The Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act

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Inherent in the concept of a hearing is the image of a person speaking in some tribunal. New section 242B of the Immigration and Nationality Act, added by the Immigration Act of 1990, stripped immigration judges of the discretion they had to determine whether a constitutionally required deportation hearing may take place in the alien's absence. The statute limits the procedure to "rescind" an in absentia deportation order and the range of acceptable justifications for doing so. It also disqualifies an alien who was notified of her deportation hearing, including an asylum hearing, from various forms of relief for five years. These new provisions were enacted without significant study and have been implemented through interim regulations adopted without the benefit of public comment. This Article addresses some of the major interpretive questions that remain.

TABLE OF CONTENTS

I. INTRODUCTION .................................................... 77
II. OVERVIEW: LEGISLATIVE HISTORY AND IMPLEMENTATION OF SECTION 242B OF THE INA .................................................. 82
   A. Overview of Section 242B of the INA .......................... 82
   B. Legislative History ............................................. 84
      1. The Immigration Act of 1990 .................................. 84
      2. Legislative History and Background of Section 242B of the INA . 85

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The author is indebted to the following colleagues for invaluable comments and assistance: Deborah Anker, Lucas Gutten tag, Sarah Ignatius, Dan Kanstroom, Harvey Kaplan, Nancy Kelly, Hiroshi Motomura, Dan Kesselbrenner, Phillip Kassel, Maureen O'Sullivan, Lory Rosenberg, Charles Wheeler, Carol Wolchok, and Chin-Chin Yeh.
3. Subsequent Amendments ........................................ 93
C. Implementation of Section 242B of the INA ................. 95
1. Timing ................................................................ 95
2. Central Address File System .................................. 96
3. New Notices and Forms ........................................ 98
4. Regulations ....................................................... 98

III. DUE PROCESS CONTEXT FOR IN ABSENTIA DEPORTATION HEARINGS .......... 100
A. Due Process and Deportation Hearings ....................... 102
B. The Right to Be Present at a Hearing ....................... 104
C. The Propriety of In Absentia Hearings .................... 109

IV. STATUTORY ANALYSIS ........................................ 113
A. Limitations On Rescinding In Absentia Deportation Orders ........ 113
1. Textual Analysis .................................................. 114
   a. Plain Meaning of “Rescind” and “Motion to Reopen” .... 114
   b. Context of Terms Within Structure of Whole Act .... 115
2. Legislative History ............................................. 122
B. Disqualifications from Relief Due to Nonappearance at Hearings .... 125
1. Generally ....................................................... 125
2. General Scope of Section 242B ................................ 128
   a. Textual Analysis ............................................ 128
   b. Legislative History ........................................ 129
3. Analysis of Particular Scope of Subsections 242B(e)(1) and 242B(e)(4) .................. 131
   a. Textual Analysis ............................................ 131
      i. The Subsection 242B(e)(1) Bar to Relief ............ 131
      ii. The Subsection 242B(e)(4) Bar to Relief .......... 133
   b. Legislative History ........................................ 138
4. Asylum Applicants in Deportation Proceedings ................. 139
   a. The Differences Between Subsections 242B(e)(1) and 242B(e)(4) .................. 139
      i. Notice .................................................... 140
      ii. Effective Period of the Five-Year Bar .......... 141
   b. Which Bar Controls? ..................................... 141
C. The “Exceptional Circumstances” Exception .................. 142
1. Textual Analysis of Subsection 242B(f)(2) ...................... 142
2. Relationship of “Exceptional Circumstances” to “Reasonable Opportunity to Appear” and “Reasonable Cause” Under INA Section 242(b) .................. 146
   a. Generally ................................................... 146
   b. The Nature of the Enactment of the Immigration Act of 1990 Section 545 .......... 147
   c. “Reasonable Opportunity to Be Present” .......... 148
   d. “Reasonable Cause” ..................................... 150
3. Legislative History ............................................. 151
   a. Intent Regarding Meaning of “Exceptional Circumstances” .... 151
   b. Intent to Repeal Subsection 242(b) .................... 155
4. Constitutional Considerations .................................. 156
5. Summary .......................................................... 157

V. CONCLUSION ................................................... 158
I. INTRODUCTION

Immigration law reform in the United States has periodically followed the recommendations of policy studies by various governmental commissions regarding changing immigration conditions. In 1978, Congress again provided for such a commission. In 1981, after analyzing United States immigration history and conditions, the Select Commission on Immigration and Refugee Policy (SCIRP) issued its Final Report. Among extensive factual and policy findings, SCIRP recommended that illegal immigration be controlled through legislation penalizing employers of "illegal aliens" and made numerous recommendations for legal immigration reform. These recommendations were the impetus to the enactment of federal legislation in 1986 and 1990 that comprehensively revised United States immigration law.


2. Pub. L. No. 95-412, § 4, 92 Stat. 907 (1978) (creating the commission "to study and evaluate ... existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate").


4. Various sections of the SCIRP Final Report used the phrase "illegal alien" in reference to noncitizens without immigration documents. See SCIRP FINAL REPORT, supra note 3. The phrase has been criticized as pejorative, however, because a person cannot be "illegal" and because it implies such aliens are criminals. Robert Rubin, Walking a Grey Line: The "Color of Law" Test Governing Noncitizen Eligibility for Public Benefits, 24 SAN DIEGO L. REV. 411, 413 n.8 (1987). Indeed, even the term "alien" has been criticized as pejorative. See DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 1.2 (1991). However, for the sake of clarity and consistency with the nomenclature of the immigration laws, the term "alien" rather than "noncitizen" will be used in this Article.

5. For example, it recommended increases in the annual world ceilings for immigrant visas, expansion of the "immediate relative" category, greater priority to immigrant admissions based on close relationships to legal permanent residents, and provision of a new and separate category of independent immigrants including investors. SCIRP FINAL REPORT, supra note 3.

The SCIRP Report did not recommend any direct changes regarding the reform of deportation procedures, the focus of this Article. It did, however, recommend administrative reforms indirectly affecting deportation procedures. For example, it recommended that the existing immigration court be formalized as an “Article I” court. This recommendation was not incorporated into either the 1986 or 1990 legislation. The recommendation, however, did indicate that what needed change was the administrative system, not necessarily legislation. The Immigration Reform and Control Act of 1986 (IRCA) for the first time established civil and criminal penalties on employers of unauthorized aliens. Pub. L. No. 99-603, 100 Stat. 3359 (1986). It also created a new major form of “relief” in the form of “amnesty” from deportation for millions of “illegal aliens” present in the United States as of 1982. Id.; see also The Simpson-Rodino Bill Analyzed: Part I - Employer Sanctions, 63 INTERPRETER RELEASES 990, 991 (1986); Part II - Legislation, 63 INTERPRETER RELEASES 1021 (1986). The Immigration Act of 1990 extensively amended the Immigration and Nationality Act (INA). Pub. L. No. 101-649, 104 Stat. 4978 (1990). For example, it established a national cap on annual immigration which is higher than previous de facto levels, added new categories of immigrants, and completely revised the grounds upon which aliens may be excluded or deported from the United States. See also The Immigration Act of 1990 Analyzed: Part I - Introduction, 67 INTERPRETER RELEASES 1353 (1990).

7. Related changes addressed would have expanded rather than narrowed present deportation hearing procedures. There were recommendations to expand the right to counsel in deportation proceedings and otherwise. SCIRP FINAL REPORT, supra note 3, at 271. Also, there was controversy over whether the Commission should recommend that hearing procedures conform to the Administrative Procedures Act, and whether the position of immigration judge should be upgraded. Id. at 250; see also id. at 341 (statement of Commissioner Elizabeth Holtzman). Shortly after the enactment of the Administrative Procedures Act (APA), the Supreme Court held it applied to deportation proceedings. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). Then, Congress amended the INA to provide otherwise. See Marcello v. Bond, 349 U.S. 302 (1955). Commentators advocated that the APA be applied because of its more comprehensive procedural safeguards. See Kelly W. Milligan, Marcello v. Bonds and Escobar-Ruiz v. INS: Application of the Administrative Procedures Act to Deportation Hearings, 5 GEO. IMMIGR. L.J. 339, 348 (1991); Khurshid K. Mehta, Ardestani v. United States Department of Justice: Applying the Equal Access to Justice Act to Deportation Proceedings—Exalting Technicalities over Justice?, 16 N.C. J. INT’L L. & C.R. 435 (1991); see also SCIRP FINAL REPORT, supra note 3, at 248-49, 346. However, the Commission did not recommend such a change. Id. at 248-50. For the Supplemental Statement of Commissioner Elizabeth Holtzman see id.

8. Article I, section 1 of the Constitution provides: “The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art III, § 1 (emphasis added). See also Maurice Roberts, Proposed: A Specialized Statutory Immigration Court, 18 SAN DIEGO L. REV. 1 (1980); Peter J. Levinson, A Specialized Court for Immigration Hearings & Appeals, 56 NOTRE DAME L. REV. 644 (1981).

9. The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), did “reform” deportation procedures for a new category of “aggravated felons.” See 8 U.S.C. § 1252a. That section required deportation hearings for aliens convicted of certain types of offenses to proceed quickly and while the alien was under detention; it established a rebuttable presumption of deportability and it generally curtailed the rights of such persons—whether or not they were lawful residents of the United States or presented strong equities militating in favor of their remaining. Id. These procedures were slightly amended in 1990. See Immigration Act of 1990 §§ 501, 504, 506, 507 (amending 8 U.S.C. § 1101(a)); 8 U.S.C. §§ 1252(a)(2), 1252a(d)(2) (1989); 42 U.S.C.
the procedural rights of the participants.

There was no study or recommendation regarding in absentia deportation hearings, which the Immigration and Nationality Act (INA)\(^\text{10}\) previously permitted at the discretion of the immigration judge.\(^\text{11}\) This provision, however, has not been routinely invoked.\(^\text{12}\) Consequently, the enactment of section 545 of the Immigration Act of 1990, which significantly changed deportation hearing procedures, occurred without much historical foundation.

As will be elaborated upon in Part II below, section 545 established section 242B of the INA\(^\text{13}\) which makes in absentia deportation orders mandatory, limits the rescission of such orders, and disqualifies individuals who do not appear for hearings\(^\text{14}\) from obtaining certain kinds of legal status for a five-year period.

These new provisions can be expected to create certain hardships for affected aliens, as will become evident when section 242B is fully implemented. For example, some valid defenses to deportability may never be heard because the reasons justifying nonappearance and the


\[^{12}\] See 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE 5-106, § 5.9e (rev. ed. 1991). See also UNITED STATES GENERAL ACCOUNTING OFFICE, IMMIGRATION CONTROL: DEPORTING & EXCLUDING ALIENS FROM THE U.S. 30-31 (Oct. 1989) [hereinafter GAO - IMMIGRATION CONTROL] (indicating that prior to April 1988, immigration judges often administratively closed many deportation cases when aliens failed to appear, rather than deport them in absentia because the judges lacked confidence that aliens were properly notified).

\[^{13}\] 8 U.S.C. § 1252b (Supp. III 1991). Section 545(a) of the Immigration Act of 1990 added 8 U.S.C. § 1252b. See Pub. L. No. 101-649, 104 Stat. 4978 (1990). However, the Immigration Act of 1990 § 545 also contained provisions that are either not part of new 8 U.S.C. § 1252b (such as the Immigration Act of 1990 § 545(b), (c), and (d)) or constituted conforming, clerical, and effective date provisions (such as Immigration Act of 1990 § 545(e), (f), and (g)). Hence, this Article will refer to INA § 242B and 8 U.S.C. § 1252b whenever the particular text of that INA section is being discussed and to the Immigration Act of 1990 § 545 whenever the context requires reference to the whole public law section. Also, this Article will henceforth use INA references rather than citations to the United States Code, which are provided in the notes.

means of presenting them are now statutorily limited.\textsuperscript{15} Families may be separated when individuals, otherwise eligible for legal status, must wait out the new five-year disqualification period prior to applying.\textsuperscript{16} Bona fide refugees, whose asylum claims already may be deemed abandoned due to nonappearance,\textsuperscript{17} will now be disqualified for five years\textsuperscript{18} from other forms of legal status (or "relief"\textsuperscript{19}). Such refugees may have to choose between returning to the place where they fear persecution or remaining in the United States without important incidents of legal status, such as Immigration and Naturalization Service (INS) permission to work.\textsuperscript{20}

The extent of the hardships on affected aliens will depend, of course, on how narrowly or broadly the statutory provisions are interpreted. The legislation has generated many conceptual and practical questions which remain largely unresolved.\textsuperscript{21} This Article will examine three major issues of statutory interpretation that may determine the extent of some of the hardships and that may have significant implications in resolving conceptual problems with the statutory language. These issues are: (1) the scope of the limits on the ability to rescind an \textit{in absentia} deportation order, (2) the scope of the five-year disqualification provision which is triggered by nonappearance at a hearing, and (3) the meaning of the "exceptional circumstances" standard which excuses nonappearance at a hearing.

The first issue is important in ascertaining how an alien can obtain a hearing after a nonappearance. A threshold consideration is whether pre-existing avenues for doing so have been altered or eliminated or whether only the new motion to reopen to "rescind" is available. The second issue addresses the proceedings that are covered by the new penalties. This includes what constitutes a "hearing," for which nonappearance is penalized, and what constitutes an

\begin{footnotes}
\begin{enumerate}
\item See, e.g., id.
\item See, e.g., Reyes-Arias v. INS, 866 F.2d 500 (D.C. Cir. 1989).
\item See 8 U.S.C. \textsection 1252b(e)(4) (1992).
\item "Relief" is immigration law nomenclature for certain kinds of immigration legal statuses and remedies. See infra notes 306 and 309 for a summary of major forms of relief.
\item See 8 C.F.R. \textsection 274a.12(a), (c) (1992).
\item Some examples include: whether new judicial review limitations in INA subsection 242B(c)(4) do in fact substantively limit issues on appeal; the constitutionality of forfeiture of notice provisions as applied to persons who are homeless, illiterate, or linguistic minorities; and the implications of new motions to reopen to rescind on the availability and timing of judicial review of underlying deportation orders. See Dan Kesselbrenner, \textit{Contesting Deportability}, 92-5 IMMIGR. BRIEFINGS 6, 6-7 (1992); Brian K. Bates & Bruce A. Hake, A Tale of Two Cities: Due Process and the Plenary Power Doctrine, 92-4 IMMIGR. BRIEFINGS 21, 21-23 (1992); Iris Gomez, Rescinding In Absentia Deportation Orders: Section 242B Motions to Reopen and Appeals, 6 INSIDE IMMIGRATION: THE PRACTICE ADVISORY, issue no. 2 (June 1993).
\end{enumerate}
\end{footnotes}
"asylum hearing" for which two potentially overlapping (and conflicting) provisions may apply. The third issue, the standard excusing nonappearance, will determine whether some aliens may ever appear before an immigration judge to defend against charges of deportability. This last issue raises important questions regarding the constitutional norms applicable to in absentia proceedings as well as potential conflicts between section 242B and pre-existing INA provisions setting forth aliens' hearing rights.

The practical impact and theoretical difficulties underlying implementation of section 242B were not explicitly addressed in the process of enactment. Therefore, it is difficult to ascertain how closely Congress evaluated the harmonization of section 242B's provisions or their interaction with other INA provisions. Indeed, as will be shown, the legislative history is rather scant, affording only slight illumination of the problems the legislation was to address and little guidance concerning the resolution of major conceptual issues. Besides the general, though unexceptional, concerns this raises about the fairness or fullness of the legislative process, the absence of adequate historical material may hamper the process of statutory interpretation; yet, it may give the legislative history that is available greater importance.

In view of existing questions regarding the scope and meaning of statutory language, agency interpretation will be critical in filling in gaps and reconciling inconsistencies that may be found within the legislation. If the legislative process is subject to criticism for not being sufficiently informed, agency rulemaking may be better suited to provide more informed interpretation to the extent that meaningful use is made of the public comment procedure. Unfortunately,

22. See infra part II.
24. See infra parts II, IV.
the regulatory process to date has not compensated for shortcomings in the legislative process with any more informed content or procedure. Major interpretative questions are left untouched by regulations adopted without adequate public comment. Also, implementation problems left unresolved because of agency record-keeping systems challenge the integrity of the implementation process as a whole.\(^27\)

This Article is divided into five parts. Part II provides an overview of section 242B of the INA in operation, as well as a summary of its legislative history and background. The section concludes with a summary of agency implementation to date.

Part III presents an analysis of the due process context within which the new statutory provisions may be reviewed by the courts. Because this Article will not address the constitutionality of section 242B, part III examines the propriety of \textit{in absentia} hearings to suggest guidelines for statutory interpretation consistent with due process principles.

Part IV addresses the three major statutory interpretation issues described above, using textual and historical modes of analysis. Part V is a brief conclusion.

II. OVERVIEW: LEGISLATIVE HISTORY AND IMPLEMENTATION OF SECTION 242B OF THE INA

A. Overview of Section 242B of the INA

Section 242B of the INA contains new \textit{in absentia} deportation hearing requirements and new standards and limitations regarding motions to reopen and judicial review. Specifically, it mandates immigration judges to enter an \textit{in absentia} deportation order against an alien when the government proves, by clear, unequivocal, and convincing evidence, that the alien is deportable and that the government has complied with the new, detailed notice requirements. To rescind an \textit{in absentia} order entered under section 242B, an alien must file a motion to reopen to demonstrate that she did not receive the notice required by the new law or that exceptional circumstances existed for not appearing at the hearing.\(^28\) These requirements, as

\(^{27}\) See infra part II (regarding the limitations of the regulatory process).

\(^{28}\) 8 U.S.C. § 1252b(c)(3)(A), (B) (1992). An alien who failed to appear while in custody may also move to reopen to rescind on that basis. \textit{Id.} Unlike the regulatory provisions governing other motions to reopen, this statute provides an automatic stay of
explained below, are contained in six subsections. 29

The subsections that specifically address the consequences of failure to appear include: subsection 242B(a), dealing with certain written notices that are prerequisites to the new adverse consequences imposed on aliens by the statute; 30 subsections 242B(c) and (e), which deal with certain consequences of nonappearance, including

deportation upon filing a motion to reopen to rescind; the stay is effective until the motion is disposed of. Id. § 1252b(c)(3). Judicial review of a final deportation order entered under § 242B, however, is confined to the validity of notice, reasons for the alien's nonappearance, and whether deportability was properly established. Id. § 1252b(c)(4).

29. Two others will not be dealt with in this Article at all: subsection (b) of 8 U.S.C. § 1252b addresses procedural requirements for aliens to secure counsel; subsection (d) of 8 U.S.C. § 1252b authorizes the Attorney General to issue regulations governing frivolous attorney behavior.

30. Subsection (a) imposes written notice obligations on both the alien and the government regarding deportation proceedings. The government must notify the alien about the proceedings with a written Order to Show Cause (OSC). 8 U.S.C. § 1252b(a)(1), (3) (1992). The alien must provide the government with a written record of her address and phone. Id. § 1252b(a)(1)(F) (alien must provide "or have provided" this information). The government must notify those aliens who furnish addresses of the hearing time and place, in writing. Id. § 1252b(a)(2). The alien must provide a written record of changes of address. Id. § 1252b(a)(1)(F)(ii). The government must provide written notice to aliens who have furnished an address of any hearing postponements. Id. § 1252b(a)(2)(B). The government's OSC, hearing notices, and postponement notices must be in both English and Spanish. Id. § 1252b(a)(3). Hearing and postponement notices must explain the fact that an unexcused failure to appear may result in a deportation order in the alien's absence. Id. § 1252b(a)(2)(A)(ii), (a)(2)(B)(ii). All these notices must be served personally or by certified mail, return receipt requested. Id. § 1252b(a)(1), (a)(2)(A), (B), and (F)(1).

31. Subsection (c) mandates in absentia deportation orders for any alien who does not appear at a deportation hearing if the government proves deportability and written notice by clear, unequivocal, and convincing evidence. 8 U.S.C. § 1252b(e)(1) (1992). The government's obligation to prove notice is satisfied by proving that the requisite information about the hearing time and place was furnished at the most recent address furnished by the alien. Id. § 1252b(c)(1). That is, the written notice to be proved under subsection (c) is the hearing notice required by subsection (a). Id. § 1252b(c)(1) ("after written notice required under subsection (a)(2)"). If the alien has not furnished an address, no written notice is required, nor need the government prove such notice was provided. Id. § 1252b(c)(2). Subsection (c)(3) sets forth the circumstances in which an in absentia deportation order may be rescinded pursuant to a motion to reopen. Three grounds are provided: 1) no notice ("did not receive notice in accordance with subsection [a](2)"") (emphasis added), 2) absence of fault by an alien in custody, and 3) "exceptional circumstances" for not appearing ("as defined in subsection (f)(2)"). Id. § 1256b(c)(3)(B), (c)(3)(A). The third ground must be raised within 180 days of the in absentia order. Id. § 1252b(c)(3)(A).

32. Subsection (e) contains four provisions governing disqualification from relief after nonappearance. Two deal with disqualification after nonappearance at a hearing, 8 U.S.C. § 1252b(e)(1) (1992) ("failing . . . to attend a proceeding under § 1252 . . ."); id. § 1252b(e)(4)(A)(iii) ("fails . . . to appear at the time and place specified for the asylum hearing"). The other two deal with disqualification for failure to depart within a period of voluntary departure and failure to report for deportation. Id. § 1252(e)(2), (3). Under the terms of all four provisions, disqualification lasts five years and affects the
limitations on motions to reopen to "rescind" based on "exceptional circumstances" and temporary disqualification from eligibility for "relief"; and subsection 242B(f), containing definitions, including the definition of "exceptional circumstances.""\(^3\)

B. Legislative History

1. The Immigration Act of 1990

The Immigration Act of 1990 was heralded as the "most comprehensive immigration reform package in over sixty years."\(^4\) It changed overall legal immigration levels, added new categories of legal immigrants, completely revised the grounds of exclusion and deportation, and generally amended the Immigration and Nationality Act of 1952.\(^5\)

Between 1986, when Congress acted to take care of the perceived problems of illegal immigration, and 1990, when it reformed the system of legal immigration,\(^6\) a number of bills were introduced proposing various measures to change the system.\(^7\) Proposals for change included immigration based on quantifiable criteria through a "point system," immigration by lottery, and other, less novel ways following forms of relief: voluntary departure, adjustment of status, suspension of deportation, registry, and change of status. \(^{11}\)

The notice of the disqualification must be provided in the alien's native language or another language the alien understands. \(^{14}\)


33. \(^8\) 33. 8 U.S.C. § 1252b(a), (e), (f) (1992).


of reforming the existing allocation of visas based principally on employment and family relationships. Other aspects of the immigration laws, such as the grounds of exclusion and deportation, were also tackled during this fertile period of legislative activity.\textsuperscript{38} Thus, much of what ultimately became the Immigration Act of 1990 was not only studied by SCIRP, it was subjected to intense public debate during the four years prior to that statute’s enactment.

Conversely, section 545 of the Immigration Act of 1990 was not subjected to much debate. That provision originated in the United States House of Representatives some eight months before passage and was never considered by the Senate or its relevant standing committees until the date of the final floor vote on a conference committee package. In the House, portions of bills that were rejected almost entirely without comment by relevant subcommittees ended up in the final version of the Immigration Act of 1990. Neither the conference committee report nor floor statements accounted for the adoption of the legislation. Moreover, formal public participation in the hearings directly relevant to these provisions was limited to governmental testimony.

