigration and Naturalization Service—were transferred from the Department of Justice to the newly created Department of Homeland Security. See Guendelsberger, 18 Georgetown Immig L J at 612 (cited in note 2).

10 See 8 CFR § 1003.1(g). See also Cruz, 16 Stan L & Policy Rev at 499 (cited in note 8) (exploring how BIA decisions can shape immigration proceedings and jurisprudence).

11 See Cruz, 16 Stan L & Policy Rev at 499 (cited in note 8) (quoting the former Board Chairman Thomas Finucane's description of the BIA's powers: the agency has the ability to "make a de novo review of the record and make[] its conclusions and findings irrespective of those made by the [IJ]").

12 See 8 CFR §§ 1003.1(d)(1)(i), 1003.1(h). These regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General. See also *Accardi v Shaughnessy*, 347 US 260, 266–67 (1954) ("[T]he scope of the Attorney General's discretion became the yardstick of the Board's."). This detail is critical in determining judicial standards of review in light of *United States v Mead*, 533 US 218 (2001), because Board members are vested with the requisite authority such that their pronouncements must be accorded the same deference that is due to the Attorney General. See, for example, *INS v Aguirre-Aguirre,* 526 US 415, 425 (1999) (recognizing that "the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication") (internal quotation marks and citation omitted).

13 Immigration and Nationality Act, 8 USC §§ 1101–1537 (2000 & Supp 2005).

14 Id § 1103(a)(1).

15 See Cruz, 16 Stan L & Policy Rev at 499 (cited in note 8) (describing the relationship between the BIA and the Attorney General).

tionship between the BIA and the Attorney General has concerned some members of the legal community, history has shown that the agency retains considerable independence from the Attorney General when deciding matters of immigration relief.[16]

B. Streamlining Rules

Between 1992 and 2000, annual appeals to the BIA increased from 12,823 to 29,972.[17] During that time, the BIA's backlog jumped from 18,054 pending cases to 63,763.[18] In an effort to reduce this growing backlog, the Attorney General promulgated new rules in October of 1999 to govern the BIA's proceedings.[19]

The streamlining regulation, as it was called, authorized the agency's Board Chairman to designate certain categories of cases as suitable for review by a single Board member.[20] Specifically, the mem-

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16 See id.

17 See Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management* (2003), online at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf at 13 (visited June 7, 2006) ("Dorsey & Whitney Report").

18 See id at 13. The Dorsey & Whitney Report found that the backlog of cases at the BIA was caused by three factors: (1) the BIA's increased caseload; (2) the frequent, significant changes in United States immigration laws; and (3) the number of members and other staffing issues at the BIA. See id.

The Dorsey & Whitney Report also introduced the following conclusions, which are relevant to the current debate on the empirical implications of the 2002 reforms: (1) a surge of appeals in the appellate courts evidences the dissatisfaction of immigrants with the quality of decisions in the aftermath of the 2002 reforms; (2) after the reforms, the BIA's reversal rates dropped from one in four to approximately one in ten, indicating fewer wins for aliens; and (3) by March 2002, more than half of the BIA's decisions were AWOs, thus forcing the courts to decipher a challenging record that likely involves reviewing the IJ's opinion. See id at 42.

Appellate courts reviewing BIA proceedings have been finding widespread error in cases where a single Board member misused the AWO procedure. See, for example, *Benslimane v Gonzales*, 430 F3d 828, 829 (7th Cir 2005) (internal citations omitted):

> In the year ending on the date of the argument, different panels of this court reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits. The corresponding figure, for the 82 civil cases during this period in which the United States was the appellee, was 18 percent. Our criticisms of the Board and of the immigration judges have frequently been severe.

According to the Seventh Circuit, this high reversal rate reflects a mounting concern that "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." Id at 830. See also *Chen v United States Department of Justice*, 426 F3d 104, 115 (2d Cir 2005) (rejecting an IJ finding that was "grounded solely on speculation and conjecture"); *Ssali v Gonzales*, 424 F3d 556, 563 (7th Cir 2005) ("This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case."). The *Benslimane* court also pronounced that the BIA's action "appear[ed] to have been completely arbitrary." 430 F3d at 833. Although outside the scope of this Comment, if individual Board members are overwhelmingly making decisions in defiance of the regulations, it is possible that this may raise rule of law concerns.

19 See 8 CFR §§ 3.1(a), 3.2(b)(3) (2000) (codifying "Streamlining Rules").

20 See id § 3.1(a)(7)(i).

ber to whom the case was assigned could affirm an IJ's decision without opinion if she determined that

> the result reached in the decision . . . was correct; that any errors in the decision . . . were harmless or nonmaterial; and that (A) the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.[21]

Although affirming an order without opinion did not necessarily "imply approval of all the reasoning of [the] decision" under the streamlining rules, it signified that "any errors in the decision of the [IJ]" were considered to be "harmless or nonmaterial."[22]

In the first two years of implementing the streamlining rules, the BIA significantly reduced its backlog of cases. Continuing this effort, the Attorney General in February 2002 proposed new regulations intended to eliminate the remaining backlog, improve efficiency, and enable the agency to provide more meaningful guidance to IJs and practitioners.[23] These regulations, entitled "Procedural Reforms to Improve Case Management," were adopted in final form on August 26, 2002.[24] They made five significant changes to the BIA's governing procedures that remain in effect today.

First, the regulations amended the circumstances under which an AWO can and should be issued. The regulations set forth:

> The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.[25]

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21 Id § 3.1(a)(7)(ii).

22 Id § 3.1(a)(7)(iii).

23 See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed Reg 7309, 7310 (2002).

24 Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed Reg 54878, 54878 (2002), codified at 8 CFR § 1003 (2006).

25 8 CFR § 1003.1(e)(4)(i) (2006).

Although similar to the 1999 provision, the above language was changed from allowing the BIA to streamline a case to requiring the procedure if the delineated criteria were present.[26] Furthermore, the last condition of the provision was amended. In 1999, it provided for an affirmance without opinion when "[t]he factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted."[27] In contrast, the new regulations change the definition of insubstantial from "when three-member review is not warranted" to when "the case [does not] warrant[] the issuance of a written opinion." Nevertheless, as with the situation under the 1999 streamlining rules, when the BIA issues an AWO, it "approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial."[28] The practical effect of this regulatory scheme is that, unless a single Board member opts to decide a given case on the merits or designate it for three-member review, the IJ's order becomes the final agency action and the courts may scrutinize the order as they would a decision by the BIA.[29] In turn, the BIA is accountable for any errors the IJ may have made.[30]

Second, the regulations direct that single-member adjudication is the default procedure of the BIA and that three-member panels are warranted only in the following situations: (1) to settle inconsistencies among IJ rulings; (2) to establish precedent; (3) to review a legal error; (4) to resolve a case or controversy of major national import; (5) to review a clearly erroneous factual determination by an IJ; or (6) to reverse the decision of an IJ other than one where reversal is "plainly consistent" with intervening law.[31] Therefore, all appeals are to be de-

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26 This is evident by comparing the language of the regulations. In 1999, the regulations read: "The Chairman *may* designate . . . permanent Board members who are authorized, acting alone, to affirm decisions of Immigration Judges and the Service without opinion." 8 CFR § 3.1(a)(7)(i) (2000) (emphasis added). These members "*may* affirm the decision of the Service or the Immigration Judge, without opinion, if the Board Member determines that the result reached in the decision was correct." 8 CFR § 3.1(a)(7)(ii) (2000) (emphasis added). In contrast, after 2002, the regulations read: "[t]he Board member to whom a case is assigned *shall* affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that." 8 CFR § 1003.1(e)(4)(i) (2006) (emphasis added).

27 8 CFR § 3.1(a)(7)(ii)(B) (2000).

28 8 CFR § 1003.1(e)(4)(ii) (2006).

