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Voluntary Departure and the Right to Reopen Removal Proceedings on the Merits

Marc E. Tarlock†

An alien1 present in the United States without being admitted or paroled is “inadmissible” under 8 USC § 1182(a)(6)(A)(i) and may be removed at any time. Once initiated, removal proceedings take place before an immigration judge ("IJ"). If the alien is found removable at the conclusion of the hearing, he may request voluntary departure in lieu of formal deportation. The voluntary departure period cannot exceed sixty days beyond the final administrative action, which is often an affirmation on appeal to the Board of Immigration Appeals ("BIA" or "Board"). In addition, after an adverse decision from the Board, the alien has ninety days to file a single motion to reopen proceedings based on new evidence or changed circumstances.2

If the alien leaves the country, he forfeits any pending motions, and if he stays beyond the sixty-day voluntary departure period, he is ineligible for further relief. But the BIA rarely addresses motions to reopen before the departure period expires, often taking much longer.3 This means that if the departure period is not tolled, the alien has little chance of being heard on a motion to reopen. Despite this, the BIA’s interpretation of the


1 Alien "means any person not a citizen or national of the United States." 8 USC § 1101(a)(3) (2000).


3 In 1997, only 25 percent of cases were decided in less than ninety days, while 42 percent took 181 days or longer. Dorsey & Whitney LLP, Board of Immigration Appeals: Procedural Reforms to Improve Case Management Appendix B-4 (2003), available at <http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf> (last visited Mar 26, 2007) ("Dorsey and Whitney Report"). The length of time for the BIA to decide a case has decreased since then, though in 2000–2001 almost half of all cases still took longer than ninety days. Id at Appendix B-5. On September 9, 2005, there were 33,063 cases pending before the BIA, of which approximately 18 percent were more than a year old. US Department of Justice, Executive Office for Immigration Review, FY 2006 Statistical Yearbook, U1, available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf> (last visited June 5, 2007).
voluntary departure statute does not provide for tolling when a motion to reopen is filed. Accordingly, aliens who accept voluntary departure are effectively precluded from introducing new evidence or changed circumstances that may affect the result of the removal order after the final BIA decision in the case.

The first circuits to address whether tolling should be allowed all agreed that a timely filed motion should toll the sixty-day departure period. But a circuit split emerged in 2006 when the Fifth Circuit—the fourth to consider the question—concluded that filing a motion to reopen does not (and should not) toll the voluntary departure period. To date, only one other circuit, the Fourth Circuit, has adopted the position of the Fifth Circuit. Aliens in those circuits are effectively unable to timely file a good-faith motion to reopen because the departure period is not tolled.

This Comment argues that the circuit split should be resolved in favor of the majority view. Because the primary benefit of voluntary departure is to reduce the costs of removal for the government, allowing the departure period to be tolled if an alien files a motion to reopen would not frustrate congressional intent. Nor is this result at odds with the plain language of the governing statutes. Limiting the voluntary departure period to sixty days, and not permitting tolling, frustrates the plain language giving aliens the statutory right to file a motion to reopen by taking away the right to be heard as well.

Part I of this Comment provides an overview of removal proceedings and voluntary departure. Part II details the circuit split and the arguments put forth by both sides. Part III concludes that allowing tolling is both permissible and necessary to best effectuate congressional intent. Particular emphasis is paid to the benefits Congress intended to receive and offer by permitting voluntary departure.

I. REMOVAL, VOLUNTARY DEPARTURE, AND MOTIONS TO REOPEN

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). The Act replaced

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4 See Kanivets v Gonzales, 424 F3d 330 (3d Cir 2005); Sidikhouya v Gonzales, 407 F3d 950 (8th Cir 2005); Azarte v Ashcroft, 394 F3d 1278 (9th Cir 2005).
5 Banda-Ortiz v Gonzales, 445 F3d 387, 391 (6th Cir 2006).
7 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").
the Immigration and Nationality Act ("INA") and introduced significant statutory changes to removal procedures for aliens. Deportation and exclusion proceedings were combined as removal proceedings. IIRIRA also put a sixty day limit on voluntary departure and changed the motion to reopen to a statutory right.

A. Removal

An "alien present in the United States without being admitted or paroled ... is inadmissible," and the Department of Homeland Security ("DHS") has discretion to initiate removal proceedings. The removal proceedings take place before an IJ, with the burden on the alien to show that he either (1) clearly and beyond doubt is entitled to be admitted if he is currently an applicant for admission; or (2) is lawfully present pursuant to a prior admission. Alternatively, the alien may petition for relief from removal, in which case he must show (1) that he satisfies the eligibility requirements; and (2) merits a favorable exercise of discretion. Based on the evidence presented at the hearing, the IJ is to determine only "whether [the] alien is removable from the United States."

After removal proceedings take place in the immigration courts, the BIA serves as an administrative appellate body to which either party may appeal an adverse decision. The Board, often in single member panels, reviews findings of fact under a clearly erroneous standard and may review questions of law, discretion, or judgment de novo. Unless the Board affirms without

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8 Id. Though not so important here, IIRIRA also provided authority for expedited removals. The Department of Homeland Security ("DHS") can order the removal of an alien not admitted or paroled—without a hearing before an immigration judge—who makes no claim either of lawful status or a credible fear of persecution if returned to his home country.

9 Historically, the Immigration and Naturalization Service ("INS"), which served as the immigration enforcement agency, was established as part of the Department of Justice. On March 1, 2003, however, the INS ceased to exist, and its functions were transferred to DHS. Removal proceedings are now initiated by DHS.

10 8 USC § 1182(a)(6)(A)(i).

11 8 USC § 1229a(c)(2).

12 8 USC § 1229a(c)(4).

13 8 USC § 1229a(c)(1)(A). The government only has the burden in the case of deportable aliens—those who have been admitted to the United States. In those cases, the government must show by clear and convincing evidence that the alien is deportable. 8 USC §§ 1229a(c)(9), (c)(4)(A).

opinion, decisions from the BIA serve as the final administrative action in removal proceedings. Frequently, though, the Board will affirm without opinion, making the IJ's decision the final agency determination.\textsuperscript{15}

B. Voluntary Departure

Once an IJ finds an alien removable, the alien may petition for voluntary departure relief. Voluntary departure is available to aliens who have been in the United States longer than a year, who can show "good moral character" for the five-year period prior to the application, and who can show they intend to depart and have the means to do so.\textsuperscript{16} The statutory scheme serves a dual purpose. For the government, voluntary departure has the benefit of expediting removal and reducing costs. And for the alien, voluntary departure provides several benefits: (1) it lets him choose his own destination point; (2) it allows him to get his affairs in order; (3) there is no risk of detention while the government prepares for his removal; (4) the alien can leave without being subject to the stigma of deportation; and (5) he is eligible earlier for future relief.\textsuperscript{17}

Before IIRIRA, the IJ had discretion to schedule the alien's departure date. An alien who failed to depart by the scheduled date other than because of "exceptional circumstances"—a term left undefined in the statute—was ineligible for relief.\textsuperscript{18} One of the goals of IIRIRA was to speed up removal proceedings, and the length of the voluntary departure period was therefore statutorily limited. Now, under IIRIRA, if voluntary departure is granted at the conclusion of proceedings with the IJ's removal order, aliens are given a maximum of sixty days to depart.\textsuperscript{19} The IJ also has discretion to grant less than the full sixty days for

\textsuperscript{15} When the Board determines the decision below should be affirmed without opinion, it issues the following order: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR § 1003.1(e)(4)." 8 CFR § 1003.1(e)(4)(B)(ii).

