AVETISYAN'S LIMITED IMPROVEMENTS WITHIN THE OVERBURDENED IMMIGRATION COURT SYSTEM

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In early 2012, the Board of Immigration Appeals (BIA) decided Matter of Avetisyan, *overturning precedent that prohibited immigration judges from administratively closing an immigrant's case over the objection of either party.* Avetisyan *enables immigration judges to administratively close a case and remove it from their active dockets, subject to later re-calendaring by either party for final resolution. By giving judges the authority to administratively close cases,* Avetisyan *reaffirms the independent decision-making authority of immigration judges and allows them to reallocate some of their limited time to more pressing cases.*

But Avetisyan*'s break from precedent cannot reach the roots of the unfairness and injustice that plague the overwhelmed immigration court system.* Avetisyan *falls short for two reasons: First, although the BIA expanded immigration judge authority to grant administrative closure over a party's objection, it simultaneously limited that authority to discreet situations, which, when coupled with entrenched enforcement-leaning attitudes of judges, will do little to change the overall composition of cases currently on immigration court dockets. Second,* Avetisyan *cannot reach the source of the immigration court case overload: the filing of cases in immigration court by the Department of Homeland Security through its own immigration enforcement actions or those of local and state law enforcement agencies. Ultimately,* Avetisyan *will serve as no more than a Band-Aid on the deeply wounded immigration court system.*

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INTRODUCTION

In the words of former Attorney General Alberto Gonzalez, "[f]or the aliens who appear before them, our immigration

judges are the face of justice."[1] Just as immigrants expect fairness in their court proceedings, every individual in the United States expects judges to follow the law. These concepts of fairness and justice undergird our legal system. But with all of the criticisms directed towards the immigration court system, is true justice being served?

Scholars and critics have cited numerous problems with the immigration court system.[2] One commentator laments that some immigration judges simply do not understand the law.[3] Another common complaint involves the conduct of the immigration judges themselves. Instances of incivility and intemperance abound; at times, an immigration judge "cross[es] over the line of impartial adjudicator and fact-finder and effectively becom[es] an aggressive prosecutor."[4] Further, others decry the inaccuracy and inconsistency of outcomes, compounded by the general inefficiency of the process.[5]

Perhaps one of the underlying causes of these problems is, quite simply, that immigration judges are expected to perform super-human feats.[6] The nation's fifty-nine immigration courts staffed with approximately 260 immigration judges bear the responsibility of deciding all of the nation's immigration removal cases.[7] The number of cases has swelled in recent years, and the Department of Justice reports that between 2008 and 2012, the number of cases received by the immigration court system increased from 352,117 to 410,753 per year—an increase of 17 percent.[8] Consequently, each judge must manage approximately 1,580 cases each year.[9] Such a colossal caseload puts enormous pressure on immigration

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1. Memorandum from Alberto Gonzalez, Att'y Gen., to Members of the Board of Immigration Appeals (Jan. 9, 2006), *available at* http://www.justice.gov/ag/readingroom/ag-010906-boia.pdf.

2. *See, e.g.*, Linda Kelly Hill, *The Poetic Justice of Immigration*, 42 IND. L. REV. 1, 4 (2009); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 (2010).

3. Hill, *supra* note 2, at 4.

4. *Id.* at 6.

5. Legomsky, *supra* note 2, at 1639.

6. *See* Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 87 (2008).

7. *Office of the Chief Immigration Judge,* U.S. DEP'T OF JUSTICE, http://www.justice.gov/eoir/ocijinfo.htm (last visited Mar. 24, 2013).

8. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK A1 (2013) [hereinafter FY 2012 STATISTICAL YEAR BOOK], *available at* http://www.justice.gov/eoir/ statspub/fy12syb.pdf.

9. *See id.*

judges to decide cases quickly, leaving them little time—if any—to think before issuing oral decisions.[10] With widespread burnout among judges, most commentators "agree that more judges and increased support are needed to handle this caseload."[11]

Heavy case burdens contribute to incongruous or arbitrary decisions by overwhelmed and frustrated judges.[12] Unfortunately, the immigration courts themselves are not the only ones feeling the effects.[13] In recent years, more petitions for review have been filed in the circuit courts following decisions issued by immigration judges and affirmed by the Board of Immigration Appeals (BIA).[14] In 2005, the Seventh Circuit overturned the BIA's decisions in 40 percent of the petitions for review that immigrants filed.[15] Judge Richard Posner has expressed his concern that the increased reversal rate "is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."[16] Noting that the problem is "not of recent origin," Judge Posner fears that low standards are at least partly attributable to a lack of resources within the immigration courts.[17] Observing the same phenomenon in other circuit courts, one scholar likewise notes that "[m]any immigration judges appear to be determining cases in a haphazard manner, with decisions influenced more by personal preferences than by careful consideration of facts and law."[18] Consequently, immigrants appearing before immigration judges cannot be assured that the judges will decide their cases accurately or justly.[19]

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10. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431 (2011).

11. Caplow, *supra* note 6, at 87.

12. *See, e.g.*, Tun v. Gonzalez, 485 F.3d 1014, 1027–29 (8th Cir. 2007); Elias v. Gonzalez, 490 F.3d 444, 451 (6th Cir. 2007).

13. Hill, *supra* note 2, at 3.

14. *See id.* at 2–4.

15. *Id.*

16. Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 NO. 48 INTERPRETER RELEASES 2005, 2010 (2005) (quoting Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005)).

17. *Id.*

18. Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 471, 473–74 (2008).

19. *Id.* at 474.

Compounding the problem of their enormous caseloads, immigration judges have had little management control over their own dockets until recently.[20] Judges were prohibited from administratively closing a case—removing it from their docket without final resolution—if Department of Homeland Security (DHS) counsel objected, even where the matter was likely to be expeditiously resolved outside of the immigration court system.[21] The only management tool that immigration judges had was the ability to grant continuances.[22] However, while continuances provide immediate relief by moving the matter to a future date, they ultimately add to the case backlog.[23]

Matter of Avetisyan, decided by the BIA in early 2012, purports to provide a window of relief to overwhelmed immigration judges by enabling them to administratively close cases even if a party objects.[24] Judges can remove cases from their active dockets if cases meet the criteria specified in *Avetisyan*,[25] thereby increasing judges' authority over their own docket management and enabling them to reallocate some of their time to more pressing matters.[26]

However, the relief that *Avetisyan* purports to provide will be insignificant in the overall picture of immigration law. Despite its break with entrenched precedent,[27] this ruling fails to address the root of the unfairness and inefficiency encased in the underlying structure of the immigration court system and will do little in the long run to ensure that cases are resolved justly or consistently.

Even though *Avetisyan* did increase immigration judges' authority, decrease DHS's veto power, and increase the amount

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20. *See In re* Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (BIA 1996).

21. *See id.*

22. *See* Matter of Silva-Rodriguez, 20 I. & N. Dec. 448, 450 (BIA 1992); Matter of Perez-Andrade, 19 I. & N. Dec. 433, 434 (BIA 1987); Matter of Sibrun, 18 I. & N. Dec. 354, 355 (BIA 1983).

23. Memorandum from Brian M. O'Leary, Chief Immigration Judge, Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 1–2 (March 7, 2013) [hereinafter O'Leary, Memorandum], *available at* http://www.justice.gov/eoir/efoia/ocij/oppm13/13-01.pdf (noting that "multiple continuances result in delay in the individual case, and when viewed across the entire immigration court system, exacerbate our already crowded dockets").

24. *See* Matter of Avetisyan, 25 I. & N. Dec. 688 (BIA 2012).

25. *See id.* at 696.

26. *See* O'Leary, Memorandum, *supra* note 23, at 4.

27. *See In re* Gutierrez-Lopez, 21 I. & N. Dec. 479 (BIA 1996).

of active case management required of DHS, these changes are small. Although *Avetisyan* increases judicial discretion in one sense, it simultaneously limits that discretion by mandating that each case be analyzed under specific criteria, thus diminishing the potential for *Avetisyan* to overcome the entrenched disfavor of immigration judges towards administrative closure. *Avetisyan*, with its inherently contradictory expansion of immigration-judge power coupled with specific limiting criteria for administrative closure, will fall short of bringing significant change to the overburdened immigration court system. It cannot change DHS's failure to follow presidential immigration enforcement priorities or the enforcement problems and civil rights violations associated with the involvement of untrained local and state law enforcement officials. Because it cannot affect overriding immigration policy and because it only slightly impacts immigration law, *Avetisyan* will likely not leave a lasting impression.

