The Role of Arbitration in Reviewing Deportation Orders of Criminal Aliens: A Possible Solution To Remedy the Current System

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I. INTRODUCTION

When aliens are convicted of a criminal offense, not only do the aliens have to face the consequences of the criminal justice system, but they also face civil procedures regarding their immigration status.[1] In 1996, Congress drastically reformed these civil procedures by increasing the number of crimes for which an alien can be deported, removing procedural due process protections, and eliminating judicial review of deportation orders. This has resulted in an increase in the number criminal aliens deported from the United States. But at what cost? The cost is that Congress has placed "the power to deport . . . squarely in the hands of the INS,"[2] an agency described as "broadly dysfunctional,"[3] "perhaps the most troubled major agency in the federal government,"[4] and "the most dysfunctional bureaucracy in government."[5] Congress has given practically unfettered discretion to an agency unable to provide a fair and efficient process while at the same time leaving the criminal alien with no opportunity for review of the agency's decision.

This Note advocates amending current immigration laws to allow for review of deportation orders of criminal aliens by an arbitrator. Part II provides a brief overview of deportation proceedings in general and explores the immigration reforms enacted by Congress in 1996 with regard to

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[1] Lisa R. Fine, Note, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation"*, 12 GEO. IMMIGR. L.J. 491, 493 (1998).

[2] Jason H. Ehrenber, Note, *A Call For Reform of Recent Immigration Legislation*, 32 U. MICH. J.L. REF. 195, 199 (1998).

[3] Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 110 (1996) (quoting Joel Brinkley, *Chaos at the Gates: At Immigration, Disarray and Defeat*, N.Y. TIMES, Sept. 11, 1994, at A1).

[4] *Id.*

[5] Michelle Mittelstadt, *INS Chief Leaves with Sense of Accomplishment: Some Praise Overhaul, but Critics Allege Lack of Enforcement*, DALLAS MORNING NEWS, Nov. 18, 2000, at 29A.

deporting aliens convicted of criminal offenses. Part III reflects on the benefits of alternative dispute resolution (ADR) and what both the INS and the alien can gain from the use of ADR in the context of providing review of deportation orders. Part III also recommends legislative action by Congress to amend current immigration law and allow aliens to seek review of their deportation order by an arbitrator. This recommendation is consistent with Congress' encouragement of the use of ADR methods by federal agencies and the Congressional trend in the field of immigration law.[6] In a system where the government interest in efficient and effective decisionmaking is so strong and where criticism and failure are rampant, new procedures need to be examined that can meet congressional goals while also providing important safeguards for aliens.

II. IMMIGRATION LAW AND THE CRIMINAL ALIEN

A. *The Deportation Process*

The Immigration and Nationality Act (the INA) vests the power to remove—otherwise known as deport—an alien from the United States with the Attorney General.[7] The Attorney General exercises this authority through the INS, Immigration Judges, and the Board of Immigration Appeals (BIA).[8] The INS bears primary responsibility for enforcing immigration laws within the United States,[9] which includes apprehending and removing aliens deemed deportable.[10] Removal proceedings expel an alien from the United States, and this expulsion is based either on grounds of inadmissibility or deportability.[11]

An alien is deportable if he is "subject to any grounds of removal specified in the [INA]", this includes an alien that "entered the country by fraud or misrepresentation or entered legally but subsequently violated the terms of his or her nonimmigration classification or status."[12] The INA lists

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[6] The Justice Department encourages those outside government to propose uses of ADR. Peter R. Steenland, Jr. & Peter A. Appel, *The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation*, 27 U. TOL. L. REV. 805, 817 (1996).

[7] Susan L Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 271 (1997).

[8] *Id.*

[9] U.S. IMMIGR. & NATURALIZATION SERVICE, STAT. Y.B. IMMIGR. & NATURALIZATION SERVICE, 1998, at 199 (2000) [hereinafter STATISTICAL YEARBOOK].

[10] *Id.*

[11] *Id.* at app. 3 at 11.