\textsuperscript{16} 8 USC § 1229c(b)(1). The statute also requires that the alien is not deportable under 8 USC § 1227(a)(2)(A)(iii) (aggravated felony) or § 1227(a)(4) (security related grounds). For a discussion of what courts have found to violate "good moral character" see Chelsea Walsh, Voluntary Departure: Stopping the Clock for Judicial Review, 75 Fordham L Rev 2857, 2895 n 109 (2005).

\textsuperscript{17} See, for example, Banda-Ortiz v Gonzales, 445 F3d 387, 389-390 (5th Cir 2006), citing Lopez-Chavez v Ashcroft, 383 F3d 650, 651 (7th Cir 2004); Rife v Ashcroft, 374 F3d 606, 614 (8th Cir 2004).

\textsuperscript{18} 8 USC § 1252b(e)(2) (1993).

\textsuperscript{19} 8 USC § 1229c(b)(2).
departure, leaving the remainder available through a petition for extension. Alternatively, permission to voluntarily depart may be given in lieu of removal proceedings, in which case the departure period can be up to 120 days. An alien who does not depart within the voluntary departure period is subject to civil fines and becomes ineligible for any further relief under 8 USC §§ 1229b, 1255, 1258, and 1259 for ten years. That is, among other things, the alien becomes ineligible for further voluntary departure relief, for adjustment of status to permanent resident, and for cancellation of removal.

C. Motions to Reopen

After the final decision from the BIA, if there are new facts or intervening circumstances that may affect the result, an alien has ninety days to file a single motion to reopen with the BIA. The motion must state the facts that, if proved, would merit relief, supported by affidavits and other evidence the alien would like to show at a new hearing. "A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." More simply, the alien must offer evidence that was not available at the time of the original removal hearing.

Prior to 1996, there was no time restriction for filing the motion to reopen. This allowed adequate time for any other motions for relief. Under the new IIRIRA provisions, any motion to reopen must be filed within ninety days of the "final administrative order of removal." Although the statute does not define "final administrative order of removal," presumably, "a removal order

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20 8 USC § 1229c(a).
21 8 USC § 1229c(d)(1).
22 8 USC §§ 1229b, 1255, 1258, and 1259.
23 After a decision from the BIA, an alien may also file a motion to reconsider. Unlike a motion to reopen, this motion "shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision and shall be supported by pertinent authority." 8 CFR § 1003.2(b)(1). Some—but not all—of the analysis here applies to motions to reconsider as well.
24 8 USC § 1229a(c)(7). There are exceptions for motions to reopen following deportation or removal orders entered in absentia, which are governed by separate provisions. See discussion in Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, 5 Immigration Law and Procedure § 64.03[4][b] (Matthew Bender, Rev Ed).
25 Id; INA § 240(c)(7)(B) (2000); 8 USC § 1229a(c)(7)(B); 8 CFR § 1003.23(b)(3).
26 8 CFR § 1003.23(b)(3).
27 INA § 240(c)(7)(C)(i); 8 USC § 1229a(c)(7)(C)(i); 8 CFR §§ 3.2(c)(2), 3.23(b).
is not final before the expiration of the time to appeal an IJ’s decision, or the Board issues a final order dismissing an appeal.”

D. The Board of Immigration Appeals

The Board of Immigration Appeals was created by the Attorney General in 1940 to review the decisions of immigration judges in removal proceedings. To this end, the BIA exists pursuant to the Attorney General’s regulations; it is not a statutory body. The Board is responsible for providing precedent to serve as “clear and uniform guidance to the [DHS], the immigration judges, and the general public on the proper interpretation and administration of the Immigration and Nationality Act and its implementing regulations.” Board decision denying motions to reopen are reviewed under an abuse of discretion standard by circuit courts. As the number of immigrants to the United States grew during the 1990s, so too did the number of expulsion proceedings, which grew exponentially from 30,039 in 1990 to 185,731 in 2000. Consequently, the BIA is forced to stretch scarce resources. The number of appeals decided by the BIA increased in the 1990s, but did not keep pace with the number of appeals filed. The result was an increasingly large backlog of cases: 63,763 in 2000. To deal with the growing backlog, the BIA has introduced several streamlining procedures, including the summary affirmation without opinion procedure (“AWO”). Even

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28 Gordon, Mailman, and Yale-Loehr, 5 Immigration Law and Procedure § 64.03[4][b] (cited in note 24).
32 See, for example, Harchenko v INS, 379 F3d 405, 409 (6th Cir 2004) (“This court reviews the BIA’s denial of a motion to reopen for an abuse of discretion.”), citing INS v Doherty, 502 US 314, 323-24 (1992).
33 Dorsey and Whitney Report at 13 (cited in note 3).
34 Id.
35 8 CFR §§ 3.1(a), 3.2(b)(3). Under certain circumstances, a single Board member may affirm the order of an IJ without providing an opinion. 8 CFR § 3.1(a)(7)(i). For a discussion of the BIA’s streamlining rules, see Jessica R. Hertz, Comment, Appellate Jurisdiction Over the Board of Immigration Appeals’s Affirmance Without Opinion Procedure, 73 U Chi L Rev 1019 (2006).
with these streamlining regulations though, in 2000, 44 percent of cases took more than ninety days to complete.\textsuperscript{36} This backlog is especially important for those who have only sixty days before they must depart, including the time to gather new evidence and to file a motion to reopen. The BIA has reduced its backlog since 2000, but as of September 5, 2006, 22 percent of the 27,918 cases pending were still more than one year old.\textsuperscript{37}

The regulation implementing motions to reopen, 8 USC § 1229a, provides that “[a]ny departure from the United States ... occurring after the filing of a motion to reopen ... shall constitute a withdrawal of such motion.”\textsuperscript{38} It is less clear what happens to a motion to reopen when an alien fails to depart during the departure period. Congress was silent as to how the ninety-day deadline for filing motions to reopen was to be reconciled with the sixty-day grant of voluntary departure. The BIA has taken the view that time is not tolled while motions to reopen are pending and dismisses timely filed motions to reopen if the alien stays beyond his voluntary departure period awaiting the result. It does not address the merits of a timely filed motion to reopen when the departure period has expired.\textsuperscript{39}

II. CIRCUIT SPLIT REGARDING TOLLING

Circuits have split over whether the Board’s interpretation of the sixty-day departure period is an appropriate implementation of the statutory scheme provided by Congress. The majority position, originating in the Ninth Circuit, holds that voluntary departure was not meant to effectively preclude an alien from filing a motion to reopen. Accordingly, filing a timely motion to reopen (that is, filing prior to the end of the voluntary departure period) tolls the departure period. But other courts have interpreted the requirement that voluntary departure is not to extend

\textsuperscript{36} Dorsey and Whitney Report at Appendix B-4 (cited in note 3).

\textsuperscript{37} EOIR 2006 Statistical Year Book at U1 (cited in note 3).

