COMMENTS

Judicial Deportation Under 18 USC § 3583(d): A Partial Solution to Immigration Woes?

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[T]he Federal Government must make sure that dangerous aliens are not on the streets, not allowed to commit new crimes, and not caught in a lengthy deportation process.

A United States Senator¹

The INS [Immigration and Naturalization Service] is completely like a Soviet bureaucracy. . . . Every sign starts with the word “no”: No smoking. No standing. No sitting. No asking questions. You cannot reach a human being by phone. And when you go, you stand for many humiliating hours in line only to reach a semihuman who answers your measly question by talking in a cabalistic language: “I-95, dash, point 6, dash, B-52.”

A Soviet refugee²

The Immigration and Naturalization Service (“INS”), the federal government’s main arbiter of immigration matters, is

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¹ Immigration Act of 1990—Conference Report, 101st Cong, 2d Sess, in 136 Cong Rec S17117, S17118 (Oct 26, 1990) (statement of Senator Robert Graham).

² Leonid Zagalsky, a Soviet refugee, quoted in Deborah Sontag and Stephen Engelberg, *Insider’s View of the I.N.S.: ‘Cold, Rude and Insensitive’*, NY Times A1, A1 (Sept 15, 1994).

bogged down with cases.³ Many aliens, while immigrating, requesting asylum, or being deported, are incarcerated for months or even years before the INS conducts its various hearings and finalizes its decisions.⁴ At the same time, thousands of aliens convicted of "aggravated felonies," mostly drug crimes and violent crimes, have absconded from INS deportation proceedings.⁵ These systemic flaws have led both Congress and the President to consider ways to expedite the criminal alien deportation process.⁶

Traditionally, the INS, an executive agency under the auspices of the Attorney General, has exercised exclusive authority over the deportation of aliens.⁷ However, with the enactment of the Sentencing Reform Act of 1984 ("SRA"),⁸ Congress may have provided for an alternative method of deportation through the judiciary. The relevant section, now codified at 18 USC § 3583(d), states that a "court may provide, as a condition of supervised release, that [the alien] be deported and . . . that he be delivered to a duly authorized immigration official for such deportation."⁹ Courts disagree as to whether this provision allows for court-

³ In 1990, the INS had a backlog of over 240,000 deportation, exclusion, and other cases pending in the immigration courts. Criminal Alien Deportation and Exclusion Act of 1990, 101st Cong, 2d Sess, in 136 Cong Rec S11940, S11941 (Aug 2, 1990) (statement of Senator Alfonse D'Amato). For a scathing attack on the INS, see Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 Georgetown Immig L J 109 (1996). Sutherland argues that the dual functions of the INS, legal immigration and law enforcement activities, create severe institutional conflict within the agency. Id at 113. He argues that the only way to rescue United States immigration policies is to split the INS into two separate agencies, one for handling legal immigration and the other for handling the law enforcement aspects of immigration. Id at 109-10, 133-35.

⁴ "Because they cannot initiate deportation or exclusion proceedings themselves, detained aliens languish at the mercy of the Attorney General." Debora Ann Gorman, Note, *Indefinite Detention: The Supreme Court's Inaction Prolongs the Wait of Detained Aliens*, 8 Georgetown Immig L J 47, 47 (1994).

⁵ Through 1992, an estimated 11,000 aliens convicted of aggregated felonies had fled after they were released from prison, and before the INS instituted deportation proceedings against them. Deborah Sontag, *Chaos at the Gates: Porous Deportation System Gives Criminals Little to Fear*, NY Times A1, B9 (Sept 13, 1994) (citing the most up-to-date figures available from the INS).

⁶ See Office of the President, *Accepting the Immigration Challenge: The President's Report on Immigration* 34 (GPO 1994) (Administration intends to expedite removal of aliens who commit serious felonies.). See also US Commission on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 153 (GPO 1994) (recommending that top priority be given to the "removal of criminal aliens from the U.S." because they are a financial burden and they threaten community safety).

⁷ An alien is defined as any person who is "not a citizen or national of the United States." 8 USC § 1101 (1994).

⁸ Pub L No 98-473, 98 Stat 1837-2034 (1984), codified at 18 USC §§ 3551-673 (1994), 28 USC §§ 991-98 (1994).

⁹ 18 USC § 3583(d) (1994).

ordered deportation as part of a criminal alien's supervised release or whether it merely allows district courts to direct the INS to conduct a deportation hearing. This Comment advocates an interpretation of Section 3583(d) that allows for the judicial deportation of certain criminal aliens as a condition of supervised release. This Comment also outlines a system through which judicial deportation could be used to eliminate repetitive hearings, lower incarceration costs, and shorten the duration of unjust incarceration.

Part I of this Comment provides a brief history of deportation procedures and examines the enactment of Section 3583(d) as part of the Sentencing Reform Act of 1984. Part II examines the majority and minority interpretations of Section 3583(d). Part III advocates the acceptance of the minority position, which permits district courts to order the deportation of certain criminal aliens as a condition of their supervised release. Part IV then analyzes the need for and benefits of judicial deportation.

I. A HISTORY OF DEPORTATION PROCEDURES AND THE ENACTMENT OF 18 USC § 3583(d)

A. Traditional Deportation Procedures

Section 8 of Article I of the Constitution gives Congress the power to "establish an uniform Rule of Naturalization."¹⁰ Congress first exercised this power to enact the infamous Alien and Sedition Acts of 1798. These Acts gave the President the power to deport, among others, any alien whom he deemed "dangerous to the peace and safety of the United States."¹¹ Since passing these Acts, Congress has continued to use its constitutional power to enact the immigration and deportation laws of the United States.¹²

The Immigration and Nationality Act of 1952 ("INA")¹³ provides much of the framework for current immigration law.¹⁴ Cer-

¹⁰ US Const, Art I, § 8, cl 4.

¹¹ 1 Stat 570 (1798).

¹² For a more in-depth history of United States immigration law, see James Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 UC Davis J Intl L & Policy 227, 228-41 (1995).

¹³ Pub L No 414, 66 Stat 163 (1952), codified at 8 USC §§ 1101 et seq (1994).

¹⁴ Because the INA continued the previously enacted national quota system, President Truman vetoed the Act. Congress, however, overrode the Presidential veto. These national quotas, strongly favoring Western and Northern Europe, remained an important, and highly controversial, aspect of United States immigration policy until the Immigration Act of 1965 eliminated racially motivated quotas. Smith, 1 UC Davis J Intl L & Policy at 233-34 (cited in note 12).

tain sections of the INA concern the deportation of aliens for, among other things, non-trivial criminal convictions.¹⁵ These sections specify the crimes that make an alien deportable and set forth the procedures that the INS must follow in deportation hearings.¹⁶ Offenses that render aliens deportable include crimes of "moral turpitude,"¹⁷ multiple criminal convictions, aggravated felonies, crimes involving controlled substances, drug abuse or addiction, certain firearm offenses, and miscellaneous crimes involving sabotage, espionage, sedition, and treason.¹⁸ These offenses apply to both illegal and legal immigrants,¹⁹ although illegal aliens are generally deportable without a criminal conviction.²⁰ Once convicted of a crime, deportable aliens, whether legal or illegal, must serve their complete prison sentence before being deported.²¹

In the INA, Congress delegated much of its power on immigration issues to the executive branch.²² The INS, under the direction of the Attorney General, exercises these powers.²³ From

¹⁵ See, for example, 8 USC §§ 1251(a)(2)(A)-(D), 1252 (1994).

¹⁶ These sections have been amended regularly since the enactment of the INA. See, for example, Antiterrorism Act of 1996, Pub L No 104-132, 110 Stat 1214, 1258-81, codified in relevant part at 8 USCA §§ 1251 et seq (1996).

¹⁷ This controversial term has no statutory definition. Not surprisingly, there is little uniformity in its application. One court has defined "moral turpitude" as conduct that "is so far contrary to the moral law, as interpreted by the general moral sense of the community, that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons . . ." *In the Matter of D.*, 1 INS Dec 190, 194 (BIA 1942), quoting opinion of the Solicitor of the Department of Labor, No 4/561 (Dec 5, 1922). It is often difficult to determine whether a crime fits within this category for immigration and deportation purposes. See Alfred Zucaro, Jr. and Beth Mitchell, *Criminal Convictions: The Immigration Consequences*, 63 Fla Bar J 36, 38 (May 1989).

