

Delineating Discretion: How *Judulang* Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges¹

Jeffrey D. Stein²

Abstract

I argue that *Judulang v. Holder* moved beyond prior doctrine by demonstrating that courts could subject immigration policies to a rigorous “arbitrary and capricious” review under the Administrative Procedure Act (APA) and *Chevron* analysis, even where those policies did not conflict with, or depart from, existing laws, regulations, or policies. In other words, it applied a thicker standard of review than ever before, meaningfully evaluating the merits of an agency’s policy against an independent “arbitrary and capricious” metric, rather than simply asking whether the policy’s formation abided by proper process, did not conflict with controlling law, or met some inescapably low threshold. In exposing the merits of a Board of Immigration Appeals policy to “arbitrary and capricious” attack, *Judulang* pushed back against a (perceived) history of special deference to the executive branch on immigration matters, and thus supports a reading of the executive’s role in immigration law as no—or, at least, not significantly—different from its role in ordinary domestic jurisprudence. I conclude that Court’s use of the APA (or, alternatively, *Chevron*) to substantively circumscribe executive policy-making discretion gives rise to a number of potential challenges to other BIA policies and decisions that may prove vulnerable to *Judulang*’s coin-flipping litmus. I review and evaluate two of them.

| | |
|---|----|
| I. Introduction..... | 2 |
| II. <i>Judulang</i> ’s Contributions: A Meaningful Review and Search for Purpose..... | 3 |
| A. Getting to <i>Judulang</i> : A Brief Survey of the Jurisprudence..... | 4 |
| B. <i>Judulang</i> Emerges..... | 13 |
| C. <i>Judulang</i> ’s Significance for Arbitrary and Capricious Review..... | 16 |
| D. <i>Judulang</i> ’s Significance for Executive Power Over Immigration..... | 22 |
| E. Doctrinal Roots of a New Analysis..... | 27 |
| F. Conclusion..... | 29 |
| III. Channels for Future Challenges..... | 30 |
| A. DHS’s Method for Sorting Aliens Between Administrative Removal Proceedings Under INA Section 238(b) and General Proceedings Under Section 240..... | 31 |
| 1. Prior Equal Protection Clause Challenges to Section 238(b) Are Distinguishable..... | 33 |
| 2. U.S. Courts of Appeals Retain Jurisdiction Over Arbitrary and Capricious Challenges to DHS’s Administration of Administrative Removal... | 35 |
| 3. DHS’s Method for Placing Noncitizens in Administrative Removal Proceedings Constitutes Agency Action..... | 37 |

¹ A version of this article will be published in a forthcoming issue of Volume 27 of the *Georgetown Immigration Law Journal*.

² J.D. 2012, New York University School of Law. I am deeply indebted to Judy Rabinovitz, Adam B. Cox, and Manny Vargas for their tireless guidance and insightful input. I also appreciate the scholarly support provided by Kara Hartzler and Caroline Solís, as well as comments from the NYU Current Issues in Immigrants’ Rights workshop. Any errors remain my own.

| | |
|---|----|
| 4. DHS’s Method for Sorting Aliens Between Administrative Removal Proceedings Under INA Section 238(B) and General Proceedings Under Section 240 Is Arbitrary and Capricious..... | 39 |
| 5. DHS Officers’ Sorting of Noncitizens Between Administrative Removal Proceedings and General Removal Proceedings Is Not Defensible as Prosecutorial Discretion..... | 43 |
| 6. Conclusion..... | 46 |
| B. BIA’s Disparate Treatment of Expedited Removal and Boarder Turnarounds for Purposes of Interrupting the “Continuous Physical Presence” Component Required for Cancellation of Removal..... | 47 |
| IV. Conclusion..... | 51 |

I. Introduction

In *Judulang v. Holder*, the Supreme Court unanimously invalidated a Board of Immigration Appeals (BIA) rule for determining whether noncitizens in deportation proceedings qualified for a certain type of discretionary waiver.³ The Court reasoned that the policy was “arbitrary and capricious” and therefore violated the Administrative Procedure Act.⁴ The decision overturned rulings by eight of the nine circuits that had addressed the issue, and relied upon a logic different from the one court whose outcome it affirmed.⁵ A flurry of commentary and confusion over *Judulang*’s significance ensued.⁶ Some heralded the decision as a proclamation that the Court would no longer tolerate unfairness in the immigration system.⁷ Others focused on situating the decision within the history of the particular BIA rule in question and argued that the invalidated rule actually represented an immigrant-friendly initiative by the

³ See *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011).

⁴ *Id.*

⁵ See *Kim v. Gonzales*, 468 F.3d 58, 62-63 (1st Cir. 2006); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63 (3d Cir. 2007); *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007); *Thap v. Mukasey*, 544 F.3d 674, 677-80 (6th Cir. 2008); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 683-97 (7th Cir. 2008); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Komarmko v. INS*, 35 F.3d 432 (9th Cir. 1994); *De la Rosa v. U.S. Attorney General*, 579 F.3d 1327 (11th Cir. 2009); *Blake v. Carbone*, 489 F.3d 88, 104 (2d Cir. 2007) (using constitutional avoidance to strike down “comparable-grounds” policy as invalid interpretation of a non-ambiguous statute).

⁶ See Patrick J. Glen, *Deconstructing Judulang* 2-3 (Georgetown Public Law and Legal Theory Research Paper No. 12-013), (2012), available at http://scholarship.law.georgetown.edu/fwps_papers/161 (summarizing responses to *Judulang* by the *New York Times*, *National Law Journal*, and SCOTUSBlog.net).

⁷ *Irrationality in Deportation Law*, N.Y. TIMES, Jan. 3, 2012, at A24 (“A stinging opinion by Justice Elena Kagan for a unanimous Supreme Court reinforced last month a message that lower courts have been sending for many years: the law applied in immigration cases too often fails to meet the standards of justice.”).

BIA.⁸ But none have thoroughly explored what are perhaps the case’s most significant facets—its actual contribution to current immigration jurisprudence and its implications for advocates going forward. Those are the two issues I take up here.

In Part II, I unearth *Judulang*’s doctrinal roots. I demonstrate that, although not as revolutionary as it might initially appear, the case makes a discrete and, for immigration advocates, useful contribution to the jurisprudence through its crystallization of a robust and independent “arbitrary and capricious” analysis that applies to executive agency⁹ decision-making in the immigration context. *Judulang*’s affirmation of a meaningful “arbitrary and capricious” standard as a vehicle for attacking the substance of executive agencies’ immigration policies gives rise to a number of potential challenges. In order to more fully grasp *Judulang*’s implications, in Part III I review and evaluate two challenges it potentially enables: (1) DHS’s method for sorting aliens between administrative removal proceedings under INA section 238(b) and general proceedings under section 240, and (2) the BIA’s disparate treatment of expedited removal and border turnarounds for purposes of interrupting the “continuous physical presence” requirement for cancellation of removal. Although by no means guaranteed victories, *Judulang*’s rationale renders these claims colorable, if not compelling. Finally, in Part IV I conclude that *Judulang* took a tangible step towards delineating the scope of immigration agencies’ discretion and, even without radically reshaping the doctrinal landscape, provides immigration advocates with a meaningful defense against at least some forms of unfavorable agency action.

II. *Judulang*’s Contributions: A Meaningful Review and a Search for Purpose

Before contemplating *Judulang*’s implications for advocates and analysts, it is important

⁸ See generally Glen, *supra* note 6, at 1-2.

⁹ Throughout this Article, I discuss what *Judulang* means for the authority of the executive branch over immigration policy-making as exercised through agencies. I do not intend to conflate the powers of executive agencies and the president. Because *Judulang* dealt with a Board of Immigration Appeals decision, an analysis of presidential power over immigration matters—to the extent it surpasses that of executive agencies—exceeds the scope of this paper.

to distill precisely what *Judulang* added to the jurisprudence. This section begins by examining the relevant statutes and line of cases leading up to *Judulang* in order to understand the doctrine existing at the time *Judulang* emerged. I show how those prior cases constructed a defined, if not definitive, platform to support *Judulang*'s application of the Administrative Procedure Act (APA) "arbitrary and capricious" standard to a BIA policy. I then explore how *Judulang* affirmed and, in a slight but still significant way, moved beyond prior doctrine by striking down an executive immigration policy based on an independent "arbitrary and capricious" metric under the APA, rather than just because the agency failed to abide by proper process in setting the policy, irrationally departed from its own regulations, or violated a Congressional statute. I further demonstrate how *Judulang*'s introduction of a "purpose" inquiry that contemplates the objectives of the statutes in question, as well as the operation of the immigration system at large, deepens the substantive standard that executive agencies must meet in designing immigration policies.¹⁰

A. Getting To *Judulang*: A Brief Survey of the Jurisprudence

To fully grasp *Judulang*'s contributions, we must first appreciate the doctrinal landscape from which it emerged. In so doing, it becomes apparent that *Judulang*'s rebuke of an act of executive discretion over immigration policy, while novel in its rigor, was not unprecedented. In the mid-1930s, Franklin D. Roosevelt's New Deal legislative plan marked a virtually unprecedented expansion of federal power, particularly through the creation and empowerment

¹⁰ I argue that *Judulang* was unique in its application of an "independent" standard of review under the APA. By "independent" review, I do not mean merely that the court contemplated the substance of a regulation. Since *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), it has been uncontroversial for courts to reverse agency actions that irrationally depart from those agencies' own regulations. Similarly, courts do not hesitate to invalidate rules and regulations that overtly conflict with Congressional statutes. Instead, I use "independent review" to refer to a court's evaluation of a policy or regulation's merits according to an independent standard of reasonableness.

of executive agencies.¹¹ The heated political struggle between Roosevelt democrats seeking to enlarge federal programs, and, on the other side, Republicans and Southern Democrats fighting to temper federal aggrandizement, manifest itself in the debate over the APA—a bill that would provide rules and procedures to govern the decision-making and operation of regulatory agencies.¹² The Act proposed to preserve the rights of individuals and the integrity of the administrative process by standardizing a number of procedural requirements binding executive agencies, such as the separation of prosecutorial functions from adjudicative ones, giving notice to the public before issuing a new rule, and promoting access to judicial review of administrative decisions.¹³ After more than a decade of vigorous debate, the warring factions of Congress reached a compromise and passed the APA in 1946.¹⁴ The Act “established the basic operating rules of regulatory agencies and articulated the principles of procedural due process for individuals caught up in the regulatory process.”¹⁵ It has not only persisted, but constitutes “arguably the most important piece of legislation governing federal regulatory agency policymaking.”¹⁶

For our purposes, the APA’s judicial review provisions are most relevant. Specifically, the APA sets forth an “arbitrary and capricious” standard of judicial review of agency action. It reads: “The reviewing court shall . . . hold unlawful and set aside agency action, findings, and

¹¹ George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1562 (explaining that during Roosevelt’s administration, “An avalanche of new federal agencies and commissions—including the National Recovery Administration, the NLRB, and the SEC—reached ever more broadly into a free market that appeared to have failed.”).

¹² *Id.* at 1560-61 (“Republicans and Southern Democrats sought to crush New Deal programs by means of administrative controls on agencies The APA was a cease-fire armistice agreement that ended the New Deal war on terms that favored New Deal proponents.”).

¹³ See 5 U.S.C. §§ 554 (separation of prosecutorial and adjudicative functions), 564 (notice), 701 (judicial review); see also H.R. Rep. No. 179- 1980, at 252 (1946); Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 589-90 (1951) (noting that despite generally serving more as a codification than a recalibration of existing rules, the APA still made modest gains in procedural restraint of executive agencies).

¹⁴ Shepherd, *supra* note 11, at 1681.

¹⁵ McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J. L., ECON., & ORG. 180 (1999).

¹⁶ McNollgast, 15 J.L. Econ. & Org. at 181.

conclusions found to be . . . (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁷ Although the APA’s drafters intended for the Act to apply as a default to all agencies, the Act expressly recognizes that its judicial review provisions do not attach where (1) Congress has precluded judicial review or (2) agency action is committed to discretion by law.¹⁸ In order to preclude the APA’s application, however, Congress must do so “expressly.”¹⁹ In a landmark case in the non-immigration context, the Court interpreted the arbitrary and capricious (“A&C”) standard to mean that an agency must itself articulate a reasonable basis for its actions.²⁰ This suggested that the A&C standard (which applies to executive agencies) is at least somewhat more demanding than the baseline “rational basis review,” under which a court may only strike down a law if it cannot conceive of any rational basis for the statute in question.²¹ While substantive A&C review of “ordinary” (i.e. non-immigration) agency actions

¹⁷ Administrative Procedure Act, 5 U.S.C. § 706 (2006).

¹⁸ 5 U.S.C. § 701.

¹⁹ 5 U.S.C. § 559 (“Subsequent statute may not be held to supersede or modify [this Act] except to the extent that it does so expressly.”); The accompanying House Report elaborates,

To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

H.R. REP. NO. 72-1980, at 281 (1946).

²⁰ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)) (“The reviewing court should not attempt itself to make up for such deficiencies: ‘We may not supply reasoned basis for the agency’s action that the agency itself has not given.’”); *but see id.* (“We will, however, ‘uphold a decision of less than ideal clarity of the agency’s path may reasonably be discerned.’”).

