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DANIEL KANSTROOM

## The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law

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“The better part of valour is discretion . . .”<sup>1</sup>

“We set up the courts. We can unset the courts.”<sup>2</sup>

## I. INTRODUCTION

Discretion, the essential, flexible shock absorber of the administrative state, must be respected by our legal system. Justice Felix Frankfurter once qualified this assessment in an important way. Discretion, he wrote, is “only to be respected when it is conscious of the traditions which surround it and of the limits which an informed conscience sets to its exercise.”<sup>3</sup> Judicial construction of the newly-passed “REAL ID Act”<sup>4</sup> will necessarily plumb the deep meaning of this qualification. This article suggests some of the limits that such an “informed conscience” ought to set.

For purposes of this article, recent history begins in 1996, a year that saw radical attacks on judicial review of immigration cases.<sup>5</sup> Cresting a transitory wave of anti-immigrant sentiment, a Republican Congress and the Clinton Administration fundamentally restructured immigration law. Two laws, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)<sup>6</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)<sup>7</sup> contained a severe limitation on judicial review of certain types of immigration decisions. These laws were, in effect, an assertion that much of immigration law was outside the mainstream of the United States rule of law. In 1997, I optimis-

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1. Sir John Falstaff. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 5, sc. 4.
  2. Tom Delay, quoted by Peter Wallsten, *2 Evangelicals Want to Strip Courts' Funds*, L.A. TIMES (Apr. 22, 2005) (cited in *Miara v. First Allmerica Fin. Life Ins. Co.*, 379 F. Supp. 2d 20, 70 n.57 (D. Mass. June 16, 2005)).
  3. *Carlson v. Landon*, 342 U.S. 524, 562 (1951) (Frankfurter, J., dissenting) (quoting Mark De Wolfe Howe, *THE NATION*, Jan. 12, 1952, at 30).
  4. The REAL ID Act is part of the much broader Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109–13, 119 Stat. 231 (May 11, 2005).
  5. See generally Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).
  6. Pub. L. No. 104–132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.). AEDPA is extraordinarily far-ranging and implicates constitutional provisions from Article III to the Suspension Clause and the First and Fifth Amendments.
  7. Pub. L. No. 104–208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.). Among other features, AEDPA and IIRIRA:
    - eliminated judicial review of certain types of deportation (removal) orders
    - radically changed many grounds of exclusion and deportation
    - retroactively expanded criminal grounds of deportation
    - eliminated and limited discretionary waivers of deportability
    - created mandatory detention for many classes of non-citizens
    - expedited deportation procedures for certain types of cases
    - vastly increased possible state and local law enforcement involvement in deportation, and
    - created a new type of streamlined “removal” proceeding — permitting the use of secret evidence — for non-citizens accused of “terrorist” activity

tically wrote: “[T]he complete preclusion of a judicial role in decisions of this magnitude, affecting in many cases legal permanent residents and their U.S. citizen families, will come to be seen . . . as the transitory excess of government actors who, as Henry Hart once put it, ‘knew not Joseph.’”<sup>8</sup>

This prediction was partly correct. The judiciary has indeed resisted the *complete* elimination of judicial review of most deportation cases.<sup>9</sup> Among the more subtle features of the otherwise remarkably un-subtle 1996 laws, however, was their preclusion of judicial review of certain so-called “discretionary” agency decisions.<sup>10</sup> Nearly a decade later, despite extensive Supreme Court construction of these statutes, two basic questions remain unanswered. First, what, exactly, are “discretionary” immigration agency decisions? Second, may such decisions legitimately be rendered unreviewable by courts?

Due to the harshness and rigidity of our current deportation laws and the powerful role historically played by discretion in immigration law — often the last repository of mercy in an otherwise merciless system — the issue of discretion is crucially important. Unfortunately, it is also very complicated.

We face a rather strange legal situation. After many years of chaotic discretionary accretion and affirmation in immigration law, Congress has passed laws that prevent the judiciary from reviewing “discretionary” decisions. The Supreme Court has recently implied that *habeas* courts may be precluded from reviewing the exercise of administrative discretion.<sup>11</sup> But we still lack fundamental agreement on what discretion actually means. Discretion is an extremely amorphous concept — a kind of shadow standard, a contentless gap-filler, a euphemism for allocation of authority.

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8. Kanstroom, *supra* note 5, at 706 (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389–91 (1953) (referring to Supreme Court justices who did not believe that “courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used . . . and . . . that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion”)).
  9. In *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999), for example, the Court construed 8 U.S.C. § 1252(g) and concluded that this provision imposes jurisdictional limits only on claims addressing one of the three “decisions or actions” specifically enumerated in the statute. 525 U.S. at 482.
  10. The earlier version of 8 U.S.C. § 1252(a)(2)(B) provided: “[n]otwithstanding any other provision of law, no court shall have jurisdiction to review —
    - (i) any judgment regarding the granting of [discretionary] relief under section 212(h), 212(i), 240A, 240B, or 245, or
    - (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [asylum for refugees].”
 IIRIRA, ch. 3 § 306, Pub. L. No. 104–108 Stat. 3009 (1996) (current version at 8 U.S.C. § 1252(a)(2)(B) (2006)).
  11. See *INS v. St. Cyr*, 533 U.S. 289 (2001). See generally Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002).

The REAL ID Act<sup>12</sup> puts a fine point on this problem.<sup>13</sup> The new law amended 8 U.S.C. § 1252(a)(2)(B), which now states:

Notwithstanding any other provision of law (statutory or nonstatutory) . . . and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a).

The major changes in this section were the clarification of congressional intent to preclude district court *habeas* jurisdiction in such cases, the rather opaque parenthetical overriding of “statutory or nonstatutory” sources of law, and the expansion of scope beyond removal proceedings.<sup>14</sup>

Most interestingly, however, the REAL ID Act also added a new subsection (D) to 8 U.S.C. § 1252:

Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) 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. (*emphasis added*).

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12. Pub. L. No. 109–13, Div. B, Title I, 119 Stat. 302.

13. The jurisdictional parts of the REAL ID Act were effective May 11, 2005:

(3) The amendment made by subsection (e) [amending subsec. (b)(4) of this section] shall take effect on the date of the enactment of this division and shall apply to all cases in which the final administrative removal order is or was issued before, on, or after such date.

(4) The amendments made by subsection (f) [amending subsec. (a)(2)(B) of this section] shall take effect on the date of the enactment of this division and shall apply to all cases pending before any court on or after such date.

*Id.* at §§ 101(h)(3) and (4).

14. This last change was evidently a response to cases that had determined that § 1252(a)(2)(B)(ii) only applied to decisions made in the context of removal proceedings. *See, e.g.*, *Talwar v. INS*, No. 00 Civ. 1166 JSM, 2001 WL 767018, at \*4 (S.D.N.Y. July 9, 2001); *Mart v. Beebe*, 94 F. Supp. 2d 1120, 1123–24 (D. Or. 2000); *Burger v. McElroy*, No. 97 CIV. 8775 (RPP), 1999 WL 203353 at \*4 (S.D.N.Y. Apr. 12, 1999); *Shanti v. Reno*, 36 F. Supp. 2d 1151, 1157–60 (D. Minn. 1999). *But see* *CDI Information Services, Inc. v. Reno*, 278 F.3d 616, 618–20 (6th Cir. 2002) (holding that § 1252(a)(2)(B)(ii) applies to all decisions made under §§ 1151–1378); *Samirah v. O’Connell*, 335 F.3d 545, 549 (7th Cir. 2003) (addressing revocation of parole); *Van Dinh v. Reno*, 197 F.3d 427, 434 (10th Cir. 1999) (addressing transfer of detainees from one facility to another); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 159 (3d Cir. 2004).

Although constitutional claims or “questions of law” are reviewable, discretionary decisions are not. This all seems simple enough and it is certainly a well-known dichotomy in legal theory. But can it withstand this much pressure? Can the dichotomy between discretion and law legitimately function as a jurisdictional bar, as the line between the rule of law and unreviewable administrative practice? I do not think so for the following three reasons: (1) the *law/discretion* line — as a normative and a structural or procedural concept, is theoretically impossible to define with sufficient precision to base a jurisdictional preclusion upon it; (2) historical legal practice in immigration law (and elsewhere) proves this point empirically; and (3) even if our legal system were able to surmount the first two points, the likely consequences of such a jurisdictional dichotomy would be exceedingly problematic for all concerned including noncitizens, their families, their communities, administrative actors, and federal judges.<sup>15</sup>

The necessary consequence of these three points, I suggest, is that all attempts to create a bright line between law and discretion for jurisdictional purposes will fail, so long as tri-partite government survives. As Louis Jaffe once wrote, “the availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”<sup>16</sup>

Perhaps the inevitably complex, unresolved, inter-branch conversation — which the REAL ID Act will compel — is not such a bad thing in theory. As compared with the 1996 laws, the REAL ID Act’s recognition that courts may review constitutional claims or “questions of law” opens the possibility of a more nuanced, better system. But the REAL ID Act, as it channels virtually all deportation appeals and many other immigration matters to the appellate courts, will likely impede the sort of genuinely fertile judicial/legislative/executive conversation that could lead to a more workable system. Important legal and factual issues will be buried beneath the jargon of discretionary preclusion, struggling to percolate to the courts of appeals. Therefore, this article ultimately concludes that either a more sophisticated jurisdictional statute or a more refined theory of discretion is needed.

Part II begins with consideration of the theoretical problem of discretion, especially as it exists in immigration and deportation law. Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion.<sup>17</sup>

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15. A very strong theory of immigration law exceptionalism might overcome all of this. But our law has resisted such exceptionalism for more than a century for good reasons.

16. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965).

17. See Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 *SAN DIEGO L. REV.* 861, 861 (1994); Arthur C. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 *SAN DIEGO L. REV.* 999, 1019–20 (1985); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *YALE L.J.* 65, 92–97 (1983); Maurice A. Roberts, *The Exercise of Administrative Discretion under the Immigration Laws*, 13 *SAN DIEGO L. REV.* 144, 146–51

This is particularly true of deportation law. Many statutory provisions of deportation law, so called “relief” provisions, for instance, are expressly called discretionary. Other aspects of immigration law, such as the interpretation of statutory terms and procedural decisions, have been considered by courts to be discretionary, though there is wide disagreement about what this means. In any case, it is clear that a noncitizen seeking admission, permanent residence or citizenship can lay claim to precious few “rights” along the way. At every step, discretionary power awaits. Thus, administrative discretion is not only the power to dispense mercy, but may also be a hurdle to overcome.

Part II thus examines three venerable dichotomies that have arisen to mediate the tension between discretion and the judicially enforced “rule of law.” These are referred to as the *extent of authority/discretion* line, the *question of law/discretion* line, and the *eligibility/discretion* line. Part II considers the roots of these dichotomies in a series of 1950s cases. It then suggests that they illustrate the need for a richer, more complex theory of the rule of law and discretion in immigration law in order to grapple with the problems raised by the REAL ID Act.

Part III more closely examines how courts have recently struggled to distinguish interpretation from “pure” discretion, yielding rather contradictory, confusing results. It also examines another feature of the REAL ID Act: its elimination of district court review. This channeling of cases to the courts of appeals, though constitutionally permissible, limits judicial fact-finding, flexibility, and responsiveness. Also, as the courts of appeals become increasingly over-burdened, a natural consequence is the development of restrictive jurisdictional gate-keeping mechanisms.

Part IV attempts to structure a more empirical examination of all of the above propositions. My research assistant and I looked at all reported cases dealing with § 1252(a)(2)(B) and the issue of discretion since 1996, the year in which IIRIRA and AEDPA were passed. As of August 22, 2005, we found 276 relevant cases, which we then categorized. Part IV, together with a series of charts, explains these data and offers my observations from them.

Part V concludes with suggestions for a better understanding of discretion and a model for the analysis of cases that arise under the REAL ID Act.

## II. THE THEORETICAL PROBLEM OF THE LAW/DISCRETION LINE

I have attempted to analyze the definitional problem of discretion in other writings<sup>18</sup> and will only summarize those arguments. The roots of the problem, in brief, are deeply intertwined with our imperfect understanding of the nature

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(1975); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1295 (1972).

18. See Kanstroom, *supra* note 5; Kanstroom, *supra* note 11.

of law. One might try to distinguish discretion from rules; the latter being the presumed core of a “rule of law.” Even so basic a dichotomy is imperfect, however. The term “rule” is itself highly ambiguous.<sup>19</sup> It requires its own standard for standards,<sup>20</sup> and it may refer to many different types of legal phenomena,<sup>21</sup> including presumptions, factors, standards, guidelines, principles, and so on. Since the definition of discretion in this model is derived residually from that of rules, this ambiguity precludes a precise definition of the latter term.<sup>22</sup>

A more pragmatic definition of discretion is, “power to make a choice between alternative courses of action.”<sup>23</sup> The implication here is that there may be a “correct” answer to a rule-based legal question, but there is no such thing as a uniquely correct discretionary decision. There may, however, be *incorrect* discretionary decisions, such as those that are unconstitutional, unauthorized or simply arbitrary or capricious. The most basic theoretical problems of discretion are how to define and restrain its abuse without destroying its non-rule-like character. It is simply impossible to define, “unconstitutional, unauthorized or simply arbitrary or capricious” without judicial review and without a rule-like, systematic backdrop. Thus, “discretion” must always be bounded in some way by “law.”