\textsuperscript{38} 8 CFR § 1003.2(d).

\textsuperscript{39} The potential for an alien to submit a petition to extend the voluntary departure period before filing a motion to reopen was dealt with by the Ninth Circuit in \textit{Azarte v Ashcroft}, 394 F3d 1278, 1282 n4 (9th Cir 2005). The Department of Justice interprets the voluntary departure statute strictly so that an alien cannot receive more than sixty days for voluntary departure under any circumstance; in \textit{Azarte} that meant the alien was eligible for a thirty-day extension. But in that case, as many others, it took the Board much longer to respond. Moreover, the court found, “under present practice the Board does not consider requests to extend time for voluntary departure,” making any such request futile. Id, citing Gordon, Mailman, and Yale-Loehr, \textit{5 Immigration Law and Procedure} § 3.05[7][d](2004) (cited in note 24).
beyond sixty days as an absolute rule not subject to any exception. Thus an alien granted voluntary departure has the right to file a motion to reopen, but not the right to be heard on the merits if the Board does not address the motion before the departure period ends.

Before discussing the circuit split, a useful starting place is how this question was resolved pre-IIRIRA. As mentioned earlier, under the previous scheme, an alien who failed to depart was ineligible for further relief unless there were “exceptional circumstances.” The question before the BIA, then, was whether filing a motion to reopen constituted an exceptional circumstance. In *In re Shaar*, the BIA held it did not. The court concluded that under the relevant statutes, to demonstrate an exceptional circumstance, the evidence must show something as compelling as the two examples Congress provided—serious illness or death of an immediate family member—and the circumstance meriting tolling must be beyond the control of the alien. In *Shaar v INS*, the Ninth Circuit affirmed.

### A. Tolling is Allowed

In 2004, the Ninth Circuit was confronted with the same question it had addressed in *Shaar*, only under the IIRIRA statutory scheme: the maximum length of voluntary departure was fixed, and motions to reopen were deemed a statutory right. The facts giving rise to the Ninth Circuit’s ruling in *Azarte v Ashcroft* that time is tolled merit consideration because part of the court’s reasoning was that Congress did not intend such a harsh result. The petitioners, the Azartes, were charged as removable. The IJ issued a removal order and granted the Azartes’ voluntary departure request; the Board subsequently affirmed. After removal proceedings concluded, the Azartes filed a motion to reopen with the BIA seven days prior to the expiration of the thirty days allotted for their voluntary departure. Along with

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40 21 INS Dec 541 (BIA 1996).
41 Id.
42 141 F3d 953 (9th Cir 1998), superseded by *Azarte v Ashcroft*, 394 F3d 1278 (9th Cir 2005).
43 Id at 957. In *Barrios v United States Attorney General*, 399 F3d 272, 277 (3d Cir 2005), the Third Circuit found that “the failure of immigration authorities to act on a legitimate application for relief filed within the voluntary departure period [was] an exceptional circumstance.” Thus tolling is allowed in the Third Circuit for pre-IIRIRA cases.
44 394 F3d 1278 (9th Cir 2005).
45 Id at 1280–81.
the motion, the Azartes requested a stay of deportation and submitted evidence to fulfill the statutory requirement, claiming that removal would result in "an exceptional and extremely unusual hardship" to their United States citizen children. The Azartes remained in the United States while their motion was pending. On October 28, 2002, after nearly six months, the BIA, in a one-judge order, held that because the Azartes had not departed within the allotted time, they were ineligible for relief. The order did not address the merits.

Confronted with whether the BIA was authorized to decline a motion to reopen solely on the grounds that the petitioners overstayed their voluntary departure period, the Ninth Circuit first noted that under the IIRIRA statutory scheme, the BIA's refusal to grant sufficient time for voluntary departure was "especially perplexing" given that it had previously done so for more than twenty-five years in the appellate context. The court concluded that tolling was necessary to "avoid creating an incompatibility in the statutory scheme, to implement a workable procedure for motions to reopen in cases in which aliens are granted voluntary departure, and to effectuate the purposes of the [two] statutory provisions." The court relied on several canons of statutory construction to support its holding. The court first found that while an agency's statutory interpretations are usually entitled to deference, such deference was not necessary because normal principles of statutory construction suffice to determine the statute's meaning. Interpreting each statute "as if all of its provisions have meaning," the court held that allowing tolling best effectuates the motion to reopen and voluntary departure provisions. Tolling was also necessary to avoid the "nonsensical" notion that Congress "would have allowed aliens subject to voluntary departure to file motions to reopen but would have simulta-

46 Id at 1281.
47 Id.
48 Azarte, 394 F3d at 1287.
49 Id at 1289.
50 Under the principles set forth in Chevron, USA, Inc v Natural Resources Defense Council, 467 US 837, 842-43 (1984), if Congress "has directly spoken to the precise question at issue," courts "must give effect to [its] unambiguously expressed intent"; but "if the statute is silent or ambiguous," courts must defer to the Commission's interpretation so long as it is "based on a permissible construction of the statute."
51 Azarte, 394 F3d at 1285, quoting Perez-Gonzalez v Ashcroft, 379 F3d 783, 786 (9th Cir 2004).
52 Id.
neously precluded the BIA from issuing decisions on those motions.”

Finally, the court justified the result by relying on the “well-established canon of construction that deportation statutes should be construed in favor of the alien.”

In ruling that tolling was allowed, the Ninth Circuit also overruled its decision in Shaar. Because Shaar was a pre-IIRIRA case, the court found that after IIRIRA, the rationale for the decision no longer applied. The court provided several reasons why this conclusion was merited: (1) when Shaar was decided there was no statutory provision for motions to reopen, and the provision in Shaar related to departure was superseded; (2) the pre-IIRIRA statutes on voluntary departure and motions to reopen had no time limits; and (3) “the voluntary departure periods . . . were much more generous pre-IIRIRA.”

After Azarte, the next two circuits to rule on the matter followed its holding. In Sidikhouya v Gonzales, petitioner Sidikhouya, who had been found removable, married a United States citizen in 2003, before the BIA affirmed the IJ’s removal order. On February 13, 2004, one day before his voluntary departure period expired, Sidikhouya sought reopening, seeking “an immediate relative visa petition with eligibility for the bona fide marriage exception, and a stay of voluntary departure.” A month later, the BIA denied the motion to reopen solely on the grounds that Sidikhouya had overstayed the voluntary departure period. On appeal, the Eighth Circuit agreed with the reasoning set forth in Azarte, and held “the BIA abused its discretion in

53 Id at 1288–89.
54 Id at 1289, quoting Kwai Fun Wong v United States, 373 F3d 952, 964 (9th Cir 2004). For a discussion of the use of this canon, see Part III E 2.
55 Azarte, 394 F3d at 1286.
56 Id at 1286–87.
57 The Ninth Circuit has expanded on the decision in Azarte to hold that tolling automatically occurs when an alien files a motion to reconsider or reopen even if the alien fails to file a separate motion to stay removal. Barroso v Gonzales, 429 F3d 1195, 1205 (9th Cir 2005).
58 407 F3d 950 (8th Cir 2005).
59 Id at 951. There is nothing in the record to indicate why Sidikhouya waited so long to file the motion to reopen. This may have been due to the fact that he lacked proper legal counsel. The government does not provide lawyers in the immigration courts, and according to several figures cited in a recent article, it appears that two-thirds of those facing removal proceedings lack any form of legal counsel. Karin Brulliard, Battling Deportation Often a Solitary Journey, Wash Post A1 (Jan 8, 2007).
60 Sidikhouya, 407 F3d at 951.
denying [petitioner's] motion to reopen solely on the ground that he had overstayed his voluntary departure period." 61

