NOTES

LIGHTEN THE LOAD: WHY THE GOVERNMENT SHOULD BEAR THE BURDEN OF PROVING THE VALIDITY OF AN ALIEN'S APPELLATE WAIVER DURING A REMOVAL ORDER COLLATERAL ATTACK[1]

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1. This Note uses the term "alien" in line with U.S. statutory language. *See infra* note 15.

INTRODUCTION

The journey for some migrants to the United States' southern border can involve over a month of travel, thousands of miles, thousands of dollars, countless perils, and even death.[2] So many people risk this perilous journey to reach the United States in order to escape the dangers of gang violence, brutal political regimes, and a lack of economic opportunity.[3] In fiscal year 2022, there were over two million encounters at the southern border, a historic high.[4] That trend continued in fiscal year 2023, with over 2.4 million encounters at the southern border.[5] Over five hundred thousand of the migrants in fiscal year 2022 came from the Northern Triangle countries: El Salvador, Guatemala, and Honduras.[6] These historic numbers motivate an ongoing national discussion at the intersection of human rights, immigration policy, politics, economics, and law.[7]

Getting to the southern border, while certainly the most dangerous part,[8] is only one of the difficult hurdles over which migrants

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2. *See* Nicholas Kulish, *What It Costs to Be Smuggled Across the U.S. Border*, N.Y. TIMES (June 30, 2018), https://www.nytimes.com/interactive/2018/06/30/world/smuggling-illegal-immigration-costs.html [https://perma.cc/KEC5-USF5].

3. *See* Terry Collins, *'New Normal': High Number of Migrants Crossing Border Not Likely to Slow*, USA TODAY (Sept. 30, 2023, 6:34 AM), https://www.usatoday.com/story/news/nation/2023/09/30/how-many-migrants-crossed-the-border-2023-mexico-venezuela-2022/70979085007/ [https://perma.cc/H7HJ-77QT] ("Parts of the world, especially Latin America, ... have worsened and some governments have been dictatorial.").

4. Conor Finnegan, *Where Historic Number of Migrants Is Coming From and Why: Analysis*, ABC NEWS (Dec. 14, 2022, 5:10 PM), https://abcnews.go.com/Politics/data-historic-number-migrants-reaching-us-borders-reasons/story?id=95198577 [https://perma.cc/F92Q-2NUB].

5. *See* Press Release, House Committee on Homeland Security, Factsheet: Final FY23 Numbers Show Worst Year at America's Borders—Ever (Oct. 26, 2023), https://homeland.house.gov/2023/10/26/factsheet-final-fy23-numbers-show-worst-year-at-americas-borders-ever/ [https://perma.cc/4XZ3-C5FR].

6. *See* Finnegan, *supra* note 4.

7. *See, e.g.*, Aaron Blake, *A Big Moment for Elusive Immigration Reform*, WASH. POST (Dec. 11, 2023, 1:22 PM), https://www.washingtonpost.com/politics/2023/12/11/immigration-reform-biden-congress/ [https://perma.cc/6UFY-RY7T].

8. The U.S. southern border is considered the world's deadliest migration land route, with over six hundred documented deaths and disappearances occurring in 2022, a trend that is getting worse. *US-Mexico Border World's Deadliest Migration Land Route*, INT'L ORG. MIGRATION (Sept. 12, 2023), https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route [https://perma.cc/SUR5-XVGT].

must maneuver.[9] Once individuals arrive at the border, they face another hurdle in navigating the complex U.S. immigration system, including waiting for an available appointment to present a claim for asylum.[10] If claiming asylum, migrants could end up waiting months or even years for a hearing before an immigration court, but often without success: there are currently 1.6 million people waiting for an asylum hearing with only about 25,000 being granted asylum annually.[11]