[12] *Id.* at app. 3 at 4.

the following six general classes of deportable aliens: (1) inadmissible at time of entry or of adjustment of status or violation of status, (2) commission of a criminal offense, (3) failure to register or falsification of documents, (4) national security or related grounds, (5) becoming a public charge within five years after the date of entry, or (6) unlawfully voting.[13] The grounds for these categories reflect "national concerns relating to economics, crime, health, morality, politics and national security."[14] The INS deportation hearings are the "sole and exclusive procedure for determining whether an alien may be . . . removed from the United States."[15]

Deportation is ordered by an immigration judge, and these decisions may be appealed to the Board of Immigration Appeals.[16] While deportation proceedings are classified as administrative proceedings,[17] they are adversarial in nature[18] and extremely complex.[19] The Supreme Court has also classified a deportation hearing as technically a civil, not a criminal, proceeding.[20] At the deportation hearing the opposing parties are the INS and the alien,[21] and the burden is on the government to show deportability.[22] Following the removal proceeding, the alien may be removed, adjusted to a legal status, or the proceedings may be terminated.[23] If an alien is removed there may also be other penalties associated with formal removal including

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[13] 8 U.S.C. § 1227 (Supp. V. 1999).

[14] STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 5 (2d ed. 1997). "Removal proceedings encompass the actions that lead to the formal removal of an alien from the United States when the presence of that alien is deemed inconsistent with the public welfare." STATISTICAL YEARBOOK, *supra* note 9, at 200.

[15] 8 U.S.C. § 1229a(a)(3) (Supp. V 1999).

[16] STATISTICAL YEARBOOK, *supra* note 9, at 200.

[17] Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1156 (1984).

[18] David A. Robertson, Comment, *An Opportunity To Be Heard: The Right to Counsel in a Deportation Hearing*, 63 WASH. L. REV. 1019, 1021 (1988).

[19] Samuel A. Yee, *Final Exit or Administrative Exhaustion? The Deported Alien's Catch-22*, 8 ADMIN L.J. AM. U. 605, 608 (1994).

[20] INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (characterizing the deportation hearing as "a purely civil action to determine eligibility to remain in this country").

[21] STATISTICAL YEARBOOK, *supra* note 9, at 375.

[22] Kirk L. Peterson, Note, *"Final" Orders of Deportation, Motions To Reopen and Reconsider, and Tolling Under the Judicial Review Provisions of the Immigration and Nationality Act*, 79 IOWA L. REV. 439, 445–46 (1994).

[23] STATISTICAL YEARBOOK, *supra* note 9, at 200.

fines, imprisonment, and a bar to future legal entry into the United States.[24] The penalties imposed depend upon the circumstances of each case.[25]

B. *Criminal Aliens: Congressional Attention and Reform*

Beginning in the 1980s, the subject of aliens committing crimes began to receive more attention from both the public and Congress.[26] This is partially because in the past two decades the number of aliens committing crimes has risen dramatically,[27] and, consequently, the percentage of aliens in prisons has also grown.[28] The apprehension of aliens who have committed criminal offenses is a significant responsibility of the INS and represents over eighty-five percent of the workload of its Investigation Program. In 1998, INS removed more than 55,000 criminal aliens,[29] which accounted for twenty-one percent of all formal removals.[30]

The increased attention paid to criminal aliens was also a result of a perceived failure on the part of the INS to expeditiously and efficiently remove criminal aliens from the United States. Aliens found guilty of committing a criminal offense were often incarcerated following completion of their prison sentence because of a backlog of cases at the INS and because of the length of time the INS and the federal courts took to hear appeals.[31] Of

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[24] *Id.*

[25] *Id.*

[26] LEGOMSKY, *supra* note 14, at 408 (noting that the activities of criminal aliens attracted "heightened public scrutiny and frenzied activity in Congress"). Congress at this time made removal of criminal aliens a priority. *Id.* at 729. Congress requires deportation proceedings of aliens convicted of criminal offenses to be started "as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1229(d)(1) (Supp. V. 1999).

[27] Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 702 (1998); *see also* Sutherland, *supra* note 3, at 111 (noting that there are an estimated 200,000 illegal aliens in the United States that have been convicted of criminal offenses).