Similarly, the Third Circuit, in Kanivets v Gonzales, 62 noted the Catch-22 situation aliens were placed in and ordered the BIA to decide petitioner's motion for reopening on the merits. 63 In Kanivets, petitioner's request for asylum was denied and he was granted sixty days voluntary departure. When the BIA affirmed, it granted an additional thirty days to depart. Kanivets then filed several motions, including a motion to reopen on November 22, 2002. The BIA responded more than half a year later, on July 31, 2003, holding that because Kanivets had not departed, he was ineligible for any adjustment of status. 64

Just a half-year before Kanivets, the Third Circuit had confronted the same problem under the pre-IIRIRA removal scheme and held that tolling was allowed. 65 In that decision, the Third Circuit fully endorsed the rationale of Azarte, even though Azarte dealt with IIRIRA. 66 In Kanivets, the court interpreted this earlier holding on the pre-IIRIRA scheme broadly: for voluntary departure, "the day that the motion was filed was the critical beginning point, rather than the date of adjudication." 67 Although the current statute did not contain the phrase "exceptional circumstances," the court felt that tolling was appropriate under IIRIRA as well, to give aliens the opportunity to be heard on the merits of a timely filed motion to reopen. 68

Most recently, the Eleventh Circuit has adopted the Azarte position. In Ugokwe v United States Attorney General, 69 under similar factual circumstances to the cases above, the court found that "[t]o accept the BIA's position here would deprive a petitioner . . . of all of the statutory rights granted to her by Congress." 70 Moreover, according to the court, the BIA's interpretation that there could be no tolling created an exception to the motion to reopen provision. But "Congress's clearly stated language . . . in 8 U.S.C. § 1229a(c)(7) . . . grants aliens the right to

61 Id at 952.
63 Id at 334–36.
64 Id at 332–33.
65 Barrios, 399 F3d at 278.
66 Id ("[W]e believe that the Azarte rationale is fully applicable here.").
67 424 F3d at 335.
68 Id at 336.
69 453 F3d 1325 (11th Cir 2006).
70 Id at 1331.
file one motion to reopen, with no mention of an exception for those in a period of voluntary departure."

The three circuits that have adopted the holding of *Azarte* have reiterated the same conclusion: because Congress never made clear that the sixty-day limit for voluntary departure was meant to effectively preclude aliens from filing a timely motion to reopen, tolling must be allowed to give effect to both statutes.

B. Tolling is Not Allowed

The Fifth Circuit, in *Banda-Ortiz v Gonzales*, read the sixty-day limit on voluntary departure as an absolute limit, and adopted the view that the filing of a motion to reopen may not conflict with the established departure period. Banda-Ortiz, a Mexican citizen who had entered the United States in 1989, was charged as removable in March 2000. He conceded removability but requested a cancellation of removal or, in the alternative, voluntary departure. Cancellation of removal was denied, but the IJ granted Banda-Ortiz’s request for voluntary departure. After the BIA affirmed on August 22, 2002, Banda-Ortiz filed a motion to reopen, claiming that departure would impose undue hardship on his older son and adoptive parents. The BIA granted the request without tolling the departure period (it later held the decision to grant the motion to reopen was in error). On remand, the IJ concluded Banda-Ortiz was ineligible for cancellation of removal because he had failed to timely depart. The BIA affirmed.

Confronted with a similar situation to that in *Azarte*, the Fifth Circuit came to the opposite conclusion. The court stated that voluntary departure is the result of “an agreed-upon ex-

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71 Id.
72 445 F3d 387 (5th Cir 2006).
73 Id at 390–91:

[The BIA has] reasonably interpreted the governing statutes in light of the purposes of the voluntary departure scheme to permit the filing and resolution of a motion to reopen, so long as it does not interfere with the agreed upon voluntary departure date or the Government’s interest in the finality of an alien’s voluntary departure.

74 Id at 388.
75 Id.
76 *Banda-Ortiz*, 445 F3d at 388.
77 Id.
78 Id.
change of benefits between an alien and the Government.” 79 “But if the alien does not depart promptly, so that the [Government] becomes involved in further and more costly procedures by his attempts to continue his illegal stay here, the original benefit to the [Government] is lost.” 80 To the Fifth Circuit, Congress had made its intent clear through the language limiting voluntary departure to sixty days, and automatic tolling would extend the departure period beyond what Congress had established.

The court also questioned whether a judicial extension was within the court’s authority, 81 but the decision ultimately rested on the court’s reading of the voluntary departure statute. Repeating an analogy made by the Seventh Circuit, the court concluded that to allow aliens to file for voluntary departure and then overstay the allotted period to exhaust their administrative appeals would be “as if the accused in a criminal prosecution demanded not only the chance of acquittal at trial but also the benefits that go with a guilty plea and the acceptance of responsibility.” 82

In August 2006, the Fourth Circuit considered the issue and agreed with the decision in Banda-Ortiz that the statutory scheme simply does not permit 8 USC § 1229c(b)(2) to be interpreted to allow voluntary departure to be tolled. 83 Like the court in Banda-Ortiz, the Fourth Circuit found that to permit tolling was both against the plain statutory language and clear congressional intent: “Voluntary departure is not a right, but a benefit.” 84 To the court, the statutory provisions reveal clear congressional intent to offer a specific benefit in return for a quick departure at no cost to the government. This intent would be frustrated if toll-

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79 Id.
80 Banda-Ortiz, 445 F3d at 390 (citation and quotation omitted).
81 Id. 8 CFR § 1240.26(f) provides:

Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B [8 USC § 1229c] of the Act.

82 Id at 391, citing Alimi v Ashcroft, 391 F3d 888, 892 (7th Cir 2004).
83 Dekoladenu, 459 F3d at 507.
84 Id at 506.
ing were allowed. And comparing the voluntary departure limit of sixty days with the ninety-day time limit to file a motion to reopen, the court reasoned that because voluntary departure is a more specific statute—in that it only applies to certain aliens—it governs over the more general motion to reopen statute. Finally, the court felt that enforcing an absolute sixty-day limit alleviated the concern that automatic tolling would provide a strong incentive for aliens facing voluntary departure to file a motion to reopen to extend the departure period.

III. RESOLUTION OF THE CIRCUIT SPLIT

A. Congressional Intent

Both positions agree that voluntary departure is the result of an agreed upon exchange of benefits between the alien and the government. They differ as to what the alien must give up to receive the benefit of voluntary departure. According to the majority, Congress did not intend aliens to have to effectively give up a motion to reopen to secure the benefit of voluntary departure. In contrast, the minority circuits emphasize that it is not unreasonable for aliens seeking the benefit of voluntary departure to have to give up the right to a resolution of a motion to reopen if it does not come within sixty days.