29 See id. See also *Yuk v Ashcroft*, 355 F3d 1222, 1230 (10th Cir 2004) ("[T]he summary affirmance regulations specifically provide that the IJ's decision is the final agency action.").

30 See *Albathani v INS*, 318 F3d 365, 378 (1st Cir 2003) ("[I]f the BIA does not independently state a correct ground for affirmance in a case in which the reasoning proffered by the IJ is faulty, the BIA risks reversal on appeal.").

31 8 CFR § 1003.1(e)(6)(i)–(vi) (2006).

cided by a single Board member unless the case fits within one of the six categories considered appropriate for three-member review.

Third, the regulations expand those categories of cases that can be summarily dismissed to include cases in which

> [t]he Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law.[32]

The decision to summarily dismiss a case is different, however, from a decision to affirm without opinion. When a case is summarily dismissed, the BIA never makes a decision on the merits. But, similar to the AWO procedure, this provision intends to eliminate quickly any remaining backlog of cases by allowing a Board member to individually dispose of a higher volume of cases.

Fourth, the regulations restrict significantly the agency's scope of review of IJs' factual findings. Whereas the BIA had previously reviewed such findings de novo, the current regulations require the agency to defer to IJs unless their decisions are clearly erroneous.[33] This standard is meant to underscore the role of the IJ as the primary factfinder and eliminate the duplicative expenditure of resources involved in successive de novo factual determinations.[34]

Last, the regulations reduce the number of Board members from twenty-three to eleven. This reduction in the size of the BIA is aimed at improving the agency's "cohesiveness and collegiality," addressing the concern that the BIA was being weighed down by its own size.[35]

II. CIRCUIT SPLIT REGARDING APPELLATE REVIEW OF THE AWO PROCEDURE

After the streamlining regulations were promulgated, they were challenged promptly on due process grounds.[36] To date, however, all circuit courts that have considered the issue have ruled that the AWO procedure is adequate.[37] Despite this unwillingness to invalidate the

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32 Id § 1003.1(d)(2)(i)(D).

33 Id § 1003.1(d)(3)(i).

34 67 Fed Reg at 54889 (cited in note 24).

35 See id at 54893–94. It is also noteworthy that Board members are appointed at the discretion of the Attorney General. See 8 CFR § 1003.1(a)(1) (2006).

36 Going forward, this Comment uses the term "streamlining regulations" to mean the amended AWO regulations promulgated in 2002, which in certain circumstances authorize a single Board member to affirm without opinion an IJ's decision.

37 See *Blanco De Belbruno v Ashcroft*, 362 F3d 272, 282–83 (4th Cir 2004); *Zhang v United States Department of Justice*, 362 F3d 155, 157 (2d Cir 2004); *Yuk v Ashcroft*, 355 F3d 1222, 1232

entirety of the regulation on due process grounds, some courts conclude that they have jurisdiction to review an application of the AWO procedure in a particular case. Specifically, the First, Third, and Ninth circuits maintain that they may review a Board member's decision to affirm without opinion. Alternatively, the Eighth and Tenth circuits hold that they are without jurisdiction to consider this challenge.[38]

The focal point of the courts' disagreement is whether the decision to affirm without opinion is within the unfettered discretion of the agency. If it is, the courts lack jurisdiction to review the order under the APA's "committed to agency discretion" exception to reviewable administrative action.[39] Part II.A provides relevant background to the APA judicial review scheme. Next, Part II.B presents the First, Third, and Ninth circuits' view that Board members are bound by nondiscretionary regulatory criteria and thus jurisdiction is both feasible and required. Last, Part II.C introduces the Eighth and Tenth circuits' position that the decision to issue an AWO is committed to agency discretion by law and thus the courts lack jurisdiction to consider whether the BIA has complied with its own regulations.

A. The APA's Judicial Review Scheme

To be subject to review under the APA, the action at issue must be a "final agency action."[40] A final agency action is defined as both "the consummation of the agency's decisionmaking process" and "one by which rights or obligations have been determined, or from which legal consequences will flow."[41] In the context of the AWO procedure, if the BIA affirms without opinion, the IJ's order becomes the final

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(10th Cir 2004); *Loulou v Ashcroft*, 354 F3d 706, 708 (8th Cir 2003); *Dia v Ashcroft*, 353 F3d 228, 238 (3d Cir 2003) (en banc); *Denko v INS*, 351 F3d 717, 729–30 (6th Cir 2003); *Falcon Carriche v Ashcroft*, 350 F3d 845, 850–51 (9th Cir 2003); *Georgis v Ashcroft*, 328 F3d 962, 967 (7th Cir 2003); *Mendoza v United States Attorney General*, 327 F3d 1283, 1288 (11th Cir 2003); *Soadjede v Ashcroft*, 324 F3d 830, 832–33 (5th Cir 2003); *Albathani v INS*, 318 F3d 365, 379 (1st Cir 2003).

38 For practical purposes it is important to note that even if jurisdiction exists, a court will not always exercise review. For example, courts have indicated that in some cases it is unnecessary to review the Board's use of the AWO procedure because the court can resolve the case on the merits by reviewing the IJ's decision. See *Olowo v Ashcroft*, 368 F3d 692, 698 (7th Cir 2004) (articulating that it makes no difference whether the AWO procedure was properly applied when a court can review the IJ decision on the merits); *Falcon Carriche*, 350 F3d at 853 n 7 (stating that in some cases, review of the IJ decision on the merits and the decision to use the AWO procedure "collapse[s] into one analysis"); *El Moraghy v Ashcroft*, 331 F3d 195, 206 (1st Cir 2003) (finding that review of a decision to issue an AWO decision was unnecessary where the case was remanded on the merits).

39 See 5 USC § 701(a)(2).

40 5 USC § 704.

41 *Bennett v Spear*, 520 US 154, 178 (1997) (internal quotation marks and citation omitted).

agency action and the decision to streamline becomes indistinguishable from the merits of the case.[42]

Once an agency's action is final, the APA creates a strong presumption in favor of judicial review of administrative action.[43] There are two exceptions to this general presumption of reviewability: first, if Congress has expressed an intent to preclude judicial review, and second, if the action in question is committed to agency discretion by law.[44] Whether Congress expressly intended to preclude judicial review will necessarily depend on the facts of the challenged application, but the courts involved in the split do not generally find this exception a barrier to review.[45] Accordingly, this Comment focuses on the second exception, concerning actions committed to an agency's discretion.

This second exception to judicial review has been interpreted by the Supreme Court in the case of *Heckler v Chaney* to apply in the rare instances where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[46] The circuit split turns on the difficulty of interpreting this declaration. As will be further discussed in Part III, however, determining the binding force of the AWO regulation can help resolve the split by guiding the courts in their "committed to agency discretion" analysis.

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42 See 8 CFR § 1003.1(e)(4)(ii); *Falcon Carriche*, 350 F3d at 855 (finding that streamlining is consistent with judicial review primarily because the decision of the IJ serves as the final, reviewable agency action). See also notes 29–30 and accompanying text.

43 See 5 USC § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

44 See 5 USC § 701(a).

45 See, for example, *Smriko v Ashcroft*, 387 F3d 279, 291 (3d Cir 2004) (concluding that because "the INA clearly does not preclude review, we now turn to whether the relevant issues are committed to agency discretion at law"); *Tsegay v Ashcroft*, 386 F3d 1347, 1354–55 (10th Cir 2004) (finding that no statute expressly precluded judicial review of the BIA's decision to affirm without opinion).

