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A STATUTE IN PARTICULARLY SERIOUS NEED OF REINTERPRETATION: THE PARTICULARLY SERIOUS CRIME EXCEPTION TO WITHHOLDING OF REMOVAL

Abstract: Withholding of removal provides that a deportable alien may avoid removal if she can show that it is more likely than not that her life or freedom will be threatened if she is removed to a particular country. Aliens are not eligible for withholding of removal, however, if they are found to have been convicted of a particularly serious crime as defined by 8 U.S.C. § 1231(b)(3)(B)(ii). Although Congress provided a per se definition of a particularly serious crime in the statute, the majority of U.S. courts of appeals have held that immigration judges can also declare crimes that do not fit this statutory definition to be particularly serious. This Note argues that the majority interpretation is incorrect and that the minority interpretation, which only allow crimes that fit the statutory definition to be declared particularly serious, is correct. This Note additionally argues that a further finding that an alien poses an ongoing danger to the community should be required before an alien is denied withholding of removal.

INTRODUCTION

Mrs. Oyenike Alaka, a citizen of Nigeria and a member of the Yoruba tribe, received permanent resident status in the United States through amnesty on December 1, 1990.¹ Ten years after becoming a permanent resident, Mrs. Alaka returned to her native Nigeria and married Ade Bola Fashola on March 1, 2001.² Ade Bola Fashola owned a complex of stores and shops.³ All of these stores, as well as his house, were located on the same block in Abutemetta, Nigeria.⁴ Ade Bola

¹ *Alaka v. Att’y Gen. of the U.S.*, 456 F.3d 88, 91–92 (3d Cir. 2006).

² Petitioner’s Brief in Support of Her Appeal at 7, *Alaka*, 456 F.3d 88 (No. 05-1632). Because the court did not reach the merits of Alaka’s persecution and torture claims, it did not provide a detailed description of her experiences in Nigeria. *See Alaka*, 456 F.3d at 92. The court did, however, outline her travails there in general terms that are in accord with the Petitioner’s Brief, albeit in far less detail. *See id.*

³ Petitioner’s Brief, *supra* note 2, at 11.

⁴ *Id.*

rented one side of the block to members of the Yoruba tribe and the other to Ibo and Hausa tribesmen.⁵ The Odua People's Congress ("OPC"), a Yoruba tribal organization attempting to control the Yoruba sections of Nigeria, violently objected to Ade Abola's renting shops to non-Yoruba tribesmen.⁶ It objected so strongly that its members severely beat him twice.⁷ The first time, they beat him with large bats, leaving him hospitalized for a month.⁸ The second time, Mr. Abola's tormentors beat him while brandishing pistols.⁹ Mrs. Alaka witnessed both of these beatings, as did her children.¹⁰ Fearing for their safety after the second attack, Mrs. Alaka immediately placed her children on a flight back to the United States and followed them two months later when she could afford to do so.¹¹

Upon returning to the United States on August 8, 2001, Mrs. Alaka was detained by the Immigration and Naturalization Service ("INS").¹² In 1992 she had been convicted of aiding and abetting bank fraud, and the INS denied her admission because of this conviction.¹³ Mrs. Alaka sought withholding of removal, a form of relief for refugee aliens who would otherwise be deported to their home country, by testifying to the persecution and torture that she could face if forced to return to Nigeria.¹⁴ The immigration judge ("IJ") found Mrs. Alaka's testimony to be credible and determined that her experience in Nigeria could support a finding of persecution on the basis of political opinion.¹⁵ Thus, it would have been inappropriate to return Mrs. Alaka to Nigeria as doing

⁵ *Id.*

⁶ *Alaka*, 456 F.3d at 92.

⁷ Petitioner's Brief, *supra* note 2, at 11.

⁸ *See id.* at 12.

⁹ *Id.* at 13–14.

¹⁰ *Id.* at 12, 14. It was also common for the OPC to drive by the house in the middle of the night and scream threats. *See id.* at 13.

¹¹ *See id.* at 14.

¹² *Alaka*, 456 F.3d at 92–93.

¹³ *Id.* at 92. Mrs. Alaka was convicted on one count, sentenced to eight months incarceration and three years supervised release, and was required to pay \$4,716.68 in restitution. *Id.* She also had two convictions and incarcerations outside of the United States. *Id.* She was convicted once in France for a drug-related offense, for which she was sentenced to approximately one and a half years incarceration, and once in Canada for fraud and unlawful possession and use of a credit card, for which she received a three month sentence. *Id.* The U.S. government, however, was unable to produce a record of conviction for these offenses, and it was uncontested that the exact details of these foreign convictions were unknown. *Id.*

¹⁴ *See id.* at 93.

¹⁵ *Id.*

so would violate the United States policy of *non-refoulement*.¹⁶ This policy recognizes a refugee's right not to be expelled from one state to another where his or her life or liberty would be threatened.¹⁷

The IJ further concluded, however, that because Mrs. Alaka had been convicted of a "particularly serious" crime under 8 U.S.C. § 1231(b)(3)(B)(ii), she would have to be removed to her native country, regardless of the conditions she might face there.¹⁸ Mrs. Alaka's crime did not fit the statute's per se definition of a particularly serious crime—an aggravated felony carrying a sentence of five years or more.¹⁹ Instead, the IJ, under the authority vested in him by the U.S. Attorney General, made a discretionary decision that the crime was of a particularly serious nature.²⁰ The Bureau of Immigration Appeals ("BIA") refused to overturn this discretionary decision on appeal.²¹ Whether Congress intended to grant IJs the discretion to declare any crime particularly serious and whether appellate courts have the power to review these decisions remain disputed matters among the U.S. courts of appeals and form the basis of this Note.²²

¹⁶ *Non-refoulement* is from the French "refouler," meaning "to drive back." BLACK'S LAW DICTIONARY 1083 (8th ed. 2004).

¹⁷ See 8 U.S.C. § 1231(b)(3)(A) (2006) (stating that the United States will not return an alien to a country where he or she will be threatened because of his or her race, religion, nationality, membership in a particular social group, or political opinion).

¹⁸ See *Alaka*, 456 F.3d at 93; see also 8 U.S.C. § 1231(b)(3)(B)(ii).

¹⁹ See 8 U.S.C. § 1231(b)(3)(B); *Alaka*, 456 F.3d at 95.

²⁰ See *Alaka*, 456 F.3d at 95. Whether such a decision is within the Attorney General's discretion is significant because a related statute denies courts the jurisdiction to review any "decision or action of the Attorney General . . . the authority for which is specified . . . to be in the discretion of the Attorney General." See 8 U.S.C. § 1252(a)(2)(B)(ii) (2006). Thus, if the definition of a particularly serious crime is committed to the discretion of the Attorney General, a court clearly lacks jurisdiction to review his decision. See *id.*; *Alaka*, 456 F.3d at 94. It is unclear from the record what led the IJ to the conclusion that Alaka's prior conviction constituted a particularly serious crime. See *Alaka*, 456 F.3d at 94. When he denied Alaka's timely motion for reconsideration, the IJ stated: "[W]hile I do not recall with specificity all of the factors which led me to find [Alaka's] conviction to be a 'particularly serious crime' . . . [her] brief, well presented as it is, does not convince me that I erred." See *id.*

²¹ See *Alaka*, 456 F.3d at 94.

²² Currently, the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Third Circuit do not interpret § 1231(b)(3)(B)(ii) as giving this discretion to the Attorney General. Both circuits have concluded that they have jurisdiction for appellate review of whether or not a crime is particularly serious. See *Nethagani v. Mukasey*, 532 F.3d 150, 154 (2d Cir. 2008); *Alaka*, 456 F.3d at 95. The issue arose recently in the U.S. Court of Appeals for the Fifth Circuit, where the court acknowledged the split among the circuits but did not address the issue, and instead resolved the case on a different constitutional claim. See *Solorzano-Moreno v. Mukasey*, 296 Fed. Appx. 391, 394 n.5 (5th Cir. 2008). The Seventh Circuit had not addressed the issue squarely for an extended period, but indicated in dicta that it would also be willing to exercise jurisdiction. See *Ali v. Ash-*

This Note examines the different statutory interpretations applied to 8 U.S.C. § 1231(b)(3)(B)(ii) by the different U.S. courts of appeals.²³ A thorough examination of the statute and its history will show that the interpretation currently applied by the majority of circuits creates a larger particularly serious crimes exception than Congress intended.²⁴ Part I of this Note explores the forum in which the statute is applied, the individuals it affects, and the origin and evolution of the statute through its many amendments.²⁵ Part II examines the language of the statute and the surrounding language of the act in which it is contained.²⁶ Part III examines whether IJs' administrative interpretations of these cases are owed deference under the *Chevron* standard, which precludes judicial review of administrative decisions in some situations.²⁷ Part IV argues that to properly effectuate the statute's intent, IJs should have the power to declare a crime particularly serious only if it is an aggravated felony and that appellate courts should have jurisdiction to see that this power is properly exercised.²⁸ Additionally, it argues that in addition to committing a particularly serious crime, an alien must also

croft, 395 F.3d 722, 730 (7th Cir. 2005); *Bosede v. Ashcroft*, 309 F.3d 441, 447–48 (7th Cir. 2002). It reversed course recently, however, and concluded that jurisdiction is not proper. *See Ali v. Achim*, 468 F.3d 462, 469 (7th Cir. 2006), *cert. dismissed*, 128 S. Ct. 828 (2007). The U.S. Court of Appeals for the Ninth Circuit similarly refuses to exercise jurisdiction, and the U.S. Court of Appeals for the Sixth Circuit has issued an unpublished opinion indicating it would also place the issue beyond its jurisdiction. *See Delgado v. Holder*, 563 F.3d 863, 872 (9th Cir. 2009); *Celaj v. Ashcroft*, 121 Fed. Appx. 608, 611 (6th Cir. 2005). The BIA advocates on its own behalf that appellate courts do not have jurisdiction to review its determinations of whether a crime is particularly serious. *In re N-A-M*, 24 I. & N. Dec. 336, 338–39 (B.I.A. 2007).

²³ The issue is one of such significance that the U.S. Supreme Court granted certiorari with an expedited briefing schedule in the matter of *Ali v. Achim* on September 25, 2007 to define the proper interpretation. *See* 128 S. Ct. 29 (2007). The writ of certiorari was subsequently dismissed, however, on December 27, 2007, when attorneys for the petitioner settled with the government on a separate claim, thereby allowing their client to remain in the country. Tony Mauro, *High Court's High-Profile Cases Guarantee Controversy*, RECORDER (San Francisco), Jan. 7, 2008, at 3. Though the larger statutory issue was not resolved, David Gossett, attorney for the petitioner, stated that other cases in the appeals pipeline would soon bring the same issue to the Court. *See id.*

²⁴ *See* 8 U.S.C. § 1231(b)(3)(B)(ii); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (finding that the language of the 1967 United Nations Protocol Relating to the Status of Refugees was adopted with the intent of conforming U.S. law to international obligations); *Nethagani*, 532 F.3d at 154; *Alaka*, 456 F.3d at 95.