This Note addresses the context of *Avetisyan*, its small gains, and even greater shortfalls. Part I examines the nature of immigration court proceedings and the powers of immigration judges. Part II discusses *Avetisyan*, examining its facts, the BIA's reasoning, and the limits the BIA placed on the discretionary exercise of administrative closure. Part III then discusses the potential for *Avetisyan* to leave a lasting impact on immigration law by examining the small accomplishments and larger deficiencies of the BIA's decision. Ultimately, Part III concludes that *Avetisyan* will change little and ends with a focus on the underlying structural issues that *Avetisyan* does not have the reach to fix.

I. DEVELOPMENT OF ADMINISTRATIVE CLOSURE IN IMMIGRATION COURT

Before evaluating *Avetisyan*'s impact, this Part will first describe the nature of immigration court proceedings and immigration judges' authority. Second, it will discuss the benefits and downfalls of two types of discretionary powers given to immigration judges: the ability to grant continuances and administrative closure. Third, this Part will examine

Gutierrez-Lopez,[28] the case that set the precedent that *Avetisyan* overturned.

A. The Immigration Court Process and the Role of Immigration Judges

The purpose of immigration proceedings is to determine if an individual is eligible to remain in the country.[29] Immigration proceedings are not intended "to punish an unlawful entry, even though entering or remaining unlawfully in this country is itself a crime."[30] Past criminal conduct is relevant in immigration proceedings only where it may bear on the individual's admissibility to the United States or deportability, not in regards to possible punishment that may be imposed for the criminal conduct.[31]

Immigration proceedings begin when DHS files a Notice to Appear with the immigration court and personally serves a copy upon the individual.[32] The Notice to Appear provides the charges of removability against the individual and the factual basis for those charges.[33] DHS wields sole discretion to initiate removal proceedings through the creation, service, and filing of a Notice to Appear.[34] DHS also may cancel a Notice to Appear before the case begins in immigration court[35] or after it has started, thereby dismissing the proceedings.[36]

Once DHS has filed the Notice to Appear with the immigration court, the immigration judge gains jurisdiction.[37]

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28. *Id.* at 480.
29. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).
30. *Id.* Some commentators, however, have rejected the notion that immigration law is civil law and have noted the increasing conflation of criminal law and immigration law—creating a legal mixture that some have labeled "Crimmingration." *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (noting that "[i]mmigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct").
31. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (deporting a prostitute not because prostitution was a crime and not as a form of punishment, but simply as "a refusal by the government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.").
32. *See* 8 U.S.C. § 1229 (2006); 8 C.F.R. § 1239.1 (2011).
33. 8 U.S.C. §§ 1229(a)(1), (c)(1)(A) (2006).
34. 8 C.F.R. § 239.1(a) (2011).
35. 8 C.F.R. §§ 239.2(a), 1239.2(a) (2011).
36. 8 C.F.R. §§ 239.2(c), 1239.2(c) (2011).
37. 8 C.F.R. § 1003.14(a) (2011).

Immigration judges are agents of the Attorney General and share his authority.[38] They must determine if the individual is subject to removal under the factual allegations and charges in the Notice to Appear.[39] Further, they must determine if the individual is eligible for any form of immigration relief.[40] An immigration judge's "sole power is to order deportation; the judge cannot adjudicate guilt or punish the [individual] for any crime related to unlawful entry into or presence in this country."[41]

Once an immigration judge renders a decision, it is administratively final unless appealed to the BIA.[42] The BIA is the administrative appellate body above the immigration courts.[43] Both the immigration court system and the BIA are housed in the Executive Office for Immigration Review, a sub-department of the United States Department of Justice.[44] As the highest Article I administrative appellate body, the BIA reviews the appealed decisions of immigration judges, and its decisions are final unless a party files a petition for review in the proper circuit court.[45]

Once jurisdiction vests in the immigration court, immigration judges gain control over the management of the case.[46] Immigration judges have the discretion to make management decisions concerning the movement of each case through the immigration court system.[47] Within this management authority, immigration judges have two discretionary tools over specific cases and over their docket: the

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38. 8 C.F.R. § 1003.10(b). However, although they are housed within the Department of Justice, immigration judges are not Administrative Law Judges. Marouf, *supra* note 10, at 429. Immigration judges, who lack lifetime appointments and can be removed by the Attorney General, are career civil servants. *Id*. Consequently, because they are beholden to the Attorney General, immigration judges have less independence than Administrative Law Judges, who gain their power through congressional legislation. *Id*.

39. *See* 8 U.S.C. §§ 1229a(a)(3), (c)(1)(A) (2006); 8 C.F.R. §§ 1240.1(a)(1)(i), 1240.11 (2011).

40. *See* 8 U.S.C. §§ 1229a(a)(3), (c)(1)(A) (2006); 8 C.F.R. §§ 1240.1(a)(1)(i), 1240.11 (2011).

41. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

42. Rick Fang Chi-Yeh, *Today's Immigration Legal System: Flaw and Possible Reforms*, 10 RUTGERS RACE & L. REV. 441, 447 (2009).

43. *Id.*

44. *Id.* at 445–46.

45. *Id.* at 447–48.

46. *See* 8 C.F.R. § 1003.14(a) (2011).

47. *See* 8 C.F.R. § 1003.29 (2011).

granting of continuances and administrative closure.[48]

B. Discretionary Options: Continuances and Administrative Closure

Continuances and administrative closure are quite different, and which one is the better option depends on the specific facts of the case.[49] Generally, because it removes a case from a judge's active docket, "administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time."[50] For events or actions expected to occur sooner, immigration judges may grant a continuance if in the best interests of the parties.[51]

Discretion to grant continuances has long been part of the authority of immigration judges.[52] Continuances can be granted at the request of either party, over the objection of a party, or at the instance of immigration judges if they find good cause to defer further action for a short period of time.[53] A continuance, unlike administrative closure, keeps a case on the active docket, making it a good tool for judges to use if the parties are awaiting an event expected to occur within the near future, such as the approval of an immigration petition filed on the alien's behalf by a spouse.[54] If a continuance is granted, after a few months, the case will again come before the judge for another hearing and further review.[55]

Administrative closure functions as another discretionary tool, but it works differently than a continuance.[56] Although the term "administrative closure" implies otherwise, it is not a final resolution of a case.[57] It simply removes a case from the

48. Matter of Avetisyan, 25 I. & N. Dec. 688, 691–92 (BIA 2012).
49. *See id.*
50. *Id.* at 692.
51. *See* Matter of Sibrun, 18 I. & N. Dec. 354, 356 (BIA 1983); *see also* 8 C.F.R. § 1003.29 (2011).
52. *See* Matter of Silva-Rodriguez, 20 I. & N. Dec. 448, 450 (BIA 1992); Matter of Perez-Andrade, 19 I. & N. Dec. 433, 434 (BIA 1987); *Sibrun*, 18 I. & N. Dec. at 355.
53. *See Avetisyan*, 25 I. & N. Dec. at 691–92.
54. *Id.*
55. *See id.* at 691.
56. *See id.* at 694.
57. Matter of Amico, 19 I. & N. Dec. 652, 654 n.1 (BIA 1988).

immigration judge's active docket instead of calendaring the case for another hearing.[58] If administrative closure is granted, either party may move to re-calendar the case on the judge's active docket to continue with its adjudication and resolution.[59]

Immigration judges cannot, however, exercise management discretion if the law otherwise prohibits a continuance or administrative closure.[60] For instance, a judge cannot grant a continuance or administrative closure where an individual fails to appear at his scheduled removal hearing.[61] In that situation, the law requires immigration judges to issue an automatic *in absentia* order of deportation against the individual.[62] The BIA discussed this precise issue in *Matter of Amico*.[63] Even though the immigration judge had previously found the individual deportable and was required to issue an *in absentia* order of deportation for his failure to appear, the judge instead administratively closed the case over the objection of DHS counsel.[64] On appeal, the BIA held that the immigration judge had abused his discretion in administratively closing the case.[65] The BIA remanded the case with instructions that the immigration judge issue the *in absentia* order of deportation for the failure to appear.[66]

Amico illustrates the legal limits of the discretionary power of immigration judges.[67] As the next section discusses, until *Avetisyan*, the discretionary power of immigration judges was limited not only by the law, but also by objections made by DHS counsel.[68]

C. Gutierrez-Lopez *and the Absolute Power of DHS Objections*

Until *Avetisyan*, a judge's decision to administratively close

58. *In re* Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (BIA 1996).
59. *See Avetisyan*, 25 I. & N. Dec. at 695.
60. *See Amico*, 19 I. & N. Dec. at 654.
61. *See id.*
62. *See id.*; Matter of Lopez-Barrios, 20 I. & N. Dec. 203, 204 (BIA 1990); Matter of Rosales, 19 I. & N. Dec. 655, 656 (BIA 1988).
63. *See Amico*, 19 I. & N. Dec. at 652.
64. *See id.* at 654.
65. *See id.*
66. *Id.*
67. *See id.*
68. *See In re* Gutierrez-Lopez, 21 I. & N. Dec. 479 (BIA 1996).