²¹ *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 487, 491 (1955) (hypothesizing justifications for the law in question, and then upholding the law because the Court could divine a rational basis for it). The possibility that a court may opine beyond the rationale provided by an agency in A&C review, *supra* note 20, does not undermine the point that A&C review is generally stronger, at least to some degree, than rational basis review. Although A&C review permits courts to look beyond the agency’s proffered rationale in some cases, rational basis review mandates that the court do so in all cases. *See Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (rational basis review requires that “a classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’”) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). While courts purporting to apply a rational basis standard sometimes subtextually apply something more demanding, such cases are the exception and are arguably not applying a traditional rational basis review at all. *Cf. Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982).

emerged early on,²² the purportedly unique status of immigration law and the related “plenary power” doctrine indicate that, at least historically, the immigration context appeared to differ from “ordinary” domestic jurisprudence and therefore warrants separate analysis.²³

In 1949, *Wong Yang Sung v. McGrath* presented the question of whether the Immigration Act’s deportation hearing provisions had “expressly” precluded the hearing provisions contained in the APA.²⁴ The regulations then governing deportation proceedings allowed for the consolidation of prosecutorial and adjudicative functions in an Immigration and Naturalization Service (“INS”) officer referred to as a “presiding inspector.”²⁵ Although the presiding officer could not also be the one who investigated a case, when no examining inspector was present, the presiding officer was obligated to “conduct the interrogation of the alien and the witnesses in behalf [*sic*] of the Government and shall cross-examine the alien’s witnesses and present such evidence as is necessary to support the charges in the warrant of arrest.”²⁶

The Court recognized that such consolidation of prosecutorial and adjudicative roles in a single person was precisely the sort of unfair practice that the APA sought to eradicate.²⁷ Moreover, because a “deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself,” the Court avoided the potential constitutional problems of reducing the process provided in

²² See, e.g. *SEC v. Chenery Corp.*, 332 U.S. 194, 196, (1947); see also Kenji Yoshino, *The New Equal Protection*, 124 *Harv. L. Rev.* 747, 759 (2011) (recognizing that a heightened, “rational basis with bite” standard sometimes operates subtextually through the facade of an ordinary “rational basis” framework).

²³ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 551-52, 564 (describing Plenary Power Doctrine while noting that courts have sometimes used subconstitutional rules to grant relief to noncitizens). For a discussion of *Judulang*’s implications for Plenary Power Doctrine, see *infra* notes 98-131 and accompanying text.

²⁴ See *Wong Yang Sung v. McGrath*, 70 S. Ct. 445, 454 (1949) *modified* 339 U.S. 908 (1950)

²⁵ *Wong Yang Sung*, 70 S. Ct. at 452.

²⁶ See 8 C.F.R. 150.6(b) (1949).

²⁷ *Wong Yang Sung*, 70 U.S. at 452 (“[T]his commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceedings, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused.”).

deportation hearings by refusing to exempt those hearings from APA requirements.²⁸ In so doing, the Court rejected the government's contention that abiding by APA requirements "will cause inconvenience and added expense to the Immigration Service" on the grounds that if Congress wanted to exempt the INS from the APA or to provide it with more funding for compliance with the APA, Congress could do so explicitly.²⁹ The Court concluded, "We find no basis in the purposes, history or text of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies."³⁰

Wong Yang Sung thus served as an early indicator that the APA could limit executive agencies' discretion; in other words, the immigration arena was not so special as to receive an implicit waiver from the APA's mandate. But where the courts saw the executive's authority over immigration as no different from ordinary jurisprudence, Congress did not. In 1951, Congress responded to *Wong Yang Sung* by passing the Supplemental Appropriation Act, which explicitly exempted deportation proceedings from APA hearing requirements and thereby superseded *Wong Yang Sung*.³¹

The changes made by the Supplemental Appropriation Act (SAA) were soon swept into uncertainty. In 1952, Congress overhauled the immigration system through the Immigration and Nationality Act ("INA"), which established a slew of new provisions and procedures, including

²⁸ *Wong Yang Sung*, 70 S. Ct. at 455.

²⁹ *Wong Yang Sung*, 70 S. Ct. at 452. This rejection of the government's "cost" argument for an exemption from the APA accords with the APA's underlying intent to impose its requirements on agencies even if inconvenient: "[The APA] is of course operative according to its terms even if it should cause some administrative inconvenience or changes in procedure." H.R. REP. NO. 72-1980, at 281 (1946).

³⁰ *Wong Yang Sung*, 70 S. Ct. at 455.

³¹ See Supplemental Appropriation Act of 1951, 64 Stat. 1048; see also A GUIDE TO FEDERAL AGENCY ADJUDICATION 33 (Michael Asimow, ed., 2003) (describing the significance of the Supplemental Appropriation Act).

those governing deportation hearings.³² With the development of the reworked INA, it became unclear to what extent the SAA remained relevant or was superseded and, therefore, whether the APA once again attached to the hearing requirements for deportation proceedings. Within three years of the INA's passage, questions about the applicability of the APA to procedures authorized by the INA were already surfacing in the courts. In *Shaughnessy v. Pedreiro*, an alien sought judicial review of his removal order.³³ The Supreme Court held that although the INA provided that deportation orders of the Attorney General shall be "final," the statute did not "expressly" supersede the APA's guarantee of judicial review.³⁴ Instead, the Court interpreted the statute to refer to "finality in administrative procedure [as opposed to finality in the judicial review process]."³⁵ Thus, the Court found that the APA applied to agency interpretations and implementation of the INA, at least insofar as judicial review was concerned, yet again suggesting that executive agencies did not command heightened discretion over immigration matters.

Less than one month later, in *Marcello v. Bonds*, the Court reconsidered the exact question addressed in *Wong Yang Sung*—whether APA hearing provisions bound deportation hearings—in light of the recently passed INA.³⁶ Among the deportation procedures introduced by the INA was one in which a "special inquiry officer" presided over deportation hearings, while another immigration officer prosecuted the alien.³⁷ The INA authorized the Attorney General to determine the kind and degree of supervision overseeing special inquiry officers.³⁸

³² See Immigration and Nationality Act of 1952, 66 Stat. 163 *et seq.*

³³ See *Shaughnessy v. Pedreiro*, 349 U.S. 48, 49 (1955).

³⁴ See *Pedreiro*, 349 U.S. at 49.

³⁵ See *Pedreiro*, 349 U.S. at 51.

³⁶ See *Marcello v. Bonds*, 239 U.S. 302 (1955).

³⁷ See Immigration and Nationality Act of 1952, 8 U.S.C. § 1104(b)(4) ("Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.").

³⁸ See *id.*

The Attorney General assigned supervision of special inquiry officers to district directors of immigration districts as well as to higher INS officials.³⁹ In other words, the Attorney General placed the presiding officers under the same supervisory structures as the prosecuting immigration officials. One noncitizen who was ordered deported through that procedure challenged the Attorney General's consolidation of supervision of prosecutors and adjudicators on the basis that it violated the hearing provisions of the APA.⁴⁰ To resolve his claim, the Court needed to address question of whether the INA had reinstated *Wong Yang Sung's* subjection of deportation hearings to the APA.⁴¹

The Supreme Court answered in the negative. It found that the drafters of the INA (Senator McCarran and Congressman Walter, who had also co-sponsored the APA⁴²) had so clearly modeled the INA hearing provisions on the APA hearing provisions that the former "expressly" superseded the latter, despite the absence of any explicit reference in the INA to the APA.⁴³ After comparing several analogous INA and APA provisions and considering the INA's statement that "[t]he procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section,"⁴⁴ the Court concluded, "Were the courts to ignore these provisions and look only to the Administrative Procedure Act, the painstaking efforts [to model the INA hearing provisions after those provided by the APA] would be completely meaningless."⁴⁵ Because the Court found the INA hearing provisions to closely mirror the comparable APA provisions such that even where they differed, the INA

³⁹ See *Marcello v. Bonds*, 349 U.S. at 306.

⁴⁰ See *Marcello v. Bonds*, 239 U.S. 302 (1955).

⁴¹ *Ardestani v. I.N.S.*, 502 U.S. 129, 133 (1991).

⁴² *Pedreiro*, 349 U.S. at 52.

⁴³ *Marcello v. Bonds*, 349 U.S. 302, 210. (1955).

⁴⁴ *Marcello*, 349 U.S. at 309.

⁴⁵ *Marcello*, 349 U.S. at 309.

authors had consciously deviated from the APA model, the Court refused to tether proceedings under the INA to APA hearing requirements.

The Court's provision-by-provision examination of APA applicability to immigration decisions established that APA judicial review attached to INA proceedings⁴⁶ and that its hearing requirements did not.⁴⁷ However, the more elusive question of the extent to which the APA cabined immigration agency policy-making discretion outside of the hearing procedure context did not emerge until 1996. In *I.N.S. v. Yueh-Shaio Yang*, the Court finally considered the Attorney General's denial of a deportation waiver that the INA explicitly stated would be awarded "in the discretion of the Attorney General."⁴⁸ The case involved an alien petitioner who had participated in a fraudulent scheme in which he divorced his alien wife, then remarried her after she acquired a false U.S. birth certificate. He then attempted to naturalize as a spouse of a U.S. citizen. The Attorney General acknowledged that the applicant was eligible for a section 1251(a)(1)(H) fraudulent conduct waiver, but nevertheless rejected his application after considering the noncitizen's participation in his wife's fraudulent entry. The petitioner challenged the rejection on the grounds that the Attorney General diverged from "settled policy of the INS to disregard entry fraud or misrepresentation . . . in making the waiver determination."⁴⁹

In upholding the Attorney General's denial on the ground that the Attorney General had not disregarded its prior policy but rather merely adopted a narrow understanding of "entry fraud," the Court noted that the APA forbids agencies from irrationally forsaking prior policies. The Court stated, "Though the agency's discretion is unfettered at the outset, if it announces and

⁴⁶ See *Pedreiro*, 349 U.S. at 51.

⁴⁷ See *Marcello*, 349 U.S. at 309.

⁴⁸ *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26 (1996).

⁴⁹ *Yueh-Shaio Yang*, 519 U.S. at 31.

follows-by rule or by settled course of adjudication-a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion’ within the meaning of the Administrative Procedure Act.”⁵⁰ While Mr. Yang would not get his waiver, in hinging the decision on the Attorney General’s compliance with the APA, the Court verified the APA as a channel for challenges to arbitrary immigration agency⁵¹ actions, at least to the extent that such actions either deviated from prior policies without reason or conflicted with controlling regulations or statutes.

Yueh-Shaio Yang and its lower court fallout eliminated any lingering doubts that at least some form of A&C standard applied to judicial review of immigration agency policies. Circuits followed *Yang* by applying APA A&C analyses to decisions by the BIA that departed inexplicably from its own policies or conflicted with controlling regulations or statutes.⁵² However, those courts failed to wade any deeper by striking down BIA policies on the ground

⁵⁰ 519 U.S. 26, 32 (1996) (citing 5 U.S.C. § 706(2)(A)). The only authority the Court cites for this proposition is the APA at 5 U.S.C. § 706(2)(A).

⁵¹ By “immigration agency,” I mean the Attorney General, Bureau of Immigration Appeals, Department of Homeland Security, and any other executive agency playing a significant role in interpreting or implementing laws formally pertaining to the admission and removal of aliens to and from the United States.

⁵² See *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 663 F.3d 582, 608-09 (3d Cir. 2011) (reversing BIA’s denial of petition for review because “Here, as we have explained, the BIA’s addition of the requirements of “social visibility” and “particularity” to its definition of “particular social group” is inconsistent with its prior decisions, and the BIA has not announced a “principled reason” for its adoption of those inconsistent requirements.”); see also *Yi Lin v. U.S. Citizenship & Immigration Services*, 246 F. App’x 68, 69 (2d Cir. 2007) (reversing as abuse of discretion BIA decision denying motion to reopen because the BIA failed to apply the standard articulated by 8 C.F.R. § 208.13(b)(3)(ii)); *Norani v. Gonzales*, 451 F.3d 292, 295 (2d Cir. 2006) (reversing denial of motion to reopen as abuse of discretion in applying regulations because petitioner made prima facie case for asylum based on changed circumstances in accordance with regulations); *Hernandez v. Reno*, 91 F.3d 775, 780 (5th Cir. 1996) (finding agency procedure arbitrary, capricious, and otherwise not in accordance with law because it conflicted directly with statute); *Succar v. Ashcroft*, 394 F.3d 8, 36 (1st Cir. 2005) (striking down Attorney General’s regulation because it conflicted with statute); *Smriko v. Ashcroft*, 387 F.3d 279, 281, 297 (3d Cir. 2004) (“Board member charged with examining Smriko’s case clearly acted arbitrarily and capriciously by issuing an affirmance without opinion, in violation of the BIA’s streamlining regulations”); *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 329 (4th Cir. 2001) (reversing as A&C BIA decision finding conviction to constitute “Crime of Violence” because it only considered two of four factors required by prior BIA’s own rule).

that they were A&C on their merits—independent of any regulatory or statutory precedent or process-derived concerns.

By the time the Supreme Court granted certiorari in *Judulang*, the jurisprudence had yet to answer the question of whether the APA A&C standard applied to BIA—or other immigration agencies’—policies absent an irrational deviation from prior policy or conflict with existing statutes; *Pedreiro* held that judicial review was available to immigration agencies’ administrative adjudications,⁵³ and *Yueh-Shaio Yang* observed that the APA prohibits even immigration agencies from deviating from prior policies without providing a reasoned explanation.⁵⁴ But in 2011, the Court would finally confront the viability of an independent and substantive A&C standard of review, even absent any conflicting regulations or statutes, through its decision in *Judulang v. Holder*.

B. *Judulang* Emerges

Judulang involved a challenge to a BIA policy for determining whether certain noncitizens would be eligible for a discretionary form of relief from removal known by its statutory shorthand: section 212(c).⁵⁵ Before 1996, section 212(c) offered discretionary relief to lawful permanent residents who left the United States temporarily and who, upon their return, were excludable due a previous criminal conviction, unless the reason for exclusion was that the noncitizen posed a threat to national security or had engaged in international child abduction—the two grounds section 212(c) explicitly precluded from a waiver.⁵⁶ In *Matter of L-*, a permanent resident of the United States was convicted of a crime that rendered him

⁵³ See *Pedreiro*, 349 U.S. at 51.