2. Legislative History and Background of Section 242B of the INA

By most accounts, the immediate impetus for legislation concerning nonappearance at deportation hearings was a General Accounting Office (GAO) report\textsuperscript{39} issued in October 1989.\textsuperscript{40} The report estimated that twenty-seven percent of the aliens apprehended in New York (during 1986-1987) and Los Angeles (during three

\textsuperscript{39} GAO, IMMIGRATION CONTROL: DEPORTING AND EXCLUDING ALIENS FROM THE UNITED STATES (Oct. 1989). The report by its own account was conducted in response to a June 10, 1987 letter from the House Immigration Subcommittee requesting that the General Accounting Office (GAO) examine procedures governing exclusion and deportation of aliens. Id. at 71. See also Criminal Aliens: Hearings on H.R. 3333 Before the Subcommittee on Immigration, Refugees and International Law of the Committee on the Judiciary, House of Representatives, 101st Cong., 1st Sess. 2 (1989) [hereinafter Criminal Aliens].
months in 1987) failed to appear at their deportation hearings. The report also found that immigration judges were generally reluctant (during the studied time periods) to take action other than close cases because the aliens might not have been properly notified of the hearings. The report did not specify what number or percentage of the studied nonappearances was due to lack of notice or any other reason.

In the month following the issuance of the GAO report, the GAO testified on its findings at a hearing on an unrelated bill (House Bill 3333) then pending before the House Judiciary Subcommittee on Immigration, Refugees and International Law (House Immigration Subcommittee). Only government representatives testified on the subject of nonappearance. They were the GAO Director for Administration of Justice Issues (assisted by a staff member) as well as the Director of the Executive Office for Immigration Review (EOIR).

The hearing, which was opened by Chairman Bruce A. Morrison, purported to focus on INS enforcement problems vis-a-vis the criminal alien population. However, the two government representatives described above testified on the general nonappearance issue as well.

In response to questioning by Chairman Morrison about the GAO findings, the EOIR Director testified that many individuals are not

42. Id. at 3, 4.
43. The report said aliens were generally provided notice by regular mail, but that the government did not verify aliens' addresses. Id. at 27-28. The GAO did not purport to have studied the reasons individual aliens failed to appear at the studied hearings, while it did acknowledge that notification procedures generally did not insure reliable notice. Id. at 27-28. Yet the report surmises not only that "non-appearance can be attributed, in part, to aliens not being notified" but "may also be due partly to the general lack of repercussions [for not appearing]." Id. at 3; see also id. at 27 ("In our opinion, many aliens do not appear at their deportation hearings mainly through either lack of knowledge or disregard of the system").
44. H.R. 3333 was a bill to expand the arrest authority of Immigration and Naturalization Service (INS) agents. H.R. 3333, 101st Cong., 1st Sess. (1989).
45. See Criminal Aliens, supra note 39.
46. Id. at III (Table of Witnesses).
47. Lowell Dodge testified for the GAO and was assisted by an Assistant Director, James M. Blume. Id. at 53. David Milhollan testified for the Executive Office for Immigration Review (EOIR). Id. at 29. The EOIR is the Justice Department unit to which the various immigration judges are accountable. See T. ALEXANDER ALIENIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS & POLICY ch. 2 (2d ed. 1991). The opening statement of Chairman Morrison announced the release of the GAO Report but did not explain how it was that the speakers on nonappearance had come to testify at that hearing. Criminal Aliens, supra note 39, at 2.
48. See Criminal Aliens, supra note 39.
49. See id.
50. See id.
properly notified of their immigration hearings by the INS. The GAO representative’s written testimony summarized the GAO report findings. Additionally, the GAO staff person stated that “some” of the aliens who failed to appear had been notified of their hearings and simply decided not to attend. The GAO also submitted draft legislation to permanently disqualify aliens who fail to appear at deportation hearings from all forms of relief except a section 243h withholding of deportation. Chairman Morrison raised concerns with the GAO representatives regarding implications of the proposed disqualification on United States international treaty obligations toward individuals with persecution-based claims.

Four months after the hearing on House Bill 3333, Chairman

51. Id. at 35. In addition he suggested in response to questioning that higher bonds might be one alternative to reduce any actual abscondion problem. Id. at 35-36.
52. Id. at 67.
53. Id. at 71 (referring to figure 2.1 on page 25 of the October 1989 report). Figure 2.1 shows the number of hearings some of the aliens had attended before ultimately failing to appear; it does not indicate what notice was provided of the hearing at which the aliens defaulted.
Evidently, Mr. Blume assumed that the aliens who failed to appear at a rescheduled hearing were informed personally of the follow-up hearing date previously. However, neither the report nor the GAO testimony explained the method used to notify the aliens in the study group of rescheduled hearings; the report simply stated it was EOIR “policy” to inform aliens “personally” of rescheduled hearings. GAO IMMIGRATION CONTROL, supra note 12, at 28. In fact, the rescheduled hearing date is not necessarily established at the time of the initial hearing, so that subsequent written notification may be the only means of informing an alien of a rescheduled hearing. See, e.g., In re Orvil, No. A26 024 709 (Boston 1987) (unreported BIA decision remanding deportation proceedings to an immigration judge where the written notices of hearing were never delivered by the post office to the respondent) (decision on file with author).
54. The GAO draft was made part of the record of the Committee hearing on HR 3333. See Criminal Aliens, supra note 39, at 80.
55. Id. Withholding of deportation is a form of relief available to an alien whose life or freedom would be threatened if she were to return to the country of origin. 8 U.S.C. § 1253(h) (1992). Unlike asylum, which is discretionary, withholding must be granted, but only if the applicant establishes her eligibility by a “clear probability.” See generally INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
56. Criminal Aliens, supra note 39, at 80. After getting no adequate response from the GAO, he asked for follow-up feedback on the issue. Id. at 81-82. Chairman Morrison’s comments during this questioning seem to present some of the rationale for § 543. On the one hand, Chairman Morrison indicates that those who “don’t play by the rules ought not to get the benefits of the rules if they don’t have to accept the burdens.” Id. at 81. On the other hand, he expressed concern about violating international law by interfering with aliens’ rights to seek and obtain humanitarian relief based on persecution claims. The chairman referred to earlier hearings in Texas concerning the detention of asylum seekers. Id. at 2. Although the record does not specify, he may have been referring to a hearing held March 9, 1989 concerning policies of the INS of confining Central American asylum-seekers. See Central American Asylum Seekers: Hearing Before the Subcommittee on Immigration, Refugees and International Law of the Committee on the Judiciary, House of Representatives, 101st Cong., 1st Sess. (1989). During that
Morrison introduced House Bill 4300 (Morrison Bill). The Morrison Bill extensively revised the immigration laws. It contained new, detailed notice requirements for deportation hearings, made in absentia hearings after a nonappearance mandatory, limited the ability to rescind an in absentia order, and imposed a five-year disqualification on those aliens who failed to appear at deportation and asylum hearings, to depart within a period of voluntary departure, or to report for deportation. Chairman Morrison gave no statement when he introduced the bill on the House floor.

Four months later, Representative Lamar Smith (minority member of the House Judiciary Subcommittee) together with eighteen other legislators introduced his own bill dealing with nonappearance, House Bill 5284 (Smith Bill). The Smith Bill, which also provided for notice, mandated in absentia deportation orders for aliens who failed to appear at their hearing and for those who did not provide their addresses. It limited the reopening of cases more generally than the Morrison Bill and disqualified aliens who failed to depart within a voluntary departure period from relief (but only from further voluntary departure relief). Representative Smith gave no

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58. Id. § 405(a)(1) (statutorily authorizing the OSC, previously required by regulation as the jurisdictional prerequisite to deportation proceedings).
59. Id. § 405(a)(2)(A).
60. Id.
61. Id. § 405(a)(3). The bill differed from 8 U.S.C. § 1252b as enacted in several important ways. Asylum was initially included on the list of relief for which an alien would be barred after a relevant nonappearance. See id. § 405(a)(3)(E)(iv). The exception excusing nonappearance used a “reasonable cause” standard and no definition was provided therefor. See id. § 405(a)(2)(B), (3)(A)-(D). Both the OSC and notices of hearings were to be provided in the “language the alien best understands.” See id. § 405(a)(1), (3). In absentia orders could be entered after proof of a “prima facie case of deportability.” Id. § 405(a)(2)(A). The bill did not explicitly require the government to prove notice before an in absentia order entered. Nor did the bill provide for forfeiture of notice by aliens who failed to provide an address. Additionally, the specific notice requirements in each subsection were different from those finally enacted. Id. § 405(a)(1), (3).
64. Id. § 3(a).
65. Id.
66. Id. § 4(b) (limits did not only apply to motions after in absentia proceedings).
67. Id. § 4(a). The bill further differed from H.R. 4300, 101st Cong., 2d Sess. (1990). It excused nonappearance based on “exceptional circumstances” and defined the
statement when introducing his bill. 68

The Senate had already passed Senate Bill 358, the predecessor of the Immigration Act of 1990, which comprehensively reformed the immigration laws. 69 In its Senate history, that bill never included nonappearance provisions. 70

There were no hearings on the Morrison Bill or the Smith Bill. The report of the House Immigration Subcommittee, which favorably reported on the Morrison Bill, indicated it was based on three previous hearings held before its introduction. 71 These included the hearing on House Bill 3333, at which only government representatives testified, and others that were held on September 27, 1989, February 21, 1990, and March 1, 7, 13 and 14, 1990. 72 The latter hearings concerned the topic of legal immigration reform, as broadly framed by Senate Bill 358's earlier passage in the Senate. 73 Thus, no witnesses testified at any hearing concerning nonappearance because that subject was not contemplated within any of the reform legislation pending at the time of the hearings. 74

When the House Immigration Subcommittee favorably reported term. H.R. 5284, 101st Cong., 2d Sess. § 3(a) (1990). But nondeparture after a voluntary departure grant was not excusable. Id. § 4(a). Language and service requirements for hearing notices were not specified; yet the bill did specify that aliens were to be orally notified in their native language of their duty to raise all defenses except when asylum or withholding of deportation were based on “a change of circumstance in the country of the alien’s nationality.” Id. § 4(b). No burden of proof was specified as to deportability or notice before an in absentia order entered. An alien was, however, presumed deportable if she failed to depart within a period of administrative voluntary departure. Id. § 4(a).

72. Id.
74. See id.
out Representative Jack Brooks' crime bill, House Bill 5269, it inserted nonappearance provisions somewhat similar to those of the Smith Bill, although less harsh. The report accompanying House Bill 5269 (Brooks Bill) cited the GAO's twenty-seven percent nonappearance statistic and the GAO's recommendation to "reduce the abscondion rate." It further explained the purpose of the nonappearance provisions as follows: "[T]he wilful and unjustifiable failure to attend deportation hearings that have been properly noticed is intolerable."

The Morrison Bill, which included some of the criminal provisions of the Brooks Bill but not the nonappearance provisions, was favorably reported out by the subcommittee two weeks later. The House Report accompanying the Morrison Bill did not discuss the nonappearance issue either, although it did discuss the incorporated criminal provisions. The Smith Bill never left committee.

On October 3, 1990, the House passed the Morrison Bill after several amendments unrelated to nonappearance. Thus, neither the Senate nor House versions of the two bills that were to become the Immigration Act of 1990 contained any nonappearance provisions.

When representatives of the House and Senate met to reconcile differences between Senate Bill 358 and the Morrison Bill, major


76. H.R. 5269 was reported out by the House Immigration Subcommittee on September 9, 1990. H.R. REP. No. 681, 101st Cong., 2d Sess. (1990). As reported, the alien nonappearance provisions applied exclusively to aggravated felons. Id. § 1510, at 36. While incorporating notice requirements and mandating in absentia orders for defaulting aliens in deportation proceedings, it established no disqualification from relief after a nonappearance. Id. § 1510(a), at 36. (But aggravated felons' eligibility for various kinds of relief was limited in other sections of the bill. Id. §§ 1508, 1511, at 35-36, 150-51. The bill also specified the form of service for hearing notices. Id. § 1510(a), at 36, 150-51.)

77. Id. at 150.

78. Id. Note that while the reported bill incorporated the "exceptional circumstances" language the report accompanying the bill uses the term interchangeably with "good cause." Id. at 36, 151. It was also intended to excuse nonappearances that are not willful. Id. at 150.


80. Id.


84. Among the conferees were House Chairman Morrison, Representative Smith, and Representative Brooks, the sponsors of the three bills that had contained nonappearance language in the House history. For complete list of conferees, see H.R. REP. No.
issues of conflict between the two were discussed and compromises achieved. On October 26, 1990, the Conference Committee reported out Senate Bill 358, as amended in the nature of a substitute bill agreed to by the conferees on both sides.

Surprisingly, Senate Bill 358, as reported by the Conference Committee, contained the eschewed nonappearance provisions with some changes. Section 545 of that bill adopted mandatory in absentia hearing provisions and disqualification provisions similar to those in the House bills, but specified distinct notice, service, and language requirements as prerequisites for each penalty. It contained a requirement that the government in in absentia proceedings prove deportability and notice by "clear, unequivocal and convincing evidence." It also adopted the original Morrison Bill's motion to reopen limitations, deleted asylum from the Morrison Bill's list of relief subject to disqualification, and made many of the new provisions contingent on the establishment of a central address system capable of recording aliens' addresses and attorneys' appearances on a timely basis. Senate Bill 358 also reduced the government's burden of proving notice when the alien had failed to provide an address.

While the provisions themselves were briefly discussed in the Conference Report, the Report did not explain why measures not included by either chamber had been reincorporated. The Report contained the following statement explaining the legislative purpose behind new section 545: "The Conference substitute contains several enforcement provisions designed to... ensure that aliens properly notified of impending deportation proceedings, or other proceedings, in

87. Id.
88. Id. at 90-95. Other provisions included limitations on judicial review, requirements to enable aliens in deportation hearings to secure pro bono counsel, and a mandate that the Attorney General promulgate regulations to control motions to reopen and circumscribe frivolous attorney behavior.
89. The language was unclear regarding the requirement to provide the alien notice when she failed to provide an address. Compare 8 U.S.C. § 1252b(a)(2) with 8 U.S.C. § 1252b(c). This ambiguity was cured by a subsequent amendment. See discussion infra regarding the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA).
91. Conferees are authorized to consider matters as to which the bills passed by the two chambers are in disagreement. See William N. Eskridge & Philip P. Frickey, Cases and Materials on Legislation 35 (1988).
fact appear for such proceedings . . . .” 92

The legislative goal in enacting section 242B is couched affirmatively.93 However characterized, this statement makes clear that Congress’ paramount objective in enacting section 242B was getting aliens to their hearings.

The Report goes on to underscore the legislators’ concern with the government’s obligation to make sure that the objective is realized:

On this latter issue, the Conference 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 accurately 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.94

The only other discussion in the Report directly addressing the nonappearance provisions is a statement regarding the interpretation of “exceptional circumstances.”95

The Conference Bill was subsequently debated on the floors of the Senate and House.96 The floor debate contained only general reference to section 242B. On the House floor, Representative Smith stated that the bill “will make deportation more closely conform to the Federal Rules of Civil Procedure” and “will establish appeal filing deadlines and help immigration judges hold in absentia hearings when aliens fail to appear.”97

The rest, as the saying goes, is history. The Immigration Act of 1990 was passed98 and signed by the President99 with the nonappearance provisions summarized above.

93. This suggests an underlying policy of providing incentives for appearances at hearings rather than a negative policy of deterring nonappearance. At the very least, the goal is not articulated in punitive terms, even if the provisions themselves may result in some punitive effects. Compare theories regarding purposes of punishment in a criminal context, including prevention, restraint, rehabilitation, deterrence, education, and retribution. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 22-27 (2d ed. 1986).
98. In the Senate, Senator Kennedy stated that “reforms are achieved in the areas of deportation and criminal aliens.” Id. at S17107. Senator Simpson stated that “the bill restructures our deportation procedures to bring them more in line with our Nation’s rules of civil procedure. We were in a situation where the deportees had more due process than did an American citizen.” Id. at S17109.
In summary, the in absentia provisions of the Immigration Act of 1990 were enacted without great study, scrutiny, or public participation. Such imperfect processes are not necessarily unusual. However, because this legislation significantly curtails—at least potentially—the procedural rights of aliens in expulsion proceedings, the results of such imperfect processes are especially troubling; they are troubling because of the extraordinary power of Congress to legislate on immigration matters and the few constitutional limitations heretofore imposed through judicial review. The brevity and insularity of the process, moreover, may have contributed to the conceptual and practical implementation difficulties created by the statutory language; mention of such issues is almost nonexistent in the traditional sources of interpretive guidance.

3. Subsequent Amendments

One year after the enactment of the Immigration Act of 1990, Congress passed the “Miscellaneous and Technical Immigration and Naturalization Amendments of 1991” (MTINA), which amends section 545 as well as other sections of the Immigration Act of 1990. Among other corrections, it clarified that aliens who fail to

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100. Under almost any theory of legislation, the process described above exposes flaws in the premises underlying the legitimacy of law; that is, it would be difficult to characterize § 242B as the product of informed, deliberative activity, a fair deal achieved in competitive bargaining, or as a vehicle for advancing society's moral-economic dialectic or for addressing oppression. See generally William N. Eskridge & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post Legal Process Era, 48 U. PITT. L. REV. 691 (1987); Peter C. Schanck, The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction and Legislative Histories, 38 KAN. L. REV. 815 (1990); Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1415 (1989); William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation, chs. 1, 3, 4 (1988) (each reference examining or applying theories of the legislative process). On the other hand, such critiques can be and are made of other legislation. See, e.g., Kitty Calavita, The Contradictions of Immigration Lawmaking: The Immigration Reform and Control Act of 1986, 11 LAW & POL'Y (Jan. 1989) (critiquing IRCA from a pluralist perspective).


102. See legislative history discussion infra part IV.

provide addresses forfeit further written notice of deportation hearings, it eliminated section 212(c) waivers from the list of relief subject to the five-year period disqualification, and it added an article to the text of the five-year disqualification bar applicable to asylum applicants.

The legislative history of the MTINA is brief. The amendments related to section 545 originated in section 6 of Senate Bill 1620. Senate Bill 1620 was passed on the floor of the Senate on August 1, 1991, without committee consideration. In the House, technical corrections related to section 545 of the Immigration Act of 1990 first appeared in House Bill 3670. That bill was reported out by the House Immigration Subcommittee on November 19, 1991 and then in the House on November 25, 1991 with only one small change in the proposed section 545-related provisions. It was passed as reported that day.

Meanwhile, House Bill 3049, an unrelated reform bill, had passed the House on November 12, 1991 without any technical corrections
On November 26, 1991, the Senate, on floor consideration of House Bill 3049, amended it with a substitute which contained technical correction provisions like those of House Bill 3670. Finally, House Bill 3049 passed the House by way of concurrence with the Senate amendment, incorporating the technical corrections provisions. As passed, only the "noncontroversial" provisions were enacted in the MTINA.

C. Implementation of Section 242B of the INA

Despite the limitations described above in the legislative process leading to enactment of section 242B, agency implementation has yet to fill in gaps or clarify many of the issues that need clarifying. As will be explained, the major issue of the early post-enactment regulatory process was the date of implementation. Congress left this to the discretion of the Attorney General, subject to the development of an agency record-keeping system capable of supplying the notices triggering section 242B's adverse consequences. Although the government later documented serious deficiencies in the system the agency was utilizing, EOIR implemented the statute anyway, publishing interim regulations that became effective before public comment could be meaningfully utilized and which raised more questions than they answered.

1. Timing

Section 545 provided different effective dates for the various penalties and other provisions of section 242B. The provisions governing notice, motions to reopen to rescind, and disqualification from relief after nonappearance at a deportation hearing were made effective no earlier than six months after the Attorney General established a central address file system. The disqualification from relief after nonappearance at an asylum hearing was made effective on February 1, 1991. The disqualifications from relief after other

117. See Back to the Future, supra note 107.
118. See Immigration Act of 1990 § 545(g).
119. See Immigration Act of 1990 § 545(g)(1) (governing subsections (a), (c) and (e)(1) of 8 U.S.C. § 1252b).
nonappearances (failure to depart during voluntary departure or during period ordered for deportation) were made effective upon enactment (i.e., November 29, 1990).21

While Congress may have had reasons for providing varying effective dates, the legislative history is silent about any such reasons. Moreover, any differences in effective dates are of arguable significance given various structural obstacles to staggered implementation. For example, even though the disqualification from relief for failure to depart during the time ordered for deportation was effective immediately, that provision applied to an alien ordered deported in absentia under section 242B, parts of which were made effective later. In addition, even though the disqualification for nonappearance at an asylum hearing was effective without the prerequisite of the central address system, it too depended on the implementation of the rest of section 242B.22 Perhaps for these and other practical reasons, full implementation of the provisions, even those made effective upon enactment, did not occur according to the legislated schedule.23

2. Central Address File System

Section 545 required that the Attorney General certify to Congress when the central address file system described in subsection 242B(a)(4) had been established.24 That subsection requires that the Attorney General "shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided [by the alien] under paragraph (1)(F) [of subsection 242B(a)]."25

Section 545 further required that the Comptroller General submit

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22. See infra part IV (regarding scope of 8 U.S.C. § 1252b(e)(4) as applying to asylum hearings in deportation proceedings, subject to the central address system notice requirements).
25. 8 U.S.C. § 1252b(a)(4)(1992). See also supra notes 92-94 and accompanying text (regarding congressional intent that the system be "efficient and trustworthy," "ensure that communications between INS and aliens are accurately recorded," and that such communications "accurately reflect" whether counsel has filed notice of appearance on the alien's behalf, and "if so, whether such notice has become stale through the passage of time or has been withdrawn." H.R. REP. NO. 955, 101st Cong., 2d Sess. 132 (1990)).
to Congress, within three months of the Attorney General's certification, "a report on the adequacy of such system." 126

On August 13, 1991, the Attorney General published a notice certifying to Congress that "a central file address system has been created to preserve notices of addresses and telephone numbers, and notices of any changes thereto, provided by aliens in deportation proceedings." 127

The notice designated February 13, 1992 as the date on which the system-contingent provisions of section 242B would become effective. 128 While further describing the system of "preservation" of information, the notice did not certify that the system established would record and preserve the required information "on a timely basis," as required in the statute. 129

On January 23, 1992, in accordance with the statutory mandate to the Comptroller General, the GAO issued a report finding that the certified central address file system was inadequate. 130 Among inaccuracies found, the report described a twenty-two percent error rate in alien addresses and a nine percent error rate in the addresses of their representatives. 131

126. Immigration Act of 1990 § 545(g)(1)(C).
128. Id.
129. Id.
131. Id. at 8. The GAO report did not examine the communications system between INS and aliens but only the EOIR (immigration court) system of communications with aliens, as certified by the Attorney General. Cf. 8 U.S.C. § 1252b(a)(1)(F) (1992) which requires aliens to provide an address and telephone number to the "Attorney General" "or have provided" that information. See also H.R. REP. NO. 955, 101st Cong., 2d Sess. 132 (1990) (regarding "communications between INS and aliens"). Consequently, the accuracy of INS' record-keeping with respect to aliens remains a mystery. See Weston Kosova, The INS Mess, THE NEW REPUBLIC, Apr. 13, 1992, at 20-25 (suggesting that record-keeping by the INS may be equally if not more deficient than EOIR's). See also NATIONAL ASYLUM STUDY PROJECT, AN INTERIM ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE (1992) (copy on file with author) (describes INS' loss of asylum applicants' files among other examples of administrative problems); Reeves v. Moschorak, No. CV 92-2937-RSWL (C.D. Cal. July 6, 1992) (finding widespread practice in Los Angeles INS district of failing to notify attorneys and representatives of naturalization applicants regarding interviews).
3. New Notices and Forms

Because section 242B requires additional information on Orders to Show Cause and explicit kinds of written notice not previously required by the INA, full implementation required the development of new written forms. On February 13, 1992, the Attorney General published a notice that the effective date of the “notice-related provisions contained in subsections 242B(a), 242B(b), 242B(c) and 242B(e)(1)” would be delayed until June 13, 1992. Shortly thereafter, the EOIR issued operating instructions referring to four new forms to be used after June 13, 1992; the forms included an English/Spanish Order to Show Cause and Notice of Hearing, an English/Spanish Notice of Limitations on Discretionary Relief and an English-only change of address form.