¹⁸ 8 USC § 1251 (1994). This statute also provides that the following classes of aliens are deportable: "excludable" aliens, aliens who entered without inspection, aliens who violated nonimmigrant status or condition of entry, aliens whose permanent resident status has been terminated, aliens who have knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States (there is an exception for family members), aliens who have failed to obtain or maintain employment as required by their immigration status, aliens participating in marriage fraud, aliens who falsify documents or fail to register, aliens who have engaged in espionage or attempted to overthrow the United States government, aliens who have or are engaged in terrorist activities, aliens whose presence in the United States may have serious adverse foreign policy consequences, aliens who assisted in Nazi persecution or engaged in genocide, and aliens who are public charges. *Id.*

¹⁹ 8 USC §§ 1101, 1251(a) (1994).

²⁰ See, for example, 8 USC § 1251(a)(1) (1994).

²¹ 8 USC § 1252(h) (1994).

²² 8 USC § 1103(a) (1994) ("The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.").

²³ 8 USC § 1103(b) (1994) ("The Commissioner [of the INS] . . . shall be charged with any and all responsibilities and authority in the administration of the Service and of this chapter which are conferred upon the Attorney General.").

the passage of the INA in 1952 until 1984, the INS possessed exclusive authority over all deportations, including the deportation of criminal aliens. A sentencing judge's power in this system was limited to his ability to issue a "judicial recommendation against deportation" ("JRAD"). Once issued, a JRAD would bind the Immigration Court and prevent the INS from deporting the criminal alien.²⁴ However, the Immigration Act of 1990 eliminated JRADs and with them the sentencing judge's power to prevent the deportation of a criminal alien.²⁵

The deportation procedures for criminal aliens are designed to follow a set pattern: (1) a court convicts an alien for a crime that might render the alien deportable; (2) the court sentences the alien and also notifies the INS that the alien may be deportable; (3) while the alien serves his sentence, the INS conducts a deportation hearing;²⁶ (4) if the INS administrative judge determines that the alien should be deported, then, upon release from prison, the alien is deported.²⁷

However, due to the enormous backlog of cases at the INS and the length of time that both the INS and federal courts take to hear appeals, aliens are often incarcerated by the INS long after completing their prison sentences.²⁸ Thus, while a United States citizen would be released after serving his sentence, an alien is often detained for considerably longer, sometimes even years longer. Perhaps worse, many deportable criminal aliens are

²⁴ See *United States v Oboh*, 92 F3d 1082, 1086 (11th Cir) (en banc), cert granted as *Ogbomon v United States*, 117 S Ct 37 (1996), cert dismissed as improvidently granted, 117 S Ct 725 (1997).

²⁵ Pub L No 101-649, 104 Stat 4978 (1990), codified at 8 USC § 1251 (1994).

²⁶ Only in recent years has the INS begun to attempt to conduct deportation hearings while the alien is serving his prison sentence. Traditionally, the INS did not begin deportation proceedings until after the criminal alien had served his complete sentence. See, for example, *Nwankwo v Reno*, 828 F Supp 171, 172 (E D NY 1993). This resulted in some criminal aliens being incarcerated by the INS for periods considerably longer than their prison sentence, which they had served fully. The INS has since changed this practice and now attempts to conduct deportation hearings during sentences so that the alien can be deported immediately upon completion of the sentence. However, the INS still does not complete deportation hearings for many aliens until well after their sentence has been served. See, for example, *United States v Restrepo*, 999 F2d 640, 643 (2d Cir 1993) (considering alien's request for sentence reduction due to expected continued detention by INS after completion of sentence). See also Gorman, Note, 8 Georgetown Immig L J at 50 (cited in note 4).

²⁷ INS deportation hearings have certain procedural safeguards: the alien must be given reasonable notice of the hearing; the alien is entitled to counsel; the alien has the right "to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government." 8 USC § 1252(b)(1)-(3) (1994). See *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 Harv L Rev 1286, 1384-95 (1983) (discussing procedural protections for aliens at deportation hearings).

²⁸ See note 26.

not incarcerated by the INS. Instead, upon completion of their sentences, they are released from prison, at which point many of them simply ignore INS deportation attempts and become fugitives, never to be caught or deported.²⁹

B. The Enactment of Section 3583(d) as Part of the Sentencing Reform Act of 1984

In 1984, Congress restructured sentencing and incarceration for the federal criminal justice system through the Sentencing Reform Act of 1984.³⁰ Among numerous other changes, the Act continued and expanded a practice known as "supervised release."³¹ As part of this expansion of supervised release, Congress enacted Section 3583(d), which may permit judicially ordered deportation.

Supervised release was originally created under the now-repealed Parole Commission and Reorganization Act of 1976 ("PCRA").³² The PCRA set up a nationwide system of parole and supervised release managed by the United States Parole Commission, an independent agency within the Department of Justice.³³ The PCRA provided that:

When an alien prisoner subject to deportation becomes eligible for parole, the [Parole] Commission may authorize the release of such prisoner on condition that such person be deported and remain outside the United States. Such prisoner[,] when his parole becomes effective, shall be delivered to the duly authorized immigration official for deportation.³⁴

Although these provisions may seem to raise issues similar to those concerning judicial deportation under Section 3583(d), the statute was apparently uncontroversial for two reasons.

²⁹ See note 5.

³⁰ See note 8 and accompanying text.

³¹ As with parole, the federal government maintains a supervisory relationship with prisoners on supervised release. However, unlike parole, a prisoner is not placed on supervised release until after he has completed his sentence. 18 USC § 3583(d). See note 38.

³² Pub L No 94-233, 90 Stat 219 (1976), formerly codified at 18 USC §§ 3655, 4201-18, 5005, 5006, 5010, 5014-21, 5041 (1976) (repealed by Pub L No 98-473, 98 Stat 1987, 2014, 2027 (1984), repeal effective 1987). The PCRA had been enacted to provide "a scientific and objective means to structuring and institutionalizing discretion in parole release decisionmaking." It also attempted "to minimize the effects of sentencing disparity." William J. Genego, et al, *Project: Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L J 810, 823 (1975).

³³ 18 USC § 4202 (1976) (repealed by Pub L No 98-473, 98 Stat 2027 (1984), repeal effective 1987).

³⁴ 18 USC § 4212 (1976) (repealed by Pub L No 98-473, 98 Stat 2027 (1984), repeal effective 1987).

First, the deportation power granted by this statute remained under the control of the Attorney General and thus within the executive branch. Second, the Parole Commission did not use this statute to order deportations; all deportation orders continued to originate with the INS.

The PCRA, which had radically changed the federal criminal justice system, did not satisfy Congress for long. Congress found many flaws with the newly-created system and soon after its enactment, it began a new reform effort that culminated in the Sentencing Reform Act of 1984.³⁵ The SRA gave Congress greater involvement in criminal sentencing. It also took control of supervised release away from the Department of Justice and returned it to the sentencing judge.³⁶ With these changes, the SRA effectively abolished the Parole Commission, which had been part of the executive branch. Its powers were divided between the United States Sentencing Commission, part of the judicial branch, and the courts.³⁷ Thus, in terms of the overall distribution of power among the three branches of the federal government, the SRA lessened the authority of the executive branch and increased the power of the legislative and judicial branches.³⁸

³⁵ 18 USC §§ 3551-673, 28 USC §§ 991-98. Senate bills containing the basic structure of the regime established by the Sentencing Reform Act of 1984 were passed as early as 1978. Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 237 (1993).

³⁶ The SRA abolished the use of parole in the federal criminal justice system. It also set up a strict system of Sentencing Guidelines from which judges could not stray without explanation. As part of this new plan, while a judge's sentencing power was limited by the Sentencing Guidelines, the judge was given control over the complete sentence and post-sentence monitoring procedures, including supervised release. Of course, supervised release was governed by an additional set of Sentencing Guidelines that the district courts were required to follow. Nevertheless, judges now have some control over supervised release, a power previously held by the Parole Commission. See Sentencing Reform Act of 1984, S Rep No 98-225, 98th Cong, 2d Sess (1984), reprinted in 1984 USCCAN 3233-48.

³⁷ *Id.*, 1984 USCCAN at 3246-47. See also *Mistretta v United States*, 488 US 361, 412 (1989) (rejecting a separation of powers challenge to the structure of the Sentencing Commission).

³⁸ Under the PCRA, a prisoner could be released on supervised release before he had fully served his prison term. 18 USC § 4205 (1976) (repealed by Pub L No 98-473, 98 Stat 2027 (1984), repeal effective 1987). However, under the SRA, a prisoner must serve his complete prison term before serving his supervised release. That is, unlike traditional parole in which a prisoner is released before serving the full length of his sentence, supervised release under the SRA occurs once the complete sentence has been served. 18 USC § 3583(a) (1994).