²⁵ *See infra* notes 30–97 and accompanying text.

²⁶ *See infra* notes 98–120 and accompanying text.

²⁷ *See infra* notes 121–159 and accompanying text.

²⁸ *See infra* notes 160–216 and accompanying text.

pose an ongoing danger to the community to be denied withholding of removal.²⁹

I. THE OPERATION AND HISTORY OF THE PARTICULARLY SERIOUS CRIMES EXCEPTION TO WITHHOLDING OF REMOVAL

A. *The Operation of 8 U.S.C. § 1231(b)(3)(B)(ii)*

Aliens who are lawfully within the United States are nevertheless subject to removal from the country if they fall within one or more of the classes of deportable aliens established by the Immigration and Nationality Act (“INA” or the “Act”).³⁰ The Act specifically enumerates a number of crimes for which legal aliens can be removed from the country.³¹ Removal proceedings are initiated by the Department of Homeland Security and are adjudicated by IJs.³² An alien who obtains an adverse ruling from an IJ can appeal his or her case to the BIA.³³ Both IJs and the BIA act under the authority granted to them by the Attorney General.³⁴

When the government initiates removal proceedings against an alien, there are numerous forms of relief by which the party can try to avoid removal.³⁵ These forms of relief include voluntary departure, cancellation of removal, adjustment of status, waiver, asylum, and withholding of removal.³⁶ These final two categories are forms of relief for deportable aliens who fear that they will be persecuted if they are re-

²⁹ See *infra* notes 217–241 and accompanying text.

³⁰ See 8 U.S.C. § 1227(a) (2006).

³¹ See 8 U.S.C. § 1227(a)(2) (2006). Aliens who are in the United States illegally are similarly subject to removal. See 8 U.S.C. § 1227(a)(1).

³² See News Release, U.S. Dep’t of Justice, Fact Sheet: Immigration Court Process in the United States: Removal Proceedings, Bond Redeterminations, Asylum, Convention Against Torture (Apr. 28, 2005), <http://www.usdoj.gov/eoir/press/05/ImmigrationCourtProcess2005.html> (last visited Nov. 11, 2009). IJs are administrative judges located within the Executive Office for Immigration Review and are appointed by the Attorney General. See 8 U.S.C. § 1101(b)(4) (2000). Unlike an Article III judge, an IJ serves as a fact-finder and adjudicator and has an affirmative obligation to establish and develop the record in the course of withholding of removal and asylum proceedings. See *Boci v. Gonzales*, 473 F.3d 762, 768 (7th Cir. 2007) (citing *Hansanai v. Ashcroft*, 385 F.3d 780, 782 (7th Cir. 2004)).

³³ See 8 C.F.R. § 1003.1(b) (2008).

³⁴ See News Release, U.S. Dep’t of Justice, *supra* note 32.

³⁵ See *id.* The Department of Justice notes that “[i]n most removal proceedings, aliens concede that they are removable, but then apply for one or more forms of relief from removal.” *Id.*; see also Veena Reddy, Note, *Judicial Review of Final Orders of Removal in the Wake of the Real ID Act*, 69 OHIO ST. L.J. 557, 563 (2008).

³⁶ See News Release, U.S. Dep’t of Justice, *supra* note 32.

turned to their home country.³⁷ Asylum is a discretionary form of relief available when the alien shows that he or she has a “well-founded fear of persecution” in his or her home country.³⁸ Withholding of removal applies a higher standard, requiring that the alien show a “clear probability of persecution,” but when this higher standard is met, the requested relief is mandatory rather than discretionary.³⁹

Thus, an alien who would otherwise be subject to removal under the INA will be allowed to remain in the United States if he can show that he would be persecuted if returned to his native country.⁴⁰ Aliens who have committed a particularly serious crime, however, are prohibited from relying on asylum or withholding of removal.⁴¹ 8 U.S.C. § 1231(b)(3)(B)(ii) provides that even if a deportable alien can show that he will be subject to persecution in his native country, he will not be eligible for withholding of removal if he has committed a particularly serious crime.⁴² What constitutes a particularly serious crime and when IJs have discretion to make such a determination are contested issues.⁴³ The answers have evolved and shifted over time as Congress has passed legislation revising and amending the definition of a particularly serious crime and the attendant power of the Attorney General to apply his own definition.⁴⁴

³⁷ See *id.*

³⁸ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

³⁹ See *INS v. Stevic*, 467 U.S. 407, 413 (1984). Once granted, asylum also affords broader benefits than withholding of removal alone. See *Cardoza-Fonseca*, 480 U.S. at 428–29 n.6 (citing *In re Lam*, 18 I. & N. Dec. 15, 18 (B.I.A. 1981)). Withholding of removal applies only to “country specific” deportation. See *Lam*, 18 I. & N. at 18. Thus, under withholding of removal, an Afghani alien could not be deported to Afghanistan, but could, for instance, be deported to Pakistan or to any other hospitable country. See *id.* Under asylum, however, an alien may be eligible for adjustment of status to that of a lawful permanent resident. See *id.* Additionally, when an alien is granted asylum, she is temporarily admitted into the United States. See H.R. Rep. No. 109-72, at 168 (2005). When an alien is granted withholding of removal, she is not granted legal entry into the United States and may be removed to her country of origin when the threat to her life and freedom has passed. See *id.*

⁴⁰ See 8 U.S.C. § 1231(b)(3)(A) (2006).

⁴¹ See *id.* § (b)(3)(B)(ii).

⁴² See *id.*

⁴³ See *Delgado v. Holder*, 563 F.3d 863, 872 (9th Cir. 2009); *Nethagani v. Mukasey*, 532 F.3d 150, 154 (2d Cir. 2008); *Ali v. Achim*, 468 F.3d 462, 469 (7th Cir. 2006), *cert. dismissed*, 128 S. Ct. 828 (2007); *Alaka v. Att’y Gen of the U.S.*, 456 F.3d 88, 95 (3d Cir. 2006).

⁴⁴ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 305, 110 Stat. 3009-546, 3009-602; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 413, 110 Stat. 1214, 1269; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, § 222, 108 Stat. 4305, 4320–22; Immigration Act of 1990, Pub. L. No. 101-649, § 515, 104 Stat. 4978, 5053; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70; Immigration and

B. *The Legislative History of 8 U.S.C. § 1231(b)(3)(B)(ii)*

The first provision providing a form of relief equivalent to withholding of removal was created in 1948.⁴⁵ At that time Congress added a provision to the Immigration Act of 1917 allowing for a “suspension of deportation” for deportable aliens.⁴⁶ This provision did not confer any kind of right to a deportable alien, but rather provided for the “unfettered discretion of the Attorney General” to grant relief from deportation when he deemed it appropriate.⁴⁷ The decision was so completely within the control of the Attorney General that suspension of deportation was regarded as “an act of grace” on the part of the Attorney General when exercised.⁴⁸ Although suspension of deportation was completely discretionary, aliens wishing to challenge their deportation did have the right to file a habeas corpus petition in federal district court to achieve the same end.⁴⁹

The next and most significant development took place with the adoption of the Convention Relating to the Status of Refugees (the “Convention”) in 1951.⁵⁰ The Convention was convened in the post-World War II environment to confront the significant refugee problems that resulted from the conflict.⁵¹ The Convention prohibited “return[ing] a refugee in any manner whatsoever to [a country] where his life or freedom would be threatened,” thereby establishing for the first time the *non-refoulement* prohibition.⁵² The initial draft contained no exception to this rule, but a narrow exception was subsequently introduced to permit the removal of an alien who, “having been convicted . . . of a particularly serious crime, constitutes a danger to the commu-

Nationality Act, Pub. L. No. 96-212, § 202, 94 Stat. 102 (1980); Selective Service Act of 1948, Pub. L. No. 80-864, 62 Stat. 1206, 1206.

⁴⁵ See Selective Service Act of 1948, 62 Stat. at 1206.

⁴⁶ See *id.*

⁴⁷ See *Jay v. Boyd*, 351 U.S. 345, 354 (1956).

⁴⁸ See *id.*

⁴⁹ See, e.g., *In re Kaine*, 55 U.S. (14 How.) 103, 116 (1853). See generally *United States v. Jung Ah Lung*, 124 U.S. 621 (1888).

⁵⁰ See generally Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150. The Convention has been ratified by 144 countries making it one of the most widely accepted treaties in refugee law. See U.N. HIGH COMM’R FOR REFUGEES, STATES PARTY TO THE CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL 1 (2008), available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

⁵¹ See Sadako Ogata, *Introduction to PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS*, at ix (Paul Weis ed., 1995).

⁵² See Convention Relating to the Status of Refugees, *supra* note 50, at art. 33.

nity of that country.”⁵³ This provision was meant to be a very narrow exception to the prevailing obligation of *non-refoulement*, and some Convention members expressed their reluctance to create any exception to the obligation at all.⁵⁴ With the understanding that a narrow exception would apply only in extreme cases, the duty of *non-refoulement* and the particularly serious crimes exception were ratified and entered into force on April 22, 1954.⁵⁵ Because the Convention was focused on the problems created by World War II, a dateline limited its application to the then-identified group of refugees, namely Europeans who had become refugees as a result of events before January 1, 1951.⁵⁶

Not surprisingly, in the years following the Convention, refugee problems began to arise in regions of the world that were not governed by the original agreement.⁵⁷ In response, the United Nations issued its Protocol Relating to the Status of Refugees (“Protocol”) in 1967 to address refugee issues more generally.⁵⁸ The Protocol removed the dateline from the Convention with the goal of making it the universal inter-

⁵³ *Id.* The Convention did not explicitly define a particularly serious crime, but it did provide a basis for comparison by defining a “serious nonpolitical crime.” See UN High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶ 155, U.N. Doc. HCR/IP/4/EngL.REV.1 (Jan. 5, 1992). In the Convention, a “serious non-political crime” is described as “a capital crime or very grave punishable act.” *Id.* Thus, to qualify as a particularly serious crime under the Convention, an offense had to be even more serious than a very grave punishable act. See *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982).

⁵⁴ See WEIS, *supra* note 51, at 325–34. “[T]he Committee [on Refugees and Stateless Persons] felt strongly that the principle here expressed was fundamental and should not be impaired.” *Id.* at 327. Indeed, the United States delegate responded to the proposal of the exception by saying that “it would be highly undesirable to suggest . . . that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution.” *Id.* at 326. The United Kingdom co-sponsoring delegate of this *non-refoulement* exception responded to this criticism by saying that “[he] hoped that the scope of the joint amendment would not be untuly widened.” *Id.* at 333. The French co-sponsoring delegate agreed that “[t]here was no worse catastrophe for an individual who had succeeded after many vicissitudes in leaving a country where he was being persecuted than to be returned to that country” and that “[r]easons such as the security of the country were the only ones which could be invoked against [the] right [of asylum].” *Id.* at 327, 329.

⁵⁵ See Ogata, *supra* note 51, at ix. The United Nations rejected a proposal to authorize *refoulement* for habitual offenders convicted of a series of less serious crimes. See WEIS, *supra* note 51, at 325–34.