4. Regulations

Section 545 also required the Attorney General to promulgate regulations under section 242(b) consistent with section 242B. During the first year and four-plus months after enactment of the Immigration Act of 1990, however, no regulations were promulgated or even proposed, with one nonsubstantive exception. Then, on April 6, 1992, the Justice Department published interim regulations to implement section 242B and other discrete requirements mandated by the Immigration Act of 1990. The bulk of the interim regulations were made effective immediately. However, the effective

133. See supra note 123 and accompanying text.
136. Immigration Act of 1990 § 545(e): “The 8th sentence of section 242(b) is amended to read as follows: ‘Such regulations shall include requirements consistent with section 242B.’” While labelled a “conforming amendment,” confusion in meaning led to inadvertent repeal of the whole of the 8th sentence of 8 U.S.C. § 1252b which sets forth basic procedural rights of aliens (such as a reasonable opportunity to present evidence) that must be included in regulations. (Compare West’s with Patel’s 1991 versions of the INA post Immigration Act of 1990) This error was corrected by the MTINA, which restored the deleted rights and provided: “[s]uch regulations shall include requirements that are consistent with section 242B . . . .” See MTINA § 306(c)(7), Pub. L. No. 102-232, 105 Stat. 1733 (1991).
137. In an interim regulation concerning changes in 212(c) eligibility, the bars to 212(c) relief contained in 8 U.S.C. § 1252b(e)(1)-(4) bars were summarily incorporated. See 56 Fed. Reg. 50033 (1991) (amending 8 C.F.R. § 212.3(f)(5)). However, in MTINA, Congress removed 212(c) from the relief subject to disqualification, making this rule obsolete. See MTINA § 306(c)(6)(J), Pub. L. No. 102-232, 105 Stat. 1733 (1991). That interim rule, in any event, did not clarify any of the issues raised in this Article.
date of two key regulations implementing section 242B was postponed until June 13, 1992, consistent with the Federal Register notice delaying implementation of the notice-related provisions of section 242B.\textsuperscript{139} The two interim regulations addressed, \textit{inter alia}, the notices required by section 242B and the \textit{in absentia} hearing requirements.\textsuperscript{140}

Extensive comments were submitted by immigration advocacy organizations objecting to both the regulatory process used as well as problems with the regulations.\textsuperscript{141} Comments objected to the agency’s publication of the regulations in interim form rather than draft form as violative of the Administrative Procedures Act and contrary to the integrity of a meaningful public participation process.\textsuperscript{142} Many substantive criticisms centered on conflicts between the regulations and the requirements of section 242B and due process. For example, the information to be furnished to aliens upon initiation of deportation proceedings was insufficient and in various respects confusing. Furthermore, INS’ burden of proof of notice was reduced in various ways, including shifting responsibility for notification errors to the alien and the EOIR. Finally, the sources of proof that an alien had provided the government with an address were restricted and the scope of the new mandatory \textit{in absentia} proceedings was apparently extended to proceedings other than deportation (\textit{i.e.}, to “any proceeding before an immigration judge”).\textsuperscript{143}

\textsuperscript{139} Id. (discussing subsections 3.15 and 3.26 of the interim regulations amending 8 C.F.R. § 3.1 (1992)).

\textsuperscript{140} Id.

\textsuperscript{141} See AILA Declares EOIR Rule on Section 545, 6 AILA Monthly Mailing 468 (June 1992); see also American Immigration Lawyers Association, EOIR, Rules of Procedure: Response to the Interim Rule Implementing Sections 504, 545, and 701 of the Immigration Act of 1990 (May 6, 1992) (on file with author); Telephone conversations with EOIR personnel regarding number and extent of comments filed (June 15, 1992 & Oct. 19, 1992) (on file with author).

\textsuperscript{142} AILA Declares EOIR Rule on Section 545, supra note 141; American Immigration Lawyers’ Association, Response, supra note 141; EOIR Publishes Revisions to Immigration Judge Proceedings, 69 INTERPRETER RELEASES 445 (1992); Dan Kesselbrenner, Contesting Deportability, IMMIGR. BRIEFINGS No. 92-5, at 6-7 (1992).

\textsuperscript{143} 8 C.F.R. § 3.26 (1992). See also 8 C.F.R. § 3.12 (1992) (scope of rules extends to “matters coming before Immigration Judges,” including, but not limited to, deportation, exclusion, bond, rescission, departure control, and disciplinary proceedings against attorneys). However, on at least this issue raised by the commentators, the agency has since provided a different interpretation. In a memorandum from the Chief Immigration Judge to judges in the field outlining instructions for implementing § 242B, the agency recognizes that the notice and penalty provisions apply to deportation proceedings but not exclusion. See 69 INTERPRETER RELEASES 715-20 (1992) (reprinting those instructions). See also In re Gonzalez-Lopez, infra note 149. For more discussion relevant to this latter issue, see infra part IV.B.
The issue of the scope of the new statutory provisions was not even raised in the agency's prefatory comments, despite the evidently overbroad drafting of the regulations and apparent questions concerning potential overlap and conflict between statutory disqualifications on relief after nonappearance at a deportation or asylum hearing. Moreover, the regulations did not clarify any substantive or procedural differences between the new motion to reopen to rescind created by section 242B and general administrative motion to reopen practice. Nor did the regulations further define the range of "exceptional circumstances" that could justify nonappearance at a hearing or otherwise. Other conceptual issues posed by the new statutory language were also not addressed. In short, the interim regulations answered very few of the questions of scope and meaning generated by section 242B. Further, the public comments concerning conflicts between the regulations and the statute suggest the regulations simply added confusion to an already problematic scheme.

Despite the volume of public comment, the agency did not withdraw the interim regulations as urged. Implementation has proceeded apace, in the course of case-by-case adjudication, with individual cases already beginning to expose problems described previously.

III. DUE PROCESS CONTEXT FOR IN ABSENTIA DEPORTATION HEARINGS

While this Article does not purport to address the constitutionality of section 242B, the relevant constitutional context must be examined. The statute will be reviewed within that context by the

144. See discussion infra part IV.B.
145. See id.
146. See discussion infra part IV.C.
147. See, e.g., 8 U.S.C. § 1252b(c)(3) (1992) (Potential jurisdictional questions were presented by the statutory requirement of rescission by motion to reopen, given the alien's right to administratively appeal underlying in absentia deportation orders under 8 C.F.R. 3.1(b)(2) and 242.21 (1992).
148. However, changes may yet occur. See Interview with EOIR general counsel (June 15, 1992) (notes on file with author) (after the regulations went into effect, indicating the agency was still in the process of reviewing the comments).
149. See, e.g., Letter from Peter D. Williamson, an attorney in Texas (Sept. 22, 1992) (on file with author) (documenting inability to file EOIR appearance forms with proper office of EOIR due to INS' failure to file OSC in the city alleged on the OSC). See also INS Noncompliance with 8 CFR § 3.14, AILF LEGAL ACTION ADVOCATE (Oct. 1992) (reporting INS' failure to advise aliens or counsel when and where the OSC is filed). This problem could lead to in absentia hearings when aliens are deemed not to have provided the addresses required by section 242B and therefore get no notice of hearing. As of the date of writing this Article, there have been no reported federal court decisions interpreting the new provisions. There is one BIA decision interpreting section 242B rescission motions as the exclusive vehicle for administrative review of in absentia deportation proceedings conducted after section 242B became effective. In re Gonzalez-Lopez, I. & N. Dec. 3198 (BIA 1993).
agency and the courts in the process of case-by-case adjudication.

A fundamental principle in statutory interpretation is that statutes should be interpreted to avoid constitutional infirmity. This principle is implicated in the interpretation of immigration statutes in two important ways. First, statutes are traditionally interpreted so that they do not conflict with clear constitutional requirements. Second, in a unique jurisprudential development, immigration statutes have sometimes been interpreted to avoid conflicts with mainstream constitutional norms not necessarily or not yet applicable to immigration law ("phantom norms").

It is well-settled that the constitutional norm of due process applies in deportation proceedings and is consequently a real norm. The traditional principle should guide interpretation of section 242B, which, by its terms, implicates the due process right to a deportation hearing (and possibly other constitutional rights). On the other

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151. See sources cited supra note 150.

152. Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545 (1990) (citing Bridges v. Wixon, 326 U.S. 135 (1945); Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Woodby v. I.N.S., 385 U.S. 276 (1966)). Professor Motomura suggests that the development of the "phantom norm" mode of statutory interpretation is largely the consequence of irreconcilable conflict between the archaic "plenary power" doctrine in immigration law and more enlightened developments recognizing some constitutional limitations on government in almost every other area of law. He further explains that phantom norm decision-making had some transitional value in moving the Court toward explicit constitutional decisions when statutory interpretations were unavailable. See, e.g., Landon v. Plasencia, 459 U.S. 21 (1982). However, that has presented problems of awkward or unpredictable theory to apply in subsequent cases as well as unfocused judicial review. Consequently, he suggests that this transitional mode of analysis be abandoned so that the plenary power doctrine may directly be modified by the Court. Motomura, supra, at 612.

It is also possible that the "phantom norm" mode of statutory interpretation is itself laying the groundwork for the Court to alter the plenary power doctrine. Since "phantom norm" analysis affords aliens rights, albeit ephemeral ones which could be taken away, it may disprove a thesis underlying the plenary power doctrine that the nation's ability to define itself and protect its territory will fall apart if the power is subjected to the requirements of the Bill of Rights. See Chae Chan Ping v. United States, 130 U.S. 581 (1889) (also known as The Chinese Exclusion Case); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

153. Federal courts have held that the right to apply for asylum and withholding of deportation also implicates an interest that is subject to procedural due process protection. See Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038-39 (5th Cir. 1982). See also Haitian Refugee Center v. Nelson, 872 F.2d. 1555, 1562 (11th Cir. 1989), aff'd,
hand, if the right to be present at a deportation hearing does not inhere in the due process hearing requirement—which controlling principles otherwise indicate—it may nonetheless represent the type of “phantom norm” used to interpret immigration statutes like mainstream laws. This is because procedural due process norms have figured prominently in Supreme Court cases applying “phantom norm” analysis. Thus, courts could interpret the new in absentia hearing provisions to avoid violating due process by assuming the existence of the right to be present within the constitutional due process norm but without explicitly incorporating such a right.

A. Due Process and Deportation Hearings

It has long been established that aliens in the United States are protected by the Due Process Clause of the Fifth Amendment. They are entitled to a fair hearing before they can be deported.

In civil matters the specific content of procedural due process is determined by analyzing the factors set forth in Mathews v. Eldridge: the individual’s interest to be affected, the risk of error in the extant procedures, the probable value of alternative procedures, and the government’s interest. The specific content of the process due an alien in deportation proceedings has not yet been articulated by the Supreme Court. However, due process fundamentally entails an opportunity to be heard “at a meaningful time” and “in a

McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (property interest in application for legalization). Obviously, all provisions of section 242B that may affect constitutional rights cannot be examined in this Article.


157. Despite the hardships it entails, deportation has been held not to constitute “punishment”; therefore the protections afforded criminal defendants under the Constitution, such as Sixth Amendment rights, are not applicable. Fong Yue Ting v. United States, 149 U.S. 698 (1893); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); United States ex. rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). See also Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Constitutional Rights, 92 COLUM. L. Rev. 1625 (1992).


159. Id.

160. See Landon v. Plasencia, 459 U.S. 21 (1982). However, the Supreme Court recently upheld the constitutionality of INS pre-hearing juvenile detention procedures
meaningful manner."\textsuperscript{161}

In \textit{Landon v. Plasencia}, the Supreme Court determined that the \textit{Mathews} balancing test was applicable in evaluating the adequacy of hearing procedures to exclude a resident alien from the United States.\textsuperscript{162} While the case specifically addressed the constitutional rights of resident aliens,\textsuperscript{163} the Court in \textit{Landon} affirmed the constitutional distinction between aliens who have already entered the United States—and therefore enjoy due process protections—and aliens who have not—and thus receive no such rights.\textsuperscript{164} Therefore, if the \textit{Mathews} analysis applies for resident aliens in the border situation,\textsuperscript{165} it logically applies at other deportation hearings in which the Court has long held that Fifth Amendment Due Process attaches.\textsuperscript{166}

The \textit{Mathews} analysis has been applied by lower federal courts to test the adequacy of immigration proceedings.\textsuperscript{167} However, because the INA implements the constitutional requirement of a fair hearing,\textsuperscript{168} statutory interpretation has played a large role in clarifying

\begin{itemize}
  \item Against procedural due process challenges, among others. \textit{Reno v. Flores}, No. 91-905 (S. Ct. Mar. 3, 1993). In that case, the Court determined, without entering into a \textit{Mathews} analysis, that the regulatory provisions authorizing detention satisfied due process on their face when the juveniles were afforded a right, upon request, to a redetermination of custody hearing before an immigration judge.
  \item \textsuperscript{161} Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
  \item \textsuperscript{162} Landon v. Plasencia, 459 U.S. 21 (1982).
  \item \textsuperscript{163} \textit{Id.} at 32-33.
  \item \textsuperscript{164} \textit{Id.} at 33-35 (discussing Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206 (1953)).
  \item \textsuperscript{165} Today, prominent scholars in the field suggest that due process must protect not only aliens domiciled within the United States but aliens at the border, as the inside-outside distinction is a flawed constitutional framework. See T. ALEXANDER ALIENIKOFF \\& DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 588 (2d ed. 1991); STEPHEN H. LEGOMSKY, IMMIGRATION PROCESS AND POLICY 41-48 (1992).
  \item \textsuperscript{166} Yamataya v. Fisher, 189 U.S. 86, 89 (1903). Although \textit{Landon} literally endorsed the distinction between exclusion and deportation, scholars have pointed out that its broader message undermined the distinction because the Court looked past the fact that the alien there fell within the category of aliens in statutory exclusion proceedings. Hiroshi Motomura, \textit{The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights}, 92 COLUM. L. REV. 1625, 1653 (1992).
  \item \textsuperscript{168} See Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989); Haidar v. Coomey, 401 F. Supp 717, 720 (D. Mass. 1974). In particular, the INA requires: a recorded hearing before an immigration judge; reasonable notice; a reasonable opportunity to be present, examine, and present evidence and cross examine witnesses; representation at the alien's expense; and a decision based on reasonable, substantial, and
procedural requirements and will undoubtedly do so in the future.\textsuperscript{169}

B. \textit{The Right to Be Present at a Hearing}

In most relevant contexts, the constitutional right to be heard includes the right to be present in person at the hearing in which the loss of one’s life, liberty, or property is being determined. The same minimal procedural due process requirements seem to control the forfeiture of the right to be present in civil and criminal contexts. Because the Fifth Amendment applies in deportation proceedings, both civil and criminal precedent regarding the right to be present as an element of Fifth Amendment Due Process is examined herein, although deportation is a civil, not criminal, proceeding.\textsuperscript{170}

In the criminal context, the right to be present has traditionally been located within the Sixth Amendment right to confront one’s accusers as well as the Fifth Amendment Due Process clause.\textsuperscript{171} Thus, the defendant’s right to be present traditionally extended to “every stage” of a felony trial, including challenges to jurors,\textsuperscript{172} and could not be waived in capital cases.\textsuperscript{173} More recently, the Court has determined that the defendant’s presence is required whenever it is reasonably substantial to his opportunity to defend.\textsuperscript{174}

The Supreme Court has sustained conviction when the trial judge viewed the crime scene in the absence of the defendant (but not his counsel),\textsuperscript{175} when a brief \textit{in camera} discussion occurred between a judge and juror about defendant’s sketching during trial,\textsuperscript{176} and at
the competency hearing of two child witnesses where no questions regarding substantive testimony were asked and witnesses were to be examined at trial.\textsuperscript{176} In the latter situation, the Court affirmed the due process right of a defendant to be present "to the extent that a fair and just hearing would be thwarted by his absence"\textsuperscript{177} and further indicated that the right is guaranteed "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure."\textsuperscript{178} Thus, the right to be present is rooted in notions of reliability as well as the broader notion of fairness.\textsuperscript{179} Although deportation is not criminal,\textsuperscript{180} these criminal precedents provide useful reference regarding the right to be present; they offer relatively stable doctrine regarding the source and scope of the right and elaborate upon it more comprehensively than precedent addressing the right in any analogous civil context.

In various noncriminal contexts, the Court has also determined that a right to be present is an ingredient of the process due an individual before liberty or property interests may be taken. Therefore, prior to civil commitment, a state must provide a hearing with the right to be present.\textsuperscript{181} Due process also requires an opportunity to be heard in person regarding one's parole revocation\textsuperscript{182} and probation revocation.\textsuperscript{183} Voluntary commitment of a juvenile satisfies due process when a neutral decision-maker conducts a prior "interview" with the child.\textsuperscript{184} Of course, because a \textit{Mathews} analysis by its nature involves case-by-case balancing, its application to deportation hearings would not automatically require incorporating the same due

\textsuperscript{176} Kentucky v. Stincer, 482 U.S. 730 (1987).
\textsuperscript{177} Id. at 745 (quoting Snyder v. Commonwealth of Mass., 291 U.S. 97, 108 (1884)).
\textsuperscript{178} Id.
\textsuperscript{179} See LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988). The principle established in earlier cases that a prisoner in capital cases had an unwaivable right to be present through sentencing was sometimes explained in terms that had more to do with fairness to the person than the accuracy of the determination. "[A]n accused . . . charged with a capital offense . . . is doomed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction." Diaz v. United States, 223 U.S. 442, 455 (1912).
\textsuperscript{180} Deportation proceedings have been held to be "civil" in nature, despite the hardship deportation entails; accordingly, deportation is not considered "punishment." See supra note 157.
\textsuperscript{181} Specht v. Patterson, 386 U.S. 605 (1967).
\textsuperscript{182} Morrissey v. Brewer, 408 U.S. 471 (1972).
\textsuperscript{183} Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973) (implied from Court's adoption of the same due process conditions specified in \textit{Morrissey}, 408 U.S. 471 (1972)).
process ingredients required for other civil proceedings. However, because these civil contexts involve interests in liberty which, like deportation, fall somewhere between the purely civil and the purely criminal,185 they are especially relevant analogues.

The Court has also interpreted a statute to mandate a right to an oral hearing in Social Security overpayment recoupment proceedings in order to determine whether or not recoupment should be made, reasoning that issues of "fault" and hardship involve credibility and other factual determinations for which presence is essential.186 To comply with constitutional due process, a pretermination welfare hearing similarly requires an "effective opportunity to defend" by "presenting arguments and evidence orally."187 By contrast, paper hearings may be adequate to review a purely technical issue such as whether a welfare or social security overpayment has occurred.188 The Court has also held that although a prisoner's administrative segregation requires an opportunity to present his views, ordinarily a written statement will suffice for constitutional purposes unless ineffective.189 The reason for this is the diminished liberty interest of a prisoner who is already confined is less weighty than that of a person on parole or probation, especially considering the government's interest in prison security.190

These cases suggest that a constitutional right to be present at one's deportation hearing is required under the Due Process Clause

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186. Califano v. Yamasaki, 442 U.S. 682 (1979). The Court was interpreting the governing statute to avoid an unconstitutional interpretation. Therefore, the Court had to assume that the constitutional norm of a right to an oral hearing existed.

187. Goldberg v. Kelly, 390 U.S. 254, 268-69 (1970). Goldberg implies a right for someone to be present at the "oral hearing"; while this could conceivably mean counsel or witnesses, it seems more reasonable to infer the Court meant the affected individual because the factual issues are those which the affected individual has the most knowledge of. See Califano v. Yamasaki, 442 U.S. 682, 697 (1979). "We do not see how these [issues] can be resolved absent personal contact between the recipient and the person who decides his case." Id.

188. Califano v. Yamasaki, 442 U.S. 682 (1979) (this was both a constitutional and statutory analysis). See also Goldberg v. Kelly, 397 U.S. 266, 269 n.15 (1970) (except perhaps "where there are no factual issues in dispute or where the application of the rule of law is not intertwined with the factual issues").

189. Hewitt v. Helms, 459 U.S. 460 (1983). "Ordinarily, a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective." Id. at 477.

190. Id. at 472.
when the liberty interest threatened is very great\textsuperscript{191} or where necessary to assure reliability.\textsuperscript{192} Additionally, there is some authority for the notion that the right to an opportunity to appear inheres in the requirement of notice.\textsuperscript{193}

The \textit{Mathews} analysis has not been expressly applied to the constitutional right to be present at an immigration hearing, except by lower courts addressing the right to translation.\textsuperscript{194} However, the INA guarantees a “reasonable opportunity to be present.”\textsuperscript{195} In the absence of such a requirement, the \textit{Mathews} analysis would mandate an opportunity to be present.

The interest of an alien in avoiding deportation is a liberty interest as great as in those “quasi-criminal” proceedings in which such a right has been established.\textsuperscript{196} In classic statements, deportation has been characterized as follows:

“[[I]]t visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.”\textsuperscript{197}

It is “a drastic measure and at times the equivalent of banishment or exile.


\textsuperscript{193} See Windsor v. McVeigh, 93 U.S. 259, 278 (1876). While that case addressed the accuracy of procedures mandated by legislation, as interpreted, the language used was broader: “The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard . . . .” \textit{Id}.

\textsuperscript{194} Augustin v. Sava, 735 F.2d 32 (2nd Cir. 1984) (an exclusion hearing on applicant’s claim to withholding of deportation required accurate translation to place his claim before the judge); see also Niarchos v. INS, 393 F.2d 509 (7th Cir. 1968) (pre-\textit{Mathews} case holding deportation hearing without translation violates due process); \textit{In re Exilus}, 18 I. & N. Dec. 276 (BIA 1982); \textit{In re Tomas}, 19 I. & N. Dec. 464 (BIA 1987). The \textit{Mathews} analysis has also been applied by federal courts determining the content of due process in various other circumstances. See, e.g., Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988), \textit{aff’d sub nom.} Orantes-Hernandez v. Thornburg, 919 F.2d 549 (9th Cir. 1990); Perez-Funez v. INS, 619 F. Supp. 656 (C.D. Cal. 1985).

\textsuperscript{195} See supra note 168 for cases characterizing INA § 242(b) as implementing minimal requirements. See Murphy, supra note 168 (explaining that the 1952 Act established this requirement, among others, “for fair administrative practice and procedure” (legislative history citation omitted); this was in response to criticisms that deportation hearings were unfair and to the Supreme Court’s decision subjecting such proceedings to the APA in \textit{Wong Yang Sung}, 339 U.S. 33 (1950).


\textsuperscript{197} Bridges v. Wixon, 326 U.S. 135, 154 (1945).
It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.\textsuperscript{198} “To be sure, deportation is not criminal. But...[this Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all bonds formed here.”\textsuperscript{199} “A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.”\textsuperscript{200}

Thus while an alien’s liberty, like that of a probationer or parolee, is potentially subject to curtailment, it is substantial and dear and deserves the protections of due process.\textsuperscript{201}

In most cases, a deportation hearing without opportunity for the alien to be present would be unreliable. Many grounds for deportation involve highly contestable facts about the alien’s characteristics and conduct.\textsuperscript{202} These facts frequently involve criteria for which the alien’s testimony is necessary, affirmatively or in defense, and for which her presence is necessary to assist counsel through other witnesses.\textsuperscript{203} Furthermore, because the government bears the burden of proof,\textsuperscript{204} the alien’s ability to be there to refute the government’s case may be highly dispositive.\textsuperscript{205} Also, an alien found deportable in the hearing can nonetheless defend affirmatively against that deportation by requesting “relief”\textsuperscript{206} for which her testimony or participation at the hearing is indispensable.\textsuperscript{207}

Therefore, the risk of an erroneous deprivation of the alien’s substantial liberty interest in a hearing without her presence is great. By contrast, a hearing in which the alien is afforded the right to be present is more likely to result in accurate decision-making.\textsuperscript{208} No greater costs are involved for the government because a hearing is

\textsuperscript{198.} Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citation omitted).
\textsuperscript{203.} For example, to prove a nonimmigrant alien deportable under 8 U.S.C. § 1251(a)(1)(C)(i), the government must establish the alien's intentions changed to those of an immigrant or that she engaged in conduct contrary to her status. See generally IMMIGRATION LAW AND DEFENSE § 7.26 (3d ed. 1992).
\textsuperscript{204.} Woodby v. INS, 385 U.S. 276 (1966).
\textsuperscript{205.} For example, the alien may be able to testify about facts that would absolve her from the immigration consequences of her conduct. See INS v. Akbarin, 669 F.2d 839 (1st Cir. 1982).
\textsuperscript{206.} See infra note 306.
\textsuperscript{208.} See, e.g., Parham v. J.R., 442 U.S. 584, 608 (1979) (in which the court found that the risk of error in a child's commitment necessitated an interview with the child).
already constitutionally required.209 Thus, with respect to an alien’s right to be present, the government’s interest in a less formal hearing is outweighed by other interests and considerations.210 Finally, as a matter of principle, the opportunity to be present at one’s hearing should be constitutionalized as it is one of the few due process components that both insures reliability and affirms the dignity of the person.211

C. The Propriety of In Absentia Hearings

When there is a constitutional right to be physically present, proceedings in which an individual’s rights, defenses, and claims are adjudicated without her there are typically treated as situations in which the individual “waived” her right to appear.212 Generally, a

209. Of course, it could be argued that a hearing without the alien present would be cheaper for the government principally by eliminating the time required for the alien’s testimony. On the other hand, such a hearing might cost more if an alien had to use attenuated means of defending herself or proving affirmative claims (e.g., increased use of witnesses with circumstantial rather than direct knowledge or greater recourse to subpoena and cross examination of government agents).