The drafters of the REAL ID Act seem to have settled upon a formula similar to that contained in the Administrative Procedure Act (the “APA”).<sup>24</sup> Discretion is not defined in the APA, and as a result, its invocation often appears to be little more than a conclusory label derived from an anterior decision by a court about the desired scope of review of a particular decision.<sup>25</sup>

Two sections of the APA use the term discretion. Section 701(a)(2) precludes judicial review under the APA of agency action if “agency action is committed to

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19. See Diver, *supra* note 17, at 66–71; see also Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961–62 (1995) (noting that, although a system of rules attempts to set the context of law in advance of its application, some legal judgments must be made in deciding actual cases).
  20. See J. Skelley Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 587 (1971) (reviewing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE – A PRELIMINARY INQUIRY* (1969)).
  21. See, e.g., 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 6 (2d ed. 1979); see also Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1466–68 (1992) (discussing various activities identified as “rulemaking”).
  22. R. M. Dworkin, *Is Law a System of Rules?*, in *THE PHILOSOPHY OF LAW* 38, 52 (1977).
  23. STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 12–13 (1987) (quoting J.M. EVANS, *DE SMITH’S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 278 (4th ed. 1980)); HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 162 (tentative ed. 1958) (defining discretion as the power to choose between multiple permissible courses of action). Prepared for publication from the 1958 tentative edition by William N. Eskridge, Jr. and Philip P. Frickey (1994).
  24. See Harvey Saferstein, *Nonreviewability: A Functional Analysis of “Committed to Agency Discretion,”* 82 HARV. L. REV. 367, 367–68 (1968).
  25. As Martin Shapiro has noted, “courts will typically label informal actions discretionary because the standard by which the actions are reviewed uses that label.” Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1489 (1983).



agency discretion by law.” This provision is related to section (a)(1), which makes clear that APA-based judicial review is not available where “statutes preclude judicial review.” Viewing the past as prologue, we should note that courts have generally been reluctant to hold agency action unreviewable under section 701(a)(2) as “committed to agency discretion.”<sup>26</sup> Indeed, the Supreme Court has adopted a presumption of reviewability derived from the structure of the APA: “the [APA] . . . embodies the basic presumption of judicial review . . . . [O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should courts restrict access to judicial review.”<sup>27</sup>

Moreover, the APA clearly envisioned review of all sorts of discretionary decisions. Thus, section 706(2)(A) mandates that a reviewing court “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.” Taken together, these provisions accept the rare possibility of a designation by “law” of a particular practice as committed to agency discretion rendering it unreviewable under the APA. The APA, however, also requires a reviewing court to determine not only what an abuse of discretion might be, but also what sorts of agency decisions *are* discretionary. In that sense, the APA accepts an inevitable judicial peek behind the veil of ostensible jurisdiction preclusion of discretionary matters. This is the same paradox one finds in the language of the REAL ID Act. As Bernard Schwartz once wrote, “there is no place for unreviewable discretion in a system such as ours.”<sup>28</sup>

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26. See *Sierra Club v. Yeutter*, 911 F.2d 1405, 1414 (10th Cir. 1990) (holding that the U.S. Forest Service’s decision to use or to not use federal reserved water rights is “committed to agency discretion by law” except where agency conduct cannot be reconciled with general mandate of governing statute); cf. *Lincoln v. Vigil*, 508 U.S. 182, 192–95 (1993) (holding that allocation of funds from lump-sum allocation is committed to agency discretion).

27. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967) (citing *Rusk v. Cort*, 369 U.S. 367, 379–80 (1962)). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court further elaborated on its reading of APA section 701(a)(2) by concluding that judicial review would only be precluded where “statutes are drawn in such broad terms that in a given case there is no law to apply.” *Id.* at 410 (quoting S. Rep. No. 79–752, at 26 (1945)). See generally Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1263 (1992) (discussing the events and politics involved in *Overton Park*); *Webster v. Doe*, 486 U.S. 592, 600 (1988) (holding that a statute-based challenge to the decision of the Director of the CIA to terminate a homosexual employee was unreviewable because it was “committed to agency discretion by law” and there was no law to apply). In *Webster*, Chief Justice Rehnquist noted — beyond the national security concerns raised by the case — the explicit way in which the statute was worded (“in his discretion” and “whenever [he] ‘shall deem such termination . . . advisable’”), and the breadth of the statutory standard (whether termination was “advisable”). *Id.* at 594, 600 (quoting National Security Act of 1947, § 102(c), amended by 50 U.S.C. 403c (2000)). But see *Franklin v. Massachusetts*, 505 U.S. 788, 817–18 (1992) (Stevens, J., concurring) (suggesting that *Webster* should be read narrowly).

28. Bernard Schwartz, *Administrative Law Cases During 1985*, 38 ADMIN. L. REV. 392, 310 (1986); see also Kenneth Culp Davis, “No Law to Apply,” 25 SAN DIEGO L. REV. 1, 2, 10 (1988) (noting that the Court always has a standard of reasonableness to apply); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 734–35 (1990) (suggesting that review of

Immigration law has proven particularly resistant to any consistent definition of discretion. Over the years, the word “discretion” has been used to describe, among other things: administrative adjudication of “discretionary” applications for relief from deportation; whether bond should be granted; whether a motion to reopen proceedings has established a *prima facie* case for relief; whether new evidence in support of such a motion is material, was not available, and could not have been presented at a former hearing; “policy-based” decisions of the Attorney General; factual determinations by immigration judges, and interpretations of the meaning of statutory terms.<sup>29</sup>

Although it is apparent that these forms of discretion are very different, no consistent taxonomy has ever captured those differences. Indeed, recent case law responding to the 1996 laws is an anarchic cacophony (or, if you prefer, a cacophonous anarchy). To be sure, some judges have tried. For example, in *INS v. Doherty*, in his opinion concurring in part and dissenting in part, Justice Scalia (joined by Justices Stevens and Souter) sought to distinguish “merits-deciding” discretion from other forms.<sup>30</sup> This is an important point, as it captures much of why certain forms of discretion developed in immigration and deportation law. But to date the Court has not gone much further than this. Important questions remain, such as how far categorical regulation may implement *delegated discretion*.<sup>31</sup> We can, however, identify a few resilient dichotomies that sketch the outlines of dilemmas.

#### A. *The Extent of Authority/Discretion Line*

The 2001 decisions in *INS v. St. Cyr*<sup>32</sup> and *Zadvydas v. Davis*<sup>33</sup> left as many questions about discretion unanswered as they resolved. In *Zadvydas*, a challenge to post-removal detention practices, the Court reasoned as follows:

Another provision . . . says that, “no court shall have jurisdiction to review” decisions “specified . . . to be in the discretion of the Attorney

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questions such as whether agency misunderstood facts, departed from precedent, or acted unconscionably, among others, is virtually always possible).

29. See, e.g., *INS v. Abudu*, 485 U.S. 94, 105–07 (1988) (motion to re-open); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443–44 (1987) (distinguishing between the discretion in the Attorney General as to the ultimate decision to grant relief and the underlying process and criteria for eligibility for relief); *Prado v. Reno*, 198 F.3d 286, 291 (1st Cir. 1999) (review of a decision not to grant an adjustment of status is precluded as “discretionary,” but “judicial review of the denial of a motion to reopen to petition for adjustment of status is permitted”).
30. 502 U.S. 314, 329–34 (Scalia, J., concurring in part and dissenting in part).
31. See *Lopez v. Davis*, 531 U.S. 230 (2001) (upholding, as permissible use of discretion, a regulation of the Bureau of Prisons that categorically denied early release to prisoners whose current offense was a drug felony involving the carrying, possession, or use of a firearm); discussion *infra* pp. 173–80.
32. *St. Cyr*, 533 U.S. at 289. There was a companion case: *INS v. Calcano-Martinez*, 533 U.S. 348 (2001). However, the Court’s reasoning was contained in *St. Cyr*.
33. 533 U.S. 678 (2001).

General.” The aliens here, however, do not seek review of the Attorney General’s *exercise of discretion*; rather, they challenge the extent of the Attorney General’s authority under the *post-removal-period detention statute*. And the extent of that authority is not a matter of discretion. . . . We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.<sup>34</sup>

This *extent of authority/discretion* line allows courts to overcome jurisdiction-stripping of discretion by defining ostensibly discretionary agency action as *ultra vires*. From the government’s perspective, however, it permits unintended judicial intervention into the agency’s actual exercise of discretion. The reason for this is that courts must examine what the agency did in order to determine whether the agency exceeded its authority. Thus, a jurisdictional bar to review of discretion is hurdled if a plausible claim is made that the agency exceeded its authority. The chicken/egg problem here is obvious.

### B. *The Question of Law/Discretion Line*

*St. Cyr* involved the fact that AEDPA and IIRIRA, in addition to limiting judicial review, had also repealed a discretionary form of relief from deportation known as section 212(c).<sup>35</sup> Enrico St. Cyr, a lawful permanent resident since 1986, pled guilty in 1996 to a criminal charge that made him deportable. At the time of his criminal conduct and of his plea he would have been eligible for 212(c) relief. His removal proceedings, however, began after the effective dates of AEDPA and IIRIRA. As a result, the Attorney General asserted that he was no longer eligible to apply for a waiver and, in effect, had no defense to deportation and, furthermore, no right to judicial review. Barred from the usual appeal routes, St. Cyr filed a *habeas corpus* petition in district court.<sup>36</sup> The district court took jurisdiction and held that the 1996 laws did not apply retroactively to removal proceedings brought against those who had pled guilty before their enactment. The Second Circuit affirmed.<sup>37</sup>

The main jurisdictional issue before the Supreme Court was whether *habeas* review remained available to review questions relating to discretionary relief. In brief, the Supreme Court concluded that, “leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious

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34. *Id.* at 688 (citing 8 U.S.C. § 1252(a)(2)(B)(ii)) (emphasis added).

35. Section 212(c) was replaced by a new form of discretionary relief known as cancellation of removal, which excludes any lawful permanent resident convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3) (2000).

36. *See Dunbar v. INS*, 64 F. Supp. 2d 47, 49 (D. Conn. 1999).

37. *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000).

constitutional questions.”<sup>38</sup> But how to characterize “claims such as those raised in this case?” Were such issues discretionary or not?

The government took a hard line on jurisdiction. Indeed, in its brief in a companion case, the INS prominently cited a 1903 case to assert, in effect, that *all of immigration law* is discretionary and may be rendered immune even from judicial scrutiny for constitutional defects:

[T]he power to exclude or expel aliens belonged to the political department of the Government, and . . . the order of an executive officer, invested with the power to determine finally the facts upon which an alien’s right to enter this country, or remain in it, depended, was due process of law . . . .<sup>39</sup>

In the *St. Cyr* opinion, Justice Stevens countered this:

For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.<sup>40</sup>

The *St. Cyr* Court then did much more than reaffirm the counter-majoritarian authority of the federal judiciary. Justice Stevens wrote that the writ of *habeas corpus*, “at its historical core” is strongest in relation to review of executive detention, that it was available to “nonenemy aliens,” and that it was not limited by the invocation of the civil-criminal distinction.<sup>41</sup> More to our point, the Court also noted that *habeas* courts “regularly answered questions of law that arose in the context of discretionary relief.”<sup>42</sup> The Court thus utilized a venerable, basic distinction, which we can term the *question of law/discretion* line.

The specific holding of *St. Cyr* was powerful: “the Suspension Clause questions that would be presented by the INS’ reading of the immigration statutes before us are difficult and significant,” and, therefore, the Court would require a “clear and unambiguous statement of constitutional intent” before finally resolving them.<sup>43</sup> Unfortunately, at the same time as the Court seemed to surmount

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38. *Calcano-Martinez*, 533 U.S. at 351.

39. Brief of Respondent at 43, *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (No. 00-1011) (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903)).

40. *St. Cyr*, 533 U.S. at 298 (citations omitted).

41. *Id.* at 301. Substantial credit for this analysis should go to the Amicus Brief filed by legal historians, authored by Michael Wishnie, among others. See Brief of Amici Curiae Legal Historians as Amici Curiae Supporting Respondent at 2–3, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767); see also David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998); David Cole, *No Clear Statement: An Argument for Preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J. 427 (1998).

42. *St. Cyr*, 533 U.S. at 307.

43. *Id.* at 304–05.

the *law/discretion* hurdle for purposes of *habeas* jurisdiction, it revitalized the dichotomy itself. It did this, in part, by resurrecting an old trope — that of discretion as “grace”: “Eligibility that was ‘governed by specific statutory standards’ provided a right to a ruling on an applicant’s eligibility, even though the actual granting of relief was not a matter of right under any circumstances, but rather is in all cases a matter of grace.”<sup>44</sup>

Thus, although the question of *how* courts should review immigration law discretion was not directly at issue in *St. Cyr* (and was artfully finessed by counsel and *amici*), the opinion leaves us with a rather binary and formalist view of the *law/discretion* dichotomy. Section II of the Court’s opinion, for instance, begins by asserting that Mr. St. Cyr’s application raises “a pure question of law.”<sup>45</sup> Apparently, for the Court, this was because it involved no specific dispute over any facts alleged to prove him deportable. Nor did it involve the ultimate exercise of discretion, as he had not even been permitted to apply for the 212(c) waiver. This may simply constitute a rejection of the most extreme version of the government’s argument that *any* discretionary component in a case renders all related questions unreviewable. As we shall see, however, this dichotomy has been highly unpredictable in practice.

### C. *The Eligibility/Discretion Line*

In an apparently gratuitous aside, the *St. Cyr* Court stated that St. Cyr did not “contend that he would have any right to have an unfavorable exercise of the Attorney General’s discretion reviewed in a judicial forum.”<sup>46</sup> Such a concession could certainly be understood as a prudent tactical move by St. Cyr’s counsel.<sup>47</sup> After all, the INS, in its opening brief, had strenuously sought to frame the entire Suspension Clause issue as one of discretion:

This Court has never ruled that the Great Writ requires a judicial forum for an alien to present the claim that he has the ‘right’ to be considered for an exercise of a power that Congress has placed in the discretion of the Attorney General to dispense with the deportation of an alien.<sup>48</sup>

The INS had also argued that the writ [historically] would not issue where, “an official had statutory authorization to detain the individual but . . . the

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44. *Id.* at 307–08 (citing *Jay v. Boyd*, 351 U.S. 345, 353–54 (1956)).

45. *St. Cyr*, 533 U.S. at 297.

46. *Id.* My guess is that at least one Justice felt that this was quite important as a limit to the ultimate holding.