1. The congressional record.

IIRIRA's legislative history does not reveal exactly what benefit scheme Congress was hoping to introduce. The House report from the Judiciary Committee, which had been charged with amending the bill, stated: “For illegal aliens already present in the U.S., there will be a single form of removal proceeding, with a streamlined appeal and removal process. To avoid removal, aliens must establish in such proceedings that they are entitled to be admitted or to remain in the United

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85 Id at 505-06. The court here is referring to the language in 8 USC § 1229c(a)(1), which states that voluntary departure applies to "certain removable aliens, i.e., those 'not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B)." This is the language governing voluntary departure in lieu of removal proceedings, not voluntary departure granted at the completion of removal proceedings, 8 USC § 1229c(b). (The court also mistakenly cites to the section covering motions to reconsider rather than motions to reopen.)

86 Dekolaidenu, 459 F3d at 506.

gress intended tolling. Nor does the statement regarding motions to reopen: “Aliens are limited to a single motion to reconsider and a single motion to reopen removal proceedings.”88 This statement is similarly vague, but noticeably does not mention that the right to be heard on a motion to reopen depends on whether the alien has received voluntary departure. What is clear is that neither statement from the record demonstrates that Congress intended aliens to sacrifice the right to file a motion to reopen for voluntary departure.

The report from the Senate Judiciary Committee is also vague on the interplay between voluntary departure and motions to reopen. It makes only a brief statement that (with a stretch) could perhaps be read as relating to voluntary departure: “The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement.”89 But this seems to do no more than corroborate the notion that voluntary departure is a privilege, which is not contested by the majority. At issue is only the extent of the privilege.

2. Saving costs for the government.

It is not obvious that allowing tolling while motions to reopen are pending frustrates Congress’s intent regarding saving costs. In fact, the opposite seems true. First, tolling time so that an alien can file a motion to reopen does nothing to affect the cost of removal. If the alien loses, he has still agreed to voluntary departure; there is no additional cost to the government in removing him. Second, Congress already considered the administrative costs of hearing motions to reopen: they granted each alien the right to file one and only one.90 That was the administrative cost Congress was willing to accept.

To be sure, one could argue that Congress may have intended to reduce the administrative costs of hearing motions to reopen through voluntary departure. But it cannot be said this was the clear congressional intent. If voluntary departure limits were indeed aimed at saving the cost of having to hear a motion to reopen, it is certainly not unambiguously expressed in the statutory language. This seems particularly true given that whether there is an administrative cost to a motion to reopen at

88 HR Rep No 104-469(I) at 194.
90 8 USC § 1229a(c)(7)(A).
all depends on other factors such as the local backlog or whether the motion was filed in a large metropolitan area. Even if Congress did want the time limit to serve as a cost-saving measure, it would only work if there was a large enough backlog at the BIA. But this seems an odd thing to rely on, given that the BIA and Congress regularly try to implement measures aimed at reducing this backlog. It remains plausible, then, that allowing the voluntary departure period to be tolled for timely filed motions to reopen does not frustrate any clear congressional intent with respect to cost savings.

There is perhaps an argument that Congress sought to avoid the cost of adjudicating motions to reopen and so offered voluntary departure as an incentive for the alien not to file the motion to reopen. If this is the case, then indeed allowing tolling would frustrate congressional intent. But this argument finds support nowhere in either the House or the Senate report. When removal costs are discussed, the reports refer only to the cost savings of the actual removal, not the administrative process. More importantly, the argument does not find any support in the language itself. That is, there is no reason the language of the voluntary departure statute should be read as providing an incentive not to file a motion to reopen. For comparison, consider the two clearly established choices for voluntary departure offered by 8 USC § 1229c: (1) the departure period is not to exceed 120 days when permitted in lieu of removal proceedings; or (2) the departure period is not to exceed 60 days when the alien does not forgo removal proceedings. It is not so difficult to read this language as offering a clear benefit (longer departure) in exchange for the alien giving up removal proceedings. But the language of 8 USC § 1229c does not support the additional argument that the limit on voluntary departure is offered as a benefit in exchange for the alien giving up the right to file a motion to reopen.

3. Plain language reading of the statutes.

In rejecting tolling, Judge Motz stated that “a judicially created tolling provision contradicts the plain language of the statute and undermines the clear congressional intent.” Under Motz's reasoning, the plain language of 8 USC § 1229c(b)(2) is

91 See Hertz, 73 U Chi L Rev at 1019 (cited in note 35) (discussing the BIA's streamlining rules).
92 See discussion in Part III A 1.
93 Dekoladenu, 459 F3d at 507.
clear: "Permission to depart voluntarily under this subsection shall not be valid for a period exceeding 60 days."94

But adopting the position that tolling will frustrate congressional intent requires reading an exception into the plain language that provides one motion to reopen for those who choose to voluntarily depart. This exception "operates to disadvantage those aliens whose good behavior has entitled them to the solicitude of the law of voluntary departure."95 It seems like more than an uphill battle to argue that Congress clearly intended this exception to be read into the following language: "An alien may file one motion to reopen proceedings."96 Thus to support the argument against tolling one must read the sixty-day voluntary departure limit in 8 USC § 1229c as an absolute rule at the expense of the plain language covering motions to reopen, 8 USC § 1229a. This makes little sense. Further, concluding tolling is prohibited by the voluntary departure period is "arbitrary because it assumes Congress intended that an alien's opportunity to obtain relief depends not on the merits of the alien's application, but on whether a randomly assigned tribunal happens to act on the motion within the alien's period of voluntary departure."97 Eligibility to be heard on the merits should only depend on whether the motion was timely filed during the voluntary departure period.

Moreover, the argument that the sixty-day limit was meant to effectively preclude motions to reopen also requires one to accept that Congress intended the statutory time limit for voluntary departure to be a deadline for adjudication of other claims as opposed to a deadline for filing them. For purposes of analogy, consider a two-year limitation on a tort claim. It would be nonsensical to require that the person have their claim fully adjudicated within two years. Instead, it is more logical to view a statute of limitations as a deadline for filing, since that is what the potential litigant can control. Otherwise, whether a person has a right to relief would depend almost entirely on the court's docket where the claim could be filed. The same is true here. There is nothing in 8 USC § 1229c to suggest the sixty-day limit is to be read as deadline to have a motion to reopen—something unmentioned in the departure statute—adjudicated.

94 This time limit applies to voluntary departure given at the conclusion of removal proceedings. See Part I B.
95 Banda-Ortiz, 445 F3d at 393 (Smith dissenting).
96 8 USC § 1229a(c)(7)(A).
97 Shaar, 141 F3d at 960 (Browning dissenting).
4. Putting a time limit on voluntary departure.

One reason to doubt whether the sixty-day limit on voluntary departure was intended to preclude motions to reopen is that IIRIRA replaced a voluntary departure scheme that left discretion with the immigration judge. And in relation to the sixty-day limit, immigration judges permitted extremely long stays. Voluntary departure grants over 120 days were common, and for certain classes of alien, departure periods of more than one year were regularly given. With the sixty-day limit, Congress provided guidance to immigration judges. From this change it seems clear only that Congress wanted a shorter and more uniform voluntary departure period. The change does not support the inference, accepted by the minority position, that Congress wanted the departure period to preclude motions to reopen for a large class of aliens in removal proceedings.

