

What Constitutes Exceptional?
The Intersection of Circumstances Warranting
Reopening of Removal Proceedings After Entry of an
In Absentia Order of Removal and Due Process Rights
of Noncitizens

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I. INTRODUCTION

According to data collected by the Department of Justice, Executive Office for Immigration Review (“EOIR”), in fiscal year 2006, 39% of noncitizens failed to appear for their removal hearings¹ before an immigration judge.² Although this was consistent with the rate from 2005, it had risen from a five-year low in 2003 of a rate of

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1. Prior to the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996), “deportation” was the term of art referring to the procedure whereby a noncitizen illegally present in the United States was removed from the country, whereas “exclusion” referenced the procedure whereby a noncitizen was denied entry to the United States because he or she was inadmissible. Since April of 1996, both are now encompassed in “removal” proceedings. *See, e.g.*, IIRIRA at §§ 308(d)(4)(B),(K),(O),(S),(T) and 308(e)(1).

2. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK H2 (2007). Of a total of 280,494 decisions by immigration judges in such cases, 102,834 cases resulted in entry of an *in absentia* order of removal, while 6,879 resulted in administrative closure. *Id.* For non-detained noncitizens (i.e., those who have never been detained), the rate of failure to appear was 60%, while for released noncitizens (i.e., those who had previously been detained but were released on bond or on their own recognizance), the rate was 36% in 2006. *Id.* at H3-H4. While the failure to appear rates for non-detained noncitizens has, consistently with the overall rates, increased over the past five years, the rate for released noncitizens has steadily decreased for the five-year period FY 2002–2006. *Id.*

22%.³ Notably, however, the number of failures to appear decreased by 60% in 2007, to a five year low.⁴

Since 1990, the Immigration and Nationality Act has contained provisions to treat more harshly those who fail to appear for these types of hearings.⁵ The harsher provisions were in part a response to a report by the General Accounting Office (“GAO”)⁶ in October 1989, which estimated that approximately 27% of noncitizens arriving in New York and Los Angeles who were suspected of being inadmissible failed to appear at their exclusion⁷ hearings.⁸ Pursuant to this report, Congress included in its draft and subsequent passage of the Immigration Act of 1990⁹ controversial new provisions regarding noncitizens who failed to appear at their removal proceedings. Among these provisions was a subsection providing that any noncitizen who fails to attend a removal proceeding shall be ordered deported¹⁰ in absentia if the INS¹¹ establishes by “clear, unequivocal, and convincing evidence” that written notice of the proceeding was properly provided to the noncitizen.¹² This act also provides that such

3. FY 2006 STATISTICAL YEAR BOOK, *supra* note 2, at H2. This information does not, however, reflect reasons for such failure to appear (i.e., whether the failure to appear was due to oversight by the noncitizen or by a failure of DHS to send proper notice), nor the number of cases that were subsequently reopened due to one of the reasons listed in the Immigration and Nationality Act (“INA”). See INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).

4. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2007, STATISTICAL YEAR BOOK H1 (2008).

5. Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 4978, 5061–65 (1990).

6. Effective July 7, 2004, the GAO was officially renamed the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004); see also U.S. Government Accountability Office, GAO’s Name Change and Other Provisions of the GAO Human Capital Reform Act of 2004, <http://gao.gov/about/namechange.html> (last visited Oct. 1, 2007); David M. Walker, *GAO Answers the Question: What’s In a Name?*, ROLL CALL, July 19, 2004, available at <http://gao.gov/about/rollcall07192004.pdf>.

7. See *supra* note 1.

8. GAO, IMMIGRATION CONTROL: DEPORTING AND EXCLUDING ALIENS FROM THE UNITED STATES (Oct. 1989).

9. Immigration Act of 1990, *supra* note 5, at § 545.

10. I.e., removed. See *supra* note 1.

11. With the Homeland Security Act of 2002, the INS ceased to exist and most of its functions were transferred to the newly created Department of Homeland Security (“DHS”). See Homeland Security Act of 2002 §§ 101, 471, and 1502, Pub.L. No. 107-296, 116 Stat. 2135, 2142, 2205, and 2308 (2002).

12. Immigration Act of 1990, *supra* note 5, at § 545(c)(1) and (2).

an order may be rescinded only upon a motion to reopen filed at any time if the noncitizen did not receive proper notice or was in custody at the time of the notice, or upon a motion to reopen filed within 180 days after the date of the in absentia order if the noncitizen can demonstrate “exceptional circumstances.”¹³

Since the enactment of this provision, the Board of Immigration Appeals (“BIA”) and the various circuit courts of appeals have varyingly interpreted “exceptional circumstances.”¹⁴ The circuits have occasionally determined that the BIA has abused its discretion in denying motions to reopen in absentia orders of removal based on exceptional circumstances.¹⁵ Certainly, the provisions of the INA regarding removal proceedings,¹⁶ particularly those regarding the process of rescinding in absentia orders of removal and thus reopening proceedings based upon exceptional circumstances,¹⁷ must be interpreted so as not to infringe upon constitutional rights.¹⁸ Such

13. Immigration Act of 1990, § 545(c)(3), *supra* note 5 (previously enacted at INA § 242B(c)(3), 8 U.S.C. § 1252b(c)(3)). Subsections (c)(1)–(3) have remained largely intact in reforms of the INA through 2006, although these provisions have subsequently been enacted at INA § 240(a). *See* IIRIRA, *supra* note 1, § 308(b)(6). Provisions to address removal proceedings for noncitizens issued a Notice to Appear on or after April 1, 1997 were added by § 304(a)(3) of IIRIRA, 110 Stat. 589, which created section 240 of the INA, 8 U.S.C. § 1229a (2006).

14. *See infra* Part II.B.

15. Under the applicable standard, a judicial court may review discretionary determinations of the BIA if such determination was arbitrary, capricious, or an abuse of discretion. Administrative Procedure Act, 5 U.S.C. § 706(2). *See also* Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966); Ogbemudia v. INS, 988 F.2d 595, 600 (5th Cir. 1993); INS v. Doherty, 502 U.S. 314, 323 (1992); Sharma v. INS, 89 F.3d 545, 547 (9th Cir. 1996).

16. INA § 240, 8 U.S.C. § 1229a (2006).

17. INA § 240(b)(5)(A)–(C)(i), 8 U.S.C. § 1229a(b)(5)(A)–(C)(i) (2006); *see also* INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii).

18. *See* Hooper v. California, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”). *See also* INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (citing *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago* 440 U.S. 490, 499–501 (1979); *Machinists v. Street*, 367 U.S. 740, 749–50 (1961)).

an interpretation must and would be consistent with congressional intent in enacting the INA.¹⁹

The right to a full and fair hearing, in compliance with the Fifth Amendment of the United States Constitution,²⁰ has repeatedly been held to extend to noncitizens in removal proceedings.²¹ This extension is justified both by text and by policy. First, the language of the amendment applies to all “person[s],” rather than simply to

19. Thus, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) the circuits cannot avoid the constitutional question at stake here. Under *Chevron* analysis, the court must answer two questions:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

Id. at 842–43. For an example of the Supreme Court’s application of *Chevron* deference to a case involving the BIA, see *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). However, *cf.* *INS v. St. Cyr*, 533 U.S. 289 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

It is well-established that in motions to reopen in absentia orders of removal, the circuit courts will review the decision of the BIA for abuse of discretion. See *infra* notes 50–51 and accompanying text. Additionally, under the avoidance canon, statutes should be construed in such a way as to avoid constitutional doubts. Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 76 (2004) (citing *Yates v. United States*, 354 U.S. 298 (1957)); *Clark v. Martinez*, 543 U.S. 371, 379 (2005). This is a “tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark*, 543 U.S. at 381–82 (citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)), *Edward J. Debartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). As the Court explained in *Zadvydas v. Davis*, 533 U.S. 678 (2001):

[T]he rule does not permit courts to press statutory construction to the point of disingenuous evasion even to avoid a constitutional question. . . . An interpretation which defeats the stated congressional purpose does not suffice to invoke the constitutional doubt rule, for it is “plainly contrary to the intent of Congress.”