⁵⁴ See 519 U.S. at 32.

⁵⁵ See INA § 212(c) (repealed 1996). For a more comprehensive history of the section 212(c) jurisprudence, see generally Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief*, 19 GEO. IMMIGR. L. J. 455, 462-66 (2005); see also *Judulang* 132 S. Ct. at 479-81.

⁵⁶ *Judulang v. Holder*, 132 S. Ct. 476, 479-80 n.1 (2011).

inadmissible.⁵⁷ He traveled abroad and was re-admitted upon his return to the United States. However, a few months after his lawful reentry, the government initiated deportation proceedings against him based on his conviction. Although he would have been eligible for section 212(c) relief had he been placed into exclusion proceedings upon his return, because he was now in deportation proceedings, section 212(c) did not apply. Nevertheless, the Attorney General granted him relief on the grounds that it would be unfair for noncitizens returning from recent trips not to have access to the relief they would have had if stopped at the border upon their return.⁵⁸ But that policy also seemed idiosyncratic—deportable aliens who left and returned could apply for section 212(c) waivers, while those who had never left could not. In *Francis v. INS*, the Second Circuit found that the distinction between permanent residents who had traveled outside the United States and those who did not violated the Equal Protection Clause.⁵⁹ It held:

We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.⁶⁰

The BIA followed the Second Circuit's lead and extended the possibility of section 212(c) relief to all otherwise eligible noncitizens in deportation proceedings.⁶¹

In 1996, Congress repealed section 212(c). As a result, noncitizens who received convictions after 1996 were no longer eligible for section 212(c) relief. However, in *INS v. St. Cyr*, the Supreme Court held that that section 212(c) relief remained available retroactively for noncitizens who pled to offenses before the repeal of section 212(c) and who would otherwise

⁵⁷ See 1 I. & N. Dec. 1 (AG 1940).

⁵⁸ *Id.* at 7. The BIA later codified the ruling by extending 212(c) eligibility to noncitizens in removal proceedings if they traveled outside the United States once they were otherwise eligible for 212(c) relief. See *In re S-*, 6 I. & N. Dec. 392, 394-96 (B.I.A.1954).

⁵⁹ 532 F. 2d 268 (2d Cir. 1976).

⁶⁰ *Id.* at 273.

⁶¹ See *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976).

have been eligible for relief under that statute. Thus, noncitizens who pled to offenses before 1996 and who were otherwise eligible for section 212(c) relief could still seek such relief even after Congress repealed the statute.⁶²

Yet, one particularly obvious tension in 212(c) doctrine remained: although the BIA made section 212(c) relief available to noncitizens in deportation proceedings, section 212(c) itself was written with exclusion—not deportation—in mind, and so its text only addresses which *exclusion* grounds can be waived—not which *deportation* grounds.⁶³ Because exclusion grounds differ from deportation grounds, it became necessary to determine which deportation grounds rendered a noncitizen eligible for section 212(c) relief.⁶⁴ It was the BIA’s attempt to generate a policy that would determine whether a deportation ground was waivable under 212(c) relief that lay the groundwork for the *Judulang* litigation.⁶⁵

Since 1996, when the IIRIRA collapsed “exclusion” and “deportation” proceedings into a one-size-fits-all “removal” proceeding,⁶⁶ the BIA had alternated primarily between two approaches: the “same facts” approach and the “comparable-grounds” approach.⁶⁷ The “same facts” approach entailed an inquiry by the agency adjudicator into whether the facts underlying the deportable conviction fell within an exclusion ground that qualified for section 212(c) eligibility.⁶⁸ In contrast, the “comparable-grounds” approach simply asked whether the deportation ground “consists of a set of crimes ‘substantially equivalent’ to the set of offenses

⁶² *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001)

⁶³ *Judulang*, 132 S. Ct. at 488 (“ § 212(c) refers solely to exclusion decisions; its extension to deportation cases arose from the agency’s extra-textual view that some similar relief should be available in that context to avoid unreasonable distinctions.”).

⁶⁴ Compare INA § 212 with § 237.

⁶⁵ *Id.*

⁶⁶ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996).

⁶⁷ *Judulang*, 132 S. Ct. at 488 (the Supreme Court referred to the BIA’s rule as the “comparable grounds” approach, without labeling the alternative approach, which I term the “safe-facts” approach).

⁶⁸ *Judulang*, 132 S. Ct. at 481.

making up an exclusion ground.”⁶⁹ If it did, the deportation ground was considered waivable under section 212(c); if it did not—even though all the crimes encompassed by the deportation ground might fall within an eligible ground of exclusion—then the deportable ground would not be waivable.⁷⁰ Thus, if a deportation ground was substantially narrower than a section 212(c)-eligible ground of exclusion, under the comparable-grounds model the deportation ground would remain unwaivable precisely because it was *narrower* than a more inclusive 212(c)-eligible, ground of exclusion.⁷¹

Joel Judulang was a lawful permanent resident who pled guilty to voluntary manslaughter. As a result, the Department of Homeland Security (DHS) charged him with having committed an “aggravated felony” involving “a crime of violence,” and placed him in removal proceedings. An immigration judge entered an order of removal. In reviewing Judulang’s appeal, the BIA upheld the comparable-grounds approach and affirmed the Immigration Judge’s ruling that Judulang was ineligible for section 212(c) relief because even though his crime would have rendered him inadmissible for a Crime Involving Moral Turpitude—an exclusion ground that was waivable under 212(c)—“the ‘crime of violence’ aggravated felony category under which he was charged [as deportable] has no statutory counterpart in the grounds of inadmissibility under section 212(a) of the Act.”⁷² The Ninth Circuit affirmed, and the Supreme Court granted certiorari.

C. *Judulang*’s Significance for Arbitrary and Capricious Review

⁶⁹ Judulang, 132 S. Ct. at 481-82.

⁷⁰ Judulang, 132 S. Ct. at 481-82.

⁷¹ In Judulang, the Court illustrates the comparable-grounds approach through use of the example of an alien being deported due to a conviction of an “aggravated felony” involving “sexual abuse of a minor.” Although the conviction constitutes a Crime Involving Moral Turpitude, which is a broad § 212(c)-eligible ground of exclusion, the BIA has held that the crime bars relief, according to the Court, “not because his crime is too serious (that is irrelevant to the analysis), but instead because no statutory ground of exclusion covers substantially the same offenses.” 132 S. Ct. at 482.

⁷²In re Judulang, A34 461 941 - ELC, 2006 WL 557842 (B.I.A. Feb. 3, 2006)

A unanimous Supreme Court reversed, striking down the “comparable-grounds” rule but leaving selection of an alternative policy to the BIA. The Court proclaimed, “When an administrative agency sets policy, it must provide a reasoned explanation for its action.”⁷³ The Court’s logic is notable for two primary reasons: (1) it moved from a weaker, process-oriented APA review of an immigration policy to a more rigorous and independent review of the policy’s merits, and (2) it cemented the role of purpose in considering whether a policy is A&C under the APA (or, alternatively, *Chevron*⁷⁴).

First, and most dynamically, the Court applied an independent A&C evaluation of the merits of an immigration agency’s policy, rather than just a review of the rationality of the process employed in developing that policy and a cursory check to ensure that the rule did not inexplicably depart from existing regulations or otherwise conflict with Congressional statutes. As explained above, *Yueh-Shaio Yang*’s holding pertained only to the process by which immigration agencies formed policy and the extent to which those policies conflicted with preexisting statutes; it did not so much as hint that an independent standard of A&C review existed.⁷⁵ In contrast, *Judulang* squarely confronted the merits of a BIA policy independent of the process by which the policy was established or other conflicting laws. In fact, the Court

⁷³ *Judulang*, 132 S. Ct. at 479.

⁷⁴ See note 116, *infra*.

⁷⁵ See notes 50-52 and accompanying text. Prior circuit decisions aligned with *Yang*’s refusal to look beneath the surface of immigration agencies’ actions: *Vo v. Gonzales*, 482 F.3d 363, 370 (5th Cir. 2007) (rejecting A&C challenge, finding no “impermissible shift in agency practice” without considering whether the comparable-grounds policy was itself A&C); see also *Francois v. Attorney Gen. of U.S.*, 264 F. App’x 211, 215 (3d Cir. 2008) (rejecting equal protection challenge without considering whether comparable-grounds policy was A&C under APA); *Caroleo v. Gonzales*, 476 F.3d 158, 168 (3d Cir. 2007) *abrogated by Judulang v. Holder*, 132 S. Ct. 476, 181 L. Ed. 2d 449 (U.S. 2011) (“We recognize the seeming illogic of a scheme under which the crime of attempted murder may constitute a crime involving moral turpitude rendering the alien removable, while the same alien, if charged with being removable under INA § 237’s aggravated felony “crime of violence” ground, is ineligible for § 212(c) relief because a “crime of violence” is not a statutory counterpart of a “crime involving moral turpitude.” However, this is the result of an administratively engrafted “statutory counterpart” requirement and its interpretation by the BIA in *Brieva* and the Ninth Circuit in *Komarenko*, and we find these authorities persuasive.”); *Frederick v. Holder*, 644 F.3d 357, 363 (7th Cir. 2011) (rejecting EPC arguments without considering A&C under APA) *cert. granted, judgment vacated*, 132 S. Ct. 999, 181 L. Ed. 2d 726 (U.S. 2012);

sharply rebuked the Government's contentions that the comparable-grounds rule was not "an 'abrupt departure' from its prior practice" because it found the inquiry irrelevant to the arbitrariness of the rule.⁷⁶ Perhaps illustrative of the Government's precedent-based belief that the Court would focus on the rationality of the process, the Government devotes approximately one-fourth of its brief to arguing that its application of the comparable-grounds rule in a 2005 case did not reflect a change in the law.⁷⁷ The Court responded, "Arbitrary action becomes no less so by dint of repetition And longstanding capriciousness receives no special exemption from APA."⁷⁸ In dismissing the Government's claim about the comparable-grounds rule's prior entrenchment, the Court highlighted that its contemplation (and ultimate rejection) of the comparable-grounds rule pertained solely to its substance, its longstanding application (or not) notwithstanding.

That is not to fault the Government for focusing much of its argument on persuading the Court that the comparable-grounds rule constituted a long-settled policy. Indeed, precedent in the immigration context provided no reason to think that the Court's A&C analysis would consider any factors other than the process by which the BIA promulgated the policy. In 1996, the Court in *Yueh-Shaio Yang* —through the voice of Justice Scalia—had held, without distinguishing the immigration context from a non-immigration context, that an "agency's discretion is unfettered at the outset," and remains so unless and until it establishes a settled course of policy. Scalia continued, "Once a policy is settled, an irrational departure from that . . . could constitute action that must be overturned as [A&C]."⁷⁹ That decision's discussion of "unfettered discretion,"

⁷⁶ Brief for Respondent, 30; *Judulang*, 132 S. Ct. at 488.

⁷⁷ See Respondent's Brief, 30-43.

⁷⁸ See *Judulang*, 132 S. Ct. at 488. Although finding longstanding application to be irrelevant to the rationality of a rule's merits, the Court goes on to reject the Government's argument that the BIA had consistently applied the comparable-grounds rule even before the 2005 case. *Id.*

⁷⁹ *Yueh-Shaio Yang*, 519 U.S. at 32.

however, never mentions a place for contemplation of the reasonableness of the immigration agency's policy itself.

The prior circuit decisions on the comparable-grounds rule serve as a telling testament to the hollowness of the pre-*Judulang* A&C standard of review for immigration cases.⁸⁰ Even in the one circuit case *Judulang* cites striking down the comparable-grounds as evidence of a circuit split, *Blake v. Carbone*,⁸¹ the Second Circuit rejected the rule by relying upon constitutional avoidance coupled with an equal protection threat and finding that the statute was not ambiguous under *Chevron*; it did not employ an “arbitrary and capricious” analysis.⁸² Furthermore, although the *Blake* petitioners challenged the comparable-grounds rule on APA grounds as well, they did so on the basis that the comparable-grounds rule irrationally departed from with BIA precedent rather than because the rule's substance was arbitrary and capricious.⁸³ Thus, even though a substantive A&C standard existed in theory under APA prior to *Judulang*,⁸⁴ it was so weak, at least in the immigration context, that of the nine circuits to consider the validity of the comparable-grounds rule, not one struck it down as A&C as the Supreme Court ultimately did. Thus, *Judulang*'s first significant contribution is its confirmation that the APA's A&C standard of review applies *meaningfully* to the substance of immigration agencies' policies, just as it does to that of policies of other executive agencies.

Second, although the *Judulang* Court describes the traditional elements of the A&C test

⁸⁰ Kim, 468 F.3d at 63 (rejecting equal protection clause challenge and according deference to BIA's interpretation of INA); Caroleo, 476 F.3d at 162-63 (same); Brieva-Perez, 482 F.3d at 356 (same); Vue, 496 F.3d 858; Thap, 544; De la Rosa, 579 F.3d 1327, 1336, 1339 (same); F.3d at 677 (rejecting equal protection clause challenge); Zamora-Mallari, 514 F.3d at 692 (same); Komarenko, 35 F.3d 432, 436 (rejecting equal protection clause challenge, according *Chevron* deference, and finding the rule to be “reasonable”).

⁸¹ 132 S. Ct. at 483 n.6.

⁸² *Blake v. Carbone*, 489 F.3d 88, 104 (2d Cir. 2007).

⁸³ *Blake*, 489 F.3d at 100 n.9.