The U.S. immigration system is backlogged as a result of unprecedented border crossings in recent years and the number of migrants seeking asylum.[12] In the first half of fiscal year 2023, the U.S. Department of Homeland Security conducted flights removing more than 48,000 individuals.[13] This number does not include the more than 450,000 expulsions that U.S. Customs and Border Protection conducted during the same period at the southern border.[14]

If an alien decides to enter the country without inspection or admission, there may be another challenge faced since neither the governing Immigration and Nationality Act (INA) section 240(b)(4) nor the U.S. Constitution guarantee an alien[15] the right to be

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9. For additional examples of hurdles that immigrants face, see *Immigrants Overwhelmingly Say They and Their Children Are Better Off in the US, but Many Also Report Substantial Discrimination and Challenges, a New KFF/Los Angeles Times Survey Reveals*, KAISER FAM. FOUND. (Sept. 18, 2023), https://www.kff.org/racial-equity-and-health-policy/press-release/immigrants-overwhelmingly-say-they-and-their-children-are-better-off-in-the-us-but-many-also-report-substantial-discrimination-and-challenges-a-new-kff-los-angeles-times-survey-reveals/ [https://perma.cc/EEB3-WBPC].

10. *See* Eileen Sullivan & Steve Fisher, *At the End of a Hard Journey, Migrants Face Another: Navigating Bureaucracy*, N.Y. TIMES (Mar. 10, 2023), https://www.nytimes.com/2023/03/10/us/politics/migrants-asylum-biden-mexico.html [https://perma.cc/F4MW-YUUX].

11. *See* Anagilmara Vilchez, *Immigration Backlog Has a U.S. Asylum-Seeker Feeling Like He's 'Imprisoned in a Country,'* NBC NEWS (June 2, 2023, 3:23 PM), https://www.nbcnews.com/news/latino/asylum-seekers-are-limbo-years-immigration-backlog-rcna87228 [https://perma.cc/LK4A-33LJ].

12. *See id.*

13. Press Release, U.S. Department of Homeland Security, DHS Conducts Dozens of Removal Flights Every Week (Apr. 27, 2023), https://www.dhs.gov/news/2023/04/27/dhs-conducts-dozens-removal-flights-every-week [https://perma.cc/96H9-8H3X].

14. *Id.*

15. For the purposes of consistency, this Note will utilize the term "alien," which is in line with applicable federal statutes. *See, e.g.*, 8 U.S.C. § 1227(a) (employing the phrase "[a]ny alien ... in and admitted to the United States"). However, there is a growing movement to adjust the vocabulary, including a shift from "alien" to "undocumented noncitizen." Joel Rose, *Immigration Agencies Ordered Not to Use Term 'Illegal Alien' Under New Biden Policy*, NPR

represented by counsel during any subsequent removal hearing.[16] This lack of representation has resulted in much litigation and academic research regarding due process violations and the fairness of the U.S. immigration system.[17] One such area of discussion includes an appellate waiver. During removal hearings, an immigration judge is required to ensure the alien is aware that when they accept the removal order as final, they are also waiving their right to appeal.[18]

While there is much to say about the current state of the U.S. immigration system, this Note focuses on what happens to many aliens when they are subsequently criminally charged with the felony of illegally reentering the United States.[19] When an alien was previously subject to deportation and later indicted on criminal charges of illegal reentry, a provision in 8 U.S.C. § 1326 allows the alien to collaterally attack the underlying removal order if it was fundamentally unfair.[20] In light of the current political conversations surrounding the U.S. immigration system, this Note advocates for ensuring that asylum and removal hearings adhere to due process requirements and recognize the human factors involved, despite the reality that the current political discourse often glosses over these factors.[21]

(Apr. 19, 2021, 2:51 PM), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-polic [https://perma.cc/8K36-J8SX].

16. *See* HOLLY STRAUT-EPPSTEINER, CONG. RSCH. SERV., IF12158, U.S. IMMIGRATION COURTS: ACCESS TO COUNSEL IN REMOVAL PROCEEDINGS AND LEGAL ACCESS PROGRAMS 1 (2022).