⁵⁶ See Ogata, *supra* note 51, at ix. Despite this limitation, the Convention contained a recommendation that it should have value exceeding its contractual scope and that nations should be guided by it in extending its protections to refugees not explicitly covered by its terms. See *id.*

⁵⁷ See *id.* at ix–x.

⁵⁸ See Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Ogata, *supra* note 51, at ix–x.

national instrument for the protection of refugees.⁵⁹ The United States bound itself to this expanded duty when it acceded to the Protocol.⁶⁰

The United States further affirmed its commitment to the Convention and its language in 1980, when Congress amended the INA.⁶¹ One of the primary motivating factors for this amendment was to bring United States statutory law governing refugees into accord with the 1967 Protocol.⁶² Congress passed the amendment for the purpose of explicitly adopting from the Convention both the *non-refoulement* policy and the narrow exception for particularly serious crimes.⁶³ Thus, the 1980 amendment revised section 243(h) of the INA to deny withholding of removal to an individual who, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.”⁶⁴ In adopting both the *non-refoulement* policy and the exception, Congress adopted nearly the exact language used by the 1951 Convention.⁶⁵

⁵⁹ See Ogata, *supra* note 51, at ix–x.

⁶⁰ See Protocol Relating to the Status of Refugees, *supra* note 58; *INS v. Stevic*, 467 U.S. 407, 416 (1984).

⁶¹ See 8 U.S.C. § 1227(a) (2000). The House Judiciary Committee Report stated, “although [U.S. law] has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention. H.R. Rep. No. 96-608, at 1–5 (1979).

⁶² See *Cardoza-Fonseca*, 480 U.S. at 436–37. Presumably, the Protocol had not explicitly constrained the Attorney General’s discretionary power because he had been honoring the dictates of the Convention already. See *id.* at 429. Nevertheless, the INA explicitly removed discretion from the Attorney General. See *id.*

⁶³ See *id.* at 436–37.

⁶⁴ Pub. L. No. 96-212, § 202, 94 Stat. 102, 107 (1980).

⁶⁵ Compare Convention Relating to the Status of Refugees, *supra* note 50, at art. 33, with § 202, 94 Stat. at 107. Article 33 of the Convention reads, “No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Convention Relating to the Status of Refugees, *supra* note 50, at art. 33. The analogous language in U.S. law, which has undergone only minor changes over the years, stated that “[the] Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened” § 203(e), 94 Stat. at 107. The Convention’s exception provided that “[t]he benefit of [*non-refoulement*] may not . . . be claimed by a refugee whom, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” Convention Relating to the Status of Refugees, *supra* note 50, at art. 33. The United States exception to this policy declares that it does not apply “to any alien if the Attorney General determines that . . . the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.” § 202, 94 Stat. at 107.

Under this standard, it was left to the BIA to determine on a case-by-case basis which crimes should be declared particularly serious.⁶⁶ In 1982, in *In re Frentescu*, the BIA established a balancing test consisting of four factors used to determine if a crime was particularly serious.⁶⁷ It established that the IJ was to investigate and weigh: (1) the nature of the conviction; (2) the circumstances and underlying facts of the conviction; (3) the type of sentence imposed; and (4) whether the type and circumstances of the crime indicated that the alien would be a danger to the community.⁶⁸ The BIA standard also considered whether the crime had been committed against a person or property.⁶⁹ The former was more likely to be considered particularly serious but the latter not barred from consideration.⁷⁰ Applying these factors in *Frentescu*, the BIA concluded that the IJ erred in ruling that a Romanian citizen who had been convicted of burglary should not receive amnesty and remanded the case for further development.⁷¹

In the following years, with an eye towards promoting efficiency and uniformity, however, the BIA began to categorize certain crimes as per se particularly serious.⁷² This practice obviated the need for an individual investigation of a crime's seriousness in every case.⁷³ In 1986, in *In re Carabelle*, the BIA also adopted a policy that once an alien had been found to have committed a particularly serious crime, there was no need for a separate determination to address whether the alien was a danger to the community.⁷⁴ In *Carabelle* the applicant was a Cuban citizen who had departed Cuba as part of the Mariel boatlift in 1980.⁷⁵ In 1983 he pled guilty to and was convicted of a number of charges stemming from a robbery.⁷⁶ The IJ found that he was ineligible for withholding of removal because of his crime.⁷⁷ On appeal, the BIA rejected the applicant's contention that despite his crime being particu-

⁶⁶ *In re Frentescu*, 18 I. & N. Dec. at 247, modified, *In re C-*, 20, I. & N. Dec. 529 (BIA 1992).

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.* at 244–45. The IJ made this ruling despite an advisory opinion from the Department of State urging that the forcible return of Mr. Frentescu to Romania would likely entail serious consequences for him. *See id.* at 245.

⁷² *See, e.g., In re Garcia-Garrocho*, 19 I. & N. Dec. 423, 425 (B.I.A. 1986).

⁷³ *See id.*

⁷⁴ 19 I. & N. Dec. 357, 360 (B.I.A. 1986).

⁷⁵ *See id.* at 358.

⁷⁶ *See id.*

⁷⁷ *See id.*

larly serious, an additional showing that he constituted a danger to the community was needed before he could be denied withholding of removal.⁷⁸ Thus, an alien found to have committed a particularly serious crime was by law found to pose a danger to the community and was automatically denied withholding of removal.⁷⁹

In order to further refine the definition of a particularly serious crime, Congress added the term “aggravated felony” to the INA through the Anti-Drug Abuse Act of 1988.⁸⁰ Congress identified aggravated felonies as the group of crimes for which non-citizens would be subject to the harshest immigration penalties.⁸¹ The Anti-Drug Abuse Act of 1988 limited this group of crimes to murder, drug trafficking, and trafficking in firearms or destructive devices.⁸²

Just a few years later, Congress attempted to clarify that the purpose behind the creation of the aggravated felony category was to control the definition of particularly serious crimes.⁸³ To this end, it implemented the Immigration Act of 1990, which added the following language to section 243(h): “[A]n alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.”⁸⁴ This act also further expanded the definition of an aggravated felony to include money laundering and violent crimes when the alien received a prison sentence of five years or more.⁸⁵ This legislation rendered the BIA’s criteria for determining a particularly serious crime inapplicable to many cases by automatically deeming many crimes particularly serious.⁸⁶

Keeping with this trend of enlarging the definition of an aggravated felony, Congress used the Immigration and Nationality Technical Corrections Act of 1994 to expand again the list of crimes that fit the definition of a particularly serious crime.⁸⁷ The act added a variety of

⁷⁸ *See id.* at 359.

⁷⁹ *See id.* at 360.

⁸⁰ Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (1988). It should be noted that the term “aggravated felony” is a concept of immigration law only, not criminal law. Tova Indritz, *Puzzling out the Immigration Consequences of Various Criminal Convictions: Part II*, 26 CHAMPION, Mar. 2002, at 20.

⁸¹ *See* Indritz, *supra* note 80, at 20.

⁸² § 7342, 102 Stat. at 4469.

⁸³ Pub. L. No. 101-649, § 515, 104 Stat. 4978, 5053 (1990).

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *See* Pub. L. 103-416, § 222, 108 Stat. 4305, 4320–22 (1994). The list has grown so significantly that it has caused some commentators to joke that “it might be briefer to list all

new offenses to the growing group of aggravated felonies, including offenses related to kidnapping, racketeering, prostitution, transmitting national defense information, fraud with a loss to the victim of more than \$200,000, document fraud, or an attempt or conspiracy to commit any of these offenses.⁸⁸

Congress then changed course and moved away from this categorical approach to aggravated felonies when it passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").⁸⁹ Section 413(f) of this act amended section 243(h) of the INA to allow the Attorney General "in [his] discretion" to override the categorical bar designating all aggravated felonies particularly serious when "necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees."⁹⁰ Thus, Congress relaxed the per se definition of particularly serious crimes so that the Attorney General could remove aggravated felonies from this category if he judged them not to be particularly serious.⁹¹ The BIA applied this standard so that an alien convicted of an aggravated felony or felonies and sentenced to at least five years of incarceration was conclusively barred from withholding of removal.⁹² An alien convicted of an aggravated felony or felonies and sentenced to an aggregate of fewer than five years would be subject to a rebuttable presumption that he had been convicted of a particularly serious crime, which would bar him from withholding of removal.⁹³

Finally, later that same year, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").⁹⁴ This act enacted the aforementioned 8 U.S.C. § 1231(b)(3)(B)(ii), which limited the application of the categorical bar to aggravated felonies carrying sentences of five years imprisonment or more.⁹⁵ One of Congress's aims in enacting these post-1990 statutory amendments was to avoid sweeping minor crimes into the categorical aggravated felony bar.⁹⁶

crimes not aggravated felonies than to list the aggravated felonies." See Indritz, *supra* note 80, at 20.

⁸⁸ See § 222, 108 Stat. at 4320.

⁸⁹ Pub. L. No. 104-132, § 413, 110 Stat. 1214, 1269 (1996).

⁹⁰ *Id.*

⁹¹ See *id.*

⁹² See *In re Q-T-M-T*, 2 I. & N. Dec. 639, 654 (B.I.A. 1996).

⁹³ See *id.*

⁹⁴ Pub. L. No. 104-208, § 305, 110 Stat. 3009-546, 3009-602 (2006).

⁹⁵ See 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

⁹⁶ See *Delgado*, 563 F.3d at 869.

Thus after nearly seventy years and numerous changes to the statute, we arrive at the current incarnation of the statutory definition of a “particularly serious crime”:

[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.⁹⁷

II. THE LANGUAGE OF 8 U.S.C. § 1231(b)(3)(B)(ii): ARE THE ATTORNEY GENERAL’S POWERS TO DECIDE AND DETERMINE EQUIVALENT TO THE POWER OF DISCRETION?

A. Courts That Find Discretion Fully Vested in the Attorney General

There are two sentences in 8 U.S.C. § 1231(b)(3)(B)(ii) that might be read to place the determination of the definition of a particularly serious crime within the discretion of the Attorney General.⁹⁸ First, “if the Attorney General *decides* that . . . the alien [has] been convicted . . .

⁹⁷ 8 U.S.C. § 1231(b)(3)(B)(ii). One final piece of legislation worth noting, though not directly affecting the particularly serious crimes exception, is the REAL ID Act of 2005. See Pub. L. No. 109-13, 19 Stat. 231 (2005). This act was passed in part to “address the anomalies” created by the U.S. Supreme Court’s decision in *INS v. St. Cyr* and its progeny. See H.R. REP. No. 109-72, at 174. In 2001, the Supreme Court held in *St. Cyr* that the AEDPA and IIRIRA did not prevent the Court from hearing the habeas petition of respondent, who had been convicted of the deportable offense of selling a controlled substance. See 533 U.S. 289, 314 (2001). The anomaly created by this case was that non-citizens who were guilty of a deportable criminal offense were permitted to seek review of their removal orders in U.S. district court and then appeal to the U.S. court of appeals, whereas non-criminal aliens were able to seek review only in a U.S. court of appeals. See *Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 153 n.5 (2d Cir. 2006); *Ishak v. Gonzales*, 422 F.3d 22, 27 (1st Cir. 2005); see also Reddy, *supra* note 35, at 570. Congress was thus concerned that aliens who had committed serious crimes in the United States could obtain more judicial review than their non-criminal counterparts. See H.R. Rep. No. 109-72, at 174. The implication of *St. Cyr* will be more fully discussed below, but for present purposes it is sufficient to note that the REAL ID Act placed review of all final removal orders for both criminal and non-criminal aliens in the court of appeals by stripping district courts of jurisdiction to hear any final orders of removal. See 8 U.S.C. § 1252(a)(2)(D)(4) (2006) (“[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review . . .”).