Id. at 707.

20. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty or property, without due process of law.”).

21. See, e.g., *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Matter of Exilus*, 18 I&N Dec. 276, 278 (B.I.A. 1982). See also *Dobrota v. INS*, 311 F.3d 1206, 1210 (9th Cir. 2002) (“Aliens facing deportation are entitled to due process under the Fifth Amendment to the United States Constitution, encompassing a full and fair hearing and notice of that hearing.”); *Farhoud v. INS*, 122 F.3d 794, 796 (9th Cir. 1997); *Andia v. Ashcroft*, 359 F.3d 1181 (9th Cir. 2004).

citizens.²² Furthermore, once a noncitizen gains admission and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly, as compared to a noncitizen seeking initial admission.²³ Thus, when a noncitizen misses an immigration hearing due to exceptional circumstances, due process concerns, such as the right to notice and a meaningful opportunity to be heard,²⁴ are implicated.²⁵

In immigration proceedings, as in other types of administrative proceedings, the test to be followed to determine what process rights are due is that established in *Mathews v. Eldridge*.²⁶ The *Mathews* test weighs the interest at stake for the individual, the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.²⁷ The role of the courts of appeal, as the judicial reviewers of decisions of the BIA,²⁸ “is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.”²⁹

22. Cf. U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States . . .”) (emphasis added).

23. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133–34 (1924); *Low Wah Suey v. Backus*, 225 U.S. 460, 468 (1912)).

24.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

25. *Kaweesa v. Gonzales*, 450 F.3d 62, 69 (1st Cir. 2006) (citing *Nazarova v. INS*, 171 F.3d 478, 482 (7th Cir. 1999)).

26. 424 U.S. 319 (1976).

27. *Id.* See also *Landon v. Plasencia*, 459 U.S. 21, 34; *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004) (“The liberty interests involved in removal proceedings are of the highest order. Removal visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

28. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (2000).

29. *Landon*, 459 U.S. at 34–35. (1982); see also *Vermont Yankee Nuclear Power Corp. v.*

This Note aims at a better understanding of the best understanding of “exceptional circumstances” in light of the decisions of the circuit courts, which are limited to reviewing agency decisions for abuse of discretion,³⁰ as compared to those of the BIA. Part II examines the history of removal proceedings in the context of failures to appear due to exceptional circumstances, as well as the interpretation of the requirements under INA § 240(b)(5)(C)³¹ for reopening by the BIA and circuits. It also turns to the role of procedural due process in such decisions. Part III analyzes two types of exceptional circumstances under the framework articulated by the BIA and circuits, and examines where due process does and should intersect in such claims. Part IV suggests “exceptional circumstances” should be interpreted as circumstances beyond a person’s control, as clearly established by the totality of the circumstances. This section further argues that such an interpretation would work at the administrative level to ensure that due process rights of noncitizens are not violated when the BIA has to make a decision on whether to reopen proceedings on this ground. It also addresses potential counterarguments against such an interpretation. Finally, Part V concludes that only by closely examining the right of noncitizens to a full and fair hearing in this unique form of removal proceedings will the BIA be able to come to a uniform interpretation of exceptional circumstances warranting reopening of cases involving in absentia orders of removal, one that is consistent with congressional intent in enacting these provisions of the INA, thus limiting the need for review of these decisions by the federal courts of appeals.

Natural Res., 435 U.S. 519, 524–25 (1978) (finding that administrative agencies will be in a better position than Congress or the courts to design procedural rules adapted to the tasks of the agency involved and to the peculiarities of its area of expertise).

30. See *supra* notes 14, 18. But compare *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001), which argues that the INS must overcome “the strong presumption in favor of judicial review of administrative action” in order to prevail. See also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974).

31. 8 U.S.C. § 1229a(b)(5)(C) (2000).

II. FROM THE IMMIGRATION ACT OF 1990 INTO THE 21ST CENTURY: INTERPRETATION OF “EXCEPTIONAL CIRCUMSTANCES” BY THE BIA AND CIRCUIT COURTS

The primary problem with the “exceptional circumstances” provision as a reason to reopen removal proceedings closed in absentia has been the lack of consistent interpretative standards articulated by the BIA, primarily, or the circuit courts, as reviewers of the BIA’s decisions. It is first necessary to understand the statutory provisions regarding removal proceedings when the noncitizen fails to appear. Thereafter, an examination of the decisions in which the BIA and circuits have examined exceptional circumstances will illuminate the problem of inconsistency that shrouds the process of reopening orders of removal entered in absentia.

A. Consequences of Failure to Appear and Motions to Reopen in Absentia Orders of Removal Under INA § 240

If the Department of Homeland Security (“DHS”) becomes aware that a noncitizen is deportable for any reason,³² it will issue to the noncitizen a Notice to Appear (“NTA”), which officially commences removal proceedings. The NTA advises the respondent noncitizen of his or her duties and of the consequences of failing to appear at the removal proceedings.³³ Should the noncitizen fail to appear at any subsequent hearing, provided adequate notice³⁴ has been given either

32. For a detailed list of the various deportability grounds, see INA § 237, 8 U.S.C. § 1227 (2006). For the list of grounds of inadmissibility, see INA § 212, 8 U.S.C. § 1182 (2006).

33. See INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2006). The notice to appear further requires the noncitizen to inform DHS of any changes in address or telephone number. *Id.* § 239(a)(1)(F).

34. The INA provisions regarding adequate notice in this regard changed significantly with the enactment of IRRIRA. The Immigration Act of 1990 added the following notice provision to the INA:

Sec. 242B (a) Notices.—

(1) ORDER TO SHOW CAUSE.—In deportation proceedings under section 242, written notice (in this section referred to as an ‘order to show cause’) shall be given *in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien’s counsel of record, if any. . . .*

(Emphasis added). Thus, notice was adequate only if the noncitizen was personally served or

to the noncitizen or his or her attorney of record,³⁵ he or she “shall be ordered removed in absentia” so long as the DHS establishes “by clear, unequivocal and convincing evidence” that such notice was provided and that the noncitizen is removable.³⁶

the notice was delivered to the noncitizen or his attorney of record by certified mail. However, according to IIRIRA’s notice provision:

Sec. 239. (a) Notice to Appear.—

(1) IN GENERAL.—In removal proceedings under section 240, written notice (in this section referred to as a ‘notice to appear’) shall be given in person to the alien (or, if personal service is not practicable, *through service by mail* to the alien or to the alien’s counsel of record, if any)

IIRIRA, *supra* note 1, § 304 (emphasis added). Some courts have interpreted this more lax notice requirement to lessen the formerly “strong presumption” of receipt. *Compare* Matter of Grijalva, 21 I.&N. Dec. 27, 37 (B.I.A. 1995) (holding that the “strong presumption” of effective service may only be overcome by “substantial and probative evidence such as documentary evidence from the Postal Service, third party affidavits, or other similar evidence demonstrating that there was improper delivery or that nondelivery was not due to the respondent’s failure to provide an address where he could receive mail”) *to Salta v. INS*, 314 F.3d 1076, 1079 (2002) (concluding BIA abused its discretion in applying the “strong presumption of effective service” because “delivery by regular mail does not raise the same ‘strong presumption’ as certified mail, and less should be required to rebut such a presumption”).

35. Adequate notice may be provided to the noncitizen pursuant to either paragraph (1) or (2) of INA § 239(a) discussed *infra* notes 41–42. Paragraph (2) of that section provides:

(2) Notice of change in time or place of proceedings

In general

In removal proceedings under section 240(b)(5) . . . , in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying—

- (i) the new time or place of the proceedings, and
- (ii) the consequences under section 240(b)(5) . . . of failing, except under exceptional circumstances, to attend such proceedings.