17. Access to counsel is discussed in more detail later. *See infra* Part IV.A.

18. *See* Narine v. Holder, 559 F.3d 246, 249-50 (4th Cir. 2009) (citing Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1322 (BIA 2000)).

19. Illegal reentry was not always a felony. The first statute prohibiting illegal reentry was enacted in 1929, and it was not until 1976 that it became a felony. *See* Thomas B. Haynes, Comment, *Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry*, 48 U. CHI. L. REV. 83, 83 n.1 (1981).

20. 8 U.S.C. § 1326(d) (providing the elements required for an alien's successful collateral attack).

21. For example, Trump was criticized for using dehumanizing language regarding immigrants during his 2024 campaign. *See* Jacob Rosen, Kathryn Watson & Olivia Rinaldi, *Trump Blasted for Saying Immigrants Are 'Poisoning the Blood of Our Country*,*'* CBS NEWS (Dec. 18, 2023, 7:43 PM), https://www.cbsnews.com/news/trump-immigrants-poisoning-the-blood-of-our-country-reaction/ [https://perma.cc/4XFH-844K]. This is not a unique issue to America—European countries are also grappling with similar issues and rhetoric. *See, e.g.*, Rachel Shabi, *How Immigration Became Britain's Most Toxic Political Issue*, GUARDIAN (Nov. 15, 2019, 1:00 AM), https://www.theguardian.com/politics/2019/nov/15/how-immigration-

This Note discusses the collateral attack process in general but focuses on a current split among the district courts within the United States Court of Appeals for the Fourth Circuit regarding which party (the government or the alien) bears the burden of proving whether an appellate waiver was knowingly and intelligently made.[22] Part I provides necessary background information on immigration removal hearings and the rights of aliens during such hearings. Part II provides background information on 8 U.S.C. § 1326 collateral attacks and the general process involved. Part III examines the current split among district courts in the Fourth Circuit regarding the appellate waiver burden of proof and argues that the government should bear this burden, as it already does in some criminal plea agreements. Part IV explores the potential impacts of changing the burden of proof to the government during collateral attack proceedings and other potential efforts to mitigate these impacts.

I. BACKGROUND INFORMATION

Before discussing the subject of collateral attacks and appellate waiver burden of proof, it is important to gain a general understanding of the procedures and rules involved in removal hearings, asylum hearings, and the immigration system generally. While this background attempts to address these areas, there are of course more in-depth analyses available on each subject.[23] This background is an attempt to provide the necessary information to better understand the collateral attack process and the burden of proof argument.

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became-britains-most-toxic-political-issue [https://perma.cc/QF5Y-B9RL].

22. The phrase "knowingly and intelligently" is used in many legal contexts, but most notably when referring to the standard used to determine whether a defendant's waiver of the right to counsel was proper. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966).

23. For a broad overview of the immigration process from the government's perspective, see generally *Executive Office for Immigration Review*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir [https://perma.cc/5E3Z-XV99].

A. Immigration Removal Hearings and Procedures

The first area of focus in this background is on removal proceedings. Immigration removal proceedings are initiated when the Department of Homeland Security (DHS) provides an alien with a Notice to Appear (NTA) and files the charging documents in an immigration court.[24] The NTA informs the alien of when and where to appear, the alleged immigration law violations that are charged, and the consequences of failing to appear.[25] An immigration judge presides over the proceedings, including removal and asylum hearings.[26] During immigration proceedings, DHS attorneys represent the United States, and aliens may provide their own counsel "at no expense to the Government."[27] The federal government is not constitutionally required to provide an alien with an attorney during these proceedings because immigration proceedings are civil and not criminal proceedings.[28]

The first appearance of the alien before the court is at the initial hearing, where the immigration judge explains the procedure to the alien, advises them of their rights, and allows the alien to plead the specific facts at issue in their case.[29] If necessary, the immigration judge may schedule a later hearing if the alien requests to apply for relief or protection (voluntary departure, asylum, et cetera).[30] The immigration judge may also grant any application presented for relief or protection from removal at this initial proceeding.[31] The

24. U.S. DEP'T OF JUST., FACT SHEET, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 2 (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/dl [https://perma.cc/7DDN-QCC9].