⁹⁸ See 8 U.S.C. § 1231(b)(3)(B)(ii).

of a particularly serious crime” that alien is ineligible for withholding of removal.⁹⁹ Second, the statute provides that in spite of the provision of per se categories of particularly serious crimes, the Attorney General “shall not [be] preclude[d] from *determining* that” the alien has committed a particularly serious crime.¹⁰⁰ Standing alone, these two sentences suggest that the statute leaves it within the discretion of the Attorney General to decide when an alien has committed a particularly serious crime.¹⁰¹ Indeed, the U.S. Court of Appeals for the Seventh Circuit and U.S. Court of Appeals for the Ninth Circuit accept these sentences on their face as a congressional grant of discretion to the Attorney General.¹⁰²

In 2006, in *Ali v. Achim*, the U.S. Court of Appeals for the Seventh Circuit held that this language granted IJs discretion to declare crimes—aggravated felonies or otherwise—to be particularly serious.¹⁰³ Ali was convicted on a felony charge of substantial battery with a dangerous weapon following an altercation with a man who, along with three other friends, had beaten him previously.¹⁰⁴ After pleading no contest, he was sentenced to eleven months of incarceration in a work-release facility.¹⁰⁵ Ali argued that because his crime was not an aggravated felony, it could not be particularly serious; the court rejected that argument.¹⁰⁶ Similarly, in 2009, in *Delgado v. Holder*, the U.S. Court of Appeals for the Ninth Circuit held that the BIA had reasonably interpreted 8 U.S.C. § 1231(b)(3)(B)(ii) as extending full discretion to IJs

⁹⁹ *See id.* (emphasis added).

¹⁰⁰ *See id.* (emphasis added). Similar language can be found in the legislative history, as in House Conference Report No. 104-828, wherein it is stated that, “the Attorney General retains the authority to *determine* other circumstances in which an alien has been convicted of a particularly serious crime, regardless of the length of sentence.” H.R. REP. NO. 104-828, at 216 (1996) (emphasis added).

¹⁰¹ *See* H.R. REP. NO. 104-828, at 216.

¹⁰² *See* *Delgado v. Holder*, 563 F.3d 863, 872 (9th Cir. 2009); *Ali v. Achim*, 468 F.3d 462, 469–70 (7th Cir. 2006).

¹⁰³ *See* 468 F.3d at 469–70. The petitioner in *Ali* was a young Somali man who had been diagnosed with post-traumatic stress disorder caused by his experiences in Somalia. *See id.* at 465. In Somalia, two of Ali’s brothers were killed, one by a stray bullet and the other by a street gang. *See id.* at 464. Ali’s sister was also killed when she resisted rape at the hands of soldiers, an event that Ali witnessed. *See id.* He was shot at on two or three occasions and was beaten by militia. *See id.* Uncontradicted expert testimony stated that Ali would likely be beaten and robbed and, in many places, would be targeted for death if he were forced to return to Somalia. *See id.* at 463–64.

¹⁰⁴ *See id.* at 464–65.

¹⁰⁵ *See id.* at 465.

¹⁰⁶ *See id.* at 469–70.

in deciding what crimes were particularly serious.¹⁰⁷ In *Delgado*, the petitioner was convicted three times for driving under the influence during his twenty years in the United States.¹⁰⁸ There, as in *Ali*, the court held that the BIA's interpretation of 8 U.S.C. § 1231(b)(3)(B), which allowed non-aggravated felonies to be particularly serious crimes, was reasonable.¹⁰⁹

B. Courts That Find Discretion Is Not Fully Vested in the Attorney General

In contrast, in *Alaka v. Attorney General*, the U.S. Court of Appeals for the Third Circuit ruled in 2006 that looking at these two sentences in isolation did not present the full picture.¹¹⁰ Indeed, it found that case law required the examination of the statute as a whole to determine whether discretionary authority had been specified.¹¹¹ Looking at the subchapter of the INA in which § 1231(b)(3)(B)(ii) appears, the court found thirty-two additional provisions that make explicit a grant of discretion to the Attorney General or the Secretary of Homeland Security.¹¹² In each of these thirty-two instances, the statute explicitly

¹⁰⁷ See 563 F.3d at 869. The petitioner was a citizen of El Salvador who entered the United States on a nonimmigrant visitor visa but then overstayed his allotted time. See *id.* at 866. The court held that Delgado had failed to meet his burden of showing that he was likely to be tortured if returned to El Salvador. See *id.* at 874. He presented evidence that his parents were victims of the rampant human rights violations in the early 1980s when he fled the country. See *id.* He did not show, however, that he faced a current risk if returned to his native country. See *id.* Country reports indicated that conditions in El Salvador had improved significantly since his departure and there was no longer evidence of political killings. See *id.*

¹⁰⁸ See *id.* at 866.

¹⁰⁹ See *id.*; *Ali*, 468 F.3d at 469–70.

¹¹⁰ See 456 F.3d 88, 96–98 (3d Cir. 2006).

¹¹¹ See *id.* at 97–98 (citing *United States v. Mobley*, 956 F.2d 450, 452–53 (3d Cir. 1992)); see also *Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that “it is the duty of the court to ‘not be guided by a single sentence or member of a sentence, but [to] look to the provisions of the whole law, and to its object and policy.’”) (citations omitted).

¹¹² See *Alaka*, 456 F.3d at 97; see, e.g., 8 U.S.C. § 1103(a)(5) (2006) (“shall, in his discretion, appoint . . . employees”); 8 U.S.C. § 1157(c)(1) (2006) (“the Attorney General may, in the Attorney General’s discretion”); 8 U.S.C. § 1159(b) (2006) (“in the Secretary’s or the Attorney General’s discretion”); 8 U.S.C. § 1181(b) (2006) (“the Attorney General in his discretion”); 8 U.S.C. § 1183 (2006) (“in the discretion of the Attorney General . . .”); 8 U.S.C. § 1225(a)(4) (2006) (“in the discretion of the Attorney General”); 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (2006) (“in the sole and unreviewable discretion of the Attorney General”); 8 U.S.C. § 1259 (2006) (“in the discretion of the Attorney General”); 8 U.S.C. § 1281(a) (2006) (“in the discretion of the Attorney General”); 8 U.S.C. § 1281(c) (2006) (“in the discretion of the Attorney General”); 8 U.S.C. § 1286 (2006) (“in the discretion of the Attorney General”); 8 U.S.C. § 1302(c) (2006) (“[t]he Attorney General may, in his discretion”); 8 U.S.C. § 1321(a) (2006) (“in the discretion of the Attorney General”); 8

uses the word “discretion.”¹¹³ The court concluded that canons of statutory construction require that if Congress had wanted to give the Attorney General discretion to define a particularly serious crime, it needed to employ the same explicit language it had used in thirty-two other locations throughout the subchapter of the statute.¹¹⁴ As a result, the court emphasized that jurisdiction was not stripped in all instances where an IJ was entitled to make a decision, only in those instances where Congress had taken the extra step of specifying that the sole authority for the action was in the IJs’ discretion.¹¹⁵

Similarly, in 2008 in *Nethagani v. Mukasey*, the U.S. Court of Appeals for the Second Circuit held that the language of the statute was not meant to put IJ decisions beyond the scope of review of appellate courts.¹¹⁶ The BIA denied petitioner’s claim for withholding of removal

U.S.C. § 1330(a) (2006) (“in the discretion of the Attorney General”); 8 U.S.C. § 1353 (2006) (“within the discretion . . . of the Attorney General”).

¹¹³ See *Alaka*, 456 F.3d at 97–98.

¹¹⁴ See *id.* (“It is a fundamental canon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply.”) (quoting *Mobley*, 956 F.2d at 452–53). It should also be noted that although the explicit use of the word “discretion” would strongly indicate a jurisdictional bar, the absence of the word alone is not sufficient to show that Congress did not mean to create a jurisdictional bar. See *Jilin Pharm. USA, Inc. v. Chertoff*, 447 F.3d 196, 203–05 (3d Cir. 2006); *Soltane v. U.S. Dep’t of Justice*, 381 F.3d 143, 147 (3d Cir. 2004); *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 160 (3d Cir. 2004). In related cases in the U.S. Court of Appeals for the Third Circuit, in determining whether Congress had intended to raise a jurisdictional bar to judicial review, the court did not rely exclusively or even primarily on the presence or absence of the word “discretion.” See *Jilin Pharm.*, 447 F.3d at 203–05; *Soltane*, 381 F.3d at 147; *Urena-Tavarez*, 367 F.3d at 160. In 2004, in *Soltane v. U.S. Department of Justice*, which raised a similar question of discretionary authority, the Third Circuit focused on other language in the statute to reach its decision. See 381 F.3d at 147. Beyond the absence of the word “discretion,” the definition of the term in question was fairly detailed and specific, and the statute instructed that the Attorney General “shall” take action, leading the court to find that there was no discretion. See *id.*

In 2006, however, in *Jilin Pharm. USA, Inc. v. Chertoff*, and in 2004 in *Urena-Tavarez v. Ashcroft*, the Third Circuit found that discretion did lie with the Secretary of Homeland Security despite the absence of the word “discretion.” See *Jilin Pharm.*, 447 F.3d at 203–05; *Urena-Tavarez*, 367 F.3d at 160–61. In *Jilin Pharm.*, the court looked at other language in the statute connoting discretion, such as the specification that the Attorney General “may” (rather than “shall”) revoke approval of a petition, something he is authorized to do “at any time.” See *Jilin Pharm.*, 447 F.3d at 203. Additionally, the only limit on the discretion, was for “good and sufficient cause,” a limit so subjective that it provided no meaningful legal standard, and even then, it was also delegated to the Secretary. See *id.* at 204. Similarly, in *Urena-Tavarez*, in addition to the use of the word “discretion,” the court found that the use of the word “may” and a grant of power to the Attorney General to decide “what evidence is credible and the weight” to accord it meant that discretion had been granted. See 367 F.3d at 159–60.

¹¹⁵ See *Alaka*, 456 F.3d at 97–98.