46 470 US at 830. See also *Webster v Doe*, 486 US 592, 599–601 (1988) (discussing what it means for an action to be "committed to agency discretion by law"); *Citizens to Preserve Overton Park, Inc v Volpe*, 401 US 402, 410 (1971) (advancing the Court's first general explanation of the meaning of § 701(a)(2)). There is some dispute about whether the committed to agency discretion idea is exhausted by the "no law to apply" test articulated in *Chaney*. See, for example, *Doe*, 486 US at 608–10 (Scalia dissenting) ("The 'no law to apply' test can account for the nonreviewability of certain issues, but falls far short of explaining the full scope of the areas from which the courts are excluded."); *Hahn v Gottlieb*, 430 F2d 1243, 1249–51 (1st Cir 1970) (suggesting and applying a balancing test to assess whether agency actions are discretionary by law, including factors such as the appropriateness of judicial review, the court's utility in safeguarding plaintiffs' rights, and the court's impact on agency operations). A majority of the Supreme Court has indicated, however, that the "no law to apply" test answers whether the agency action is committed to discretion by law. *Doe*, 486 US at 599–600 (citing *Overton Park* and *Chaney* to explain what it means for an agency action to be discretionary by law).

B. Judicial Review Is Permissible

The First, Third, and Ninth circuits assert that they may review a Board member's decision to streamline a case.[47] These circuits mainly rely on interpreting the decision to apply the AWO procedure as an action *not* committed to agency discretion by law. The primary justification for this conclusion is that the decision to affirm without opinion is subject to internal regulatory criteria. That is, a Board member may not choose when to summarily affirm an IJ's order. Instead, the member may issue an AWO only when certain conditions—spelled out in the Code of Federal Regulations—are met: (1) if the underlying IJ opinion was correct; (2) if any errors are harmless or nonmaterial; and (3) if the issues on appeal were either squarely controlled by existing precedent or were insubstantial.[48] These circuits conclude that the existence of these limitations "provides more than enough 'law' by which a court could review the Board's decision to streamline."[49] Accordingly, the proposition stated in *Chaney*—where a law "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," Congress is assumed to have "committed the decision making to the agency's judgment absolutely"[50]—is inapplicable in the context of streamlining.[51]

But the existence of governing standards does not altogether unpack the issue of judicial review, for AWO decisions are not exclusively discretionary or nondiscretionary determinations. They can involve multiple issues, only some of which may be reviewable. For example, in *Falcon Carriche v Ashcroft*,[52] the Ninth Circuit found that it did not have jurisdiction to review whether the BIA properly streamlined a decision that contained discretionary and nondiscretionary factors, but in which only the discretionary factor was in dispute.[53] Nevertheless, the court was careful to articulate that "[a]lthough we agree with the government's ultimate conclusion [that the court had no jurisdiction over the instant case], we do not embrace the government's

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47 See, for example, *Haoud v Ashcroft*, 350 F3d 201, 206 (1st Cir 2003); *Smriko*, 387 F3d at 294; *Chong Shin Chen v Ashcroft*, 378 F3d 1081, 1087–88 (9th Cir 2004).

48 See 8 CFR § 1003.1(e)(4)(i).

49 *Haoud*, 350 F3d at 206. See also *Smriko*, 387 F3d at 293–94 (stating that the streamlining criteria "provide amply sufficient 'law' for courts to apply"); *Chong Shin Chen*, 378 F3d at 1088 (concluding that the streamlining rules are clearly nondiscretionary because each subsection can only be invoked in specified circumstances); *Denko v INS*, 351 F3d 717, 731 (6th Cir 2003) ("[T]his argument for committing this decision [to streamline] to the agency's discretion is doubtful because there are judicially manageable standards available to a reviewing court.").

50 470 US at 830–32 (internal quotation marks omitted).

51 See *Haoud*, 350 F3d at 206; *Smriko*, 387 F3d at 292–93.

52 350 F3d 845 (9th Cir 2003).

53 Id at 852–54.

argument that the streamlining decision is inherently discretionary. Indeed, portions of the streamlining decision are non-discretionary determinations that we would ordinarily have jurisdiction to review."[54] Thus, certain subsets of BIA decisions to streamline may be unreviewable while others may remain reviewable.[55]

Adding yet another wrinkle to the reviewability debate, several other courts have considered whether a Board member properly implemented the AWO regulation without addressing the jurisdictional question at all. Two examples are *Denko v INS*[56] and *Georgis v Ashcroft*,[57] in which the Sixth and Seventh circuits, respectively, assumed that the BIA's decision to streamline was reviewable. In *Denko*, the Sixth Circuit stated that "[the] argument for committing [a BIA streamlining] decision to the agency's discretion is doubtful because there are judicially manageable standards available to a reviewing court."[58] This reasoning is consistent with the First, Third, and Ninth circuits' conclusion that the regulations governing the BIA provide the clear and manageable standards necessary for judicial review, and, therefore, the BIA's judgment is nondiscretionary by nature. Similarly, in *Georgis*, the Seventh Circuit noted that "[w]ithout explicitly deciding this issue [of reviewability], we have upheld the BIA's use of the streamlining procedure in a case whose facts presented no substantial issue of law and no basis for granting asylum."[59] But by previously upholding the use of the AWO practice, the court implicitly acknowledged its jurisdiction to review a Board member's compliance with its governing regulations.

Notwithstanding the Sixth and Seventh circuits' lack of explicit endorsement, the courts that assert jurisdiction over a Board member's decision to streamline a case conclude that the agency's regulations do not allow for single Board members to make discretionary decisions. Instead, the courts emphasize that the Attorney General issued strict criteria for when the agency's authority must affirm without opinion.[60] By contrast, if the conditions required by the AWO

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54 Id at 852–53.

55 It is noteworthy that another circuit split exists regarding the reviewability of an IJ decision that contains both a reviewable and an unreviewable basis, which the BIA affirms without opinion. For a discussion of this split, see *Cuellar Lopez v Gonzalez*, 427 F3d 492, 495–97 (7th Cir 2005) (describing the split and concluding that the proper disposition when an IJ opinion contains both reviewable and unreviewable grounds is to remand the case back to the BIA so that it may clarify the basis of its holding).

56 351 F3d 717 (6th Cir 2003).

57 328 F3d 962 (7th Cir 2003).

58 351 F3d at 731.

59 328 F3d at 967 (internal citation omitted).

60 See 8 CFR § 1003.1(e)(4)(i).

regulation are not present, the individual Board member may issue an order explaining the agency's position.[61] The regulations also permit the Board member to reconsider or reopen a decision she previously adjudicated, or even reverse a decision if "required by intervening Board or judicial precedent."[62] Or, provided that the case meets the conditions specified for three-member review, the regulations allow the Board member to designate the case for review by a three-member panel. These four possibilities, however, are the only options a Board member has when faced with an adjudicatory proceeding. And, given that the BIA must adhere to the conditions of these guidelines, the First, Third, and Ninth circuits maintain that the agency has fettered discretion to issue an AWO and this decision is subject to judicial review under the APA.

C. The AWO Decision Is Not Reviewable

The Eighth and Tenth circuits adhere to the view that they generally lack the power to review the BIA's decision to streamline a case.[63] These circuits advance the following arguments: (1) because agencies have discretion to develop and administer their own procedural rules—which may involve the complex allocation of agency resources—the BIA's decisions are committed to agency discretion by law; (2) because the AWO procedure is a case-management technique rather than a course of action designed to confer special rights upon aliens, any review of the decision to issue an AWO would disrupt the agency's management of immigration appeals; and (3) because the AWO provision plainly bars a Board member who issues an AWO opinion from explaining the reasons for the affirmance, judicial review would be impractical.[64] This Part examines each explanation in turn.

First, these circuits indicate that the AWO procedure is "committed to agency discretion by law," within the meaning of the APA.[65] To support this assertion, the courts cite *Chaney* for a different proposition than the First, Third, and Ninth circuits do; instead of using *Chaney* as a benchmark against which to measure whether the regulations provide sufficient "law" to judge the agency's actions, the Eighth

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61 See 8 CFR § 1003.1(e)(5) (explaining the procedure if the decision is not appropriate for affirmance without opinion).