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* U.S. CONST. amend. VI ("In all *criminal* prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence." (emphasis added)); Erica Bryant, *Immigrants Facing Deportation Do Not Have the Right to a Publicly Funded Attorney. Here's How to Change That.*, VERA INST. (Feb. 9, 2021), https://www.vera.org/news/immigrants-facing-deportation-do-not-have-the-right-to-a-publicly-funded-attorney-heres-how-to-change-that [https://perma.cc/TB28-HYWM] (emphasizing that in 77 percent of immigration court cases in 2019, the alien had no legal representation).

29. U.S. DEP'T OF JUST., *supra* note 24.

30. *Id.* at 5-6.

31. *Id.*

findings and rulings of the immigration judge are subject to the Board of Immigrations (BIA) on appellate review.[32]

B. Duties of Immigration Judges and Rights of Aliens

There has been much litigation and conversation regarding the procedural and constitutional rights of aliens during asylum hearings.[33] The rules and procedures surrounding asylum hearings are governed by the INA, with most provisions contained in 8 U.S.C. chapter 12.[34]

The Department of Justice's Executive Office for Immigration and Review outlines the general procedures for an application of asylum, including that the application (Form I-589) must be filed within fifteen days of the first hearing before an immigration judge and that the deadline is waivable by the immigration judge for good cause.[35] During an asylum hearing, the immigration judge has a duty to develop the record, meaning that judges "have an affirmative duty to assist and work with applicants to ensure that asylum or withholding of removal is granted to those who qualify ... based on their individual circumstances."[36] Immigration judges have an especially important duty during immigration proceedings since an alien is often unrepresented,[37] lacks an understanding of the

32. Daniela Mondragón, *Finality of a Conviction: A Noncitizen's Right to Procedural Due Process*, 49 ST. MARY'S L.J. 519, 522 (2018) (citing 8 C.F.R. § 208.14(c)(1)). This Note primarily deals with discretionary relief in the form of asylum or voluntary departure, but there are several other forms of discretionary relief that an alien may be eligible for, including withholding of removal, Convention Against Torture relief, cancellation of removal, adjustment of status, and termination of proceedings. *See* U.S. DEP'T OF JUST., *supra* note 24, at 2-5. This Note mainly discusses both asylum and voluntary removal as part of the framework of collateral attacks.

33. *See, e.g.*, Stephen Meili, *Asylum Under Attack: Is It Time for a Constitutional Right?*, 26 BUFF. HUM. RTS. L. REV. 147, 148 (2020) (asking the question: "Is it time for the Supreme Court to recognize a constitutional right to seek asylum?").

34. *See* 8 U.S.C. ch. 12; *see also Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum [https://perma.cc/QFP4-LR9U].

35. *See* 8 C.F.R. § 1208.3-.5 (2023).

36. Quintero v. Garland, 998 F.3d 612, 626 (4th Cir. 2021) (citing S-M-J-, 21 I. & N. Dec. 722, 729 (BIA 1997)).

37. *See* Bryant, *supra* note 28.

English language,[38] and has little to no understanding of the U.S. immigration system.[39]

Ultimately, during a hearing, if the immigration judge determines that the alien is not eligible for discretionary relief, a removal (deportation) order will be entered.[40] Part of the immigration judge's duty to develop the record is to ensure that the alien understands their right to appeal a removal order.[41] An alien's acceptance of the removal order as final and waiver of a right to appeal must be made knowingly and intelligently, and the immigration judge is required to ensure the waiver is made as such.[42] This Note focuses on an alien's acceptance of a removal order as final, or the desire to appeal the removal order as it relates to a later collateral attack.