Exception

In the case of an alien not in detention, a

written notice shall not be required under this paragraph if the alien has failed to provide the address required under paragraph (1)(F)

Id.

36. INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2005). To be sufficient, DHS need only provide written notice to the most recent address under section 239(a)(1)(F). *Id.* § 239(b)(5)(A),(B).

Since 1990, the INA has taken into account the fact that circumstances beyond the control of the noncitizen may cause some noncitizens to miss their removal proceedings.³⁷ As such, INA § 240(b)(5)(C)(i) provides that an order of removal entered in the noncitizen's absence may be rescinded upon a motion to reopen "filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances."³⁸ The motion to reopen is the means used to present material new facts which were "not available and could not have been discovered or presented at the former hearing."³⁹ The Act further defines exceptional circumstances as those "circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien."⁴⁰

Additionally, the *Immigration Judge Benchbook* ("Benchbook") provides some guidance in interpreting "exceptional circumstances"

37. See Immigration Act of 1990, § 545(c), enacted as INA § 242B(c), 8 U.S.C. § 1252B(c) (1990). This section was later reenacted as INA § 240(b)(5), 8 U.S.C. § 1229a(b)(5) (2005). These sections are substantially the same, except *compare* Immigration Act of 1990, § 545(c)(4) to current INA § 240(b)(5)(D)(iii).

38. 8 U.S.C. § 1229a(b)(5)(C)(i) (2005). Paragraph (ii) of § 1229a(b)(5)(C) further provides for motions to reopen filed at any time if the noncitizen demonstrates either that sufficient notice was not provided or that the noncitizen "was in Federal or State custody and the failure to appear was through no fault of the alien." This paragraph, however, is beyond the scope of this note, except to observe the similarity of the latter part of this paragraph (failure to appear "through no fault of the alien") to the definition of exceptional circumstances as "beyond the control of the alien." See, INA § 240(e)(1). Such similarity would seem to indicate a similar concern in both provisions authorizing reopening of removal proceedings previously concluded with an in absentia order of removal.

39. 8 C.F.R. § 1003.2(c)(1) (2005). Such a motion is distinct from a motion to reconsider, which is filed for the purpose of calling attention to "errors of fact or law in the prior Board decision" and thus must "be supported by pertinent authority." *Id.* § 1003.2(b)(1). Motions to reopen under this section of the INA are to contain "the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." INA § 240(c)(6)(B), 8 U.S.C. § 1229a(c)(7)(B).

A series of measures in recent years, including the Immigration Act of 1990 and IIRIRA, have imposed major procedural restrictions on the filing of motions to reopen. The noncitizen may file only one motion to reopen a removal order, and if exceptional circumstances have not been demonstrated, that motion must be filed within 90 days of the final order of removal (with the exception of certain asylum cases). See INA § 240(c)(6)(A),(B), 8 U.S.C. § 1229a(c)(6)(A),(B); INA § 240(c)(7)(A), 8 U.S.C. § 1229a(c)(7)(A); INA § 240(c)(7)(C)(i),(ii), 8 U.S.C. § 1229a(c)(7)(C)(i),(ii).

40. INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1) (2005). See also *infra* notes 41–42 and accompanying text.

in motions to reopen.⁴¹ According to its discussion of motions to reopen,

A motion to rescind an in absentia order of deportation in exclusion proceedings shall be denied unless the alien provides a reasonable explanation for his or her failure to appear. See *Matter of S-A-*, 21 I&N Dec. 1050 (BIA 1998) (holding that traffic is not a reasonable cause to warrant the reopening of exclusion proceedings).⁴²

While the *Benchbook* mentions “exceptional circumstances,” it does not expand on the meaning of that term much beyond that which is provided in the Statute.⁴³ Although limited in its interpretation of when exceptional circumstances warrant reopening, the *Benchbook* does, however, give examples of when exceptional circumstances do not exist, explaining, for instance, when ineffective assistance of counsel does not qualify as an exceptional circumstance justifying reopening.⁴⁴

41. U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (“EOIR”), IMM. JDG. BNCHBK. (2001), <http://www.usdoj.gov/eoir/statspub/benchbook.pdf>.

42. *Id.* at 8.II.B.25; *see also supra* note 1.

43. IMM. JDG. BNCHBK., *supra* note 41, at 8.II.B.29. The only expansion of the INA’s definition given in the *Benchbook* allows for exceptional circumstances in cases involving ineffective assistance of counsel:

The term “exceptional circumstances” refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the alien’s spouse, child or parent, but not including less compelling circumstances) beyond the control of the alien. INA § 240(e)(1); 8 C.F.R. § 3.23(b)(4)(iii)(A)(1) (2000). The ineffective assistance of counsel constitutes “exceptional circumstances” excusing the failure to appear. *Matter of Grijalva*, 21 I&N Dec. 472 (B.I.A. 1996). Immigration Judge’s [sic] should ALWAYS read and issue all warnings, advisals, dates for applications as well as the penalties that apply should applications not be timely filed directly to the alien through an interpreter so that there is no question in the mind of the alien what must be done in his or her case. This eliminates many “ineffective assistance” issues that may otherwise result in remands.

Id. *See also* *Matter of Gustavo Alonzo Grijalva-Barrera*, 21 I.&N. Dec. 472 (B.I.A. 1996) (ineffective assistance of counsel warranted reopening). The requirements for a claim of ineffective assistance of counsel to be examined by the Immigration Judge when ruling on a motion to reopen are set out in *Matter of Lozada*, 19 I.&N. Dec. 537, Interim Decision 3059 (B.I.A. 1988).

44. These provisions provide:

B. Administrative and Judicial Interpretation of “Exceptional Circumstances”

To date, the BIA and the circuits appear to have recognized three primary areas of contention regarding claims of exceptional circumstances.⁴⁵ The first type of claims revolve around the meaning of “serious illness” as would warrant reopening under the INA.⁴⁶ The second group of claims involves ineffective assistance of counsel,⁴⁷ and the third group consists of claims involving tardiness to removal hearings.⁴⁸ Contrary to what might be expected, the extent to which the reason for the tardiness was beyond the control of the noncitizen is not necessarily a major consideration taken into account by the BIA or the circuit courts.⁴⁹ In all categories, however, the courts

a. An alien seeking to reopen in absentia proceedings based on his or her unsuccessful communications with his or her attorney did not establish exceptional circumstances pursuant to section 242B(c)(3)(A) of the Act when she failed to satisfy all of the requirements for a claim of ineffective assistance of counsel as set out in *Matter of Lozada*, 19 I&N Dec. 637 (B.I.A. 1988). *Matter of Rivera-Claros*, 21 I&N Dec. 599 (B.I.A. 1996); cf. also *Matter of A-A-*, Interim Decision 3357 (B.I.A. 1998) (a claim of ineffective assistance of counsel does not constitute an exception to the 180-day statutory limit for the filing of a motion to reopen to rescind an in absentia order of deportation on the basis of exceptional circumstances); *Matter of Lei*, Interim Decision 3356 (B.I.A. 1998) (same).

b. An alien’s failure to appear at his or her rescheduled deportation hearing due to his inability to leave his or her employment on a fishing vessel was not an “exceptional circumstance.” *Matter of W-F-*, 21 I&N Dec. 503 (B.I.A. 1996).

Id. at 8.II.B.29.a, b.

45. Certainly there are cases that do not fall squarely into any three of these categories or for which there may be overlap between several of the categories; *see, e.g.*, *Matter of Chaman Singh*, No. A72567465 2004 WL 3187212 (B.I.A. 2004) (no exceptional circumstances where in absentia order was entered while respondent was waiting outside courtroom for attorney to appear and respondent had not previously been to such a hearing); *Chete Juarez v. Ashcroft*, 376 F.3d 944 (9th Cir. 2004) (BIA abused its discretion in determining that there were no exceptional circumstances where noncitizen did not receive notice of hearing because of change in address, misunderstanding of time of hearing could constitute exceptional circumstances). However, for purposes of defining a standard by which the BIA should properly interpret “exceptional circumstances” so as not to violate due process rights of noncitizens, it is necessary to examine these three classes, on which the BIA and the courts of appeals have had numerous occasions to rule.