[28] Newcomb, *supra* note 27, at 702; *see also* Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 590 n.9 (1998) (noting that in the early 1980s approximately 1000 aliens were in federal prisons, but this number grew to more than 24,000 in federal prisons and 62,000 in state prisons by 1997).

[29] STATISTICAL YEARBOOK, *supra* note 9, at 200.

[30] *Id.* at 204. The most common crimes that will subject an alien to removal include drug convictions, burglary, assault, larceny, and robbery. *Id.*

[31] Martin Arms, Comment, *Judicial Deportation Under 18 USC § 3583(d): A Partial Solution to Immigration Woes?*, 64 U. CHI. L. REV. 653, 654 (1997) (noting that aliens being deported "are incarcerated for months or even years before the INS conducts

the aliens who are actually apprehended, disposition of their cases could take from several months to several years because of appeals procedures.[32] In addition, there are many deportable aliens who, after completion of their criminal sentence, were released from prison and evaded deportation proceedings.[33] Thousands of aliens convicted of aggravated felonies have managed to escape the INS deportation proceedings in this manner.[34]

Congress, recognizing the burden criminal aliens placed on the immigration system determined that the long delays and unsuccessful attempts to deport criminal aliens were no longer acceptable.[35] Therefore in 1996, Congress made substantial reforms to the INA[36] by passing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[37] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[38] With these reforms, Congress expanded deportation grounds for criminal aliens by broadening the definition of what constitutes an aggravated felony.[39] Congress also provided for expedited removal of criminal aliens so as to initiate removal proceedings before an alien's release from prison and therefore to deport the criminal alien immediately upon completion of his or her prison sentences.[40] This was all in an effort to "improve the INS' poor record at removing deportable criminal aliens"[41] and

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its various hearings and finalizes its decisions"). Twenty-one percent of deportation cases in which an appeal is filed take a minimum of five years to reach finality. *Id.* at 675; *see also* LEGOMSKY, *supra* note 14, at 729 (noting that by the time an alien is scheduled to be released from prison, the removal proceedings may not be completed).

[32] STATISTICAL YEARBOOK, *supra* note 9, at 205.

[33] *Id.*

[34] Arms, *supra* note 31, at 653.

[35] *Id.* at 673 & n.120

[36] The Immigration and Nationality Act (INA) §§ 101–507, 8 U.S.C. §§ 1101–1537 (1994). The INA is an amalgamation of immigration laws that Congress has passed since 1952. Kirk L. Peterson, Note, *"Final" Orders of Deportation, Motions to Reopen and Reconsider, and Tolling Under the Judicial Review Provisions of the Immigration and Nationality Act*, 79 IOWA L. REV. 439, 441 (1994).

[37] Antiterorrism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter AEDPA]

[38] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA].

[39] Newcomb, *supra* note 27, at 697–701.

[40] *Id.* at 701.

[41] Frank Trejo, *The Long, Long Arm of Immigration Law; Old Crimes are Leaving Legal Residents Open to Deportation Under New Rules*, DALLAS MORNING NEWS, Nov. 18, 1997, at 1A (quoting Senator Spencer Abraham). Senator Abraham, who chairs the

to take "important steps toward solving a major problem faced by Federal and State criminal justice systems—the problem of how to expeditiously remove from our streets those aliens who are convicted of murder, or trafficking in drugs and weapons."[42]

Prior to the AEDPA and IIRIRA, aliens deemed deportable had procedural protections such as the right to advance notice of the charges against them, the right to a hearing before an immigration judge and the right to federal appellate review of the final order of deportation.[43] However, after the AEDPA and IIRIRA, the "INS agents [have] the power to deport some classes of aliens without a trial or even an administrative hearing."[44] Aliens that are convicted of crimes that Congress has defined as "aggravated felonies" and that are not lawful permanent residents may be removed through an administrative removal. In an administrative hearing, the alien identified by the INS as being deportable as an aggravated felon is given only a brief opportunity to rebut charges. The INS then determines whether to order removal. "The process takes place entirely on paper, takes very little time, and will likely most frequently occur while the aliens are incarcerated, with little access to legal counsel, translation services or useful immigration-related advice."[45] A decision by the INS to deport an alien because of commission of a criminal offense is not subject to review by any court.[46]