¹¹⁶ See 532 F.3d 150, 154 (2d Cir. 2008).

because it deemed his crime, reckless endangerment in the first degree, particularly serious.¹¹⁷ On review, the court distinguished IJ decisions that only require the IJ to make a routine determination from those decisions that the text of a statute specifically articulates as being in the discretion of the IJ.¹¹⁸ The court examined cases where it had previously ruled that it did not have jurisdiction to review IJ decisions and found that in each such instance the statutes in question had specifically characterized the act as discretionary.¹¹⁹ The court concluded that because the statute in this instance did not expressly place the determination within the discretion of the IJ, the decision was not solely within the IJ's discretion and the court had the power to review the decision.¹²⁰

¹¹⁷ See *id.* at 152. Khalid Nethagani was a native and citizen of India who had shot into the air a gun that he possessed illegally. See *id.*

¹¹⁸ See *id.* at 154–55.

¹¹⁹ See *id.* at 154 n.2 (citing *Blake v. Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007); *Atsilov v. Gonzales*, 468 F.3d 112, 116–17 (2d Cir. 2006); *Jun Min Zhang v. Gonzales* 457 F.3d 172, 175–76 (2d Cir. 2006); *Avendano-Espejo v. DHS*, 448 F.3d 503, 505 (2d Cir. 2006); *Saloum v. U.S. Citizenship & Immig. Servs.*, 437 F.3d 238, 242–44 (2d Cir. 2006)).

¹²⁰ See *id.* at 154–55. In *Delgado*, Judge Berzon also observed that a reading of the statute that granted the Attorney General discretion would conflict with the statutory interpretation norm of “*expressio unius est exclusio alterius*.” See *Delgado*, 563 F.3d at 881 (Berzon, J., concurring in part, dissenting in part). This interpretive rule states that the inclusion of one item ordinarily excludes similar items that could have been, but were not enumerated. See *id.* (citing *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). The statute specifically permits the Attorney General to designate an aggravated felony as a particularly serious crime, even though it carries a prison term of less than five years. See 8 U.S.C. § 1231(b)(3)(B) (2006). Applying this rule of statutory interpretation, the fact that Congress did not mention *non-aggravated* felonies carrying prison terms of less than five years means they did not intend to extend the discretion of the Attorney General that far. See *Delgado*, 563 F.3d at 881–82 (Berzon, J., concurring in part, dissenting in part).

The U.S. Court of Appeals for the Seventh Circuit examined this argument in *Ali* and found it unconvincing. See 468 F.3d at 470. The court found that 8 U.S.C. § 1231(b)(3)(B)(ii) does not state a general rule that only aggravated felonies can be considered particularly serious crimes. See *id.* The court asserted that the designation of some crimes as per se particularly serious created no presumption that the Attorney General could not exercise discretion on a case-by-case basis to decide that other non-aggravated felonies were also particularly serious. See *id.* It thus concluded that the absence of a provision for granting discretion for non-aggravated felonies did not imply that only aggravated felonies could qualify as particularly serious crimes. See *id.* The court went on to conclude that to the extent that the statute might be ambiguous on this issue, the BIA's decision was reasonable and thus was entitled to deference. See *id.* This interpretation was criticized by Judge Berzon in *Delgado* for “re[ly]ing] on what the statute *doesn't* say, rather than on what it does” See *Delgado*, 563 F.3d at 881 (Berzon, J., concurring in part, dissenting in part).

III. *CHEVRON* OR *ST. CYR*: DOES THE U.S. SUPREME COURT FAVOR OR DISFAVOR AN INITIAL PRESUMPTION OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE IMMIGRATION SETTING?

In the seminal 1984 case of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* the U.S. Supreme Court set forth the test for determining whether to grant deference to a government agency's interpretation of its own statutory mandate.¹²¹ There, the Natural Resources Defense Council challenged the Environmental Protection Agency's ("EPA") definition of major stationary sources of air pollution, but the Court upheld the EPA's definition.¹²² The Court ruled that when the statute at issue speaks clearly and directly to the question at hand, courts and the agency both must give effect to Congress's unambiguously expressed intent.¹²³ If, however, the statute is silent or ambiguous on a specific issue, a court must ask whether the agency's answer is based on a permissible construction of the statute.¹²⁴ If the construction is permissible, it should be given deference by the court, even if it differs from the construction the court would have given it if the question had initially arisen in a judicial proceeding.¹²⁵ Considerable weight is given to an executive department's construction of a statutory scheme that department is entrusted to administer.¹²⁶ The Court has explained that a deferential stance is especially important in the immigration context where officials exercise sensitive political functions with serious implications for foreign relations.¹²⁷ Some courts advocate that under this standard it is inappropriate for courts to review BIA decisions regarding 8 U.S.C. § 1231(b)(3)(B)(ii).¹²⁸

In 2009, in *Delgado v. Mukasey*, the U.S. Court of Appeals for the Ninth Circuit deferred to the BIA on the proper interpretation of 8 U.S.C. § 1231(b)(3)(B)(ii) under the *Chevron* standard.¹²⁹ It held that the statutory designation of certain aggravated felonies as per se particularly serious did not preclude IJs from deciding that any other crime was also particularly serious.¹³⁰ The petitioner was a citizen of El

¹²¹ See 467 U.S. 837, 842–43 (1984).

¹²² See *id.* at 841–42.

¹²³ See *id.* at 842–43.

¹²⁴ See *id.* at 843.

¹²⁵ See *id.* at 843 n.11.

¹²⁶ See *id.* at 844.

¹²⁷ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

¹²⁸ See *Delgado v. Mukasey*, 563 F.3d 863, 867 (9th Cir. 2009).

¹²⁹ See *id.*

¹³⁰ See *id.*

Salvador who entered the United States on a nonimmigrant visitor visa and remained for over twenty years.¹³¹ During that time he was convicted three times for driving under the influence.¹³² The court held that it lacked jurisdiction to review the decision to declare the alien's convictions particularly serious.¹³³ In doing so, the court dismissed as not controlling a number of cases holding to the contrary because, at the time of the earlier decisions, the BIA had not addressed the issue in a precedential opinion.¹³⁴ In 2007, however, the BIA issued such a precedential opinion in *In re N-A-M*, concluding that § 1231(b)(3)(B)(ii) permitted the Attorney General to decide through case-by-case adjudication that crimes were "particularly serious," even though they were not aggravated felonies.¹³⁵ Accordingly, the Ninth Circuit held in *Delgado* that the *N-A-M* opinion was entitled to deference under the *Chevron* standard.¹³⁶

Although the *Chevron* standard can be argued to militate for judicial deference to BIA decisions, Supreme Court decisions subsequent to *Chevron* call this argument into question.¹³⁷ In 1987, in *INS v. Cardoza-Fonseca*, the Court found unconvincing the argument that the BIA's construction of the Refugee Act of 1980 was owed deference, even if the Court concluded that a lower court's interpretation was more in keeping with Congress's intent.¹³⁸ There, a Nicaraguan woman entered the country as a visitor, but stayed longer than her visa permitted.¹³⁹ At her deportation hearing she conceded that she was in the country illegally, but applied for withholding of removal.¹⁴⁰ The question before the Court was what standard of proof an alien must meet to show that she has a "well-founded fear" of persecution.¹⁴¹ In finding that a lower

¹³¹ See *id.* at 1019.

¹³² See *id.*

¹³³ See *id.* at 867.

¹³⁴ See *Delgado*, 563 F.3d at 867. The issue had been addressed by a single BIA member in an unpublished opinion, but neither party contended that such a decision was owed any deference under the *Chevron* standard. See *id.*

¹³⁵ See 24 I. & N. Dec. 336, 338–39 (B.I.A. 2007).

¹³⁶ See *Delgado*, 563 F.3d at 867.

¹³⁷ See *INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445 (1987).

¹³⁸ See 480 U.S. at 445.

¹³⁹ See *id.* at 424.

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 425–26. In trying to show that her fear was well-founded, the petitioner testified that her brother had been tortured and imprisoned for his political views. See *id.* at 424–25. She believed the Sandanistas knew that the two of them had fled the country together. See *id.* at 424. She testified that even though she had not been politically active

standard than that for which the BIA advocated was required, the Court cited its own language in *Chevron*.¹⁴² It explained that “[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.”¹⁴³

Another seminal case, which postdates *Chevron*, also supports judicial review in the deportation arena.¹⁴⁴ In 2001, in *INS v. St. Cyr*, the U.S. Supreme Court found that a “strong presumption in favor of judicial review of administrative action” is the norm, even in deportation cases.¹⁴⁵ The respondent in *St. Cyr* was a Haitian citizen who was admitted to the United States as a lawful permanent resident in 1986.¹⁴⁶ In 1996 he pleaded guilty to selling a controlled substance, a conviction which made him deportable.¹⁴⁷ Between his conviction and his removal proceedings, Congress had passed the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, which made him ineligible for a waiver of deportation.¹⁴⁸ He brought a habeas corpus claim to determine whether these statutes applied retroactively to his case.¹⁴⁹ In determining that these acts did not apply retroactively to the respondent, the Court concluded, inter alia, that “some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’”¹⁵⁰

In 2006, in *Alaka v. Attorney General*, the U.S. Court of Appeals for the Third Circuit found that the strong showing necessary to overcome this presumption of judicial review had not been made with regard to the particularly serious crime exception.¹⁵¹ There, the petitioner was

herself, she would be interrogated and tortured to determine her brother’s whereabouts. *See id.* at 424–25.

¹⁴² *See id.* at 447–48.

¹⁴³ *See id.* at 448 (citing *Chevron*, 467 U.S. at 843 n.9).

¹⁴⁴ *See St. Cyr*, 533 U.S. at 300.

¹⁴⁵ *Id.* at 298. Similarly, in 1991, in *Board of Governors of the Federal Reserve System v. MCorp Financial Inc.*, the U.S. Supreme Court held that only a showing of “clear and convincing evidence” is sufficient to support a finding that Congress intended to preclude judicial review. *See* 502 U.S. 32, 44 (1991). Also, though not directly bearing on the issues discussed here, it is worth noting that the *St. Cyr* Court ruled that neither the AEDPA nor IIRIRA denied federal courts jurisdiction over habeas corpus petitions brought by criminals who were in custody under deportation orders, thereby showing a continued preference for judicial review. *See* 533 U.S. at 314.

¹⁴⁶ *St. Cyr*, 533 U.S. at 293.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at 300 (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

¹⁵¹ *See* 456 F.3d 88, 101 (3d Cir. 2006).

denied withholding of removal for her conviction of aiding and abetting bank fraud.¹⁵² The court thus found that it was not stripped of jurisdiction to determine if the alien had been convicted of a particularly serious crime.¹⁵³ It went on to find that because aiding and abetting bank fraud was not an aggravated felony, it could not be considered a particularly serious crime.¹⁵⁴

In 2008, the U.S. Court of Appeals for the Second Circuit invoked *St. Cyr* in *Nethagani v. Mukasey*.¹⁵⁵ Khalid Nethagani was a citizen of India.¹⁵⁶ He was convicted of reckless endangerment in the first degree after he shot into the air a gun that he possessed illegally.¹⁵⁷ The BIA denied his claim for withholding of removal because it deemed his crime particularly serious.¹⁵⁸ Citing *St. Cyr* and its strong presumption in favor of judicial review, the court held that when a statute authorizes the Attorney General to make a determination, but lacks additional language specifically rendering that determination to be within his discretion, the decision is subject to review by appellate courts.¹⁵⁹

IV. HOW THE PARTICULARLY SERIOUS CRIMES EXCEPTION SHOULD BE REVISED TO COMPORT WITH ITS ORIGINAL INTENT

Non-refoulement has come to be recognized as “the cornerstone of international refugee law.”¹⁶⁰ It has its origins in the 1951 Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees, to which the United States is a signatory and which it incorporated into United States law.¹⁶¹ The obligations and spirit of the Protocol, more than anything, should be the driving force in interpreting the particularly serious crimes exception to withholding of removal.¹⁶² Courts that allow the BIA to declare any crime particularly

¹⁵² *See id.* at 93.