210. In some cases, the government’s enforcement interests may be great in having the alien present because it will not be possible to prove deportability without her. See In re Guevara-Santos, I. & N. Dec. 3143 (BIA 1990); Dan Kanstroom, Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings, 4 GEO. IMMIGR. L.J. 599 (1990). The Guevara case held that while an immigration judge may draw adverse inferences from an alien’s unprivileged silence during deportation proceedings, silence alone does not meet the Woodby standard. Therefore, under the circumstances giving rise to the Guerera case, in which the aliens moved to suppress statements taken during an INS raid, the only way for the government to meet its burden would be to successfully cross-examine the aliens on their affidavits in support of suppression or otherwise refute their suppression evidence. See generally IMMIGRATION LAW AND DEFENSE § 7.75 (3d ed. 1992).

Additionally, the government’s interest in weeding out claims for relief that are not credible may also be furthered by requiring the alien to testify. See In re Fefe, I. & N. Dec. 3121 (BIA 1989).

Finally, the government’s interest in efficient utilization of court resources is only slightly affected by the short delays attending procedures to ensure the alien’s presence; when weighed against the risk of error that aliens will be deported who are not deportable, or should not be, the government’s interests ought not to prevail unless there is evidence of the alien’s obstructionist intent. Timothy W. Murphy, Comment, Deporting Aliens In Absentia: Balancing the Alien’s Right to Be Present Versus the Court’s Need to Avoid Unnecessary Delays, 13 W. NEW ENG. L. REV. 269 (1991).

211. In contrast, some constitutional requirements, such as the keeping of a record, almost exclusively promote the instrumental value of reliability. See LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 666-714 (2d ed. 1988) for a discussion of both instrumental and dignitary values as important in due process theory.

212. See, e.g., Diaz v. United States, 223 U.S. 442 (1911); Illinois v. Allen, 397 U.S. 337 (1970); Taylor v. United States, 414 U.S. 17 (1973) (per curiam) (“The broad dicta in Hopt v. Utah and Lewis v. United States that a trial can never continue in the
waiver is “an intentional relinquishment of a known right.” However, the waiver construct is applied not only in situations in which an individual makes a conscious contemporaneous decision to exchange or give up certain rights, but also to situations in which the forfeiture of a right is imposed by presumption.

In criminal cases the Court has held that the right to be present can be waived by consent or by misconduct if, after warning from the judge, the defendant engages in conduct so disorderly, disruptive, and disrespectful that the trial cannot proceed with her present. Additionally, procedural rules authorizing in absentia criminal proceedings upon a defendant's absence reflect the constitutional waiver standard for loss of appearance rights. A defendant's mental status may also be relevant to determine whether she properly waived the right to appear.

In the civil context, the Court has not yet ruled on the standard by which the right to appear may be forfeited. However, opinions from related contexts suggest that rules authorizing forfeiture of civil appearance rights would have to incorporate such a standard in order to conform to principles of fairness. At the least, forfeiture of defendant's absence have been expressly rejected.” (citing Diaz and Illinois) (other citations omitted).


216. Taylor v. United States, 414 U.S. 17, 18-20 (1973). The Court upheld Rule 43 of the Federal Rules of Criminal Procedure authorizing in absentia proceedings when defendant's absence is voluntary and quoted with approval a lower court case stating the controlling rule that defendant “must have no sound reason for remaining away.” Id. at 17-18 (quoting Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968)). The defendant did not challenge the factual conclusion that his absence was voluntary, nor did the facts stated seem to warrant a contrary conclusion. Id. at 17, 20. The Court further held that to be effective, such a waiver did not require prior warning of the consequences.

217. Drope v. Missouri, 420 U.S. 162 (1975) (when defendant shot himself second day of trial, Court reversed conviction and remanded for evaluation of competence issues). See also Fikes v. Alabama, 352 U.S. 191 (1957) (mental status relevant to whether confession was voluntary under the “totality of circumstances” and therefore violated due process).

218. However, in Humphrey v. Cady, 405 U.S. 504 (1972), the plaintiff claimed he was denied the opportunity to be present at his commitment renewal hearing, as required by Specht. The Court remanded and implied that a waiver standard would be appropriate. Id. at 512.
should not be permitted when attributable to involuntary or unintentional circumstances.

While the Court has indicated that rules may define the time and condition under which appearance rights may be forfeited, the principle that forfeiture of due process rights should be occasioned only by rules excusing unintentional or involuntary noncompliance finds support in various cases addressing the propriety of procedural provisions. Language in cases decided long before the right to be present was specifically incorporated into a pre-termination hearing reflects a long-standing assumption that due process may tolerate an in absentia proceeding only when the absence is intentional and voluntary. Additionally, in sustaining default judgments pursuant to state statute and findings of personal jurisdiction pursuant to Federal Rule of Civil Procedure 37(b)(2), as sanctions for noncompliance with discovery orders, the Court noted that the rules in question penalized bad faith noncompliance rather than unintentional or involuntary noncompliance.

Lower court decisions examining the constitutional propriety of in absentia deportation proceedings under subsection 242(b) suggest

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220. Compare Windsor v. McVeigh, 93 U.S. 274 (1876) (once notified of proceedings against him, property owner could not, consistent with due process, be completely refused an opportunity to appear and defend) with Simon v. Craft, 182 U.S. 427, 436 (1901) (statutory "lunacy" proceedings did not violate due process when individual was notified and "if she had chosen to do so, she was at liberty to make such defence as she deemed" (emphasis added)).

221. Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908); Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694 (1982). In Hammond, the Court responded to arguments that the orders to produce in question conceivably required compliance that a defendant was incapable of achieving, stating: "[A]ll the statute required was a bona fide effort to comply . . . therefore any reasonable showing of an inability to comply would have satisfied the requirements of both the statute and the order," 212 U.S. at 347. In Insurance Corp. of Ireland, the Court indicated that personal jurisdiction, like other individual rights, was subject to waiver—by intent as well as constructively—under circumstances in which it may be fair to presume jurisdiction exists. The Court noted that Rule 37(b)(2) limited the discretionary use of sanctions to situations in which it was "just" to do so and stated that this standard represented the general due process restriction on a court's discretion. Id. at 708. Then, while not elaborating on the nature of what is "just," the Court reviewed the defendant's factual pattern of repeated noncompliance with discovery orders in the face of repeated warnings to conclude the "justice" of the trial judge's order was thereby demonstrated. 456 U.S. at 708-09. See also Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197 (1958). In light of Fifth Amendment doctrine underlying civil rules, Rule 37(b)(2) dismissal for noncompliance with discovery order was not justified absent "willfulness, bad faith or any fault of petitioner." Id. at 212.

222. INA § 242(b) provides: "If any alien has been given a reasonable opportunity
that due process requires an opportunity to be present, but that *in absentia* proceedings are not unfair when pursuant to a statute justifying absence according to the standard of reasonable cause. In *Maldonado-Perez v. INS*, the circuit court determined that the statutory requirement of a “reasonable opportunity to be present” at a deportation hearing met the constitutional requirements of a fair hearing. It also found that statutory provisions for *in absentia* hearings, when an alien who was given the opportunity failed to provide “reasonable cause” for her absence, did not violate due process.

In *Patel v. INS*, the Fifth Circuit Court of Appeals similarly ruled that a deportation hearing *in absentia* is not violative of the Fifth Amendment. The Eleventh Circuit has ruled similarly. The Ninth Circuit Court of Appeals addressed the issue in *United States v. Dekermenjian*, a criminal case based on charges of re-entry after deportation, which was challenged because the deportation hearing to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present.” § 1252(b). See part IV for discussion on how this unrepealed statutory provision relates to the interpretation of INA § 242B.

223. *Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989). See also Ex *Parte Bunji Une*, 41 F.2d 239 (S.D. Cal. 1930) (proceeding, pursuant to regulations before 1952, violated regulations when alien’s attorney was absent during adverse witness testimony and violated due process when identification of alien by witnesses was made in his absence).

224. *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. Cir. 1989); *Ibrahim v. INS*, 821 F.2d 1547 (11th Cir. 1987); *Patel v. INS*, 803 F.2d 804 (5th Cir. 1986); see also *United States v. Dekermenjian*, 508 F.2d 812 (9th Cir. 1974).

225. *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. Cir. 1989); but see Ex *parte Bunji Une*, 41 F.2d 239 (S.D. Cal. 1930) (in which the court held that due process requires alien’s presence) (This was before the INA established fair hearing requirements). The effect of the statutory standard justifying nonappearance on the constitutional propriety of the proceedings is examined more closely in part IV.

226. *Maldonado-Perez v. INS*, 865 F.2d 328, 333 (D.C. Cir. 1989); see also *Sewak v. INS*, 900 F.2d 667, 672 (3rd Cir. 1990) (which appears to endorse this analysis).

227. *Maldonado-Perez*, 865 F.2d at 333. The circuit court so held, even though it quoted dicta from INS v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984), suggesting that the “reasonable opportunity to be present” requirement is permissible in civil but not criminal proceedings because civil proceedings require less constitutional safeguards. The D.C. Circuit Court also relied on the Ninth Circuit’s discussion of “voluntariness” in *United States v. Dekermenjian*, 508 F.2d 812 (9th Cir. 1974), discussed infra. In another case, the D.C. Circuit Court held that dismissal of an asylum claim for failure to prosecute after an alien (but not his counsel) missed the hearing did not violate due process where the alien was competently represented, had been afforded two opportunities to be heard, and did not actually explain his absence. *Reyes-Arias v. INS*, 866 F.2d 500 (D.C. Cir. 1989).

228. *Patel v. INS*, 803 F.2d 804, 906 (5th Cir. 1986). In so holding, *Patel* cited both *Shah v. INS*, 788 F.2d 970 (4th Cir. 1986) which was a statutory rather than constitutional holding, and *United States v. Derkermenjian*, 508 F.2d 812 (9th Cir. 1974).

229. *Ibrahim v. INS*, 821 F.2d 1547, 1550 (11th Cir. 1987).
was held *in absentia*. The court held that due process is not violated when the defendant voluntarily chooses not to attend the hearing. *Maldonado-Perez* and *Dekermenjian* specifically used voluntariness language and *Patel* cited *Dekermenjian*, suggesting that a statutory standard for justifying *in absentia* proceedings may satisfy due process requirements when voluntariness is included within it.

IV. STATUTORY ANALYSIS

A. Limitations on Rescinding In Absentia Deportation Orders

Subsection 242B(c)(3)(A) provides that an *in absentia* deportation order may be rescinded only upon a motion to reopen due to “exceptional circumstances” for the alien’s nonappearance. Alternatively, an order may be rescinded upon a motion to reopen based on no “notice.” A motion to reopen is the vehicle by which various immigration proceedings, once completed, are restored to their formal legal posture by the adjudicating authority.

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230. United States v. Dekermenjian, 508 F.2d 812 (9th Cir. 1974).
231. *Id.* at 814.
232. *Maldonado-Perez* v. INS, 865 F.2d 328, 333 (D.C. Cir. 1989); United States v. Dekermenjian, 508 F.2d 812, 814 (9th Cir. 1974); *Patel* v. INS, 803 F.2d 804, 806 (5th Cir. 1986). *See also* Sewak v. INS, 900 F.2d 667, 672 (3rd Cir. 1990). While not reaching the merits due to factual questions in the record, the Sewak court appeared to adopt the voluntariness analysis of *Maldonado-Perez* and *Dekermenjian*. Similarly, in Thomas v. INS, 976 F.2d 786 (1st Cir. 1992), the First Circuit cited both *Maldonado-Perez* and voluntariness language; however, that court apparently decided the case on statutory rather than constitutional grounds.

233. More often, the courts have evaluated whether the circumstances of an *in absentia* hearing complied with the statutory requirement of a “reasonable opportunity to be present” or satisfied the statutory exception of “reasonable cause.” *See* Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989); *Patel* v. INS, 803 F.2d 804 (5th Cir. 1986); Thomas v. INS, No. 976 F.2d 786 (1st Cir. 1992). *See also* Dhangu v. INS, 812 F.2d 455 (9th Cir. 1987). In Sewak, 900 F.2d at 668, the Third Circuit remanded for factual development, indicating that the facts alleged implicated both constitutional and statutory issues. The opinion in *Ibrahim*, 821 F.2d at 1550, indicates that due process might be violated if prejudice is shown. *See also* part IV.C.

237. T. ALEXANDER ALIENIKOFF & DAVID A. MARTIN, IMMIGRATION LAW AND
One of two interpretations is possible regarding the scope of subsection 242B(c)(3)(A). The first interpretation is that subsection 242B(c)(3) forecloses all motions to reopen for any purpose except when based upon exceptional circumstances or lack of notice. The second interpretation is that subsection 242B(c)(3) limits motions to reopen to rescind, which are different from motions to reopen for other purposes. The applicability of 242B(c)(3)(A) turns, then, on the meaning of “rescind” and the relationship between rescission and reopening.

1. Textual Analysis

a. Plain Meaning of “Rescind” and “Motion to Reopen”

Analysis of a statute must begin with the words of the act to be interpreted. The meaning of the term “rescind” is not elaborated in section 242B or the rest of the INA. The plain meaning of a term must be given effect unless the literal import is inconsistent with the legislative meaning or intent, or such interpretation leads to absurd results, or such interpretation may generate constitutional conflict. The plain meaning usually denotes the ordinary meaning of words and sometimes their technical, legal, or specialized meanings.

The ordinary meaning of the term “rescind” is “to do away with, remove, take back, annul, cancel, abrogate, vacate, make void.” In


244. Webster's Third New International Dictionary 1930 (1981). See also
legal parlance, the term is traditionally associated with the un-making of a contract. Common law meanings are often considered a useful guide to ascertaining the legal meaning of a statutory term. Additionally, it has been said that the legal meaning of “rescind” is its ordinary meaning. In most circumstances, the nature of an act to rescind is to restore the status quo ante, the act being rescinded, as if the action being rescinded had not occurred. The concept of a “motion to reopen” is not defined in section 242B nor anywhere in the INA. Although “motion” and “reopen” have ordinary meanings, it is improper to enforce the meaning of constituent parts rather than the whole meaning of a group of words generally used as a term of art. Therefore, the proper meaning of “motion to reopen” must be garnered from its relevant legal context.

b. Context of Terms Within Structure of Whole Act

Before the Immigration Act of 1990, the term “rescind” appeared in section 246 of the INA (rescission of adjustment of status) and subsection 1187(d) (authority to rescind waiver of visa requirements

Oxford English Dictionary 689 (2d ed. 1989) (“to abrogate, annul, repeal, cancel”); American College Dictionary 1031 (1960) (“1. to abrogate; annul; revoke; repeal; 2. to invalidate [an act, measure, etc.] by a later action or a higher authority”).


248. 77 C.J.S. Contracts, § 418 (1) and Rescind, Recission, 276-77 (1952). Thus, a rescission of a contract based on fraud should restore the parties to their former positions, as if the contract had never been entered. Id.

249. As will be discussed in part IV.A.1.b, the “motion to reopen” device was created by administrative practice.

250. In the context of a statute circumscribing legal procedures, the legal meaning would control the meaning of “motion” as “an application made to a court or judge for purpose of obtaining a rule or order directing some act to be done.” Black’s Law Dictionary 1013 (6th ed. 1990); see Barber v. Gonzales, 347 U.S. 637, 641 (1954) (contextual legal meaning controls over ordinary one). The ordinary meaning of “reopening” includes its legal meaning: “to try or hear [a legal suit or action] anew, especially for the purpose of hearing new evidence.” Webster’s Third New International Dictionary 1923 (1981); see also Black’s Law Dictionary 1298 (6th ed. 1990) (“to permit the introduction of new evidence and, practically to permit a new trial”).

for nationals of certain countries). These provisions are not directly analogous to rescission of an order of deportation under section 242B. Therefore, they do not clarify the meaning of the term "rescission" in relation to a "motion to reopen."^253

While legislative precedent for use of the term "rescind" prior to the Immigration Act of 1990 is not extensive, such precedent for use of the term "motion to reopen" is nonexistent. The INA previously did not provide for motions to reopen at all, and the right to make such motions depended entirely on administrative regulations. Indeed, the Immigration Act of 1990 contains the first Congressional acknowledgement of the use of the reopening device, in three separate provisions. First, subsection 106(a), as amended, (governing judicial review of deportation orders) now requires consolidation of review of motions to reopen with review of the underlying deportation order. Second, section 242B also refers to motions to reopen.

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^252. If, at any time within five years . . . it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting the adjustment of status to such person and canceling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made.


"Any person who has become a naturalized citizen . . . as a result of an adjustment of status . . . which is subsequently rescinded . . . shall be subject to the provisions of section 1451 [denaturalization] . . . ." 8 U.S.C. § 1256(b) (1988) (emphasis added).


^253. However, by the terms of the statutory language, the effect of rescission in those contexts is generally compatible with its general meaning. That is, rescission of adjustment of status under INA § 246 places an alien in the position she had been without the adjustment. See American Immigration Lawyers Association, Immigration and Nationality Law: Fundamentals 228 (1990). See also Richard Boswell, Immigration and Nationality Law 508 (1991) (discussing In re Anwall, I. & N. Dec. 3056 (BIA 1988) for the proposition that a person who has had her permanent residence status rescinded is in effect placed back into the position held at the time she was applying for permanent residence). The standards to rescind a visa waiver or designation under INA § 217 have not been reviewed by the courts--perhaps because a condition for the visa waiver is that the alien waive most appeal and judicial review rights. See 8 U.S.C. § 1187(b) (1992).


^255. Immigration Act of 1990 § 545(a), (b), (d).

^256. 8 U.S.C. § 1105a(a)(6). "[W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order . . . ." Id.
Third, subsection 545(d) instructs the Attorney General to promulgate regulations governing the timing and number of allowable motions to reopen. Like the reference to the term "motion to reopen" in section 242B, the other two references do not clarify differences which may exist between motions to reopen to "reconcile" and motions to reopen for other purposes.

The new statutory references to motions to reopen do not explicitly endorse any aspect of existing administrative motion to reopen practice. Nevertheless, analysis of the meaning of a term derived from administrative practice logically requires reference to the history of the practice upon which the statutory term relied.

In the context of motions to reopen deportation proceedings, the administrative regulatory practice, elaborated in administrative and court decisions, distinguishes between different kinds of motions to reopen proceedings. It distinguishes between general motions to reopen to submit new evidence and specific motions to apply for relief not sought previously. The former may include submission of

257. The Attorney General shall issue regulations with respect to —
(1) The period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum period for the filing of such motions . . . .

Immigration Act of 1990 § 545(d).

258. Id.; see also supra note 256. Nor does the limited legislative history suggest an intention to endorse those practices in toto. Because the legislative history of the motion to reopen language in the Immigration Act of 1990 does not discuss the legal standards for such motions, the extent of congressional acquiescence thereto is doubtful. See Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring). This Article, however, does not purport to examine the possible acquiescence by Congress in those practices.

259. Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 455(1989) (prior use in Executive Order). See also Lichter v. United States, 334 U.S. 742 (1948) (statute used a term, administrative directive defined factors it included, statute later incorporated the factors, court uses this history as part of "factual background" of the statute).

260. Other immigration proceedings may also be reopened; for example, applications for legalization. In re O., 19 I. & N. Dec. (BIA 1989). Exclusion proceedings may also be reopened. See 8 C.F.R. § 3.22 (1991); In re Barrera, 19 I. & N. Dec. (BIA 1989); In re Haim, 19 I. & N. Dec. 641 (BIA 1988). Inasmuch as the statutory language under examination here encompasses only deportation proceedings, this analysis will address the applicability of motion to reopen procedure to deportation proceedings.


evidence regarding deportability as well as additional evidence regarding relief. The grant of a motion to reopen to submit new evidence contesting deportability eliminates the deportability finding and, if the motion is granted, allows the alien to go free. By contrast, an alien reopening solely for purposes related to relief leaves intact the finding that she is deportable and the relief operates to prevent or avoid deportation.

A motion to reopen to rescind an in absentia deportation order is consistent with those practices, as well as the plain meaning of the term "rescind," when the effect of such reopening would be to place the alien in the position she would have been in without the order. In other words, a motion to reopen to rescind must have the effect of removing all aspects of the in absentia order including the finding of deportability. Under this interpretation, subsection 242B(c)(3)(A) would restrict motions to reopen to when rescission is necessary. Hence, rescission would be necessary any time an alien wished to submit new evidence to contest the government's proof of deportability. Also, because various grounds of deportation preclude or affect eligibility for various kinds of relief, aliens would need to rescind if ordered deported on statutory grounds foreclosing that relief. This interpretation effectuates theplain meaning of the term

1987); Sakha v. INS, 796 F.2d 1201 (9th Cir. 1986); Conti v. INS, 780 F.2d 698 (7th Cir. 1985); Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985); In re Baroco, 19 I. & N. Dec. (BIA 1985).

263. See Ramon-Sepulveda v. INS, 824 F.2d 749, 750 (9th Cir. 1987); Garcia-Franco, 748 F.2d 518 (9th Cir. 1984); Lai Haw Wong v. INS, 474 F.2d 739 (9th Cir. 1973).

264. See Vargas v. INS, 938 F.2d 358 (2d Cir. 1991). Additionally, motions to reopen may be filed to cure procedural infirmities. Chung Young Chew v. Boyd, 309 F.2d 857 (9th Cir. 1962).

265. See Ramon-Sepulveda, 824 F.2d at 750 (because of res judicata, INS was not permitted to reopen deportation proceedings in which it failed to prove petitioner was an alien or that he was deportable).

266. See, e.g., De Lucia v. INS, 370 F.2d 305, 307 (1966). Thus, the number of potentially deportable aliens is greater than the number who might seek discretionary relief from deportation.

267. See 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 72.07(2)(1992). Note that the grounds upon which the alien has been found deportable may affect her categorical and discretionary eligibility for relief. See, e.g., 8 U.S.C. §§ 1158(d), 1254 (1992). Thus an alien seeking a particular form of relief may need to reopen to contest deportability if the ground upon which she was found deportable makes her ineligible for or undeserving of such relief. See INS v. Rios-Pineda, 471 U.S. 444, 451 (1985) (suggesting ordinary "entry without inspection" deportability ground may not be as adverse a discretionary factor as multiple illegal entries with the aid of a professional smuggler).