5. Immigration numbers.

In 2004, 1,035,477 aliens accepted voluntary departure. Of that group, more than 99 percent involved aliens apprehended by Border Patrol and removed quickly. This is significant for several reasons. First, it highlights the oddity of reading the voluntary departure statute as a bar on motions to reopen. In fact, the two rarely overlap. This strongly corroborates the concern that the departure period should not be read as an incentive against filing a motion to reopen. And second, the numbers suggest that allowing time to be tolled while a timely filed non-frivolous motion to reopen is pending would at most affect less than 1 percent of voluntary departure grants. So extending voluntary departure several months to allow the BIA to address timely filed motions to reopen does not seem an unreasonable burden to expedition.

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98 Austin T. Fragomen, Jr. and Steven C. Bell, Immigration Fundamentals § 7:4.6[A] (4th ed, Rel #18, 2005).
100 Id ("This statistic includes recidivists and thus is a measure of events rather than unique individuals.").
101 In reality, it is likely a much smaller figure, given that many aliens withdraw their applications for admission or concede removability and agree to voluntary departure in lieu of removal proceedings (making tolling irrelevant). Id.
6. The criminal plea bargain analogy.

In *Alimi v Ashcroft*, Judge Easterbrook said that allowing those who let the voluntary departure period expire to remain eligible for cancellation of removal would be as if “the accused in a criminal prosecution demanded not only the chance of acquittal at trial but also the benefits that go with a guilty plea and the acceptance of responsibility. If one could have both, the incentive to accept responsibility would disappear. So too with immigration disputes.” This analogy was invoked by the Fifth Circuit in *Banda-Ortiz* to suggest that tolling should not be allowed, but it is inapposite here. A guilty plea is premised on acceptance of responsibility for the criminal wrong. For this reason, it may make sense to deny one who pleads guilty of a crime the possibility of acquittal or a second trial if new evidence arises. But the grant of voluntary departure is not related to the merits of the original removal order or the subsequent motion to reopen. It is a different matter therefore to bar only those who agree to voluntary departure from filing motions to reopen because there is no need to provide an incentive to accept responsibility at that point. And most important, in *Alimi*, the petitioners had overstayed their departure period before filing for relief. The analogy does not apply to motions to reopen filed before the end of the departure period.

B. Frivolous Motions and the Potential for Abuse

In *Dekoladenu v Gonzales*, the court found that adopting the *Azarte* approach “would have the effect of rendering the time limits for voluntary departure meaningless.” If filing a motion to reopen automatically tolled the voluntary departure period,” the court reasoned, “aliens who have been granted voluntary departure would have a strong incentive to file a motion to reopen in order to delay their departure.” At first, this appears to be a valid concern, and one that cautions against reading the statutory provisions to allow tolling. But a motion to reopen is not

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102 391 F3d 892 (7th Cir 2004).
103 Id at 892.
104 445 F3d at 391.
105 459 F3d 500 (4th Cir 2006).
106 Id at 506.
107 Id.
108 The court in *Ugokwe v United States Attorney General*, 453 F3d 1325, 1331 n 9 (11th Cir 2006), acknowledged the possibility of a frivolous motion to reopen, but declined
an option for every alien facing a removal order. To the contrary, it is available only to those aliens who have new factual evidence (that is material to the claim for relief), or who face intervening circumstances that may affect the results, and it requires supporting affidavits and evidence. Those aliens who have no new material evidence to present do not have the option to file a motion to reopen as a means of extending the departure period. And there is nothing to prevent the BIA from dismissing motions to reopen that fail to show what new material evidence the alien will try to prove in a rehearing.

Perhaps the court in Dekoladenu was concerned with the incentive for aliens facing voluntary departure to file frivolous motions to reopen. Under this reasoning, if tolling were allowed, aliens who had accepted voluntary departure but lacked new evidence or changed circumstances would submit false affidavits to toll the departure period. But to respond to such a concern by effectively eliminating the motion to reopen for most aliens who have opted to voluntary depart seems too drastic an action.

There is no evidence either to support or to negate the claim that aliens will file frivolous motions to reopen if doing so means time will be tolled. Absent such evidence a court is not in the best position to decide, and should not do so at the risk of supplanting Congress’s authority. Moreover, Congress already addressed the problem of “proliferating motions to reopen by regulating [their] quantity, quality, and timeliness.” If tolling was allowed and frivolous motions became a problem for the BIA, either the BIA or Congress could also respond by clarifying the statutory bar for changed circumstances. Until there is a real threat, the mere possibility of frivolous motions to reopen should not keep a court from ordering the BIA to toll the departure period while the motion is pending. Providing an incentive for aliens to file

to address whether tolling would still be appropriate, as the issue was not before the court.

109 8 USC § 1229a(c)(7)(B); 8 CFR § 3.23(b)(3).
110 This is especially true in matters of immigration policy. See, for example, Fiallo v Bell, 430 US 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete.”) (citations and quotation omitted); Matthews v Diaz, 426 US 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”).
111 Banda-Ortiz, 445 F3d at 392 (Smith dissenting).
112 Congress seems to have recognized, for example, that allowing voluntary departure to be tolled pre-IIRIRA only for “exceptional circumstances” was too vague. The term has since been defined. See 8 USC § 1229a(a)(1).
motions to reopen need not come at such staggering administrative cost if the BIA or Congress is prepared to revisit the process at a later time if the concern proves to be a valid one.

C. The Power of Courts to Stay Removal

In rejecting the argument that filing a motion to reopen tolls the voluntary departure period, the Fifth Circuit found that tolling is either "in tension with" or "opposed to" the court's authority to extend the limited departure period.\footnote{Banda-Ortiz, 445 F3d at 390.} In addition, the court wrote that a judicial extension is "arguably contrary" to 8 CFR § 1240.26(f).\footnote{Id. 8 CFR § 1240.26(f) provides:}

\begin{quote}
Authority to extend the time within which to depart voluntarily specified initially by an immigration judge or the Board is only within the jurisdiction of the district director, the Deputy Executive Associate Commissioner for Detention and Removal, or the Director of the Office of Juvenile Affairs. An immigration judge or the Board may reinstate voluntary departure in a removal proceeding that has been reopened for a purpose other than solely making an application for voluntarily departure if reopening was granted prior to the expiration of the original period of voluntary departure. In no event can the total period of time, including any extension, exceed 120 days or 60 days as set forth in section 240B [8 USC § 1229c] of the Act.
\end{quote}

\footnote{407 F3d at 953 (Loken concurring in part and dissenting in part).}

\footnote{Id.}

Several arguments have been advanced by both sides regarding this issue.