¹⁵³ *See id.* at 101–02.

¹⁵⁴ *See id.* at 105, 109. This holding was significantly strengthened by the REAL ID Act of 2005, which explicitly provided for review of all final removal orders in the U.S. courts of appeals. *See* 8 U.S.C. § 1252 (2006).

¹⁵⁵ *Nethagani v. Mukasey*, 532 F.3d 150, 154 (2d Cir. 2009).

¹⁵⁶ *See id.* at 152.

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 154–55. Though the court found that it did have the power to review the BIA’s decision, it then deferred to the BIA, citing *Chevron*, in what it thought was a reasonable construction of the ambiguous statutory language. *See id.* at 156.

¹⁶⁰ António Guterres, U.N. High Comm’r for Refugees, Address to the League of Arab States (Mar. 4, 2007), in 27 REFUGEE SURV. Q. 66, 66 (2008).

¹⁶¹ *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987).

¹⁶² *See id.*

serious have lost sight of this and have allowed the BIA to stray from the original impetus for creating these laws.¹⁶³ This Part argues that courts must honor the intent of the Protocol, and thus of Congress, by applying a more restrictive understanding of the particularly serious crimes exception.¹⁶⁴ To do so, courts must exercise judicial review of BIA decisions on this issue and not allow non-aggravated felonies to be declared particularly serious crimes.¹⁶⁵ This Part also argues that beyond this resolution of the circuit conflict, another step must be taken to ensure compliance with the United States' obligations under the Protocol: courts must find that an individual poses a continuing danger to the community before they may deny him protection under withholding of removal provisions.¹⁶⁶

A. *Judicial Review of the Application of the Particularly Serious Crimes Exception Is Appropriate*

Courts that hold that there should not be judicial review of BIA decisions on whether a crime is particularly serious support this position by alternatively pointing to the *Chevron* standard or the language of the statute vesting unfettered discretion in the Attorney General.¹⁶⁷ Neither of these sources, however, actually supports this position.¹⁶⁸

1. *Chevron* Deference Is Not Appropriate in Light of the U.S. Supreme Court's Rulings in *Cardoza-Fonseca* and *St. Cyr*

U.S. Supreme Court decisions subsequent to *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* clearly show that *Chevron* does not control with respect to 8 U.S.C. § 1231 (b) (3) (B) (ii).¹⁶⁹ In 1984 the U.S. Supreme Court did establish in *Chevron* that when a statute is silent or ambiguous on a specific issue, a court must ask whether an agency's interpretation of that statute is based on a permissible construction of the statute and, if so, give that interpretation deference.¹⁷⁰ In 1987, in

¹⁶³ See *id.*

¹⁶⁴ See *Nethagani v. Mukasey*, 532 F.3d 150, 154 (2d Cir. 2008); *Alaka v. Att'y Gen. of the U.S.*, 456 F.3d 88, 101 (3d Cir. 2006).

¹⁶⁵ See *infra* notes 167–216 and accompanying text.

¹⁶⁶ See *infra* notes 217–239 and accompanying text.

¹⁶⁷ See *Delgado v. Holder*, 563 F.3d 863, 867 (2d Cir. 2009); *Ali v. Achim*, 468 F.3d 462, 468–469 (7th Cir. 2006).

¹⁶⁸ See *INS v. St. Cyr*, 533 U.S. 289, 297–98 (2001); *Cardoza-Fonseca*, 480 U.S. at 445; *Nethagani*, 532 F.3d at 154; *Alaka*, 456 F.3d at 101–02.

¹⁶⁹ See *St. Cyr*, 533 U.S. at 297–98; *Cardoza-Fonseca*, 480 U.S. at 445.

¹⁷⁰ See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 480 U.S. 837, 842–43 (1984).

INS v. Cardoza-Fonseca, however, the Court found that the BIA's construction of the Refugee Act of 1980 was not owed *Chevron* deference.¹⁷¹ In ruling on the standard of proof an alien must meet to show that they have a "well-founded fear of persecution," the Court found that the plain language of the act, its symmetry with the United Nations Protocol, and its legislative history led inexorably to a different conclusion than that reached by the BIA.¹⁷² The Court found that because traditional rules of statutory construction revealed Congress's intent, it was the Court's obligation to give that law effect.¹⁷³ Again, in 2001, in *INS v. St. Cyr*, in overturning a BIA ruling that the AEDPA and IIRIRA applied retroactively to an alien, the Court found that it did have jurisdiction to review the case and that a strong presumption in favor of judicial review should prevail even in deportation cases.¹⁷⁴

In light of these subsequent rulings, particularly the overwhelming similarities between the question presented and sources examined by the Court in *Cardoza-Fonseca* and the sources necessary to interpret the particularly serious crimes exception, it is plain that *Chevron* deference is not required with regard to 8 U.S.C. § 1231 (b)(3)(B)(ii).¹⁷⁵ All the same factors that the Court considered in *Cardoza-Fonseca*—the plain language of the act in question, its symmetry with the United Nations Protocol, and its legislative history—should be similarly considered here.¹⁷⁶ Because Congress's intention on the precise issue of interpretation of the particularly serious crimes exception is as clear as its intention regarding a "well-founded fear of persecution" in *Cardoza-Fonseca*, courts need not defer to the BIA's interpretation.¹⁷⁷

Additionally, a BIA opinion does not warrant *Chevron* deference if the interpretation advocated by the BIA clashes with standard principles of statutory interpretation.¹⁷⁸ Under *Chevron*, when an interpretation by an agency is unreasonable, a court does not owe it any deference.¹⁷⁹ An agency interpretation is not reasonable when it ignores an

¹⁷¹ See *Cardoza-Fonseca*, 480 U.S. at 445.

¹⁷² See *id.* at 449.

¹⁷³ See *id.* at 446.

¹⁷⁴ See 533 U.S. at 298.

¹⁷⁵ See *id.*; *Cardoza-Fonseca*, 480 U.S. at 449.

¹⁷⁶ See 480 U.S. at 449.

¹⁷⁷ See *id.*; see also John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 591 (2008) (arguing that Congress should amend the Refugee Act, but rather than waiting for this change, the Supreme Court should reevaluate the application of *Chevron* to certain immigration cases, because "the dangerous mood of near complete judicial acquiescence to the BIA must change").

¹⁷⁸ See *Delgado*, 563 F.3d at 882–83 (Berzon, J., concurring in part, dissenting in part).

¹⁷⁹ See 467 U.S. at 844.

established rule of statutory construction set forth by the Supreme Court.¹⁸⁰ Here, if one agrees that the interpretation advocated by the BIA does indeed deny the standards of statutory interpretation, then it is not owed any deference by a court.¹⁸¹

The BIA's reason for its decision is also determinative of whether or not it is owed deference.¹⁸² In *N-A-M* the BIA declared that its decision was compelled by a "plain reading of the Act" suggesting that the BIA did not think that it was offering its own reasonable interpretation of an ambiguous statute.¹⁸³ If the BIA was not attempting to fill a gap left by Congress, then it was not exercising the general authority of an agency to resolve statutory ambiguities.¹⁸⁴

Finally, it must also be noted that the touchstone of *Chevron* deference is a congressional intent to leave a particular issue to the agency.¹⁸⁵ Some authorities have rightly doubted that Congress meant to give the BIA discretion to abrogate U.S. treaty obligations by expanding the particularly serious crimes exception beyond the limits imposed by those obligations.¹⁸⁶ Such an interpretation would conflict with the extensive efforts of Congress to comport with its obligations under the Convention and Protocol.¹⁸⁷

2. The Language of the Statute Does Not Indicate an Intent to Give the Attorney General Unfettered, Unreviewable Discretion

The only way that one can agree that the Attorney General has complete, unreviewable discretion under 8 U.S.C. § 1231 (b) (3) (B) (ii) is to look at a few lines of the statute in isolation.¹⁸⁸ Courts did just that in 2006, in *Ali v. Achim*, and in 2009, in *Delgado v. Holder*, where the U.S. Court of Appeals for the Seventh and Ninth Circuits ruled that the definition of a particularly serious crime was completely within the Attorney General's discretion.¹⁸⁹ The more expansive view, which is re-

¹⁸⁰ See *Bell v. Reno*, 218 F.3d 86, 94 (2d Cir. 2000).

¹⁸¹ See *Delgado*, 563 F.3d at 882–83 (Berzon, J., concurring in part, dissenting in part).

¹⁸² See *id.* at 883.

¹⁸³ See *id.* (quoting *In re N-A-M*, 24 I. & N. Dec. 336, 338 (B.I.A. 2007)).

¹⁸⁴ *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (finding that deference to an agency's interpretation of a statute is inappropriate if the agency mistakenly believes that the interpretation is compelled by Congress).

¹⁸⁵ See 467 U.S. at 843–44.

¹⁸⁶ See Brief of International Law Scholars as Amici Curiae Supporting Petitioner at 19, *Ali*, 128 S. Ct. 828 (No. 06-1346).

¹⁸⁷ See *id.* at 19–20.

¹⁸⁸ See *Nethagani*, 532 F.3d at 154–55; *Alaka*, 456 F.3d at 96–98.

¹⁸⁹ See *Delgado*, 563 F.3d at 869; *Ali*, 468 F.3d at 470.

quired by norms of statutory construction, shows that the intent of these phrases was in fact to limit the discretion of the Attorney General.¹⁹⁰ In 2006, this broader examination of the statute led the U.S. Court of Appeals for the Third Circuit to the proper interpretation in *Alaka v. Attorney General*.¹⁹¹ Because the *Alaka* court looked at the entire subchapter of the INA in which 8 U.S.C. § 1231 (b)(3)(B)(ii) appears and not just two lines in isolation, it recognized that the delegation of power to “decide” and “determine” was in fact a limitation, when compared with the thirty-two other instances where “discretion” was granted.¹⁹² The *Alaka* court rightly emphasized that jurisdiction was not stripped in all instances where IJs were entitled to make a decision, only in those instances where Congress had taken the extra step of specifying that the sole authority for the action was in the IJs’ discretion.¹⁹³

In 2008 in *Nethagani v. Mukasey*, the U.S. Court of Appeals for the Second Circuit similarly found that the language of the statute was not meant to put IJ decisions beyond the scope of review by appellate courts.¹⁹⁴ As in *Alaka*, the *Nethagani* court drew a distinction between IJ decisions that require the exercise of routine discretion and decisions which the text of the statute specifies as being in the discretion of the IJ.¹⁹⁵ The court examined cases where it had previously ruled that it did not have jurisdiction to review IJ decisions, and the court found that in each instance the statute in question had specifically characterized the act as discretionary.¹⁹⁶

¹⁹⁰ *Nethagani*, 532 F.3d at 154–55; *Alaka*, 456 F.3d at 96–98; *Soltane v. U.S. Dep’t of Justice*, 381 F.3d 143, 147–48 (3d Cir. 2004); *see also* *Richards v. United States*, 369 U.S. 1, 11 (1962).