47. See Brief of Petitioner at 27, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767).

48. See Brief of Respondent at 32, *INS v. Calcano-Martinez*, 533 U.S. 348 (2001) (No. 00-1011).

official was not properly exercising his discretionary power to determine whether the individual should be released.”<sup>49</sup>

To answer the question whether the Suspension Clause issue was a “serious constitutional” one, the Court focused on early *habeas* cases that had reviewed executive detention for anything other than pure constitutional error.<sup>50</sup> This is a complicated inquiry for many reasons. But it is considerably simpler if one confines the inquiry to “pure questions of law” that arise in “discretionary” contexts, rather than seeking to redefine the *law/discretion* line itself. The Court noted, for example, an early case involving the impressment of a master of a coal vessel, where the writ was issued despite the argument that exemptions for “seafaring persons of this description” were given only as a matter of “grace and favour,” not “of right.”<sup>51</sup> Thus, Justice Stevens wrote of “questions of law that arose in the context of discretionary relief.”<sup>52</sup>

More specifically, *St. Cyr* also held that “courts recognized a distinction between *eligibility* for discretionary relief, on the one hand, and the *favorable exercise of discretion*, on the other hand.”<sup>53</sup> Eligibility for discretionary relief that is governed by “specific statutory standards” provides a “right” to a ruling even though the actual relief itself was not “a matter of right under any circumstances, but rather is in all cases a matter of grace.”<sup>54</sup> Therefore, the Court noted, as discussed above, that even though suspension of deportation was “a matter of grace,” a deportable alien had a right to challenge the Executive’s *failure to exercise discretion* authorized by law.<sup>55</sup>

This means that the threshold characterization of an issue as either a “pure question of law” (e.g., “can you apply”?) or “a matter of grace” (“was relief granted”?) determines whether a court will review the case. We might call this the *eligibility/discretion* line. Although, like the other lines to which it is related, it offers a certain apparent clarity, it is not unproblematic. For example,

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49. *St. Cyr*, 533 U.S. at 303 (citing Brief of Respondent at 33, *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (No. 00-1011)).

50. *Id.* at 299.

51. *Id.* at 303 n.23 (citing *Ex Parte Boggin*, 104 Eng. Rep. 484 n.(a)2 (K.B. 1811) (also discussing *Hollingshead’s Case*, 91 Eng. Rep. 307 (K.B. 1702) (“[G]ranting relief on the grounds that the language of the warrant of commitment — authorizing detention until ‘otherwise discharged by due course of law’ — exceeded the authority granted under the statute to commit ‘till [the bankrupt] submit himself to be examined by the commissioners’”)); see also Brief for Legal Historians as Amici Curiae Supporting Respondent at 8–10, 18–28, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767).

52. *St. Cyr*, 533 U.S. at 306 (citing *United States ex rel. Accardi v. Shaughnessy*, 349 U.S. 280 (1955), and *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957)).

53. *St. Cyr*, 533 U.S. at 307 (citing Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1991 (2000) (describing the “strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ”)) (emphasis added).

54. *St. Cyr*, 533 U.S. at 307 (citing *Jay*, 351 U.S. at 353–54).

55. *St. Cyr*, 533 U.S. at 308 (emphasis added).

what happens if an agency seeks to exercise its discretion categorically, or if a litigant believes that the entire discretionary process has been tainted in some way?

These problems take us back to the 1950s and the early judicial interpretations of the post-APA administrative state. In a 1954 case, *Accardi v. Shaughnessy*, the Court recognized that powerful discretion may be granted to an agency to make decisions.<sup>56</sup> If it is so granted, however, the Court said that discretion — apparently meaning a nuanced, individualized, good faith, procedurally proper, balancing action — *must be exercised*.<sup>57</sup> *Accardi* had claimed that a list of “unsavory characters” whom the Attorney General wanted deported had been circulated to the Board of Immigration Appeals (“BIA”), making fair consideration of his case impossible.<sup>58</sup> The Court held that if the allegations were true, it indeed showed that the Board’s discretion had been compromised.<sup>59</sup> Most relevant, however, was the Court’s idea that there is a meaningful distinction between review on *habeas* of the *exercise of discretion* itself and review of *whether discretion had actually been exercised*: “It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. . . . Rather, we object to the Board’s alleged failure to exercise its own discretion.”<sup>60</sup>

This distinction has held up for more than half a century, but does it make sense? The *Accardi* dissenters, led by Justice Jackson, thought not, beginning their rebuttal with the charge that “the [majority’s] doctrine seems proof of the adage that hard cases make bad law.”<sup>61</sup> The dissenters would have rendered most of immigration law potentially lawless. First, they asserted that the nature of the power and discretion vested in the Attorney General was analogous to the power of pardon or commutation of a sentence “which we trust no one thinks is subject to judicial control.”<sup>62</sup> Their second argument was that *Accardi* had no legal *right*, “by virtue of constitution, statute or common law to have a lawful order of deportation suspended” and “*habeas corpus* is to enforce legal rights, not to transfer to the courts control of executive discretion.”<sup>63</sup> In other words, the “matter of grace” idea merged with the right/privilege distinction for both jurisdictional and substantive purposes. For the dissenters, a bright-line distinction

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56. 347 U.S. 260 (1954).

57. *Id.* at 267–68 (emphasis added).

58. *Id.* at 264.

59. *Id.* at 267–68.

60. *Id.* at 268.

61. *Id.* at 269 (Jackson, J., dissenting).

62. *Id.*

63. *Id.* This doctrine has also re-appeared in some post-1996 cases. *See, e.g.,* *Assaad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004).

between law and discretion was fundamentally linked to their view of the role of constitutional courts:

Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function.<sup>64</sup>

The majority and the dissent thus differed greatly on whether a way could (or should) be found to maintain at least a vestige of judicial control over immigration decisions. What is perhaps more interesting, however, is that they shared certain questionable theoretical premises and were both burdened by an inadequately nuanced definition of discretion. They both seemed to accept the following propositions: first, that there is an easily definable difference between law and discretion in the context of relief from deportation; second, that this discretion, *as such*, could legitimately be rendered unreviewable by courts.<sup>65</sup>

The majority, therefore, faced a powerful theoretical impediment to its obvious desire to oversee an allegedly improper administrative process. If it had questioned the *law/discretion* line entirely, then the floodgates would open on *habeas* to second-guess all sorts of discretionary denials on the merits. When seen in this light, the *Accardi eligibility/discretion* line was obviously a pragmatic compromise. It should also be noted that the issue in *Accardi* was allegedly improper influence by the Attorney General over a BIA that was required by regulation (not by statute) to exercise its own discretion. The issue seems rather arcane, if not irrelevant, as the Attorney General retained the power to overturn the very decision of the Board which he had allegedly improperly influenced.<sup>66</sup> A deeper problem would arise had the Attorney General himself decided to deport *Accardi*, in his discretion, despite credible allegations of improper influences on the process.<sup>67</sup> Nevertheless, the basic definitional problem of discretion is the same.

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64. *Accardi*, 347 U.S. at 271 (Jackson, J., dissenting).

65. The majority's analysis of this point is inelegant, but one effect of the *eligibility/exercise of discretion* line is to avoid confronting the review of discretion problem directly.

66. As Justice Jackson had argued in dissent: "[w]e do not think [that the] validity [of the Board's order] can be impeached by showing that [the Attorney General] overinfluenced members of his own staff whose opinion in any event would be only advisory." *Accardi*, 347 U.S. at 270 (Jackson, J., dissenting).

67. This would raise significant structural constitutional problems under Articles I, II, and III and invoke the most basic question whether immigration law is law at all. *See, e.g., Myers v. United States*, 272 U.S. 52, 135 (1926) ("Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty. . . ."); *cf. Humphrey's Executor v. United States*, 295 U.S. 602 (1935) ("The commission . . . is charged with the enforcement of no policy except the policy of the law. Its duties are . . . quasi judicial and quasi legislative.").



The controversial implications of the *Accardi* doctrine were immediately clear, however, and the controversy remains strong today. Justice Scalia in his *St. Cyr* dissent, for example, asserted:

[T]here is no authority whatever for the proposition that, at the time the Suspension Clause was ratified — or, for that matter, even for a century and a half thereafter — *habeas corpus* relief was available to compel the Executive’s allegedly wrongful refusal to exercise discretion. . . . [W]hen, in [*Accardi*], the Warren Court held that the Attorney General’s alleged refusal to exercise his discretion . . . could be reviewed on habeas . . . it did so without citation of any supporting authority . . . .<sup>68</sup>

Such vituperative commentary seems somewhat odd, in light of the rather small real-world effects of the *Accardi* exception. Consider what happened, for example, to *Accardi*. On remand, the district court had found that the Board members “reached their individual and collective decision on the merits, free from any dictation or suggestion” and dismissed the writ.<sup>69</sup> The Second Circuit reversed, with one judge dissenting.<sup>70</sup> The majority held that the “Attorney General’s statements [had] *unconsciously* influence[d] the Board members so that they felt obliged not to exercise their discretion and, without doing so, to decide against *Accardi*.”<sup>71</sup> The chief judge, concurring in the result, thought that the Supreme Court’s prior opinion merely required *Accardi* to prove “that there was a list as alleged, that he was on it, and that this fact was known to the Board.”<sup>72</sup> The dissenting judge, however, read the Supreme Court’s mandate to require that *Accardi* was entitled to a hearing on the question of “whether the Board’s denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General.”<sup>73</sup>

The Supreme Court then went to some lengths to limit the possible implications of its prior holding, which the Court bemoaned, “appears to have conveyed a triplicity of meaning to the Court of Appeals.”<sup>74</sup> The Supreme Court agreed with the dissenting judge “both as to the interpretation of our prior opinion and

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68. *St. Cyr*, 533 U.S. at 344 (2001) (Scalia, J., dissenting). Gerald Neuman has suggested that *Accardi* was consistent with the rule being applied by the lower courts in other cases under the 1917 Immigration Act. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

69. *United States ex rel. Accardi v. Shaughnessy*, 219 F.2d 77, 80 (2d Cir. 1955) (quoting Judge John. F. McGohey, presiding judge over the case on remand in the Southern District of New York).

70. *See id.* at 88, 90.

71. *Id.* at 81.

72. *Id.* at 89 (Clark, C.J., concurring).

73. *Id.* at 90 (Harlan, J., dissenting).

74. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280, 281 (1955).

its application to the facts of this case.”<sup>75</sup> In the end, Accardi lost: “We believe that Accardi has had the hearing required by our previous opinion and that he has failed to prove his case.”<sup>76</sup>

The dissenters, Justices Black and Frankfurter, were still troubled by a system in which arbitrariness could be permissible. They noted that “a fair hearing by an impartial board has been established as a prerequisite to final exercise of discretion by the Attorney General.”<sup>77</sup>

The *Accardi* doctrine, in sum, puts some, but not much, pressure on the government by affirming at least a possibility of judicial review where some textual basis exists — regulatory or statutory — for arguing that arbitrary executive action can be cabined. It is a highly deferential fail-safe mechanism derived from a rather blunt understanding of discretion.

Two other 1950s Supreme Court cases illustrate the depth of the problem of potentially unlimited executive discretion. In 1956, *Jay v. Boyd*, using the “matter of grace” formulation, achieved the strongest position on the unavailability of judicial review of the ultimate discretionary calculus.<sup>78</sup> As the majority’s 5-4 opinion put it, the law does not “restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised.”<sup>79</sup> More generally, the majority wrote that, although there may be a right to a discretionary determination, “a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it ‘comes as an act of grace.’”<sup>80</sup>

The dissents in *Jay* were strident. Chief Justice Warren wrote: “In conscience, I cannot agree with the opinion of the majority. It sacrifices to form too much of the American spirit of fair play in both our judicial and administrative processes.”<sup>81</sup> Justice Black began his dissent by noting: “[T]his is a strange case in a country dedicated by its founders to the maintenance of liberty under law.”<sup>82</sup> And Justice Frankfurter, focusing more on the rule of administrative law, wrote that under the regulatory system developed by the Attorney General, “administrative arbitrariness is ruled out.”<sup>83</sup> Moreover, once the government, “invokes the aid of administrative law,” then it must accept, “the presuppositions of a fair hearing.”<sup>84</sup> The Attorney General, wrote Justice Frankfurter, “cannot shelter

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75. *Id.* at 283.

76. *Id.* at 284.

77. *Id.* at 288 (Black, J., dissenting).

78. 351 U.S. 345 (1956).

79. *Id.* at 354.

80. *Id.*

81. *Id.* at 361 (Warren, C.J., dissenting).

82. *Id.* at 362 (Black, J., dissenting).

83. *Id.* at 371 (Frankfurter, J., dissenting).

84. *Id.*

himself behind the appearance of legal procedure — a system of administrative law — and yet infuse it with a denial of what is basic to such a system.”<sup>85</sup>

Another case from the same era suggests a similar view in its majority opinion. In 1957, the Court, in *Hintopoulos v. Shaughnessy*, indicated that the door to the courthouse should not be completely closed simply because a decision was part of the discretion delegated to the Attorney General.<sup>86</sup> The case, like *Jay v. Boyd*, involved a BIA discretionary denial of an application for suspension of deportation.<sup>87</sup> The contention on a *habeas* petition was simply that the Board had abused its discretion. The district court, following Jerome Frank’s earlier lead,<sup>88</sup> offered reasoning that was subtly different from that of *Accardi*.<sup>89</sup> Although it was said to be well-established that “courts may not review the exercise of such discretion by the Attorney General,” the opinion further explained that “they may interfere only where there has been a *clear abuse of discretion or a clear failure to exercise discretion* . . . the Court can do no more than to require that the discretion be properly exercised.”<sup>90</sup> This requirement of “proper exercise” thus merged three separate ideas: (1) courts should not generally second-guess substantive discretionary decisions on the merits; (2) *unless* there has been a *clear abuse*; or (3) a *failure to exercise* discretion.

The Second Circuit affirmed.<sup>91</sup> Its formulation of the applicable standard of review was highly deferential. But it, too, preserved some possibility of review of the ultimate exercise of discretion, using the idea of “arbitrary or illegal consideration”: “[T]he Board has untrammelled discretion to grant or withhold a suspension. Only if the discretion is shown to have been formulated on arbitrary or illegal consideration may the courts interfere.”<sup>92</sup>

In other words, even “untrammelled discretion” does not necessarily mean absolute jurisdictional preclusion. The court, as the Supreme Court would in *Jay*, analogized discretionary relief from deportation to the power of a judge to suspend execution of a sentence or of the President to pardon a convict. But even this did not completely insulate it from review: “[I]t is a matter of grace, over which courts have no review, *unless . . . it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant.*”<sup>93</sup>

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85. *Id.* at 372.