268. See infra notes 306, 309.

269. For example, to obtain voluntary departure under INA § 244. 8 U.S.C. § 1254 (1992). Recession could also be required for a legal permanent resident, ordered deported just short of the seven years required for a § 212(c) waiver, to reopen for such relief, as the order might otherwise terminate the required period of lawful domicile. See In re Cerna, I. & N. Dec. 3161 (BIA 1991); Gonzalez v. INS, 921 F.2d 236 (9th Cir.
“rescind” and utilizes a distinction between different kinds of motions to reopen which are already part of the administrative practice. Consistent with the logic of administrative practice, motions to reopen to “rescind” a deportation order would sensibly equate with motions to reopen to contest or vacate a finding of deportability rather than with other reopening motions that leave the deportability finding intact. A motion to reopen for other purposes, such as to seek relief, does not require one to vacate or otherwise disturb a deportability finding; such motions should not be controlled by subsection 242B(c)(3)(A) because rescission is not required.

Whole act analysis of the provision in question also supports this interpretation. Because Congress used both the terms “rescind” and “reopen” in subsection 242B(c)(3)(A), that distinction should be given effect. Had Congress wished to limit all motions to reopen an in absentia order rather than to limit a smaller group of such motions (those involving rescission) it could have done so quite easily by omitting the word “rescind” altogether in subsection 242B(c)(3)(A). Simpler language would state that in absentia orders can be “reopened only” rather than “rescinded only upon a motion to reopen filed.” The fact that the sentence includes both terms requires that each be given effect. Grammatical indicators in the sentence also support the conclusion that rescission does not mean the same as reopening. The adverbial clause “upon a motion to reopen filed” modifies the preceding verb “rescinded” in subsection

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270. The doctrine of “whole statute” interpretation requires that all parts or sections be construed in harmony with each other to produce a harmonious whole. COIT Independent Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561 (1989).
271. See INS v. Stevic, 467 U.S. 407 (1984) (synonymy in meaning may not be implied where different terms are used); Kungys v. United States, 485 U.S. 759 (1988) (plain meaning of giving “false testimony” under 8 U.S.C. § 1101(f)(6) does not require materiality; literal analysis also supported by necessity of reconciling that provision with the differently worded provision of 8 U.S.C. § 1451(a) [“wilful misrepresentation”] so as to avoid redundancy); Moskal v. United States, 498 U.S. 103 (1990) (avoid equating “falsely made” with “forged” or “counterfeited” in same statutory provision); Primate Protection League v. Tulane Ed. Fund, 111 S. Ct. 1700 (1991) (“official” versus “agency”). See also 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1985) (quoting State v. Bartley, 39 Neb. 353, 58 N.W. 172 (1890)) (“It is an elementary rule of construction that effect must also be given, if possible, to every word, clause and sentence of a statute”).
272. See SINGER, supra note 271.
242B(c)(3); this means that what is limited is rescission, not motions to reopen.274

This interpretation of subsection 242B(c)(3)(A) is structurally consistent with the overall scheme of section 242B. First, it squares with the underlying logic of subsection 242B(c)(1) that deportability issues—but not necessarily relief issues—will be fairly resolved before an *in absentia* order ends the proceedings. As previously indicated, subsection 242B(c)(1) requires that before an *in absentia* order is entered the government must prove deportability under the clear, unequivocal, and convincing evidence standard.275 It says nothing regarding the disposition of evidence about eligibility for relief. Yet it mandates entry of the deportation order.276 This concern with proper proof of deportability could reflect legislative avoidance of constitutional infirmity in the new statute.277 It potentially rationalizes the strict time limits on motions to reopen for purposes of rescission but not for other purposes under subsection 242B(c)(3)(A). This is because when the government has already been required to prove deportability by clear, unequivocal, and convincing evidence, even in the alien's absence, a six-month limit on the alien's ability to later contest that finding278 because she could not be there may safeguard the reliability of the process.279 No similar logic, except a

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273. The relevant text is: “Such an order may be rescinded only—(A) upon a motion to reopen filed within 180 days after the date of the order . . . .” 8 U.S.C. § 1252b(c)(3) (1992).


276. This could indicate one of a number of possibilities. For example, Congress may not have anticipated that relief evidence might already be in the record in cases of nonappearance. Alternatively, Congress may have declined to legislate on the relief aspect of INA § 242(b) proceedings to avoid sanctioning the procedure resolving both deportability and relief matters in the same proceeding.


278. *See* 8 U.S.C. § 1252b(c)(3)(A) (1992) (motions to reopen to rescind based on “exceptional circumstances” are thereby limited to 180 days from date of entry of order).

279. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (reliability of procedures used among factors to determine their constitutional sufficiency under the Due Process Clause). On the other hand, because subsection 1252b(c)(3)(B) imposes no time limits on motions to reopen in the absence of notice, aliens may reopen to contest deportability in such cases even though the government already proved deportability. The statute itself does not reveal the policy behind this difference, although given the testimony and background showing that inadequate notice by the government has been a persistent problem, the more permissive rescission rule at subsection 1252b(c)(3)(B) may operate as a check on agency compliance with the clear mandate of Congress to furnish
purely punitive intent, justifies interpreting subsection 242B(c)(3) to limit all motions to reopen in absentia proceedings such as those based on claims for relief arising after the deportation order entered.280

The interpretation proposed above furthers the schematic design of section 242B in differentiating the hearing-related penalties for nonappearance from those bearing on an alien's ability to subsequently seek relief. That is, it interprets subsections 242B(c)(3) and 242B(c)(1) harmoniously with subsections 242B(e)(1)-(4), governing eligibility for relief after a nonappearance. If subsection 242B(c)(3) completely foreclosed motions for relief after inexcusable nonappearances, the five-year bars to relief, such as subsection 242B(e)(1), would be rendered largely meaningless because aliens ordered deported would almost never be able to apply for relief.281

Interpreting subsection 242B(c)(3) to limit all motions to reopen after an in absentia deportation order would also conflict with the statutory design which insulates the right to petition for persecution-based relief from those penalties imposed by section 242B. This design is clearly manifested in subsection 242B(e)(5), which identifies the forms of relief affected by nonappearance.282 Those forms of

280. The legislative history does not include a punitive intent. Rather, the overriding objective of Congress in enacting the Immigration Act of 1990 § 545 was to get aliens to their hearings. See supra part II. 281. This is because of the effect of an outstanding deportation order on an alien's ability to do anything but be expelled. Absent a motion to reopen and the grant of a stay of deportation, an alien under a final order of deportation “shall” in most cases be taken into custody and deported. 8 C.F.R. § 243.3(a) (1992). The only way to “save” the statute from virtual superfluity, then, is to interpret subsection 1252b(e)(1) to apply to an alien who leaves the United States after the entry of an in absentia deportation order and comes back to the United States in some other status (e.g., nonimmigrant) after getting a waiver of excludability due to re-entry after deportation. Then, if the alien applied to change status or adjust, the five-year bar would prevent it. However, this interpretation cannot save the five-year bar on suspension, which requires more than seven years in the United States before the alien can qualify, because the departure would inevitably interrupt the alien's physical presence in the United States. See 8 U.S.C. § 1254(b)(2) (1992); In re Loza-Bedoya, 10 I. & N. Dec. 778 (BIA 1964); Barragan-Sanchez v. Rosenberg, 471 F.2d 758 (9th Cir. 1972); Segura-Viarechi v. INS, 538 F.2d 91 (5th Cir. 1976); Vargas-Gonzales v. INS, 647 F.2d 457 (5th Cir. 1981); McCalvin v. INS, 648 F.2d 935 (4th Cir. 1981). For registry, see Mrvica v. Esperdy, 376 U.S. 560 (1964); In re P., 8 I. & N. Dec. 167 (Asst. Comm'r 1958); In re S.J.S., 8 I. & N. Dec. 463 (Asst. Comm'r 1959). Finally, this interpretation would render the ability to apply for asylum and withholding after an in absentia order practically nonexistent (because aliens seeking such relief obviously cannot go home and come back), notwithstanding that Congress did not intend to disqualify defaulting aliens from eligibility for asylum or 243h withholding relief. See 8 U.S.C. § 1252b(e)(5) (1992). 282. 8 U.S.C. § 1252b(e)(5) (1992).
relief do not include asylum under section 208 of the INA or withholding under section 243h of the INA. If subsection 242B(c)(3) restricted motions to reopen for relief after an in absentia order it would conflict with subsection 242B(e) by effectively imposing restrictions on asylum or withholding relief, which were expressly prohibited by Congress. 283 Thus, a result could be accomplished indirectly that the statute has forbidden directly. Indeed, the restrictions would potentially be greater because relief could be permanently proscribed under subsection 242B(c)(3). 284

2. Legislative History

The legislative history of the Immigration Act of 1990 section 545 is silent on the meaning of “rescission” or reopening. Of the various drafts of bills containing nonappearance language, only the Morrison Bill contained the rescission language. 285 Thus, the House Report accompanying the Brooks Bill had nothing to say on the subject. 286 The only places in which an explanation or definition could have been provided were in the Conference Report on the Morrison Bill and Senate bill, or on the floor before final passage; however, no intimations of the intent of Congress concerning the meaning of the term were provided. 287

The legislative history of the provisions referring to motions to reopen is also silent on the meaning of that phrase, although the topic of motions to reopen is generally addressed. 288 Analysis of the draft

283. This is because of the effect of an outstanding deportation order on an alien seeking relief. See supra note 281. As discussed, to save the provisions from superfluity, an alien ordered deported in absentia who could not meet the § 1252b(e)(3) standards for reopening to rescind would have to leave the United States and return to apply for asylum and 243h relief at a port of entry. Under this interpretation, the difference between such an alien and one who re-entered as a nonimmigrant and later sought adjustment of status is that the adjustment-seeker would be subject to the five-year bar while the asylum-seeker would not. But asylum and 243h relief are predicated on a principle of safe haven or nonreturn (“nonrefoulement”). See Deborah Anker, Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980, 28 VA. J. INT’L L. 1, 32-33 (1987). Surely, to require the departure of putative refugees in order to give meaning to the statutory omission of asylum from the § 1252b(e)(5) list would constitute an interpretation leading to absurd results. See American Tobacco Co. v. Patterson, 456 U.S. 63 (1981); Marek v. Chesney, 473 U.S. 1 (1985); United States v. Brown, 333 U.S. 18 (1948).

284. That is, for properly notified aliens who did not have “exceptional circumstances” for not appearing or had them but did not move to reopen within the requisite six-month period.


288. The Conference Committee report states, as explanation for subsection 545(d), that:

[t]he Attorney General shall issue regulations on the filing deadlines, including a maximum time period, for motions to reopen and to reconsider, and a limit
bills with respect to motion to reopen language is only slightly more illuminating. As indicated, the enacted subsection 242B(c)(3) language is taken verbatim from Morrison's original bill.\textsuperscript{289} The Smith Bill would have generally limited all motions to reopen, not just those following \textit{in absentia} orders.\textsuperscript{290}

Therefore, one inference that could be drawn is that Congress was aware of a choice between limiting all motions to reopen, as proposed in the Smith Bill, and limiting them narrowly, as proposed by the Morrison Bill. Because it opted to limit only motions to reopen to rescind, as proposed by Morrison, and left broad-reaching limitations on the ability to reopen (especially for relief) to the Attorney General,\textsuperscript{291} it is more probable that Congress did not intend the subsection 242B(c)(3) language to operate as a general bar on all motions to reopen deportation proceedings.\textsuperscript{292}

The legislative history of other subsections of section 242B also supports the conclusion that Congress did not intend to subject motions to reopen for relief to the limitations of subsection 242B(c)(3). Congress intended to provide greater, not lesser, protections to those

292. Indeed, the Attorney General was expressly warned against excluding motions to reopen for asylum relief due to a "change in circumstances" in the alien's country. See H.R. Rep. No. 955, 101st Cong., 2d Sess. 133 (1990).
seeking asylum or section 243h relief. As is clear in the asylum-related provisions of section 242B and intimated by legislative history, Congress was particularly concerned with safeguarding the rights of asylum-seekers. The GAO draft permanently barred aliens from all relief except under section 243h. The original version of the Morrison Bill included asylum on the list of relief subject to a five-year bar and contained the motion to reopen language ultimately enacted. This implies that under Morrison’s original bill it still would have been possible to seek asylum after a nonappearance, but only after five years.

The Smith Bill as introduced did not contain bars on relief except for aliens who failed to depart within a period of administrative voluntary departure. Although such aliens forfeited most relief, asylum and section 243h relief could be sought on a motion to reopen based on a “change of circumstances.” The Brooks Bill said nothing about limits on discretionary relief after nonappearance, but its in absentia hearing provisions only applied to aggravated felons, for whom much relief was limited. The final bill as recommended by the conference committee incorporated the Morrison Bill’s five-year bars to relief as well as the Morrison motion to reopen language. However, it removed asylum from the list of relief barred. Therefore, under the enacted bill—as opposed to the original Morrison draft—it should be possible to seek asylum even before five years from the date of the hearing nonappearance. But applying for asylum in such cases would be largely impossible if subsection 242B(c)(3) were interpreted to bar all motions to reopen after a nonappearance because such aliens must generally be deported. The

293. At the hearing on H.R. 3333, Chairman Morrison engaged the GAO representative in colloquy concerning his United States treaty obligations to asylum-seekers. See Criminal Aliens, supra note 39 (testimony of Lowell Dodge and James M. Blume).

294. Compare 8 U.S.C. § 1252b(e)(1) with 8 U.S.C. § 1252b(e)(4). The former only requires oral notice that relief will be barred; (e)(4) mandates both oral and written notice of same. Furthermore, the (e)(4) bar is triggered only after the alien has had opportunity to apply for asylum relief. See infra part IV.B.

295. Criminal Aliens, supra note 39, at 80.


297. The question is under what circumstances could one seek asylum after five years. See supra discussion at notes 281 and 283.


300. See 8 U.S.C. § 1252b(e)(5) (1992). Subsection (e)(5) is incorporated into (e)(1) through (e)(4). The removal of asylum from provisions curtailing aliens’ substantive eligibility for relief, in light of this history, cannot be viewed as unconsidered or insignificant.

301. Smith’s “changed circumstances” motion to reopen exception was not enacted, as his bill died in committee. But the omission of asylum from the list effectively accomplished the same objective as the Smith language would have, if enacted, under the interpretation of subsection 242B(c)(3) suggested herein.

302. See supra notes 281 and 283.
logic of the legislative drafting process therefor indicates Congress could not have intended such an interpretation. Otherwise, the ability to seek asylum would have been less adversely restricted under the original Morrison Bill, which included asylum on the list of restricted relief, than under the enacted bill, which did not.303

Finally, even in explaining its authorization to the Attorney General to promulgate regulations limiting all motions to reopen or reconsider in subsection 545(d), Congress carefully reserved its intention that asylum based on a "change in circumstances" should not be foreclosed by any such regulations.304 Thus, Congress was expressing its concern that persons who became eligible for asylum after a proceeding was over should not be foreclosed from applying for that relief. An overly broad interpretation of subsection (c)(3) would obviously thwart those concerns.

In conclusion, a review of the history establishes no evidence of congressional intent to depart from the plain meaning of the term "rescission" or to restrict all motions to reopen after a nonappearance rather than those controlled by the plain meaning of "rescission." On the other hand, the history supports the interpretation urged because it is consistent with the identifiable intentions of Congress in relation to the whole of section 242B, especially provisions protective of asylum seekers. In the absence of contrary legislative intent, the plain meaning should be adopted.305

B. Disqualification from Relief Due to Nonappearance at Hearings

1. Generally

Subsections 242B(e)(1)-(4) contain additional penalties for failure to appear. As will be explained, these subsections broadly disqualify aliens from certain forms of relief although not necessarily the same forms of relief under consideration at the time and in the forum in which the nonappearance occurred.306

304. See supra note 292 and accompanying text.
305. See supra notes 238-42.
306. The term "relief" typically refers to remedies under the INA that operate to prevent the deportation of an alien otherwise subject to expulsion. See generally 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE ch. 74 (rev. ed. 1991). In most cases the relief granted is of a "lasting" nature in that it preserves or grants legal permanent residence. STEPHEN H. LEGOMSKY, IMMIGRATION LAW
Both subsections 242B(e)(1) and 242B(e)(4) disqualify aliens who do not appear at a "hearing" from eligibility for various kinds of relief during a five-year period following the nonappearance. The forms of relief are enumerated at subsection 242B(e)(5). Those forms of relief are adjustment of status pursuant to section 245, registry pursuant to section 249, suspension of deportation pursuant to section 244, voluntary departure pursuant to sections 241 and 244, and change of status pursuant to section 248 of the INA. As origi-

& POLICY 516 (1992). This includes registry under INA § 249, suspension of deportation under INA § 244(a) and adjustment of status under INA § 245. 8 U.S.C. §§ 1259, 1254(e), 1255a (1992). These forms of relief are further described in note 309 infra.

Other relief, such as voluntary departure under INA §§ 244(e) and 242(b) (8 U.S.C. §§ 1254(e) and 1252(b)), is of less lasting nature in that it does not establish legal permanent residence and is usually granted for brief periods. See LEGOMSKY, supra, at 578-95. See also infra note 310. While all the above forms of relief can be sought in deportation proceedings, some can also be sought "affirmatively" from the INS. This is true for adjustment of status, registry, and voluntary departure. 8 C.F.R. §§ 245.2(a), 249.2(a) (1992); 8 U.S.C. § 1252(b) (1992). Other forms of relief which may be sought within deportation proceedings are: waivers of deportability for a legal permanent resident with seven consecutive years lawful domicile in the United States, under INA § 212(e) (1992), 8 U.S.C. § 1182(e) (1992); asylum based on persecution or feared persecution upon return to the country of origin, under INA § 208, § 1158(a) (1992); and withholding of deportation based on a threat to life or freedom, under INA § 243h, 8 U.S.C. § 1231(a) (1992). Additionally, certain waivers which "cure" grounds of exclusion or deportation are also available, thereby enabling an otherwise qualified alien to apply for the relief described above. See generally LEGOMSKY, supra.

307. The relevant text of these two provisions follows. "Any alien against whom a final order of deportation is entered in absentia . . . failing . . . to attend a proceeding under section 1252 . . . shall not be eligible for relief described in paragraph (5) for a period of 5 years . . . ." 8 U.S.C. § 1252b(e)(1) (1992). "[A]ny alien . . . who fails . . . to appear . . . for the asylum hearing, shall not be eligible for relief described in paragraph (5) for a period of 5 years . . . ." Id. § 1252b(e)(4).

308. Id. at § 1252b (e)(5).

309. Adjustment of status is a vehicle by which an alien entitled to immigrate by virtue of a designated family or employment relationship is permitted to remain in the United States following issuance of an immigrant visa, rather than process her/his case at a consular post abroad. See 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE ch. 51 (1992). Registry and suspension are avenues to legal permanent residence for aliens who have been in the United States for a continuous period of time. See 8 U.S.C. §§ 1259, 1254(a) (1992). For registry, they must have resided here since 1972. 8 U.S.C. § 1259 (1992). For suspension, the period of presence is seven or ten years, depending on the reason they are deportable; suspension also requires a showing of extreme hardship and good moral character. 8 U.S.C. § 1255 (1992). Voluntary departure under INA § 244 requires a showing of good moral character. 8 U.S.C. § 1254(e) (1992). Generally, voluntary departure enables an otherwise deportable alien to leave the United States without the stigma of a deportation order; it also avoids possible criminal liability for re-entry after a deportation order. See LEGOMSKY, supra note 306, at 578-95. Finally, change of status is a benefit by which an alien may seek to change from one nonimmigrant visa classification to another. 8 U.S.C. § 1258 (1992). Unlike the other forms of "relief" listed in 8 U.S.C. § 1252b(e)(5), change of status is not available in proceedings before an immigration judge but must be sought affirmatively. See generally LEGOMSKY, supra note 306, at ch. 7; T. ALEXANDER ALIENIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS & POLICY (2d ed. 1991); 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE (rev. ed. 1991).
nally enacted in 1990, subsection 242B(e)(5) also listed relief pursuant to subsection 212(c).\textsuperscript{310} However, the MTINA amended subsection 242B(e)(5) by deleting subsection 212(c) relief from that list.\textsuperscript{311} Two other subsections also disqualify aliens from these forms of relief for five years but will not be discussed here except as they bear on the interpretation of subsection 242B(e)(1) and subsection 242B(e)(4).\textsuperscript{312}

Subsections 242B(e)(1) and 242B(e)(4) overlap textually and thus there is a potential conflict. Subsection 242B(e)(4) governs an "asylum hearing" which may occur during deportation "proceedings"\textsuperscript{313} under subsection 242B(e)(1). The problems of overlap and conflict will first be discussed by reference to general principles governing the resolution of ambiguities as to the scope of all of section 242B. Then, the scope of the two specific provisions will be examined. While it is possible to infer that subsection 242B(e)(1) governs deportation hearings of all kinds, including those in which asylum is sought, and that subsection 242B(e)(4) governs other asylum hearings, close analysis establishes otherwise. In summary, subsection 242B(e)(4) must govern asylum hearings within deportation proceedings for the following reasons: 1) the textual context for the subsection 242B(e) bars is deportation and there are no asylum hearings outside the deportation context that either bar governs; 2) subsection 242B(e)(4) is more specific than subsection 242B(e)(1) and therefore governs the subclass of asylum hearings within deportation proceedings; and 3) to construe subsection 242B(e)(4) as applicable to asylum hearings other than those in deportation proceedings would contravene the clear intent of Congress to afford asylum-seekers enhanced protections.

\textsuperscript{310} 8 U.S.C. § 1182(c) permits waiver of certain grounds of exclusion and deportation for an alien who is already a legal permanent resident but has become excludable or deportable. See supra note 306.


\textsuperscript{312} 8 U.S.C. § 1252b(e)(2) disqualifies aliens who are granted voluntary departure, either in deportation proceedings or affirmatively, but fail to leave within the period of the grant. Subsection (e)(3) disqualifies aliens who failed to appear at a deportation hearing and were ordered deported \textit{in absentia}, then additionally fail to appear for deportation. Thus, the effects of these two provisions do not flow from the failure to appear at a "hearing" but the failure to appear at an event subsequent to or in lieu of a deportation proceeding. This distinction becomes more important in clarifying the scope of the "exceptional circumstances" exception for nonappearance in hearing versus nonhearing situations. See part IV.C.

\textsuperscript{313} See infra note 360.
2. General Scope of Section 242B

a. Textual Analysis

The two statutory bars appear in section 242B, the heading of which is "Deportation Procedures." Therefore, while a heading may not rule out a contrary interpretation within the text, it is relevant to resolving ambiguities that may exist as to the scope of textual language. Thus, absent contrary evidence in the words of the text or in legislative history, the plain meaning of this heading indicates that section 242B governs deportation procedure and not any other procedure.

Within the text of section 242B the only unambiguous reference to proceedings other than deportation is a reference to administrative voluntary departure proceedings in subsection 242B(e)(2). That provision, unlike subsections 242B(e)(1) and 242B(e)(4), specifically cites the applicable sections of the INA affected, which are subsection 241(b)(1) (the statutory authority for administrative voluntary departure) and section 244 (authorizing voluntary departure in deportation proceedings). By contrast, the text of the other three bars, including subsection 242B(e)(4), does not specifically cite any non-deportation proceedings to which their penalties apply. Thus, only subsection 242B(e)(2) contains explicit textual language referring to

314. See 8 U.S.C. § 1252b (1992). Ordinarily, interpretation of a specific provision begins with the words thereof, then proceeds to analysis of their interaction with other textual sources, including headings and titles. See generally 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION (4th ed. 1985). In this case, because the subject is the scope of the provisions, it is logically useful to begin inversely, although analysis, as will be shown, yields the same result.