¹⁹¹ *See* 456 F.3d at 97–98.

¹⁹² *See id.*

¹⁹³ *See id.*; *see also* Daniel Kanstroom, *The Better Part of Valor: The Real ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 198 (2008) (arguing that because “[t]he scope of judicial review can . . . be understood on a continuum ranging from the most deferential review of delegated discretion to the closest scrutiny of legal interpretive discretion . . . a less deferential scope of judicial review is both theoretically sound and most likely to lead to fair and consistent results”); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1630 (2000) (arguing that judicial review in immigration cases is desirable because of the actual and perceived independence it brings to an issue of extreme stakes, its benefit in public relations, the generalist perspective brought by judges from their courts of general jurisdiction (as opposed to the narrow specialty of IJs), and because the possibility of judicial review encourages more thoughtful and rational decision-making on the part of administrative adjudicators).

¹⁹⁴ *See* 532 F.3d at 154.

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* (citing *Blake v. Carbone*, 489 F.3d 88, 98 n.7 (2d Cir. 2007); *Atsilov v. Gonzales*, 468 F.3d 112, 116–17 (2d Cir. 2006); *Jun Min Zhang v. Gonzales*, 457 F.3d 172, 175–76

Thus, it is only when a court does a narrow and superficial review that it finds discretion to be solely within the Attorney General's power.¹⁹⁷ When courts venture into a deeper and more exacting review, they rightly reach the conclusion that they do indeed possess jurisdiction to review 8 U.S.C. § 1231 (b) (3) (B) (ii) decisions.¹⁹⁸ This broader view is not simply desirable, but required by the canons of statutory construction.¹⁹⁹

B. *The Circuit Split Should Be Resolved So That Only Aggravated Felonies Can Be Particularly Serious Crimes and Courts Can Exercise Appellate Review of Particularly Serious Crime Rulings*

Both the U.S. Court of Appeals for the Seventh Circuit and the U.S. Court of Appeals for the Ninth Circuit have held that IJs have the discretion to declare non-aggravated felonies as particularly serious crimes.²⁰⁰ In reaching this conclusion, these courts relied heavily on the fact that discretion was retained by the Attorney General throughout the many amendments to the statute.²⁰¹ The Ninth Circuit emphasized in *Delgado* that under the INA, which marked the codification of the particularly serious crime exception, the BIA was responsible for determining on a case-by-case basis which crimes were particularly serious.²⁰² Because the statute initially vested discretion in the BIA, the Ninth Circuit held that none of the subsequent amendments to the INA were meant to divest the Attorney General of his power.²⁰³ It further concluded that the designation of some felonies as per se particularly serious in the Immigration Act of 1990 did not suggest an intent to strip the Attorney General of the authority to determine that other crimes were also particularly serious.²⁰⁴ The court found support for

(2d Cir. 2006); *Avendano-Espejo v. Dep't of Homeland Sec.*, 448 F.3d 503, 505 (2d Cir. 2006); *Saloum v. U.S. Citizenship & Immig. Servs.*, 437 F.3d 238, 242-43 (2d Cir. 2006)).

¹⁹⁷ See *Nethagani*, 532 F.3d at 154; *Alaka*, 456 F.3d at 96-98.

¹⁹⁸ See *Nethagani*, 532 F.3d at 154; *Alaka*, 456 F.3d at 97-98.

¹⁹⁹ See *Richards*, 369 U.S. at 11.

²⁰⁰ See *Delgado*, 563 F.3d at 872; *Ali*, 468 F.3d at 469.

²⁰¹ See *Delgado*, 563 F.3d at 869; *Ali*, 468 F.3d at 469.

²⁰² See 563 F.3d at 868 (citing *In re Frentescu*, 18 I. & N. Dec. 244 (B.I.A. 1982)).

²⁰³ See *id.* at 869.

²⁰⁴ See *id.* at 868. The court did recognize that the relaxation of the per se bar in 1996 under the AEDPA and again under the IIRIRA was probably done in order to avoid sweeping minor crimes, crimes that had not explicitly been defined as aggravated felonies, into the categorical bar. See *id.* at 869. It maintained, however, that neither the creation of this initial bar, nor its subsequent relaxation showed a congressional intent to eliminate the Attorney General's pre-existing discretion to declare a crime particularly serious, whether or not it was an aggravated felony. See *id.*

this stance in the fact that after the 1990 amendment, the BIA continued to apply its particularly serious crime test to non-aggravated felonies and find that they were particularly serious.²⁰⁵ The *Delgado* court also noted that the Second Circuit had ruled in a 1995 decision that the BIA had the power to make such discretionary decisions.²⁰⁶

Critically, however, these decisions ignore the origins of the duty of *non-refoulement* and the particularly serious crimes exception to which it gives way.²⁰⁷ In *Cardoza-Fonseca*, the U.S. Supreme Court, in determining what standard of proof an alien must meet to show that he has a “well-founded fear of persecution,” found that the INA drew its language directly from the Convention.²⁰⁸ The Court found that Congress had adopted the language of the Convention with the goal of enacting the Convention’s intent and spirit.²⁰⁹ As has already been noted, the intent of the Convention was for the particularly serious crimes exception to be viewed narrowly.²¹⁰ This is evidenced by the absence of any exception in the earliest drafts, and the commentary on the proposed exception, specifically describing it as a narrow one, intended only to protect the national security of the state.²¹¹

Thus, in *Delgado*, Judge Berzon, in a partial concurrence and partial dissent, focused on the origin of the particularly serious crime exception in the Convention and thus rightly argued that the current statute is most sensibly understood as still another attempt to implement the particularly serious crime exception in a manner that con-

²⁰⁵ See, e.g., *In re B-*, 20 I. & N. Dec. 427, 430 (B.I.A. 1991).

²⁰⁶ See 563 F.3d at 868 (citing *Ahmetovic v. INS*, 62 F.3d 48, 52 (2d Cir. 1995)).

²⁰⁷ See *Cardoza-Fonseca*, 480 U.S. at 436–37.

²⁰⁸ See *id.*

²⁰⁹ See *id.* “If one thing is clear from the legislative history of the . . . 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1968 United Nations Protocol . . .” *Id.*; see also *Molzof v. United States*, 502 U.S. 301, 307 (1992) (finding that it is a fundamental principle that when Congress adopts language from another source where it has an accepted meaning, it is presumed to intend that meaning absent direction to the contrary). The *Cardoza-Fonseca* Court also later highlighted its longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the aliens. See 480 U.S. at 449 (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

²¹⁰ See WEIS, *supra* note 51, at 325–334.

²¹¹ See *id.* The duty the United States bound itself to becomes even narrower, if as some scholars advocate, the exception “should be considered only where the crimes usually defined as ‘serious’—for example, rape, homicide, armed robbery, and arson—are committed with aggravating factors, or at least without significant mitigating circumstances.” James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J. 257, 292 (2001).

forms to the Protocol.²¹² In support of this position, Judge Berzon cited instances where Congress openly questioned whether U.S. law conformed to the Protocol.²¹³ In retracing the history of the statute, Judge Berzon found nothing in the legislative history that suggested a congressional intent to allow IJs to designate any offense as a particularly serious crime; if Congress did not regard a crime as sufficiently severe to include it in the ever-broadening definition of an aggravated felony, then it could not be considered particularly serious.²¹⁴ The dissent rightly argued that such an interpretation would also be in keeping with the United States' well-settled principle of interpreting its international agreements broadly and granting expansive rights to those protected under them.²¹⁵ Because the origin and original intent of the statute are clear, so too should be the duty of courts to apply 8 U.S.C. § 1231 (b) (3) (B) (ii) in a restrictive fashion by allowing only aggravated

²¹² See 563 F.3d at 884 (Berzon, J., concurring in part, dissenting in part g). Immigration courts have also recognized that the interpretation of the exception must be understood as complying with the Protocol's standards. See *In re L-S*, 22 I. & N. Dec. 645, 652 (1999) (finding that "the reason for [Congress'] . . . different approach" in 8 U.S.C. §§ 1158(b)(2)(B) and 1231(b)(3)(B) is that "Congress understood that in enacting revised section 241(b)(3) [of the INA], it was carrying forth the statutory implementation . . . of our international treaty obligations").

²¹³ See *Delgado*, 563 F.3d at 884 (Berzon, J., concurring in part, dissenting in part) ("Senator Kennedy explained that, '[T]o declare an aggravated felon anyone convicted of an offense involving imprisonment of one year, . . . means that people with fairly minor offenses would be ineligible to seek withholding of deportation, [which] in many instances may violate the Refugee Convention.'" (quoting *Mark-up on S. 1664 before the S. Comm. on the Judiciary*, 104th Cong. 60–61 (1996) (statement of Sen. Edward Kennedy, Member, S. Comm. on the Judiciary))).

²¹⁴ See *Delgado*, 563 F.3d at 882 (Berzon, J., concurring in part, dissenting in part); see also Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner at 19 n.23, *Ali v. Achim*, 128 S.Ct. 828 (2007) (No. 06-1346) ("[G]iven the over-breadth of the aggravated felony definition, it is difficult for UNHCR to conceive of a crime outside that category as one that is particularly serious.").

²¹⁵ *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (finding that international agreements are to "be construed in a broad and liberal spirit" and that "when two constructions are possible, one restrictive of rights that may be claimed under [them] and the other favorable to [those rights], the latter is to be preferred"); accord *United States v. Stuart*, 489 U.S. 353, 368 (1989); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (finding that an exemption from "humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress"). This stance is also appropriate in keeping with the *Cardoza-Fonseca* Court's observation that "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." See 480 U.S. at 449. Such a recognition is grounds for constraining, not expanding the group of individuals who should face this treatment, particularly through the discretion of one individual. See *id.*

felonies to be declared particularly serious and exercising judicial review to ensure that the BIA properly applies this standard.²¹⁶

C. *The Dual Requirement That Individuals Have Committed a Particularly Serious Crime and Pose a Continuing Danger to the Community*

Resolving the circuit split in the above fashion will make substantial progress towards reinstating the United States' obligations under the Convention.²¹⁷ Even with these two issues resolved, however, the United States will not have guaranteed that it has met its international treaty obligations.²¹⁸ This section argues that to bring U.S. law into conformance with international obligations, a new step will have to be introduced into the process, namely the requirement that aliens be found not only to have committed a particularly serious crime, but also to pose an ongoing danger to the community before they are declared ineligible for withholding of removal.²¹⁹

In 1986, in *In re Carabelle*, the BIA found that a two-part inquiry was unnecessary, as the question of whether or not an alien subject to deportation had committed a particularly serious crime answered the question of whether he or she posed a danger to the community.²²⁰ The applicant was a Cuban citizen who had departed Cuba as part of the Mariel boatlift in 1980.²²¹ He pled guilty and was convicted in 1983 to a number of charges stemming from a robbery.²²² The IJ found that he was ineligible for withholding of removal because of his crime and rejected his contention that despite his crime being particularly serious, a further showing that he constituted a danger to the community was needed before he could be denied withholding of removal.²²³

Such an interpretation is incorrect, however, as the Convention intended that an individual's current danger to the community be a separate and distinct question from whether he had already committed

²¹⁶ See *Alaka*, 456 F.3d at 97–98.