a case could be blocked by an objection from DHS, even if administrative closure was the best option.[69] In 1996, the BIA held in *In re Gutierrez-Lopez* that an immigration judge could not grant administrative closure "if opposed by either of the parties."[70] This ruling enabled either party to exercise an "absolute veto power over administrative closure requests," even if that party did not have a strong or justifiable reason for the opposition.[71]

DHS's ability to block an immigrant's request for relief with an objection was upheld in other contexts.[72] In *In re Velarde-Pacheco*, the BIA set forth a list of five factors that must be met to reopen a case so that an alien may apply for adjustment of status.[73] The fifth factor stated that the BIA could not reopen a case if DHS opposed it or if the I-130 petition filed on the alien's behalf had not yet been adjudicated by the United States Citizenship and Immigration Services (USCIS).[74] Thus, if an immigration judge or the BIA found that good cause to reopen a case existed, the BIA could not grant such relief against DHS's opposition, even if the immigrant were otherwise eligible to adjust his status.[75]

However, the BIA's holding in *Velarde-Pacheco* soon came under attack from the circuit courts.[76] Following the lead of the Second and Sixth Circuits, the Ninth Circuit rejected the BIA's holding in *Velarde-Pacheco*.[77] It held that the BIA should consider DHS's objection to the motion "but may not deny the motion based solely on the fact of the DHS's objection."[78]

It took only a year for the BIA to follow the Second, Sixth,

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69. *See id.*

70. *Id.* (citing Matter of Lopez-Barrios, 20 I. & N. Dec. 203 (BIA 1990)).

71. Matter of Avetisyan, 25 I. & N. Dec. 688, 692 (BIA 2012).

72. *See In re* Velarde-Pacheco, 23 I. & N. Dec. 253 (BIA 2002).

73. *Id.* at 256.

74. *Id.* The other four *Velarde-Pacheco* factors required to re-open a case are: (1) that the motion to re-open be timely filed; (2) that the motion is "not numerically barred by the regulations"; (3) that "the motion is not barred by *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996), or on any other procedural grounds"; and (4) that "the motion presents clear and convincing evidence indicating a strong likelihood that the respondent's marriage is bona fide." *Id.*

75. *See id.*

76. *See* Ahmed v. Mukasey, 548 F.3d 768, 772 (9th Cir. 2008); Melnitsenko v. Mukasey, 517 F.3d 42, 51–52 (2d Cir. 2008); Sarr v. Gonzales, 485 F.3d 354, 363 (6th Cir. 2007).

77. *Ahmed*, 548 F.3d at 772.

78. *Id.*

and Ninth Circuits.[79] In 2009, *Matter of Lamus-Pava* reversed *Velarde-Pacheco*.[80] The BIA concluded that, after further consideration, "whether as a matter of clarification or of modification, we now hold that the fifth factor set forth in *Matter of Velarde* does not grant the DHS 'veto' power over an otherwise approvable *Velarde* motion."[81] The BIA reasoned that a DHS objection should not control whether the motion should be granted.[82] Immigration judges should instead consider the reasons and merits of both the motion and of DHS's opposition and then exercise independent judgment and discretion.[83]

The BIA further chipped away at DHS's power to block an immigration judge's exercise of discretion when it addressed DHS objections to continuances.[84] In *Matter of Hashmi*, the BIA named several factors that the immigration judge should consider in deciding whether to grant a continuance over an objection by DHS.[85] In considering DHS's objection, immigration judges must look at the reasonableness of DHS's opposition and evaluate it under the totality of the circumstances.[86]

Despite the inroads made against the power of a DHS objection to override an immigration judge's independent authority, the *Gutierrez-Lopez* rule remained in effect, prohibiting immigration judges from granting administrative closure over a DHS objection, until the BIA decided *Avetisyan*

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79. *See* Matter of Lamus-Pava, 25 I. & N. Dec. 61, 64–65 (BIA 2009).
80. *Id.*
81. *Id.*
82. *Id.* at 65.
83. *Id.*
84. *See* Matter of Hashmi, 24 I. & N. Dec. 785 (BIA 2009).
85. *Id.* at 790. *Hashmi* stated:

> In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.

Id. Even in setting forth these five factors, *Hashmi* emphasized that "[t]hese factors are illustrative, not exhaustive." *Id.*

86. *Id.*

in 2012.[87] Thus, until *Avetisyan*, the discretionary authority of immigration judges to grant administrative closure was limited not only by the law, but also by the absolute veto power of DHS.[88] In effect, a DHS objection impeded judges' abilities to both manage their own dockets and to resolve cases in the best interests of the intending immigrant.[89]

II. *AVETISYAN*'S OVERRULING OF DHS'S ABSOLUTE VETO POWER

With the decision in *Avetisyan*, DHS can no longer prevent an immigrant's request for administrative closure by arbitrarily objecting to it.[90] Instead, *Avetisyan* provides that immigration judges can override an objection if they find that administrative closure is in the best interests of the immigrant and if there will be some palpable final resolution to the case in the near future.[91] Focusing on the immigration judge's position to determine the best interests of the immigrant, the BIA limited administrative closure to certain situations, emphasizing that a determination to grant administrative closure is a fact-specific analysis.[92] This section will begin with a close look at the facts and procedural history of Avetisyan's case, followed by an analysis of the BIA's reasoning and ultimate decision.

A. Facts and Procedural History

Bavakan Avetisyan, a native and citizen of Armenia, entered the United States as a nonimmigrant J-1 exchange visitor[93] to go to school here.[94] However, she dropped out of her

87. Matter of Avetisyan, 25 I. & N. Dec. 688, 690 (BIA 2012).
88. *Id.* at 692.
89. *Id.* at 692–93.
90. *See id.* at 693.
91. *Id.* at 691.
92. *Id* at 694.
93. To obtain a J-1 nonimmigrant visa, an immigrant must have been "approved to participate in work- and study-based exchange visitor programs." *J-1 Visa Basics,* U.S. DEP'T OF STATE, http://j1visa.state.gov/basics/ (last visited Feb. 3, 2013). If an immigrant chooses to withdraw from his work- and study-based program here in the United States, the educational institution acting as his sponsor will notify the Department of State of the immigrant's withdrawal or failure to complete the program, and the immigrant will be expected to depart from the United States immediately. *Questions for Participants*, U.S. DEP'T OF

educational program a couple of weeks after classes began.[95] Although her legal status as a J-1 immigrant terminated when she quit school, Avetisyan remained in the United States instead of departing for her home country as required by law.[96]

Lacking legal status, Avetisyan was placed in immigration court after she was personally served a Notice to Appear by DHS.[97] The Notice to Appear charged her with removability under INA 237(a)(1)(C)(i), codified in 8 U.S.C. § 1227(a)(1)(C)(i), "as a nonimmigrant who failed to maintain or comply with the conditions of the status under which she was admitted."[98] Appearing without an attorney, Avetisyan conceded this charge and admitted the factual allegations of the Notice to Appear at an immigration court hearing on June 3, 2004, but maintained that she wished to apply for immigration relief.[99] The immigration judge granted her a number of continuances so that she could pursue this relief.[100]

At a hearing two and a half years later, with her case still unresolved, Avetisyan advised the immigration judge that she had recently married.[101] Her husband was a legal permanent resident and was undergoing the process of naturalization to become a United States citizen.[102] He intended to file a visa petition on her behalf.[103] The immigration judge granted

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STATE, http://j1visa.state.gov/participants/common-questions/ (last visited Feb. 3, 2013).

94. *Avetisyan*, 25 I. & N. Dec. at 689.