C. Collateral Attack of an Underlying Removal Order

The issue of a collateral attack on an underlying removal order arises after the removal order has already been issued—for instance, when an alien who was previously subject to a removal order has illegally returned to the U.S. and is now facing criminal charges for illegal reentry.[43] 8 U.S.C. § 1326 concerns illegal reentry

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38. In 2018, 90 percent of immigration court hearings required a translator, and 75 percent required Spanish interpretation. Maya P. Barak, *Can You Hear Me Now? Attorney Perceptions of Interpretation, Technology, and Power in Immigration Court*, 9 J. ON MIGRATION & HUM. SEC. 207, 208 n.2 (2021).

39. *See Quintero*, 988 F.3d at 627 (noting there is a duty to develop the record in all immigration hearings, but an emphasis is placed on immigration judges with pro se aliens). Immigration judges' duty to develop the record is similar to that of Administrative Law Judges (ALJs) in some respects but differs greatly from the role of judges in most other legal proceedings. For example, during a hearing on disability benefits, an ALJ "generally has an affirmative obligation to develop the administrative record" because the hearing is non-adversarial. Perez v. Chater, 77 F.3d 41, 47 (2d Cir. 1996) (citing Echevarria v. Sec'y of Health & Hum. Servs., 685 F.2d 751 (2d Cir. 1982)).

40. *See* U.S. DEP'T OF JUST., *supra* note 24.

41. *See, e.g.*, Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1323 (BIA 2000) (emphasizing that the Board of Immigrations Appeals is "more likely to find a valid waiver where an Immigration Judge has adequately conveyed both the alien's appeal options and the finality associated with waiving appeal").

42. *See* Narine v. Holder, 559 F.3d 246, 249 (4th Cir. 2009) ("An alien's waiver of his appellate rights must be 'knowingly and intelligently made.'" (quoting Rodriguez-Diaz, 22 I. & N. Dec. at 1322)).

43. *See, e.g.*, United States v. Castro-Aleman, No. 3:23-CR-51, 2023 WL 4937304, at *1, *3 (E.D. Va. Aug. 2, 2023) (explaining that the defendant-alien was charged with Illegal Reentry After Felony Conviction, violating 8 U.S.C. § 1326(a) and (b)(1)).

and describes the procedures, punishments, and option for collateral attack during cases involving reentry of removed aliens.[44] Because an underlying removal order must be in place for illegal reentry, an alien may collaterally attack, or challenge the validity of, a prior removal order under the Due Process Clause.[45] A successful collateral attack that invalidates an underlying removal order usually results in dismissal of the current criminal indictment against the alien for illegal reentry.[46]

This Note argues that the government should bear the burden of proving that an appellate waiver was knowingly and voluntarily made, as is the standard in some federal circuits regarding appellate waivers as part of plea agreements.[47] Additionally, this Note will discuss the impacts of this burden of proof on the United States' current immigration system and potential ways to mitigate those impacts, including mandatory access to counsel during immigration hearings and specific language used by immigration judges during hearings.[48]

II. USE OF COLLATERAL ATTACKS AND APPELLATE WAIVERS

Having provided background information regarding the immigration system and asylum generally, Part II of this Note will discuss how collateral attacks are utilized within the immigration context and waiving the right to appeal. Collateral attacks come up as a

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44. 8 U.S.C. § 1326 draws from a long line of federal statutes addressing illegal reentry, the first of which was enacted in 1929. For a concise history of these provisions, see generally Haynes, *supra* note 19.

45. *See* 3C AM. JUR. 2d *Aliens and Citizens* § 2472 (2024). For an explanation of collateral attacks in general, see *Collateral Attack*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/collateral_attack [https://perma.cc/88BG-LFKJ]. *See also* U.S. CONST. amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law.").