⁸⁴ See, e.g., *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867, 77 L. Ed. 2d 443 (1983) (“[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

through citations to classic administrative law cases like *State Farm* and *Citizens to Preserve Overton Park*,⁸⁵ its decision includes two additional (and uncited) indicia of a particular immigration policy's reasonableness under the umbrella of "purpose": (1) the policy's alignment with the purposes of the immigration laws and (2) the appropriate operation of the immigration system as measured by the extent to which the policy conditions a noncitizen's eligibility for relief upon the discretionary charging decisions of an immigration officer.⁸⁶ As the Court announced, an immigration agency's action "must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system."⁸⁷

The Court does not expressly define "the purposes of the immigration laws or the appropriate operation of the immigration system."⁸⁸ However, its subsequent analysis provides a strong indication that the "purpose"-inquiry encompasses both Congress's specific purpose in passing the particular statute(s) in question, as well as the general purposes of, and principles underlying, the immigration system. Evidence of the first point (inquiry includes specific purpose) lies in a footnote, in which the Court reveals, "The case would be different if Congress had intended for section 212(c) relief to depend on the interaction of exclusion grounds and deportation grounds [i.e. the comparable-grounds approach]."⁸⁹ There, the Court looked directly to Congress's intent in passing section 212(c) and found that it provides no support for the BIA's

⁸⁵ Judulang 132 S. Ct. at 483-84. I discuss the significance of such citations to ordinary administrative law cases rather than immigration cases, particularly as it relates to deference to the executive branch, *infra* notes 116-122; **Error! Marcador no definido.** and accompanying text.

⁸⁶ Judulang, 132 S. Ct. at 490 (invalidating the BIA's comparable-grounds rule as A&C under the APA because, *inter alia*, "[the] rule is unmoored from the purposes and concerns of the immigration laws."). Although the second prong may arguably comprise a subpart of the first, I analyze the two separately because the Court appears to present them sequentially and seems to justify them with different lines of logic. *See* Judulang, 132 S. Ct. 485-87.

⁸⁷ Judulang, 132 S. Ct. at 485.

⁸⁸ *Id.*

⁸⁹ Judulang, 132 S. Ct. at 485, n.9.

comparable-grounds policy.⁹⁰

Support for the second point (inquiry includes general purpose) is even more explicit, suggesting that absent clear evidence of specific statutory purpose, the general purposes of the immigration system are germane to a determination of whether an agency action is reasonable. For instance, the Court dovetails its call for a “purpose” inquiry with an explanation that any “method for disfavoring deportable aliens that bears no relation to these matters [referring to the purposes of the immigration laws or the appropriate operation of the immigration system]—that neither focuses on nor relates to an alien’s fitness to remain in the country—is arbitrary and capricious.”⁹¹ The passage clarifies that at least one of “the purposes of immigration laws” and “the appropriate operation of the immigration system” involves not disfavoring deportable noncitizens based on variables unrelated to their “fitness to remain in the country.”⁹² Thus, the Court inaugurated a two-step purpose approach that requires scrutiny of an immigration agency action in light of both the purpose motivating the particular statute at issue as well as the general principles driving the immigration system at large.⁹³

As a consideration in the requisite purpose-inquiries, the *Judulang* Court vocalized extensive skepticism about agency policies that condition removable noncitizens’ eligibility for relief upon discretionary decisions of charging officials.⁹⁴ Much of the opinion suggests that “appropriate operation of the immigration system” requires that major decisions affecting the scope of a given alien’s eligibility for relief cannot occur at the whim of a charging officer.

⁹⁰ Importantly for immigration advocates, the Court appears to place the burden of proving that an agency action is in line with the statute’s purpose on the Government. *See id.* (“[T]he Government has presented us with no evidence [that Congress intended for § 212(c) relief to depend on the interaction of exclusion and deportation grounds], nor have we found any.”).

⁹¹ *Judulang*, 132 S. Ct. at 485.

⁹² *See id.*

⁹³ The robustness of this purposivist holding is particularly fortified given that two staunch textualists—Justice Scalia and Justice Thomas—signed on to the unanimous opinion without qualification.

⁹⁴ *See id.* at 486 (criticizing the comparable-grounds policy because “[a]n alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country.”).

Laying out the reasons for invalidating the BIA comparable-grounds policy as “arbitrary and capricious,” the Court chides that “the outcome of the Board’s comparable-grounds analysis itself may rest on the happenstance of an immigration official’s charging decision. . . . So everything hangs on the charge.”⁹⁵ To underscore its point, the Court quotes Judge Learned Hand’s exhortation that “deportation decisions cannot be made a ‘sport of chance,’” and likens the effectively random operation of the “comparable-grounds” policy to a “coin-flip.”⁹⁶ By referencing the potentially grave implications that may arise from the discretionary charging decisions of immigration officials as one of the bases for striking down the comparable-grounds rule as A&C, the Court indicates that “the appropriate operation of the immigration system” weighs against policies that endow low-level and relatively decentralized charging decisions with the power to significantly alter a noncitizens’ options for relief.

D. *Judulang*’s Significance for Executive Power Over Immigration

Judulang added to both the scope and character of judicial review over immigration agencies’ action. In addition to those core contributions, *Judulang* feeds into a larger discourse surrounding the nature of immigration law and understandings of deference to executive agencies on immigration matters. To the extent that the executive branch commands heightened deference over immigration decisions, which may derive—even if not explicitly—from “plenary power” doctrine,⁹⁷ *Judulang* contributes to a reigning-in of that deference. To fully appreciate the state of the executive branch’s aura of deference in immigration matters, I now briefly

⁹⁵ *Judulang*, 132 S. Ct. at 486. The Court’s suspicion of the conditioning of aliens’ eligibility for relief upon a charging official’s discretionary decision strengthens claims against agency actions such as administrative removal, which I address *below*. See text accompanying notes 135-215, *supra*.

⁹⁶ *Judulang*, 132 S. Ct. at 487 (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)).

⁹⁷ See, e.g., *Palomino v. Aschroft*, s. 944 (8th Cir. 2004) (Although the “standard of review for legal determinations is *de novo* . . . some deference is appropriate in the immigration context because sensitive political decisions with important diplomatic repercussions may be involved.”); see also *Kim*, 468 F.3d at 63 (rejecting equal protection clause challenge to BIA’s “comparable-grounds” rule and according deference to BIA’s interpretation of INA); *Caroleo*, 476 F.3d at 162-63 (same); *Brieva-Perez*, 482 F.3d at 356 (same); *Vue*, 496 F.3d 858; *Thap*, 544; *De la Rosa*, 579 F.3d 1327, 1336, 1339 (same).

summarize the “plenary power” doctrine debate. I then interpret the present status of executive deference in immigration questions in light of *Judulang*.

The “plenary power” doctrine (PPD), as described by both courts and academics, is a theory that implies at its maximum that the federal government exercises unreviewable authority in the area of immigration law,⁹⁸ and at its minimum that the federal government deserves at least some degree of deference in its decisions about whether to admit or remove noncitizens into or from the United States (i.e. the most basic functions of the immigration system).⁹⁹ At its core is a sense that “immigration is special” and constitutes a sphere in which normal rules of judicial review do not apply to decisions by the political branches of the federal government.¹⁰⁰

Particularly in the early immigration cases, the Supreme Court often exhibited a deep deference to immigration decisions by the executive branch.¹⁰¹ In *Chae Chang Ping v. United States*, the Court first articulated a policy of deference to the political branches when deciding questions of immigration law.¹⁰² There, the Court rejected a noncitizen’s challenge to his

⁹⁸ Even within a PPD framework, what constitutes an “immigration law” is a murky, and perhaps impossible, question. See Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 370 (2008) (arguing that the dichotomy between immigration and non-immigration laws has broken down in both theory and practice).

⁹⁹ See Kevin R. Johnson, *Responding to the “Litigation Explosion”: The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 418 (1993) (“[T]he Court has invoked selectively [Plenary Power Doctrine] over the last century as a bar to meaningful judicial review of immigration decisions by Congress and the executive branch.”); see also Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 502-04 (2001) (summarizing PPD and criticism of it); Legomsky, *infra* note 101 at 937 (anticipating an increasingly diluted version of PPD, which he terms “PPD-lite.”).

¹⁰⁰ For purposes of this paper, I will treat PPD as a doctrine of judicial restraint. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (“Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system [as immigration law].”).

¹⁰¹ Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 925 (1995) (“For more than a hundred years, the Supreme Court of the United States has been telling us that immigration law is just plain different.”); see also Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law* 1990 Duke L.J. 984, 1022 (1990) (summarizing data for 1984-85 and concluding that courts’ rate of affirming INS rulemaking was higher than that for many other agencies); *J.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 1445, 143 L. Ed. 2d 590 (1999) (“[W]e have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials “exercise especially sensitive political functions that implicate questions of foreign relations.”).

¹⁰² *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have

exclusion from the United States based on one of the Chinese Exclusion Acts.¹⁰³ The decision explained that such complaints “must be made to the political department of our government, which is alone competent to act upon the subject.”¹⁰⁴

In another early case, the Court upheld the executive branch’s exclusion, without a hearing or disclosure of its reasoning, of a U.S. citizen’s noncitizen spouse, who was otherwise admissible under the War Brides Act.¹⁰⁵ The Court explained, “The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”¹⁰⁶ Other cases also appear to allot great deference to the executive branch’s decision-making on issues pertaining to immigration, suggesting that it wields special authority over immigration decisions.¹⁰⁷

Based on a competing strain of cases, others argue that the Court is moving away from a plenary power “blank check” to a less deferential, if still somewhat amorphous, “check” on the political branches’ control of immigration. They assert that although PPD may have driven immigration decisions historically, the Court has gradually eroded the political branches’ plenary

qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination.”).

¹⁰³ Chae Chan Ping, 130 U.S. at 609

¹⁰⁴ Chae Chan Ping, 130 U.S. at 609.

¹⁰⁵ United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 547 (1950).

¹⁰⁶ United States ex rel. Knauff, 338 U.S. 537 at 542.

¹⁰⁷ Adam B. Cox & Christina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 461 (2009) (“[T]he [executive branch] has historically possessed tremendous power over core immigrant screening policy through three channels: through claims of inherent executive authority; through formal mechanisms of congressional delegation; and through what we call de facto delegation.”); *see also, e.g.*, Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (“It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); *Fong Yue Ting* 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

power¹⁰⁸ and thereby has brought immigration law closer to the realm of ordinary domestic jurisprudence.¹⁰⁹ Still other theorists contend that a more careful examination of cases purportedly decided on PPD grounds reveals that “plenary power” has done little work, if any, in the Supreme Court’s decisions. For example, Professor Gabriel Chin writes, “*At the time they were decided*, many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law. . . . There is no need for a special plenary power doctrine or other constitutional rule to explain the cases.”¹¹⁰ As is evident, the debates about PPD and the balance of immigration authority between the executive and legislative branches are still very much alive in both classrooms and courtrooms.¹¹¹

While PPD generally pertains to constitutional questions rather than statutory issues like the one addressed in *Judulang*, scholars have recognized that the aura of deference motivating PPD may infect other, non-constitutional areas of judicial review as well.¹¹² Executive agencies have historically received significant deference in the area of immigration beyond that warranted

¹⁰⁸ At least, understanding “plenary power” as immunity from, or at least deserving of deference in, judicial review.

¹⁰⁹ See Legomsky, *supra* note 101 at 930 (acknowledging that while some lower courts apply rigid PPD, “many other lower courts have reinforced and expanded the devices for circumventing at east the traditional version of the plenary power doctrine.”).

¹¹⁰ Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (emphasis in original).

¹¹¹ Compare *Argueta v. U.S. Immigration & Customs Enforcement*, CIV.A. 08-1652 (PGS), 2009 WL 1307236 (D.N.J. May 7, 2009) (noting and rejecting government’s argument that executive plenary power “largely immunize[s] its decisions in [immigration matters] from judicial review), and *Arias v. U.S. Dep’t of State*, 8:10-CV-721-T-23TBM, 2010 WL 3835799 (M.D. Fla. Sept. 29, 2010) (“The executive’s discretionary exercise of this power [over exclusion decisions] generally escapes judicial review.”) with JON FERRE, CENTER FOR IMMIGRATION STUDIES, PLENARY POWER: SHOULD JUDGES CONTROL U.S. IMMIGRATION POLICY? 16 (2009) (acknowledging that courts have recently curtailed the political branches’ plenary power, but arguing for a return to traditional PPD), available at <http://www.cis.org/articles/2009/back209.pdf> (last visited Apr. 1, 2012). 9

¹¹² See Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231, 247 (2010) (commenting that subtextual deference to the executive’s plenary power over immigration law may have played a part in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1101 (2008) (pointing to *Jama v. ICE*, 543 U.S. 335 (2005), as an example of the Court’s strongly deferring to executive branch construction of immigration law, without ever mentioning plenary power doctrine).

by traditional *Chevron* analysis.¹¹³ Therefore, the status of PPD may underly and drive the deference due to executive agencies' immigration policies. Given the questionable status of PPD at present, the question emerges: do executive agencies presently command special deference in the development and implementation of immigration policies that immunizes them from meaningful judicial review?

The lower courts contemplating the “comparable-grounds” policy at issue in *Judulang* certainly thought it did.¹¹⁴ And yet, in *Judulang*, a unanimous Court rejects that notion, appearing to further circumscribe deference to executive agencies' decisions in the immigration arena.¹¹⁵ *Judulang* was clear in its refusal to even contemplate a more deferential standard of review under the APA—or *Chevron*, had the Court decided that the BIA policy was based on its interpretation of an ambiguous statute¹¹⁶—in that the opinion does not even intimate that the executive branch receives special deference on immigration matters; it does not cite a single plenary power case nor any case involving the application of APA to immigration policies. Instead, it cites to quintessential administrative law cases such as *State Farm* and *Citizens to Preserve Overton Park, Inc.*¹¹⁷

¹¹³ *I.N.S. v. Abudu*, 485 U.S. 94, 110, 108 S. Ct. 904, 915, 99 L. Ed. 2d 90 (1988) (“INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.”); see also Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 Willamette L. Rev. 773, 774-75 (1992) (describing the “frequent application of an unduly deferential standard of review to agency legal determinations [regarding refugee policy].”); John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of Ins v. Ventura*, 18 Geo. Immigr. L.J. 605, 618 (2004) (“Most of these decisions [involving questions of deference to BIA] emphasized that more deference was due the agency [*sic*] than afforded by the court in the particular case.”).