86. 353 U.S. 72 (1957).

87. *Id.* at 75.

88. *See* United States *ex rel.* Adel v. Shaughnessy, 183 F.2d 371 (2d Cir. 1950).

89. United States *ex rel.* Hintopoulos v. Shaughnessy, 133 F. Supp. 433, 434 (S.D.N.Y. 1955).

90. *Id.* (citations omitted; emphasis added).

91. United States *ex rel.* Hintopoulos v. Shaughnessy, 233 F.2d 705 (2d Cir. 1956).

92. *Id.* at 708.

93. *Id.* at 709 (citing United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950) (emphasis added)).

The Supreme Court, in *Hintopoulos*, confirmed that *habeas* courts could review the *legal interpretive discretion* of the Board to determine eligibility.<sup>94</sup> The Court held that “it is clear from the record that the Board applied the correct legal standards in deciding whether petitioners met the statutory prerequisites for suspension of deportation.”<sup>95</sup> Though suspension was again said to be “a matter of discretion and of administrative grace,” the opinion continued, “[n]or can we say that it was abuse of discretion to withhold relief in this case.”<sup>96</sup> Indeed, Justice Harlan applied a relatively straightforward “abuse of discretion” and “arbitrary and capricious” test on *habeas* review.<sup>97</sup> The opinion states that “the reasons relied on by the Hearing Officer and the Board . . . were neither capricious nor arbitrary.”<sup>98</sup>

Thus, these 1950s cases present the very same continuum facing courts today. Is discretion, like “grace,” simply unreviewable? Is the *eligibility/discretion* line workable? Or does *Hintopoulos* suggest a more fluid, more realistic approach?

Professor Gerald Neuman has suggested that a statute or regulation may confer a “right” to consideration for discretionary relief, in which case, “an arbitrary refusal even to consider exercising discretion, or a legally erroneous finding of ineligibility, would deprive the alien of that limited right, and could render a resulting removal order unlawful.”<sup>99</sup> The first part of this formulation — that the refusal to exercise discretion must be reviewable — certainly seems unproblematic, if the refusal is obvious. If the agency simply were to refuse to consider apparently eligible cases, one can easily envision a successful court challenge. Similarly, if the alleged ground of denial were a clearly unconstitutional one, for example, race, then the REAL ID Act and the fundamental responsibility of constitutional courts appears to warrant judicial review.<sup>100</sup> Finally, as in *Accardi*, the alleged intrusion of unauthorized outside influence ought not to evade review.

But the meaning of the term “discretion” remains unclear as one considers how Professor Neuman, pre-*St. Cyr*, saw what the future might hold. “Scrutiny . . . would not, however, include the intrusive substantive evaluations that courts have performed under the APA abuse of discretion standard.”<sup>101</sup> Fair enough,

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94. See generally Kanstroom, *supra* note 5 (proposing taxonomy of discretion).

95. *Hintopoulos*, 353 U.S. at 77.

96. *Id.*

97. *Id.*

98. *Id.*

99. Neuman, *supra* note 68, at 1055 (citations omitted). Neuman cites as examples of this sort of review: admission of unaccompanied children, admission of former residents under the seventh proviso, and suspension of deportation.

100. *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 485, may give pause, however.

101. Neuman, *supra* note 68, at 1057.

some of those evaluations were pretty intrusive. But can *all* scrutiny of arbitrary and capricious action be eliminated by jurisdictional statutes? Implicit values of regularity, consistency, transparency, and separation of powers (not to mention justice) undoubtedly inspired Justice Harlan to assume in *Hintopoulos* that some potential for review — even of the ultimate exercise of discretion — must remain. Those values remain strong. To be sure, what one ends up with is not so formally clear as the *Accardi* line; it is more a general attitude than a bright line. But in times such as these of muscular assertions of executive power, it is a very important attitude to preserve.

What we need is a richer, more complex theory of the rule of law and discretion in immigration law. The dichotomies used by courts offer superficial order but little more than that. One can imagine any number of Mad Hatter scenarios that illustrate the point as to any of the listed dichotomies. What if, on remand, the agency said to St. Cyr: “Okay, we have to let you apply, but we now deny your case because: (1) It’s Tuesday; (2) You are not a white European; or (3) It’s our discretion and we don’t have to give you a reason.”

As Judge Friendly once noted, discretion that “is not subject to the restraint of the obligation of reasoned decision and hence of reasoned elaboration of a fabric of doctrine governing successive decisions” is the “rare — some say non-existent — case” where “review for ‘abuse’ may be precluded.”<sup>102</sup>

The congressional delegation of discretionary authority in immigration law is exceedingly broad and in some cases standardless. But this does not necessarily mean that the judiciary should — or may — cede the field completely to administrative actors. The attempt by the drafters of the REAL ID Act to differentiate law from discretion for jurisdictional purposes without better definition is theoretically unsound and will therefore, one hopes, have little effect.

### III. JUDICIAL CONSTRUCTION OF DISCRETION PRE- AND POST REAL ID ACT

#### A. *Conflicting Visions*

One way to test the hypothesis that the REAL ID Act will have less impact than one might expect is to note how courts divide over how to differentiate reviewable law from unreviewable discretion. As to what kind of immigration decisions were discretionary and thus non-reviewable under former (pre-REAL ID Act) 8 U.S.C. § 1252(a)(2)(B), two main schools of thought emerged.<sup>103</sup> The majority rule was that the decision simply had to be “discretionary in nature” under §§ 1151-1378 to be jurisdictionally precluded. An alternative model, however, which is more protective of the court’s jurisdiction, is that the decision

102. *Wong Wing Hang v. Immigration & Naturalization Service*, 360 F.2d 715, 718 (2d Cir. 1966) (citing HART & SACKS, *supra* note 23, at 175-77); see also Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965); Raoul Berger, *Administrative Arbitrariness – A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966).

103. See *Zhu v. Gonzalez*, 411 F.3d 292, 294-95 (D.C. Cir. 2005).

must be left, “entirely within the judgment or conscience” of the Attorney General. Essentially, this means that such acts are matters of “pure discretion,” as opposed to “discretion guided by legal standards.”<sup>104</sup>

Under the majority approach, the complete acceptance of the *law/discretion* dichotomy masks considerable complexity. What does “discretionary in nature” mean in a statute that has been built by accretion over more than a century and that contains a *melange* of signifiers of discretion? For example, in *El-Khader v. Monica*, the Seventh Circuit relied on the language of the relevant statute, 8 U.S.C. § 1155, which contained the permissive word “may,” the temporal phrase, “at any time,” and the subjective phrase, “for what he deems,” (“the Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke”).<sup>105</sup> The court concluded that this language plainly signified a discretionary decision of the type for which there should be no judicial review.<sup>106</sup> Many statutory sections do not contain such multiple discretionary language, however. Still, the D.C. Circuit found no jurisdiction in a case involving applications for so-called national interest waivers of the labor certification requirement.<sup>107</sup> The court found that the waiver decision was within the Attorney General’s discretion, even though the relevant statutory language did not use the term “discretion.”<sup>108</sup> The waiver statute did, however, use terms (primarily the word, “may”) that made it sufficiently clear to the court that waivers were discretionary.<sup>109</sup> The court also focused on the last clause of § 1252(a)(2)(B)(ii), which contains an exception to the rule against judicial review for “any . . . decision . . . granting . . . relief under section 1158(a) [asylum claims].”<sup>110</sup> Noting that “discretion” does not appear in § 1158(a) — but breezily ignoring the special nature of asylum claims, the statute’s use of the word “may,” and Supreme Court case-law that had made clear that asylum is discretionary — the court held that, “[t]he exception . . . establishes that a decision may be ‘specified . . . to be in the discretion of the Attorney General’ even if the grant of authority to make that decision does not use the word ‘discretion.’”<sup>111</sup>

In the 2003 *Spencer Enterprises* case, the Ninth Circuit determined that it had jurisdiction to review the Attorney General’s decisions, “where his or her exercise of discretion is guided by the application of legal standards to the facts in

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104. *E.g.*, *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683 (9th Cir. 2003).

105. 366 F.3d 562, 567 (7th Cir. 2004).

106. *Id.*

107. *Zhu*, 411 F.3d at 294.

108. *Id.* at 294–95.

109. *Id.*

110. *Id.* at 294.

111. *Id.* at 295.

question.”<sup>112</sup> The case involved the (former)<sup>113</sup> INS’s denial of an immigrant investor visa petition.<sup>114</sup> The court found — and both parties conceded — that neither the Administrative Procedure Act nor 8 U.S.C. § 1252(a)(2)(B)(ii) precluded judicial review because the statutory framework provided meaningful standards by which to review the INS’s action.<sup>115</sup> The authority to issue such a visa was not specified by any statute to be discretionary. The jurisdictional victory was pyrrhic, however, as the denial of the petition was held not arbitrary, capricious, or an abuse of discretion.<sup>116</sup>

The *Spencer* court engaged in a close statutory interpretive process to limit the reach of the jurisdictional preclusion, distinguishing IIRIRA’s transitional rules, which govern cases pending at the time IIRIRA was enacted.<sup>117</sup> The transitional rules withdrew jurisdiction over “any discretionary decision” made pursuant to several enumerated sections of the INA.<sup>118</sup> In 1997, in *Kalaw v. INS*, the Ninth Circuit had interpreted the transitional rules to preclude review of several types of “discretionary” decisions: those that had previously been “reviewed for an abuse of discretion,” those that were “by the express terms of [a] statute . . . discretionary determinations,” and those that were “wholly discretionary.”<sup>119</sup> (Bear in mind, however, that habeas petitions in the district court were not necessarily so precluded at that time.)

Now, however, the Ninth Circuit saw a different congressional intent: the language of § 1252(a)(2)(B)(ii) was “sufficiently distinct from the language of the transitional rules to compel a different interpretation.”<sup>120</sup> This section referred not to “discretionary decisions,” as did the transitional rules, but to “acts the authority for which is specified under the INA to be discretionary.” The court felt compelled to assume that this difference in language was legally significant. “If Congress had intended to withdraw jurisdiction over all ‘discretionary decisions,’ it would have used the same language found in the transitional rules.”<sup>121</sup>

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112. See *Spencer*, 345 F.3d at 690–91 (examining various types of decisions which the Attorney General had “the ultimate discretionary authority to make, by either granting or withholding relief”).

113. As of March 1, 2003, the Immigration and Naturalization Service ceased to exist, as most of its functions were transferred to the Bureau of Border Security and the Bureau of Citizenship and Immigration Services. See Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135.

114. *Spencer*, 345 F.3d at 686.

115. *Id.* at 689.

116. *Id.* at 694–95.

117. *Id.* at 689.

118. IIRIRA § 309(c)(4)(E), 110 Stat. at 3009–626.

119. 133 F.3d 1147, 1151–52 (9th Cir. 1997) (citing *Torres-Guzman v. INS*, 804 F.2d 531, 533 (9th Cir. 1986)).

120. *Spencer*, 345 F.3d at 689.

121. *Id.*

The court found that the language of § 1252(a)(2)(B)(ii) differed from the transitional rules in at least two ways.<sup>122</sup> First, the language of § 1252(a)(2)(B)(ii) required that the discretionary authority be “specified” under the INA. “Specify,” according to the court, means “to mention specifically.”<sup>123</sup> Thus, the language of the statute in question must provide the discretionary authority. Second, the statute required that the “authority . . . be in the discretion of the Attorney General.”<sup>124</sup> “Authority,” said the court, may be defined as the “right to exercise powers; to implement and enforce laws . . . to command; to judge.”<sup>125</sup> “Discretion” means the power to act “according to [one’s] own understanding and conscience.”<sup>126</sup> From this, the court distinguished *interpretive* from “pure” discretion. It held that “if the authority for a particular act is in the discretion of the Attorney General” then this meant that “the right or power to act is entirely within his or her judgment or conscience.”<sup>127</sup> Such acts were said to be “matters of pure discretion, rather than discretion guided by legal standards.”<sup>128</sup>

The court recognized that its interpretation of § 1252(a)(2)(B)(ii) was virtually identical to the interpretation of “committed to agency discretion by law” under APA section 701(a)(2).<sup>129</sup> “[T]he rule against redundancy,’ however, is only ‘one rule of construction among many,’ and ‘does not necessarily have the strength to turn a tide of good cause to come out the other way . . . .’”<sup>130</sup> To avoid this problem, in any event, the court determined that the two provisions were not identical, because § 1252(a)(2)(B)(ii) withdraws jurisdiction wherever discretionary authority is “specified” by statute, whereas, under the APA, “even a decision that is wholly discretionary by statute may be reviewed if regulations or agency practice provide standards by which an agency’s conduct may be judged.”<sup>131</sup> The court said that under § 1252(a)(2)(B)(ii), if the statute specifies that the decision is wholly discretionary, regulations or agency practice will not make the decision reviewable.<sup>132</sup>

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122. *Id.*

123. *Id.*

124. *Id.* at 690.

125. *Id.*

126. *Id.* (citing *Accardi*, 347 U.S. at 267).

127. *Spencer*, 345 F.3d at 690.

128. *Id.*

129. *Id.* at 690–91.

130. *Id.* at 691 (citing *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000)); *cf.* *Kungys v. United States*, 485 U.S. 759, 778 (1988) (it is a “cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”).

131. *Spencer*, 345 F.3d at 691.

132. *Id.* There might still remain the due process issue of an agency deviating from its own regulations, however.