95. *Id.*

96. *See id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* Although not specifically mentioned in the BIA's decision, both Avetisyan's visa petition and her husband's naturalization application were adjudicated by the United States Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security. *See* U.S. DEP'T HOMELAND SEC., ORGANIZATIONAL CHART (2013), http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf. USCIS is the only agency with authority to adjudicate immigration visa petitions and naturalization applications. 6 U.S.C. § 271 (b) (2008) (explaining that the authority to adjudicate these petitions had been transferred from "the Commissioner of Immigration and Naturalization to the Director of the Bureau of Citizenship and Immigration Services"); *see also* 8 C.F.R. § 204.1(b) (2011) (stating that a petition for an alien relative—commonly known as an "I-130 petition" or a "visa petition"—"must be filed on the form prescribed by USCIS"). Immigration judges, therefore, "do not have the authority

Avetisyan another continuance so that she could file proof of her husband's naturalization and a copy of the visa petition that he filed for her.[104] This continuance was intended to give Avetisyan the opportunity to seek an immigration benefit through USCIS while the case remained on the immigration judge's active docket so that he could check on her case at the next hearing.[105]

Avetisyan's next immigration court hearing was on February 14, 2007.[106] She provided the immigration judge with proof that her husband had filed a visa petition for her, which remained pending.[107] Additionally, Avetisyan reported that, although her husband had applied for naturalization, he had not yet undergone his oath ceremony to be sworn in as a citizen.[108] Based on Avetisyan's pending visa petition and her husband's pending naturalization application, the immigration judge granted her another continuance.[109]

At her next hearing four months later, Avetisyan told the judge that her husband had successfully naturalized to become a United States citizen.[110] She also reported that she and her husband had been interviewed by USCIS on May 30, 2007, in conjunction with the visa petition he had filed for her.[111] USCIS had requested additional evidence from Avetisyan for the petition.[112] The immigration judge again continued the proceedings.[113] Subsequently, at her next hearing, Avetisyan reported that she and her husband had provided all of the documents requested by USCIS but that they still had not received a decision on the visa petition.[114]

From there, the judge "granted five additional continuances for the adjudication of the pending visa petition."[115] At a hearing on December 11, 2007, DHS counsel

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to adjudicate I-130 petitions." Avitan v. Holder, No. C 09-02592 RS, 2010 WL 299172, at *8 n.7 (N.D. Cal. July, 28, 2010).

104. *Avetisyan*, 25 I. & N. Dec. at 689.
105. *See id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

explained that she did not have Avetisyan's alien file—commonly referred to as an "A-file"—because it was in the hands of USCIS for the adjudication of Avetisyan's visa petition.[116] Avetisyan's A-file was being mailed back and forth between DHS counsel for her immigration court hearings and the USCIS office that was adjudicating her visa petition.[117] DHS counsel explained that it was taking so long for USCIS to adjudicate Avetisyan's visa petition because of the need to send her A-file back and forth for each of her immigration court hearings.[118]

At a hearing on April 15, 2008, Avetisyan requested that the immigration judge administratively close her case while her visa petition was pending.[119] Administrative closure in this case would have made it easier for USCIS to finally adjudicate her visa petition, because once her case was removed from the judge's active docket, there would have been no need to send her A-file back and forth between DHS counsel and the USCIS office. However, DHS objected to administrative closure, and the immigration judge denied Avetisyan's request, instead granting another continuance.[120] Because of the limitations placed upon the immigration judge by *Gutierrez-Lopez*, which held that an immigration judge could not grant administrative closure over the objection of DHS, the judge had no choice but to deny Avetisyan's request for administrative closure.[121]

After two more continuances, at her final hearing on June 25, 2009, Avetisyan's visa petition was still pending with USCIS.[122] She again asked the immigration judge to administratively close her case, but DHS counsel objected.[123] Despite DHS's objection, the immigration judge broke with the precedent of *Gutierrez-Lopez*, granting administrative closure and denying DHS counsel's request for a continuance, a decision that marked a shift in procedure and policy.[124]

Following the judge's repudiation of *Gutierrez-Lopez*, DHS

116. *Id.*
117. *Id.* at 689–90.
118. *Id.*
119. *Id.*
120. *Id.* at 690.
121. *See In re* Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (BIA 1996).
122. *Avetisyan*, 25 I. & N. Dec. at 690.
123. *Id.*
124. *Id.*

filed an interlocutory appeal with the BIA.[125] The BIA accepted the interlocutory appeal because it concerned how immigration judges handle cases and the "administration of proceedings under our immigration laws."[126]

B. BIA's Decision to Depart from the Precedent of Gutierrez-Lopez

Through its decision in *Avetisyan* that the mere opposition of DHS should not prevent immigration judges from administratively closing a case for good cause, the BIA intentionally shifted its policy and gave more discretion to immigration judges to manage their cases and dockets.[127] However, the BIA did not give immigration judges absolute discretion.[128] In its analysis, the BIA set forth several limitations on when administrative closure is appropriate.[129] This section examines the BIA's reasoning.

After considering whether an immigration judge or the BIA has the authority to administratively close a case over the objection of either party, the BIA dismissed DHS's appeal.[130] Examining its precedent regarding administrative closure, the BIA held that immigration judges and the BIA have the authority to administratively close a case if it is appropriate under the circumstances.[131] Even if a party opposes administrative closure, the BIA reasoned that it is "improper to afford absolute deference to a party's objection."[132] By doing so, the BIA explicitly overruled *Gutierrez-Lopez*.[133]

In reaching this decision, the BIA discussed the authority held by DHS, the immigration judge, and the BIA, grounding its analysis in its past holdings relating to prosecutorial discretion and administrative closure.[134] Based on their particular roles within the immigration court process, the parties have specific opportunities when they may choose to

125. *Id.* at 688.
126. *Id.* at 689.
127. *See id.* at 696.
128. *See id.*
129. *Id.*
130. *Id.* at 689–90.
131. *Id.* at 690.
132. *Id.*
133. *Id.*
134. *See id.* at 690–95.

exercise discretion.[135]

Representing the country's interest in enforcing its immigration laws, DHS has discretion to initially decide how and against whom it will enforce the law.[136] DHS has the sole authority to initiate removal proceedings against an individual through personal service of a Notice to Appear and through filing the Notice to Appear with the immigration court.[137] DHS uses prosecutorial discretion when it decides what charges to file and whether or not to initiate removal proceedings.[138]

Much of DHS's discretion shifts to the immigration judge once it files the Notice to Appear with the immigration court.[139] Only the immigration judge has the authority to decide whether an individual is removable or deportable under the grounds charged in the Notice to Appear and whether the individual has any way to avoid removal.[140] Because immigration judges are the ultimate decisionmakers, they have the power to "regulate the course of the hearing and to take any action consistent with applicable law and regulations as may be appropriate."[141] As long as immigration judges abide by the law, they can use their independent legal judgment and discretion.[142]

Because of the large amount of discretion that rests with immigration judges and the BIA, either adjudicatory body may use that discretion to administratively close a case.[143] The BIA reasoned that, "[d]uring the course of proceedings, an Immigration Judge or the Board may find it necessary or, in the interests of justice and fairness to the parties, prudent to defer further action for some period of time."[144] Immigration judges may grant a continuance to allow the parties to take additional action while keeping the case open and active on the docket.[145] A continuance may be granted at the request of one of the parties for good cause shown or at the instance of the

135. *Id.* at 694.
136. *Id.* at 690–91.
137. *Id.* at 691.
138. *Id.* at 694.
139. *Id.* at 691.
140. *Id.* (citing 8 C.F.R. § 1003.14(a) (2011)).
141. *Id.* (citing 8 C.F.R. §§ 1240.1(a)(1)(iv), (c)).
142. *Id.* (citing 8 C.F.R. § 1003.10(b)).
143. *Id.* at 692.
144. *Id.* at 691.
145. *Id.*

immigration judge.[146] But a continuance is practical only for actions that the judge expects the parties to complete within a reasonable and short amount of time.[147] Consequently, if the immigration judge finds that the case depends on some sort of relevant action or event that is "outside the control of the parties or the court and may not occur for a significant or undetermined period of time," a continuance may not be appropriate.[148]

After reviewing cases in which it had previously dealt with administrative closure, the BIA focused on its decision in *Gutierrez-Lopez*.[149] The BIA noted that *Gutierrez-Lopez* "has been interpreted as investing a party, typically the DHS, with absolute veto power over administrative closure requests."[150] However, the BIA noted that the *Gutierrez-Lopez* rule "directly conflicts with the delegated authority of the Immigration Judges and the Board and their responsibility to exercise independent judgment and discretion in adjudicating cases and to take any action necessary and appropriate for the disposition of the case."[151]

Because immigration judges have the authority to act on their own and despite a party's objection, the absolute power of DHS to veto a request for administrative closure would contradict judges' discretionary powers.[152] The BIA reasoned that an immigration judge cannot "abdicate the responsibility to exercise independent judgment and discretion" where one party has objected to a continuance or a motion to reopen.[153] Consequently, an immigration judge should not allow a party's objection to act as an absolute bar when the judge believes that administrative closure would be the best option.[154] Finding that a DHS objection cannot act as an absolute bar to administrative closure, the BIA overruled *Gutierrez-Lopez* and held that immigration judges and the BIA may administratively close a case where appropriate as an exercise