46. *See Matter of Singh*, 21 I&N Dec. 998 (B.I.A. 1997) (family illness causing respondent to be 15 minutes late constituted exceptional hardship). *See also infra* notes 54–55.

47. *See also infra* notes 56–60 and accompanying text.

48. *See infra* notes 73–74.

49. *See infra* notes 63–64 and accompanying text.

examine the legal determinations of the BIA *de novo*, subject to principles of administrative deference.⁵⁰ The BIA's ultimate decision to deny a motion to reopen is reviewed by the courts for abuse of discretion.⁵¹

Generally, one area in which the BIA and circuit courts have been in agreement has been in their unwillingness to find exceptional circumstances where the noncitizen is late to his or her hearing due to traffic problems.⁵² However, at least one court has found that traffic problems in combination with other factors may allow the noncitizen to reopen based on exceptional circumstances.⁵³

The first category of in absentia orders of removal, serious illness of the noncitizen or immediate relative,⁵⁴ is contained in the statute and has been applied strictly by the BIA and the courts.⁵⁵

50. *See, e.g.*, *De Massenet v. Gonzales*, 485 F.3d 661, 663 (1st Cir. 2007); *see also supra* note 19.

51. *De Massenet, supra* note 50; *see also Zhao v. U.S. Dep't of Justice*, 265 F.3d 83 (2d Cir. 2001); *Sevoian v. Ashcroft*, 290 F.3d 166 (3d Cir. 2002); *Stewart v. U.S. I.N.S.*, 181 F.3d 587 (4th Cir. 1999); *Aneyoue v. Gonzales*, 478 F.3d 905 (8th Cir. 2007); *Iturribarria v. I.N.S.*, 321 F.3d 889 (9th Cir. 2003); *Assa'ad v. U.S. Atty. Gen.*, 332 F.3d 1321 (11th Cir. 2003).

52. *See Matter of S-A-*, 21 I.&N. Dec. 1050 (B.I.A. 1997) (traffic problem causing noncitizen to be half an hour late is not exceptional circumstance); *Sharma v. INS*, 89 F.3d 545 (9th Cir. 1996); *Doering v. INS*, 172 F.3d 56 (9th Cir. 1999) (where noncitizen was a long-time Los Angeles resident and allowed only thirty-five minutes travel time during rush hour to get to his hearing in downtown Los Angeles, heavy traffic due to an auto accident causing him to arrive forty-five minutes late did not constitute exceptional circumstances).

53. *See Herbert v. Ashcroft*, 325 F.3d 68 (1st Cir. 2003). There, the court held that where the noncitizen was delayed due to traffic congestion and where the noncitizen's counsel of record failed to appear at the hearing, exceptional circumstances warranted reopening. The court also found it persuasive that the noncitizen clearly intended to appear, and took into account the fact that the noncitizen had appeared at all prior hearings in making its determination. *Id.* at 72–73.

54. In an unpublished decision issued in 2003, the BIA overturned a decision by an immigration judge who had found that the respondent's claim of needing to take care of his mother in Nigeria who was suffering from breast cancer (a claim that was uncontested by DHS) did not constitute exceptional circumstances. Vacating the IJ's decision, the BIA determined that his mother's cancer was "certainly a matter beyond his control" that warranted reopening based on exceptional circumstances excusing his failure to appear. The Board also noted that the IJ erred in requiring the respondent to have notified the immigration court ahead of time of this circumstance, explaining that while this may have been the "courteous" thing to do, "such courtesy is not always possible or practicable, as in this case." *Matter of Alphonsus Mary Obiora Gusiara*, No. A23464590, 2003 WL 23508564 (B.I.A. Dec. 23, 2003). *See also* Unpublished B.I.A. Opinion Considers 'Exceptional Circumstances' and In Absentia Removal, 81 Interpreter Releases 214 (Feb. 16, 2004).

55. *See, e.g.*, *Valle v. Gonzales*, 138 Fed. App. 979 (9th Cir. 2005) (unsigned note from medical clinic and noncitizen's affidavit failed to establish serious illness sufficient to warrant

The second category, dealing with ineffective assistance of counsel, is one regularly applied by both the BIA and the circuit courts, despite the lack of specific reference to this type of claim in the INA. Claims based on ineffective assistance of counsel typically rely on *Matter of Lozada*, 19 I.& N. Dec. 637 (BIA 1988) to determine when such cases rise to the level of exceptional circumstances.⁵⁶ *Lozada* held that a noncitizen filing a motion to reopen removal proceedings based on ineffective assistance of counsel must (1) submit an affidavit setting forth in detail the agreement that was entered into with his or her counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) inform the counsel

reopening in absentia order of removal); *Morales v. Ashcroft*, 103 Fed. App. 169 (9th cir. 2004) (exceptional circumstances excusing failure to appear existed where alien submitted affidavit explaining that she went to the hospital the night before the hearing because of difficulty breathing, that she left the hospital mid-morning the day of the removal hearing, and that doctors prescribed valium and told her not to drive and get bed rest and where alien also submitted a medical form from the hospital dated the day of the hearing). *See also* *Matter of B-A-S-*, 22 I.&N. Dec. 57 (B.I.A. 1998) (holding that a foot injury suffered by respondent day before and day of his hearing did not constitute exceptional circumstance where he did not support his claim with medical records or an affidavit from his employer); *Matter of J-P-*, 22 I.&N. Dec. 33 (B.I.A. 1998) (finding that a serious headache suffered by the respondent on the day of his hearing was not an exceptional circumstance justifying his failure to appear, where he the only evidence supporting his claim was an affidavit he had written as to his symptoms). *But cf.* *Matter of J-P-*, 22 I.&N. Dec. at 36–48 (Rosenberg, J., dissenting) (noting that in certain circumstances a serious headache may constitute exceptional circumstances; pointing out new standard articulated by majority suggesting three additional requirements: corroboration, medical opinion, and a diligence requirement whereby the noncitizen should call to notify the immigration court of these circumstances; finding that remand is only appropriate means of providing fundamental fairness to noncitizen to address these three new requirements); *Matter of B-A-S-*, 22 I.&N. Dec. at 60–66 (Rosenberg, J., dissenting).

56. *See, e.g.,* *Dakane v. U.S. Att’y Gen.*, 371 F.3d 771, 775 (11th Cir. 2004) (explaining a petitioner claiming ineffective assistance of counsel must show “substantial, if not exact, compliance with the procedural requirements of *Lozada*”); *Hamid v. Ashcroft*, 336 F.3d 465, 469 (6th Cir. 2003) (“Sound policy reasons support compliance with the *Lozada* requirements.”); *Stroe v. INS*, 256 F.3d 498, 503–04 (7th Cir. 2001) (rejecting ineffective assistance of counsel claim because the petitioner did not comply with the *Lozada* requirements); *Lara v. Trominski*, 216 F.3d 487, 498 (5th Cir. 2000) (“[T]he general application of the *Lozada* rules is not an abuse of discretion.”); *Castillo-Perez v. INS*, 212 F.3d 518, 525 (9th Cir. 2000) *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999) (citing the *Lozada* requirements as supporting dismissal of ineffective assistance claim); *Stewart v. INS*, 181 F.3d 587, 596 (4th Cir. 1999) (holding that since petitioner “failed to assert her claim of ineffective assistance of counsel to the BIA in the manner prescribed by *Matter of Lozada* . . . [the] Court [could not] consider the claim”); *In re Assaad*, 23 I.&N. Dec. 553 (B.I.A. 2003) (in banc) (reaffirming the continuing validity of the *Lozada* requirements).