The *Spencer Enterprises* approach would seem to require re-consideration of some earlier Ninth Circuit cases. In *Romero-Torres v. Ashcroft*, for example, the Ninth Circuit had concluded that it lacked jurisdiction to review the BIA's determination that a non-citizen had failed to satisfy the "exceptional and extremely unusual hardship" requirement for cancellation of removal under 8 U.S.C. § 1229(b)(1) because the ultimate determination depended on a "value judgment" of the Attorney General.<sup>133</sup> In another case,<sup>134</sup> a Ninth Circuit panel had decided that it lacked jurisdiction over an appeal of the BIA's denial of withholding of removal because the decision to deny withholding "was based upon the Attorney General's discretion, pursuant to § 1231(b)(3)(B)(ii), 'to determine whether an aggravated felony conviction resulting in a sentence of less than 5 years is a particularly serious crime.'"<sup>135</sup>

The effect of the *Spencer Enterprises* approach can be seen in a later case involving the revocation of a visa.<sup>136</sup> The immigration statute provides, in relevant part, that the Attorney General "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition [for an immigrant visa]." <sup>137</sup> Is this discretionary, so as to preclude jurisdiction? Under the D.C. Circuit method, the answer would likely be affirmative. The Ninth Circuit, however, arrived at the opposite conclusion: "To put a purely subjective construction on the statute is to render the words 'good and sufficient cause' meaningless."<sup>138</sup>

In any event, said the court, prior case-law had made clear that the authority of the Attorney General to revoke visa petitions "is bounded by objective criteria."<sup>139</sup> Thus, "we are bound to the narrower interpretation, in which 'good and sufficient cause' refers to a meaningful standard that the Attorney General may

133. 327 F.3d 887, 891–92 (9th Cir. 2003).

134. *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001).

135. *Id.* (quoting *In re S-S-*, 22 I. & N. Dec. 458, II. B (no page cite available) (B.I.A. Jan. 21, 1999)).

136. *Ana Int'l v. Way*, 393 F.3d 886 (9th Cir. 2004).

137. 8 U.S.C. § 1155. In 2004, this statute was amended so that "Attorney General" was struck out, and "Secretary of Homeland Security" was inserted. *Id.*

138. *Ana Int'l*, 393 F.3d at 893. Inquiry of this type, however, quickly becomes rather metaphysical:

The search for meaning is not well-served by carving the phrase into discrete components, counting up the permissive bits and the constraining bits and tallying the score. Rather, the key to understanding the provision is to look holistically at the language . . . . What does it mean to deem something to be a good and sufficient cause? Is it to decide the general principles under which individual decisions to revoke a visa should be made? Or is it to identify, in a particular case, the specific factual ground upon which a particular visa is to be revoked?

*Id.* at 894.

139. *Id.* (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984) (holding that § 1155 furnishes a meaningful legal standard)); *Matter of Tawfik*, 20 I. & N. Dec. 166 (B.I.A. 1990) (concluding that a visa is revoked "for 'good and sufficient cause' when the evidence of record at the time of issuance . . . would warrant a denial of the visa petition").

'deem' applicable or inapplicable in a particular case, but which he does not manufacture anew in every new instance."<sup>140</sup> The court asserted that if the Attorney General relies upon "discrete legal classifications of an individual or an act to reach a decision," then the meaning of such classification would remain reviewable, even if the decision involves "a certain measure of discretion."<sup>141</sup> One could hardly find a better example of how the use of the rigid *law/discretion* dichotomy in statutes inspires rather strained judicial reasoning (albeit in the service of admirable goals) in particular cases.

The question of *law/exercise of discretion* and the *eligibility/discretion* lines retain vigor in other circuits. Consider the recent First Circuit case of *Succar v. Ashcroft*.<sup>142</sup> Succar was held by the agency to be ineligible, per 8 C.F.R. § 245.1(c)(8), to apply for adjustment of status to become a lawful permanent resident.<sup>143</sup> The BIA concurred with an immigration judge ("IJ") that he was ineligible for adjustment of status because he was "an arriving alien."<sup>144</sup> The regulation precluded applications for adjustment from the entire category of noncitizens who had been granted parole status and placed in removal proceedings.<sup>145</sup> Succar had applied for asylum, an asylum pre-screening officer had determined that he had a credible fear of persecution, and he was "paroled" into the

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140. *Ana Int'l*, 393 F.3d at 894. The court also noted that the decision to revoke the visa also implicated INA section 1101(a)(44), which defines the notion of "managerial capacity" upon which the decision relied. The subsection provides detailed criteria for determining, for any purpose governed by another section of the immigration law, whether someone is employed in a managerial capacity. *Id.* at 895.

141. *Id.*; see also *Nakamoto v. Ashcroft*, 363 F.3d 874, 878 (9th Cir. 2004) (holding that under § 1252(a)(2)(B)(ii), a partially discretionary removal decision based on "whether a petitioner committed marriage fraud is not a decision the authority for which is specified under the INA to be entirely discretionary").

142. 394 F.3d 8 (1st Cir. 2005).

143. *Id.* at 11.

144. *Id.* at 12 n.3.

145. The purpose of parole is to permit a non-citizen to enter the United States temporarily while investigation of eligibility for admission takes place. See 8 U.S.C. § 1182(d)(5)(A). The statute authorizes the Attorney General to allow parole "temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* The Attorney General has promulgated parole regulations. See 8 C.F.R. § 212.5. Non-citizens can be paroled for urgent humanitarian reasons or significant public benefit "provided the aliens present neither a security risk nor a risk of absconding." 8 C.F.R. § 212.5(b). There are several types of parole. The most common type is known as "port of entry parole." See DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 83 (2004), available at <http://www.uscis.gov/graphics/shared/statistics/archives/index.htm>. "Advance parole" is a second type; it is issued to a non-citizen residing in the United States who has an unexpected need to travel abroad and whose conditions of stay do not otherwise allow for readmission to the United States. *Id.* "Deferred inspection parole" is conferred by an immigration inspector when a non-citizen appears with documentation, but after preliminary examination some questions remain about admissibility. *Id.* "Humanitarian parole" is granted in instances of medical emergency; "public interest parole" is granted for non-citizens participating in legal proceedings; and "overseas parole" may be granted to individuals while they are in their home country to allow them to enter the United States. *Id.*

United States.<sup>146</sup> The IJ denied his request for asylum.<sup>147</sup> While his appeal was pending before the BIA, he married a United States citizen and applied for adjustment of status to a permanent resident.<sup>148</sup>

The government argued that the whole matter was discretionary and therefore not subject to judicial review.<sup>149</sup> As described by the court, the argument was that, “since [the Attorney General] has been given ultimate discretion to deny adjustment of status after application, the validity of the regulation is itself not subject to judicial review.”<sup>150</sup> Indeed, the government further argued that, even if it were subject to review, “the regulation must be upheld as a permissible exercise of that ultimate discretion.”<sup>151</sup> The court disagreed on both points. The court reasoned that, “[t]he mere fact that a statute gives the Attorney General discretion as to whether to grant relief” does not necessarily give the Attorney General the discretion “to define eligibility for such relief.”<sup>152</sup> Courts must still interpret the statute.<sup>153</sup>

More specifically, the court drew the familiar distinction between legal interpretation and discretion, noting consistent rejection by courts of arguments that Congress had eliminated judicial review of “the *legal question of interpretation* of the statute as to whether an alien is eligible for consideration of relief.”<sup>154</sup> As opposed to this ostensibly legal question, the court suggested that “[i]f the BIA had adjudicated and denied Succar’s application on the merits . . . then, arguably this court would not have jurisdiction to review that discretionary determination.”<sup>155</sup> The two questions, said the court, “are distinct.”<sup>156</sup> The court held that whether the regulation was contrary to the adjustment statute was “a purely legal question” and was therefore not within the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B).<sup>157</sup>

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146. *Succar*, 394 F.3d at 11.

147. *Id.*

148. *Id.*

149. *Id.* at 9.

150. *Id.*

151. *Id.*

152. *Id.* at 10 (citing *Cardoza-Fonseca*, 480 U.S. at 443).

153. Interestingly, the court opined, “[w]here the statute is silent on eligibility, the agency involved may reasonably choose to exercise its discretion to withhold relief by excluding certain persons from eligibility for such relief.” *Succar*, 394 F.3d. at 10 (citing *Lopez*, 531 U.S. 230).

154. *Succar*, 394 F.3d at 19 (emphasis added).

155. *Id.* at 19 n.15.

156. *Id.*

157. The court further held that the regulation was inconsistent with 8 U.S.C. § 1255(a) because it was contrary to congressional intent since Congress itself had determined categories of noncitizens who were eligible for adjustment of status and when it had desired to limit eligibility, it had done so explicitly. *See id.* at 23.

In a later case, *Singh v. Gonzales*, the First Circuit similarly distinguished interpretation of eligibility from discretion in a case seeking review of a denial of adjustment of status.<sup>158</sup> The court found that the IJ had denied the application, based on a finding “that he did not meet the statutory prerequisite of admissibility.”<sup>159</sup> This, said the court, “is not a discretionary denial; it is mandated by the statute.”<sup>160</sup> Thus, review was not precluded by 8 U.S.C. § 1252.<sup>161</sup> The Second Circuit has ruled similarly, resisting government arguments to the contrary.<sup>162</sup>

Conversely, the Fifth Circuit in *Torres-Riasco v. Gonzales* offers a typical example of how some courts completely over-ride the *interpretation/discretion* line.<sup>163</sup> In its construction of the jurisdictional bar of 8 U.S.C. § 1252(a)(2)(B)(i), the court found that the Immigration Judge’s determination that Torres-Riasco’s spouse and child would not suffer an “exceptional and extremely unusual hardship” if Torres-Riasco were removed to Colombia “involved the exercise of discretion.”<sup>164</sup> For this reason, the court found that it lacked jurisdiction “to review the IJ’s determination on hardship.”<sup>165</sup>

Some judges clearly appreciate more than others the deep implications of the *law/discretion* problem. The *Succar* court, for instance, linked its opinion to historical practice under the APA as well as to powerful legitimacy arguments: “It is central to the real meaning of the rule of law, [and] not particularly controversial that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so.”<sup>166</sup>

It is interesting, however, to note how easily, in the same opinion, the well-accepted *extent of authority/discretion* analysis extends to the more controversial, broader oversight of discretionary agency decisions. Thus, wrote the court,

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158. 413 F.3d 156 (1st Cir. 2005).

159. *Id.* at 160 n.4.

160. *Id.*

161. *Id.* at 160 n.3; *see also* Ornelas v. Gonzales, 135 Fed. App’x 897, 898–99 (8th Cir. 2005) (“Although the decision to grant cancellation of removal under section 1229b is an unreviewable discretionary act by the Attorney General, the nondiscretionary determinations underlying such a decision are subject to review . . . .”) (citing Ortiz-Cornejo v. Gonzales, 400 F.3d 610, 612–13 (8th Cir. 2005) (finding appeals court had jurisdiction to review IJ’s decision that LPR did not meet the continuous-physical-presence requirement, and thus was ineligible for cancellation relief) and Reyes-Vasquez v. Ashcroft, 395 F.3d 903, 906 (8th Cir. 2005) (same)).

162. *See* Sepulveda v. Gonzales, 407 F.3d 59, 62–63 (2d Cir. 2005) (“The Government contends that under § 1252(a)(2)(B), we may not review any order granting or denying . . . relief, regardless of whether relief was denied as a matter of discretion or because a nondiscretionary factor was found to preclude eligibility for relief. We disagree. . . . 8 U.S.C. § 1252(a)(2)(B) does not strip courts of jurisdiction to review nondiscretionary decisions regarding an alien’s eligibility for the relief . . . .”).

163. 122 Fed. App’x 170, 171 (5th Cir. 2005).

164. *Id.* (citations omitted).

165. *Id.*

166. *Succar*, 394 F.3d at 20 (quoting Transohio Sav. Bank v. Dir., Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Cir. 1992) (internal citations omitted)).

“[w]hen an agency action is contrary to the scope of a statutory delegation of authority *or is an arbitrary and capricious exercise of that authority*, that action must be invalidated by reviewing courts.”<sup>167</sup> This, I suggest, is not best understood as improper “judicial activism.” Rather, it reflects the inherent instability of the *law/discretion* line itself. As Justice Scalia once inscrutably put it, “[e]ven discretion, however, has its legal limits.”<sup>168</sup> Much of the case law in this line is often, to say the least, rather subtle.<sup>169</sup>

On the other hand, courts have not infrequently allowed review of constitutional claims that involved discretionary matters. The Fifth Circuit, for instance, concluded that 8 U.S.C. § 1252(a) stripped it of jurisdiction to review the BIA’s denial of a noncitizen’s applications for adjustment of status and for a waiver of inadmissibility “because these statutes implicate purely discretionary determinations of the Attorney General.”<sup>170</sup> Nevertheless, the court retained jurisdiction “to consider whether Cervantes has established a substantial constitutional due process violation.”<sup>171</sup> The Fifth Circuit has also distinguished statutory from regulatory conferral of discretionary authority. In *Zhao v. Gonzales*, the court noted that a federal regulation, 8 C.F.R. § 1003.23(b)(3), and not any statute, prescribed the amount of discretion given to the Attorney General to decide motions to reopen.<sup>172</sup> The court held that this regulatory-provided discretion could mistakenly be read as jurisdiction-stripping.<sup>173</sup> That reading, however, would be incorrect, because, said the court, § 1252(a)(2)(B)(ii) strips courts only of jurisdiction to review discretionary authority *as specified in the statute*.<sup>174</sup> The statutory language does not apply in general to “discretionary authority” or to “discretionary authority exercised under this statute” but to “authority for which is specified under this subchapter to be in the discretion of the Attorney General.”<sup>175</sup> Thus, the court found it had jurisdiction to review the

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167. *Succar*, 394 F.3d at 20.

168. *INS v. Doherty*, 502 U.S. 314, 330 (1992) (Scalia, J., concurring in part and dissenting in part) (internal cross-reference omitted).

169. Consider how easily a Second Circuit panel in *Santos-Salazar v. United States Dept. of Justice*, 400 F.3d 99 (2d Cir. 2005), accepted a BIA refusal to allow Mr. Santos *even to apply* for discretionary relief: “[T]o the extent that Santos seeks review of so much of the BIA’s order as denied his request for an opportunity to apply for discretionary relief from removal, we lack jurisdiction.” *Id.* at 104 (citing 8 U.S.C. § 1252(a)(2)(B) and stating: “except as to requests for asylum, ‘no court shall have jurisdiction to review,’ *inter alia*, discretionary decisions with regard to ‘the granting of relief from removal.’”).

170. *De Cervantes v. Gonzales*, 134 Fed. App’x 744, 744 (5th Cir. 2005).