146. *Id.* at 691–92.
147. *Id.* at 692.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 693.
152. *Id.*
153. *Id.* at 694.
154. *Id.*

of their independent judgment and discretion.[155]

Although immigration judges may grant administrative closure over the objection of DHS, this exercise of discretion in no way interferes with DHS's ability to exercise its own powers.[156] Administrative closure is simply a tool available to immigration judges and the BIA to enable them to better regulate and manage their cases and dockets.[157] The BIA reasoned that "[a]lthough administrative closure impacts the course removal proceedings may take, it does not preclude the DHS from instituting or pursuing those proceedings and so does not infringe on the DHS's prosecutorial discretion."[158] Because administrative closure does not enable immigration judges to enter into DHS's sphere of authority, it is a power that judges can legally exercise.[159]

In overruling *Gutierrez-Lopez*, the BIA emphasized that a grant of administrative closure does not function as a final order in a case.[160] Rather, it takes a particular case off of the immigration judge's active calendar.[161] The case itself remains open and unresolved, and either party may file a motion to re-calendar the case on the active docket.[162]

Although *Avetisyan* overruled *Gutierrez-Lopez* in finding that DHS counsel cannot block administrative closure simply by objecting, it does not give immigration judges complete freedom.[163] It only allows them to bypass the objection of DHS in some circumstances,[164] and it is these restrictions dictated by the BIA, as discussed in the next section, that will ultimately limit the ability of immigration judges to fully exercise their discretion.

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See id.*
160. *Id.* at 695.
161. *Id.*
162. *Id.* (citing Bravo-Pedroza v. Gonzales, 475 F.3d 1358, 1360 (9th Cir. 2007)).
163. *See id.* at 696.
164. *See id.*

C. Limits and Restrictions on Discretion over Administrative Closure

Despite the BIA's recognition of the independent judgment and discretion of immigration judges, the BIA did not provide them absolute freedom to decide when administrative closure would be appropriate. Instead, the BIA listed six factors in *Avetisyan* that judges must consider in evaluating whether administrative closure would be appropriate:

(1) The reason the party is seeking administrative closure;
(2) The basis behind the opposition to administrative closure, if any;
(3) The likelihood of the immigrant's success on any application or petition he has filed with USCIS outside of the immigration court system;
(4) How long the administrative closure is expected to last;
(5) If any party is responsible for delay in the case; and
(6) The expected ultimate outcome of the immigration court proceedings once the case is re-calendared.[165]

Giving examples to guide future judges, the BIA explained that it may be proper to administratively close a case where the individual has shown that "she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for naturalization"[166]—an example mirroring the facts of Avetisyan's case. The BIA emphasized that administrative closure would not be appropriate where the request is based on:

(1) "[A] purely speculative event or action," such as a possible revision of the law;
(2) An event that is certain to occur but not within a reasonable period of time, such as over several years in the case of a remote family-based visa in the fourth-preference category; or
(3) An event or action on which the course of an immigrant's proceedings is contingent, such as the

165. *Id.*
166. *Id.*

outcome of a pending criminal case.[167]

In providing these six factors and examples of when administrative closure would not be appropriate, the BIA underscored that immigration judges must evaluate the totality of a particular case.[168]

Examining the facts of Avetisyan's case, the BIA determined that administrative closure was appropriate and dismissed DHS's interlocutory appeal.[169] Avetisyan was the beneficiary of a visa petition filed by her husband, who had obtained his citizenship.[170] This visa petition appeared approvable on its face.[171] Even though the visa petition had not yet been adjudicated by USCIS, DHS had not identified any reason that the visa petition might be eventually denied.[172] Further, Avetisyan had not caused the delay in USCIS's adjudication of her petition.[173] She appeared eligible to adjust her status, and this eligibility "warrant[ed] a termination of these proceedings."[174]

Avetisyan marked a change in the way that immigration judges are able to manage their dockets by giving them the authority to administratively close a case in certain situations, even if DHS objects.[175] While it is true that *Avetisyan* did increase the discretionary authority of immigration judges,[176] it worked no real change in the immigration court system because of the specific and strict limitations that the BIA placed on immigration judges' exercise of discretion.

III. THE LIMITED LEGACY OF *AVETISYAN*

Avetisyan did change the ability of immigration judges to manage the flow of cases on their dockets,[177] but only to a limited extent. In attempting to give immigration judges more

167. *Id.*
168. *Id.*
169. *Id.* at 697.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 690.
176. *Id.*
177. *See id.* at 694.

authority over their workload, *Avetisyan* only underscores the larger problems caused by the nature of the system. *Avetisyan* is simply not powerful enough to address these problems; larger, more comprehensive reforms are needed.

This section begins with an analysis of the small, yet beneficial, accomplishments of *Avetisyan*. It then discusses the weaknesses of *Avetysian*, examining how the engrained attitudes of immigration judges and DHS, coupled with the limitations placed on immigration judges' discretion to grant administrative closure, will ultimately diminish *Avetisyan*'s ability to leave a lasting imprint. Finally, this section concludes with a discussion of the larger systemic problems in immigration court that *Avetisyan* cannot resolve and an analysis of possible solutions.

A. Avetisyan*'s Small Accomplishments*

Although the BIA placed significant limitations on when immigration judges may exercise discretion and administratively close a case,[178] the fact that *Avetisyan* overruled DHS's absolute veto power under *Gutierrez-Lopez* is a notable achievement. The overruling of *Gutierrez-Lopez* will likely have small, but beneficial, impacts on the course of immigration proceedings in the future. First, *Avetisyan* has strengthened the power of immigration judges to exercise their own independent judgment regarding what would be best for a particular case. Second, the ability of judges to override a DHS objection will require DHS to substantiate any objections with valid, legal concerns. Lastly, with their new power to grant administrative closure over DHS objections, immigration judges will force DHS to play a more active role in managing and supervising its cases, instead of relying on the regular and systematic dockets of judges.

1. Increased Immigration Judge Power

By overruling *Gutierrez-Lopez*, *Avetisyan* buttressed the power of immigration judges to exercise their own independent judgment and discretion in deciding what would be the best

178. *See id.* at 696.

course of action for each particular case.[179] Now that DHS cannot prevent administrative closure simply by objecting, immigration judges are expected—and encouraged—to look at the particular facts and circumstances of each case to determine the best option.[180]

By preventing DHS from blocking administrative closure, *Avetisyan* has placed the decision-making power back where it belongs—in the hands of immigration judges. The power to determine the proper course of action is best held by immigration judges, who are tasked with evaluating both sides of a case—the arguments of DHS and those of the immigrant.[181] As a neutral party, a judge is uniquely positioned to further the country's dual-pronged immigration laws: removing illegal aliens from the country while providing immigration relief to those who are eligible.[182] DHS, in contrast, has a one-sided view that leads it to focus on removing those who violate immigration law.[183] In their zealous pursuit of that goal, DHS counsel often fail to see the other side of the story—factors that qualify immigrants for relief and make them eligible to avoid deportation. Thus, by preventing DHS from acting as the decision-maker, *Avetisyan* has reinforced the neutral decision-making authority of immigration judges.[184]

Further, because immigration judges can now more easily administratively close a case, *Avetisyan* has enabled them to regain some control over their dockets and calendars. In a memorandum encouraging the use of administrative closure to reduce caseloads, the Chief Judge noted that "[a]dministrative closure under the standards set forth in *Avetisyan* provides judges with a powerful tool to help them manage their dockets, by helping to focus resources on those matters that are ripe for resolution."[185] Administrative closure gives judges more control over their calendars, allowing them to move cases through the

179. *Id.* at 690.
180. *Id.*
181. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).
182. *See id.*
183. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. Rev. 475, 486–89 (2013) (explaining that DHS and its sub-agency Immigration and Customs Enforcement (ICE) prosecute removal cases in immigration court).
184. *See Avetisyan*, 25 I. & N. Dec. at 694.
185. O'Leary, Memorandum, *supra* note 23, at 4.

court system and obtain resolutions more quickly.[186]

Any means of increasing the speed with which cases are resolved will have several beneficial effects. Faster resolution will give more force to the nation's immigration laws. For those who are eligible for immigration relief, faster movement through the court system will enable faster acquisition of legal status, saving time, money, and stress. Finally, faster resolution of cases has the potential of partially reducing the suffocating caseloads of immigration judges.[187]

2. Decreased DHS's Blocking Power

One of *Avetisyan*'s greatest strengths is that it has significantly chipped away at DHS's ability to block an immigration judge's independent discretion. DHS can no longer block an otherwise meritorious motion for administrative closure simply by objecting to it.[188] An objection to an alien's request for administrative closure must be reasonable and substantiated.[189]

Although *Avetisyan* does not specifically require that DHS give legally-supported reasons for objections, this conclusion logically follows from the BIA's reasoning. In overturning *Gutierrez-Lopez*, the BIA noted that it was essential for immigration judges to consider both sides of the argument: the reasons for and against administrative closure.[190] Consequently, unless DHS puts forth a substantial reason as to why a case should not be administratively closed, if the facts of the case support administrative closure, the immigration judge will likely overlook any unsubstantiated objections. Unreasonable objections will no longer serve as obstacles to administrative closure[191] and will likely serve only to reduce DHS counsel's credibility in the eyes of the judge.