While Congress has made its intent to preclude judicial review of deportation orders of criminally convicted aliens quite clear through enacting the AEDPA and IIRIRA, the results of these reforms are of great consequence. Aliens convicted of certain crimes are now not able to seek review of their deportation order beyond the agency that is prosecuting their deportation. This is problematic, because institutional bias allegations have been made against immigration judges because they work for the same government agency as the prosecutor—the Department of Justice. "[T]he Immigration Judges ultimately continue to work for the same governmental agency and should not be entrusted as an impartial guardian of aliens' best

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Senate immigration subcommittee, has been quoted as saying that "law-abiding people, not hardened criminals, should be filling our priceless immigration slots." *Id.*

[42] Arms, *supra* note 31, at 669–70 (quoting Senator Robert Graham).

[43] Ehrenber, *supra* note 2, at 203–04.

[44] *Id.* at 204 (noting that this new procedure is called "summary exclusion" or "expedited removal" and all that the INS has to do is provide the alien with a screening interview—which does not allow for an appeal).

[45] Pilcher, *supra* note 7, at 287.

[46] 8 U.S.C. § 1252(a)(2)(C) ("[N]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense. . . .").

interests."[47] In some cases, an alien's attorney will concede deportability out of fear that the immigration judge may retaliate against the alien's demand for a complete deportation hearing by denying discretionary relief.[48] The INS has also been accused of racism.[49] This is the same agency that one congressman has described as "the most inept, badly managed federal agency that we have."[50]

The present INS system is both flawed and overloaded and not a system capable of offering equitable treatment to criminal aliens. While fully aware of these problems, Congress has placed too much discretion in the hands of the INS while providing no safety net for aliens. This seriously endangers the rights of these aliens, because the effects of deportation can be quite severe and can result in great hardship to the alien being deported and his or her family.

> Deported aliens often lose everything that "makes life worth living," including their families, friends, community, jobs, and religious freedom. In the most extreme cases, deported aliens fear for their personal safety and self-preservation. . . . Deportation also affects those left behind, often U.S. citizens, by banishing their loved ones, tearing families apart, and eliminating any economic support the deported alien provided.[51]

The Supreme Court has described deportation as "a drastic measure"[52] and Justice Louis Brandeis has explained that deportation may deprive an individual "of all that makes life worth living."[53] Given the severe consequences that can result from deportation, the need for a fair and impartial review of deportation orders is paramount. Yet, Congress has removed a long-standing check on arbitrary agency decision making by precluding judicial review. Therefore, this Note argues that a system must be established to allow for independent review of the INS' decisions so as not to leave an alien's fate only in the hands of the agency that is prosecuting his or

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[47] Robertson, *supra* note 18, at 1033 n.106.

[48] Patricia J. Schofield, Note, *Evidence in Deportation Proceedings*, 63 TEX. L. REV. 1538, n.5 (1985).

[49] Arms, *supra* note 31, at 673 & n.120.

[50] Sutherland, *supra* note 3, at 110 (quoting *INS Takes it on the Chin at Wide-Ranging House Subcommittee Hearing*, 72 INTERPRETER RELEASES 495 (1995) (statement of Representative Harold Rogers)).

[51] Sara A. Martin, Note, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 686–87 (1999).

[52] Tan v. Phelan, 333 U.S. 6, 10 (1948).

[53] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

her deportation. The Note also advocates for review of deportation orders by an arbitrator so as to leave open the possibility of correcting arbitrary and unjust decisions by the INS. In situations involving the deportation of an alien, there is a principal interest in ensuring that the INS does not have unrestrained power.

III. A POSSIBLE SOLUTION: ALLOWING REVIEW OF DEPORTATION ORDERS BY AN ARBITRATOR

There is a clear need for reform in the current system. Denying independent review of deportation orders is too far reaching, especially when deportation imposes such extreme hardships on aliens and their families. The laws should be changed to allow for independent review of the INS deportation order. Implementation of an ADR mechanism, such as arbitration, can provide a solution that would allow for independent review of the INS' deportation order while remaining consistent with congressional policy regarding both immigration law and the use of ADR by federal agencies.