171. *Id.*; *see also Corchado-Moya v. Gonzales*, 128 Fed. App’x 74, 76 (10th Cir. 2005) (requiring proof of a “substantial constitutional issue”).

172. 404 F.3d 295, 303 (5th Cir. 2005).

173. *Id.*

174. *Id.* at 303.

175. *Id.*

BIA's denial of the petitioner's motion to reopen because the BIA had not exercised any statutorily provided discretion.<sup>176</sup>

Review of procedural discretionary decisions — a completely separate category — often turns on whether a court concludes that a legal interpretation has compelled agency action. The Third Circuit, for example, held that the BIA's interpretation of the “stop-time” provision<sup>177</sup> was “a purely legal determination,” and therefore, the prohibition against appellate review of discretionary determinations was not applicable.<sup>178</sup>

Finally, claims of ineffective assistance of counsel may permit jurisdiction even in the discretionary realm. The Ninth Circuit retained jurisdiction under 8 U.S.C. § 1252 to review the BIA's denial of the petitioners' motion to file a late brief.<sup>179</sup> Indeed, the court then concluded that the BIA had “abused its discretion in refusing a late brief” on the rather attenuated ground that the “[p]etitioners' attorney's failure to timely file an appellate brief constituted ineffective assistance of counsel and it was apparent from the face of the record.”<sup>180</sup>

In sum, as all of these cases indicate, the line between interpretation and “pure” unreviewable discretion in immigration is quite hard to draw. It involves numerous dichotomies, many variables, and often hidden normative assumptions. Case outcomes are extremely hard to categorize, let alone to predict.<sup>181</sup>

### *B. The Lost Role of District Courts*

“Then . . . Congress stripped this Court of jurisdiction to act in this pending case and all others like it . . . this surprising mandate has gone utterly unnoticed by our people . . . How can this be in modern day America? Mr. Enwonwu is an immigrant alien.”<sup>182</sup>

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176. *Id.*; see also *Manzano-Garcia v. Gonzales*, 413 F.3d 462, 467 (5th Cir. 2005).

177. 8 U.S.C. §§ 1229b(b)(1)(A), 1229b(d)(1).

178. *Okeke v. Gonzales*, 407 F.3d 585, 588 n.4 (3d Cir. 2005).

179. *Garcia Cantor v. Gonzales*, 131 Fed. App'x 601, 602 (9th Cir., 2005).

180. *Id.* at 603 (citing *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) (“[T]he jurisdictional bar contained in 8 U.S.C. § 1252(a)(2)(B)(ii) applies only to acts where the Attorney General has pure discretion ‘unguided by legal standards or statutory guidelines.’”).

181. Indeed, even the (precluded) question whether all apparently relevant factors have been considered by the agency still blurs the jurisdictional analysis:

Respondent contends that pursuant to 8 U.S.C. § 1252(a)(2)(B)(i), we lack jurisdiction to consider the petition for review because the Board denied cancellation of removal as a matter of discretion. Gaspar-Correia argues that this exercise of discretion was based upon the immigration judge's erroneous — and reviewable — factual finding that he was not likely to be rehabilitated. This argument lacks merit because the Board and the immigration judge considered Gaspar-Correia's criminal history in their discretionary weighing of the equities of his case.

*Gaspar-Correia v. Gonzales*, 131 Fed. App'x 561, 562 (9th Cir. 2005) (citations omitted).

182. *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 43 (D. Mass. 2005).

The “jurisdiction stripping” provisions of AEDPA and IIRIRA followed models developed in bills proposed two decades earlier to strip federal courts of jurisdiction over abortion and busing.<sup>183</sup> Although the attacks on abortion and busing failed, noncitizens have made easier targets. The most recent jurisdiction-stripping provisions of the REAL ID Act were a specific reaction to the Supreme Court’s decision in *INS v. St. Cyr*, which held that review of “legal” questions must remain available.<sup>184</sup> As the Conference Committee Report saw it, however, *St. Cyr* allowed, “criminal aliens to delay their expulsion from the United States for years.”<sup>185</sup> Under *St. Cyr*, “criminal aliens [were] able to begin the judicial review process in the district court, and then appeal to the circuit court of appeals.”<sup>186</sup> They were able to appeal to two judicial levels, whereas “non-criminal aliens” were generally limited to the courts of appeals.<sup>187</sup> “Not only is this result unfair and illogical,” the report said, “but it also wastes scarce judicial and executive resources.”<sup>188</sup> Thus, concluded the Committee Report, section 106 of the REAL ID Act “address[es] the anomalies created by *St. Cyr* and its progeny by restoring uniformity and order to the law.”<sup>189</sup>

Massachusetts Chief District Court Judge William Young has recently offered a less sanguine view of this new “uniformity and order”: “While Congress represents that ‘abbreviating the process of judicial review’ leaves room for an ‘adequate and effective alternative to habeas’ review . . . the REAL ID Act is actually intended to, and has the practical effect of, ‘rights stripping.’”<sup>190</sup>

Judge Young reports that there were some 68 pending *habeas corpus* petitions in Massachusetts District Courts, many of which were challenges to removal.<sup>191</sup> Judge Young notes:

These petitioners are now without the benefit of the district courts’ experience in conducting searching evidentiary hearings and listening to their first-hand narratives. Instead, they will each now be afforded their “one day in the court[s] of appeals,” judicial bodies more accus-

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183. See Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1552 (2001).

184. See 151 Cong. Rec. H2813-01, H2872-2873 (2005).

185. *Id.* at H2872.

186. *Id.*

187. *Id.*

188. *Id.* “Finally,” the report complained, “the result in *St. Cyr* has created confusion in the federal courts as to what immigration issues can be reviewed, and which courts can review them.” *Id.* This is a point with which I heartily agree.

189. *Id.* at H2873.

190. *Enwonwu*, 376 F. Supp. 2d at 82.

191. *Id.* at 82-83.

tomed to reviewing “cold record[s]” for legal error than hearing testimony and evaluating evidence.<sup>192</sup>

Congress is certainly constitutionally permitted to limit the district courts’ jurisdiction. However, too restrictive an interpretation of discretion might result in an arguably impermissible restriction on the constitutionally protected writ of *habeas corpus*.<sup>193</sup> As Judge Young piquantly put it, the issue may arise as the courts of appeal “see the practical effect of this wholesale dumping of these cases onto their already overburdened dockets.”<sup>194</sup>

#### IV. EMPIRICAL RESEARCH OF CASE OUTCOMES

Here is a possibly testable hypothesis: the *law/discretion* dichotomy is so malleable that attempts to use it for jurisdictional purposes are bound to fail. To examine this question, my research assistant and I undertook a LexisNexis Keyword Search. The keywords we utilized were “1252(a)(2)(B) w/p discretion!” We narrowed the date range to include only cases reported from 1996, the year in which IIRIRA and AEDPA were passed. This Lexis search returned almost 350 cases in which 8 U.S.C. § 1252(a)(2)(B) and the root word “discretion” were found to be in the same paragraph, and as of August 22, 2005, we found 276 relevant cases.

##### A. Spreadsheet Organization

We organized all the cases onto a spreadsheet, and then placed each case into one of four categories, hinging on whether: 1) the court found no jurisdiction; 2) the court found jurisdiction and remanded the case; 3) the court found jurisdiction but still denied the petition on its merits; and 4) the court found jurisdiction and found a non-discretion-related way to resolve the case that was not on the merits. Some of the cases, as one would expect, seemed to fall into more than one category, so we had to decide which category fit best based upon the reasoning of the opinion.

Finally, we attempted to add more layers of organization within the “Lack of Jurisdiction” category itself. An initial attempt to divide cases that fell into this bundle by the type of discretion that was exercised (delegated, interpretive, procedural, and factual) proved quite difficult, due in large part to wide variations in terminology and transparency (or, to be more critical, opacity). Very few of the opinions even attempted to distinguish which type of discretion the BIA or IJ had exercised. In the end, we therefore settled on a system that divides the cases according to what type of claim was at issue (e.g., Voluntary Departure or

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192. *Id.* at 83 (citations omitted).

193. *See, e.g.*, Brackett v. United States, 206 F. Supp. 2d 183, 184 n.3 (D. Mass. 2002) (“Congress and the courts are limited . . . in how they may restrict [the] availability of the writ of habeas corpus.”).

194. *Enwonwu*, 376 F. Supp. 2d at 85.



Adjustment of Status) but separated out from those lists cases that involved interpretive discretion (by far the most common term was “Extreme Hardship”) or obvious procedural discretion (e.g., a motion to re-open).

### B. *Statistical Analysis*

Having categorized these cases, we were able to count how many cases fell into which categories using the auto-filter function. With these raw numbers, we then calculated the percentage of jurisdictional outcomes involving § 1252(a)(2)(B) and constructed the tables and pie charts that are attached in Appendices A and B.

#### 1. *Lack of Jurisdiction*

Of all the cases that discussed jurisdiction specifically, 64.86% (179 of 276) found that the courts lacked jurisdiction to review the appeal.<sup>195</sup> Within these cases a significant number concerned four types of IJ or BIA determinations (“significant” meaning that they were involved in at least five cases): extreme hardship, cancellation of removal, adjustment of status, and voluntary departure. The extreme hardship (*interpretive discretion*) determination was the most common type of case that the courts felt was not subject to review, making up 46.93% (84 of 179) of the cases that lacked jurisdiction. Next in line was the “ultimate exercise of discretion” category at 22.91% (41 of 179), followed by adjustment of status at 7.82% (14 of 179), then cancellation of removal, which made up 7.2% (13 of 179), and finally voluntary departure at 6.15% (11 of 179).<sup>196</sup>

#### 2. *Remanded*

As for the remaining cases that found that § 1252(a)(2)(B) did not preclude judicial review, only 14.86% (41 of 276) of all the cases surveyed resulted in the case being remanded to the BIA or IJ.<sup>197</sup> However, even within that group of cases, eight were remanded to clarify whether their decisions were discretionary or not. If, upon remand, the BIA or IJ declared that their determinations were indeed discretionary, the courts said that they would consequently lack jurisdiction. In essence, then, only 11.9% (33 of 276) of the cases surveyed were remanded to the BIA or IJ to make substantive decisions consistent with the court’s opinion.

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195. See *infra* App. A.1.

196. See *infra* App. B.1.

197. See *infra* App. A.1.

### 3. *Denied on the Merits*

Among the 35% of cases where courts found jurisdiction, about 50% (44 of 97 if no merits cases are counted, 44 of 85 otherwise) of the cases denied the petition on its merits.<sup>198</sup>

### 4. *Pre and Post–REAL ID contrasted*

Before the REAL ID Act, 65.5% (161 of 246) of all cases were jurisdictionally precluded.<sup>199</sup> After REAL ID, 60% (18 of 30) were precluded.<sup>200</sup> Before the REAL ID Act, the total outright denial rate, jurisdictional and merits combined, was 80% (197 of 246).<sup>201</sup> After REAL ID, it was 87% (26 of 30).<sup>202</sup>

### 5. *District versus Circuit Courts*

54.39% (31 of 57) of district court decisions, pre and post–REAL ID, found jurisdiction lacking.<sup>203</sup> At the circuit court level, the percentage of jurisdictional preclusions was higher: 67.89% (148 of 218).<sup>204</sup> The most common basis for such district court decisions, 51.61%, was “pure discretion.”<sup>205</sup> Among circuit courts, however, it was “extreme hardship” at 55%.<sup>206</sup>

## C. *Observations from Data*

### 1. *The vast majority of cases from 1996 to the present — more than 90% — involving discretionary grounds are denials.*

Those who suggest that the federal courts are too highly interventionist in discretionary immigration cases should consider these data. These government success rates are not much different from the historical norm in discretionary (and probably all other) immigration cases. I base this hypothesis on years of personal experience, review of hundreds of cases, and conversations with judges and with practitioners (including those from the Office of Immigration Litigation) on both sides. Thus, I suspect that, despite the excitement with which they are passed in the Congress, jurisdictional preclusions have, at best, marginal impact. I believe that the reason for this is that the immigration law system is already heavily weighted against a non-citizen appellant for a variety of reasons including: the

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198. *See infra* App. A.1.

199. *See infra* App. A.2.

200. *See infra* App. A.3.

201. *See infra* App. A.2.

202. *See infra* App. A.3.

203. *See infra* App. A.4.

204. *See infra* App. A.7.

205. *See infra* App. B.7.

206. *See infra* App. B.4.

plenary power doctrine; deference to the government; judicial case-load concerns; the highly technical nature of immigration law; *and* a sense among federal judges that these cases are not as “serious” as some others.

2. *A significant majority of the reported cases held that jurisdiction was precluded.*

This fact would seem to contradict my previous assessment of the impact of jurisdictional preclusions. Within that majority, however, the largest category by far was that of cases involving interpretation of the statutory terms “extreme hardship.” My strong suspicion is that the percentage of denials would change very little if courts applied *Chevron* deference in such cases.<sup>207</sup> Administrative law would, however, be much less distorted by such a regime than it is at present. Moreover, those courts that might resolve such cases at *Chevron* step one — not a completely implausible approach — are not finding jurisdictional preclusion under the current system.<sup>208</sup>

3. *Very few cases were remanded, and the most common reason for remand was the “continuous presence requirement.”*

After taking into account the eight cases that were remanded for clarification from the BIA or IJ of whether the determination was discretionary or not, only 11.9% (33 of 276) of all the cases we surveyed were remanded with a reasonable possibility that relief would be granted. Assuming a 50% success rate upon remand (optimistic, in my view) this still results in a very low chance of victory. Of the cases that were remanded because the court did find jurisdiction, cases that dealt with the “continuous physical presence” requirement were the most common.<sup>209</sup> The typical reasoning in such cases was that, although a discre-

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207. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

208. Under *Chevron*, judges generally undertake a two-step approach to review agencies’ statutory interpretation. First, if the intent of Congress is “clear, that is the end of the matter.” 467 U.S. at 842. But if the court decides that Congress has not directly decided the question, then “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* Thus, the *Chevron* architecture changes the judicial analysis from whether the agency construction is correct to whether it is “permissible” or, perhaps, “reasonable.” *Id.* at 843–44.