¹¹⁴ *Kim*, 468 F.3d at 63 (rejecting equal protection clause challenge to BIA's “comparable-grounds” rule and according deference to BIA's interpretation of INA); *Caroleo*, 476 F.3d at 162-63 (same); *Brieva-Perez*, 482 F.3d at 356 (same); *Vue*, 496 F.3d 858; *Thap*, 544; *De la Rosa*, 579 F.3d 1327, 1336, 1339 (same).

¹¹⁵ See *Judulang*, 132 S. Ct. at 483-84.

¹¹⁶ See *Judulang*, 132 S. Ct. at 483 n.7 (“Were we to [analyze the case under the second step of the test announced in *Chevron*], our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is “arbitrary and capricious in substance.”). The dicta regarding a hypothetical *Chevron* ruling supports a reading of *Judulang* as a clarification that the BIA does not receive more deference under *Chevron* than do non-immigration agencies.

¹¹⁷ *Judulang*, 132 S. Ct. at 484.

Although the Court does not include a citation for its purpose-driven inquiry, even that element aligns with ordinary principles of administrative law jurisprudence.¹¹⁸ As if the absence of any such citations was not a sufficiently obvious rebuke of the concept of ‘immigration law as special’ (at least as far as executive agencies are concerned), the opinion’s penultimate paragraph concludes, “The BIA’s approach therefore cannot pass muster under *ordinary principles of administrative law*.”¹¹⁹ The notable absence of any discussion whatsoever of PPD, the executive’s role in immigration decisions, or even the unique nature of immigration generally, evidences the Court’s current discomfort with (and, perhaps more precisely, disavowal of) allocating more deference to the executive in immigration matters than that branch receives in ordinary contexts.¹²⁰

E. Doctrinal Roots of a New Analysis

Although *Judulang* represents the Supreme Court’s most rigorous review of an immigration agency’s action under the APA to date, it is not the first time the Court has cabined the executive branch’s immigration policy-making authority.¹²¹ Though eventually superseded by statute, *Wong Yang Sung* applied APA procedural quality controls to immigration hearings as early as 1950.¹²² Similarly, there is a line of cases braided with those expressing deference to the

¹¹⁸ See, e.g., *Am. Ass’n of Retired Persons v. E.E.O.C.*, 489 F.3d 558, 556 (3d Cir. 2007) (upholding proposed regulation because, *inter alia*, “The EEOC has shown the regulation to be reasonable, necessary, and proper according to the terms and purposes of the statute.”).

¹¹⁹ *Judulang*, 132 S. Ct. at 490 (emphasis added).

¹²⁰ See *Judulang*, 132 S. Ct. at 484

¹²¹ See notes 73-96 and accompanying text.

¹²² See notes 24-31 and accompanying text. Although some might consider *Sung* not to be evidence of the absence of plenary power over immigration as it is a piece in a larger pattern of courts recognizing that noncitizens within the United States possess at least some procedural rights, see, e.g., *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), *Zavydas v. Davis*, 533 U.S. 678, 692 (2001), the procedural cases involve constitutional questions centering around the due process clause, whereas *Sung* and the subsequent APA cases pertain to courts’ willingness to award statutory rights in arguably ambiguous circumstances and despite the executive branch’s urging to the contrary. See Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 Fla. St. U. L. Rev. 363, 387 (2007) (“the Court stated that the government’s exercise of its immigration power was subject to “important

executive branch, which proves consistent with *Judulang*'s imposition of a low, but nevertheless, firm, standard of rationality and good faith, which the executive must meet even when exercising discretion.

Kleindienst v. Mandel christened a constitutional standard requiring that even discretionary decisions by the executive branch be “facially legitimate and bona fide.”¹²³ Although the Court refused ‘to look beneath the veil’ of the executive’s reasoning, the Court required that it at least exhibit a rationale that meets the standard.¹²⁴ Although the Court in *Kleindienst* upheld the Attorney General’s decision to reject a communist professor’s nonimmigrant visa application, the case nevertheless stood for the principle that executive discretion in immigration is not unbounded.¹²⁵ Indeed, as the dissent points out, the “facially legitimate and bona fide” standard has no clear origin.¹²⁶ Instead, it seems to materialize out of the Court’s belief that even in an immigration context—and even where Congress has bolstered by delegation whatever authority the executive may inherently possess—executive discretion cannot be limitless.¹²⁷ Although different in the sense that the A&C standard arises out of a statute rather than the Constitution, the Court’s decision in *Judulang* to use a non-immigration-

constitutional limitations” and applied the same due process analysis to the detention of aliens as it would to the detention of citizens”); see also T.A. Aleinikof, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (“Justice Breyer’s opinion is unlikely to represent the death knell for the plenary power doctrine.”).

¹²³ *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972). Admittedly, the Supreme Court viewed “facially legitimate and bona fide” standard as arising out of the Constitution whereas the A&C standard stems from a statute. However, both standards evidence the court’s willingness to interpret standards to constrain executive implementation of immigration law.

¹²⁴ *Id.* at 770 “When the Executive exercises this [Congressionally delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion.”).

¹²⁵ Motomura, *supra* note 23 at 581 (“[B]y distinguishing the plenary power cases and conditioning its approval of discretionary decisions by requiring the government to offer a ‘facially legitimate and bona fide reason,’ the Court suggested some outer limits to executive discretion that might not apply to direct congressional decisions.”).

¹²⁶ See *Kleindienst*, 408 U.S. at 777-78 (Marshall, J., dissenting) (“No citation is given for this kind of unprecedented deference to the Executive, nor can I imagine (nor am I told) the slightest justification for such a rule.”).

¹²⁷ *Kleindienst*, 408 U.S. at 769 (refusing to reach the question of whether, in light of the delegation by Congress, the executive may execute unreviewable discretion).

specific statutory standard to strike down an executive immigration policy illustrates its unwillingness to defer specially to the executive on immigration matters.¹²⁸ Although even *Marcello*¹²⁹ did not cite to PPD or special deference as a justification for its exemption of deportation proceedings from APA requirements, scholars have recognized that the Court need not openly acknowledge the work done by PPD for it to nevertheless influence the decision.¹³⁰ When read in combination with *Kleindienst*, *Judulang* contradicts a conception of heightened executive discretion over immigration policies.¹³¹

F. Conclusion

Judulang moved beyond previous decisions by (1) unshackling the availability of a meaningful independent review of the merits of immigration agency action and (2) focusing that review on both the specific provisions of the immigration statutes in question as well as on the purposes and operation of the immigration system in general. In fact, at least one circuit has already followed *Judulang*'s lead in striking down BIA rules on the merits under the A&C

¹²⁸ A reading of *Judulang*'s overruling the comparable-grounds approach on statutory grounds complies with Motomura's theory that courts are increasingly relying upon "phantom constitutional norms . . . to undermine the plenary power doctrine through statutory interpretation." Motomura, *supra* note 23, at 549. *Judulang* argued that the comparable-grounds policy raised equal protection concerns, *see* Petitioner's brief at 51, however the Court ruled on statutory APA grounds without so much as a nod at the constitutional question. *See Judulang*, 132 S. Ct. 476. Importantly, the constitutional claim in *Judulang* was at least colorable, as it formed the basis for the Second Circuit's invalidation of the comparable-grounds rule in *Blake*, 489 F.3d at 104.

¹²⁹ *See* *Marcello*, 239 U.S. at 312.

¹³⁰ *See* Juliet P. Stumpf, *The Implausible Alien: Iqbal and the Influence of Immigration Law*, 14 Lewis & Clark L. Rev. 231, 247 (2010) (commenting that subtextual deference to the executive's plenary power over immigration law may have played a part in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *cf.* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1101 (2008) (pointing to *Jama v. ICE*, 543 U.S. 335 (2005), as an example of the Court's strongly deferring to executive branch construction of immigration law, without ever mentioning plenary power doctrine).

¹³¹ The Supreme Court extended the *Kleindienst* standard to congressional statutes in *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977), though the court similarly found that the INA provision in question (establishing that neither natural fathers nor their illegitimate children are entitled to preferential treatment as a "parents" or "children" for purposes of obtaining visas) satisfied it.¹³¹ Thus, the Court has not always retreated from applying at least some level of review to the congressional creation (*Fiallo*) and executive enforcement (*Kleindienst*) of laws pertaining to admission and deportation of aliens. Indeed, these cases help undermine assertions of plenary power by the political branches generally. However, *Judulang*'s imposition of a deeper (statutory) standard that contemplates the reasonableness of a policy limits executive discretion even more so, particularly as it evaluates executive action in light of congressional purpose.

standard.¹³² Moreover, *Judulang* indicates that in contemporary jurisprudence, executive agencies lack special deference over immigration matters beyond that received by ordinary executive agencies operating within their field of expertise.

Some will no doubt read *Judulang* as merely an unexceptional application of a low, if straightforward, A&C threshold, which has more to do with an egregious policy than an evolving analysis. But *Judulang* is not just about the application of a pre-established standard; it solidifies the A&C analysis' commitment to consideration of purpose—not just of the particular statute in question, but of the immigration laws in general. And it proved the Court's willingness to strike down agency an policy that fell short of that standard. After all, if *Judulang* really were just a standard application of prior law, it is unlikely that eight of the nine circuit courts that had ruled on the issue would have gotten it wrong.¹³³ Having identified *Judulang*'s contributions to the jurisprudence and distilled the present standard of A&C review, I now identify and evaluate potential challenges to other actions by immigration agencies.

III. Channels for Future Challenges

By striking down a Board of Immigration Appeals (BIA) policy not in overt conflict with existing procedures, regulations, or laws, the Court in *Judulang* affirmed the viability of the “arbitrary and capricious” standard as a meaningful avenue for challenging the merits of immigration agency action under either the Administrative Procedure Act (APA) or *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*¹³⁴ While there are a number of policies and actions that may prove susceptible to such challenges, two in particular are worth contemplating

¹³² See *Castro v. Attorney General of the United States*, 671 F.3d 356, 370 (B.I.A. 2012) (rejecting BIA's interpretation of what constitutes a false statement for “purpose or benefit” under § 1182(a)(6)(C)(ii) as “unmoored from the purposes and concerns” of the statute.”);

¹³³ Even the Second Circuit, which was the sole court of appeals to strike down the comparable-grounds rule, did so on equal protection grounds rather through the APA. See note 5, *supra*.

¹³⁴ 467 U.S. 837 (1984).

here because of the important questions that they raise and their reasonable potential for success: (1) DHS’s method for deciding which noncitizens to place in administrative removal proceedings under INA section 238(b) and which to place in general proceedings under section 240, and (2) the BIA’s disparate treatment of expedited removal and border turnarounds for purposes of interrupting the “continuous physical presence” component required for cancellation of removal. Although by no means guaranteed victories, *Judulang*’s rationale renders these claims colorable, if not compelling.

A. DHS’s Method for Sorting Aliens Between Administrative Removal

Proceedings Under INA Section 238(b) and General Proceedings Under Section 240

INA section 238(b) allows for the Attorney General¹³⁵ to place non-LPRs charged with having an “aggravated felony” conviction into either administrative removal proceedings or general removal proceedings under section 240.¹³⁶ While section 238(b)(4) sets out several procedural requirements for individuals placed into administrative removal proceedings,¹³⁷ there remain two primary differences between administrative removal proceedings and standard removal proceedings, the second of which is central to our analysis. First, administrative removal proceedings do not occur before an immigration judge; instead, a DHS officer adjudicates them on an accelerated timeframe.¹³⁸ Second, section 238(b)(5) bars noncitizens placed into administrative removal proceedings from receiving any discretionary relief for removal. Although those in administrative removal proceedings may still apply for mandatory relief such

¹³⁵ The statute itself refers to the “Attorney General,” however the Homeland Security Act of 2002, Pub. L. 107-296, Stat. 2135, created the Department of Homeland Security and vested it with power to enforce immigration statutes.

¹³⁶ INA § 238(b) (“The Attorney General may . . . determine the deportability of [a non-LPR convicted of an aggravated felony conviction] and issue an order of removal pursuant to the procedures set forth in this subsection or section 240.”).

¹³⁷ Such requirements include notice, the option of hiring an attorney, an opportunity to rebut the charges, maintenance of a record for judicial review, and separation of adjudicative and charging functions. INA § 238(b)(4).

¹³⁸ INA § 238(b). The statute authorizes the Attorney General to execute a removal order just fourteen days following the entry of the order.

as withholding of removal¹³⁹ and relief under the Convention Against Torture,¹⁴⁰ they are ineligible for discretionary forms of relief such as adjustment of status with a section 212(h) waiver.¹⁴¹ Thus, the category of removal proceeding in which DHS places a noncitizen concretely expands or constricts the varieties of relief for which the noncitizen may be eligible.

Despite the serious consequences that the DHS charging official's choice of proceeding-type carries for the noncitizen, the Attorney General does not appear to have issued any formal regulations, policies, or even discretionary guidelines to direct those charging decisions.¹⁴² Thus, determinations of whether to place noncitizens in administrative or general removal proceedings are made by low-level DHS officials without any meaningful guidance from above. An A&C challenge (under either *Chevron* or APA)¹⁴³ would target the agency's *de facto* policy of placing non-LPRs in administrative removal proceedings without so much as a set of guiding principles. It would contend that such a policy is unreasonable and unmoored from "the purposes of the immigration laws as well as the appropriate operation of the immigration system" in that it vests low-level officers with enormous discretion in making decisions with potential drastic consequences for the noncitizen's eligibility for relief.¹⁴⁴ After explaining why an A&C challenge might succeed where past challenges to administrative removal have failed, I will describe the courts' jurisdiction to hear such a claim, lay out the primary arguments the challenge

¹³⁹ See INA § 241(b)(3).