A district court must provide a term of supervised release for any prison sentence over one year in length. The United States Sentencing Commission provides guidelines for the length of supervised release. Violations of supervised release may result in penalties, including a further period of incarceration. See, generally, *Twenty-Fifth Annual Review of Criminal Procedure—Supervised Release*, 84 Georgetown L J 713, 1319-22 (1996) (discussing supervised release under the SRA).

In transferring³⁹ the power of supervised release from the Parole Commission to the courts, the SRA provides that:

If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.⁴⁰

This provision, now Section 3583(d), seems to give district courts the power to order the deportation of a criminal alien as a condition of his supervised release. However, most courts that have addressed the issue disagree with this conclusion.

II. THE CONFLICT OVER THE INTERPRETATION OF 18 USC § 3583(d)

There are two conflicting interpretations of Section 3583(d). The majority view, originating in the First Circuit and followed by the Second, Fourth, Fifth, and Tenth Circuits,⁴¹ is that this statute merely allows for the delivery of a convicted alien to the INS for a deportation hearing upon the alien's supervised release from prison. The minority view, held by the Eleventh Circuit and possibly the Third Circuit, interprets this statute as allowing district courts to order deportation as a condition of supervised release.⁴²

The majority view relies upon statutory interpretation,⁴³ Congress's traditional grant of deportation power to the executive

³⁹ It is not a direct transfer. As a comparison of the two statutes reveals, while 18 USC § 4212 allowed for deportation as a condition of parole, 18 USC § 3583(d) pertains to deportation as a condition of supervised release, not parole, which is eliminated under the SRA.

⁴⁰ 18 USC § 3583(d).

⁴¹ *United States v Sanchez*, 923 F2d 236, 237 (1st Cir 1991); *United States v Kassir*, 47 F3d 562, 568 (2d Cir 1995); *United States v Xiang*, 77 F3d 771, 772 (4th Cir 1996); *United States v Quaye*, 57 F3d 447, 449 (5th Cir 1995); *United States v Phommachanh*, 91 F3d 1383, 1385 (10th Cir 1996).

⁴² *United States v Chukwura*, 5 F3d 1420, 1423 (11th Cir 1993), cert denied, 513 US 830 (1994). See also *United States v Oboh*, 92 F3d 1082, 1087 (11th Cir 1996) (en banc) (affirming the holding of *Chukwura*), cert granted as *Ogbomon v United States*, 117 S Ct 37 (1996), cert dismissed as improvidently granted, 117 S Ct 725 (1997). Under both the majority and minority interpretations, the criminal alien must serve his complete sentence before being deported. Congress does not permit the release of a criminal alien for deportation purposes prior to the completion of his sentence. 8 USC § 1252(h) (1994). See *Rodriguez v United States*, 994 F2d 110, 111 (2d Cir 1993) (explaining that Section 1252(h) tempers the "rush to deportation" by requiring convicted aliens to serve their complete sentences). See also Duane Carling, *Rodriguez v. United States: Adjustments to the Length of Incarceration for Alien Convicts Expecting Deportation*, 20 J Contemp L 272, 274 (1994) (discussing *Rodriguez*).

⁴³ *Phommachanh*, 91 F3d at 1385; *Quaye*, 57 F3d at 449-50; *Xiang*, 77 F3d at 772.

branch,⁴⁴ and a Supreme Court instruction to construe "any lingering ambiguities in deportation statutes in favor of the alien."⁴⁵

The majority interpretation begins with the determination that the language of the statute is ambiguous.⁴⁶ In discerning the intended meaning of the statute, the majority interpretation juxtaposes Congress's use of "provide" and "order" within Section 3583(d). The Tenth Circuit interpreted "provide" as not giving district courts the power to "order" deportation.⁴⁷ Because Congress used the word "order" in other parts of Section 3583(d), the court reasoned that Congress did not intend to grant direct deportation power to district courts.⁴⁸ If Congress had meant to give district courts such power, it would have used the word "order" instead of "provide."⁴⁹ In *United States v Xiang*, the Fourth Circuit agreed that a "natural reading" of Section 3583(d) does not authorize judicial deportation.⁵⁰

Courts following the majority view fortify this interpretation by analyzing the statute in light of the traditional separation of powers between the executive branch and the judiciary on matters pertaining to immigration.⁵¹ Since the executive branch has traditionally controlled immigration matters,⁵² the Fifth Circuit reasoned that Congress intended Section 3583(d) to fit within this historical treatment of deportation.⁵³ Because the court did not wish to interpret an ambiguous statute in a manner that would conflict with this well established allocation of power between the Article II and Article III branches of the government, the court determined that a district court's only role in the deportation proceedings is the judicial review of INS administrative hearings once the Attorney General has finalized a deportation order.⁵⁴ Thus, in a majority of circuits to have ruled on the issue,

⁴⁴ *Phommachanh*, 91 F3d at 1386-87; *Xiang*, 77 F3d at 773.

⁴⁵ *INS v Cardoza-Fonseca*, 480 US 421, 449 (1987).

⁴⁶ *Quaye*, 57 F3d at 449; *Phommachanh*, 91 F3d at 1385.

⁴⁷ *Phommachanh*, 91 F3d at 1386.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 77 F3d 771, 772 (4th Cir 1996). In *Quaye*, the Fifth Circuit agreed with the statutory interpretation put forth by the Fourth and Tenth Circuits and, furthermore, was unwilling to allow judicial deportation without a "greater clarity of [congressional] purpose," considering the great changes that could be effected through judicial deportation. 57 F3d at 450 ("We insist on greater clarity of purpose when a statute would be read to upset a status quo long in place.").

⁵¹ *Xiang*, 77 F3d at 772-73; *Quaye*, 57 F3d at 450.

⁵² See text accompanying notes 13-25.

⁵³ *Quaye*, 57 F3d at 449-50.

⁵⁴ *Id.* at 450. The Immigration and Nationality Act of 1952 grants power to the Attorney General, not the INS, 8 USC § 1103(a) (1994). While the INS is the agency under the Attorney General that actually handles the matters in question, courts nevertheless de-

the power to deport criminal aliens remains solely with the INS.⁵⁵

Under the minority view, Section 3583(d) *does* allow district courts to order deportation as a condition of supervised release. Indeed, in *United States v Chukwura*, the Eleventh Circuit interpreted Section 3583(d) to allow for judicial deportation as well as the traditional INS administrative deportation.⁵⁶ When an alien is convicted of an offense listed in 8 USC § 1251, the district court may order that the alien be deported as part of his supervised release.⁵⁷ Under the *Chukwura* regime, the INS still performs the actual physical deportation; that is, when the criminal alien is released after serving his complete prison sentence, the INS takes the alien into custody and physically deports him from the country.⁵⁸

The Eleventh Circuit bases its interpretation of Section 3583(d) on a combination of the statute's text and recent congressional immigration policy. In contrast to the courts that followed the majority interpretation, an en banc panel found the statute's text to be relatively unambiguous. Indeed, it described the language as "clear and unequivocal."⁵⁹ "[P]resum[ing] that a legislature says in a statute what it means and means in a statute what it says there,"⁶⁰ the Eleventh Circuit reasoned that the plain meaning of Section 3583(d), further supported by congressional policies of the last two decades, such as the abolition of JRADs, shows that Congress intended to enable district courts to order deportation.⁶¹

scribe the situation in terms of the Attorney General's authority.

⁵⁵ Several courts that follow the majority view offer little justification for their holdings. While the decisions in the Fourth, Fifth, and Tenth Circuits contain reasoned explanations, other courts merely cite *United States v Olvera*, 954 F2d 788, 793-94 (2d Cir 1992), as precedent. See, for example, *Kassar*, 47 F3d at 568 (concluding without analysis that "the decision to deport rests in the sound discretion of the Attorney General"); *United States v Concepcion*, 795 F Supp 1262, 1274 (E D NY 1992) (holding that a district court's order restricting a criminal defendant's right to reenter or stay in the United States is improper to the extent that it assumes deportation or exclusion power). However, *Olvera* does not provide strong precedential support. While stating that the Attorney General "has sole discretion to institute deportation proceedings," *Olvera* never mentions Section 3583(d). 954 F2d at 793-94.