A. *Congressional Policy: Promoting the Use of ADR*

While the federal government can use ADR to find more efficient, less expensive, and acceptable solutions for disputes, only recently has the government appreciated the benefit that ADR methods can provide and encouraged the use of such tools in government litigation.[54] But in spite of the United States government's increasing use of ADR as a means of settling much of its civil litigation, the federal government is still lagging behind the private sector.[55]

In partial response to this, Congress in 1990 enacted the Administrative Dispute Resolution Act (ADR Act), [56] which authorized and encouraged the use of ADR techniques by government agencies.[57] Congress' intent with

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[54] Steenland & Appel, *supra* note 6, at 805. Settlement of disputes through ADR techniques has major benefits for the government as compared to litigation. Cynthia B. Dauber, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 176 (1995); *see also* Streenland & Appel, *supra* note 6, at 805 (noting that "the interests of the United States are not exclusively furthered through courtroom resolution of disputes in which the government finds itself enmeshed."). In addition, greater than seventy percent of disputes settle when submitted to ADR. Dauber, *supra*, at 174.

[55] Steenland & Appel, *supra* note 6, at 806.

[56] Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (1996).

[57] Dauber, *supra* note 54, at 167.

regard to the ADR Act was to extend the use of ADR techniques that have been successful in the private sector to government agency use.[58] With the enactment of the ADR Act, Congress also hoped that the use of ADR techniques by government agencies would result in "greater efficiency, lower costs, fewer formal procedures, and better continuing relationships with consensual solutions."[59] Even before the ADR Act, some agencies had successfully implemented trial programs that utilized ADR methods such as mini-trials, arbitration, mediation, and negotiated rulemaking in the areas of government contracts, employment, the environment, and consumer protection.[60] Congress, in passing the ADR Act, however, challenged federal agencies to carefully review disputes within the agency for further areas to implement ADR techniques.

Congress did not originally provide for the use of arbitration by federal agencies in the 1990 ADR Act.[61] This changed in 1996 when President Clinton signed into law the ADR Act of 1996,[62] which reauthorized the ADR

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[58] H.R. REP. No. 101-513, at § 2 (1990), *reprinted in* 1990 U.S.C.C.A.N (104 Stat.) 2736.

> The Congress finds that (1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts; (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; (3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious; (4) such alternative means can lead to more creative, efficient, and sensible outcomes; (5) such alternative means may be used advantageously in a wide variety of administrative programs; (6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law; (7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and (8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

[59] Dauber, *supra* note 54, at 169.

[60] *Id.* at 174.

[61] Jonathan D. Mester, Note, *The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability*, 13 OHIO ST. J. ON DISP. RESOL. 167, 170 (1997).

[62] Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571–584 (Supp. II 1996).

Act of 1990.[63] One of the major changes brought about by this new law was the authorization of binding arbitration in agency disputes.[64] Therefore, federal agencies, including the INS, are now free to utilize binding arbitration. However, while Congress did authorize the use of binding arbitration for agency disputes, there were some limits imposed.[65] For example, agencies are required to devise standards concerning the appropriate use of binding arbitration for resolution of agency disputes.[66]

While both the executive and legislative branches have taken substantial steps towards developing alternative methods of administrative dispute resolution, the willingness of agencies to use these ADR techniques has been moderate.[67] This is partly because the ADR Act only authorized the use of ADR; the choice to actually engage in these methods is left to the agency's discretion.[68] "Congress's effort to clarify and broaden the scope of [the ADR Act] signifies its intent to provide agencies and private parties greater flexibility in resolving disputes that implicate the federal government."[69]

B. *A Proposal: The Use of Arbitration To Review Deportation Orders of Criminal Aliens*

In the context of immigration, Congress has taken a favorable view toward any program that successfully deports criminal aliens.[70] Congress has also recognized that alternative means of dispute resolution "may be used advantageously in widely varied administrative programs."[71] As this Note

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[63] Mester, *supra* note 61, at 167. The Administrative Dispute Resolution Act of 1990 expired on October 1, 1995. Margaret Ward, Legislative Development, *Public Fuss in a Private Forum*, 2 HARV. NEGOT. L. REV. 217, 217 (1997).