¹⁴⁰ See 8 C.F.R. § 208.17.

¹⁴¹ See § 245.

¹⁴² The regulation governing administrative removal under section 238 does not mention the process or proper considerations involved when determining whether or not to place noncitizens in administrative versus general removal proceedings. See 8 C.F.R. § 1238.1. Calls to the Immigration and Customs Enforcement (ICE) Policy Center and review of its website suggest that no formal policies exist within the public domain. See ICE, FOIA Library, <http://www.ice.gov/foia/library/> (last visited May 3, 2012). Although a FOIA request might reveal otherwise, for purposes of this analysis I assume that none exist.

¹⁴³ The challenge would probably proceed on a *Chevron* basis because it focuses on the reasonableness of DHS's interpretation of § 238(b). See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (explaining that executive agency interpretations of statutes within their expertise receive *Chevron* deference unless the interpretation is, *inter alia*, arbitrary and capricious in substance). However, the A&C analysis under *Chevron* is identical to that under APA. *Judulang*, 132 S. Ct. at 483 n.7.

¹⁴⁴ See *Judulang*, 132 S. Ct. at 485.

would make, and conclude with some strategic concerns that might shape an advocacy organization's approach to such a claim.

1. Prior Equal Protection Clause Challenges to Section 238(b) Are Distinguishable

Courts have consistently upheld administrative removal under INA section 238(b) against challenges under the Equal Protection Clause (EPC).¹⁴⁵ Those challenges asserted that the statute lacks a rational basis for allowing the Attorney General to distinguish between similarly situated non-LPRs (by precluding those placed in administrative removal proceedings from receiving discretionary relief, which remains available to those in general removal proceedings).¹⁴⁶ However, those cases do not preordain the outcome of an A&C attack on DHS's implementation of section 238(b) primarily because those were constitutional challenges to Congressional statutes, whereas an A&C claim would be a statutory challenge to an executive agency's interpretation and/or implementation of those statutes.¹⁴⁷ In light of *Judulang*, the differences in type and target of the challenges yield two significant, if somewhat overlapping, implications for the A&C claim: (1) a higher formal standard of review and (2) lower deference to the target's action.

First, the constitutional cases involved a far more relaxed standard than would an A&C challenge rooted in principles of administrative law. Courts rejected the EPC challenges to section 238(b) on the grounds that it would be "rational" for the Attorney General to use his or her discretion to favor ambassadors, professors, and other noncitizens who, in the Attorney

¹⁴⁵ See *Flores-Ledezma v. Gonzales*, 415 F.3d 375 (5th Cir. 2005) (holding that the Attorney General's discretion over Expedited Removal survives rational basis); see also *Gonzalez v. Chertoff*, 454 F.3d 813, 818 (8th Cir. 2006) (same); *United States v. Calderon-Segura*, 512 F.3d 1104, 1107 (9th Cir. 2008) (same); *Graham v. Mukasey*, 519 F.3d 546, 552 (6th Cir. 2008) (same).

¹⁴⁶ See *id.*

¹⁴⁷ Determining whether DHS's vesting field officers with such vast and unguided authority is an interpretation of § 238(b) or simply a product of the agency's attempt to implement 238(b) will determine whether the A&C attack proceeds under the flag of *Chevron* or the APA, respectively. Because *Judulang* confirms that the *Chevron* and APA standards are identical (and that, therefore, the outcome would be the same under either), I do not devote additional analysis to identifying which form would technically be correct. See *Judulang*, 132 S. Ct. at 483 n.7.

General's view, merited special treatment. In so holding, the courts applied either a traditional rational basis test¹⁴⁸ or the "bona fide and facially legitimate" test for immigration legislation.¹⁴⁹ As discussed above, the standards may be satisfied by a court's merely conceiving of a rational basis for the legislation¹⁵⁰ or by the submission of any "facially legitimate and bona fide" reason by the government.¹⁵¹ On the other hand, the A&C standard, while by no means stringent,¹⁵² does impose a more exacting burden on the agency¹⁵³ to establish that its action is not unreasonable when evaluated in light of the purposes of immigration law and appropriate operation of the immigration system.¹⁵⁴

Second, deference makes a difference. The deference due to Congress's passage of section 238(b) dwarfs that commanded by an executive agency's interpretation and/or implementation of that statute.¹⁵⁵ The Fifth Circuit emphasized the deference it owes Congress based on the legislative branch's plenary power over immigration in its decision upholding 238(b).¹⁵⁶ Specifically, the court noted the "need for special judicial deference to congressional

¹⁴⁸ See Chertoff, 454 F.3d 813 at 818

¹⁴⁹ See Flores-Ledezma, 415 F.3d 375 at 381. It is not entirely clear how these two standards interact.

¹⁵⁰ Gonzalez v. Chertoff, 454 F.3d 813, 818 (8th Cir. 2006) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.") (citing FCC v. Beach Communications, Inc., 508 U.S. 307, 313(1993)).

¹⁵¹ See Flores-Ledezma, 415 F.3d at 381 ("a facially legitimate and bona fide reason" will satisfy the rational basis test.").

¹⁵² *Judulang*, 132 S. Ct. at 479 ("[The A&C test] is not a high bar, but it is an unwavering one.").

¹⁵³ See note 90, *supra*.

¹⁵⁴ See note 21, *supra*, and accompanying text. A comparison of the Supreme Court's reasoning in *Judulang* to its reasoning in *Fiallo* further substantiates A&C as a higher threshold than rational basis review or even "facially legitimate and bona fide review." *Fiallo* suggested that one possible justification for the INA's distinction for purposes of awarding visas between illegitimate children and their mothers and illegitimate children and their fathers is "problems of proof," and went on to conclude, "In any event, it is not the judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Fiallo v. Bell*, 430 U.S. 787, 799 (1977). However, in *Judulang*, the Court specifically rejects considerations of cost as a valid justification for an agency action. See *Judulang*, 132 S. Ct. at 478 ("[C]heapness alone cannot save an arbitrary agency policy.").

¹⁵⁵ For a more extensive discussion of plenary power over immigration matters, particularly as it is allotted between the legislative and executive branches, see notes 98-130, *supra*, and accompanying text.

¹⁵⁶ *Flore-Ledezma*, 415 F.3d at 381.

policy choices in the immigration context.”¹⁵⁷ The Court in *Judulang* hinted that the comparable-grounds rule would have likely survived had it been endorsed by Congress.¹⁵⁸ However, the BIA policy lacked a Congressional blessing and so collapsed under A&C review.¹⁵⁹ Here, DHS’s method for placing noncitizens in administrative or general removal proceedings does not receive the same degree of deference as does the Congressionally enacted section 238(b) statute. Thus, the differences between the EPC challenges and the proposed A&C attack in terms of the challenges’ type (i.e. constitutional as opposed to statutory) and target (i.e. congressional statute as opposed to executive action) distinguish prior EPC challenges from a potential A&C claim to the section 238(b) statute itself.

2. U.S. Courts of Appeals Retain Jurisdiction Over Arbitrary and Capricious Challenges to DHS’s Administration of Administrative Removal

Because administrative removal does not provide for hearings before an immigration judge (or any other court), a party seeking to challenge DHS’s implementation of administrative removal would do so by filing a petition for review in the proper circuit court.¹⁶⁰ Although the REAL ID Act significantly scaled back judicial review of orders of removal for noncitizens previously convicted of criminal offenses, section 242(a)(2)(D) specifically provides, “Nothing . . . in any other provision of this Act . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.”¹⁶¹ Whether

¹⁵⁷ *Flore-Ledezma*, 415 F.3d at 381.

¹⁵⁸ *See Judulang*, 132 S. Ct. 476, 485 n.9 (“The case would be different if Congress had intended for § 212(c) relief to depend on the interaction of exclusion grounds and deportation grounds.”).

¹⁵⁹ *Judulang* 132 S. Ct. at 490.

¹⁶⁰ *See* INA § 242(a)(2)(D) (providing that noncitizens may raise “constitutional claims or questions of law” in the appropriate court of appeals).

¹⁶¹ INA § 242(a)(2)(D); *see also* INA § 242(b)(2) (“The petition for review [of an order of removal] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings.”);²

an administrative agency's action is A&C constitutes a question of law. Therefore, its falls under the section 242(a)(2)(D) judiability safe harbor sheltering "questions of law or fact."

Skeptics might object that section 242(g) strips all courts of "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."¹⁶² However, as the Supreme Court made clear in *Reno v. American-Arab Anti-Discrimination Comm.*, "[Section 242(g)] applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, *adjudicate* cases, or *execute* removal orders."¹⁶³ An A&C attack on DHS's policy for determining whether to place a noncitizen in administrative or general removal proceedings does not implicate DHS's decision whether or not to "commence" proceedings," "adjudicate cases," or "execute removal orders"; rather, it challenges the current method for selecting which type of proceedings to commence.¹⁶⁴ As such, there are no jurisdictional bars to a noncitizen raising an A&C claim in the controlling Court of Appeals following the entrance of his or her final order of removal.

3. DHS's Method for Placing Noncitizens in Administrative Removal Proceedings Constitutes Agency Action

Before the A&C standard may attach, the petitioner must first establish that the target of the challenge does, in fact, constitute an agency "action."¹⁶⁵ Here, the "action" in question does

Chertoff, 454 F.3d at 815-16 ("We have jurisdiction over Gonzalez's petition to review the administrative order of removal.").

¹⁶² INA § 242(g).

¹⁶³ 525 U.S. 471, 482 (1999).

¹⁶⁴ *See id.*; *see also* *Flores-Ledezma v. Gonzales*, 415 F.3d at 380 (holding that 242(g) did not bar challenge to deportation procedure); Chertoff, 454 F.2d at 815-16 (same). While *Flores-Ledezma* and *Chertoff* presented a slightly different jurisdictional question to the extent that they involved constitutional challenges to the deportation statute itself, 242(g) does not create a "constitutional claim" exception.

¹⁶⁵ Administrative Procedure Act, 5 U.S.C. § 706 (2006) ("The reviewing court shall . . . hold unlawful and set aside *agency action*, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (emphasis added).

not inhabit the form of a formal regulation or policy. And it doesn't need to.¹⁶⁶ Instead, the A&C claim would challenge DHS's *de facto* policy of vesting low-level charging officials with unfettered and unguided authority to place non-LPRs convicted of aggravated felonies in either administrative or general removal proceedings. That constitutes action.

If challenged, DHS would likely attempt to recast the claim as one involving agency *inaction*: DHS's disinclination to announce a formal policy of considering certain criteria or priorities when considering the form of proceedings in which to place noncitizens. DHS would advance that argument because, although the jurisprudence remains somewhat uncertain,¹⁶⁷ inaction generally receives a presumption of unreviewability.¹⁶⁸ Moreover, the argument would go, the APA requires a far higher standard¹⁶⁹ than the one applied to agency action before a court may intervene to compel an agency to act where the agency has chosen not to.¹⁷⁰

A closer examination of how the Supreme Court has conceptualized "inaction" reveals that DHS's consolidation of decision-making authority in low-level charging officials constitutes agency action.¹⁷¹ In its most definitive treatment of judicial review of agency inaction, the Court explained, "[W]hen an agency refuses to act it generally does not exercise its *coercive* power

¹⁶⁶ See *United States v. Gaubert*, 499 U.S. 315, 316 (1991) (standing for the principle that policies may be implied).

¹⁶⁷ Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 Va. Envtl. L.J. 461-62 (2008) (observing, "There is confusion about the proper standard of review and the distinction between agency action and inaction," and arguing, "[T]here is no fundamental difference between judicial review of agency inaction or action under the APA.").

¹⁶⁸ *Heckler v. Chaney*, 470 U.S. 821, 834, 105 S. Ct. 1649, 1657, 84 L. Ed. 2d 714 (1985)

¹⁶⁹ 5 U.S.C. § 706(1) ("The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.").

¹⁷⁰ "[A] claim under [the APA provision governing judicial review of agency inaction] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

¹⁷¹ Even if a court found DHS's method for choosing between administrative or general removal proceedings to constitute inaction, challengers could still reasonably contend, albeit less convincingly, that DHS had a nondiscretionary duty to establish a policy governing its implementation of 238(b), and the process by which it would determine whether to place a noncitizen in administrative or general removal proceedings. See Raymond Murphy, *The Scope of Review of Agencies' Refusal to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 103 (1985) ("[W]here the agency pursues a policy of nonenforcement that is so extreme as to be an abdication of its statutory responsibilities, courts may be able to take review."); see also, e.g., *Hong Wang v. Chertoff*, 550 F.Supp.2d 1253 (W.D. Wash. 2008) (holding USCIS possessed a nondiscretionary duty to act on noncitizen's application to adjust status within a reasonable amount of time).

over an individuals' liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."¹⁷² Thus, the Court understood agency inaction as a non-coercive failure to exercise its authority.

In contrast, DHS's exercise of power to place noncitizens in administrative removal proceedings without a reasonable framework for guiding those decisions is both "coercive" and an "exercise [of] its authority." It substantially increases noncitizens' likelihood of removal by eliminating all forms of discretionary relief,¹⁷³ reducing the time period in which noncitizens may gather evidence or obtain legal counsel,¹⁷⁴ and restricting opportunities for judicial review.¹⁷⁵ The Supreme Court has repeatedly described deportation as a severe consequence representing a coercive governmental act, and so increasing its likelihood of occurrence cannot be characterized as passive inaction.¹⁷⁶ Instead, doing so aligns with the Court's description of agency action: "[W]hen an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner."¹⁷⁷ As it relates directly to "enforce[ment]" and "exercise[] [of] its power," DHS's methodology for placing noncitizens in administrative or general removal proceedings fits comfortably within the perimeter of agency action. As a form of agency action, the question becomes only whether the

¹⁷² Chaney, 470 U.S. at 832 (emphasis in original).