⁵⁶ 5 F3d 1420, 1423 (11th Cir 1993), cert denied, 513 US 830 (1994).

⁵⁷ See *Oboh*, 92 F3d at 1087 (If an alien is "deportable," Congress permits either the executive or the judicial branch to order deportation.).

⁵⁸ *Chukwura*, 5 F3d at 1423.

⁵⁹ *Oboh*, 92 F3d at 1084.

⁶⁰ Id., quoting *Connecticut National Bank v Germain*, 503 US 249, 253-54 (1992).

⁶¹ *Oboh*, 92 F3d at 1086-87 (The majority interpretation "fails to recognize important congressional action that occurred before and after the enactment of Section 3583(d)."). The Third Circuit has indicated that it may follow the minority interpretation of Section 3583(d). In *United States v Porat*, the Third Circuit noted in a footnote that "[c]ourts may,

The majority and minority views regarding the interpretation of Section 3583(d) also disagree about the role of 8 USC § 1252a(c) in Congress's deportation scheme. This section, enacted in 1994,⁶² allows the judicial deportation of criminal aliens convicted of aggravated felonies when this deportation is requested by a United States Attorney with the concurrence of the Commissioner of the INS.⁶³ This form of judicial deportation contains certain procedural safeguards such as the requirement that the United States Attorney inform the alien at least thirty days prior to sentencing that deportation has been requested.⁶⁴

In *United States v Quaye*, the Fifth Circuit stated that allowing judicial deportation under Section 3583(d) would be illogical because there are situations in which the criminal aliens deportable under Section 1252a(c) would have more procedural safeguards than those deportable under Section 3583(d), even though deportation under Section 1252a(c) is only allowed for more serious crimes.⁶⁵ For example, a murderer being deported under Section 1252a(c) would be provided with thirty days notice of the deportation request,⁶⁶ while an alien convicted of credit card fraud could not be deported under Section 1252a(c), but would be subject to a Section 3583(d) deportation order, without thirty days notice. To the Fifth Circuit, this inconsistency indicates that Congress did not intend for Section 3583(d) to permit the direct judicial deportation of criminal aliens.⁶⁷

On the other hand, the Eleventh Circuit has determined that the enactment of Section 1252a(c) is evidence in favor of the minority interpretation.⁶⁸ To the court, the enactment of Section 3583(d), the abolition of JRADs, and the enactment of Section 1252a(c) show that Congress not only "intended to enable district

as a condition of supervised release, provide that an alien defendant who is subject to deportation be deported." 17 F3d 660, 669 n 16 (3d Cir 1993), cert granted and judgment vacated, *Porat v United States*, 115 S Ct 2604 (1995). This note, however, was merely dicta, and courts in the Third Circuit might not follow it when called upon to decide this exact issue.

⁶² 8 USC § 1252a was enacted in 1952 as part of the INA. However, Section 1252a(c), which allows for judicial deportation, was enacted in 1994 as part of the Immigration Technical Corrections Act of 1994, Pub L No 103-416 § 224, 108 Stat 4322 (1994), codified at 8 USC § 1252a(c). This Section, previously § 1252a(d), was recodified as § 1252a(c) in late 1996.

⁶³ 8 USC § 1252a(c)(1). This section, in conjunction with Section 1251(a)(2)(A), also allows for this form of judicial deportation for crimes of moral turpitude involving a sentence of over one year or multiple criminal convictions.

⁶⁴ 8 USC § 1252a(c)(2)(A)-(D).

⁶⁵ *Quaye*, 57 F3d at 450.

⁶⁶ 8 USC § 1252a(c)(2)(B).

⁶⁷ *Quaye*, 57 F3d at 450.

⁶⁸ *Oboh*, 92 F3d at 1087.

courts to order the deportation of defendants who are 'subject to deportation,' but in fact *favours* such deportation when either the executive or judicial branch deems it appropriate."⁶⁹ The Eleventh Circuit also responded to other circuits' fears about the lack of procedural safeguards under Section 3583(d). The court's argument was quite simple: judicial deportation under Section 3583(d) possesses procedural safeguards equivalent to those available to other convicted criminals—the option to challenge the sentence in an appellate court.⁷⁰

III. COURTS SHOULD FOLLOW THE MINORITY INTERPRETATION OF SECTION 3583(d)

District courts should be permitted to order the deportation of criminal aliens. Even though a majority of circuits have decided otherwise, the Eleventh Circuit offers the more persuasive interpretation of Section 3583(d). While the courts following the majority view base their decisions on statutory interpretation, principles of separation of powers, and an analysis of the traditional immigration and deportation systems, their decisions conflict with both the plain meaning of the statute and contemporary congressional policy. Conversely, the minority interpretation accurately follows Section 3583(d) as Congress has written it,⁷¹ permitting judicial deportation as a condition of supervised release.

Arguments in favor of the minority position can be made on at least three grounds: the plain language and structure of the statute, its legislative history, and current congressional immigration policy.

A. A Textual Analysis of Section 3583(d)

The central focus of the controversy surrounding Section 3583(d) is the text of the statute. The starting point for the majority interpretation is that the text is ambiguous.⁷² This view is strongly supported by the existence of two facially reasonable interpretations of the statute.⁷³ Nevertheless, even though the

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.*

⁷¹ See *United States v. Ron Pair Enterprises, Inc.*, 489 US 235, 241 (1988) ("Where the statutory language is plain, the sole function of the courts is to enforce it according to its terms.") (citation omitted).

⁷² See notes 46-50 and accompanying text.

⁷³ See, for example, *Smiley v. Citibank (South Dakota) N.A.*, 116 S Ct 1730, 1732 (1996) (noting that when courts have interpreted a word in two different ways, "it would be difficult indeed to contend that the word . . . is unambiguous").

statute is ambiguous and has two possible interpretations, an in-depth analysis reveals that the reasoning behind the minority interpretation is considerably stronger.

The applicable part of the statute reads, "the court may provide, as a condition of supervised release, that he [the deportable alien] be deported and remain outside the United States and may order that he be delivered to a duly authorized immigration official for such deportation."⁷⁴ The two controversial aspects of the statute are the meaning of "provide" and the structure of the final clause.

The majority interpretation focuses on the use of "provide" in the statute instead of "order." The courts reason that this choice of words demonstrates that Congress did not intend to grant deportation power to the district courts.⁷⁵

A natural reading of the statute does not support this view. The verb "to provide," as used normally, is certainly broad enough to encompass "to order." Indeed, the ordinary usage of "provide" in such a sentence is equivalent to require, direct, or order. The plain meaning of the statute appears to grant a district court the option of issuing deportation orders.

Dictionaries support this proposition. *Webster's New World Dictionary* lists definitions that directly match this normal usage of "provide," including "to state as a condition; stipulate."⁷⁶ This definition supports the minority interpretation of Section 3583(d): the court may provide, or stipulate, or state as a condition, that a criminal alien be deported as part of his supervised release. Furthermore, the Supreme Court has used a similar definition of "provide" in a recent statutory interpretation case.⁷⁷

Nevertheless, in holding that the use of "provide" instead of "order" supports their interpretation,⁷⁸ the majority view employs a different definition of "provide." In *United States v Phommachanh*, the Tenth Circuit quoted a definition of "provide" from the *Oxford English Dictionary* that reads "[t]o exercise foresight in taking due measures in view of a possible event."⁷⁹ However, according to *Webster's New World Dictionary*, this usage is out-

⁷⁴ 18 USC § 3583(d).

⁷⁵ See text accompanying notes 47-50.

⁷⁶ *Webster's New World Dictionary* 1083 (3d college ed 1988).

⁷⁷ *Rake v Wade*, 508 US 464, 473 (1993) ("The most natural reading of the phrase to 'provid[e] for by the plan' is to 'make a provision for' or 'stipulate to' something in a plan. See for example, *American Heritage Dictionary* 1053 (10th ed 1981) ('provide for' defined as 'to make a stipulation or condition').").

⁷⁸ See text accompanying notes 47-50.

⁷⁹ *Phommachanh*, 91 F3d 1383, 1386 (10th Cir 1996), quoting 12 *Oxford English Dictionary* 713 (Clarendon 2d ed 1989).

dated.⁸⁰ Indeed, the courts deciding both *Quaye* and *Phommachanh* used a definition of "provide" that is "Now Rare" to argue for the majority interpretation of Section 3583(d), which was enacted in 1984—a mere thirteen years ago. It seems unlikely that Congress would have used "provide" so recently in a manner that is now so rare.