[64] Mester, *supra* note 61, at 168; *see also* 5 U.S.C. § 580 (1996).

[65] Ward, *supra* note 63, at 220. "Prior to using binding arbitration under this subchapter . . . the head of an agency . . . shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration." 5 U.S.C. § 575(c) (Supp. V 1999).

[66] Ward, *supra* note 63, at 220 (noting that the 1996 ADR Act requires agencies to adopt safeguards to "ensure that matters of significant public interest or precedential value are not submitted to arbitration").

[67] *Id.* at 218.

[68] Dauber, *supra* note 54, at 169–70.

[69] Ward, *supra* note 63, at 223 (noting that Congress has expanded the scope of the ADR Act to include a broader range of administrative disputes).

[70] Newcomb, *supra* note 27, at 704.

[71] H.R. REP. No. 101-513, at § 2(5) (1990), *reprinted in* 1990 U.S.C.C.A.N (104 Stat.) 2736.

advocates, the use of ADR methods, particularly arbitration, can provide a system for independent review of deportation orders that can meet the goals of Congress in enacting both the ADR Act and immigration law reform while also providing an important procedural safeguard for the alien.

In general, ADR mechanisms are used to achieve resolution to a dispute through the participation of a neutral third party.[72] There are various types of ADR procedures that can be used,[73] however, the principle forms of ADR employed in the United States include mediation[74] and arbitration.[75] Arbitration is very similar to a court proceeding.[76] It is an adjudicative process "in which a designated neutral person (or panel of neutrals) conducts hearings and considers evidence."[77] The arbitrator issues an award that is "based on a personal interpretation of relevant laws, regulations, legal precedents, and policy directives."[78] Arbitration is a binding process that conclusively resolves a dispute and is subject to limited appeal rights. Unlike other ADR methods, arbitration is "not a process designed to promote voluntary settlement [but] an alternative method of reaching a decision on the merits of the case."[79]

One of the reasons for preventing judicial review of deportation orders of criminal aliens was because appeals could add several months to several years to the final disposition of an alien's case. Therefore, Congress recognized the need to create a faster means of deporting aliens convicted of

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[72] *See* Steenland & Appel, *supra* note 6, at 813.

[73] Peter H. Woodin, *Alternative Dispute Resolution, in* PLI'S MCLE: BRIDGE THE GAP PROGRAM MATERIALS 661, 663 (Practicing Law Institute, 1999) (noting that ADR procedures include "direct negotiations without third party involvement, various non-binding procedures involving the participation of a neutral third party, binding procedures in which one or more neutral participants impose a resolution on the disputants, and 'hybrid' procedures with both non-binding and binding components.").

[74] In mediation, a neutral person attempts to assist disputing parties in reaching an agreement. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1297 (1998). Mediation is a consensual process in which the disputing parties may not always be able to come to a resolution. *Id.* at 1298. However, mediators will not impose a resolution on the parties. Woodin, *supra* note 73, at 664. The benefit of mediation is that it is the quickest and least expensive ADR method. *Id.* at 670–71.

[75] Sabatino, *supra* note 74, at 1296.

[76] Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1946 n.3 (1996).

[77] Sabatino, *supra* note 74, at 1296.

[78] Dauber, *supra* note 54, at 179.

[79] Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 204 (1996).

criminal offenses.[80] Unfortunately, they took the extreme step of completely eliminating the opportunity to seek judicial review of deportation orders. However, the use of arbitration may provide relief for a system in which normal proceedings—in this case federal appellate review—can be quite lengthy.[81]

Because the use of ADR techniques, such as arbitration, can result in disputes being resolved in very short time frame in comparison to litigation,[82] a number of state and federal jurisdictions have formulated ADR programs in efforts to relieve congestion in their court dockets.[83] Programs utilized by federal and state courts vary from voluntary programs to court-mandated participation in ADR.[84] ADR can also be more efficient than normal litigation, because it is more informal and administered separately from the court system.[85] The parties can arrange an ADR session within days or weeks.[86]

Congress itself has recognized that utilizing ADR may yield faster decisions as compared to litigation.[87] This is the case with arbitration. Arbitration resolves disputes with a binding and final decision on the merits.[88] Therefore, arbitration is faster and less expensive than litigation, because the decision is final and there exists only narrow grounds for appeal.[89] Since the INA already severely restricts judicial review of deportation orders,[90] the limited appeal rights in arbitration are consistent with current immigration law.