²¹⁷ See *Cardoza-Fonseca*, 480 U.S. at 436; *Nethagani*, 532 F.3d at 154–55; *Alaka*, 456 F.3d at 97–98.

²¹⁸ See Convention Relating to the Status of Refugees, *supra* note 50, at art. 33.

²¹⁹ See *infra* notes 220–240 and accompanying text.

²²⁰ 19 I. & N. Dec. 357, 360 (B.I.A. 1986). Though this was the first time the BIA had definitively addressed the question, the U.S. Court of Appeals for the Eleventh Circuit had previously examined the question and come to the same conclusion. See *Crespo-Gomez v. Richard*, 780 F.2d 932, 934–35 (11th Cir. 1986); *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222 (11th Cir. 1985) (Vance, J., concurring).

²²¹ See *Carabelle*, I. & N. Dec. at 358.

²²² See *id.*

²²³ See *id.*

a particularly serious crime.²²⁴ Basic logic also argues that the commission of a particularly serious crime in the past is not in and of itself an indication of a threat to the community in the present or future.²²⁵ It is particularly important to give effect to the second clause when Congress's categorical approach included crimes such as tax evasion and trafficking in vehicles with altered identification numbers in the aggravated felony category; these are crimes that do not inherently indicate the offender's danger to the community, much less a danger so grave as to justify exceptions to the United States' statutory and treaty requirement of *non-refoulement*.²²⁶ Ignoring the second prong of the requirement also violates the "cardinal principle of statutory construction," namely to give effect to every clause and part of a statute.²²⁷

Though every circuit that has considered the issue has deferred to the BIA's interpretation,²²⁸ the alternative interpretation actually follows from the intent of the Convention, is endorsed by leading commentators on the issue, and is endorsed by other signatory nations to the Convention.²²⁹ Though this would mark a significant departure

²²⁴ See WEIS, *supra* note 51, at 342.

²²⁵ See GUNNEL STENBERG, NON-EXPULSION AND NON-REFOULEMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 228 (1989) ("It may be that a person who has been convicted for a major crime or several times of a minor, but nevertheless serious, offense, constitutes, as a habitual criminal, a danger to the community, while a person, who, on the other hand has been convicted for a capital crime—which he has committed in a state of emotional distress or in self-defense—would not constitute a danger to the community."); WEIS, *supra* note 51, at 342.

²²⁶ See Brief of International Law Scholars as Amici Curiae Supporting Petitioner at 14, *Ali*, 128 S.Ct. 828 (No. 06-1346).

²²⁷ *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (finding that courts must "give effect, if possible, to every clause and word of a statute"). Specifically, this duty requires that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

²²⁸ See, e.g., *Kankamalage v. INS.*, 335 F.3d 858, 861 n.2 (9th Cir. 2003); *Yousefi v. INS.*, 260 F.3d 318, 327–28 (4th Cir. 2001); *Hamama v. INS.*, 78 F.3d 233, 240 (6th Cir. 1996); *Al-Salehi v. INS.*, 47 F.3d 390, 396 (10th Cir. 1995); *Garcia v. INS.*, 7 F.3d 1320, 1323 (7th Cir. 1993); *Mosquera-Perez v. INS.*, 3 F.3d 553, 559 (1st Cir. 1993); *Martins v. INS.*, 972 F.2d 657, 661 (5th Cir. 1992); *Crespo-Gomez v. Richard*, 780 F.2d 932, 934–35 (11th Cir. 1986). The U.S. Court of Appeals for the Second Circuit alone was "troubled [by the] BIA's failure to give separate consideration to whether [the alien] is a 'danger to the community.'" *Ahmetovic*, 62 F.3d at 52. Nevertheless, in light of the unanimity of the other circuits, among other factors, it too deferred to the BIA's interpretation. See *id.* at 53.

²²⁹ See NEHEMIAH ROBINSON, WORLD JEWISH CONGRESS, CONVENTION RELATION TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 29–30 (1953), available at <http://www.unhcr.org/home/PUBL/3d4ab67f4.pdf> (noting that Article 33's language

from the current interpretation used by the BIA, implementation of this alternative interpretation is necessary to comply with the Convention's stated goal of "assur[ing] refugees the widest possible exercise of these fundamental rights and freedoms."²³⁰

As has been previously discussed, *non-refoulement* has come to be recognized as "the cornerstone of international refugee law."²³¹ When it was first created, the particularly serious crime exception to this policy was meant to be read narrowly as evidenced by the original draft, wherein there was no exception to *refoulement* at all.²³² Though exceptions were ultimately made to this *non-refoulement* policy, they were only accepted in order to allow states to safeguard their security.²³³ Thus, it was the potential "danger to the community" and not the criminal conviction alone that was meant to activate the exception.²³⁴ The BIA's disregard of this language limiting access to a statutory grant of relief contravenes the policy of the U.S. Supreme Court, which "usually read[s] [an] exception narrowly in order to preserve the primary operation of the [policy]."²³⁵ As an exception to the Act's general and strongly expressed rule of *non-refoulement*, the particularly serious crimes exception should be construed narrowly.²³⁶

Congress's use of the exact words of the Convention as well as its stated intent to conform U.S. law to the Convention establish that the exception must be read to be consistent with the international understanding of the operative language.²³⁷ Even without this language and

allows a refugee to submit mitigating evidence to show he does not pose a threat to public order). "Two conditions must be fulfilled: the refugee must have been convicted by final judgment of a particularly serious crime, and he must constitute a danger to the community of the country." WEIS, *supra* note 51, at 342. Dr. Weis's interpretation is particularly instructive, as he was intimately involved in the preparation of the Convention and Protocol. Ogata, *supra* note 51, at x. "[Application of the exception] hinges on an appreciation of a *future* threat from the person concerned rather than on the commission of some act in the past." SIR ELIHU LAUTERPACHT & DANIEL BETHLEHEM, THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT: OPINION 129 (2001), available at <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf>. See generally Brief of International Law Scholars as Amici Curiae Supporting Petitioner, *Ali*, 128 S.Ct. 828 No. 06-1346).

²³⁰ See Convention Relating to the Status of Refugees, *supra* note 50, pmbl.

²³¹ Guterres, *supra* note 160, at 66.

²³² See WEIS, *supra* note 51, at 325.

²³³ See *id.* at 325-34.

²³⁴ See *id.*

²³⁵ *Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (citing *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

²³⁶ See *John Hancock Mut'l Life Ins. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 97 (1993) (finding that exceptions in comprehensive schemes should be read narrowly).

²³⁷ See *Cardoza-Fonseca*, 480 U.S. at 445.

the legislative history, a later enactment of Congress would not be presumed, absent a clear statement, to abrogate the United States' treaty obligations, such as its obligations under the Protocol.²³⁸ As a matter of U.S. law, "the opinions of . . . sister signatories [are] entitled to considerable weight."²³⁹ It is thus essential to consider the interpretation of other signatory countries to the Convention.²⁴⁰ This is clearly not something U.S. courts have done to date, as other signatory nations routinely treat the question of a refugee's potential danger to the community as a distinct inquiry under the Convention.²⁴¹

CONCLUSION

One must not lose sight of the fact that in order for 8 U.S.C. § 1231 (b) (3) (B) (ii) to be activated, it must first be established that the individual is facing return to a country where he is likely to face persecution. As such, the exception to the *non-refoulement* policy was meant to be an extremely narrow one. Although legislative reforms over the years did expand the number of crimes defined as aggravated felonies and thus particularly serious crimes, such reforms were not intended to unduly expand this narrow exception. Indeed, the expansion of the per se category of particularly serious crimes only makes sense if only these crimes can be particularly serious and if the satisfaction of this requirement is viewed as only the first step in a two-step process. Once it has been established that an individual committed a particularly seri-

²³⁸ See *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1983) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." (quoting *Cook v. United States*, 288 U.S. 102, 120 (1930))); see also *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934).

²³⁹ See *Air France v. Saks*, 470 U.S. 392, 404 (1985) (quoting *Benjamins v. British European Airways*, 572 F.2d 919 (1978)).

²⁴⁰ See *id.*

²⁴¹ See, e.g., *Pushpanathan v. Minister of Citizenship & Immig.*, [1998] 1 S.C.R. 982, 999 (Can.). The Canadian Supreme Court ruled that after finding that a refugee has committed a particularly serious crime, the government must still "make the added determination that the person poses a danger to the safety of the public or to the security of the country." See *id.* In Austria, an administrative court overturned the deportation of a refugee who had committed a particularly serious crime because the conviction had "only evidential relevance; it could not be deduced therefrom that, *ipso facto*, the applicant constituted a danger to Austrian society within the meaning of Article 33(2)." *Ahmed v. Austria*, App. No. 35964/94, 24 Eur. H.R. Rep. 278, 281 (1996). The ruling was subsequently overturned when it was held that the refugee did, in fact, constitute a future danger to society. See *id.* at 282.

ous crime, it is still necessary to show that he poses an ongoing danger to the community before the exception is activated. This was the intent of the Convention as shown in its legislative history and interpreted by other courts around the globe.

By collapsing this two pronged test into one question and granting the Attorney General discretion to declare any crime particularly serious, the BIA has overextended what was meant to be a narrow exception. If a crime is not sufficiently grave to be an aggravated felony, it cannot be a particularly serious crime. Review by appellate courts is also necessary to ensure that the BIA properly applies the definition of a particularly serious crime. The BIA, and the appellate courts on review, must also find that an individual who has committed a particularly serious crime is a danger to the community before an exception to the *non-refoulement* policy is appropriate. Only with these steps in place can we feel confident that we are not too hastily sending individuals back to countries where they are likely to face persecution.

To return to the example of Mrs. Alaka, she was clearly not a blameless party as she had been a participant in fraud in the United States, her adopted home. But to deport her to a country where the IJ openly acknowledged she would likely face persecution would not have been a commensurate punishment for a non-violent crime that carried a relatively light punishment, and where she did not pose an ongoing danger to the community. The reforms discussed herein will assure that only the most serious criminals who pose a danger to a community will be sent back to environments where they are likely to face persecution.

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