209. *See, e.g.*, *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005) (“The denial of relief based on the ground that the alien has failed to demonstrate a continuous physical presence . . . is a non-discretionary factual determination and properly subject to appellate review.”); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 217 (5th Cir. 2003) (holding that “whether an alien satisfies the continuous presence requirement [of 8 U.S.C. § 1229b] is a nondiscretionary determination because it involves straightforward statutory interpretation and application of law to fact” and is therefore reviewable); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1141 (9th Cir. 2002) (holding that IJ’s determination of whether alien’s daughter qualifies as a “child” for the purposes of § 1229b was not a “judgment” within meaning of statute because it did not involve exercise of discretion); *Najjar v. Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001) (holding that a determination regarding whether an alien met the “continual physical presence” requirement of 8 U.S.C. § 1229b was nondiscretionary and thus reviewable).

tionary decision regarding the granting of relief under 8 U.S.C. § 1229b was not subject to judicial review, the “nondiscretionary” determinations underlying such a decision are reviewable. This, I suspect, is due in large measure to the particular history of litigation, including cases at the Supreme Court that have involved this precise question.<sup>210</sup> Many courts have since held that the continuous physical presence requirement is a nondiscretionary determination.<sup>211</sup> In the remainder of remanded cases, a majority subscribed to the *Spencer Enterprises* school of thought that only “pure discretion” unguided by legal standards was non-reviewable. As a result, actions or decisions taken by the Attorney General that had statutory guidelines, or likewise were not specified by statute to be discretionary, were more commonly deemed reviewable.

4. *Cases that were denied on the merits rather than dismissed for lack of jurisdiction or remanded follow the same pattern as cases that were remanded.*

Cases that were denied on the merits comprised 15.94% of the reported cases, and much like cases that were remanded, many of these cases concerned the “continuous presence requirement,” or another statutory requirement requiring interpretation. Most others were “procedural discretion” cases in which the court held that the BIA’s (or Attorney General’s) denial of a motion to reopen did not constitute a discretionary decision.<sup>212</sup> Even assuming an (optimistic) ultimate grant rate of 50% among remanded cases, this means that more than 75% of all “discretionary” cases that were decided would result in denials.

5. *There is little statistical evidence to date that the REAL ID Act has made any material difference in outcomes.*

It is obviously too early to determine, but the early data seem to track rather exactly the pre-REAL ID Act statistics. Future research will probably show no difference from historical norms due to the murkiness with which courts analyze the *law/discretion* dichotomy.

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210. See, e.g., *INS v. Phinpathya*, 464 U.S. 183 (1984).

211. See, e.g., *Ortiz-Cornejo*, 400 F.3d at 612; *Reyes-Vasquez*, 395 F.3d at 906; *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 2004); *Mireles-Valdez*, 349 F.3d at 217.

212. See, e.g., *Singh v. Gonzales*, 404 F.3d 1024, 1026 (7th Cir. 2005); *Guerra-Soto v. Ashcroft*, 397 F.3d 637, 639–40 (8th Cir. 2005); *Infanzon v. Ashcroft*, 386 F.3d 1359, 1362 (10th Cir. 2004); *Medina-Morales*, 371 F.3d at 527.

6. *District courts found jurisdiction precluded in a lower percentage of the cases than did circuit courts and “pure discretion” accounted for a much higher percentage of such denials at the district than at the circuit court level.*

In my experience, the most common basis for jurisdiction at the district court level is *habeas corpus*. District court judges have realized that they are the courts of last resort in the post-1996 system and therefore are more likely to err on the side of jurisdiction. Also, being closer to the facts and seeing the people affected may well have a positive impact on outcomes for non-citizens.

## V. CONCLUSION

As Judge Henry Friendly long ago noted in *Wong Wing Hang v. INS*, we generally reject the idea that immigration law discretion could “not [be] subject to the restraint of the obligation of reasoned decision.”<sup>213</sup> Judge Friendly, to be sure, suggested a limited judicial role: “[D]iscretion is held to be abused only when the action ‘is arbitrary, fanciful or unreasonable,’ which is another way of saying that discretion is abused only where no reasonable man would take the view under discussion.”<sup>214</sup> Such a deferential stance is particularly appropriate where the relevant statute expressly empowers discretionary decisions. Judge Friendly offered the following formula for suspension, a classic form of *delegated discretion*: “[T]he denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race.”<sup>215</sup> This, it seems to me, remains an appropriate model for distinguishing a legal question from a discretionary one under REAL ID. The discretionary decision is the residual, subjective decision that can be entrusted to an administrative agency *so long as* a reviewing court has made certain that it has not been “made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race.”<sup>216</sup> Beyond this, of course, if the decision involves a patent misinterpretation of a legal term, then it is simply not discretionary in this strong sense of *delegated discretion*.

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213. 360 F.2d at 718 (quoting HART & SACKS, *supra* note 23, at 175–77). Judge Friendly rejected the argument that unreviewability was mandated by *Jay*, 351 U.S. at 345, and cited *Hintopoulos*, 353 U.S. at 72, in which the Supreme Court affirmed an agency denial of section 244 relief as neither arbitrary nor an abuse of discretion.

214. *Wong Wing Hang*, 360 F.2d at 718 (quoting *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942)).

215. *Wong Wing Hang*, 360 F.2d at 719.

216. *Id.*

Another question arises from the BIA precedents and regulations that have sometimes been developed to standardize the exercise of discretion in cases involving applications for relief from deportation. Such rules, part of a commendable aspiration towards transparency and consistency, tend to blur the line between interpretation and discretion.<sup>217</sup> The development of a list of factors could be seen as an exercise of ultimate, *delegated discretion*, in which case neither their promulgation nor their application would be subject to review under the dominant view of the REAL ID system. But they could also be seen as *legal interpretive discretion*. Viewed this way, they must be at least potentially reviewable by courts. And how can a court decide whether that *potential* review should be *actual* review without engaging in *some* review?

Imagine if the Board were to add this criterion to a precedential decision about extreme hardship: “we have considered the applicant’s race — adjudicators should recognize that white people have more sensitive emotional constitutions.” Under REAL ID, this is clearly a constitutional question, subject to review, and it obviously cannot survive scrutiny. But what of this criterion: “we have considered the applicant’s cultural history — based on our understanding of the nature of life in his culture — and we conclude that certain family ties are not so important in that culture as in ours?” Is it not a reviewable “question of law” whether and how an agency may consider such things in the exercise of its discretion?

The judiciary will thus need to consider three problems in the wake of REAL ID. The first is whether statutory provisions that embody *delegated discretion* are reviewable at all. Immigration — especially deportation — cases often have uniquely poignant humanitarian implications. In my view, the appropriate model for discretion, whether constitutionally grounded in due process or sub-constitutional, should be one of mercy and fairness. However difficult it may be in close cases to define the line between law and policy, the agency decisions in individual deportation cases presumptively fall on the law side of that divide. In addition, such cases typically present questions that are far less obviously policy-based than how to spend a lump-sum appropriation and far less resistant to meaningful standards than whether to initiate an enforcement action.

The constitutional legitimacy of the administrative state rests upon a balance between (potentially unreviewable) agency discretion and the judicially enforced Rule of Law. The government’s argument in many pre-REAL ID Act cases was that virtually any statutory reference to discretion rendered the entire case unreviewable. That extreme vision of insulated executive action has been breached somewhat by the REAL ID Act. The new legislation, however, is in this sense a conclusion (“questions of law must always remain reviewable”) in search of a clearer question (“what, exactly, is a question of law?”).

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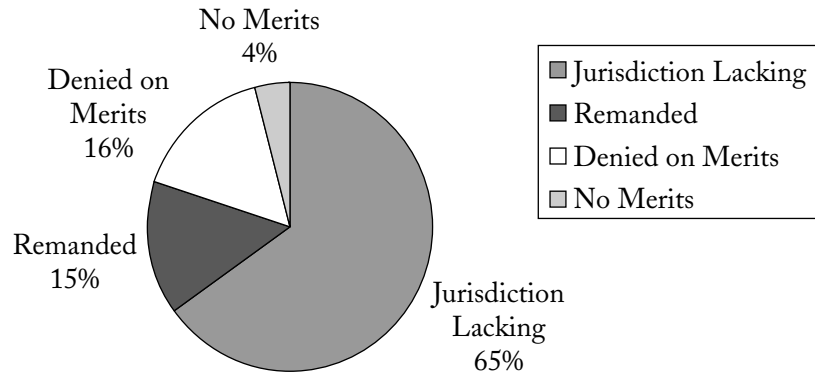
217. See, e.g., *Matter of Anderson*, 16 I. & N. Dec. 596 (B.I.A. 1978) (in which the Board listed criteria for “extreme hardship”).

The second problem thus requires an answer to the question whether courts may impose any *meaningful* sub-constitutional requirements on immigration agency decisions. Here, my proposed distinction between *delegated* and *interpretive discretion* could prove useful. If, for example, the Board's construction of relief terms is understood as *interpretive discretion*, then the Court could, following some of its more nuanced, post-*Chevron* decisions, review those categories fairly closely, without necessarily abandoning all deference. The wide divergence between the "continuous presence" and "extreme hardship" line of cases is a cumbersome analytic embarrassment that can be easily overcome with a less binary model.

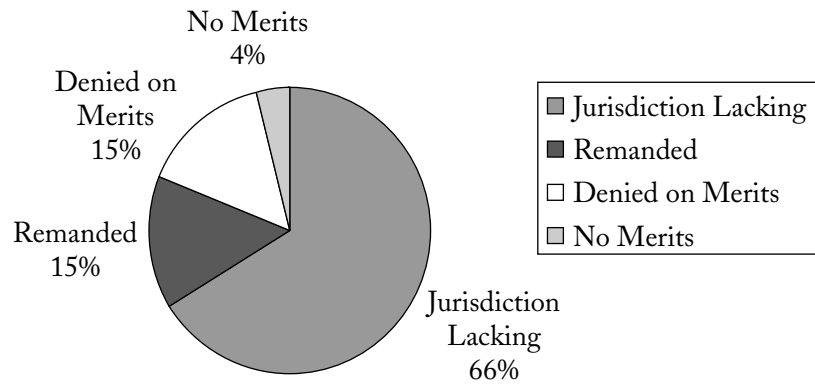
Third, and most broadly, we should rethink discretion and deference in immigration law. Although administrative law scholarship is replete with formulae by which discretion may be cabined in general, the best practice and theory derives from a highly specific understanding of the particular field at issue. A more refined taxonomy of discretion, viewed as part of a repertoire of interpretive methods, will help us to avoid confusing or inconsistent usages. The scope of judicial review in deportation cases can then be understood on a continuum ranging from the most deferential review of *delegated discretion* to the closest scrutiny of *legal interpretive discretion*, as in *Cardoza-Fonseca*. Because this latter class of cases presents the most "law-like," and least "policy-like" sorts of interpretive questions, a less deferential scope of judicial review is both theoretically sound and most likely to lead to fair and consistent results.