As with the definition of "provide," the final clause of Section 3583(d) has created a great deal of controversy. After the court has provided, or stipulated, that the alien be deported as a condition of supervised release, the court "may order that he be delivered to a duly authorized immigration official for such deportation."⁸¹ It is the fundamental argument of the majority interpretation of Section 3583(d) that this clause only permits district courts to deliver the criminal alien to the "duly authorized immigration official" for a deportation hearing, not for immediate deportation.⁸²

The statute, however, does not state that once the criminal alien is delivered to the "duly authorized immigration official," this immigration official should conduct a hearing. If Congress had intended this, it easily could have stated it explicitly. Indeed, in two other statutes using the term "deliver," Congress has completely specified the reasons for, and actions to occur upon, the delivery.⁸³ Thus, in order for the majority interpretation to be correct, an action—an INS deportation hearing—must be implied into a statute when Congress has clearly laid out the complete extent of post-delivery actions under similar statutes.

The minority view sets forth a more plausible explanation for the structure of this clause. Under the minority interpretation as set forth in *Chukwura*, the INS still maintains responsibility for the actual processing of a person ordered deported.⁸⁴ The court is not involved in the physical deportation of aliens, as this "ministerial responsibility resides with the INS and its

⁸⁰ Webster's New World Dictionary at 1083 (cited in note 76) (referring to the "foresight" definition of "provide" as "Now Rare").

⁸¹ 18 USC § 3583(d).

⁸² *Phommachanh*, 91 F3d at 1385; *Quaye* 57 F3d at 449 (Statute "simply permits the sentencing court to order, as a condition of supervised release, that an alien defendant [who] is subject to deportation be surrendered to immigration officials for deportation proceedings."), quoting *United States v Sanchez*, 923 F2d 236, 237 (1st Cir 1991) (internal quotation marks omitted).

⁸³ 22 USC § 702 (1994) (Military officers or authorities "shall deliver him forthwith to the custody of an officer of such force, for trial . . . in service courts."); 18 USC § 3142(i) (1994) ("The judicial officer shall . . . direct that . . . the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.").

⁸⁴ *Chukwura*, 5 F3d at 1423.

authorized immigration officials.”⁸⁵ The clause merely “clarifies any possible confusion that may arise from the administration of the deportation process.”⁸⁶

Thus, instead of requiring a separate INS deportation hearing, the minority interpretation reasons that the “deliver” clause delineates the various responsibilities of the separate branches of the federal government. The district court, part of the judicial branch, may order the deportation of certain criminal aliens. When this is done, the court delivers the aliens to the INS, an executive agency under the Attorney General, so that the INS may execute the deportation.⁸⁷

The minority argument is fortified by the structure of another congressional criminal statute. The “deliver” clause, which declares that the court “may order that he be delivered to a duly authorized immigration official for such deportation,”⁸⁸ closely parallels 18 USC § 3142(i), a statute under which judicial officers can issue detention orders. The relevant part of Section 3142(i) states that “the judicial officer shall . . . direct that . . . the person in charge of the corrections facility in which the person is confined deliver the person to a United States Marshal for the purpose of an appearance in connection with a court proceeding.”⁸⁹ Both 3583(d) and 3142(i) involve a judicial officer directing (or ordering) that a prisoner be delivered to an agent of the executive branch for a specific reason—deportation in one case and a court appearance in the other. While it would seem nonsensical to argue that Section 3142(i) permits the United States Marshal to conduct a court hearing or issue a detention order himself, the majority interpretation of Section 3583(d) makes an equivalent claim. In order to be consistent with the statutes’ parallel structures, Section 3583(d) should be interpreted so that, just as the role of the United States Marshal is to bring the prisoner to the court appearance, the role of the INS is to deport the criminal alien, not to provide a redundant deportation hearing or review the actions of the district court.

Thus, the natural reading of the statute, the use of dictionary definitions, and a comparison with similar statutes all support the minority interpretation. Some legal experts, however, are not willing to rely solely on textual analysis. For exam-

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1424 (While both the judiciary and the INS “may order defendants deported, only the INS may actually deport them.”).

⁸⁸ 18 USC § 3583(d).

⁸⁹ 18 USC § 3142(i).

ple, Judge Raymond Randolph of the D.C. Circuit criticizes an over-reliance on dictionaries in statutory interpretation.⁹⁰ Instead, Judge Randolph advocates using textual analysis to form a preliminary conclusion. This preliminary conclusion should be tested within the greater confines of both legislative history and the results that would follow from such an interpretation.⁹¹ When the preliminary conclusion in this Section—that Congress has granted district courts the power to order the deportation of criminal aliens—is placed, in the following two Sections, within the greater confines of legislative history and the results that would follow from such an interpretation, the outcome remains the same as with the textual analysis performed above. The minority interpretation of Section 3583(d) is more persuasive.

B. The Legislative History of Section 3583(d)

Although not directly referring to deportation,⁹² the legislative history of Section 3583(d) supports the minority position. In a report accompanying the introduction of the bill that enacted Section 3583(d), the Senate Committee on the Judiciary stated that a court may order, as a condition of supervised release, “any . . . condition it considers appropriate, if the condition is reasonably related to the history and the characteristics of the offender and the nature and circumstances of the offense.”⁹³ The Committee on the Judiciary also stated that judges should take into account “the need for the sentence to protect the public from further crimes of the defendant.”⁹⁴ Deportation as a condition of supervised release would seem to be a sentence that is related to the history and characteristics of the offender and that protects the public from “further crimes of the defendant.” Thus, judicial deportation appears to fit within these stated purposes.

⁹⁰ Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 Harv J L & Pub Pol 71, 73-74 (1994). See also Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 67 (1994) (describing dictionaries as “museum[s] of words”).

⁹¹ Randolph, 17 Harv J L & Pub Pol at 76-78 (cited in note 90).

⁹² 18 USC § 3583(d) is a long subsection that lists deportation among numerous other possible discretionary conditions of supervised release. The legislative history does not refer specifically to any of the possible discretionary conditions. S Rep No 98-225, 1984 USCCAN at 3307.

⁹³ S Rep No 98-225, 1984 USCCAN at 3307.

⁹⁴ *Id.*

C. The Congressional Overhaul of the Criminal Deportation Process

While the plain meaning and legislative history of Section 3583(d) may be enough by themselves to validate the minority interpretation, recent congressional immigration policy provides further support. Over the past twenty years,⁹⁵ Congress has been reshaping both sentencing and immigration procedures in order to streamline deportation. Judicial deportation is a result of these changes.

Prior to the Sentencing Reform Act of 1984, the executive branch exercised control over all deportations.⁹⁶ However, as Congress eliminated parole and increased supervised release, it increased the power of the judiciary and decreased the power of the executive branch.⁹⁷ Under the minority interpretation of Section 3583(d), one of the many powers granted to the judicial branch was the power to order deportation. While the INS's deportation power is not lessened by this grant, the power to deport now resides in two branches of the government.⁹⁸

At the same time that Congress overhauled the sentencing procedures, it also radically altered immigration law. The Refugee Act of 1980,⁹⁹ the Immigration Reform and Control Act of 1986,¹⁰⁰ and the Immigration Act of 1990¹⁰¹ are only a few of the major changes that Congress has made to United States immigration law. These Acts have improved the United States' treatment of refugees, increased the amount of skilled-worker and employment-based immigrants, raised penalties against employers hiring illegal aliens, and altered the federal government's deportation procedures.¹⁰² One of the expressed goals of congressional immigration reform was to take "important steps toward solving a major problem faced by Federal and State criminal justice systems—the problem of how to expeditiously remove from

⁹⁵ Since the 1976 enactment of PCRA.

⁹⁶ This control rested primarily with the INS under the Immigration and Nationality Act of 1952, 8 USC §§ 1101 et seq, but also with the United States Parole Commission through 18 USC § 4212 (1976) (repealed by Pub L No 98-473, 98 Stat 1987, 2014, 2027 (1984), repeal effective 1987).

⁹⁷ See the discussion of the SRA at Part I.B.

⁹⁸ See *Chukwura*, 5 F3d at 1423-24.

⁹⁹ Pub L No 96-212, 94 Stat 102 (1980), codified at 8 USC §§ 1101, 1151-53, 1157-59, 1181-82, 1225-27, 1253-54, 1521-25 and 22 USC § 2601 (1994) (8 USC § 1525 repealed by Pub L No 103-236, 108 Stat 409 (1994)).

¹⁰⁰ Pub L No 99-603, 100 Stat 3359 (1986), codified in relevant part throughout 8 USC.