whose integrity or competence is being impugned of the allegations leveled against him or her so that counsel is provided an opportunity to respond, and (3) either establish that a complaint has been filed with the appropriate bar association or other disciplinary authorities for such ineffective assistance, or explain why such action has not been taken.⁵⁷

Courts vary on their willingness to reopen such cases, particularly where the noncitizen has failed to meet the last of these enumerated factors.⁵⁸ Some circuits have explained that the requirements enumerated in *Lozada* were merely factors to be considered,⁵⁹ and at least one circuit has held that the application of *Lozada* to bar a claim of ineffective assistance of counsel was “arbitrary and an abuse of the IJ’s discretion.”⁶⁰

As to the third category of exceptional circumstances claims (tardiness), the BIA and the circuits reviewing these decisions have yet to reach a uniform standard.⁶¹ The circuits seem more willing to take into account the reasons for the tardiness and the amount of time

57. Matter of *Lozada*, 19 I.&N. Dec. 637 (B.I.A. 1988).

58. See also INA § 242B(c)(3)(A), 8 U.S.C. § 1252b(c)(3)(A); *Jobe v. INS*, 212 F.3d 674 (1st Cir. 2000) (doctrine of equitable tolling creates an exception to the 180-day period for seeking rescission of an in absentia order of removal based on exceptional circumstances if failure to timely file was the result of ineffective assistance of counsel).

59. *Castillo-Perez v. INS*, 212 F.3d 518, 526 (9th Cir. 2000) (“While the requirements of *Lozada* are generally reasonable, they need not be rigidly enforced where their purpose is fully served by other means.”).

60. *Twum v. INS*, 411 F.3d 54, 56 (2d. Cir. 2005).

61. Compare Matter of *Singh*, 21 I&N Dec. 998 (B.I.A. 1997) (holding that slight tardiness due to family illness can constitute exceptional circumstance) to *Pineda v. U.S. Att’y Gen.*, 186 Fed. App. 854, 856 (11th Cir. 2006) (holding that arrival approximately fifteen minutes after hearing was scheduled due to confusion about the location of the hearing was *not* exceptional circumstance because not “of the same type as the events discussed in the INA”); see also *Herbert v. Ashcroft*, 325 F.3d 68, 69–70 (1st Cir. 2003) (reversing BIA denial of motion to reopen decision in absentia where respondent arrived approximately thirty minutes late and in light of “other unusual circumstances” including his counsel’s filing of an emergency motion for continuance explaining that respondent had been ordered to appear before a magistrate judge continued from the preceding day); *Nazarova v. INS*, 171 F.3d 478 (7th Cir. 1999) (finding that two hour tardiness was an exceptional circumstance warranting reopening where respondent was waiting for an interpreter that the court had told her would be provided); Matter of *Chaman Singh*, No. A72567465 2004 WL 3187212 (B.I.A. 2004) (determining that exceptional circumstances warranting reopening did not exist where respondent arrived on time but waited outside the courtroom for an hour for his attorney to arrive, during which time an in absentia order of removal was entered against him).

elapsed between the time the hearing was scheduled and the time the noncitizen arrived.⁶²

Beginning with *Matter of W-F-* and in a number of subsequent cases,⁶³ the BIA has asserted a “totality of the circumstances” approach to interpreting “exceptional circumstances.”⁶⁴ However, the BIA has not uniformly applied this test, and in some cases it has been up to the courts of appeal to reiterate this standard to the BIA for consideration on remand. Furthermore, the BIA and the courts of appeals have articulated various factors to be considered in evaluating the total circumstances. According to the BIA, such factors as supporting documentary evidence, the noncitizen’s efforts in contacting the immigration court, and the noncitizen’s promptness in filing the motion to reopen may be significant.⁶⁵ The Ninth Circuit Court of Appeals has added factors to this list, including the strength of the noncitizen’s underlying claim, the harm the noncitizen would suffer if the motion to reopen is denied, and the inconvenience the government would suffer if the motion were granted.⁶⁶

62. Many instances of tardiness involve cases where the noncitizen was delayed due to traffic and thus exceptional circumstances usually are not found. However, in certain cases the courts of appeals have distinguished cases of shorter delays as not constituting failure to attend a hearing, and thus warranting reopening. *See, e.g.,* *Alarcon-Chavez v. Gonzales*, 403 F.3d 343 (5th Cir. 2005) (arriving 20 minutes late did not constitute failure to attend hearing so as to support an in absentia order) *Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006) (immigration judge deprived noncitizen of due process by issuing in absentia order, when noncitizen was merely late and thus did not fail to appear nor was required to demonstrate exceptional circumstances). *See also* *Jerezano v. INS*, 169 F.3d 613 (9th Cir. 1999) (granting motion to reopen where court found that the immigration judge had deprived the noncitizen of his due process rights where he arrived in the courtroom approximately fifteen minutes past the scheduled time of hearing while the judge was still on the bench).

63. *See, e.g.* *Matter of M-S-*, 22 I.&N. Dec. 349 (B.I.A. 1998); *Matter of Lei*, 22 I.&N. Dec. 113, 119 (B.I.A. 1998); *Matter of J-P-*, 22 I.&N. Dec. 33, 36 (B.I.A. 1998); *Matter of S-M-*, 22 I.&N. Dec. 49, 50 (B.I.A. 1998).

64. *Matter of W-F-*, 21 I.&N. Dec. 503 (B.I.A. 1996). In setting forth this standard, the BIA looked to the House Conference report for the Immigration Act of 1990, discussed *infra* notes 84–85 and accompanying text. In that particular case, the BIA found that “the respondent’s situation has not been shown to be ‘exceptional,’ unforeseeable, or in any way beyond his control,” and held that the respondent’s failure to appear because he was on a fishing vessel for employment purposes did not constitute “exceptional circumstances.” *Id.* at 509.

65. *Matter of B-A-S-*, 22 I.&N. Dec. 57, 58–59 (B.I.A. 1998).

66. *Kaweesa v. Gonzales*, 450 F.3d 62, 68–69 (1st Cir. 2006); *see also* *Singh v. INS*, 295 F.3d 1037, 1039–40 (9th Cir. 2002). The Ninth Circuit also stated in *Singh* that if a respondent has no possible reason to try to delay the hearing and denying a motion to reopen would lead to

C. Due Process Rights of Noncitizens in Removal Proceedings

To protect due process, federal immigration regulations should not be so strictly interpreted as to provide unreasonable, unfair, or absurd results.⁶⁷ Furthermore, whenever an alien misses any immigration hearing due to either lack of notice or exceptional circumstances, due process concerns, including the right to notice and a meaningful opportunity to be heard, are implicated.⁶⁸

The U.S. Supreme Court has established that removal involves a loss of liberty such that due process must be provided before an alien is deported.⁶⁹ At a minimum, due process requires that such a deprivation of liberty be preceded by notice and an opportunity for hearing appropriate to the nature of the case.⁷⁰ As mentioned above,⁷¹ the Supreme Court's decision in *Mathews v. Eldridge*⁷² articulated three factors to be considered in deciding what procedures are required when there has been a deprivation of liberty, including the private interest that will be affected, the risk of erroneous deprivation of that interest and the probable value of additional procedural safeguards, and the Government's interest.⁷³

III. USING DUE PROCESS AS A GUIDE TO INTERPRETING EXCEPTIONAL CIRCUMSTANCES

What exactly is meant by "exceptional circumstances" justifying rescission of in absentia orders of removal and thus reopening of removal proceedings is not immediately clear from the face of the

the "unconscionable result" of deporting an individual who is eligible for relief, the totality of the circumstances approach suggests that exceptional circumstances may exist. *Id.* at 1040.

67. *Chowdhury v. INS*, 241 F.3d 848, 853 (7th Cir. 2001).

68. *Kaweesa*, 450 F.3d at 69; *see also Nazarova*, 171 F.3d at 482.

69. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Sung v. McGrath*, 339 U.S. 33 (1950).

70. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996) (holding that the opportunity to be heard is essential to due process).

71. *See supra* notes 26–27 and accompanying text.

72. 424 U.S. 319 (1976).

73. *Id.* at 335. Determination of the Government's interest includes an evaluation of "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

statute, nor have the BIA's decisions always provided clear-cut interpretation.⁷⁴ While Congress left some guidance as to the interpretation of various enforcement provisions in the House Conference Report accompanying the Immigration Act of 1990,⁷⁵ many of the key terms remain ambiguous. The proper interpretation, one that does not violate the due process rights of noncitizens in cases which should be reopened, must be determined by analyzing decisions of both the BIA and the various courts of appeals reviewing the BIA's decisions.

The statutory "definition" of exceptional circumstances⁷⁶ sheds little (if any) light as to how to interpret this term. Properly read, INA § 240(e)(1) defines exceptional circumstances as "exceptional circumstances . . . beyond the control of the alien".⁷⁷ It also parenthetically and perfunctorily gives examples that may qualify,

74. However, see Iris Gomez, *The Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act*, 30 SAN DIEGO L. REV. 75 (1993) for a very thoughtful analysis and statutory construction of the exception as originally enacted. Gomez concedes that the term "exceptional circumstances" is ambiguous. *Id.* at 143. Even after looking to the definition set out in BLACK'S LAW DICTIONARY 560 (6th ed. 1990) ("Conditions which are out of the ordinary course of events; unusual or extraordinary circumstances. For example, lack of jurisdiction to hear and determine a case constitutes 'exceptional circumstances' as a basis for raising a question for the first time on a habeas corpus."), she determines that the phrase is "not susceptible to ready classification." *Id.* at 144. She further carefully examines the statutory parameters of the definition of exceptional circumstances as both enlarging and limiting the situations to which the term may be applied. *Id.* at 144–45. Further, Gomez analyzes the relationship of "exceptional circumstances" to "reasonable opportunity to appear" and "reasonable cause" under then INA Section 242(b). *Id.* at 146–58. She concludes that at least as of 1993, agency rulemaking had "yet to close major gaps or clarify many significant interpretive questions Congress left untouched." *Id.* at 158.

75. H.R. CONF. REP. NO. 101-955 (1990), as reprinted in 1990 U.S.C.A.N. 6784, 6797. According to that report, the Act includes "several enforcement provisions" designed, in part, to

ensure that aliens properly notified of impending deportation proceedings, or other proceedings, in fact appear for such proceedings. On this latter issue, the Conferees expect the Attorney General to establish an efficient and trustworthy system to ensure that communications between INS and aliens subject to deportation are accurately recorded and that they reflect whether counsel has filed notice of appearance on behalf of the alien and, if so, whether such notice has become stale through the passage of time or has been withdrawn. Additionally, the conferees expect that in determining whether an alien's failure to appear was justifiable the Attorney General will *look at the totality of the circumstances to determine whether the alien could not reasonably have been expected to appear.*

Id. (emphasis added).

76. See INA § 240(e)(1), 8 U.S.C. § 1229a(e)(1).

77. *Id.*

but such examples are not meant to be exhaustive.⁷⁸ Thus, the only requirements established by the INA for exceptional circumstances are that the reasons for the failure to appear be “compelling” and “beyond the control of the alien.”

This then leads to the question of what qualifies as a “compelling” failure to appear. Clearly, Congress’s intent was to make the standard warranting reopening of in absentia orders more stringent.⁷⁹ At the same time, however, a “compelling” failure to appear must be interpreted in such a way as to not violate the due process rights of the noncitizen.⁸⁰

The exceptional circumstances provision is important for a number of reasons, including its due process implications, that the drafters of the INA undoubtedly had in mind. With the Immigration Act of 1990, Congress had dual concerns regarding immigration. As the “most important immigration statute in many years,”⁸¹ the Immigration Act of 1990 addressed and rejected the hostility that characterized the earlier McCarran-Walter Act of 1952,⁸² while simultaneously toughening various substantive grounds, including the procedure regarding removal.⁸³ The House of Representatives, in passing this Act, further expressed that among its purposes was a desire to ease current immigration law restrictions that (1) hinder reunification of nuclear families, (2) impose barriers to immigration on nationals of countries that have served as traditional sources of immigration to the United States, and (3) severely limit the number of highly skilled or otherwise needed foreign-born workers who may become lawful permanent residents.⁸⁴

78. *Id.* These examples include “serious illness of the alien” and “death of a spouse, child or parent of the alien,” but not “less compelling circumstances.” *Id.*

79. This is especially true given the previous standard had been that the noncitizen was only required to show “reasonable cause” for his or her failure to appear. *Georcely v. Ashcroft*, 375 F.3d 45, 50 n.4 (1st Cir. 2004) (citing *Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989); *Tang v. Ashcroft*, 354 F.3d 1192, 1194 n.3, 1195 n.4 (10th Cir. 2003)).

80. *See supra* note 25 and accompanying text and Part II.C; *infra* note 106 and accompanying text.

81. 1 CHARLES GORDON, STANLEY MAILMAN, AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 2.04[11][b]2-38 (2004).

82. *Id.*

83. STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 22 (Foundation Press ed., 4th ed. 2005).

84. H.R. REP. NO. 101-723, pt. 1, at 31 (1990).

Furthermore, Congress expressed its intent to “repeal[] and moderniz[e] outdated laws” and to “eas[e] unintended or harmful consequences” of other provisions of the INA as previously enacted.⁸⁵

The Immigration Act of 1990 sought to continue to protect the due process rights of aliens in removal proceedings. Noncitizens in the United States had long been protected by the Due Process Clause.⁸⁶ Yet the constitutional protection extended to noncitizens is not as complete as the protection received by U.S. citizens.⁸⁷ Furthermore, the freedom and protection offered by the Constitution was recognized more fully by prior versions of the INA.⁸⁸

85. *Id.* at 32. Furthermore, the Presidential signing statement expressed a number of goals intended to be accomplished by this Act revising the INA. According to then-President Bush, “Immigration reform began in 1986 with an effort to close the ‘back door’ on illegal immigration through enactment of the Immigration Reform and Control Act (IRCA).” The Immigration Act of 1990 was seen as “open[ing] the ‘front door’ to increased legal immigration” while providing the “needed enforcement authority” to do so. 1990 U.S.C.C.A.N 6801-1. Additionally, Bush praised the legislation for meeting “several objectives of this Administration’s domestic policy agenda” including “cultivation of a more competitive economy, support for the family as the essential unit of society, and swift and effective punishment for drug-related and other violent crime.” *Id.*

86. *See* U.S. CONST. amend. V. *See also* *Yick Wo v. Hopkins*, 118 U.S. 365 (1886); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yamataya v. Fisher*, 189 U.S. 86 (1903); *United States ex rel Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

87. Indeed, if the same protections were available to both citizens and noncitizens, noncitizens would not be subject to removal proceedings in the first place; the argument for such a change, however, is not herein advanced.

For a discussion of the extent to which the Due Process clause applies to noncitizens in other types of proceedings, see Clarence E. Zachery, Jr. *The Alien Terrorist Removal Procedures: Removing the Enemy Among Us Or Becoming the Enemy From Within?*, 9 GEO. IMMIGR. L.J. 291, 298 (1995). *See also* *Mathews v. Diaz*, 426 U.S. 67, 78–79 (1976) (“The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not afforded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.”).