¹⁷³ See § 238(b)(5).

¹⁷⁴ See § 238(b)(3) (authorizing the Attorney General to execute an order of removal as soon as 14 calendar days after its issuance); see also STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 3 (2011) (reporting that noncitizens in removal proceedings who are represented by counsel are 600% more likely to prevail than those not represented by counsel).

¹⁷⁵ See § 238(b)(3).

¹⁷⁶ See, e.g., Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (describing the "harsh consequences of deportation"); see also, e.g., Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (describing deportation as a "drastic measure"); Fong Yue Ting v. United States (describing deportation as a "penalty"), St. Cyr, 533 U.S. at 323 ("Preserving the [criminal] client's *right to remain in the United States* may be more important to the client than any potential jail sentence") (emphasis added); Rosenberg v. Fleuti, 374 U.S. 449, 455 (1963) (recognizing, "nothing can be more disingenuous than to say that deportation in these circumstances is not punishment.").

¹⁷⁷ Chaney, 470 U.S. at 832.

de facto policy is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁷⁸

4. DHS’s Method for Sorting Aliens Between Administrative Removal

Proceedings Under INA Section 238(b) and General Proceedings Under Section 240

Is Arbitrary and Capricious

An A&C challenge to DHS’s method for selecting administrative or general removal proceedings would assert that vesting low-level field officers with virtually unfettered power—particularly without guidance to ensure that they at least consider a standardized set of factors or priorities—fails to advance the purpose of section 238(b) and clashes sharply with the appropriate operation of the immigration system.¹⁷⁹ First, the method in question fails to advance the Congressional purpose motivating section 238(b). While one of Congress’s objectives in enacting the larger Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹⁸⁰ was admittedly to expedite the removal of aliens who had been convicted of aggravated felonies,¹⁸¹ there is little evidence that Congress intended to do so through an unprecedented delegation of outcome-determinative authority to low-level charging officials.¹⁸² By authorizing the Attorney General to determine the deportability of qualifying noncitizens under administrative removal procedures or general removal procedures, Congress gave no indication that it intended for the placement-decision to be made by field officers without guidance from the Attorney General.¹⁸³

¹⁷⁸ 5 U.S.C. § 706(2).

¹⁷⁹ As in section III.A, my research suggested that no formal policies are available within the public domain. Although a FOIA request might reveal otherwise, for purposes of this section I assume that none exist.

¹⁸⁰ Pub.L. 104-208, 110 Stat. 3009-546.

¹⁸¹ *Zhang v. INS*, 274 F.3d 103, 108 (2d Cir.2001) (“[I]t is beyond cavil that one of Congress’s principal goals in enacting IIRIRA was to expedite the removal of aliens who have been convicted of aggravated felonies.”) *United States v. Hernandez-Vermudez*, 356 F.3d 1011, 1014 (9th Cir. 2004).

¹⁸² *Cf.*, *Lettman v. Reno*, 168 F. 3d 463, 468 (11th Cir. 1999) (mentioning that IIRIRA intended to expedite removal for aggravated felons, but not that it intended to concentrate outcome-determinative power in low-level charging officials).

¹⁸³ *See* S.Rep. No. 104-249 (1996).

In fact, as I now detail, such unsanctioned inflation of low-level charging officials' decision-making authority served as one of the primary reasons the Court in *Judulang* struck down the comparable-grounds rule, as such low-level aggrandizement undermined the appropriate operation of the immigration system.¹⁸⁴

The process by which DHS selects either administrative or general removal proceedings may be attacked as A&C because it vests charging officials with enormous power to eliminate noncitizens' potential options for relief, without ensuring that those officials at least consider the legal implications of their charging decisions. It thereby undermines the appropriate operation of the immigration system. In *Judulang*, the court loudly rejected the BIA's comparable-grounds test for section 212(c) eligibility, in part, because the Government lacked a policy to govern—or even guide—charging officials' individual decisions about whether or not to charge a given alien with removal grounds eligible for section 212(c) relief.¹⁸⁵ Indeed, just as under the comparable-grounds regime, under DHS's current implementation of section 238(b), the charging official enjoys essentially unbridled discretion to make an outcome-determinative decision about what charge to bring: under the comparable-grounds rule, the impermissible choice was between a ground of deportation with or without a “comparable” ground of exclusion—the latter of which stripped the noncitizen of eligibility for a section 212(c) waiver;¹⁸⁶ in the administrative removal context, the analogous choice is between placement of the noncitizen in general removal proceedings and placement in administrative removal proceedings—the latter of which similarly strips a noncitizen of eligibility for all discretionary relief.¹⁸⁷ Just as in the comparable-grounds

¹⁸⁴ See *Judulang*, 132 S. Ct. at 486.

¹⁸⁵ See *Judulang*, 132 S. Ct. at 486 (“[T]he Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring, or that those officials are exercising their charging discretion with § 212(c) in mind.”).

¹⁸⁶ *Judulang*, 132 S. Ct. at 486.

¹⁸⁷ INA § 238(b) (1), (5)

context, the eligibility for relief of an alien convicted of an aggravated felony “hangs on the fortuity of an individual official’s decision.”¹⁸⁸ Thus, absent a regulation or policy guiding charging officials’ decision-making, “An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in this country.”¹⁸⁹ Subjecting noncitizens to such a high-stakes dice game constitutes A&C action that may not survive under the APA or *Chevron*.

The significant implications of a charging decision do not alone render a system A&C. However, an agency’s consolidation of unfettered and unguided power in low-level officers might. As the Court in *Judulang* held, agency action must be based on non-arbitrary, “relevant factors.”¹⁹⁰ And yet, the Attorney General has not issued any regulations to guide charging officials in sorting noncitizens between general and administrative removal proceedings.¹⁹¹ As in *Judulang*, “the Government has provided no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring, or that those officials are exercising their charging discretion with section 212(c) [analogous, for our purposes, to the discretionary relief implications of section 238(b)] in mind.”¹⁹² Without guidance from above, low-level charging decisions with serious implications for noncitizens’ eligibility for relief might as well depend on a coin-flip.¹⁹³ *Judulang* emphasizes, “APA’s ‘arbitrary and capricious’ standard is designed to thwart” the making of deportation decisions into a “sport of chance.”¹⁹⁴ Thus, a charging official’s random and potentially unreasoned determination of whether or not to place an alien into expedited removal proceedings as opposed to regular section 240 proceedings also

¹⁸⁸ *Judulang*, 132 S. Ct. at 486.

¹⁸⁹ *Judulang*, 132 S. Ct. at 486.

¹⁹⁰ *Judulang*, 132 S. Ct. at 485 (citing *State Farm*, 463 U.S. at 43).

¹⁹¹ See note 179, *supra*.

¹⁹² *Judulang*, 132 S. Ct. 487.

¹⁹³ *Cf.* *Judulang*, 132 S. Ct. at 486 (comparing the comparable-grounds rule to a coin-flip).

¹⁹⁴ *Judulang*, 132 S. Ct. at 487.

implicates the core concerns motivating APA review.¹⁹⁵ DHS's *de facto* policy of amassing authority in charging officials to place noncitizens in either administrative or general removal proceedings is reminiscent of the BIA's comparable grounds policy. "A method for disfavoring deportable aliens that bears no relation to [the purposes of immigration laws or appropriate operation of the immigration system]—that neither focuses on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious."¹⁹⁶ And, the claim would go, such is the current process of the administrative removal placement process.

Finally, DHS might attempt to distinguish *Judulang*'s disapproval of "everything hang[ing] on the fortuity of an individual official's decision"¹⁹⁷ and rejection of "coin-flipping" as an appropriate mechanism for resolving deportation cases¹⁹⁸ on the grounds that the petitioner in *Judulang*, and indeed, all individuals affected by section 212(c) jurisprudence, was a lawful permanent resident ("LPR"), whereas section 238(b) applies only to non-LPRs.¹⁹⁹ DHS would argue that because LPRs retain a stronger interest in remaining in the country than non-LPRs, the law requires fewer procedural protections for the latter than for the former.²⁰⁰ However, a closer reading of *Judulang* reveals that the Court not only refrains from attributing importance to *Judulang*'s status as an LPR, but in the relevant passages refers exclusively to "aliens," and not to LPRs.²⁰¹ Moreover, the court's APA-based reasoning focuses on the arbitrariness in the

¹⁹⁵ *Judulang*, 132 S. Ct. at 487 (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879).

¹⁹⁶ *Judulang*, 132 S. Ct. at 486.

¹⁹⁷ *Judulang*, 132 S. Ct. at 486.

¹⁹⁸ *Judulang*, 132 S. Ct. at 486.

¹⁹⁹ INA § 238(b); *cf. Vera v. Attorney Gen. of United States*, 672 F.3d 187, 198 n.19 (3d Cir. 2012) (distinguishing *Judulang* from a case involving a visa-overstay because the former case governed only "lawfully admitted alien[s]").

²⁰⁰ *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with *permanent residence* his constitutional status changes accordingly.") (emphasis added).

²⁰¹ *See, e.g., Judulang*, 132 S.Ct. at 484 ("By hinging a deportable alien's eligibility for discretionary relief on the chance . . ."), 485 ("A method for disfavoring deportable aliens that bears no relation to these matters . . . is arbitrary and capricious"), 490 (cheapness cannot justify arbitrary agency policies because "If it could, flipping coins would be a valid way to determine an alien's eligibility for a waiver.").

system—not the rights of the affected alien.²⁰² Thus, *Judulang* does not reserve its logic for LPRs.

In fact, consideration of the purpose of INA section 212(h) reveals that Congress did not intend to preclude even non-LPRs convicted of aggravated felonies from all routes of relief. As a statute that provides for discretionary relief to non-lawful permanent residents (“non-LPRs”) with aggravated felony convictions—precisely those noncitizens who may be placed in administrative removal proceedings under section 238—it serves as evidence of Congress’s intent that even certain non-LPRs convicted of aggravated felonies should have access to at least some potential relief, unless there is good reason to preclude them from it. By enabling low-level officials to arbitrarily preclude certain noncitizens from eligibility for relief, DHS’s *de facto* policy of vesting charging officers with absolute discretion interferes with the purposes of the immigration laws in violation of the APA as framed by *Judulang*.²⁰³

5. DHS Officers’ Sorting of Noncitizens Between Administrative Removal Proceedings and General Removal Proceedings Is Not Defensible as Prosecutorial Discretion.

If the EPC cases are any indication, DHS would likely defend its method for placing noncitizens in administrative or general removal proceedings as an exercise of prosecutorial discretion that is immune from judicial review.²⁰⁴ Notably, despite the government’s mounting of a prosecutorial discretion defense in the Fifth and Eighth circuits, those courts consciously declined to rule on the question.²⁰⁵ While the doctrine of prosecutorial discretion is a robust one

²⁰² See, e.g., *Judulang*, 132 S. Ct. at 484 (surveying ordinary principles of administrative law), 485 (focusing on BIA’s approach to discretionary relief), 487 (explaining that deportation is too serious of a consequence to hinge on chance).

²⁰³ See *id.*

²⁰⁴ See *supra* notes 145-159 and accompanying text.

²⁰⁵ See *Flores-Ledezma v. Gonzales*, 415 F.3d 375, 382 (5th Cir. 2005) (“[W]e decline at this juncture to equate the Attorney General’s discretion to choose which proceeding a non-LPR will receive with prosecutorial discretion.”).

that generally accords prosecutors wide latitude in charging choices in both immigration and criminal contexts,²⁰⁶ the decisions of *whether to charge* or *which charge* to bring—questions at the heart of prosecutorial discretion doctrine—differ critically from the decision of in *which system* to place and prosecute a noncitizen.²⁰⁷

The doctrine of prosecutorial discretion, perhaps most familiar in the criminal context, maintains that prosecutors enjoy broad discretion in their decisions of whether or not to prosecute a given individual and the severity of the charges to bring.²⁰⁸ Courts view such deference as appropriate because “the decision to prosecute is particularly ill-suited to judicial review.”²⁰⁹ That is because prosecutors must make calculations based on a multitude of factors including “strength of the case . . . , the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan [which are] not readily susceptible to the kind of analysis courts are competent to undertake.”²¹⁰ The deference afforded to an agency official’s decision whether or not to commence removal proceedings against a noncitizen in an immigration context is as great, if not greater, than the deference awarded in the criminal context.²¹¹

But decisions about *in which system* to place and prosecute a noncitizen are different. While choices about what charges to bring, or whether to bring them at all, sit in the core of the prosecutorial discretion doctrine, selection of a procedural system falls outside of it and constitutes an unprecedented modulation of prosecutorial discretion. In *Reno v. American-Arab*

²⁰⁶ Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 870 (2009) (“Federal prosecutors wield enormous power.”)

²⁰⁷ Indeed, the distinction explains why the circuit courts, *see supra* note 205, found the question of whether prosecutorial discretion encompassed decisions to place qualifying noncitizens in administrative removal proceedings to be an open question.

²⁰⁸ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (observing that prosecutors receive “broad discretion” in their decisions of whether or not to prosecute).

²⁰⁹ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999).

²¹⁰ *Id.*

²¹¹ *Id.* at 490-91.

Anti-Discrimination Commission, the Supreme Court rejected a selective prosecution claim and defended executive officials' decisions to initiate proceedings against virtually any deportable alien on the ground that if they are removable, the government may remove them.²¹² However, the decision to place someone into administrative versus general removal proceedings is not a routine decision like—and in fact differs significantly from—the decision of *whether* to initiate removal proceedings.