46. *See, e.g.*, *Castro-Aleman*, 2023 WL 4937304, at *2 ("Mr. Castro-Aleman moves the Court to dismiss his Indictment on the basis that the removal order underlying his prior deportation is invalid.").

47. This Note discusses the frameworks applied in the Second, Fifth, Seventh, and Eighth Circuit Courts. *See infra* Part III.C.

48. This is not an exhaustive list of ideas or solutions, but rather several that seem to best address any such burden shift to the government in the collateral attack context.

defense to an illegal entry charge,[49] and the process by which an alien may successfully collaterally attack a previous removal order is described in 8 U.S.C. § 1326(d):

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
>
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.[50]

A. The Role of an Appellate Waiver

An appellate waiver impacts the requirements of a successful collateral attack under § 1326(d) in two ways: first, if an alien waived their right to appeal a removal order, then they cannot demonstrate that they exhausted the administrative remedies available;[51] second, if an alien's waiver was improper, then they may be excused from having to meet the first and second elements of § 1326(d).[52]

If an alien knowingly and intelligently waives their right to appeal, the immigration judge's removal order is final and to "be implemented immediately," and no other court has jurisdiction as to that decision.[53] This process—asking an alien if they want to waive the right to appeal—is not such a sinister or misleading interaction; often if there is no eligibility for discretionary relief, an

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49. *See* 3C AM. JUR. 2d, *supra* note 45 ("An alien charged with illegal reentry after removal has a due process right to collaterally attack the underlying removal order because the prior removal order serves as a predicate element of the illegal reentry after removal offense." (footnotes omitted)).

50. 8 U.S.C. § 1326(d).

51. *See* 3C AM. JUR. 2d, *supra* note 45, § 2473.

52. *See* United States v. Reyes-Bonilla, 671 F.3d 1036, 1043 (9th Cir. 2012) ("If [defendant] did not validly waive his right of appeal, the first two requirements under § 1326(d) will be satisfied.").

53. *See* Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1322 (BIA 2000) (first citing Shih, 20 I. & N. Dec. 697 (BIA 1993); and then citing 8 C.F.R. §§ 3.3(a)(1), 3.39 (2000)).

alien may just want to leave the country as soon as possible.[54] However, this should be more than a procedural check-the-box type interaction, since the implications of whether there was a valid or invalid waiver can be of great importance to the success of a subsequent collateral attack.

B. Knowingly and Intelligently Waiving a Right to Appeal

Because an appellate waiver in the immigration context may have significant consequences,[55] the immigration judge plays an important role in ensuring that the alien is knowingly and intelligently waiving their right to appeal the removal decision. During a removal hearing, upon the decision of the immigration judge to deport the alien, the immigration judge should ask the alien if they wish to appeal the order or accept it as final.[56] This is a pivotal part of the removal hearing and has been the subject of much litigation concerning how the immigration judge should ask this question and what specific language is or is not satisfactory.[57]

What is more, as emphasized in the introduction and background sections, many aliens during these types of hearings are unrepresented and require the assistance of an interpreter.[58] This reality only adds to the importance of the language used by the immigration judge when they are informing the alien of their right to appeal

54. *See, e.g.*, United States v. Castro-Aleman, No. 3:23-CR-51, 2023 WL 4937304, at *2 (E.D. Va. Aug. 2, 2023) (noting how the defendant requested immediate departure once he believed he was ineligible for voluntary departure).

55. Referring to both legal and practical implications. For the legal implications of a waiver, see *supra* Part II.A. For the practical implications, see *infra* Part IV.B.

56. *See Rodriguez-Diaz*, 22 I. & N. Dec. at 1322 (emphasizing that § 240(c)(4) of the Immigration and Nationality Act "requires that an alien be notified of his or her right to appeal if an Immigration Judge orders removal").