62 Id.

63 See *Ngure v Ashcroft*, 367 F3d 975, 983 (8th Cir 2004) (holding that "the BIA's decision whether to employ the AWO procedure in a particular case is committed to agency discretion and not subject to judicial review"); *Tsegay*, 386 F3d at 1355–56 (agreeing with the Eighth Circuit's decision in *Ngure*). See also *Garcia-Melendez v Ashcroft*, 351 F3d 657, 662–63 (5th Cir 2003) (refusing to review the BIA's use of the AWO procedure).

64 See *Tsegay*, 386 F3d at 1355–57; *Ngure*, 367 F3d at 983–84.

65 See *Tsegay*, 386 F3d at 1355–58; *Ngure*, 367 F3d at 983–88.

and Tenth circuits emphasize that the complicated task of balancing resources unique to the agency carries significant weight in discerning whether a meaningful standard for judicial review exists.[66] However, these circuits reason that "an administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission traditionally has been free from judicial supervision."[67] Taken together, these two factors weigh heavily in favor of categorizing the BIA's decision to issue an AWO as an action committed to agency discretion by law.

The Eighth and Tenth circuits next consider the nature of the streamlining regulations. They conclude that the regulations are a case-management technique created for the BIA to manage its caseload.[68] To support this classification, the circuits cite the Department of Justice's rationale behind implementing the AWO procedure:

> The [streamlining] process is a reasonable response to the current situation, because it allows the Board to concentrate its resources on cases where there is a reasonable possibility of reversal, or where a significant issue is raised in the appeal, while still providing assurances that correct results are achieved in all cases under the Board's appellate jurisdiction.[69]

According to the Eighth Circuit, this justification suggests that the regulation is a procedural mechanism by which to expedite review and focus the attention of three-member panels on cases that require a more searching inquiry into the decision below.[70] Furthermore, the Eighth Circuit points out that the regulation that creates the AWO appears in a section of the Code of Federal Regulations entitled "Case management system," again indicating that the rules were designed to structure the agency's procedural needs.[71] These factors lead the Eighth and Tenth circuits to conclude that the decisionmaking practice was adopted as a management tool, and, because judicial review is generally circumscribed when "'a procedural rule is designed primarily to benefit the agency carrying out its functions,' rather than 'in-

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66 See *Tsegay*, 386 F3d at 1355 (noting that whether a decision is committed to agency discretion by law depends on the context of the procedure and the "nature of the administrative action involved," such as whether the procedure is a case-management technique); *Ngure*, 367 F3d at 982 (discussing when *Chaney* applies).

67 *Ngure*, 367 F3d at 983. See also *Tsegay*, 386 F3d at 1355 (noting that "it is well-settled that agencies have discretion to develop case management techniques that make the best use of their limited resources").

68 See *Tsegay*, 386 F3d at 1356; *Ngure*, 367 F3d at 983–84.

69 *Ngure*, 367 F3d at 984, quoting 64 Fed Reg 56135, 56138 (1999). See also *Tsegay*, 386 F3d at 1356, quoting 64 Fed Reg at 56138.

70 See *Ngure*, 367 F3d at 983. See also 64 Fed Reg at 56137.

71 *Ngure*, 367 F3d at 984, quoting 8 CFR § 3.1(e).

tended primarily to confer important procedural benefits upon individuals,'"[72] the BIA retains discretion to administer the regulation as it sees fit.

Last, the courts put forth a pragmatic argument: "[A]s the Supreme Court has emphasized, an agency decision made without statement of reasons creates practical difficulties for judicial review."[73] This is because "it is practically impossible for a court to defer to an agency's interpretation of its own regulations, unless the agency gives some explanation for its decision."[74] But because the regulation at issue explicitly prohibits the BIA from providing an explanation for its decisions, the court has no feasible way to assess the propriety of an affirmance without opinion without remanding the case to determine why the agency chose to apply the procedure in the first place.[75] In doing so, however, the court would be creating new rules for the BIA and contravening those already in existence.

III. RESOLUTION OF THE CIRCUIT SPLIT

The circuit split turns on the question of when agency action is committed to discretion by law and is thus unreviewable by the courts. Courts on both sides of the split cite *Chaney* to guide their analyses of this inquiry.[76] Yet, the courts do not mention that there is a critical question left unanswered by the *Chaney* Court: whether binding rules of conduct promulgated under an agency's legislative authority provide sufficient law to support judicial review.

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72 *Tsegay*, 386 F3d at 1355, quoting *American Farm Lines v Black Ball Freight Service*, 397 US 532, 538–39 (1970) (favoring judicial review where agency rules are intended to confer procedural benefits on individuals). See also *Ngure*, 367 F3d at 983 ("[O]ur review of the text, structure, and history of the streamlining regulations leads us to conclude that the Attorney General surely did not intend to create substantive rights for aliens in the determination whether a particular decision of an IJ was affirmed without opinion.").

73 *Tsegay*, 386 F3d at 1356, citing *ICC v Brotherhood of Locomotive Engineers*, 482 US 270, 283 (1987) (finding that actions are committed to agency discretion when it is not possible to devise an adequate standard of review). See also *Ngure*, 367 F3d at 984 (noting that judicial review of the BIA's streamlining decision would have "'disruptive practical consequences' for the Attorney General's administration of the alien removal process") (internal citation omitted).

74 *Tsegay*, 386 F3d at 1357. Compare *Brotherhood of Locomotive Engineers*, 482 US at 283–84 (noting that it would be unworkable for a court to review for abuse of discretion when a decision is made without a statement of reasons), with *Auer v Robbins*, 519 US 452, 461 (1997) ("[A]n agency's interpretation of [its own regulations] is . . . controlling unless plainly erroneous or inconsistent with the regulation.").

75 See *Tsegay*, 386 F3d at 1357.

76 See, for example, *Smriko v Ashcroft*, 387 F3d 279, 292 (3d Cir 2004) (contrasting the streamlining regulations with the Supreme Court's "no law to apply" test in *Chaney*); *Ngure v Ashcroft*, 367 F3d 975, 982 (8th Cir 2004) (citing *Chaney* as a point of reference to determine whether there is an adequate standard of review for an agency action).

Given this oversight, this Part concludes that an application of *Chaney*'s framework is by itself inadequate to solve the disagreement at the heart of the circuit split. Specifically, Part III.A argues that the circuits' reliance on *Chaney* overlooks important distinctions between the AWO procedure and the nonenforcement proceeding at issue in *Chaney*. Parts III.B and III.C propose a resolution to the circuit split. First, Part III.B establishes that the regulation creating the AWO procedure is a legislative rule. Next, Part III.C argues that this classification should guide the courts in their "committed to agency discretion" analysis. Put simply, whether the rule is of present binding effect strongly correlates to whether the rule is committed to agency discretion by law. Last, Part III.D illustrates the potential effect of this new framework by analyzing two cases that characterize the poles of the split.

A. Misplaced Reliance on *Heckler v Chaney*

Prior to *Chaney*, the Supreme Court long recognized a presumption in favor of the reviewability of agency actions.[77] This presumption encompassed action as well as inaction, based on the APA's inclusion of the latter in its creation of a petitioner's right to review.[78] In *Chaney*, however, the Court departed from this precedent.

Chaney involved a group of death row inmates petitioning the Court to order the Food and Drug Administration to take enforcement action against the unapproved use of certain drugs in lethal injections.[79] The FDA's Commissioner had denied the petition because he was uncertain of the agency's jurisdiction and because he did not consider the action to be a productive use of the agency's discretionary enforcement authority.[80] In response, the Court held that the Commissioner's decision not to undertake enforcement action should be presumptively exempt from judicial review because of the practical difficulties that would arise if the judiciary sought to review and supervise an agency's decisions as to which violations of law to pursue and which to ignore.[81] In reaching this conclusion, the Court empha-

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77 See, for example, *Abbott Laboratories v Gardner*, 387 US 136, 141 (1967) (finding that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review").