¹⁰¹ Pub L No 101-649, 104 Stat 4978 (1990), codified in relevant part throughout 8 USC.

¹⁰² See Smith, 1 UC Davis J Intl L & Policy at 236-41 (cited in note 12).

our streets those aliens who are convicted of murder, or trafficking in drugs and weapons.”¹⁰³

The congressional changes to the deportation proceedings for criminal aliens served one overriding purpose: to streamline the system.¹⁰⁴ There had been enormous delays and complications in the deportation of criminal aliens that Congress was no longer willing to tolerate.¹⁰⁵ In various attempts to create a more efficient and streamlined process for deporting criminal aliens, Congress eliminated JRADs,¹⁰⁶ allowed for one form of judicial deportation under 8 USC § 1252a(c), and declared that “[a]n alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States.”¹⁰⁷ Each of these changes lessens the extensive procedures that it takes to deport a criminal alien. Section 3583(d) fits directly into Congress’s new deportation scheme.¹⁰⁸

¹⁰³ 136 Cong Rec S17117 (cited in note 1) (statement of Senator Robert Graham).

¹⁰⁴ See id at S17109 (statement of Senator Alan Simpson). In reference to the Immigration Act of 1990, which eliminated JRADs, Senator Simpson explained: “The bill restructures our deportation procedures to bring them more in line with our Nation’s rules of civil procedure. We were in a situation in deportation where the deportees had more due process than did an American citizen.” Id. See also Criminal Alien and Deportation Exclusion Act, 136 Cong Rec at S11940-41 (cited in note 3) (statement of Senator Alfonse D’Amato) (Congress must eliminate the outrageous claims used by criminal aliens to fight deportation since the system “tilts too far” in their favor.).

¹⁰⁵ 136 Cong Rec at S11940-41 (cited in note 3) (statement of Senator Alfonse D’Amato).

¹⁰⁶ See notes 24-25 and accompanying text.

¹⁰⁷ Antiterrorism Act of 1996, Pub L No 104-132, 110 Stat 1280 (1996), codified at 8 USC § 1252a(c) (1996).

¹⁰⁸ On April 17, 1996, Senator Paul Coverdell introduced the following bill in the Senate:

A BILL

To amend title 18 of the United States Code to permit the judicial deportation of criminal aliens.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. JUDICIAL DEPORTATION.

Section 3583 of title 18, United States Code, is amended . . .

(4) by adding at the end the following:

‘(2)(A) Notwithstanding any provision of the Immigration and Nationality Act, if an alien defendant is subject to deportation, the court may order, as a condition of supervised release, that he be deported and remain outside the United States, and that he be delivered to a duly authorized immigration official for deportation in accordance with such order.

‘(B) While such alien defendant is awaiting deportation pursuant to such order, the Attorney General shall take such alien into custody and shall not release such alien on bond, parole, or otherwise, unless so permitted by order of the sentencing court.’

Indeed, when the INS's powers under the INA, and the judicial powers under Section 3583(d) and 8 USC § 1252a(c), are viewed together, a coherent criminal alien deportation system becomes apparent.¹⁰⁹ Frustrated by the INS's inefficiency, Congress has supplemented the traditional method of deportation by adding additional, faster means to deport criminal aliens. Under this new deportation regime, a criminal alien may be deported through either a judicial proceeding or an administrative proceeding. Moreover, judicial deportation may be initiated by the executive branch under 8 USC § 1252a(c) or by the court itself as part of sentencing under Section 3583(d).¹¹⁰ These two statutes, the abolition of JRADs, and the congressional records provide support for the "clarity of [congressional] purpose" that the Fifth Circuit failed to find when it refused to allow judicial deportation under Section 3583(d).¹¹¹

It is true, as the Fifth Circuit mentioned in *Quaye*, that situations will occur involving apparent inconsistencies in the procedural safeguards for deportation hearings, such as the thirty-days provision previously mentioned.¹¹² However, the different means through which these two methods of deportation are implemented provide an explanation for these apparent inconsistencies. Deportation under 8 USC § 1252a(c) is initiated by United States Attorneys, whereas deportation under Section 3583(d) is part of the sentencing power of the district court judge. When this difference is included in the analysis of the procedural differences, they no longer appear inconsistent. It is quite logical to have a greater amount of procedural safeguards in a process initiated by the prosecution than in a process initiated by a supposedly less biased district court judge.

One factor behind the contentiousness of Section 3583(d) is that, under the minority interpretation, Congress has moved away from its traditional treatment of deportation—granting ex-

S 1680, 104th Cong, 2d Sess (1996). This bill was referred to the Committee on the Judiciary. As of April 7, 1997, no further action pertaining to this bill has occurred.

While this bill initially appears to support the majority interpretation of Section 3583 by changing the Section to allow for judicial deportation, the bill is probably only a response to the majority interpretation. The bill was introduced in April, 1996, many months before the minority position was solidified in *Oboh*. By changing "provide" to "order" and directly referring to judicial deportation in the title of the bill, Senator Coverdell appears to be responding directly to, or disagreeing with, *Quaye's* statutory interpretation.

¹⁰⁹ See *Oboh*, 92 F3d at 1087.

¹¹⁰ *Id.*

¹¹¹ See *Quaye*, 57 F3d at 450 ("We insist on greater clarity of purpose when a statute would be read to upset a status quo long in place.").

¹¹² *Id.* See text accompanying notes 65-70.

clusive power to the executive branch. Congress, however, clearly has the power to do this. The Constitution grants Congress the power to "establish an uniform Rule of Naturalization" and Congress may, within the normal constitutional boundaries, use this power as it chooses. The fact that, for two hundred years, Congress has delegated most of this power to the executive branch does not limit Congress's ability to grant certain deportation powers to district courts.¹¹³ The Constitution's grant of power supersedes tradition and historical practice.¹¹⁴

After years of granting sole deportation power to the executive branch, Congress has exercised its constitutional prerogative to lessen immigration backlogs and create faster deportation proceedings by granting deportation powers to the judiciary in certain situations. These powers do not override or replace the powers granted to the Attorney General. Instead, they coexist with them.¹¹⁵ By creating judicial deportation under both 18 USC § 3583(d) and 8 USC § 1252a(c), Congress has used its constitutional authority to permit district courts to order the deportation of certain criminal aliens.

IV. THE NEED FOR AND BENEFITS OF JUDICIAL DEPORTATION

If Congress, through Section 3583(d), has indeed granted district courts the discretionary power to order the deportation of criminal aliens as a condition of supervised release, the question naturally arises whether district courts should use this power. This Comment argues that they should. While judicial deportation should not replace INS deportation, Congress has enacted laws under which these two methods of deportation can coexist in a manner that lessens deportation gridlock and governmental redundancy to the benefit of both the United States and many criminal aliens. These benefits can be achieved through the sensible use of judicial deportation as permitted by Congress under 18 USC § 3583(d).

¹¹³ While following the majority interpretation, the Fourth Circuit acknowledges that "Congress undoubtedly has the constitutional authority to vest deportation authority in the Third Branch." *Xiang*, 77 F3d at 773.

¹¹⁴ The Supreme Court has implicitly acknowledged Congress's power to control immigration and the INS, notwithstanding tradition and historical practice. "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *INS v Chadha*, 462 US 919, 955 (1983). "Congress ultimately controls administrative agencies in the legislation that creates them." *Id.* at 955 n 19. "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *Id.* at 953-54 n 16.

¹¹⁵ *Chukwura*, 5 F3d at 1423.

A. The INS: The Federal Government's "Broadly Dysfunctional" Immigration Agency¹¹⁶

While courts supporting the majority interpretation of Section 3583(d) express fear that judicial deportation may lessen procedural safeguards and endanger the rights of criminal aliens,¹¹⁷ these courts should recognize that the present INS system for deporting criminal aliens is both flawed and overloaded. In practice, district courts may offer more equitable treatment to criminal aliens than the INS now provides.

The recent INS attempts to develop a just and efficient system for deporting criminal aliens have been resounding failures: the INS has been unable to process enough cases or hold enough hearings;¹¹⁸ courts and the INS have held repetitive trials and hearings; criminal aliens have absconded from INS deportation proceedings and remained free within the United States.¹¹⁹ At the same time, the INS has exhibited racism¹²⁰ and has not been held accountable for its actions.¹²¹ Furthermore, many criminal aliens who have been successfully deported were incarcerated beforehand for periods well in excess of their sentences.¹²² These systemic failures cost the United States both time and money, and in some cases, unjustly increase the incarceration times for criminal aliens.¹²³

¹¹⁶ Joel Brinkley, *Chaos at the Gates: At Immigration, Disarray and Defeat*, NY Times A1, A1 (Sept 11, 1994).