3. Requires Active Participation by DHS

Finally, by removing cases from their active calendars,

186. *See id.*
187. *See id.*
188. *Avetisyan*, 25 I. & N. Dec. at 696.
189. *See id.* at 694.
190. *Id.* at 696.
191. *See id.* at 694.

immigration judges will place pressure on DHS to more actively manage its cases to carry out its goal of enforcing the immigration laws. As long as a case remains on a judge's active docket, it will appear every few months for another hearing until an ultimate resolution is reached.[192] This automatic and systematic calendaring brings the case to the regular attention of both the immigration judge and DHS without any effort by DHS to keep track of the case itself, ensuring perpetual reconsideration of the case by the immigration court until an event permanently removes it from the docket.[193]

Administrative closure, however, changes the way that a case moves through the immigration court system.[194] If the immigration judge grants administrative closure, the case will be removed from the active calendar.[195] It will no longer be brought before the immigration judge and DHS on a regular basis.[196] Once a case has been administratively closed, it can be returned to the immigration judge's active calendar only upon a motion by either the immigrant or DHS.[197]

Before *Avetisyan*, DHS did not have to keep as close an eye on immigration cases. As long as DHS objected to administrative closure, there was no way for a case to be taken off the immigration judge's active calendar until the case was ultimately resolved.[198] However, now that immigration judges may administratively close a case, the burden will fall on DHS to track any changes or events in a particular case after it has been administratively closed. From there, DHS will have to take the extra step to request that a case that has previously been administratively closed be re-calendared on the immigration judge's active docket.[199]

Ideally, an expanded use of administrative closure will force DHS to spend more time on active case management, thereby increasing its overall knowledge of a particular case.

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192. *See In re* Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (BIA 1996).
193. *See id.*
194. *Id.*
195. *Id.*
196. *See id.*
197. Matter of Avetisyan, 25 I. & N. Dec. 688, 695 (BIA 2012).
198. *See* Caplow, *supra* note 6, at 92 (noting that ICE officers and DHS—as well as immigration judges—have little time and incentive to review a particular case and decide to exercise discretion, "instead relying on general information rather than individualized attention").
199. *In re* Gutierrez-Lopez, 21 I. & N. Dec. 479, 480 (BIA 1996).

The more that DHS counsel knows about a particular case, the more DHS counsel and the immigration judge will be able to work towards the ideal resolution. Administrative closure, because it will require more active case management, has the potential of increasing DHS's workload and forcing it to be more selective in initiating removal proceedings against individuals in the first place, forcing DHS to narrow its focus on dangerous or criminally convicted immigrants instead of those with minor infractions. An increased workload will potentially increase DHS's compliance with its current enforcement and removal priorities. Although the necessity for DHS to be more actively involved in case management may initially increase its work load, stretching its already tight resources to the limit, this extra work will force DHS to be more judicious in the long run. This potential consequence of the increased use of administrative closure will depend, however, on how readily immigration judges themselves exercise their expanded authority.

B. Restrictions on Immigration Judge Discretion Created by Avetisyan

Despite the inroads *Avetisyan* made in affirming immigration judge authority and decreasing DHS power, it likely will have a minimal impact on the immigration court system and the adjudication of cases in general. One limitation on *Avetisyan*'s impact is the entrenched traditions of both DHS and immigration judges.[200] Additionally, its influence is curbed by the BIA's explicit limitations upon a judge's discretion to grant administrative closure.

1. Entrenched Attitudes of Immigration Judges and DHS

There is little hope that *Avetisyan* will have any major impact because of the adversarial nature of the immigration

200. *See* Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 686 (2006) (implying that immigration courts may have an entrenched, pro-enforcement attitude by noting that "[t]he immigration courts, though now stepping out of the shadow of the immigration enforcement agency, still remain in an enforcement-minded agency").

court system and the calcified views of both immigration judges and DHS counsel alike. With its role as the enforcer and prosecutor of immigration laws, DHS likely will continue to object to immigrants' requests for administrative closure. Even if the objection has no basis and is simply adversarial in nature, a busy immigration judge, who may have several cases on her docket in a single day,[201] may decide it is easier to simply deny the individual's request for administrative closure rather than examine its merits. The fact-specific inquiry required to determine if administrative closure is appropriate necessitates an initial investment of time. Ironically, although administrative closure has the potential to ease their work load, judges may be deterred from granting administrative closure because they may perceive the time necessary for a fact-specific inquiry as creating even more of a backlog.

Additionally, immigration judges may be hesitant to grant administrative closure because it is solely an administrative tool, not a final resolution.[202] It is possible that an administratively-closed case will be removed from the court's radar and become lost in the system because both immigration judges and DHS counsel lack initiative to systematically review administratively-closed cases. Ultimately, because a final resolution provides certainty, many immigration judges may choose to keep a case on their active dockets in order to guarantee eventual resolution instead of administratively setting cases aside.

2. BIA's Explicit Limitations on Immigration Judge Discretion

More importantly, instead of giving immigration judges great latitude to exercise their discretion, the BIA set forth six factors that judges must consider before granting administrative closure.[203] The BIA deems it appropriate for immigration judges to grant administrative closure only if a specific case meets most of these six factors.[204] Although

201. *See generally* FY 2012 STATISTICAL YEAR BOOK, *supra* note 8, at A1 (reporting that in 2012, a total of 410,753 new cases were received in the nation's fifty-nine immigration courts).

202. *Gutierrez-Lopez*, 21 I. & N. Dec. at 480.

203. Matter of Avetisyan, 25 I. & N. Dec. 688, 696 (BIA 2012).

204. *Id.*

Avetisyan increased the authority of immigration judges, enabling them to overcome a DHS objection, their expanded power was restricted by the BIA in a different way—by requiring them to assess each case under these six specific factors.[205]

One factor the BIA requires judges to consider is "the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings."[206] This requirement essentially asks the immigration judge to determine whether the individual is eligible for any form of immigration relief through USCIS and whether USCIS is likely to approve any such request for relief.[207] Unfortunately, only a small portion of the undocumented immigrant population is eligible for some sort of immigration relief. In 2012, only 28 percent of immigrants who ended up in immigration court were eligible to file an application for relief to avoid deportation.[208] Because administrative closure will only be an option for the small percentage of people in immigration proceedings eligible for immigration relief, not many aliens will be able to benefit from immigration judges' expanded powers.

Further, the BIA has also limited administrative closure by requiring that such discretion be exercised only if an event or action that will affect the immigrant's case is certain to occur within a reasonable period of time.[209] What constitutes a "reasonable period of time" is unclear, and the BIA did little to clarify it in *Avetisyan*.[210] The only example provided by the BIA referenced Avetisyan's situation:

> Considering these factors, it may, for example, be appropriate for an Immigration Judge to administratively close removal proceedings where an alien demonstrates that he or she is the beneficiary of an approved visa petition filed by a lawful permanent resident spouse who is actively pursuing, but has not yet completed, an application for

205. *See id.*
206. *Id.*
207. *Id.*
208. FY 2012 STATISTICAL YEAR BOOK, *supra* note 8, at A2.
209. *Avetisyan*, 25 I. & N. Dec. at 696.
210. *See id.*

naturalization.[211]

Instead, the BIA attempts to define a "reasonable period of time" by noting situations in which administrative closure would not be appropriate because of a long period of time or an uncertain event.[212] Ultimately, the BIA's attempt to define a "reasonable period of time" is flawed by circular reasoning. It states that administrative closure is not appropriate when there is "an event or action that is certain to occur, but not within a period of time that is reasonable under the circumstances (for example, remote availability of a fourth-preference family-based visa)."[213]

Although the BIA does not give any clear direction regarding what constitutes a "reasonable period of time," it implies that a remote or distant event would preclude administrative closure, with the example of the far-off "availability of a fourth-preference family-based visa" as an event that is too remote.[214] Consequently, even those individuals who are guaranteed eventual immigration relief by means of a petition filed by an employer or family member may not benefit from administrative closure if they have been placed in a slow-moving preference category. Instead, these individuals will likely be removed from the country because approval of their pending visa petitions will not occur within a reasonable period of time, and they will lose any chance they had of ever immigrating to the United States legally. As waiting times for other types of visas increase due to greater demand, one wonders where immigration judges and the BIA will draw the line on what constitutes a reasonable amount of time for an event to occur.