78 See 5 USC § 702 (authorizing review if an agency officer "acted or failed to act").

79 See 470 US at 823.

80 See id at 824–25, quoting the Commissioner's statement:

> Generally, enforcement proceedings in this area are initiated only when there is a serious danger to the public health or a blatant scheme to defraud. We cannot conclude that those dangers are present under State lethal injection laws, which are duly authorized statutory enactments in furtherance of proper State functions.

81 See id at 831–32 ("The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

sized several considerations, such as the agency's balancing of complicated discretionary factors, institutional competency concerns, and the nature of enforcement proceedings.[82] These considerations contributed to the Court's general conclusion that agency decisions to refuse enforcement are presumptively unreviewable.[83] This presumption can be rebutted only when Congress has established statutory guidelines circumscribing an agency's enforcement discretion.[84]

The BIA's decisions to affirm without opinion share virtually none of the characteristics of the FDA's decision that led the Court in *Chaney* to institute a presumption of unreviewability and a "corollary requirement of a heightened degree of discernible standards to rebut the presumption."[85] Most significantly, in *Chaney* the Court set aside the question of whether review would be available when an agency's governing regulations prescribed its present and future conduct. In doing so, the Court directly implied that judicial review might be possible when an agency's own regulations provided precise enforcement guidelines.[86] This possibility is consistent with *Chaney*'s broader mode of analysis; for, in defending its curtailment of judicial review the Court relied upon the distinction between positive law (meaning rules of conduct laid down by a legislative authority) and mere enforcement policy (meaning an agency's decisions regarding whether to pursue certain violations of those rules).[87] At issue in *Chaney* was the latter, but the Court provided no judgment as to whether judicial review would be precluded if adequate law were available in the form of agency regulations. And, as will be further discussed in the next Part, the BIA's streamlining regulations fit the category of positive law rather than enforcement policy.

Furthermore, "[i]n *Chaney*, the FDA had simply declined to take action to pursue possible violations of a statute."[88] The Court upheld this decision, reasoning that as "an agency generally cannot act against each and every violation, only the agency can balance all of the vari-

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82 See id.

83 See id at 832.

84 See id at 833 ("[I]n establishing this presumption [of unreviewability of agency nonenforcement decisions], Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.").

85 *Robbins v Reagan*, 780 F2d 37, 44 (DC Cir 1985).

86 See *Chaney*, 470 US at 836 (noting that at issue in the case was a policy statement not properly adopted by an agency rule). See also Ashutosh Bhagwat, *Three-Branch Monte*, 72 Notre Dame L Rev 157, 171 (1996) ("[T]he core problem created by *Chaney*, which is the ability of agencies to avoid judicial review of their regulatory policies by substituting enforcement guidelines for legislative rules, remains unsolved.").

87 See Bhagwat, 72 Notre Dame L Rev at 176 (cited in note 86).

88 *Robbins*, 780 F2d at 46.

ous factors in deciding how to expend its limited resources."[89] In contrast, the circuit split is comprised of cases in which the BIA makes affirmative decisions based on specific regulations. Reviewing these decisions therefore "does not implicate the concern that the court should not force the agency to funnel its efforts in any one direction. Rather, the court is simply ensuring a limited degree of fidelity to the agency's own decision on how to use its resources," as promulgated through its governing regulations.[90]

In *Chaney*, the Court itself recognized this difference in two places. First, the Court compared *Chaney* to *Citizens to Preserve Overton Park v Volpe*,[91] in which the Court declined to review the Secretary of Transportation's approval of the building of an interstate highway through a park in Memphis, Tennessee.[92] In *Chaney*, the Court disagreed with the lower court's application of *Overton Park* to the situation at hand, reasoning that "[r]efusals to take enforcement steps generally involve precisely the opposite situation [from affirmative acts of approval under a statute that sets clear guidelines for determining when such approval should be given], and in [the former] situation we think the presumption is that judicial review is not available."[93] As in *Overton Park*, at issue in the circuit split is a Board member's decision to take an affirmative action based on a set of valid regulations.[94] Accordingly, the presumption created by *Chaney* does not apply. Second, the *Chaney* Court noted that "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."[95] Thus, the FDA's *refusal* to exercise its powers must be treated differently from when an agency has *exercised* its coercive power. In the context of the circuit split, the BIA exercises its power by requiring its members to apply a predefined set of rules to any given case. Such an action is markedly different from discretionary inaction. This difference, how-

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89 Id.

90 Id at 46–47. See also *California Human Development Corp v Brock*, 762 F2d 1044, 1048 n 28 (DC Cir 1985) (finding that *Chaney* does not bar a review of the reasonableness of agency action, even if the agency was under no initial duty to undertake it).

91 401 US 402 (1971).

92 See id at 420–21.

93 470 US at 831.

94 It may be argued that there is no principled distinction between challenging a Board member's decision to use the AWO procedure and the decision not to use a three-member panel. This argument, however, overlooks the fact that the BIA's regulatory scheme sets forth clear, binding guidelines for when a member is authorized to affirm without opinion and when she can opt for a three-member panel. Both decisions involve an active exercise of the streamlining regulations, the conditions of which are precisely specified. Furthermore, the Board member must choose one procedure over the other, according to the facts or issues presented.

95 470 US at 832.

ever, is collapsed in the courts' analyses of whether a Board member properly issued an affirmance without opinion.

To summarize, the Court's analysis in *Chaney* does not answer the question of whether the circuit courts may review a Board member's decision to issue an AWO. Indeed, it actually maintains the possibility that the BIA's regulations, if they are binding, can serve as sufficient "law" to guide the courts in a jurisdictional analysis. This possibility provides the beginnings of a resolution to the circuit split. If the BIA's streamlining regulations are binding, they may overcome *Chaney*'s presumption of unreviewability and serve as a viable basis for judicial review. Accordingly, the courts must assess whether the regulations creating the AWO procedure provide adequate indicia of the Attorney General's intent to sharply circumscribe the BIA's enforcement discretion, or whether the provisions are simply suggestive guideposts for the agency to take note of in its adjudication of cases.

B. The AWO Procedure Is a Legislative Rule

Whether the regulation that institutes the AWO decisionmaking practice overcomes *Chaney*'s presumption of unreviewability depends on whether it is, in fact, a binding rule.[96] The distinction between a binding and a nonbinding rule is based on whether the regulation at issue is "legislative" or "interpretive."[97] Legislative rules are capable of having binding force on reviewing courts, whereas interpretive rules are not.[98] To distinguish between a legislative and an interpretive rule,

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96 When classifying agency action, there is also a distinction between "rulemaking" and "adjudication." In the present situation, streamlining provisions are "rules" by virtue of the fact that they guide the agency's present and future proceedings. But a Board member's decision to issue these rules in an individual case is an example of adjudication. The technicality of this classification is, however, not as important as what kind of rule the streamlining regulation is; whether the rule is legislative or interpretive determines its binding force and therefore guides our jurisdictional analysis. For a general discussion on the difference between rulemaking and adjudication, see Richard J. Pierce, Jr., 4 *Administrative Law Treatise* §§ 6.1, 8.1 (Aspen Law 4th ed 2002).

97 The courts sometimes articulate this distinction as "substantive" versus "interpretive." See, for example, *White v Shalala*, 7 F3d 296, 303 (2d Cir 1993) (discussing the interpretive/substantive terminology). There is also a distinction between "policy statements" and "interpretive" rules. See *American Mining Congress v Mine Safety & Health Administration*, 995 F2d 1106, 1111 (DC Cir 1993) (distinguishing "policy statements, rather than interpretive rules, from legislative norms") (emphasis omitted). The Court in *Chaney* distinguished a policy statement from a legislative norm by noting that although the policy statement at issue in the case indicated that the agency considered itself "obligated" to take certain investigative action, this directive was attached to a rule that was never adopted. 470 US at 836. In contrast, the circuit split involves formally adopted rules dictating how the BIA is to manage its appellate authority over the review of immigration proceedings. This indicates that the relevant distinction is that of legislative versus interpretive, rather than legislative versus policy statement.