317. The subheadings do not clarify further. Two subsections of § 242B deal with the consequences of a failure to appear. Subsection (c), entitled "Consequences of failure to appear," deals with three such consequences. They are: entry of an in absentia order, (c)(1); limits on rescission of such an order, (c)(3); and limits on judicial review, (c)(4). 8 U.S.C. § 1252b(c)(1), (c)(3), (c)(4) (1992). Subsection (e), titled "Limitations on discretionary relief for failure to appear," deals with the effect of a nonappearance on an alien's eligibility for relief. 8 U.S.C. § 1252b(e) (1992). A "limitation on discretionary relief," however, is also a "consequence" of failing to appear, because a "consequence" is generally "an effect or result." THE AMERICAN COLLEGE DICTIONARY 257 (1970).

318. 8 U.S.C. § 1252b (e)(2) (1992). That bar disqualifies properly notified aliens who fail to depart within a voluntary departure period, whether granted in deportation proceedings or administratively, from certain kinds of relief for five years. Thus, the bar does change the procedure for granting administrative voluntary departure by requiring new types of notice to aliens granted the relief as a prerequisite to the invocation of the bar. The notice also presumably insures an alien's "appearance" (to wit, her timely departure) within such proceedings in keeping with the statement of legislative purpose. See supra part II.
proceedings other than deportation. When one section of a statute identifies the scope of a provision and others do not, whole act analysis militates against inferring an enlarging scope from the provisions that are less specific. This is especially true when the section heading implies a limiting scope to the textual language covered by the heading. In such circumstances an interpretation limiting the text to the scope of the heading should be adopted especially if supported by legislative history. Therefore, the scope of subsection 242B(e)(4) should be interpreted as limited to the deportation context.

b. Legislative History

The legislative history of section 242B refers almost exclusively to deportation proceedings. The GAO's proposed draft specifically applied to aliens in deportation proceedings. The Brooks Bill applied only to aggravated felons in subsection 242(b) deportation proceedings. The Smith Bill also applied to subsection 242(b) deportation proceedings and contained additional separate language changing administrative voluntary departure eligibility. The Morrison Bill contained language and structure fairly similar to the enacted 242B. However, it too applied to deportation proceedings because it purported to amend subsection 242(b). Testimony on the GAO findings by both the GAO representative and the Chair of the Board of Immigration Appeals centered exclusively on nonappearance at deportation proceedings. Indeed, the GAO report that triggered

319. Subsection 242B(e)(5)'s list of relief subject to disqualification also cites both sources of authority for voluntary departure. 8 U.S.C. § 1252b(e)(5)(A), (C) (1992). This explicit reference to both kinds of voluntary departure is consistent with the drafting approach in subsection (e)(2).
320. COIT Indep. Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561 (1989). Analysis of a whole act requires examination of statutory framework. When one section of statute explicitly included adjudicatory authority but other section generally conferring authority to “settle, compromise or release claims” did not, the latter is interpreted not to embrace the authority omitted. Id.
322. Criminal Aliens, supra note 39, at 80. In fact, the GAO proposal sought to amend INA § 242(b) itself, governing deportation proceedings generally, rather than create a new INA section. Id.
326. Id.
327. The BIA reviews orders of deportation and exclusion in proceedings under INA §§ 242(b) and 236, but not administrative proceedings, such as those involving affirmative applications for relief. See 8 C.F.R. §§ 3.1(b), 208.18 (1992).
328. Criminal Aliens, supra note 39, at 35 (statement of David Milhollan)
the legislation only examined nonappearance at EOIR deportation proceedings (before immigration judges). Exclusion hearings before immigration judges were only studied with respect to the issue of administrative delays.329

The introductory sentence in the conference committee report about the purpose of section 242B refered to provisions designed to “ensure that alien[s] properly notified of impending deportation proceedings and other proceedings” appear for them, but made no further elaboration.330 Given the title of section 242B, the exclusive textual references to voluntary departure proceedings in subsection 242B(e)(2), and legislative history referencing deportation hearings and voluntary departure, this introductory sentence must mean administrative voluntary departure proceedings, which are the only non-deportation proceedings referred to in the legislative history specific to nonappearance.331 On the other hand, the Conference Report language is not very precise as none of the subsection 242B(e) bars would ensure aliens’ appearances at other proceedings.332 Finally, floor statements of various immigration subcommittee members at the time of the vote on the final bill solely addressed deportation proceedings.333

(“brought before an immigration judge ... an individual is held under bond [to] ... show up at hearings ... regardless of the amount of the bond”). Indeed, Chairman Morrison’s own questioning referred exclusively to deportation. Id. at 34, 35, 71 (“in the deportation process”; “deportable people” and “allegedly deportable aliens”; “improve our deportation”).


331. In further examining this reference to “other proceedings” it is helpful to review the framework for administrative voluntary departure proceedings under 8 U.S.C. § 1252(b). As explained above, these are the only textually described nondeportation proceedings explicitly governed by the new nonappearance penalties. See 8 U.S.C. § 1252b(e)(2) (1992). Administrative voluntary departure is provided for in the pre-Immigration Act of 1990 section dealing with “deportation procedure” because it is relief which may be granted in lieu of deportation proceedings. 8 U.S.C. § 1252(b) (1992). Thus, even though the conference report uses the term “other proceedings,” that language does not conflict with the textual language of the heading referent to deportation procedure. Also, the (e)(3) bar applies to aliens who do not appear for deportation after a final order has been entered. 8 U.S.C. § 1252b(e)(3) (1992). Because a final order terminates a judge’s jurisdiction over deportation proceedings under INA § 242, it is possible that these post-order proceedings were being viewed as “other proceedings” rather than “deportation proceedings.” Like administrative voluntary departure, however, post-order action is also encompassed within the heading “Deportation Procedure” because INA § 242 legislates post-deportation enforcement (8 U.S.C. § 1252 (e), (d), (g), (h)) as if it too were auxiliary to deportation procedure.

332. The only statutory provisions that expressly mandate the government to furnish notice to insure alien’s appearances are at 8 U.S.C. § 1252b(a), (e) (1992). The subsection (e) bars, by contrast, are in a sense optional. While they foreclose relief if the specified notices are not provided, the text of the bars does not mandate the government to necessarily furnish notice, as does subsection (a)(2). See 8 U.S.C. § 1252b(e) (1992).

In sum, the legislative history does not evince an intent to apply section 242B to procedures other than deportation. To the contrary, the history only evinces an intent that the new penalties apply only to deportation proceedings and, where specified, to administrative voluntary departure proceedings. Consequently, to the extent there is ambiguity within the text as to the scope of the various subsections, the legislative history should resolve them by confining the scope to those proceedings clearly intended to be covered.\textsuperscript{334} Such a construction is especially warranted when consistent with both the section heading and structural or textual analysis.\textsuperscript{335}

3. Analysis of Particular Scope of Subsections 242B(e)(1) and 242B(e)(4)

a. Textual Analysis

i. The Subsection 242B(e)(1) Bar to Relief

The subheading and text of the subsection 242B (e)(1) bar to relief further define the proceedings to which it applies. The heading states it applies "At Deportation Proceedings."\textsuperscript{336} The text states that the bar to relief applies to any alien "against whom a final order is entered in absentia under this section (i.e., section 242B) and who fails to attend a "proceeding under section 242."\textsuperscript{337} Subsection 242B(e) states when an order may be entered in absentia.\textsuperscript{338} That subsection must therefore be consulted because it is incorporated by implication into subsection 242B(e)(1).\textsuperscript{339} Subsection 242B(c) applies to an alien who "does not attend a proceeding under section

\begin{itemize}
\item \textsuperscript{334} Cf. Brotherhood of R.R. Trainmen v. Baltimore & O.R.R., 331 U.S. 519 (1947) (invalidating regulation as an unreasonable interpretation of statute; when legislative history does establish a broader scope than a section heading, the text will be construed more broadly).
\item \textsuperscript{335} United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982).
\item \textsuperscript{337} \textit{Id.}
\item \textsuperscript{338} \textit{Id.} at (c).
\item \textsuperscript{339} See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1985).
\end{itemize}
Both clauses of subsection 242B(e)(1) cited above thus apply to bar relief to aliens not appearing at a "proceeding" under section 242.

Section 242 of the INA applies to proceedings to determine an alien's deportability. Deportability is not defined in the INA, although section 241 defines an alien as "deportable" if she fits within one of the provisions therein listed. Additionally, by regulation, applications for relief from deportation are also heard within deportation proceedings. Judicial review of deportation decisions in proceedings under section 242 has consequently been held to include review of decisions denying relief. This would appear to constitute a "settled meaning" of the legal expression "proceeding under section 242."

Accordingly, subsection 242B(e)(1) would apply to any nonappearance within deportation proceedings, whether at a hearing on deportability or on the merits of an alien's application for relief from deportation. Thus, it potentially overlaps and even conflicts with subsection 242B(e)(4), which applies to nonappearance at an "asylum hearing." These differences must be resolved, as a matter of statutory construction, because Congress cannot be presumed to act

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341. "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien . . . ." Id. § 1252b(b). See infra note 360 regarding the meaning of "proceeding" to include hearings.
342. Id. § 1251(a). The pre-Immigration Act of 1990 version of this section of the INA used the term "deportable" only in the heading, while the section as amended contains the term in both the heading and the first sentence of the text.
343. 8 C.F.R. §§ 242.17-18, 208.2, 208.14 (1992). Thus, a special inquiry office first determines whether the alien fits within the statutory categories of deportable aliens; if so, she determines if the alien is entitled to relief from deportation. 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW & PROCEDURE ch. 72 (rev. ed. 1992).
344. Foti v. INS, 375 U.S. 217 (1963) (holding that decision regarding eligibility for relief from deportation is part of determination whether a person is subject to deportation). While that decision interpreted the meaning of a "final order of deportation" under INA § 106(a), its reasoning implicitly applies to the interpretation of "proceedings under Section 242" because those were the proceedings in which the "order of deportation" being reviewed had to be entered. 8 U.S.C. §§ 1105(a), 1252 (1992). The full text of the clause interpreted is "final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) . . . ." 8 U.S.C. § 1105a. Additionally, the regulatory framework allowing applications for relief in deportation proceedings that was thus affirmed in Foti is essentially the same today. See 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW & PROCEDURE ch. 72 (rev. ed. 1992).
346. For explanation of relief that may be sought in deportation proceedings, see supra notes 306 and 309. As explained there, certain waivers may also be adjudicated within § 242(b) proceedings independent of or incident to an application for relief. Thus, (e)(1) could also govern nonappearance at deportation hearings involving waivers.
347. For example, there are differences in the notice to be provided in advance of the hearing. See infra notes 390-94 and accompanying text.
inconsistently in enacting several provisions in a statute. Each part or section must be construed so as to produce a harmonious whole.\textsuperscript{348}

\textit{ii. The Subsection 242B(e)(4) Bar to Relief}

The heading and text of subsection 242B(e)(4) applies to the failure to appear for an "asylum hearing."\textsuperscript{349} Although the INA does not specifically define the phrase, an "asylum hearing" can take place within the context of both deportation and exclusion proceedings.\textsuperscript{350} Therefore, it is necessary to first resolve the scope of applicability of the subsection 242B(e)(4) bar to relief within its proper statutory context. Potentially, subsection 242B(e)(4) applies to asylum hearings in both deportation and exclusion proceedings, or solely to asylum hearings in either deportation proceedings or exclusion proceedings.\textsuperscript{351} As will be explained, subsection 242B(e)(4) does not

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\item \textsuperscript{349} 8 U.S.C. § 1252b(e)(4) (1992).
\item \textsuperscript{350} 8 C.F.R. §§ 208.2(b), 236.3, 242.17 (1992).
\item \textsuperscript{351} Asylum may also be sought affirmatively in administrative proceedings before an asylum officer. 8 C.F.R. §§ 208.2, 208.4(a) (1992). Shortly after enactment of the Immigration Act of 1990, immigration advocates became concerned that INS might misinterpret the term "asylum hearing" to include affirmative asylum interviews. Conversations with various persons in attendance at AILA 1991 National Convention in which Justice Department officials may have so intimated (on file with author). However, in subsequent conversations with Justice Department officials, it became clear that INS did not so construe the statute. Conversation with INS Asylum Office personnel (Nov. 15, 1991) (on file with author); Conversation with attorneys in the INS general counsel's office (Oct. 22, 1991); Conversation with attorneys in the EOIR (Oct. 10, 1991) (on file with author). In any event, the 1992 interim regulations did not incorporate such an interpretation. See 57 Fed. Reg. 11568 (1992). Clearly, such an interpretation would be erroneous. The alien in affirmative asylum proceedings is afforded an informal, nonadversarial "interview" in which some procedural safeguards, such as the opportunity to submit evidence, are provided. 8 C.F.R. § 208.9 (1992). Other procedural rights, such as the opportunity to present and cross-examine live witnesses and the involvement of counsel in the proceedings, may be foreclosed or limited. \textit{Id.} Additionally, the interview may be closed. \textit{Id.} The plain language of the term "hearing" and prior discrepant uses of the terms "hearing" and "interview" by Congress in the INA, the Attorney General in regulations, and the Supreme Court in a variety of settings, clearly establish that an "interview" in administrative proceedings to adjudicate an application is different than a "hearing." For statutory differences, see 8 U.S.C. §§ 1160(D)(3)(C), 1159(a)(2), 1186a(B)(1)(A)(I), 1186a(C)(1) (1992); for regulatory differences, compare 8 C.F.R. § 242 with 8 C.F.R. §§ 208-09; compare 8 C.F.R. § 242.17(e)(4) (1992) with § 208.9. For differences in Court usage, see Morrissey \textit{v.} Brewer, 408 U.S. 471, 477 (1972) (concerning preliminary hearing before revocation of parole); see also Specht \textit{v.} Patterson, 386 U.S. 605, 606, 610 (1967) (requiring pre-sentencing hearings under state sex-offender law); \textit{cf.} Parham \textit{v.} JR, 442 U.S. 584, 608 (commitment of child prior to admission to state mental health hospital need not be conducted as full hearing, but does
\end{itemize}
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and was not intended to apply in exclusion hearings. Because section 242B generally governs deportation proceedings, it is apparent textually that subsection 242B(e)(4) governs asylum hearings in deportation proceedings. In light of the textual and legislative indicators as to the general scope of section 242B, subsection 242B(e)(4) cannot apply in exclusion proceedings unless some section-specific evidence unambiguously establishes that subsection 242B(e)(4) covers these proceedings.

The phrase “asylum hearing” appears as a phrase only in section 242B and is not elsewhere defined in the INA. However, section 208 does provide that the Attorney General must establish “a procedure” for an alien within the United States or at its borders to apply for “asylum.” “Asylum” is not defined, but subsection 208(a) requires a putative asylee to meet the statutory definition of a “refugee” in section 101(a)(42). Consequently, although “asylum” has a broader ordinary meaning, in the context of the INA its technical meaning would control.

The term “hearing” also has a specialized meaning under the INA and a more general legal meaning. The general meaning of it is “a proceeding of relative formality (though less formal than a trial), generally public, with definite issues of fact or of law to be tried, in require an interview).

See supra notes 314-21 and accompanying text. Therefore, it is not necessary structurally for the subsection to be applied to exclusion in order to save it from being superfluous. Of course, any conflicts between (e)(4) and (e)(1) should be resolved. See infra notes 397-400 and accompanying text.


8 U.S.C. § 1158(a) (1992). A “refugee” is defined in part as one “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of [his/her] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion.” Id. § 1101(a)(42).

a place of refuge and protection . . . a place exempted by custom or convention from the territorial jurisdiction of a state within which it is so that refugees may not be followed to or taken from it except by the consent of the state enjoying the immunity . . . a place of retreat and security; shelter . . . the protection or inviolability afforded by an asylum: REFUGE . . . The act or custom of affording shelter or protection to one under or in danger of persecution

Of course some of the above meanings are related to the international legal concept of asylum to which the Refugee Act was drafted to conform. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).


134
which witnesses are heard and evidence presented.\textsuperscript{358} Under the INA, the term “hearing” is used but not defined in reference to six different types of “hearings.”\textsuperscript{359} The INA often uses the broader term “proceedings,” which by definition includes hearings.\textsuperscript{360} Proceedings are before “special inquiry officers” (or immigration judges)\textsuperscript{361} to determine deportability under section 241, excludability under section 236, and rescission of adjustment of status under section 246.\textsuperscript{362} Regulations implementing the above statutory provisions use the term “hearing” in reference to “proceedings” before immigration judges to determine an alien’s deportability or excludability, including her eligibility for relief.\textsuperscript{363}

The term “hearing” is usually interpreted according to its relevant statutory context.\textsuperscript{364} Therefore, “hearing” as used in section 242B must mean those hearings in proceedings that the INA itself

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  \item 359. See INA § 209(a), 8 U.S.C. § 1159(a) (1992) (regarding exclusion hearing for a previously admitted refugee). Other relevant INA references to “hearings” regarding an alien's excludability or deportability are found in two places: INA § 216(b)(2), (c)(2)(B), (e)(3)(D), (d)(2)(C) (1986); 8 U.S.C. § 1186a(b)(2), (c)(2)(B), (e)(3)(D), (d)(2)(C) (1986) (regarding deportation hearings for aliens whose conditional residence was obtained through a qualifying marriage and was subsequently terminated); INA § 216A(b)(2), (c)(2)(B), (e)(3)(D), (d)(2)(C) (1986); 8 U.S.C. § 1186b(b)(2), (c)(2)(B), (e)(3)(D), (d)(2)(C) (1992) (deportation hearings for aliens who obtained conditional residence based on investments, which residence has been terminated). All these references are to the “hearing” before an immigration judge in proceedings in which the alien’s immigration status is determined.
  \item 360. The other “hearings” referred to in the INA are as follows:
  3. Administrative law judge hearings on employer sanctions, employer discrimination, and document fraud. 8 U.S.C. §§ 1324a(e)(2), (g)(2), 1324b(e), (f), 1324c(d).
  4. Hearings regarding labor certification and attestations before the Secretary of Labor. 8 U.S.C. §§ 1182(m), (n), 1188(b)(2)(A), (e)(1), 1288.
  \item 362. “Special inquiry officers” are immigration judges. See Purba v. INS, 884 F.2d 516, 517 (9th Cir. 1989) (citing 8 C.F.R. § 1.1(1) (1988)).
\end{itemize}
With respect to "asylum," the regulations mirror the above pattern by indicating that "hearings" on asylum applications are those involving appearances before immigration judges in deportation and exclusion "proceedings." Because the phrase "asylum hearing" in subsection 242B(e)(4) contains the specialized term "asylum," the contextual meaning of the phrase as a whole controls over separate analysis of its constituent parts. Therefore, within its statutory context, an "asylum hearing" is a hearing before an immigration judge to determine an alien's eligibility for asylum.

This analysis, however, does not resolve the issue of whether the phrase "asylum hearing" applies to asylum hearings in exclusion as well as in deportation proceedings. Textually, there are at least three indications that the term applies exclusively to deportation proceedings. The first indicator previously discussed is that the section heading disavows its applicability to exclusion. The second indication that the term applies to deportation proceedings, also discussed previously, is that whenever the failure to appear in a proceeding that potentially includes more than one forum is penalized, a citation to both statutory contexts is included. Yet subsection 242B(e)(4) does not state that it applies to an asylum hearing pursuant to section 236 and section 242(b), the two potentially applicable forums for asylum hearings. Whole act analysis assumes statutory consistency and when headings and structural analysis imply a limiting scope ambiguities are resolved in favor of the narrower interpretation. There is a third structural indicator that subsection 242B(e)(4) does not apply to an "asylum hearing" in exclusion proceedings. The penalties imposed by the subsection 242B(e)(4) bar can rarely be imposed against excludable aliens because they are largely ineligible

365. This is, of course, a narrower view of the term "hearing" than the more general meaning. It is consistent with the general legal meaning, except with respect to the point that the "hearing" must be before an immigration judge, according to the statutory context of the phrase.

366. 8 C.F.R. §§ 236.3(c), 242.17(c) (1992) (referring to "an evidentiary hearing" before the immigration judge). This is contrasted with those asylum regulations referring to action on applications by an Asylum Officer, which includes an "interview." 8 C.F.R. § 208.9 (1992). Therefore, although the regulations establish two means by which an alien may seek asylum, only one involves a "hearing."


368. See supra notes 315-17 and accompanying text.


for the relief covered by subsection 242B(e)(5). Thus, if subsection 242B(e)(4) covered an excludable alien’s failure to appear at an asylum hearing and she successfully reopened to apply for the listed relief she would generally not qualify, rendering the five-year bar practically meaningless. The bar might be of some effect if the excludable alien left the country after exclusion proceedings, re-entered the United States without inspection, and then applied for relief within five years of her re-entry. In that rare and complicated circumstance, the bar would probably only operate to disqualify the alien from voluntary departure relief. She would still be ineligible for most of the other listed relief.

By contrast, the bar does not penalize the availability of any INA relief or benefit available to excludable aliens such as parole under subsection 212(a)(5), or waivers of excludability under subsection 212(d)(3). This implies that the scope of the subsection 242B(e)(4) bar is limited to asylum hearings in deportation proceedings and does not extend to exclusion proceedings.

Indeed, the fact that all categories listed in subsection 242B(e)(5)

372. Of the five forms of relief listed in § 242B(e)(5)(A)-(C), an excludable alien is eligible only for “adjustment of status” and then only under very limited circumstances. See 8 C.F.R. § 236.4 (1992). She is ineligible for suspension pursuant to INA § 244 which by its terms applies to deportable aliens. 8 U.S.C. § 1254a. See also, In re E, 3 I. & N. Dec. 541 (BIA 1949). Voluntary departure, pursuant to INA §§ 242(b) and 244, is also only available to deportable aliens. 8 U.S.C. § 1251(b), 1254a (1992). Registry, pursuant to INA § 249, requires an “entry” into the United States, 8 U.S.C. § 1259 (1992). Excludable aliens are deemed not to have entered the United States; they are treated as though not admitted into the country, even though physically present. Leng May Ma v. Barber, 357 U.S. 185, 188 (1958). Therefore, they are statutorily ineligible for registry. Similarly, excludable aliens are ineligible for change of status pursuant to INA § 248, which requires an admission. 8 U.S.C. § 1258 (1992).

373. Excludable aliens are often from countries located on noncontiguous bodies of land, necessitating some air travel. See, e.g., WILLIAM S. SLATTERY, NEW YORK CITY DISTRICT: AN OVERVIEW (May 7, 1992) (giving March 1992 statistics for countries of origin of asylum claimants placed in exclusion proceedings).

374. Both suspension and registry require more than five years in the United States after the re-entry, and the exclusion order would surely have broken any continuity of residence existing previously. See supra note 281. Also, persons who enter without inspection are not entitled to adjust. 8 U.S.C. § 1255 (1992). While change of status is available to change from one nonimmigrant classification to another, the original classification must be granted overseas. It seems a very remote possibility that an alien ordered excluded after not appearing at an asylum hearing would return to the country of claimed persecution to get a nonimmigrant visa with which to return.

375. As originally enacted, § 242B(e)(5) listed § 212(c) waivers of excludability and deportability for returning legal permanent residents. However, the 1991 MTINA deleted § 212(c) relief from the list, amending § 242B, as if enacted ab initio. See supra part II.

376. See Alexander v. United States Dep’t of Hous. & Urban Dev., 441 U.S. 39 (1979) (where ambiguity exists, narrow scope may be indicated by structural analysis
have in common their availability to aliens who have already entered the United States manifests a structural design not to apply the bar to relief to excludable aliens. Such structural considerations, together with evidence of legislative history, may further warrant limiting the scope of a phrase that does not explicitly identify all subjects of its scope.377

Finally, the remote circumstances described above that might render subsection 242B(e)(4) effective if applied in exclusion proceedings could be more significant if such analysis were necessary to save the provision from becoming superfluous.378 However, because subsection 242B(e)(4) does apply to an "asylum hearing" in deportation proceedings it is not necessary to stretch the scope of the statute just to find a way to give it effect.

b. Legislative History

The legislative history of section 242B does not specifically address the individual bars. However, in enacting section 242B, Congress was clearly seeking to cure the "mischief" of high nonappearance rates in deportation proceedings.379 Because this problem evidently did not present itself in the exclusion context,380 there is no legislative history explicitly evincing an intent to apply subsection 242B(e)(4) to exclusion.381 On the other hand, there is the history that Congress intended the new provisions to apply to deportation showing that broader reading may make it impossible to apply related provisions to certain persons covered).