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[80] Arms, *supra* note 31, at 671.

[81] *See infra* notes 31–32 and accompanying text.

[82] Arms, *supra* note 31, at 667.

[83] Woodin, *supra* note 73, at 666. "[M]ore than half of the states in America have enacted, or are considering enacting, some type of court-related ADR program." Michael E. Weinzierl, *Wisconsin's New Court-Ordered ADR Law: Why It Is Needed and Its Potential for Success*, 78 MARQ. L. REV. 583, 583 (1995). In 1990, approximately one-third of the federal district courts utilized some form of ADR. *Id.* at 591.

[84] Woodin, *supra* note 73, at 666.

[85] Weinzierl, *supra* note 83, at 588.

[86] *Id.*

[87] H.R. REP. No. 101-513, at § 2 (1990), *reprinted in* 1990 U.S.C.C.A.N (104 Stat.) 2736 (noting that "alternative means of dispute resolution . . . have yielded decisions that are faster, less expensive, and less contentious.")

[88] *Id.*

[89] Beth A. Rowe, Comment, *Binding Arbitration of Employment Disputes: Opposing Pre-Dispute Agreements*, 27 U. TOL. L. REV. 921, 922 (1996); *see also* Sabatino, *supra* note 74, at 1296.

[90] Fine, *supra* note 1, at 503.

The use of ADR techniques can also be very beneficial because of their flexibility. The flexibility of ADR allows it to be used either instead of litigation or in tandem with litigation.[91] ADR can also be formulated to fit the particular nature and needs of the dispute including procedural rules.[92] This is crucial because in the context of government use of ADR, special care needs to be paid to ensure that standards for due process are met.[93] With regard to immigration law, Congress has statutorily provided aliens with some procedural rights regarding deportation hearings.[94] In addition, the Supreme Court has recognized some standards of procedural due process apply to aliens that are present in and have developed ties to the United States.[95] The Supreme Court has stated, "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[96] Therefore, any ADR mechanisms employed by the INS must be carefully designed to ensure due process protections.

Normally, ADR is also perceived as being flexible because it gives the parties a greater degree of control over the process and the end result.[97] However, because the nature of relief available under deportation proceedings is prescribed by law, there does not exist the flexibility for the

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[91] Woodin, *supra* note 73, at 663.

[92] Tom Arnold, *Why ADR, in* 2 PATENT LITIGATION 1996, at 245, 266–67 (PLI Inst. Patents, Copyright, Trademark and Literary Property Course Handbook Series No. G-457 1996) (noting that ADR, in contrast to litigation, allows parties to tailor the process to the need of the case taking into consideration among other things the complexity of the case and the need for neutrals with specialized knowledge or experience); Woodin, *supra* note 73, at 668.

[93] Dauber, *supra* note 54, at 179.

[94] 8 U.S.C. § 1229a(b)(4)(B) (Supp. V. 1999) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.").

[95] Schofield, *supra* note 48, at 1541, 1543. For example, "deportation hearing[s] must comport with fundamental principles of due process." *Id.* at 1541; *see also* Robertson, *supra* note 18, at 1026. In deportation hearings, "aliens have a Fifth Amendment right" that affords them a fair hearing in which they have an opportunity to be heard. *Id.* at 1026; Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98 (1953). However, because deportations hearings are classified as a civil hearing, the courts have not guaranteed "an alien the right to appointed counsel under the Sixth Amendment." Robertson, *supra* note 18, at 1032. In addition, the deportation hearing provides no right to confront adverse witnesses and no right to present oral argument. Verkuil, *supra* note 17, at 1157, 1158 (noting that courts have held that deportation cases can be decided on the merits without oral argument where there are no facts at issue and eighty percent of deportation cases are decided in this manner).