98 See Kenneth Culp Davis, 2 *Administrative Law Treatise* § 6.4 at 324–25 (K.C. Davis 2d ed 1979).

the following question can be posed: does the agency exercise its rulemaking power to "clarify an existing statute or regulation, or to create new law, rights, or duties in what amounts to a legislative act"?[99] Put another way, "a legislative rule has the same binding effect as a statute."[100]

Whether a rule seeks to "make law," however, is not always clear.[101] In order to account for this difficulty, in *American Mining Congress v Mine Safety & Health Administration*,[102] the D.C. Circuit compiled a comprehensive list of questions to ascertain whether a rule has "legal effect."[103] These questions are:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.[104]

The court stated that "[i]f the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule."[105] Following this scheme, the streamlining regulations can be categorized as legislative rules in part because they are published in the Code of Federal Regulations.[106] Furthermore, the BIA exercised its legislative power in

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99 *White*, 7 F3d at 303.

100 Davis, *Administrative Law Treatise* § 6.4 at 324 (cited in note 98).

101 See *Community Nutrition Institute v Young*, 818 F2d 943, 946 (DC Cir 1987) (quoting authorities who describe the distinction between the legislative and interpretive rules as "tenuous," "blurred," and "baffling").

102 995 F2d 1106 (DC Cir 1993).

103 In a case prior to *American Mining*, the D.C. Circuit also considered the extent to which the disputed rule left the agency "free to exercise discretion" to be indicative of whether the rule was binding. *Community Nutrition*, 818 F2d at 946. In its analysis, the court emphasized that the relevant norm narrowly limited administrative discretion and thus was a legislative rule. See id at 947–48. Although the issue in *Community Nutrition* was distinguishing a policy statement from a legislative rule, its actual description of a legislative rule has not been superseded. See *American Mining*, 995 F2d at 1111 (noting that "restricting discretion tells one little about whether a rule is interpretive," but the approach still stands to qualify a rule as legislative rather than a policy statement). Because the streamlining regulations direct the BIA to affirm without opinion if and when three conditions are met, they leave little room for a Board member to deviate from the rule in future proceedings and therefore qualify the regulation as a legislative rule.

104 *American Mining*, 995 F2d at 1112. It is worth noting that the D.C. Circuit has extensive experience discerning when disputed rules have "the force of law." See John F. Manning, *Nonlegislative Rules*, 72 Geo Wash L Rev 893, 893 (2004) ("[T]he D.C. Circuit's cases have laid extensive groundwork for distinguishing between legislative and nonlegislative rules.").

105 *American Mining*, 995 F2d at 1112.

106 See 8 CFR § 1003.1. In *Health Insurance Association v Shalala*, 23 F3d 412, 423 (DC Cir 1994), the D.C. Circuit reduced but did not eliminate the weight given to publication as a factor.

promulgating the rule, thus satisfying condition three of the *American Mining* test.

An old but reliable blueprint to the conclusion that the streamlining regulations are binding is the Second Circuit's decision in *National Nutritional Foods Association v Weinberger*.[107] *Weinberger* addressed the Federal Food, Drug, and Cosmetic Act,[108] which provided: "The authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided in this section, is vested in the Secretary."[109] No conditions were expressly imposed upon this expansive grant of authority, yet the court held that the provision authorized the FDA to issue legislative rules (1) defining the standards of evidence that drug manufacturers must meet when called upon to demonstrate the efficacy of their products in new drug applications, and (2) dismissing without a hearing an application failing to meet these standards.[110] The court also approved of the administrative determination of whether a product was a "new drug" within the meaning of the Act.[111] In doing so, it reasoned that "the FDA may follow streamlined procedures designed to avoid the endless delays [caused as a result of case-by-case enforcement proceedings] that have tended to paralyze adjudicatory hearings and render them ineffective as a means of utilizing agency expertise."[112] In spite of the FDA's discretion to determine whether a drug product was "new," however, once qualified, the agency was not relieved of satisfying the Act's procedural requirements.[113]

Similar to the FDA's authority under the Federal Food, Drug, and Cosmetic Act, the Attorney General has the explicit authority under the INA to promulgate regulations managing immigration adjudication.[114] He issued the streamlining regulations under this authority, with the purpose of improving the BIA's adjudicatory process and reducing an overwhelming backlog of cases. Although this intention may implicate "procedural" concerns such as the agency's case-management techniques, *Weinberger* illustrates that a binding regulation's directive must be observed even when the procedure was ini-

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Accordingly, because the streamlining rules are published in the Code of Federal Regulations, this provides a "snippet" of evidence but is no longer determinative of the legislative rule label.

107 512 F2d 688 (2d Cir 1975).

108 21 USC § 301 et seq (2000).

109 21 USC § 371.

110 See *Weinberger*, 512 F2d at 697.

111 Id at 697.

112 Id at 697–98.

113 See id at 702–04 (assessing whether the Commissioner's actions were arbitrary and capricious in light of the Act's requirements).

114 See Immigration and Nationality Act, 8 USC § 1101 et seq. See also text accompanying note 13.

tially implemented to "avoid endless delays." Furthermore, it is well established that once binding rules are issued, they must be followed by the agency and given full effect by the courts.[115] Therefore, although individual Board members may have minimal discretion to decide when the factual determinations required by the regulations are present, neither the BIA nor the courts can disregard the regulations' mandate to issue an AWO when these conditions are met.[116]

C. The Classification of the AWO Procedure as a Legislative Rule Resolves the Split

Part III.A explained why *Chaney* does not solve the problem of reviewability in the case of a Board member's decision to affirm without opinion. It concluded that an alternate framework is necessary to resolve the circuit split. Part III.B provided the foundation for this framework by establishing that the AWO procedure is a legislative rule. This Part builds upon that basis to propose that the courts should consider the AWO procedure's binding strength to reconcile the split. It argues that because the regulations are legislative, the decision to affirm without opinion is not committed to agency discretion by law, and judicial review is available to ensure the agency complies with its obligations.

This framework focuses on the relationship between legislative rules and discretionary action. Once an agency chooses to limit its discretion by promulgating binding rules, the agency's application thereof should be considered nondiscretionary. This is because certain criteria must be met before any action can be taken. Furthermore, the nature of legislative rules as restrictions on an agency's ability to exercise its delegated power implies that the rules themselves will typically set forth discernable standards controlling the agency's discretion. And, because it is well recognized that binding, identifiable standards may provide the judiciary with adequate guidance to review an

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[115] See *Accardi v Shaughnessy,* 347 US 260, 268 (1954) (vacating a deportation order of the BIA because the procedure leading to the order did not conform to the relevant regulations); *Arizona Grocery Co v Atchison, Topeka & Santa Fe Railway Co*, 284 US 370, 389–90 (1932) (standing for the proposition that an administrative agency's ruling, until changed, binds both the outside world and the agency; moreover, the agency is obliged to adhere to its existing regulations when adjudicating and may not make ad hoc exceptions or departures). See also *Nader v Bork*, 366 F Supp 104, 108 (D DC 1973) ("It is settled beyond dispute that under such circumstances [as where a procedural rule is binding] an agency regulation has the force and effect of law, and is binding upon the body that issues it.").

[116] See, for example, *Montilla v INS*, 926 F2d 162, 168–70 (2d Cir 1991) (reversing a decision by the BIA for failing to follow its own regulatory procedures regarding a petitioner's right to counsel in a deportation hearing).

agency's compliance,[117] this Comment contends that the categorization of the AWO procedure as a binding legislative rule strongly implies that a Board member's decision to streamline is both nondiscretionary and subject to review.