APPENDIX A

A.1 Combined Federal All Dates

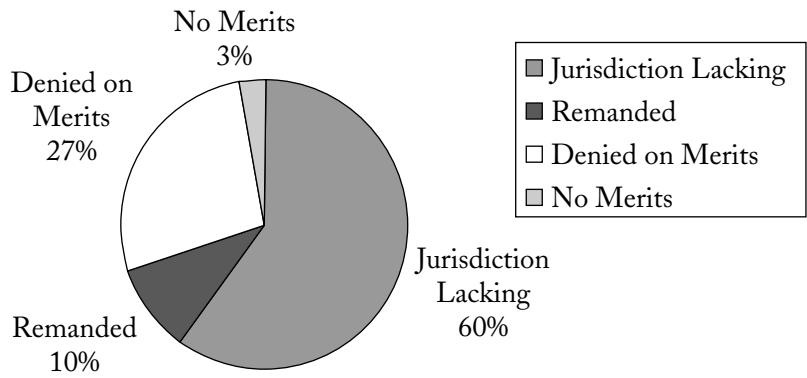


A.2 Combined Federal Pre-May 11

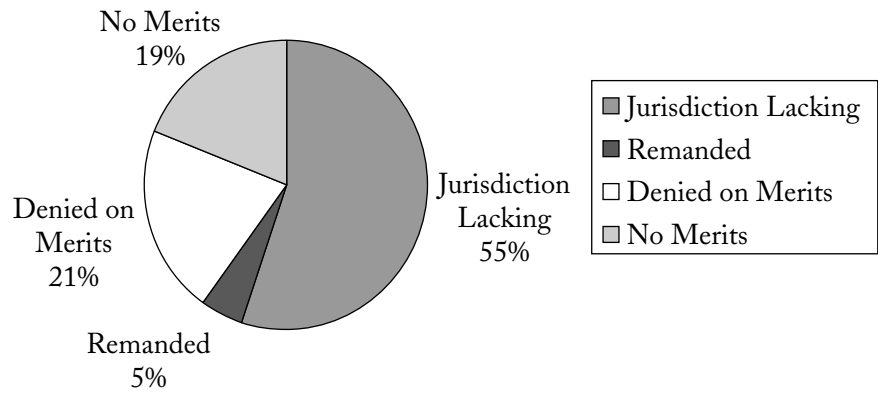




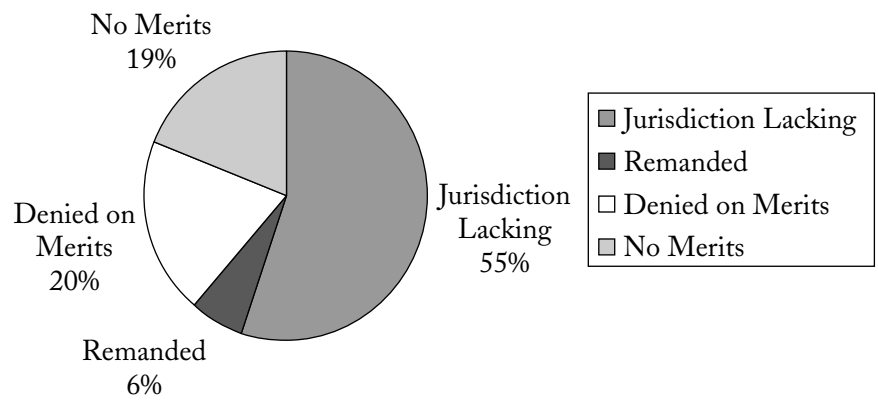
**A.3 Combined Federal Post-May 11**



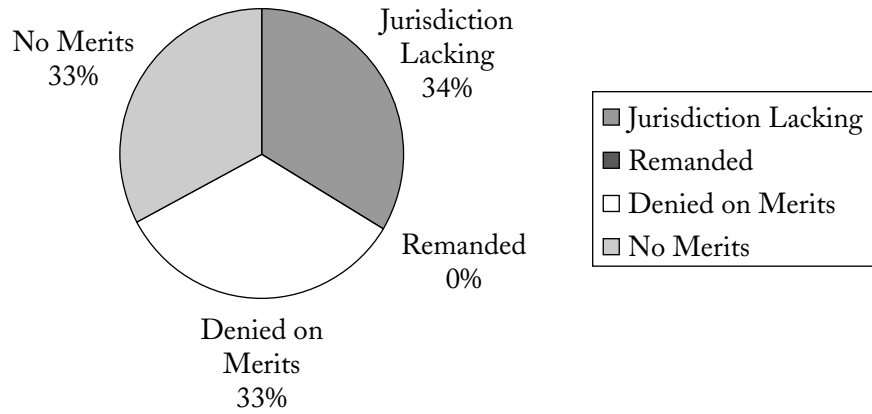
**A.4 District All Dates**



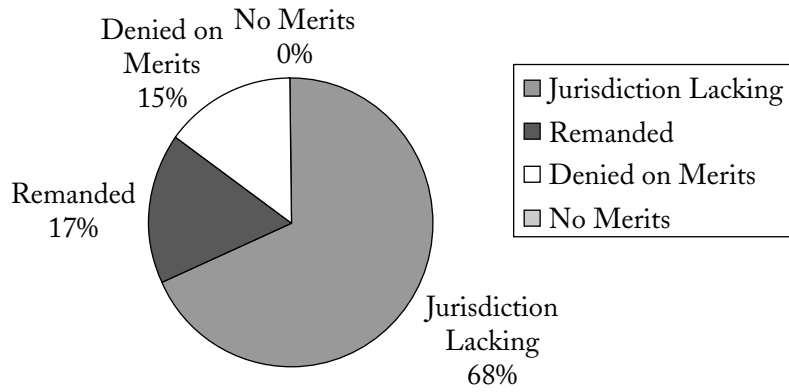
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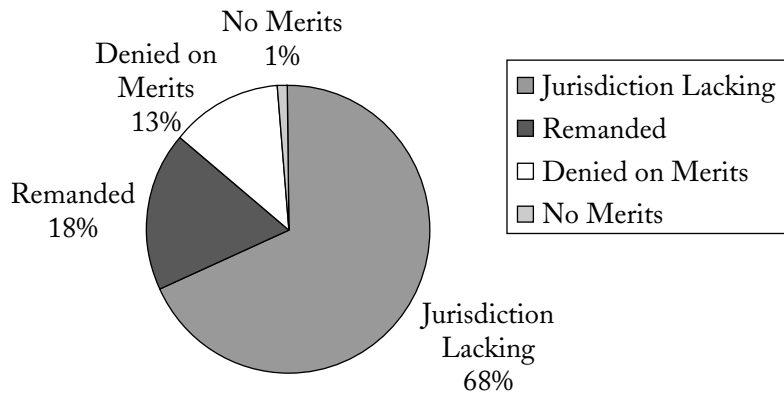
**A.6 District Post-May 11**



**A.7 Circuit All Dates**

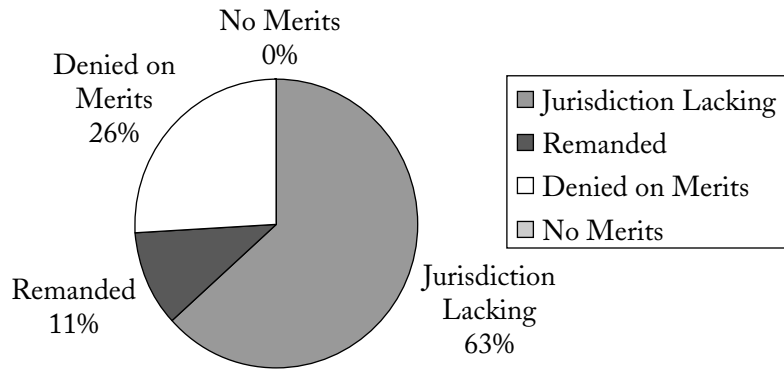


**A.8 Circuit Pre-May 11**



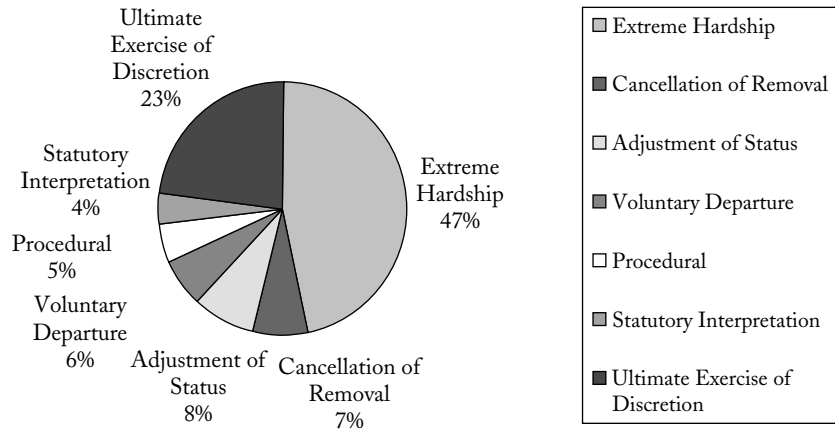
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**A.9 Circuit Post-May 11**

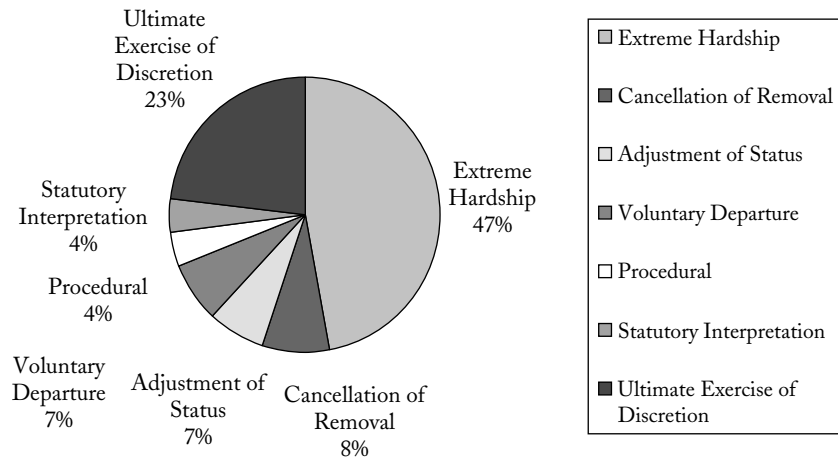


APPENDIX B

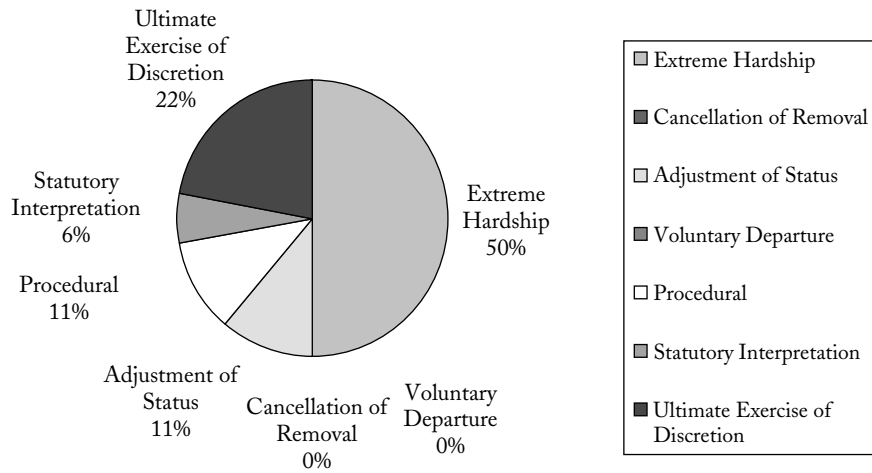
**B.1 Combined Federal: Lack of Jurisdiction Types All Dates**



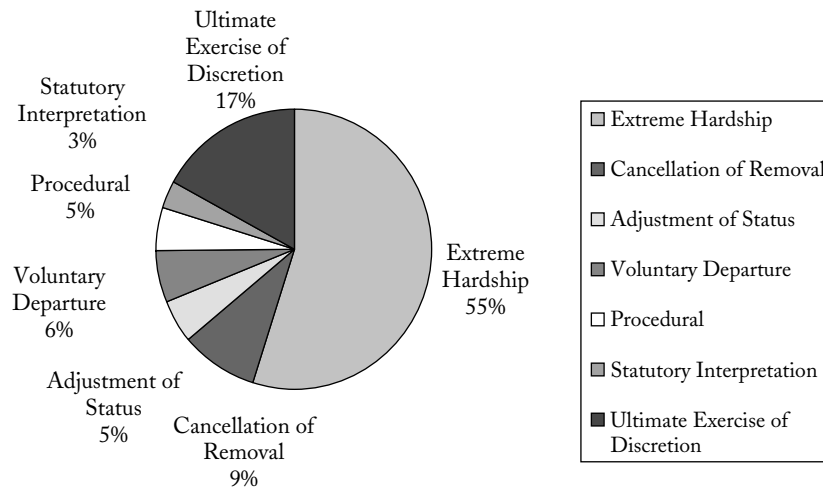
**B.2 Combined Federal: Lack of Jurisdiction Types Pre-May 11**



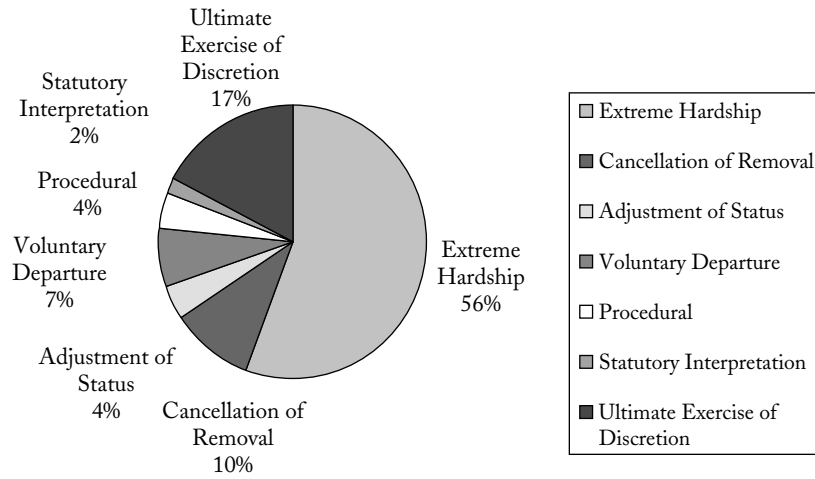
**B.3 Combined Federal: Lack of Jurisdiction Types Post-May 11**



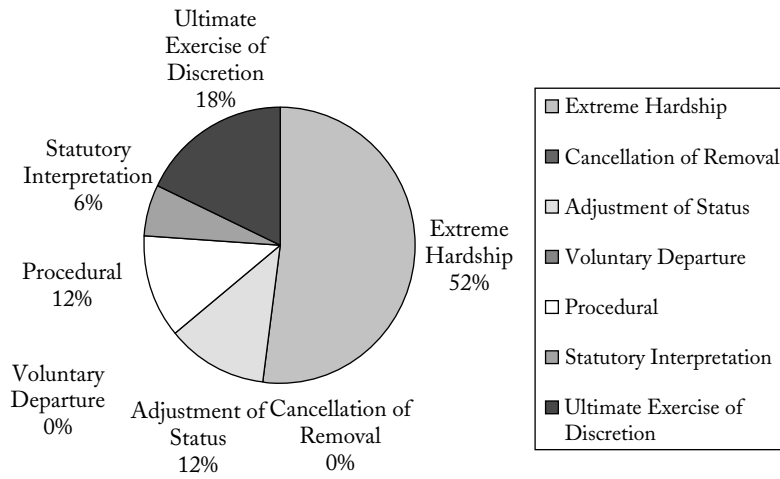
**B.4 Circuit: Lack of Jurisdiction Types All Dates**



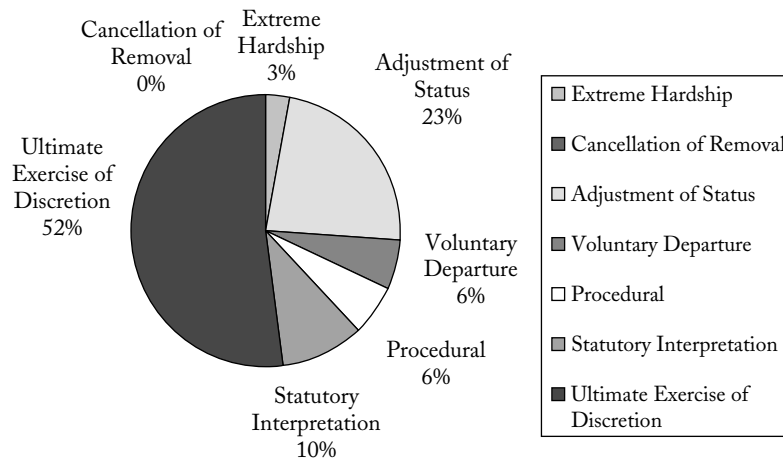
**B.5 Circuit: Lack of Jurisdiction Types Pre-May 11**



**B.6 Circuit: Lack of Jurisdiction Types Post-May 11**



**B.7 District: Lack of Jurisdiction Types All Dates**



**B.8 District: Lack of Jurisdiction Types Pre-May 11**