[96] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S 206, 212 (1953).

[97] Woodin, *supra* note 73, at 668.

parties to fashion their own resolution as in other arenas. With the reforms enacted in 1996, Congress changed the relief available for criminal aliens.[98] The relief now available is termed "Cancellation of Removal,"[99] and to be eligible an alien must have resided in the U.S. for ten years and show that "exceptional and extremely unusual hardship" would be incurred by a United States citizen or legal permanent resident family member if the alien were removed.[100] Therefore, given the nature of relief available under immigration law, there would not be flexibility in this context to allow the parties to shape their own resolution.

The use of ADR techniques, such as arbitration, can also result in more just results without undermining the function of the government agency.[101] Providing for more just results is especially relevant in the context of deportation. The concerns of bias can be addressed through the use of ADR, because ADR allows the parties to mutually select a neutral.[102] A key issue to consider in selecting a neutral in the immigration context would be whether the neutral should have expertise or knowledge concerning the subject of the dispute.[103] Generally, specialized knowledge and expertise is not needed in most ADR processes,[104] although ADR allows the parties to designate the dispute to be decided by someone familiar with the complex question or specialized subject matter at issue.[105] Given the complex nature of immigration regulations and the nature of relief available under the law, knowledge and expertise of immigration law may be paramount. Therefore, the parties could select a third party neutral that would have knowledge of immigration law. Since arbitrators are normally experts in the matter being submitted to arbitration,[106] this would allow the INS and the alien to mutually select an arbitrator that is well versed in immigration regulations to

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[98] INS v. St. Cyr, 121 S. Ct. 2271, 2277 (2001). With the passage of the AEDPA and IIRIRA in 1996, Congress substantially narrowed the class of aliens eligible for relief from deportation. *Id.*

[99] 8 U.S.C. § 1229b (Supp. V 1999).

[100] Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO. IMMIG. L. J. 507, 522 (1997). Aliens convicted of aggravated felonies are not eligible for this relief. *Id.*

[101] *See* Steenland & Appel, *supra* note 6, at 817; *see also* Arnold, *supra* note 92, at 268–70 (noting that ADR can lead to "win-win" solutions and that ADR has the potential to be more flexible, rational and fair than the adjudicative process).

[102] Woodin, *supra* note 73, at 673.

[103] *Id* at 674.

[104] *Id.*

[105] *Id.* at 668.

[106] Carbonneau, *supra* note 76, at 1946.

determine whether an alien is deportable based on the applicable immigration law and the nature of relief available under the law. Most importantly, a neutral arbitrator could review a deportation decision, thereby correcting any arbitrary and unjust decision by the INS.

IV. CONCLUSION

The goal of using ADR in deportation proceedings is a more expedient, efficient, and just proceeding. The use of arbitration would not result in the long and drawn out appeals process that Congress eliminated; therefore arbitration still meets the Congressional goal of expeditiously removing criminal aliens. But the use of arbitration would also allow for an independent review of an agency's decision, thereby potentially guarding against arbitrary and unjust decisions by the INS. Allowing review of the INS deportation proceeding by an arbitrator is consistent with the ideals of Congress in establishing both immigration law and the ADR Act.[107]

Normally the decision to arbitrate may be voluntarily pursued by the disputing parties, mandated by contract provisions, or mandated by the court system.[108] However, in this context, Congress should mandate the use of arbitration to review all orders of deportation. Congress has plenary power over immigration matters[109] and should use this power to institute procedures that can check arbitrary and unjust decisions by the INS while also providing an important and neutral review of an alien's deportation order.

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[107] Both the "Supreme Court and Congress have indicated general approval of binding arbitration . . . ." Rowe, *supra* note 89, at 923.

[108] Sabatino, *supra* note 74, at 1296.

[109] Landon v. Plasencia, 459 U.S. 21, 34 (1982) ("[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."). In addition, the Supreme Court "recognizes few limits on congressional discretion to define aliens' rights . . . ." Robertson, *supra* note 18, at 1025.