This Comment, however, does not claim that any given agency's application of a legislative rule is per se nondiscretionary. Binding rules will not always create enough "law to apply" for reviewing courts to conduct a meaningful review of the agency's compliance. For example, in *Center for Auto Safety v Dole*,[118] the D.C. Circuit acknowledged that it "previously held that regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action."[119] Nevertheless, the court found that the binding regulation at issue did not furnish it with adequate standards for review. This is because the regulation in *Center for Auto Safety* directed the administrative agency to "tak[e] into account appropriate factors, which may include, among others, allocation of agency resources, agency priorities and the likelihood of success in litigation which might arise from the order" to commence investigation against automobile manufacturers for safety defects in automobiles.[120] Yet the regulation did not purport to state how the agency should balance the factors contained in the regulation, and therefore the court concluded that it had no judicially manageable standards by which to review the agency's decision.[121]

Center for Auto Safety is an example of an agency's application of a legislative rule that is *not* reviewable because the law does not adequately guide a reviewing court in its assessment of the agency's compliance. In *Center for Auto Safety*, the language of the relevant regulation indicates that the agency can either consider the listed factors or disregard them if it so chooses. In contrast, in order for a Board member to properly streamline a case, the Board member *must* find:

(1) the "result reached in the decision under review was correct;"
(2) any "errors in the decision under review were harmless or

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117 See *Vitarelli v Seaton*, 359 US 535, 539–40 (1959) (establishing that binding regulations can provide standards for judicial review of agency action); *Service v Dulles*, 354 US 363, 388 (1957) (finding that when an agency imposed upon itself binding regulations, it could not "proceed without regard to them"). See also *Ngure*, 367 F3d at 982 (acknowledging an agency's binding regulations may provide the requisite law to apply for judicial review).

118 846 F2d 1532 (DC Cir 1988).

119 Id at 1534.

120 49 CFR § 552.8 (1987).

121 *Center for Auto Safety*, 846 F2d at 1534–35 (finding that because the "regulation at issue permitted agency consideration of non-safety factors" and there was "no way to second-guess the weight or priority to be assigned these elements," the regulation failed to provide judicially manageable standards that would enable review).

> nonmaterial;" *and* (3) "(A) [t]he issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation" or "(B) [t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.[122]

These three conditions supply the agency and the courts with a precise framework circumscribing a Board member's authority to issue an AWO decision. Such limitations also imply that the decision to affirm without opinion is nondiscretionary by virtue of the fact that the agency's choice of proceeding is tightly cabined by the case's factual underpinnings.

The Ninth Circuit in *Chong Shin Chen v Ashcroft*[123] implicitly supported this conclusion through its analysis of whether a streamlining decision is discretionary by nature:

> Application of subsection (A) of the streamlining regulation is clearly non-discretionary, as it can only be invoked when "the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation." Application of subsection (B) is also not discretionary. It can only be invoked when the factual and legal issues presented are "insubstantial." While the agency's determination that the issues presented are "insubstantial" will often warrant deference, at times that determination would be absurd, as in this case.[124]

This interpretation implies that although there may be a minimal amount of discretion involved in choosing to streamline a case, this discretion is constrained by the BIA's regulatory scheme. Thus, "[w]hile the regulation does not provide guidance on how the [agency] is to 'weigh' or 'balance' the factors, it does provide a list of objective criteria that the decisionmaker is required to consider in evaluating

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122 8 CFR § 1003.1(e)(4)(i). There seems to be a disagreement amongst the circuits over whether all three of these criteria must be satisfied before a Board member may issue an AWO. Compare *Smriko*, 387 F3d at 292 ("All three of these criteria must be met in order for a case properly to be streamlined."), with *Ngure*, 367 F3d at 987 ("The regulations do specify that *one* of several enumerated circumstances must be present before the BIA is permitted to employ a three-member panel.") (emphasis added). Primarily because of the use of the conjunction "and" between the second and third criteria, this Comment assumes that all three conditions must be satisfied for the BIA to properly affirm without opinion.

123 378 F3d 1081 (9th Cir 2004).

124 Id at 1088.

[the relevant inquiry]."[125] And, because the touchstone of the courts' review is to determine "whether the decision was based on a consideration of the relevant factors,"[126] the exacting criteria set forth by the streamlining regulations provides a meaningful and objective standard by which the courts can judge a Board member's decision to affirm without opinion.

A counterargument to this last assertion is that the regulations offer only a vague standard by which to evaluate a Board member's action. That is, although the term "substantial" is qualified in the regulation by the requirement that the issues be "*so* substantial" as to warrant the issuance of a *written opinion*, this qualification (of when a written opinion is mandated) is itself not defined by the regulations. A Board member's determination is instead discretionary.[127] Although it is true that the regulations do not require a written opinion in any specified situation, it is not true that the regulations leave a Board member with no guidance on the matter. An opinion may be written when a Board member issues a "brief order affirming, modifying, or remanding the decision under review," or when the Board member "designates the case for decision by a three-member panel."[128] Additionally, the regulations set forth six circumstances for when three-member review is appropriate.[129] These provisions therefore help qualify the term "written opinion" and supply the courts with a standard against which to judge a Board member's determination of "substantial."

D. Application of the Proposed Framework to the Circuit Split

This Comment argues that categorizing a rule as legislative provides the courts with a framework to resolve the circuit split. Because the streamlining regulations are binding, they require the agency and the courts to comply with their preconditions. In turn, the BIA's decision to streamline is nondiscretionary. Furthermore, because the regulations list explicit criteria to guide the agency in its choice of proceeding, the court's holding in *Center for Auto Safety* is inapplicable. Thus, if the agency fails to consider a stated factor, a petitioner has grounds to appeal and the court must inquire whether the choice made was

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125 *McAlpine v United States*, 112 F3d 1429, 1434 (10th Cir 1997). See also *Turri v INS*, 997 F2d 1306, 1308–09 (10th Cir 1993) (holding that, provided that the administrative agency "considers all the relevant factors, [the] court cannot second-guess the weight, if any, to be given any factor" where no weight is prescribed in the law).

126 *Overton Park*, 401 US at 416.

127 For a discussion of this argument, see *Ngure*, 367 F3d at 986–87 (concluding that "there is no manageable standard for judicial review" regarding whether issues presented to the BIA are "so substantial that the case warrants the issuance of a written opinion").

128 8 CFR § 1003.1(e)(5).

129 See id § 1003.1(e)(6).

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[130]

The proposed framework has two distinct advantages. First, it supplies the courts with a manageable standard of review, addressing the question left open by *Chaney*. Specifically, as discussed in Part III.A, it is likely that the presumption against reviewability of nonenforcement decisions gives way when an agency takes affirmative action authorized by a binding regulation. Second, the framework accounts for the regulation's binding effect on the agency's adjudication proceedings. In doing so, it aligns the findings of the courts involved in the circuit split. To illustrate this effect, this Part examines two cases that raise significant issues within the split—*Haoud v Ashcroft*[131] and *Ngure v Ashcroft*.[132]

In *Haoud*, the First Circuit addressed whether the Board correctly followed its regulatory scheme when it issued an AWO decision.[133] This inquiry required a threshold determination that the court had jurisdiction to review the Board member's decision. The basis upon which the First Circuit asserted its jurisdiction was by comparison to *Chaney*, and by reference to the regulations themselves.[134]

First, the court distinguished its case from *Chaney* because the BIA's own regulations provided sufficient guidelines for the court to review a Board member's decision to affirm without opinion.[135] Moreover, the court emphasized that "[e]specially when the Board's review of an IJ's decision often hinges on circuit court precedent, [the court is] well-equipped, both statutorily and practically, to review a decision to streamline."[136] Thus, because the regulations served as a roadmap delineating when a Board member could properly issue an AWO decision, and because the court was familiar with its own precedent, the First Circuit decided in favor of jurisdiction over the challenge.