From a legal standpoint, the decision to initiate removal proceedings against an individual does not typically alter the remedies they have available. In contrast, placement in administrative removal proceedings automatically eliminates all discretionary routes for relief and thereby fundamentally reconfigures the noncitizen's legal options. And a charging official may do so without even realizing it. Indeed, one of the Court's concerns in *Judulang* was that DHS officials would affect noncitizens' eligibility for section 212(c) relief without the charging official ever contemplating the implications of his or her decision to pick one charge as opposed to another.²¹³ Similarly, absent an explicit policy or regulation mandating as much, there is no guarantee that charging officials will consider the impact their decisions will have on noncitizens' options for relief before selecting to proceed through administrative or general removal proceedings. Moreover, the proposed A&C challenge does not seek to curtail the discretionary authority exercised by the executive branch in determining which system in which to place noncitizens. Similar to the Court's remand to the BIA to determine a replacement for the comparable-grounds approach,²¹⁴ the proposed A&C challenge would merely demand that the Attorney General guide its officers' discretion; the challenge would not seek to impose such a policy or regulation externally. An attack on DHS's *de facto* policy of consolidating unfettered

²¹² *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999)

²¹³ *Judulang*, 132 S. Ct. at 486.

²¹⁴ *Judulang*, 132 S. Ct. at 490.

authority in low-level officials to limit noncitizens' options for relief without providing them guidance in the form of regulations or formal policies might thus dodge a prosecutorial discretion defense.

6. Conclusion

Judulang provides immigrant defense attorneys with a cogent argument that DHS's method of sorting noncitizens into section 238(b) administrative and section 240 general removal proceedings is A&C and that, therefore, its placement of individuals into the former should be enjoined until it issues a policy or regulation to guide charging officers' decisions. While noncitizens and their attorneys will no doubt seek to raise any defense they can,²¹⁵ advocacy organizations should contemplate whether such a challenge would advance their larger goals. After all, one possible response by DHS to an A&C claim might be just to issue a policy that sets placement in administrative removal proceedings as a default to be overridden only in cases of direct intervention by the Attorney General.

Before bringing such a challenge, advocacy organizations should first confirm that no policies or guidelines exist by filing a Freedom of Information Act (FOIA) request. They might then endeavor to collect data, via either FOIA requests or otherwise, on the number and qualities of qualifying noncitizens who are placed in administrative versus general removal proceedings, and, if possible, on individual officers' charging statistics. Such information would inform an organization's thinking about whether bringing an A&C claim would improve or worsen conditions. For instance, if the data revealed that many more noncitizens were being placed in general removal proceedings than administrative removal proceedings, organizations might be

²¹⁵ Of course, the short timeframe of administrative removal proceedings coupled with mandatory detention, *see* INA § 236(c), suggests that noncitizens in such proceedings are less likely to obtain counsel competent to file an A&C challenge or, even if they do, may encounter difficulty in preparing and filing an A&C claim before their removal is executed.

more hesitant to challenge the status quo than if the reverse were true. Additionally, access to such information could bolster an A&C claim if the data revealed that placement in administrative removal proceedings does not correlate with any particular set of traits, or if they indicated that certain DHS officials are far more likely than their colleagues to place noncitizens of comparable profiles in administrative removal proceedings. While an A&C claim's outcome would be far from certain, the more information advocacy organizations could muster and present as evidence of arbitrary implementation of section 238(b), the more convincing the case would be.

B. BIA's Disparate Treatment of Expedited Removal and Border Turnarounds for Purposes of Interrupting the "Continuous Physical Presence" Component Required for Cancellation of Removal²¹⁶

Cancellation of removal under INA section 240A is a discretionary form of relief that enables otherwise removable noncitizens to avoid removal and to (re-)acquire a green card.²¹⁷ The statute contains several eligibility provisions, one of which requires the applicant to have been "physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application."²¹⁸ The statute elaborates that short breaks in continuity do not render a noncitizen ineligible for cancellation.²¹⁹ However, service of a "notice to appear" and the commission of certain criminal offenses do.²²⁰ In addition to interruptions recognized by statute, the BIA has ruled that other actions, such a voluntary departure under

²¹⁶ I am grateful to Andrew Knapp for proposing this idea.

²¹⁷ See INA § 240A(b).

²¹⁸ *Id.*

²¹⁹ See INA § 240A(d)(2) ("An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.").

²²⁰ INA § 240A(d)(1).

threat of deportation, may also disrupt a period of “continuous physical presence.”²²¹ On the other hand, the BIA has expressly held that a “voluntary turnaround,” in which an immigration officer permits the arriving noncitizen to withdraw his or her application for admission instead of subjecting the noncitizen to formal exclusion, such as through in expedited removal proceedings,²²² does not break a period of continuous presence.²²³

The decision of whether to formally exclude an arriving noncitizen or to offer them the opportunity to withdraw their application lies, with certain exceptions for asylum and Convention Against Torture applicants, in the unreviewable discretion of the immigration officer who happens to process the arriving noncitizen.²²⁴ If the immigration officer determines that the arriving noncitizen has presented false documents, or simply lacks adequate documentation, the officer may exercise his or her unreviewable discretion (unless the noncitizen asserts a fear of persecution) to order the noncitizen removed.²²⁵ Thus, the immigration officer’s generally unreviewable decision to place arriving noncitizens in removal proceedings will interrupt any period of continuous presence that they have accrued and so may eliminate their eligibility for cancellation.

²²¹ See *In Re Romalez-Alcaide*, 23 I. & N. Dec. 423 (B.I.A. 2002) (“[R]espondent’s departures under threat of deportation broke his continuous physical presence in this country.”). All circuits that have considered the rule have upheld it as a “reasonable” exercise of discretion. See *Mendez-Reyes v. Attorney Gen.*, 428 F.3d 187, 191-92 (3d Cir. 2005); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 427 (7th Cir. 2004); *Palomino v. Ashcroft*, 354 F.3d 942, 944 (8th Cir. 2004); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 218 (5th Cir. 2003); *Vasequez-Lopez v. Ashcroft*, 343 F.3d 961, 973 (9th Cir. 2004).

²²² See INA § 235 (providing for expedited removal of arriving aliens).

²²³ *In Re Avilez-Nava*, 23 I. & N. Dec. 799 (B.I.A. 2005) (“[I]f . . . the evidence indicates that the alien's encounter with immigration authorities involves nothing more than being returned to the border following refusal of admission for failure to have proper documents, the encounter does not break continuous physical presence.”).

²²⁴ See INA § 235(a)(4) (“An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.”), (b)(1) (mandating that all determinations are final and unreviewable “unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.”); see also *Ebba Gebisa, Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 566 (2007) (highlighting “the wide discretion granted to low-level immigration inspection officers to make unreviewable admission and removal decisions.”); Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 244 (1998) (offering an overview of the expedited removal process)

²²⁵ INA § 235(b)(1)(A)(i).

To understand how such a scenario might play out in practice, imagine a simple example.²²⁶ Suppose a noncitizen mother has been continuously present on an H-1 visa with her United States citizen child in the United States for the past eleven years. Let's say that she travels home to Mexico for a weekend. Upon her return to the United States, she presents her visa to Customs and Border Patrol (CBP) agent working at the border. If he suspects (for whatever reason) that her visa is fraudulent or belongs to someone else, or if, as she is looking through her purse for her visa she realizes that she has forgotten the visa at her lodging in Mexico and just needs to drive back home to get it, he may order her removed via expedited removal (assuming she does not express a fear of persecution). Under the BIA's rule in *In re Avilez-Nava*, the CBP agent's unreviewable decision to place her in expedited removal proceedings rather than to permit her to withdraw her application interrupts her continuous presence (a weekend's absence would otherwise fall within the under-ninety day exception to departures from the United States) and renders her ineligible for cancellation of removal. Importantly, had that agent allowed her to withdraw her application so that she could attempt to re-enter later in the week with more documentation (if he suspected it was not her visa) or simply to drive home to retrieve her visa (had she forgotten it), she would have maintained the ten-year period of continuous presence in the United States necessary to qualify for cancellation. However, because the agent chose not to, she became ineligible for a major ground of relief from removal.²²⁷ Several courts of appeals

²²⁶ For purposes of simplicity, assume the departure occurred prior to 1996, when Congress passed INA section 241(a)(5), allowing for reinstatement of prior orders of removal. For a real-life example, see *Landin-Zavala v. Gonzales*, 488 F.3d 1150, 1151 (9th Cir. 2007).

²²⁷ Additionally, because expedited removal precludes noncitizens from all discretionary forms of relief, even though the mother would otherwise be immediately eligible for cancellation of removal under 240A(b) due to her accrual of ten years of continuous presence, agent's potentially whimsical decision to place her in expedited removal proceedings eliminates her ability to apply for that form of relief. See INA § 238(b)(5) ("No alien described in this section shall be eligible for any relief from removal that the Attorney General may grant in the Attorney General's discretion."). While *Judulang* offers fodder for challenging the absence of rules or guidelines for placement of noncitizens in expedited removal under 238(b)(5) in much the same way as it does with regard to administrative

have upheld the BIA's distinction between voluntary turnarounds and placement in expedited removal for purposes of determining continuous presence as a reasonable interpretation of an ambiguous statute that is accorded deference under *Chevron*.²²⁸ However, those decisions occurred before *Judulang*, which offers advocates powerful arguments for the courts to reconsider the BIA policy's reasonableness.

Like the comparable-grounds rule invalidated in *Judulang*, the expedited removal/voluntary turnaround distinction for purposes of cancellation hinges almost entirely upon the charging decision of a low-level immigration officer.²²⁹ Indeed, whether a particular applicant for admission is permitted to withdraw her application or is placed in expedited removal and stripped of eligibility to apply for cancellation of removal depends on the unreviewable whim of the immigration officer. And, as in *Judulang*, there is "no reason to think that immigration officials must adhere to any set scheme in deciding what charges to bring [i.e. whether to allow an applicant to withdraw their application], or that those officials are exercising their charging discretion with section 212(c) [i.e. section 240A cancellation of removal] in mind."²³⁰ Investing such a magnitude of unreviewable discretion in the hands of a low-level immigration officer transforms deportation decisions into a "sport of chance,"²³¹ as *Judulang* held they cannot be. Thus, advocates may successfully argue that the BIA's disparate treatment

removal placements that challenge would look sufficiently similar to that described in Part III.A., *supra*, that repeating it here would be redundant. As such, I focus on the formal BIA rule.

²²⁸ See *Vadquez v. Holder*, 635 F.3d 563, 568-70 (1st Cir. 2011) (finding that BIA's approach "was not unreasonable"); *Ascencio-Rodriguez v. Holder*, 595 F.3d 105, 112 (2d Cir. 2010) ("[T]he BIA's interpretation of the cancellation of removal statute expressed in both of those decisions is reasonable and is entitled to *Chevron* deference."); *Valadez-Munoz v. Holder*, 623 F.3d 1304, 1311 (9th Cir. 2010) (affirming the BIA's approach as "reasonable.").

²²⁹ *Judulang*, 132 S. Ct. at 486.

²³⁰ *Judulang*, 132 S. Ct. at 486.

²³¹ *Judulang*, 132 S. Ct. at 487.

of border turnarounds and expedited removal orders conflicts with the appropriate operation of the immigration system and is, therefore, A&C even under a *Chevron* or APA analysis.²³²

IV. Conclusion

The decision in *Judulang* surprised advocates and analysts alike. A unanimous Court overturned a nearly uniform set of circuit courts by striking down an executive agency's rule in a domain in which executive agency action has been viewed traditionally as deserving of special deference. In this Article, I show that, perhaps, it shouldn't have been so surprising. There exists a lengthy history of application of the APA to immigration agency actions. *Judulang* was not the first time that a court struck down a BIA policy under the APA.²³³ Nevertheless, *Judulang* did take a significant step forward in defining the contours and content of the "arbitrary and capricious" ("A&C") standard. That case inaugurated a meaningful, independent and substantive A&C review in the immigration context, in which courts must evaluate the agency's justification of its action in light of the purposes of immigration laws as well as the general operation of the immigration system. And the decision broadcast condemnation for agency policies that vest low-level immigration officials with broad discretion to drastically restrict noncitizens' options for relief. Finally, *Judulang* added to the growing corpus of cases suggesting that, to the extent that many have viewed the executive as enjoying special deference over immigration matters, that discretion may be in decline.

Judulang arms advocates with an A&C standard that may enable challenges to a number of immigration agency actions. I examined two of them: (1) DHS's method for sorting aliens between administrative removal proceedings under INA section 238(b) and general proceedings under section 240 and (2) the BIA's disparate treatment of expedited removal and border

²³² See notes 87-96 and accompanying text.

²³³ See notes 24-54 and accompanying text.

turnarounds for purposes of interrupting the “continuous physical presence” component required for cancellation of removal. There are no doubt many more, but I leave them for future scholars and advocates to address.²³⁴ *Judulang* is part of a growing tide of cases openly applying ordinary principles of domestic law to immigration cases. As the immigration canon develops, courts may continue to erode the prevalent notion that ‘immigration is special’ and scale back the corresponding perception of an aura of deference to executive agencies’ decisions on immigration matters. Whether or not courts will ever close the perceived gap between immigration and domestic jurisprudence, *Judulang* makes clear that the “immigration”-brand does not immunize executive discretion from substantive attacks. As such, *Judulang*’s implementation of the A&C standard offers a meaningful way for noncitizens to challenge the arbitrariness of immigration agencies’ action, and thereby shifts, if subtly, the immigration system towards a more just jurisprudence.

²³⁴ See, e.g., the BIA’s distinction between pleas and convictions for purposes of section 212(c) relief, application of *Silva-Trevino*’s modified categorical approach to crimes involving moral turpitude but not to aggravated felonies, counting of LPR parents’ time but not USC parents’ time for purposes of LPR cancellation, and its recognition paraphernalia convictions as meeting the thirty-gram exception for section 212(h) waivers but not for purposes of § 237.