88. *See* INA § 242(a)(2)(A),(B),(C), imposing limits on judicial review of orders of removal. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act [hereinafter IIRIRA], which enacted the above-mentioned sections of the INA. IIRIRA focused on the swift removal of undocumented immigrants, and stripped the federal courts of jurisdiction to review several categories of deportation orders. Previous to the enactment of IIRIRA, an administratively final order of removal could be judicially reviewed as a general rule by petition for review in the courts of appeals. However, IIRIRA barred judicial

Nonetheless, constitutional due process, including the right to a full and fair hearing, continues to be the right of aliens in removal proceedings, even, or perhaps especially, when they are faced with an in absentia order of removal.⁸⁹

As it currently stands, the INA and surrounding regulations have made it increasingly difficult for the noncitizen to seek any remedy after entry of an in absentia order of removal, particularly if the person actually is removed pursuant to such order. In absentia orders of removal are reviewable only on the issues of the adequacy of notice, the reasons for the person's absence, and deportability.⁹⁰ Furthermore, if a final order of removal is entered in absentia against a noncitizen due to failure to attend a removal proceeding (with the sole exception for failures due to exceptional circumstances), that person becomes ineligible for relief until ten years after the final

review of almost the entire category of crime-related removal grounds. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C). IIRIRA also acted to preclude judicial review of most discretionary decisions. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(C). Furthermore, IIRIRA's enactment caused a prohibition on a number of other judicial remedies. INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A) (barring judicial review of orders of expedited removal); *Id.* § 1252(g) (barring review of prosecutorial discretion to institute removal proceedings); *id.* § 1252(f)(1) (barring class actions seeking injunctive relief). Note also that the prefatory exception before the substantial elements of each of these subsections ("Notwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of title 28, United States Code . . .) was added by the REAL ID Act of 2005. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 380–84 (2006); LEGOMSKY, *supra* note 83, at 23. However, due process rights of aliens upon judicial review have been conserved, although to a much more limited extent by INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) ("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").

89. INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4) describes the current state of the law regarding aliens' rights in removal proceedings. That section states that the noncitizen

shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act.

Id. § 240(b)(4)(B).

90. INA § 240(b)(5)(D), 8 U.S.C. § 1229a(b)(5)(D). Thus, eligibility for discretionary relief, including cancellation of removal and adjustment of status under § 240A (among the most common issues presented in petitions for review), would not be subject to judicial review.

order of removal is entered.⁹¹ Thus, noncitizens who are ordered removed in absentia suffer adverse consequences beyond the removal order itself.⁹²

Because of these severe, adverse results from in absentia orders, the “exceptional circumstances” exception is key in ensuring that noncitizens in such proceedings are given all the rights that are due to them. Foremost among such rights is that of procedural due process, which must be taken into consideration when motions to reopen are before the BIA, and subsequently, if denied by the BIA, in the judicial review process.

The “totality of the circumstances” approach advocated by the BIA⁹³ provides a useful means of analyzing “exceptional circumstances” claims, although the factors to be considered may vary between the BIA and the various courts of appeals. There is a need for clarification here, especially when considering the due process implications in such cases.

Furthermore, using due process to interpret exceptional circumstances may help elaborate a more uniform approach to the three categories of such circumstances.⁹⁴ Particularly in regard to the second category, claims of ineffective assistance of counsel, due process should be crucial to interpreting the *Lozada* factors, so that the alien is not deprived of a full and fair hearing due to an unfortunate choice of counsel.⁹⁵ In the context of the third category (exceptional circumstances argued due to tardiness), the distinction between circumstances which are unforeseeable and those which are merely unforeseen has played, and will likely continue to play, an important role. The immigration judges and the BIA will need to focus more upon circumstances beyond the control of the alien in order to come to a consensus and uniform rule that is aligned with congressional intent behind these provisions of the INA.

The importance of developing a uniform rule of interpretation of “exceptional circumstances” is likely to be felt most, however, in

91. INA § 240(b)(7), 8 U.S.C. § 1229a(b)(7).

92. LEGOMSKY, *supra* note 83, at 839.

93. *See supra* note 64 and accompanying text.

94. *See supra* Part II.B.

95. *See supra* notes 56–60 and accompanying text; *infra* note 107 and accompanying text.

claims that do not squarely fit into any of the above-enumerated categories. In all three of the above-discussed categories, elaboration on the meaning of “totality of the circumstances,” determinations of credibility, actual notice of the hearing, and a real opportunity to be heard become increasingly important. Furthermore, the various factors elaborated by the BIA and the courts of appeals will inevitably be crucial in determining whether the noncitizen’s due process rights have been violated.

Certainly, since September 11, 2001, national security has become key in the ways in which legislators have considered immigration reform as well as in the minds of the public discussing immigration.⁹⁶ Those concerned with both problems of national security and more generally of immigrants arriving and staying in the country illegally may have three major responses to the arguments advanced here.

96. Following the tragedy of September 11, 2001, the United States Congress has passed several acts revising the INA in efforts to step up national security in the immigration context. In the past approximately five years, five major bills dealing with immigration and national security have been enacted. *See* USA PATRIOT Act, 115 Stat. 272 (enacted Oct. 26, 2001), EBSVERA, 116 Stat. 543 (enacted May 2002), the Homeland Security Act of 2002, 116 Stat. 2135 (HSA), the Intelligence Reform and Terrorism Prevention Act of 2004, 118 Stat. 3638, and the REAL ID Act of 2005 (enacted May 15, 2005). Among other provisions, these bills have increased funding for border patrol, heightened scrutiny of passports and visas and thus caused delays in the visa process, prohibited the issuance of nonimmigrant visas to noncitizens “from a country that is a state sponsor of international terrorism” without waiver from the Secretary of State and Attorney General (see EBSVERA § 306(a)), and nearly eliminated procedural rights of noncitizens the government for whatever reason suspects to be a terrorist. *See, e.g.*, LEGOMSKY, *supra* note 83, at 843–914. For more on the detention and disappearing procedural rights of noncitizens in the context of national security, see David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161 (2005); Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIG. L.J. 1 (2002); Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 U.C. DAVIS L. REV. 815 (2005). *See also* David Cole, *Enemy Aliens—Double Standards and Constitutional Freedoms in the War on Terrorism* (2003); *Ctr. for Nat’l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003); 68 Fed. Reg. 4364–67, adding 8 C.F.R. § 236.6 (Jan. 29, 2003) (regulation preventing nonfederal detention facilities from releasing information relating to their immigration detainees). *Cf.* Jan C. Ting, *Unobjectionable But Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002) (arguing that 28 C.F.R. § 501.3 (2004), which authorizes monitoring the conversations between detained immigrants and their attorneys where the Attorney General suspects the immigrant to be a terrorist, is justified by the government’s interest in preventing the deaths of innocent civilians that could be caused by a future terrorist attack).

First, if noncitizens are here illegally, they should not be granted the same rights as citizens (or of noncitizens who are legally present). Secondly, the GAO report to which the Immigration Act of 1990 was a response⁹⁷ made it clear that lack of appearance for immigration hearings had been a significant problem, and the enactment of the Immigration Act of 1990 was merely a valid solution to a clear problem in the immigration laws as they stood at that time. Finally, opponents to broader interpretation of the immigration laws may argue that if an alien fails to appear for a deportation hearing, he or she has waived that right and should not be able to assert that his or her due process rights were violated unless he or she falls into one of the exceptions set forth by the specific language of the INA. As part of this, it might be argued that the “exceptional circumstances” provision has not in fact been interpreted so narrowly as to work a deprivation of rights. Rather, along this line of argument, the high standard has been correctly applied so as to enable the BIA to distinguish between those who legitimately missed their hearing due to circumstances beyond their control and those who voluntarily chose not to appear.

First, as discussed above, the Fifth Amendment to the United States Constitution guarantees all persons, not only citizens, the right to a full and fair hearing.⁹⁸ Among few places could the abridgment of this right be more severe than in the context of a removal proceeding.⁹⁹

In response to the second argument, the GAO report further explained that the problem of aliens not arriving for their removal hearings was largely due to a failure on the part of the INS to provide

97. See *supra* notes 8–9 and 12–13 accompanying text.

98. See *supra* notes 20–22 and accompanying text; see also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–97 n.5 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945)) (“[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all ‘persons’ and guard against any encroachment on those rights by federal or state authority.*”) (emphasis added).