C. Deeper Problems Unreachable by Avetisyan *and Potential Solutions*

Ultimately, *Avetisyan* will likely have only a slight impact on the immigration court system, simply because it does not sufficiently empower immigration judges. The major problems do not stem from the limitations on immigration judges'

211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

authority but rather from the nature of immigration proceedings. *Avetisyan* cannot fix the overwhelmed immigration court system and the unfairness it brings; it is merely a temporary solution to a much larger systemic problem.[215] Three major systemic problems that *Avetisyan* cannot reach include: (1) DHS and Immigration and Customs Enforcement's (ICE) failure to follow the President's enforcement priorities; (2) a departure from the administration's priorities caused by local law enforcement involvement in federal immigration law; and (3) the requirement that immigration judges give effect to codified law, not general policy goals.

1. DHS and ICE's Failure to Follow Presidential Enforcement Priorities

Because they have no control over who is brought into their courtroom by a Notice to Appear issued by DHS, immigration judges cannot use *Avetisyan* to limit how many cases are placed on their dockets initially. It is the initiation of proceedings against individuals that creates problems for immigration judges' dockets. *Avetisyan* falls short of bringing complete relief to immigration judges because it cannot influence DHS's choice over whom to prosecute, and due to this disconnect in authority, the number of individuals placed in removal proceedings lies beyond the control of immigration judges.

As a department within the executive branch, DHS and its sub-department, ICE, are tasked with carrying out the policies of the current presidential administration.[216] Because of separation-of-powers limitations, the executive branch cannot create law by passing bills, and it may only affect the way that laws are enforced by adapting its policies to modern needs and

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215. *See* Chi-Yeh, *supra* note 42, at 442–43. Mr. Chi-Yeh further notes that decreasing the "docket load and the backlog of cases within the present immigration legal system" is not the final solution because the "lack of trial fairness and the guarantee of the accused's Constitutional rights in immigration cases will continue to exist within the immigration adjudication system." *Id*. at 464. He argues that the major structural problem causing this unfairness is immigration judges' lack of judicial independence, which stems from the fact that the Attorney General may overturn their decisions at any time. *Id.*

216. *See, e.g.*, *Department Components*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/department-components (last visited Mar. 24, 2013).

the administration's priorities.[217] Consequently, the President and his administration have implemented a policy of prosecutorial discretion to carry out his immigration enforcement goals.[218]

In enforcing immigration law, prosecutorial discretion is applied on two levels: (1) towards categories of people and (2) towards meritorious individuals.[219] Those that benefit from prosecutorial discretion are able to avoid deportation and can often obtain work authorization.[220] One of the benefits of prosecutorial discretion is that it can be used in a wide range of situations, giving it the flexibility to adapt to changing societal beliefs and political priorities.[221] Much of the flexibility comes from the fact that policies can be molded to fit new circumstances without having to go through the time- and resource-consuming processes of notice-and-comment rulemaking or legislative amendments.[222] Prosecutorial discretion further allows agencies like ICE and DHS to focus their limited resources on the most pertinent problems and enables officials to consider humanitarian in addition to legal factors.[223]

Putting forth a pro-immigrant policy, President Obama and DHS have set forth several changes regarding how the current immigration laws will be enforced and which categories of immigrants will be prioritized.[224] In the year preceding *Avetisyan*, the Obama Administration issued two memoranda

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217. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 946 (1983).

218. *See* John Morton, U.S. Dep't of Homeland Sec., Memorandum Regarding Civil Immigration Enforcement: Priorities for the Apprehension, Detention and Removal of Aliens 1 (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [herein-after Morton, Mar. 2, 2011 Memorandum]; John Morton, U.S. Dep't of Homeland Sec., Memorandum Regarding Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 1 (June 17, 2011) [hereinafter Morton, June 17, 2011 Memorandum], *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

219. Shoba Sivaprada Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 246 (2010).

220. *Id.*

221. *Id.*

222. Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIG. L.J. 611, 621 (2006).

223. Wadhia, *supra* note 219, at 244–45.

224. *See* Morton, Mar. 2, 2011 Memorandum, *supra* note 218, at 1; Morton, June 17, 2011 Memorandum, *supra* note 218, at 1.

describing its policies regarding deportation and the enforcement of immigration laws.[225] These memoranda detail the immigration enforcement priorities that ICE is directed to follow.[226]

In the first memorandum, dated March 2, 2001, the Director of ICE set forth the department's priorities for the apprehension, detention, and removal of aliens.[227] At the highest level of priority are aliens who pose a danger to national security, public safety, or border security,[228] including those participating in terrorist activities, those who have been convicted of violent crimes, and those who are involved in gangs.[229] The next priority level targets recent illegal entrants in order to maintain control over illegal immigration at the border.[230] Lastly, situated on the lowest priority level are "[a]liens who are fugitives or otherwise obstruct immigration controls," a category that covers all other undocumented immigrants.[231]

On June 17, 2011, in a second memorandum, the Director of ICE outlined the manner in which ICE shall exercise prosecutorial discretion in relation to its enforcement priorities as described in the previous memorandum.[232] The June memorandum sets forth nineteen factors that ICE officers should consider when exercising prosecutorial discretion.[233] Those factors include, but are not limited to, an individual's length of time in the United States, his criminal history, age, family ties, and whether any family members need special medical treatment.[234] The memorandum emphasizes, however, that ICE officers should consider whether or not to extend prosecutorial discretion on a case-by-case basis and should strive to conform to ICE's enforcement and removal priorities.[235]

The two 2011 ICE memoranda encourage DHS counsel to

225. *Id.*
226. *Id.*
227. Morton, Mar. 2, 2011 Memorandum, *supra* note 218, at 1.
228. *Id.*
229. *Id.* at 1–2.
230. *Id.* at 2.
231. *Id.* at 2–3.
232. Morton, June 17, 2011 Memorandum, *supra* note 218, at 1.
233. *Id.* at 4.
234. *Id.*
235. *Id.*

strive for what is best for each immigrant by adjudicating each case fairly and focusing enforcement on dangerous individuals.[236] But, unfortunately, looking at the overwhelming immigration court case load, it appears that such policy changes were not understood—or at least not followed—by several ICE officers and DHS counsel.[237] Numerous individuals were either arrested and put into immigration court or have remained in immigration court despite their inclusion in one of the categories deserving of discretion under the two ICE memoranda.[238]

The problem solidifies once an individual is placed in removal proceedings because there are—with rare exceptions—only two outcomes: (1) deportation or removal from the United States or (2) the approval of immigration relief that enables the alien to remain in the United States with legal status.[239] Professor Motomura noted that, once removal proceedings are initiated, "the range of possible outcomes narrows further because discretion in this adjudication phase is also severely limited."[240] For example, in 2009, out of a total of 232,212 individuals in removal proceedings, 185,314 of the cases resulted in deportation or voluntary departure.[241] Only 46,898—or about 20 percent—involved individuals who were fortunate enough to benefit from immigration relief.[242] Given the overwhelming majority of cases that result in removal from the country and the fact that the BIA has suggested that administrative closure is only appropriate in cases where individuals are eligible for some form of immigration relief,[243] the percentage of cases in which administrative closure can have any meaningful effect covers only a small piece of the case backlog.

The problem facing the immigration court system is not the inability of immigration judges to exercise their own

236. Morton, Mar. 2, 2011 Memorandum, *supra* note 218, at 1; Morton, June 17, 2011 Memorandum, *supra* note 218, at 1.

237. *See* FY 2012 STATISTICAL YEAR BOOK, *supra* note 8, at A1.

238. *See id.*

239. *See* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil—Criminal Line*, 58 UCLA L. REV. 1819, 1839–40 (2011) [hereinafter Motomura, *Discretion that Matters*].

240. *Id.* at 1839.

241. *Id.*

242. *See id.*

243. *See* Matter of Avetisyan, 25 I. & N. Dec. 688, 696 (BIA 2012).

independent judgment; rather, the problem is that too many individuals are put into removal proceedings by DHS in the first place.[244] Although DHS and ICE are supposed to exercise prosecutorial discretion before initiating removal proceedings against individuals, to a large extent, they are not following the guidance and policies laid out in the two memoranda issued by ICE Director Morton.[245] Perhaps there needs to be more oversight of how individual ICE and DHS officials exercise prosecutorial discretion to make sure that it is being exercised uniformly and in appropriate circumstances.[246] Instead, because DHS is struggling to target the proper individuals under its enforcement priorities, more immigrants are placed into immigration court than should be, and the caseload continues to build, augmenting the underlying problems.