1. Tolling during appeal to the BIA.

The language in 8 USC § 1229c is clear that there is a sixty-day limit for voluntary departure. But as Chief Judge Loken stated in Sidikhouya, "the BIA appears not to construe this as an absolute prohibition."\footnote{Id.} In that case, a January 2004 BIA order affirming the IJ's decision permitted the petitioner (Sidikhouya) to stay for up to thirty days following its decision, even though at that point it was long after the sixty days granted by the IJ in September 2002.\footnote{Id.} According to Judge Loken, this indicated that the BIA "obviously believes it has authority to toll or stay the voluntary departure period during administrative appeals."\footnote{Id.} In addition, Judge Loken felt that the agency's regulations provided no authority for such a rule.\footnote{Id.} He concluded that the actions of

\footnote{113 Banda-Ortiz, 445 F3d at 390.}
\footnote{114 Id. 8 CFR § 1240.26(f) provides:}
\footnote{115 407 F3d at 953 (Loken concurring in part and dissenting in part).}
\footnote{116 Id.}
\footnote{117 Id.}
\footnote{118 Id.}
the BIA immediately suggest that tolling the departure period is not necessarily "opposed to" statutory authority.\textsuperscript{119}

For Judge Loken, the question was obvious: if the BIA has the power to toll the departure period during administrative appeals, does it not have the same power while motions to reopen are pending?\textsuperscript{120} But the two situations are distinguishable, and as one court has noted, the statutory scheme treats the two differently.\textsuperscript{121} An alien is not bound by the voluntary departure period until the removal order becomes final, which is generally not until the BIA issues a final order dismissing the appeal. So it is not that voluntary departure is tolled pending an appeal of the removal order to the BIA, but that the departure period is not yet effective. Moreover, motions to reopen do not disturb the finality of an appeal.\textsuperscript{122} This analysis by the court in \textit{Dekoladenu} seems to be the best reading of the language: "the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal."\textsuperscript{123} The language does not seem to suggest that the finality of the removal order is called into question with the motion to reopen.

2. No absolute prohibition against tolling.

Judge Loken was not far off when he suggested that even the BIA does not construe the sixty-day limit as absolute. In fact, the idea that the limit is absolute is refuted by the procedural history of \textit{Kanivets}. There, the alien was granted a voluntary departure period of sixty days, the entire statutory limit, at the conclusion of removal proceedings before the IJ. After the BIA affirmed the order, it extended the departure period an additional thirty days.\textsuperscript{124} This meant Kanivets was granted a total of ninety days for voluntary departure, and voluntary departure was not given in lieu of removal proceedings. Any attempt to distinguish this case as an asylum case fails because the word "asylum" is never mentioned in 8 USC § 1229c, which governs voluntary departure. So the conclusion that tolling is not allowed be-

\textsuperscript{119} \textit{Sidikhouya}, 407 F3d at 953. This seeming paradox was also noted by the court in \textit{Azarte}, see Part II B.

\textsuperscript{120} Id.

\textsuperscript{121} \textit{Dekoladenu}, 459 F3d at 507.

\textsuperscript{122} Id.

\textsuperscript{123} 8 USC § 1229a(c)(7)(C)(i) (emphasis added).

\textsuperscript{124} \textit{Kanivets}, 424 F3d at 332. Although it is not stated explicitly that Kanivets had a hearing before an IJ, the opinion does discuss Kanivets's testimony to the IJ, which presumes a hearing. Id.
cause voluntary departure can never exceed sixty days is not always valid.

The fact pattern from *Kanivets* suggests that even if the court would have wanted to decide in favor of the minority rule, it would have faced an uphill battle. The argument put forth in *Banda-Ortiz* and *Dekoladenu* is that the BIA and the courts are subject to the same absolute sixty-day limit on the voluntary departure period. But such an argument fails in the face of evidence that the BIA itself does not view the congressional limit as an absolute prohibition against longer stays.

3. Tolling during judicial appeals.

A question similar to whether tolling is allowed pending motions to reopen is whether courts have authority to toll the voluntary departure period during judicial appeals of BIA decisions. Both issues require an analysis of whether courts have any power to stay voluntary departure. Although there is a circuit split on this issue as well, only one circuit has held that courts lack the authority to stay the departure period.125

The argument for tolling during judicial appeals is that the court is only “stay[ing] the immediate effectiveness of the relief already granted [voluntary departure] by [the United States Attorney General] in his discretion, to allow the alien petitioner to receive appellate review.”126 There is a balancing test to determine when a stay is merited, which includes whether the alien has demonstrated a likelihood of success on the merits. This op-

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125 Compare *Nwakanma v Ashcroft*, 352 F3d 325, 327 (6th Cir 2003) (per curiam) (holding that if an alien meets the requirements for a stay of removal the departure period may be stayed); *Lopez-Chavez v Ashcroft*, 383 F3d 650, 654 (7th Cir 2004) (holding that “in an appropriate case, one that falls under the permanent IIRIRA rules and in which the time for voluntary departure has not yet run, nothing in IIRIRA divests us of the power to grant a stay tolling the time for departure until the completion of judicial review if the other prerequisites to such equitable relief are satisfied”); *Rife v Ashcroft*, 374 F3d 606, 616 (8th Cir 2004) (“Because voluntary departure is most beneficial to the government as well as to the alien when a removal order is finally effective, it would make no sense to construe IIRIRA as permitting a stay of removal but precluding a complementary stay of voluntary departure.”); *El Himri v Ashcroft*, 344 F3d 1261, 1262 (9th Cir 2003) (“We hold that [post-IIRIRA] this court retains equitable jurisdiction to stay the voluntary departure period,” and that “the standards for obtaining a stay of removal shall also apply to stays of voluntary departure.”); with *Ngarurih v Ashcroft*, 371 F3d 182, 194 (4th Cir 2004) (“Having concluded, however, that 8 USC § 1252(a)(2)(B) precludes judicial review of the BIA's order granting voluntary departure, we cannot evade this statutory directive by resort to equity. Indeed, since we lack jurisdiction over the BIA's order granting voluntary departure, there is nothing before us to stay.”).

126 *Nwakanma*, 352 F3d at 327 (citation omitted). For a discussion of tolling the clock pending judicial review, see *Walsh*, 78 Fordham L Rev at 2857 (cited in note 16).
erates as a check against frivolous appeals. Such a balancing test is not needed for motions to reopen because there are already checks in place.\textsuperscript{127}

This analysis is largely applicable here as well.\textsuperscript{128} In fact, it seems even stronger given that leaving the country while a motion to reopen is pending constitutes a withdrawal of the motion.\textsuperscript{129} In contrast, judicial appeals can be pursued from abroad. If courts have the power to stay voluntary departure pending a judicial appeal, it makes sense they could do the same while motions to reopen are pending before the BIA.

D. Statutory Canons

Courts on both sides of the circuit split have used several statutory canons of construction. This next section addresses two of those canons in an effort to demonstrate not only that they were used incorrectly as justification for the particular holding, but that they do not provide any resolution to the ultimate question.

1. The more specific provision governs the general.

"It is a fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs."\textsuperscript{130} The Fourth Circuit, in \textit{Dekoladenu}, applied this provision to the question of tolling.\textsuperscript{131} The court noted that section 1229c, which governs voluntary departure, does not apply to those deportable under 8 USC §§ 1227(a)(2)(A)(iii) and 1227(a)(4); in contrast, sec-

\textsuperscript{127} Though there may be some initial appeal to incorporating a balancing test to determine whether voluntary departure should be tolled pending a motion to reopen, it involves a significant administrative cost that would not clearly change the result. Compared to the length of time involved in judicial review, motions to reopen often require substantially less time. This makes a preliminary inquiry into, among other things, the likelihood of success on the merits, nearly as time consuming as the review of the motion to reopen itself.