99. See *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Matter of Exilus*, 18 I.&N. Dec. 276, 278 (B.I.A. 1982); *Dobrota v. INS*, 311 F.3d 1206, 1210 (9th Cir. 2002).

adequate notice of the hearing to the respondent.¹⁰⁰ Read in this context, the revisions in the Immigration Act of 1990 would appear to be aimed at ensuring that DHS properly notifies noncitizens of the proceedings instituted against them to minimize the number of missed hearings in this manner.¹⁰¹ Furthermore, subsequent GAO reports suggest that the harsher provisions in the Immigration Act of 1990 have not accomplished what they sought to. For instance, according to one report, the number of in absentia cases increased by approximately 80% between 2004 and 2005, from roughly 70,000 cases in 2004 to roughly 126,000 in 2005.¹⁰² A different report addresses the unreliability of address information DHS maintains on noncitizens, and concludes lack of publicity about its requirements as well as inadequate processing procedures help to explain this unreliability.¹⁰³ Since DHS is thus unable to maintain accurate records of domicile for noncitizens in removal proceedings, this suggests that the same problem exists today as in 1989 – namely, that DHS continues to fail to properly notify individuals of the procedures to be followed, leading to an increased number of missed hearings. Furthermore, in determining the reason for a failure to appear at a removal hearing, it is necessary to look beyond the adequacy of notice; this is the reason the “exceptional circumstances” provision is necessary.¹⁰⁴

Third and finally, if properly interpreted by careful, case-by-case analysis, full effect may be given to the text of INA § 240, such that immigration judges and the BIA will be able to distinguish between voluntary absence from removal proceedings and cases involving circumstances truly beyond the control of the noncitizen. This is not to say that the BIA has failed to undertake careful, case-by-case

100. *Supra* note 8.

101. *See infra* note 102.

102. GAO, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT GAO-06-771, 13 (Sept. 2006), <http://www.gao.gov/new.items/d06771.pdf>. That report further states that there had been an increase in the number of DHS charging documents that did not have the address of the immigrant, which in part led to this drastic increase in the number of in absentia decisions from 2004 to 2005. *Id.* at n.23.

103. GAO, HOMELAND SECURITY: INS CANNOT LOCATE MANY ALIENS BECAUSE IT LACKS RELIABLE ADDRESS INFORMATION GAO-03-188, 16 (Nov. 2002), <http://www.gao.gov/htext/d03188.html>.

104. *See supra* note 34.

analysis to date; merely that the interpretation to date has left many cases where judgments are seemingly inconsistent. Therefore, the BIA and the courts of appeal need to come to agreement on a uniform means of approaching cases involving exceptional circumstances.

IV. WHERE DO WE GO FROM HERE? IN SEARCH OF UNIFORMITY AND PROTECTION OF DUE PROCESS RIGHTS

The need for uniformity among the interpretations of immigration judges, the BIA, and the courts of appeals is apparent. Without any word from the Supreme Court on the proper interpretation, it seems likely that for now the circuit courts will have the final say in these matters. Currently, it is crucial that the immigration judges and the BIA undertake a careful analysis, considering the unique circumstances in each case, in a manner that is consistent with the analysis undertaken in such cases as *Kaweesa* and *Nazarova*, as well as with the “totality of the circumstances” approach advocated by the BIA.

In order to successfully protect the due process rights of noncitizens in such proceedings, it is necessary for the BIA to come to a uniform conclusion as to how to settle matters. A broadening of the factors to be considered in the totality of the circumstances approach, as per the suggestion of various courts of appeals, should not be overlooked by the BIA. This may become especially important as there are likely to be increasing numbers of cases that do not easily fit into the three-prong framework enumerated above.¹⁰⁵ Additionally, the BIA should not be concerned that this may erroneously enable certain noncitizens who voluntarily chose not to appear to have their cases reconsidered, as the credibility determinations of the immigration judges will prevent such errors from occurring.

The close examination of due process rights should be particularly crucial in the context of exceptional circumstance claims based upon ineffective assistance of counsel.¹⁰⁶ Although the *Lozada* factors are quite helpful as guidelines to determining whether exceptional

105. See *supra* Part II.B.

106. See *supra* notes 56–60 and accompanying text.

circumstances exist warranting reopening of in absentia orders of removal, they should not be interpreted in such a way as to infringe upon the noncitizen's right to a full and fair hearing. This is especially true in a context where the failure of the noncitizen to appear at his or her hearing is entirely beyond his or her control, and is due entirely to the incompetence of his or her chosen counsel. At a minimum, both the BIA and the circuit courts (should the BIA abuse its discretion) should make it standard practice to stay orders of removal and remand such cases if there is reason to believe that the *Lozada* requirements could be met.¹⁰⁷ Arguably, more could be required in interpreting *Lozada*, as the third condition (filing a bar claim) has occasionally led to a deprivation of due process rights or delays in the processing of valid claims of ineffective assistance of counsel.¹⁰⁸ Allowing noncitizens to pursue their claims of ineffective assistance of counsel with this requirement lessened might help to ensure that the noncitizen is not deprived of a full and fair hearing simply because her counsel has been inadequate. This is even more true where the noncitizen who has been assisted by inadequate counsel is unlikely to know of his or her duty under *Lozada* to report such a claim other than in court. Worries about fraud due to attorneys and clients collaborating to raise ineffective assistance of counsel claims could further be mitigated by requiring such claims to be inadmissible where the same counsel is arguing the claim as the client is claiming was ineffective.

Additionally, as it requires with other types of exceptional circumstance claims, the BIA can mitigate the likelihood of such fraud by requiring affidavits supporting the claim from the noncitizen as well as others with knowledge of the noncitizen's claim.¹⁰⁹ Rather than increasing fraud, this would have the effect of increasing

107. See, e.g., *Dominguez-Capistran v. Gonzales*, 438 F.3d 876, 878–79 (8th Cir. 2006) (staying order of removal ninety days to afford respondent an opportunity to file a motion to reopen where she had offered evidence of ineffective assistance of counsel, because court was “troubled by the manner in which [respondent’s attorney] has handled this case”).

108. See *supra* note 57 and accompanying text.

109. See, e.g., *Matter of J-P-*, 22 I.&N. Dec. 33 (B.I.A. 1998), *Matter of B-A-S-*, 22 I.&N. Dec. 57 (B.I.A. 1998) (requiring for claims of “serious illness” that the noncitizen submit affidavits from medical personnel, family and/or friends with knowledge of the noncitizen’s illness, and/or affidavits from an employer attesting to the noncitizen’s absence from work due to such illness).

accountability for lawyers for their actions with respect to removal proceedings. Essentially, exceptional circumstances must be interpreted so that innocent noncitizens are not deprived of their constitutional rights while their attorneys are permitted, without reprimand, to continue to make the same mistakes leading to removal of noncitizens with valid claims.

V. CONCLUSION

Little guidance is provided by the INA as to the interpretation of the term “exceptional circumstances” with regard to removal proceedings. This has resulted in divergent interpretations at the BIA level and at the circuit court level as well, leading to a deprivation of constitutionally provided due process in the cases of numerous aliens who have had orders of removal entered against them in absentia. In a context where immigration actions are becoming more like criminal than civil proceedings, it is crucial that aliens’ right to due process be protected wherever and as much as possible. This will only be fully accomplished in the context of these motions to reopen in absentia orders of removal upon uniform interpretation of “exceptional circumstances.” Such an interpretation will examine the extent to which the circumstances were “compelling” and beyond the noncitizen’s control. Furthermore, this type of examination in every instance must include a “totality of the circumstances” approach, evidenced by a true weighing of the government’s interest against the hardship on the noncitizen of removal takes place, as well as a focus upon the due process rights of noncitizens to a full and fair hearing in such proceedings.