378. For example, if § 242B(e)(4) clearly did not apply to any other "asylum hearing."
380. Nonappearance in exclusion hearings was not studied by the GAO in the report that prompted the legislation. See GAO, IMMIGRATION CONTROL, DEPORTING AND EXCLUDING ALIENS FROM THE UNITED STATES (1989). Indeed, the report implied that if studied, exclusion hearings would yield a lower nonappearance rate than deportation proceedings; the GAO found that deportation proceedings take longer to resolve than exclusion. Id. at ch. 4. They therefore multiply the likelihood that an alien might not be notified or otherwise fail to appear. Additionally, the INA requires that excludable aliens be presumptively detained pending exclusion proceedings and they have no statutory right to bail. See INA § 235, 8 U.S.C. § 1225 (1992). Thus, they may be released only pursuant to the executive’s exercise of the discretionary parole authority. See 8 U.S.C. § 1182(d)(5)(1992). That authority is subject to extremely narrow judicial review. See, e.g., Amanullah v. Nelson, 811 F.2d 1 (1st Cir. 1987). This further reduces the likelihood of a significant absconsion problem in the exclusion context.
381. See Holy Trinity Church v. United States, 143 U.S. 457 (1892) (statute interpreted to exclude matters that were not the "evil" to be cured according to committee reports).
proceedings. Consequently, the legislative history supports a textual analysis that indicates that an "asylum hearing" means an asylum hearing before an immigration judge in deportation proceedings.

Moreover, an interpretation of subsection 242B(e)(4) as applying to asylum applicants in exclusion and subsection 242B(e)(1) to all other deportable aliens would contravene the intention of Congress to provide greater protections to asylum-seekers by discriminating against asylum-seekers who are deportable. This implausible result was clearly not contemplated by Congress.

4. Asylum Applicants in Deportation Proceedings

Because both subsections 242B(e)(1) and 242B(e)(4) may apply to aliens who fail to appear at an asylum hearing in deportation proceedings it is necessary to determine which subsection controls in light of the principle that a legislature does not make superfluous or contradictory enactments. First, the differences between the two bars will be examined. Second, two reasons will be provided indicating that subsection 242B(e)(4) controls such nonappearances.

a. The Differences Between Subsections 242B(e)(1) and 242B(e)(4)

There are two major areas of difference between the subsection 242B(e)(1) and subsection 242B(e)(4) bars. These differences concern notice and the effective period of each five-year bar.

382. See supra notes 322-35 and accompanying text. The only reference that could conceivably encompass exclusion is the phrase "other proceedings" in the conference report. See H. R. REP. No. 95, 101st Cong., 2d Sess. (1990). This reference in the report is insufficient to establish the intent of Congress to apply § 242B(e)(4) to exclusion given the exclusive statutory references to voluntary departure proceedings elsewhere in the legislative history and in the statute itself, by which Congress evinced its intent that § 242B be generally applied in deportation proceedings. See H.R. 5284, 101st Cong., 2d Sess. (1990).


385. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1985).
i. Notice

Before disqualification under subsection 242B(e)(1) or subsection 242B(e)(4), an alien is entitled to the following notice:

1) written notice in English and Spanish of the hearing.

2) written notice in English and Spanish that an in absentia order may be entered.

3) oral notice in native language or a language she understands of the hearing.

4) oral notice in native language or a language she understands of the five-year bar consequences.

One difference between subsection 242B(e)(1) and subsection 242B(e)(4) is that subsection 242B(e)(4) contains an additional requirement of written notice concerning the five-year bar consequences. A second difference relating to notice has to do with the potential effects of failure by the alien to provide an address as required by subsection 242B(a)(1)(F). Neither subsection 242B(e)(1) nor subsection 242B(e)(4) provide any exceptions to the requirement that an alien be notified of the hearing and consequences before disqualification from relief. However, the oral notice in subsection 242B(e)(1) is required “at the time of the [written] notice described in subsection 242B(a)(2).” But written notice under subsection 242B(a)(2) may be forfeited by an alien who fails to provide an address. Therefore, because the timing must be simultaneous, the subsection 242B(e)(1) oral notice is possibly forfeited by such aliens or that notice can never be provided to them; alternatively, the subsection 242B(e)(1) bar may only apply to aliens who failed to give their addresses in those cases in which the government, at the time of service of the written hearing notice, delivered the oral notice required by subsection 242B(e)(1).


392. 8 U.S.C. § 1252b(a)(2) (1992). Section 306 of the MTINA amended § 1252b(a)(2) to add a last sentence: “written notice shall not be required . . . if the alien has failed to provide the address required under § 1252b(a)(1)(F).” Before the amendment, similar language was contained in § 1252b(c)(2), suggesting that before the 1991 amendment, § 1252b(e)(2) lessened the government’s burden of proof in such cases to showing that no notice was required (although the alien still had to be notified under § 1252b(a)(2)). This contradiction was resolved by the technical amendment.

393. The legislative history of § 545 is totally silent on the issue of forfeiture and notice. The same is true for the history of the MTINA, which amended § 242B(a)(2). See supra part II.

140
Because the timing of the subsection 242B(e)(4) bar notice is not specified, no problem exists regarding forfeiture of subsection 242B(e)(4) notice. Thus, while aliens covered by subsection 242B(e)(1) may arguably forfeit their oral notice of hearing, aliens covered by subsection 242B(e)(4) clearly may not. Moreover, even if aliens covered by subsection 242B(e)(4) forfeited their subsection 242B(a)(2) written notice of hearing, they may get notice of the hearing anyway under subsection 242B(e)(4) because that is a prerequisite to disqualification under subsection 242B(e)(4).

Finally, subsection 242B(e)(1) and subsection 242B(e)(4) may differ with respect to notice of rescheduled hearings. Subsection 242B(e)(4) requires oral notice of a rescheduled hearing and written and oral notice of the five-year bar consequences of not appearing at that hearing. The subsection 242B(e)(1) bar does not contain similar language regarding rescheduled hearings.

**ii. Effective Period of the Five-Year Bar**

The subsection 242B(e)(1) bar is potentially longer in certain circumstances than the subsection 242B(e)(4) bar. The subsection 242B(e)(1) bar runs from "the date of the entry of the final order of deportation." The subsection 242B(e)(4) bar begins to run from the hearing nonappearance date. Thus, in cases involving appeals or judicial review in which the nonappearance is not ultimately excused, the subsection 242B(e)(1) bar could affect the alien longer into the future than would the subsection 242B(e)(4) bar.

**b. Which Bar Controls?**

Subsection 242B(e)(1) applies to aliens who fail to appear at deportation proceedings and subsection 242B(e)(4) applies to aliens who fail to appear at asylum hearings in deportation proceedings. Therefore, subsection 242B(e)(4) is the more specific bar because it covers a smaller subgroup of aliens who do not appear in deportation proceedings. Subsection 242B(e)(4) should control, then, as specific provisions prevail over more general ones governing the same subject.

394. 8 U.S.C. § 1252b (e)(4) (1992). As § 242B(e)(4) applies to aliens who have "filed an application" for asylum, the § 242B(e)(4) advisals would probably be provided at or after that stage in the proceedings.


within the same enactment. Inasmuch as subsection 242B(e)(4) contains greater procedural protections than subsection 242B(e)(1), it is consistent with congressional intent to treat asylum-seekers more protectively than other deportable aliens. That concern is manifested in the statutory scheme insulating the ability to apply for asylum and section 243h withholding from the penalties for nonappearance. It is also manifest in other legislative history regarding the concern of Congress about United States treaty obligations to asylum-seekers. Subsection 242B(e)(4) itself manifests the intent of Congress to insure that aliens who default in asylum hearings receive as much notice as possible before they forfeit the right to seek other relief. The fact that subsection 242B(e)(4) provides more specific procedural protection before a putative asylum seeker may be deprived of eligibility for other relief justifies in substance that specific provisions prevail over general ones.

C. The “Exceptional Circumstances” Exception

1. Textual Analysis of Subsection 242B(f)(2)

The phrase “exceptional circumstances” appears in the statute in two important contexts. First, an alien may rescind an in absentia deportation order pursuant to a motion to reopen under subsection 242B(c)(3) if she “demonstrates that the failure to appear was because of exceptional circumstance.” Second, an alien can avoid


398. See supra parts II, IV.A, IV.B.

399. See supra part II.

400. While there is no more specific legislative history than that already discussed, it is widely acknowledged that the stakes are rarely as great as when deporting an alien to a country where her life itself may be threatened. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). These stakes are placed in high relief when an asylum applicant loses not only the ability to pursue an asylum claim, but also the ability to pursue voluntary departure. That is because voluntary departure enables her to depart on her own without the risk of official detection by her government. See Orantes-Hernandez v. INS, 919 F.2d 549, 553-54 (9th Cir. 1991).

401. 8 U.S.C. § 1252b(c)(3) (1992). Such an after-the-fact opportunity to account for her absence may accommodate due process concerns with proceeding in absentia at the outset. See generally supra part III. See also Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991), cert. denied, 112 S. Ct. 583 (1991) (availability of motion to reopen vehicle satisfies due process problems with failing to provide alien an opportunity at hearing to rebut officially noticed findings); accord Gutierrez-Roque v. INS, 954 F.2d 769 (D.C. Cir. 1992). Cf. Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir.) (because ordinary motion to reopen is discretionary). But see supra notes 277-79 and accompanying text. However, the statutory time limitation on motions to reopen to rescind based on exceptional circumstances could belie their adequacy as a due process safeguard. That
Consequences of Nonappearance

The burden of establishing whether or not the alien's facts fit within the definition may vary with the context in which the nonappearance must be justified.\textsuperscript{404}

The term "exceptional circumstances" is defined in the statute as follows: "The term 'exceptional circumstances' refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien."\textsuperscript{405}

The meaning of the words "exceptional circumstances" is ambiguous. Neither a constituent parts analysis nor a term-of-art approach\textsuperscript{406} identifies all that fits within the scope of the phrase. The issue though, is beyond the scope of this Article.

\textsuperscript{402} Or nondeparture or failure to report. See 8 U.S.C. § 1252b(e)(2), (3) (1992).

\textsuperscript{403} 8 U.S.C. § 1252b(e)(1)-(4) (1992). Each of the four five-year bars uses this language. However, subsection (e)(1) states that aliens must be notified of the consequences of failing to appear "other than because of exceptional circumstances." The provision does not explicitly say that exceptional circumstances is a defense to nonappearance, as does the language of the other three bars. Nevertheless, it is reasonable to infer that subsection (e)(1)'s language mandating notice of an exceptional circumstances defense indicates the intent of Congress that there be one. In the absence of anything in the legislation or history suggesting otherwise, it is reasonable to conclude that Congress did not intend to require the government to furnish the alien with notice of something that does not exist. See United States v. Brown, 353 U.S. 18 (1948) (absurd interpretations should be avoided).

\textsuperscript{404} Under 8 U.S.C. § 1252b(e)(3), the alien must "demonstrate" that her explanation for not appearing at a deportation hearing falls within the allowed exception when moving to reopen to rescind an \textit{in absentia} order. The issue of the burden of proof is less clear when asserting eligibility for relief after a nonappearance. The elliptical phrase "other than because of exceptional circumstances" implies that there may be in existence another reason for the alien's nonappearance which does not fall within the parameters of the exception. But the statute does not say that an alien must prove the absence of the negative (i.e., demonstrate she is not ineligible by virtue of her failure to appear). The statute is silent as to who must come forward with evidence of facts adverse to the alien. In general, an alien has the burden of proof to show that she is eligible for and deserving of discretionary relief. See 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE 74-10, § 74.01(2) (rev. ed 1992). However, in some cases in which the law establishes eligibility disqualifications, as opposed to prerequisites, the government must come forward with evidence that the disqualifying grounds apply before the alien is required to refute them. See, e.g., 8 C.F.R. § 208.14(b) (1992) (regarding asylum). "[I]f the evidence indicates" that certain grounds listed may apply, the applicant shall have the burden to prove they do not. \textit{Id.} Similarly, the structure and language of this statute suggest the government would have to allege facts to show the existence of a prior unexcused nonappearance before the alien had to establish that her excuse met the subsection (f)(2) standards, thereby refuting her ineligibility for subsection (e)(5) relief.


ordinary meaning of “circumstance” is essentially any event or situation. Exceptional” means “forming an exception . . . out of the ordinary: uncommon, rare.” Even where defined as a phrase, “exceptional circumstances” is not susceptible to ready classification. Thus, because almost anything can be a “circumstance” and “exceptional” requires the interpreter to determine what is normal, in order to ascertain that which deviates from the norm, the phrase inherently requires elaboration.

The parameters of the definition of “exceptional circumstances” as used in the statute are established by the element of control and comparison with the parenthetical examples. The definition limits “exceptional circumstances” to those “beyond the control of the alien.” Because “beyond” and “control” are ordinary words with plain meanings, that clause confines the scope of “exceptional circumstances” to circumstances that are not solely in the power of the alien.

The effect of the parenthetical clause is both to enlarge as well as to limit the situations to which the phrase “exceptional circumstances” may be applied. The words “such as” are words of enlargement, conveying that there are other situations which may be included though not specifically listed. Plainly, the list of examples is not exhaustive. Thus, the statutory inclusion of two examples of what may be “exceptional circumstances . . . beyond the control of the alien” does not foreclose other nonspecified circumstances that the phrase may encompass. On the other hand, the words “but not including less compelling circumstances” are words of limitation; that clause is potentially subject to the doctrine of ejusdem generis (when general words follow specific words in a statute, the general


409. 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.” Wesley v. Schnect- cloth, 55 Wash. 2d 90, 93, 246 P.2d 658, 660 (1959).

410. See, e.g., Jordan v. De George, 341 U.S. 223 (1951) (“moral turpitude” under the INA was held to permit judicial elaboration).

411. “Beyond” means “surpassing” or “in addition to” and “control” means “power or authority to guide or manage.” Webster’s Third New International Dictionary 210, 497 (1981).

412. The words “such” and “as” are separately defined in dictionaries. See Webster’s Third New International Dictionary 2283, 125 (1981). However, the expression “such as” is probably idiomatic. See A Dictionary of American English Usage 556 (4th prtg. 1967) (“such as” used for “as” and equated—in the example provided—with dictionary meanings of “as,” “to wit,” “for instance,” or “by way of inclusion”).

are construed to include others similar to those previously enumerated).\textsuperscript{414} However, the canon is often applied to clauses which add to an enumeration, for example: "and otherwise" or "or for any other immoral purpose"\textsuperscript{416} rather than a negative phrase such as "but not including less compelling circumstances." Nevertheless, under the doctrine of \textit{ejusdem generis} the scope of unstated terms is arrived at by identifying the most general characteristics of the listed examples.\textsuperscript{416}

In this case, the clause does not state that exceptional circumstances must be "compelling"\textsuperscript{417} per se; rather, applying the doctrine of \textit{ejusdem generis} and inferences from the syntax of the clause, those unstated circumstances alleged to be within the definition must be similar to the two listed examples in the sense that they are compelling. Two qualities that might make an unspecified circumstance "not less compelling" than the listed examples are the alien's ability to prevent the event's occurrence and the fact that the event may be expected to evoke sympathy. The former quality could duplicate the statutory requirement that a circumstance be "beyond the control of the alien." Therefore, an interpretation reading in such a requirement would be improper.\textsuperscript{418} The latter quality may be difficult to objectify. However, it leaves room for the decision maker's response to the person's excuse for not appearing, thereby permitting an ordinary exercise of discretion. Therefore, an interpretation would be permissible that encompasses circumstances generating a similarly sympathetic response. The legislative history, as will be explained, supports such a mixed objective-subjective approach to evaluating the justifiability of nonappearances.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{414} 2A \textsc{Norman J. Singer}, \textit{Sutherland Statutory Construction} (4th ed. 1985).
\item \textsuperscript{415} See, e.g., Gooch v. United States, 297 U.S. 124, 128 (1936); United States v. Bitty, 208 U.S. 393 (1908).
\item \textsuperscript{416} Cleveland v. United States, 329 U.S. 14, 18 (1946) (bottom line of "\textit{ejusdem generis}" is that the interpretation of the general term cannot rule out the fact that there are listed examples). See also Acadia v. Ohio Power Co., 111 S. Ct. 415, 419 (1990).
\item \textsuperscript{417} "Compelling" means any of the following: 1. forcing, impelling, driving; 2. demanding respect, honor or admiration; 3. calling for examination, scrutiny, consideration or thought; 4. demanding and holding in attention; 5. demanding to convince or convert by or as if by forcefulness of evidence." \textsc{Webster's Third New International Dictionary} 463 (1981). In this legal context, definition number five is probably the most appropriate.
\item \textsuperscript{418} Arcadia v. Ohio Power Co., 111 S. Ct. 415, 419 (1990); see also \textsc{Colt Independent Joint Venture v. Federal Sav. and Loan Ins. Corp.}, 489 U.S. 561, 573-79 (1989) (analyzing the whole act as opposed to just a particular clause).
\end{itemize}
\end{footnotesize}
2. Relationship of "Exceptional Circumstances" to "Reasonable Opportunity to Appear" and "Reasonable Cause" Under INA Section 242(b)

a. Generally

Section 242(b) of the INA requires the government to furnish a deportable alien with "reasonable opportunity to be present" at a deportation hearing, unless she "without reasonable cause fails or refuses to attend or remain."419 Each of these two statutory requirements of the INA could conflict with subsection 242B(c)(3) inasmuch as the latter potentially restricts rescission of deportation orders based on "exceptional circumstances" when "a reasonable opportunity to appear" may have been denied or the alien had "reasonable cause" for not appearing. Therefore, the effect of section 242B on INA section 242(b) must be examined. Because section 242B amends INA section 242(b) and does not repeal its provisions, the subsection (c)(3) restrictions on rescission based on "exceptional circumstances" must be construed in harmony with section 242(b)'s requirements.420

At the outset, it is important to clarify the nature of the enactment of section 242B because amendatory statutes that potentially conflict with the statute are interpreted by reference to whole act analysis (i.e., that all parts of a statute should be considered together).421 Whole act analysis gives effect to the plain meaning of all

419. 8 U.S.C. § 1252(b) (1992). This language of § 242(b) was enacted because prior thereto the deportation process had been subjected to unnecessary delays by aliens who without legitimate cause refused to attend or left hearings "without other than contumacious reasons" and because Congress wished to create a vehicle for dealing with "such obstructionist tactics." See Timothy W. Murphy, Comment, Deporting Aliens In Absentia: Balancing the Alien's Right to Be Present Versus the Court's Need to Avoid Unnecessary Delays, 13 W. NEw ENG. L. REV. 269, 274 (1991) (quoting H.R. REP. NO. 1365, 82d Cong., 2d Sess., at 28 (1952)).

420. This analysis pertains to the "exceptional circumstances" limitations of § 242B(c)(3) because that subsection governs hearings that are subject to the requirements of § 242(b). The analysis is clearly not applicable to the interpretation of "exceptional circumstances" as a defense to the five-year bar for failing to depart within a period of voluntary departure under § 242B(e)(2) or to show up for deportation under subsection (e)(3). Such a person presumably received her statutory (and constitutional) due process before this nonappearance. Therefore, § 242(b) provisions are not implicated; nor are the constitutional considerations discussed infra in part IV.C.4 related to the fairness of the hearings. Not addressed in this analysis is the "exceptional circumstances" language of § 242B(e)(1) and (4) as limiting an alien's eligibility for subsequent relief—a matter not controlled by the procedural requirements of § 242(b)(1). However, to read out the "reasonable cause" limitations on "exceptional circumstances" in that context might be irrational because eligibility would then be restricted based on conduct otherwise justified by the statute. See infra note 481 (regarding problem of unfairness).

provisions of a statute, not just to particular words and phrases. Because an amendment ratifies pre-existing portions of the statute not amended, the statute as amended becomes one act and all its provisions must be considered together.

By contrast, separate statutes that potentially conflict with pre-existing statutes are interpreted in light of their relational relevance. While harmony between separate statutes is also generally assumed, the presumption of consistency may be less compelling because the subjects under legislative review may not be exactly the same. However, even where conflicts exist, repeals by implication are disfavored absent irreconcilability or whole substitution of one act by the other and clear legislative intent to repeal.

b. The Nature of the Enactment of the Immigration Act of 1990

Section 545

The Immigration Act of 1990 contained a preamble that described it as an act "[t]o amend the Immigration and Nationality Act." Section 1(b) of the Immigration Act of 1990 further provides: "(b) References to Act - Except as specifically provided in this Act, whenever in this Act an amendment or repeal is expressed as an amendment to or repeal of a provision, the reference shall be deemed to be made to the Immigration and Nationality Act." In keeping with the congressional distinction between amendments and repeals, various provisions of the Immigration Act of 1990 expressly repealed former INA provisions. On the other hand, the Immigration Act of 1990 did not expressly repeal INA subsection

426. Pub. L. No. 101-649, 104 Stat. 4978 (1990). "To amend the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization and for other purposes." Id.
427. Id.
428. See, e.g., INA § 241(f) and (g), repealed by P.L. 101-649 § 602(b)(1) (1990), 104 Stat. 4978, 5081 (1990).
Rather, the Immigration Act of 1990 section 545 stated in its opening sentence: "Title II of the INA is amended by inserting after section 242A the following new section," which was section 242B.

Thus, Immigration Act of 1990 section 545, which added INA section 242B, was in the nature of an amendment and not, by virtue of the language of subsection 1(b), or that of the amending section itself, a repeal. Accordingly, subsection (f)(2) must be reconciled with subsection 242(b).

c. "Reasonable Opportunity to Be Present"

The "reasonable opportunity" requirement of INA subsection 242(b) encompasses notice of a deportation hearing and has been held satisfied in situations in which additional protections, such as warning of the consequences of not appearing or more than one notification, were provided. The new notice prerequisites of section 242B may affect case-by-case determinations of "reasonable opportunity" because the fact of notice is already relevant. However, the "reasonable opportunity to be present" language includes more than just "notice." Because whole act analysis assumes that each part of a statute must be construed so that none is superfluous, the notice provisions of section 242B cannot be read to constitute the whole of "reasonable opportunity" for that would render retention by Congress of the "reasonable opportunity" language in the Act superfluous. To have done so may have precipitated a significant constitutional problem because § 242(b) (8 U.S.C. § 1252(b)) implements certain minimum procedural requirements also necessary under the Fifth Amendment. See supra part III.

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429. To have done so may have precipitated a significant constitutional problem because § 242(b) (8 U.S.C. § 1252(b)) implements certain minimum procedural requirements also necessary under the Fifth Amendment. See supra part III.


431. See discussion infra part IV.C.3.b (regarding absence of intent to repeal).

432. Shah v. INS, 788 F.2d 970 (4th Cir. 1986) (notice to alien's three attorneys by certified mail of the hearing, coupled with two warnings of the consequences of failure to appear, constituted a reasonable opportunity to be present); Patel v. INS, 803 F.2d 804 (5th Cir. 1986) (notice to alien and each of two attorneys of hearing, together with warnings of consequences, constituted a reasonable opportunity to be present); Maldo- nado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989) (when, after notice to alien and his three attorneys, immigration judge continued the hearing all morning to allow absence to be explained, alien afforded reasonable opportunity to appear). But see Thomas v. INS, 967 F.2d 786 (1st Cir. 1992) (one notice to alien and attorney). Under administrative case law, the "reasonable opportunity" requirement has similarly been satisfied. In re Marallag, 13 I. & N. Dec. 775 (BIA 1971) (respondents had reasonable opportunity to attend the hearing; that decision does not specify facts for the conclusion, although facts indicate respondents informed the judge they would not attend); In re S, 7 I. & N. 529 (BIA 1957) (two notices served on respondent).