2. Enforcement Problems and Civil Rights Violations by Local Police

The involvement of state and local law enforcement in the enforcement of immigration law compounds DHS's inability to uniformly follow its own enforcement priorities and increases immigration court caseloads. The active participation of state and local law enforcement officials augments the number of individuals arrested and put into immigration court in three ways: (1) variation in enforcement and DHS oversight causes wide national disparities; (2) local and state officials often lack sufficient training to properly enforce immigration laws; and (3) overzealous local and state enforcement, combined with inadequate training, often leads to unlawful arrests and racial profiling.[247] Not only do these three issues raise constitutional concerns, they increase the pressure on the immigration court system as more individuals are issued Notices to Appear by DHS even though they legally should not have been arrested in the first place.[248] As ICE and DHS rely on state and local

244. *See generally* FY 2012 STATISTICAL YEAR BOOK, *supra* note 8, at A1.

245. *See generally* Morton, Mar. 2, 2011 Memorandum, *supra* note 218; Morton, June 17, 2011 Memorandum, *supra* note 218.

246. *See* Wadhia, *supra* note 219, at 297.

247. *See* Kristina M. Campbell, *Imagining a More Human Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS U. PUB. L. REV. 415, 437 (2010).

248. Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 643–

officials to arrest illegal aliens, national enforcement priorities are again subverted. *Avetisyan*, with is power confined to the immigration court context, cannot fix the pressures put on the system by state and local law enforcement arrests and subsequent prosecution by DHS.

The growth of state and local involvement in the enforcement of immigration law resulted from the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.[249] Seeking to increase the enforcement of federal immigration law, IIRIRA enabled the federal government to enter into agreements with state and local law enforcement agencies to help enforce immigration law and detain illegal immigrants.[250] IIRIRA was codified in INA § 287(g), and the delegation of federal immigration enforcement authority to these local and state agencies is often referred to as the "§ 287(g) program."[251] State and local involvement in the enforcement of immigration law further intensified when, following the attacks of September 11, 2001, Attorney General John Ashcroft asked local agencies to help enforce federal immigration laws under § 287(g) in an effort to prevent terrorism.[252]

Under § 287(g), there are two different mechanisms by which state or local law enforcement officials can participate in the enforcement of federal immigration law.[253] The first enables local and state officials to enforce immigration laws in connection with routine law enforcement actions, such as traffic stops and criminal arrests.[254] State and local law enforcement officials regularly and systematically consult the FBI criminal database, which contains the civil immigration status of individuals, for every traffic stop or arrest that they make.[255] If implementing the first mechanism, state and local law enforcement officials receive training regarding

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46 (2004).

249. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1367 (1999).

250. *Id.*

251. Campbell, *supra* note 247, at 437.

252. April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1156–57 (2004).

253. Campbell, *supra* note 247, at 436.

254. *Id.*

255. Stumpf, *supra* note 30, at 389.

immigration law similar to—but not as extensive as—the training received by ICE officials.[256] Under the second mechanism, instead of checking an individual's immigration status themselves, state and local law enforcement officials simply allow ICE to check the status of any immigrants booked for local or state criminal violations.[257]

Both models of state and local enforcement pose problems.[258] Widespread variation among state and local agencies in the enforcement of immigration laws creates inconsistencies in immigration enforcement across the nation.[259] Even if DHS has been providing adequate oversight, some argue that improper implementation of the § 287(g) program springs from "overzealous local law enforcement agencies."[260] Regardless of where the differences come from, the ultimate result of state and local involvement has been a lack of uniformity in immigration enforcement.[261]

The second concern regarding state and local involvement is that improper or inadequate training leads to unlawful arrests that place individuals in immigration court proceedings.[262] Even though § 287(g) mandates that state and local law enforcement officials be trained in proper immigration enforcement, neither the statute nor the regulations specify how much training these officials must complete.[263] Consequently, local and state officials' understanding of immigration law and its complexities varies substantially.[264]

The improper arrest of immigrants often raises Fourth Amendment search and seizure and probable cause issues, and some fear that local law enforcement officials' lack of proper training is the culprit.[265] Regardless of their level of immigration training, some officials seem to forget that the Fourth Amendment applies to the enforcement of all types of law—not just criminal laws—leading to many unlawful

256. Campbell, *supra* note 247, at 437.
257. *Id.* at 436.
258. *See id.* at 437.
259. *Id.*
260. *Id.* at 440.
261. *Id.* at 437.
262. McKenzie, *supra* note 252, at 1161.
263. *Id.*
264. *See id.*
265. *Id.*

immigration detentions.[266] From there, even if the arrest is unlawful, it is very hard for immigrants to get out of immigration court and avoid deportation unless they qualify for some sort of immigration benefit.[267]

The third concern regarding local and state involvement in the enforcement of immigration laws is the possibility that overzealous enforcement may lead to racial profiling.[268] Racial profiling would violate civil rights and constitutional protections.[269] With all of immigration law's complexities, proper enforcement requires significant training, and inadequate training can lead to "[e]thnically selective enforcement and the targeting of individuals solely on the basis of their ethnicity."[270] Because state and local officials often lack a complete understanding of the complexities of immigration law, they "are more likely to use race or ethnicity as a substitute for reasonable cause," exacerbating the current enforcement problems through inadvertent—or even intentional—racial profiling.[271]

Some question whether the involvement of state and local law enforcement under § 287(g) truly strengthens national security.[272] Perhaps as a result of inadequate DHS oversight or overzealous local enforcement, local and state officials may be detaining the least dangerous immigrants—"the undocumented, yet law-abiding aliens, working in various industries in the United States"[273]—instead of those who are real threats. Although the goal is to strengthen homeland security, state and local law enforcement involvement in immigration enforcement adds to the number of cases on immigration judges' dockets, and the limited scope of *Avetisyan* can do nothing to stop the trend.

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266. *Id.*
267. *See* Motomura, *Discretion that Matters*, *supra* note 239, at 1839–40.
268. McKenzie, *supra* note 252, at 1162.
269. Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 371, 373 (2002).
270. *Id.* at 373–74.
271. *Id.* at 374.
272. McKenzie, *supra* note 252, at 1164–65.
273. *Id.* at 1165.

3. Requirement that Immigration Judges Apply Law, Not Policy

Even though DHS is not following the immigration enforcement guidelines set out by the current administration, immigration courts must enforce the law and cannot force DHS to follow these policies.[274] Immigration judges, due to the nature of the immigration court system, only have the power to determine whether an individual is removable or not.[275] The disconnect between the power to enforce the law—but not immigration policy—weakens the reach of *Avetysian*.

If we hope to create a unified body of law and policy, as one commentator has suggested, the enforcement priorities outlining the exercise of prosecutorial discretion must be codified.[276] Until DHS undergoes the extensive notice-and-comment rulemaking process, immigration judges will be unable to enforce presidential priorities and hold ICE and DHS accountable to their mandates.[277] Ultimately, in order to solve the woes of the immigration courts and the enforcement of immigration laws in general, there will need to be large-scale immigration reform, either through Congressional action to amend the law or through significant changes to current regulations by the responsible agency. Notwithstanding all of *Avetisyan*'s inroads, once individuals have been placed in removal proceedings, the authority of immigration judges is simply too limited to make any substantial dent in solving the problems facing the immigration court system.

CONCLUSION

Despite all of its shortfalls, *Avetisyan* remains a small step toward larger improvement in the immigration court system. It remains to be seen how far its influence will extend, but given the larger and deeper problems within the system of immigration law, its impact likely will be small. For now, though, because of its holding that immigration judges have the authority and discretion to grant administrative closure

274. *See* 8 U.S.C. §§ 1229a(a)(3), (c)(1)(A) (2006); 8 C.F.R. §§ 1240.1(a)(1)(i), 1240.11 (2011).
275. *See id.*
276. Wadhia, *supra* note 219, at 295.
277. *See id.*

over the objection of DHS counsel, at least a few more immigrants will be able to rest assured knowing that an immigration judge has taken their cases off the active docket so they may obtain legal means to remain in this country. Hopefully, *Avetisyan* will stand as one small beacon of justice in immigration law and spark a move to greater consistency in immigration enforcement. It cannot be forgotten that "[w]hat we do in the law governing immigration speaks volumes about who we are as a nation, not just as a nation that respects the rule of law, but also as a nation that has at its core a deep and fundamental sense of justice."[278]

278. Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT'L L. 139, 140 (2008).