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130 5 USC § 706(2)(A). See also *INS v Yueh-Shaio Yang*, 519 US 26, 32 (1996):

> Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary, capricious, [or] an abuse of discretion" within the meaning of the Administrative Procedure Act.

131 350 F3d 201 (1st Cir 2003).

132 367 F3d 975 (8th Cir 2004).

133 See 350 F3d at 205 (finding that the court had jurisdiction and remanding the case back to the BIA because the court could not determine whether the BIA properly reviewed the petitioner's case).

134 See id at 206–07 (finding that, unlike in *Chaney*, the applicable regulation provided the court with a judicially manageable standard to enable review, and that the regulation was binding).

135 See id. See also 8 CFR § 1003.1(e)(4) (setting out the guidelines for affirming without opinion the decision of the Department of Homeland Security or the IJ).

136 *Haoud*, 350 F3d at 206.

Next, in deciding whether the BIA properly employed an AWO decision, the First Circuit explained: "As the regulation clearly sets out, 'Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be *binding* on all officers and employees of the Service or Immigration Judges in the administration of the Act.'"[137] This language is significant because it explicitly acknowledges that the decisions of the BIA are binding. While this conclusion is the same as the outcome proposed under the new framework, the First Circuit makes no mention of the implications of a regulation's binding effect in the context of judicial review. Instead, the court claims that the AWO procedure is reviewable because the streamlining regulations provide manageable standards for the purposes of review. However, were the court to address the binding nature of the AWO procedure as a legislative rule, it would begin its analysis supported by a strong precedent for the reviewability of binding norms.[138]

In contrast to *Haoud*, in *Ngure* the Eighth Circuit commenced its analysis by acknowledging the potential effect of a binding regulation. It noted that "the judiciary may in certain contexts review an agency's compliance with its own regulations when the regulations impose binding norms on the agency."[139] The court then indicated that its touchstones for determining when an agency's regulations intended to bind discretion were the context and the language of the regulation.[140] As for the context of the immediate case, the court emphasized that "an administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission traditionally has been free from judicial supervision."[141] The court cited the Supreme Court case of *Vermont Yankee Nuclear Power Corp v NRDC*,[142] to support this assertion.[143] But *Vermont Yankee* was decided on a different level of generality than *Haoud* and *Ngure*. Specifically, *Vermont Yankee* stands for the proposition that "Congress intended that the discretion of agencies and not that of the courts be exercised in determining when extra procedural devices should be employed."[144] And, while this general maxim of administrative law is certainly relevant to the circuit

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137 Id at 207, quoting 8 CFR § 1003.1(g) (emphasis added).

138 See *Nader*, 366 F Supp at 108 (establishing that once binding norms are issued the courts have jurisdiction to review the agency's compliance). See also notes 115, 117, and accompanying text.

139 *Ngure*, 367 F3d at 982.

140 See id.

141 Id at 983.

142 435 US 519 (1978).

143 Id at 544 ("[A]gencies should be free to fashion their own rules of procedure.").

144 Id at 546 (emphasis omitted).

split, the question at issue in the split is not the validity of the AWO as an "extra procedural device."[145] Instead, it is whether the appellate courts may review the BIA's decision to *apply* the AWO procedure in any given case. This determination does not require a simple statement of an agency's ability to define its own rules, but rather an examination of the jurisdictional issue in light of the regulation's binding strength on the agency and the courts.

Next, the court considered the "text, structure, and history" of the AWO procedure and concluded that "the Attorney General surely did not intend to create substantive rights for aliens in the determination whether a particular decision of an IJ was affirmed without opinion."[146] As evidence, the court noted the regulation's initial reason for implementation, namely administrative efficiency.[147] This led the court to classify the rule as "procedural" and to decline review on the basis that review of an agency's decision is generally limited when "a procedural rule is designed primarily to benefit the agency carrying out its functions," rather than "intended primarily to confer important procedural benefits upon individuals."[148] But although the Eighth Circuit correctly pointed out that the AWO regulation has a procedural function (to streamline the agency's review process), the court's distinction between "procedural" and "substantive" does not withstand close analysis.[149]

Although the streamlining regulations are procedural directives, the rules were also promulgated in part to ensure the *quality* of the agency's adjudications; the regulations were designed not only to address the agency's extensive backlog of cases and lengthy delays (which encouraged abuse of the system and imposed a particular burden on those who merited relief from deportation), but they also enabled the BIA to focus more attention and resources on those cases presenting significant issues for resolution.[150] And although exceptions

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145 See note 37 and accompanying text (noting that the majority of federal courts have held that the AWO procedure does not violate due process, thus the constitutional validity of the procedure is no longer in question).

146 *Ngure*, 367 F3d at 983.

147 See id at 983–84.

148 Id at 982–83, quoting *American Farm Lines v Black Ball Freight Service*, 397 US 532, 538–39 (1970).

149 The Supreme Court has held that agencies are bound by regulations intended to ensure that fair factfinding procedures are provided before the agency acts against an individual. See generally *Vitarelli*, 359 US 535 (invalidating the dismissal of an Interior Department employee after a hearing that lacked required safeguards); *Service*, 354 US 363 (invalidating the Secretary of State's dismissal of an employee without the required approval of the Deputy Undersecretary and consultation of the hearing record); *Accardi* 347 US 260 (invalidating a deportation because the required appeal on the suspension of deportation was improperly conducted).

150 See Part I.B (discussing the streamlining regulations).

to the general rule that agencies are expected to follow their regulations have been permitted where the regulation in question concerns only internal agency procedures, the AWO regulation fits no such exception.[151] Therefore even if the regulation instituting the AWO procedure does not go so far as to create any substantive rights for aliens, it is not merely a procedural rule that facilitates internal housekeeping. As a result, the courts *must* insist on the agency's compliance with the conditions of the rule.[152]

The proposed framework would adjust the way in which each of these courts approached the issue of judicial review. Yet if the courts agreed that the AWO rule is legislative and subsequently gave weight to the effect of this classification on the agency's adjudicatory discretion, this Comment contends that the courts should come to the same conclusion regarding jurisdiction: that courts may review whether a Board member properly applied the AWO regulation.

CONCLUSION

The circuit split involves a disagreement over when administrative action is committed to agency discretion by law. In their analyses of this issue, the courts rely on the judicially created doctrine of "no law to apply," emanating primarily from *Chaney*. This reliance, however, is misguided largely because *Chaney* left open the possibility that courts could review agency applications of their own binding regulatory policies.[153] Because the BIA's streamlining regulations are both published in the Code of Federal Regulations and promulgated as a result of a valid exercise of legislative authority, the rules are legislative and thus binding on the BIA and the courts. *Chaney* therefore cannot control the jurisdictional analysis. Instead, this Comment proposes that the binding effect of the streamlining regulations should guide the courts' decision as to whether the issuance of an AWO is committed to agency discretion by law. Specifically, because the regulation that creates the AWO procedure is a binding rule that constrains a Board member's ability to deviate from the prescribed conditions, the decision to streamline a case is not committed to agency discretion and is thus subject to judicial review.

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151 See, for example, *American Farm Lines*, 397 US at 538–39 (involving rules promulgated to assist an agency in compiling information for internal decisionmaking).

152 The Eighth Circuit itself implicitly acknowledged the rule's ability to impose *obligations* on the agency when it insisted that the regulations specifically prohibited a Board member from offering any reasoning for its decision to affirm without opinion. See *Ngure*, 367 F3d at 984. See also notes 107–16 and accompanying text.

153 See Bhagwat, 72 Notre Dame L Rev at 171 (cited in note 86) (noting that *Chaney* left open the possibility of judicial review when legislative rules were present).