433. That is, one notice would comply with § 242B notice but could, depending on the circumstances, fall short of a "reasonable opportunity" to appear under § 242(b). See supra note 432; infra notes 437-38.


entirely superfluous.\textsuperscript{436} For example, the government could comply with the specific notice requirements under section 242B yet act in a manner that would surely be held to deprive the individual affected of a reasonable opportunity to be present.\textsuperscript{437} Moreover, "notice" is only one aspect of what makes an opportunity to be present reasonable.\textsuperscript{438} Accordingly, because under whole act analysis, all of a statute’s provisions must be given effect,\textsuperscript{439} the "exceptional circumstances" language of subsection 242(B)(c)(3) must be interpreted together with the "reasonable opportunity to appear" language of 242(b). To preserve the reasonableness requirement in that provision, the standard for excusing an alien’s absence from a hearing must not be so high as to deprive her of a reasonable opportunity to be present at her hearing.

The language of the statutory definition of "exceptional circumstances" is potentially broad enough to avoid conflict with the "reasonable opportunity" language. In particular, because the identification of examples that fit the definition is expressly left to interpretation, the "but not including less compelling circumstances" language could certainly ensure that "reasonable opportunity" be accommodated.

\footnotesize{\textsuperscript{436} For similar reasons, "reasonable opportunity" must be more than an "opportunity." Cf. Costle v. Pacific Legal Foundation, 445 U.S. 198, 218 (1980). \textsuperscript{437} Government officials could, for example, misrepresent that a person, notified of her hearing rights, waived them. Cf. Garza v. Hudson, 779 F.2d 390 (7th Cir. 1985). \textit{See also} Windsor v. McVeigh, 93 U.S. 274, 276 (1876) (confederate property owner’s claim and answer at a hearing to condemn his property had been stricken from the record). \textsuperscript{438} \textit{See} El Rescate Legal Serv. v. EOIR, 959 F.2d 742 (9th Cir. 1991) (holding that it must be determined on remand, depending on how the EOIR applied its policies, whether a reasonable opportunity to be present could be undermined by the denial of interpreters to aliens). \textit{But see} Thomas v. INS, 976 F.2d 786, 789 (1st Cir. 1992) ("Basically, the requirement . . . is satisfied so long as the alien receives notice of the date and place of hearing.") (emphasis added). However, if "reasonable opportunity" equates with constitutional due process hearing requirements at all, statutory notice would not satisfy the "reasonable opportunity to be present" requirement if the government also acted to deprive the alien of the benefit of the notice. \textit{See Windsor v. McVeigh}, 93 U.S. 274, 278, 281-82 (1876). However, if "reasonable opportunity" equates with constitutional due process hearing requirements at all, statutory notice would not satisfy the "reasonable opportunity to be present" requirement if the government also acted to deprive the alien of the benefit of the notice. \textit{See Windsor}, 93 U.S. at 278, 281-82. \textsuperscript{439} Blair v. City of Chicago, 201 U.S. 400 (1906); Coit Indep. Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561, 573-74 (1989).}
d. "Reasonable Cause"

In the context of a deportation hearing under INA subsection 242(b), both "reasonable cause" and "exceptional circumstances" excuse nonappearance at a hearing. Because the amendment adding INA section 242B did not expressly repeal the pre-existing INA provision, both must be given effect, even if covering the same subject. Implied repeal is generally disfavored and will not be presumed unless the earlier and later statutes are irreconcilable. However, the "exceptional circumstances" definition, unlike "reasonable cause," also applies to excuse nonappearances for purposes of an alien's subsequent eligibility for relief. Therefore, because that standard applies to some situations not covered by "reasonable cause," the two provisions do not altogether conflict.

Where the apparent conflict remains is in the section 242(b) hearing context. A structural appraisal of the Immigration Act of 1990 indicates the two provisions must be harmonized. Congress could easily have stated that only "exceptional circumstance" shall constitute "reasonable cause" for nonappearance, in a manner similar to what it did elsewhere in the Immigration Act of 1990 when it wished to specify the meaning of a pre-existing statutory term. Yet Congress opted to preserve the old term and define the new one. Therefore, it would be difficult to conclude that section 242B narrowed the standard in the former provision, especially in view of contrary legislative history. Accordingly, the two standards should be interpreted consistently.

The case law has not yet fully elaborated the meaning of "reasonable cause" in subsection 242(b) proceedings. Outside the deportation hearing context of subsection 242(b), "reasonable cause" may apply to situations where an alien's absence is justified by factors such as travel difficulties, illness, or other compelling circumstances. The burden of proof lies with the alien to establish "reasonable cause" for nonappearance.

444. See United States v. Borden, 308 U.S. 188, 198 (1939) (two titles capable of coexistence, as they applied to convictions under different acts).
446. See King v. St. Vincent's Hosp., 112 S. Ct. 570, 574 (1991) (if one clause includes durational limits, it is improper to read them into other clauses not containing such limits).
447. See supra part IV.C.3.
448. The cases are clear that absence coupled with pendency of a motion that could delay the hearing if granted (such as for continuance or change of venue) does not by itself establish reasonable cause. Maldonado-Perez v. INS, 863 F.2d 328 (D.C. Cir. 1989); Patel v. INS, 803 F.2d 804 (5th Cir. 1986); Shah v. INS, 788 F.2d 970 (4th Cir. 1986). Nor is failure to maintain contact with one's attorney adequate justification for missing a hearing so as to warrant reopening of proceedings in which an asylum claim
be a broader standard than the “exceptional circumstances” standard as defined in subsection (f)(2). Because the “exceptional circumstances” definition leaves room for elaboration of other examples that are not less compelling than those provided, the language could also accommodate justifications that, in a hearing situation, meet “reasonable cause.”

3. Legislative History

a. Intent Regarding Meaning of “Exceptional Circumstances”

Among the few explicit statements of congressional intent in the history of section 242B is a sentence in the conference committee report regarding the proper interpretation of the statutory standard justifying nonappearance: “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...”

By its terms, this statement evinces the intent of Congress that the justifications for aliens’ nonappearances be evaluated in a generous, flexible manner. Such a clear statement of congressional intent was thereby deemed abandoned. Reyes-Arias v. INS, 866 F.2d 500 (D.C. Cir 1989). The First Circuit has upheld the BIA’s refusal to remand an in absentia deportation proceeding when an alien who was given a reasonable opportunity to appear failed to provide reasonable cause for his absence. Thomas v. INS, 976 F.2d 786 (1st Cir. 1992). The court determined that the BIA’s decision was not an abuse of discretion in view of the alien’s failure to supply any evidence concerning his 30 minute tardiness. Even though facts were asserted in counsel’s brief, those facts were disputed and the BIA had noted that no affidavits were filed to support the facts asserted. Under the administrative case law, the aliens generally did not present reasons to explain their absence. See, e.g., In re Marallag, 13 I. & N. Dec. 775 (BIA 1971) (alien did not explain absence; missing attorney explained he was “busy”; no reasonable cause established); In re Perez-Andrade, 19 I. & N. Dec. 3025 (BIA 1987) (no explanation). Cf. In re S, 7 I. & N. Dec. 529 (BIA 1957) (nonappearance due to assumption that immigration judge did not have jurisdiction did not establish reasonable cause). However, the BIA has held in at least one unreported decision that lack of actual notice to an alien, because the post office did not always deliver his mail, constituted “reasonable cause.” See In re Orvil, No. A26-024709, (Boston 1987) (on file with author). The paucity of factual circumstances held to constitute “reasonable cause” may reflect earlier reluctance by judges to exercise the in absentia hearing prerogative, which a leading treatise characterized as “an extreme power” whose use “could be justified only in the event of aggravated defiance.” 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE 5-106, § 5.9e (rev. ed. 1991).


should ordinarily be given effect in interpreting ambiguous statutory language. As described, the words “exceptional circumstances” themselves are ambiguous and there is ambiguity in what is subsumed by the words “but not including less compelling circumstances” in the parenthetical clause.

Congress evidently intended that the exceptional circumstances standard be construed more broadly than the definitional language might at first blush suggest. The determination of whether an alien could not reasonably have been expected to appear may encompass more “circumstances” than those explicitly provided for in subsection 242B(f)(2). Also, a “totality of circumstances” approach may include subjective factors such as the mental status of the individual and therefore accommodate justifications for nonappearance that are less objective than the examples specifically enumerated in the parenthetical clause of subsection 242B(f)(2).

History of the draft legislation also contains some indication that a generous interpretation was envisioned by Congress. Both the GAO proposed language and the Morrison Bill contained a “reasonable cause” standard as a defense to forfeiture of relief and, under H.R. 4300, as a basis for reopening to rescind. By contrast, the Smith Bill as introduced, and the Brooks Bill, as reported out, contained the “exceptional circumstances” standard as a defense to a hearing nonappearance, only harsher, inasmuch as an alien’s sickness would have required hospitalization in order to justify her failure to appear. However, the Smith Bill did not provide any excuse for


452. The statement of intent is not expressly restricted to “exceptional circumstances” as a justification for not appearing at a hearing under INA subsection 242(b). This suggests that “exceptional circumstances” must be construed as intended even in those circumstances where INA subsection 242(b) does not provide an independent textual mandate to construe the phrase consistently with “reasonable opportunity” and “reasonable cause”. See supra part IV.C.2.

453. See Fikes v. Alabama, 352 U.S. 191 (1957) (regarding the use of totality of circumstances to determine whether an uneducated person of low intelligence could knowingly, voluntarily, and intelligently confess).


455. Id.

456. H.R. 5284, 101st Cong., 2d Sess. § 3, at 6 (1990); H.R. REP. No. 101-681, 101st Cong., 2d Sess., pt. 1, § 1510, at 36 (1990). The hospitalization language was omitted from the Conference Committee bill and was therefore not enacted. Thus, an interpretation of “exceptional circumstances” that reincorporated a requirement that a sick alien be hospitalized before his nonappearance is excused would be contrary to clear congressional intent to eliminate such a requirement.
failure to depart within a period of voluntary departure.\textsuperscript{457} Thus, even though the standard in the draft legislation moved from “reasonable cause” to “exceptional circumstances,” that progression itself does not establish an intention to apply a strict standard to all nonappearances across the board in view of the distinct legislative treatment of hearing nonappearances that are already subject to subsection 242(b)’s “reasonable cause” requirements\textsuperscript{458} and its treatment of other nonappearances. Congress must have decided, by the end of the drafting process, that it was not necessary to include reasonableness language in the subsection 242(b) nonappearance provisions, because there was already statutory language applicable to such situations.\textsuperscript{459} On the other hand, there was no standard to justify other nonappearances that Congress chose to make forgivable, such as nondeparture within a voluntary departure period.\textsuperscript{460}

The House report accompanying the Brooks Bill,\textsuperscript{461} as reported out with the “exceptional circumstances” language, stated that the “willful and unjustifiable failure to attend deportation hearings that have been properly noticed is intolerable” and that failure to appear at such hearings “without good cause” would result in \textit{in absentia} orders.\textsuperscript{462} This language indicates that “exceptional circumstances” was being viewed interchangeably with good cause, a potentially

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\textsuperscript{458} See discussion \textit{infra} part IV.C.3 showing that Congress did not intend to repeal § 242(b) and must have been aware that it could have because it repealed other INA sections.

\textsuperscript{459} Indeed, all the prior bills would have amended INA § 242(b) directly. Therefore § 242(b)’s “reasonable cause” language had to be included in the amended versions to be preserved. \textit{See infra} part IV.C.3.b. When the Conference Committee opted to add a new section instead of amending § 242(b), it was no longer necessary to include the reasonableness language because § 242(b) retained it unchanged.

\textsuperscript{460} Still, any intent to treat the justifications for hearing nonappearances differently may have changed by the time of the Conference Report statement, discussed \textit{supra}, because that statement does not appear to distinguish accordingly. Of course, that would mean all nonappearances are subject to the more generous view of (f)(2) set forth in the Conference Report because committee reports accompanying enactment are a stronger proof of intent than rejected drafts of legislation. \textit{See generally} 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION (4th ed. 1985). For discussion of various committee reports, see H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Harrison v. Northern Trust Co., 317 U.S. 476 (1943); Zuber v. Allen, 396 U.S. 168 (1969); CIR v. Bilder, 369 U.S. 499 (1962). That in turn may lead to conflict between the language of (f)(2) and legislative intent in those contexts where there is no independent textual basis for reading (f)(2) more generously (\textit{i.e., in the (e)(2) and (e)(3) situations}).

\textsuperscript{461} The Smith Bill died in committee. \textit{See supra} part II.

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broader standard. It was also being viewed more generously than a strict reading of the "exceptional circumstances" phrase warranted because absences which are not "willful" and satisfy "good cause" could conceivably fall short of "exceptional circumstances." The process of enactment thus illustrates that Congress, throughout the legislative process, did not intend "exceptional circumstances" to be interpreted too narrowly.  

When the Conference Committee, in the final bill, applied the *in absentia* provisions to all deportable aliens, not just aggravated felons, it gave no indication it intended to adopt a stricter interpretation than previously contemplated under earlier drafts. To the contrary, the Conference Committee report language was even more liberal than that of the House report, incorporating the element of reasonableness as well as a flexible, objective-subjective approach in the "totality of circumstances" language.

Committee statements are traditionally accorded great weight in determining congressional intent. Conference committee reports explaining the nature and effect of statutory language are especially weighty. Therefore, even if there were contrary indications in the rest of the legislative history, the clear statement of intent in the Conference Committee report should be given controlling weight. When, as here, some of the earlier legislative history supports the subsequent history of a generous congressional intent, the conference report language may have greater persuasiveness. Furthermore, even if under the doctrine of *ejusdem generis* the phrase "but not including less compelling circumstances" warranted interpretation very close to the parenthetical examples, congressional intent would have to override such a mechanical construction.  

Floor statements prior to final vote on passage of Senate Bill 358

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466. *See supra* notes 464-65 and *infra* note 472.

467. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 462 (1989) (conference report language tended to support earlier report's interpretation, even though the statutory words were modified).

468. United States v. Alpers, 338 U.S. 680 (1950) ("obscene books, pictures or other matter" construed to include nonvisual matter because of congressional intent). *See also* United States v. Powell, 423 U.S. 87 (1975) (citing *Alpers*).
did not address specifically the "exceptional circumstances" provisions, or the issue of justification at all. Statements to the effect that the act would make deportations more similar to the Federal Rules of Civil Procedure could conceivably be related to the interpretation of "exceptional circumstances." Given the general nature of these statements, it is difficult to determine how they might relate to the interpretation of a specific standard. Consequently, they do not compromise the integrity of the conference committee statement of intent. Accordingly, that intent should govern the interpretation of "exceptional circumstances" under subsection 242B(f)(2).

b. Intent to Repeal Subsection 242(b)

There is no explicit evidence in the legislative history that Congress intended to repeal subsection 242(b) when it enacted section 242B. In fact, there are at least two indicators that Congress did not intend to repeal subsection 242(b). One is the fact that various provisions of section 242B incorporate section 242 by reference, thereby ratifying it. Second, there is evidence from the drafting process that Congress considered changing subsection 242(b) itself and ultimately decided to leave that subsection basically unchanged.

Subsections 242B(a)(1)-(3), 242B(b)(1)-(2), 242B(c)(1), and 242B(e)(1) specifically incorporate by reference deportation proceedings under section 242. The only part of subsection 242(b) Congress changed was the eighth sentence of that subsection, which

469. See supra part II for exact language of Smith and Simpson statements.
470. For example, under Rule 55 of the Federal Rules of Civil Procedure a civil litigant must show "good cause" to remove a default judgement; a litigant may also move to vacate under Rule 60b based on "excusable neglect," among other grounds. Fed. R. Civ. P. 55, 60b.
471. There are many possible similarities as well as differences between the Rules and the INA as amended by the Immigration Act of 1990. For example, § 242B incorporates new notice and service requirements roughly parallel with those of the Federal Rules. 8 U.S.C. § 1252b; Fed. R. Civ. P. 4, 5. Also, § 242B, like the Rules, now authorizes sanctions on attorneys who engage in frivolous behavior. 8 U.S.C. § 1252b(d) (1992); Fed. R. Civ. P. 37. On the other hand, there is no "discovery" per se in deportation proceedings, and therefore no rules penalizing noncompliance with such orders. See 8 C.F.R. § 242; In re Benitez, 19 I. & N. Dec. 173 (BIA 1984). Moreover, penalties under the Federal Rules are imposed in the exercise of a judge's discretion, Fed. R. Civ. P. 37, 41, 55(b)(2) and (c), 60, whereas those imposed by immigration judges under § 242B(c) are mandatory. 8 U.S.C. § 1252b(c)(1) (1992). But see id. § 1252b(c)(3) (authorizing a subsequent rescission).
does not deal with "reasonable cause" for nonappearance. Therefore, if Congress amended one part of subsection 242(b), but no others, it may be assumed that Congress did not intend to change the part it left alone.476

Moreover, Congress had the opportunity to amend other parts of subsection 242(b) besides the eighth sentence. The GAO draft submitted as part of the record in the hearings on House Bill 3333 was proposed as an amendment to follow the third sentence of subsection 242(b)—the very sentence containing the "reasonable cause" language.476 The Morrison Bill proposed to amend the first paragraph of subsection 242(b), change the numbering of the subparagraphs (1) through (4), and add to subsection 242(b), while not changing the rest of that section.477 Both the Smith Bill and the reported version of the Brooks Bill would also have amended section 242, adding a final section and leaving subsection 242(b) otherwise intact.478 Yet in the final bill the conferees opted to create a new section and leave subsection 242(b) unchanged except for the changes in the eighth sentence.479 This indicates that Congress was aware that it could change subsection 242(b) but opted not to. Therefore, it could not be said that Congress had intended to implicitly repeal the "reasonable opportunity" or "reasonable cause" language. In sum, the process of enactment indicates that Congress intended the "exceptional circumstances" language to be interpreted reasonably.480

4. Constitutional Considerations

The scope of the meaning of "exceptional circumstances" may affect the constitutional propriety of the in absentia hearing provisions.481 Assuming that aliens have some constitutional right to be

476. Criminal Aliens, supra note 39, at 80. ("After the third sentence in subsection (b) insert the following . . . .").
480. See supra notes 463-66.
481. This analysis is not relevant to the interpretation of "exceptional circumstances" as a defense to nonappearance for other purposes not implicating constitutional hearing requirements. See 8 U.S.C. § 1252b(e)(2)-(e)(3) (1992). For example, while nonappearance at the deportation hearing preceding an order to report for deportation would be governed by the following analysis, that would not be true for the alien's excuse for failing to report for deportation. Id. § 1252b(e)(3). A more complex issue arises regarding the applicability of this analysis to "exceptional circumstances" in (e)(1) and (e)(4). Id. § 1252b (e)(1), (e)(4). If the constitutional hearing requirement necessitates a
present at their deportation hearings, an overly restrictive interpretation of “exceptional circumstances” could result in involuntary or unintentional forfeiture of constitutional rights, contrary to principles of fairness which militate against such forfeitures. That is, if “exceptional circumstances” is interpreted too narrowly it could authorize unknowing, unintelligent, and involuntary waivers of the Fifth Amendment right to be present at a hearing. Indeed, those lower court cases which have previously sustained the constitutional propriety of \textit{in absentia} hearing provisions in the INA have assumed the aliens’ nonappearances were voluntary.

Constitutional conflicts could be avoided by interpreting the statute in a flexible, generous manner. That is, any standard justifying a deportation hearing in the person’s absence should encompass conduct from which it would be fair to presume that the alien knowingly, intelligently, and voluntarily waived her right to be present.

5. \textit{Summary}

Whole act analysis of the “exceptional circumstances” definition, in order to harmonize with subsection 242(b)’s hearing requirements, requires that in the deportation hearing context, “exceptional circumstances” should be interpreted consistently with “reasonable opportunity” and “reasonable cause.” As directly expressed in the conference committee report, Congress intended that the justifications for an alien’s failure to appear be interpreted using a totality of more expansive reading of the term, then it may be improper to condition eligibility for relief on compliance with unconstitutional procedural requirements. See \textsc{Lawrence Tribe, American Constitutional Law} ch. 10 (2d ed. 1988) (specifically commenting on \textit{Arnett v. Kennedy}, 416 U.S. 134 (1974)). Such an interpretation may raise constitutional problems when due process attaches to the right to apply for relief. See, e.g., \textit{Haitian Refugee Center v. Smith}, 676 F.2d 1023 (5th Cir. 1982).

482. \textit{See supra} part III.

483. \textit{Id.}

484. \textit{Id.}

485. \textit{Califano v. Yamasaki}, 442 U.S. 682 (1979); \textit{Public Citizen v. United States Dep’t of Justice}, 491 U.S. 440 (1989). According to principal, the statute should be interpreted to avoid conflict with a Constitutional norm. See \textit{supra} part III (regarding the conflict with “phantom norms”). While the Supreme Court has not elaborated the extent of the process due a deportable alien, the right to due process does exist. Therefore, the opportunity to be present at the hearing should be treated as a “real” norm. There is, in any event, strong reason to suppose that courts would interpret the statute accordingly, even if the norm were phantom. That is because a phantom norm regarding the opportunity to be present a hearing is closer to a real norm—due process—than those purely phantom norms courts have used to save immigration statutes to avoid constitutional conflict. \textit{Id.}
circumstances approach and with reference to a reasonableness standard. Finally, constitutional considerations advise an interpretation that would excuse nonappearances that were unintelligent, unknowing, or involuntary. These textual, historical, and constitutional considerations warrant a flexible, generous construction of subsection 242B(f)(2) in the deportation hearing context.

Regarding nonhearing situations, the guidelines are not as clear for the resolution of textual ambiguity and the agency and the courts may have to approach them differently. However, in the context of subsections 242B(e)(1) and 242B(e)(4), constitutional considerations may also warrant an interpretation that does not limit eligibility for relief to those who fail to meet a standard deficient under due process analysis. On the other hand, because Congress evidently intended that all nonappearances, not just those at hearings, be evaluated in a flexible and generous manner, it is not entirely clear how much less generous the interpretation of subsection 242B(f)(2) may be in nonhearing situations. One way to resolve this dilemma is to conclude that in nonhearing situations, subject to none of the constitutional and statutory strictures on interpretation described above, the broad statement of intent by Congress can be used as a source of guidance on agency policy inviting a generous interpretation by the agency in those situations as well.

V. Conclusion

Despite the limited historical foundation for the statutory changes made by section 242B, congressional enactment of that provision altered in potentially far-reaching ways the procedural rights of respondents in deportation hearings. In neither the text of the statute nor in the legislative history, however, did Congress explicitly address the potential practical impact and theoretical difficulties underlying implementation. These deficiencies now challenge the process of statutory interpretation.

Agency rulemaking has yet to close major gaps or clarify many significant interpretive questions Congress left untouched. The rulemaking undertaken to date has occurred through the publication of interim regulations, which became effective before public comment. This limited their fairness and comprehensiveness in addressing many of the unresolved issues.

Further complicating implementation is the fact that Congress left one of the most fundamental issues—the effective date of the provisions—to the agency to determine. Adding another level of uncertainty, Congress tied the effective date to the agency’s development of a sophisticated record-keeping system capable of supplying the kinds of notices that trigger section 242B’s adverse consequences.
Thus, the effective date was left dependent on the practical realities of unresolved deficiencies in agency record-keeping, compromising the integrity of the implementation process as a whole.

In view of the massive legislative reforms of the period from 1980 through 1990, there may be no substantial immigration law reforms in the near future. Repeal of these provisions, therefore, seems less likely than corrective legislation. However, given the imperfections of the legislative process as revealed by the history of this legislation, exclusive reliance on that process to resolve the problems through corrective amendments may be unsatisfactory.

As yet, the regulatory process has not compensated for limitations in the legislative process through more informed or more complete interpretation of major issues, including those addressed in this Article. The full effects of the statutory changes also await judicial interpretation. Despite and even, one might argue, because of the limitations in the legislative and regulatory processes to date, it is necessary to realize the potential for effective and fair resolution of these issues through the process of agency adjudication, guided by informed judicial review.