¹¹⁷ *Quaye*, 57 F3d at 450.

¹¹⁸ Sutherland, 10 Georgetown Immig L J at 110 (cited in note 3). See text accompanying notes 134-36.

¹¹⁹ Sontag, NY Times at B9 (cited in note 5).

¹²⁰ See, for example, Deborah Sontag, *Bias in Immigration Agency is Subject of House Hearing*, NY Times A33 (Nov 18, 1994) (reporting assertion by an EEOC counselor to the INS that "[t]he INS is run by white males . . . [who] grow to believe they are superior"); *Rights group cites INS for abuses along border: Agents said to have no Accountability*, Houston Chron A12 (Feb 25, 1992) (local civil rights group accuses INS of racism); Niki Cervantes, *Ezell ousted as INS chief in West*, San Diego Union Trib A3 (July 11, 1989) (former INS regional commissioner accused of racism); Doug Grow, *Lawmaker would make sure English has the last word*, Minn-St. Paul Star-Trib B1 (Jan 27, 1987) (leader of state Spanish Speaking Affairs Council accuses INS of racism).

¹²¹ See Stephen Rosenbaum, *Keeping an Eye on the I.N.S.: A Case for Civilian Review of Uncivil Conduct*, 7 La Raza L J 1, 3 (1994) (noting the need for greater oversight of the INS).

¹²² *Nwankwo v Reno*, 828 F Supp 171, 173 (E D NY 1993) (noting that there are "countless number of illegal aliens incarcerated . . . long after the service of their sentence at an enormous cost to taxpayers"); Gorman, Note, 8 Georgetown Immig L J at 50 (cited in note 4) (discretion granted to the Attorney General can lead to indefinite detention).

¹²³ According to a government report, criminal aliens are detained for an average of fifty-nine days by the INS beyond the end of their period of prison incarceration. United States General Accounting Office, *Immigration Control: Immigration Policies Affect INS Detention Efforts* 26 (1992). These periods of detention cost the INS in excess of fifty mil-

In recent years, INS deportation hearings have come to resemble rubber-stamp procedures,¹²⁴ particularly for more serious crimes.¹²⁵ For example, 97.5 percent of non-criminal aliens taken into custody by the INS admit they are deportable and voluntarily leave the United States.¹²⁶ However, criminal aliens are almost never eligible for voluntary departure.¹²⁷ The convictions that render a criminal alien "deportable" under 8 USC § 1251 are virtually identical to those that prevent a criminal alien from undergoing voluntary departure under 8 USC § 1254(e).¹²⁸ Thus almost all deportable criminal aliens must remain in prison until they receive an official deportation order from an INS hearing.¹²⁹ These hearings will continue to become more ministerial and less

lion dollars yearly. Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 Seton Hall Legis J 201, 211 n 57 (1993).

¹²⁴ See Robert James McWhirter, *The Rings of Immigration Hell: The Immigration Consequences to Aliens Convicted of Crimes*, 10 Georgetown Immig L J 169, 181 (1996) ("Deportation hearings are often conducted with ten or more aliens together. Moreover, the immigration law judge will often conduct the hearing in the absence of the alien."). In addition, deportation hearings lack the procedural protection of a criminal proceeding. The overall burden of proof is only "clear, unequivocal, and convincing evidence." See *Woodby v INS*, 385 US 276, 285 (1966). The exclusionary rule does not apply to deportation hearings. *INS v Lopez-Mendoza*, 468 US 1032, 1050 (1984). See also Hilary Sheard, *Ethical Issues in Immigration Proceedings*, 9 Georgetown Immig L J 719, 754 (1995) (absence of exclusionary rule is one example of reduced procedural protections afforded to aliens). Furthermore, while an alien has the right to counsel at an INS deportation hearing, the alien, unlike the criminal defendant, has no right to counsel appointed at governmental expense. *Martin-Mendoza v INS*, 499 F2d 918, 922 (9th Cir 1974).

¹²⁵ As one commentator explains,

Nowhere is it more difficult to obtain discretionary relief from an Immigration Judge than with respect to an aggravated felon. Clearly expressed statutory, Congressional, and executive policy favor the prompt removal of such criminal aliens from the United States. Immigration Judges are invariably law-abiding and enforcement-oriented individuals who feel a personal commitment to implement stated national policy objectives. The burden of proof is clearly upon the respondent in applying for discretionary relief, and the initial attitude of many Immigration Judges may be to give a respondent his "day in court" and then order him deported.

Martin Rothstein, *Practicality of Obtaining Discretionary Relief from Deportation in Aggravated Felony Cases*, in R. Patrick Murphy, ed, 2 1991-1992 *Immigration and Nationality Law Handbook* 302, 303-04 (Am Immig Lawyers Assn 1992).

¹²⁶ See *Lopez-Mendoza*, 468 US at 1044 (the vast majority of aliens who are faced with deportation proceedings opt for voluntary departure). This number refers to all illegal aliens, not criminal aliens. As explained below, most criminal aliens are not permitted to depart voluntarily. See note 128.

¹²⁷ See 8 USC § 1254(e) (1994).

¹²⁸ An alien is not eligible for voluntary departure if deportation proceedings have begun for reasons of United States security, or if he has been convicted of: a crime of moral turpitude, an aggravated felony, possession or sale of a controlled substance, a firearms offense, or giving false testimony for immigration benefits. *Id.*

¹²⁹ See note 4.

adversarial since Congress has decreed that all aliens convicted of aggravated felonies are to be "presumed deportable."¹³⁰

While the actual deportation hearing usually functions as little more than a rubber-stamping process, of the 75,000 aliens to whom the INS actually issued deportation orders in 1994, 35,000 managed to avoid deportation.¹³¹ Currently, an estimated 200,000 criminal aliens are still within this country.¹³² Nevertheless, in 1994 only 22,000 criminal aliens were successfully deported.¹³³

Perhaps the single greatest problem preventing the efficient deportation of criminal aliens from the United States is the INS's deportation backlog. In 1990, the INS had a backlog of over 240,000 deportation, exclusion, and other cases pending in the immigration courts.¹³⁴ By 1995, there was a backlog of 450,000 applications for asylum.¹³⁵ Although the Clinton Administration has been claiming success in revamping procedures within the INS, the backlog of asylum applications has actually increased by 10,000.¹³⁶

In circuits following the majority interpretation of Section 3583(d), deportable criminal aliens first must be tried and sentenced by the district court. Then, the INS must conduct a separate deportation hearing. This system is both expensive and redundant, especially for more serious crimes for which the result of the INS deportation hearing is never in doubt. These costs increase when one considers the consequences of the INS's inability to conduct many deportation hearings until after the criminal alien has finished his sentence—greater incarceration costs and an increased chance that the alien will become a fugitive.¹³⁷ Notwithstanding these consequences, 21 percent of INS deportation cases in which an appeal is filed take at least five years from start to finish.¹³⁸

When the INS is unable to conduct a deportation hearing before the completion of a criminal alien's prison sentence, there

¹³⁰ 8 USC § 1251(a)(2)(A)(iii) (1994).

¹³¹ Antiterrorism Act of 1996, Hearing before the House Subcommittee on Immigration and Claims of the Committee on the Judiciary, 104th Cong, 1st Sess 2 (Mar 23, 1995) (statement of Representative Lamar Smith), reprinted in *Removal of Criminal and Illegal Aliens* 2 (GPO 1995).

¹³² Sutherland, 10 Georgetown Immig L J at 111 (cited in note 3).

¹³³ Hearing on Antiterrorism Act of 1996 (statement of Representative Lamar Smith), reprinted in *Removal of Criminal and Illegal Aliens* at 2 (cited in note 131).

¹³⁴ 136 Cong Rec at S11941 (cited in note 3) (statement of Senator Alfonse D'Amato).

¹³⁵ Sutherland, 10 Georgetown Immig L J at 111 (cited in note 3).

¹³⁶ Id.

¹³⁷ See notes 5 and 123.