\textsuperscript{128} And even if courts do not have the power to stay the voluntary departure, they likely have the power to order the BIA to address motions to reopen on the merits under their abuse of discretion review.

\textsuperscript{129} 8 CFR § 1003.2(d).

\textsuperscript{130} \textit{Shawnee Tribe v United States}, 405 F3d 1121, 1129 (10th Cir 2005) (quotation and citation omitted). See also \textit{Sacramento Metro Air Quality Mgmt Dist v United States}, 215 F3d 1005, 1013 (9th Cir 2000) ("[A] general statutory provision may not be used to nullify or trump a specific provision."); \textit{Warren v NC Dept of Human Resources, Div of Social Servs}, 65 F3d 385, 390 (4th Cir 1995) ("[I]t is an elementary principle of statutory construction that a specific statutory provision controls a more general one.").

\textsuperscript{131} 459 F3d at 505–06.
tion 1229a(c)(7), which governs motions to reopen, carries no such limitations, and applies to all aliens. The court then reasoned that because section 1229c is the more specific statute, it should govern.

This analysis fails for several reasons. Most importantly, the canon applies only when the two statutes govern the same subject. That is certainly not the case here. The first statutory provision governs motions to reopen, the second voluntary departure. Thus, an obvious problem with the court’s analysis is that it treated voluntary departure and motions to reopen as if they were a single subject, dealt with at different points in time. In reality, the two are very different parts of a more general statutory removal scheme. The canon used by the court was not a well-established canon of construction.

Even if the subject matter were irrelevant, as the court’s interpretation suggests, and all that mattered was which statute was more specific, the voluntary departure provision is not the clear winner. There are separate deadlines in the statute for motions to reopen for battered spouses and children. The time limit also does not apply to asylum seekers. Under the statutory canon that the more specific governs the more general, as applied by the court in Dekoladenu, the question is which statute is more specific (that is, narrower). On the one hand is a voluntary departure statute that does not apply to aggravated felons. On the other is one that allows motions to reopen but has filing exceptions for battered spouses, children, and asylum seekers. Neither is necessarily more specific, and so the inquiry into specificity is fruitless. The canon, under any interpretation,

132 Id.
133 Id at 506.

The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

135 8 USC § 1229a(c)(7)(C)(iv).
136 8 USC § 1229a(c)(7)(C)(ii).
137 It is likely fruitless for the reason set forth in the previous paragraph. Namely, the
then, should not have been invoked in this case, as it does nothing to resolve the conflict.

It is also worth noting that the court may have erred from the beginning in invoking a canon governing conflicting statutes. As the Supreme Court has stated, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."\(^\text{138}\) There is nothing that suggests a provision allowing ninety days to file a motion to reopen and one allowing sixty days for voluntary departure are not capable of co-existence. And there is certainly no clearly expressed congressional intent that one is not meant to be effective. The two seemingly inconsistent statutes should have been read to coexist. (This is, in effect, the approach of the majority position.)

2. Rule of lenity.

The court in \textit{Azarte} relied on three canons of statutory construction to justify its holding. The final, "well established canon of construction," that deportation statutes are to be construed in favor of the alien, does not seem to be persuasive.\(^\text{139}\) While the court only quoted part of the canon, the full "longstanding principle," as proclaimed by the Supreme Court is to construe "any lingering ambiguities in deportation statutes in favor of the alien."\(^\text{140}\) Thus the canon is only to be invoked in the face of ambiguities. But the court in \textit{Azarte} avoided the holding in \textit{Chevron} by finding that traditional canons could provide a resolution to the statute.\(^\text{141}\)

Just how the rule of lenity and \textit{Chevron} should be dealt with has been considered at length by attorney Brian Slocum.\(^\text{142}\) According to Slocum, because the immigration rule of lenity is a substantive canon "rooted in policy and value judgments," it is

\(^{138}\) \textit{Morton v Mancari}, 417 US 535, 551 (1974). See also \textit{United States v Borden Co}, 308 US 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest.'") (citations omitted).

\(^{139}\) \textit{Azarte}, 394 F3d at 1289.


\(^{141}\) \textit{Azarte}, 394 F3d at 1285.

more difficult to reconcile with *Chevron* than textual canons (which set forth inferences to be drawn from word choice). Slocum concludes that the rule of lenity is consistent with *Chevron*, but might properly be transformed to just a weighted factor. Even then, though, he contends that where the statute deals only with inadmissible noncitizens, the rule of lenity "should be entitled less, if any, weight."

E. Uniform Immigration Policy

At stake in this debate is also a non-uniform immigration policy with respect to an important part of removal proceedings. Currently, the Third, Eighth, Ninth, and Eleventh Circuits have all held that tolling must be allowed while motions to reopen are pending. Two circuits, the Fifth, and the Fourth have concluded otherwise. And so the right of an alien to be heard on the merits of a motion to reopen hinges on the judicial circuit the alien can appeal to (or the speed of the BIA in his district). This seems to be a situation where the BIA should yield to the interests of a uniform immigration policy.

The Board has previously relented in its adherence to its own standards in the face of a circuit split. In *In re Yanez-Garcia*, the Board determined that a state drug conviction would count as a "drug trafficking crime," such that it could be considered an "aggravated felony" under the INA, if it was analogous to one of the federal drug statutes referenced in 18 USC § 924(c)(2). But there was a "clear trend" among the circuit courts to abandon this definition. Before the BIA revisited the matter, five circuits interpreted a "felony" by reference to the definition set forth in 21 USC § 802(13). Only two circuits adopted the interpretation put forward by the Board for immigration cases. When the "division of authority among the circuits" made a uniform immigration policy an "elusive goal," the Board abandoned its interpretation: "Because uniformity is presently unattainable in this context, we find that continued adher-

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143 Id at 541–42.
144 Id at 577–79.
145 Id at 579.
146 23 INS Dec 390 (BIA 2002).
147 Id at 394.
148 Id at 394–95. This definition permits “a state drug offense that is classified as a felony under the law of the convicting state to qualify as a felony under the CSA even if it could only be punished as a misdemeanor under federal law."
ence to the standard adopted . . . no longer makes sense . . . . Consequently, we conclude that the best approach is one of deference to applicable circuit authority.”149 This seems to be the appropriate course of action here as well. The best resolution of this conflict is one that comes not from the circuit courts, but from the Board itself.

CONCLUSION

Ultimately, it seems that the majority position gets the best of the debate. The minority position rests primarily on the assumption that congressional intent has been clearly expressed: Congress intended an absolute bar on extending voluntary departure beyond the statutory limit. But this reading is supported only by the plain language of one statute and comes at the expense of the plain language of another. Moreover, if the BIA does not view the voluntary departure period as absolute, courts should not be forced to either.

Congressional intent regarding voluntary departure is best viewed not alone, but in context with congressional intent to give aliens a statutory right to file a motion to reopen, a right not conditioned with an exception for aliens who previously opted for voluntary departure. Giving effect to the majority position is the best possible way to ensure that aliens who want to voluntarily depart are not pushed into a Catch-22 scheme implemented by the BIA and enforced by federal courts.

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149 Id at 396.