¹³⁸ Feldman, Note, 17 Seton Hall Legis J at 210-11 n 58 (cited in note 123).

are two possible results: either the INS incarcerates the criminal alien at great expense¹³⁹ or releases the alien. As previously mentioned, by 1992, 11,000 criminal aliens had absconded from INS control when released from custody.¹⁴⁰ With this system, the INS not only wastes time and money conducting unnecessary deportation hearings, but also releases criminal aliens back onto the streets. Little wonder that a congressman described the INS as "the most inept, badly managed federal agency that we have."¹⁴¹

Furthermore, it must be noted that charges of discrimination have plagued the INS.¹⁴² This leads to serious questions about how fairly the INS treats aliens. The majority of aliens involved in immigration litigation are from Central America, Mexico, the Caribbean, the Middle East, and the South Pacific.¹⁴³ These non-Caucasians are prime targets for racial bias and discrimination. Although the federal criminal justice system may not be completely immune from problems of racial bias, it was the INS, not the federal criminal justice system, that recently received a "public spanking" in Congress for its problems with racism.¹⁴⁴

These problems and statistics indicate that the circuits supporting the majority interpretation of Section 3583(d) are advocating the use of an expensive and unsuccessful system instead of relying on the judicial process that they regularly use in cases involving criminals who are United States citizens. While the sentencing procedures of the district courts are deemed appropriate for sentencing United States citizens to life imprisonment, according to the courts following the majority interpretation, these sentencing procedures are insufficient to order the deportation of a criminal alien.¹⁴⁵

B. The Solutions Offered by Judicial Deportation Under Section 3583(d)

Congress has provided an alternative to the present system: judicial deportation under Section 3583(d). Judicial deportation

¹³⁹ See note 123.

¹⁴⁰ See text accompanying note 5.

¹⁴¹ Sutherland, 10 Georgetown Immig L J at 110 (cited in note 3), quoting *INS Takes it on the Chin at Wide-Ranging House Subcommittee Hearing*, 72 Interpreter Releases 495 (1995) (statement of Representative Harold Rogers).

¹⁴² See note 120.

¹⁴³ Peter H. Schuck and Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan L Rev 115, 128, 132-33 (1992).

¹⁴⁴ Representative John Conyers, Jr. delivered the "public spanking" to INS Commissioner Doris Meissner at a hearing before the House Government Operations Committee. Sontag, NY Times at A33 (cited in note 120).

¹⁴⁵ See *Quaye*, 57 F3d at 450.

can be used in a manner that is both more efficient for the government and more fair to the criminal aliens than the present INS deportation process.

Judicial deportation would help alleviate pressure from the overloaded docket of the INS and result in the improved treatment of criminal aliens. It would eliminate the repetition that occurs when an alien must be convicted, sentenced, and then go through separate deportation hearings. It would also create a more efficient system for deporting criminal aliens and save part of the fifty million dollars the INS spends yearly on detaining criminal aliens for deportation.¹⁴⁶ Finally, with its increased efficiency, the threat of judicial deportation would provide greater deterrence for aliens participating in, or considering participating in, criminal activities.

At the same time, judicial deportation would facilitate more equitable treatment of criminal aliens. At present, many aliens are incarcerated by the INS after serving their complete prison sentences. Because the timing of deportation hearings is left to the discretion of the Attorney General, criminal aliens often remain incarcerated for months before the INS conducts their hearings.¹⁴⁷ While some criminal aliens wish to fight deportation, others merely remain incarcerated for months because their criminal convictions prohibit them from taking advantage of the "voluntary departure" option.¹⁴⁸ Thus, in many cases, a criminal alien who is willing to be deported must remain in prison until he has a hearing before an immigration judge.

In a ruling that indicates the unfortunate position of many criminal aliens, the Second Circuit has held that a defendant's status as an alien, and the increased incarceration that he may suffer because of this status, may be grounds for a downward departure from the Sentencing Guidelines.¹⁴⁹ Judicial deportation would limit the injustices suffered by criminal aliens by provid-

¹⁴⁶ See note 123.

¹⁴⁷ See note 4.

¹⁴⁸ See 8 USC § 1254(e). See also *Okechukwu v United States*, 825 F Supp 139, 143 (S D Tex 1993) (Petitioner was incarcerated after request for voluntary departure was denied.). Generally, aliens prefer to take advantage of the voluntary departure option. See *Parcham v INS*, 769 F2d 1001, 1002 n 1 (4th Cir 1985) ("Voluntary departure offers significant advantages over deportation. An alien who is granted voluntary departure avoids the stigma of deportation, is permitted to choose his own destination, and finds it considerably easier to gain reentry to the United States.") (citations omitted). Because the departure is voluntary, aliens do not have a deportation order on their United States immigration record. See *Parcham*, 769 F2d at 1010 n 7 (Harrison dissenting). Thus, it is much easier to return to the United States in the future.

¹⁴⁹ *United States v Restrepo*, 999 F2d 640, 644 (2d Cir 1993).

ing a faster deportation procedure, especially considering that deportation is a foregone conclusion for most criminal aliens.¹⁵⁰

Although it may appear that the use of judicial deportation would overload the federal judiciary, this should not be the case. Section 3583(d) only applies to federal criminals. The INS will still be the sole arbiter of deportation hearings for state criminal aliens.¹⁵¹ The federal courts will only be considering deportation for criminals who are already on trial.¹⁵² The deportation aspect of the trial will be only an addition to the sentencing hearing, instead of a completely separate proceeding, as it is with the INS. While the length and complexity of sentencing hearings would presumably increase slightly, this increase should be relatively small, especially once judges and attorneys become more familiar with deportation as a regular part of sentencing hearings.

By paying attention to immigration court decisions, particularly those issued by the Board of Immigration Appeals ("BIA"), district courts can stay fairly consistent with the INS. When resolving controversial cases, such as designating consensual homosexual acts as crimes of "moral turpitude"¹⁵³ and deciding cases involving minor crimes committed by aliens with strong familial ties to the United States, district courts can take into account the rulings of the BIA. For example, 8 USC § 1254 identifies certain situations under which an alien with a criminal conviction can receive a suspension of deportation.¹⁵⁴ If the alien can show continuous physical presence in the United States for ten years following his criminal act, good moral character for those ten years, and exceptional hardship to the alien's spouse, parent, or child, then the alien's deportation may be suspended.¹⁵⁵ When

¹⁵⁰ Deportation is not a foregone conclusion for all criminal aliens, only deportable criminal aliens as defined by 8 USC § 1251.

¹⁵¹ In 1994, 23,349 non-U.S. citizens were imprisoned in federal prisons. *Bureau of Justice Statistics: Sourcebook of Criminal Justice Statistics—1994* 557 (DOJ 1994). Since most of these aliens are deportable, estimates would place the deportable criminal alien population at approximately 20,000 in federal prisons and 100,000 in state prisons. See Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 *Hastings Const L Q* 1087, 1110 n 117 (1995) (Estimated federal and state deportable alien prison population is 120,000.).

¹⁵² The federal judiciary will not have exclusive jurisdiction over the deportation of federal criminal aliens. This power will be shared with the INS. District courts will not need to handle deportation on a particular case if they do not wish to do so. See text accompanying note 98.

¹⁵³ This controversial point is both a legal and an immigration issue and has been addressed by both the INS and federal appellate courts. See Shannon Miller, *Sodomy and Public Morality Offenses under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 *Cornell Intl L J* 771, 783-91 (1993).

¹⁵⁴ 8 USC § 1254(a)-(d) (1994).

¹⁵⁵ *Id.* See also McWhirter, 10 *Georgetown Immig L J* at 182 (cited in note 124).

a district court judge is confronted with an alien who may be deserving of a suspension of deportation under these criteria, the judge might choose not to order deportation, particularly if the BIA would not do so.¹⁵⁶

V. CONCLUSION

The federal government's present system for deporting criminal aliens is highly flawed. It possesses the worst stereotypical characteristics of bureaucracy—expense, delay, and impersonality—without displaying any of the benefits, such as accurate or just results. Managed by the INS, the present system is repetitive, severely overloaded, and often cruel.

Congress, through the enactment of 18 USC § 3583(d), has provided a mechanism to ease some of these problems: judicial deportation as part of a criminal alien's supervised release. Contrary to the opinion of a majority of circuits, this statute not only allows a district court to require the INS to conduct a deportation hearing, but also permits the district court to order the deportation itself. District courts should use this power to increase governmental efficiency, lower costs, and shorten unjust incarceration periods.

¹⁵⁶ This would become a more positive option if present attempts at reforming the INS are successful. See generally, Hearing on Antiterrorism Act of 1996, reprinted in *Removal of Criminal and Illegal Aliens* at 2 (cited in note 131).