57. *See, e.g.*, *id.* (discussing the use of the term "final" as a "shorthand expression commonly used by Immigration Judges" and whether that was sufficient to meet the statutory requirement to inform the alien of their right to appeal the removal order).

58. *See* Joseph Darius Jaafari, *Immigration Courts Getting Lost in Translation*, MARSHALL PROJECT (Mar. 20, 2019, 6:00 AM), https://www.themarshallproject.org/2019/03/20/immigration-courts-getting-lost-in-translation [https://perma.cc/Q8BJ-E6G2] (describing how immigration judges have difficulty securing enough translators and have been required to utilize translators over the phone during proceedings).

and whether the alien wishes to waive that right, something federal courts have emphasized in the immigration context.[59]

III. WHICH PARTY SHOULD BEAR THE BURDEN OF PROOF

Having explained the importance of an appellate waiver and the role it plays during an alien's collateral attack, this next section will examine the current split among district courts in the Fourth Circuit as to which party should bear the burden of proving there was or was not a valid waiver of the alien's right to appeal during a previous removal hearing.

There are currently multiple district courts in the Eastern District of Virginia that place the burden of proving the invalidity of an appellate waiver on the alien,[60] whereas multiple district courts in Maryland have adopted the opposite burden requirement and placed the burden on the government to prove the waiver was valid.[61] The Eastern District of Virginia and District of Maryland decisions each relied on different circuit court decisions to support their holdings.[62]

A. Arguments for the Alien to Bear the Burden of Proof

Notably, there is strong support in precedent for the argument that the alien bears the burden of proving that their previous

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59. *See, e.g.*, *Rodriguez-Diaz*, 22 I. & N. Dec. at 1322 ("Asking an unrepresented alien whether he or she accepts a decision as 'final' does not necessarily alert the alien to the fact that the question concerns the right of appeal or that an affirmative answer will be construed as an irrevocable waiver of that right.").

60. *See* United States v. Castro-Aleman, No. 3:23-CR-51, 2023 WL 4937304, at *4 (E.D. Va. Aug. 2, 2023) (noting specifically that the Fourth Circuit has not directly decided this question); United States v. Romero-Diaz, No. 3:22-CR-177, 2023 WL 2775144, at *5 (E.D. Va. Apr. 4, 2023) ("Romero-Diaz bears the burden to demonstrate the invalidity of his waiver."); United States v. Garcia, No. 3:19-CR-29, 2019 WL 4195345, at *10 (E.D. Va. Sept. 4, 2019) ("[I]t is the defendant's burden to prove that the waiver is invalid.").

61. *See* United States v. Miranda-Rivera, 206 F. Supp. 3d 1066, 1070 n.2 (D. Md. 2016); United States v. Merino-Hernandez, 46 F. Supp. 3d 602, 607 (D. Md. 2014) ("The government bears the burden of showing that an alien's waiver of his rights is knowing and intelligent.").

62. The *Castro-Aleman* case in the Eastern District of Virginia cited *United States v. Soto-Mateo*, 799 F.3d 117, 120-22 (1st Cir. 2015) and *Richardson v. United States*, 558 F.3d 216, 219-22 (3d Cir. 2009). *See Castro-Aleman*, 2023 WL 4937304, at *4. The *Miranda-Rivera* case in the District of Maryland had a string cite that eventually led back to *United States v. Reyes-Bonilla*, 671 F.3d 1036 (9th Cir. 2012). *See Miranda-Rivera*, 206 F. Supp. 3d at 1069.

appellate waiver was invalid during a subsequent collateral attack, especially when considering the burden that is already placed on the alien during immigration hearings.[63]

Multiple circuit courts have determined that the alien bears the burden throughout a § 1326(d) collateral attack and must demonstrate each element of the statute.[64] Additionally, Congress has statutorily allocated a large portion (with notable exceptions discussed in the next section) of the burden of proof for immigration proceedings to the alien.[65] This includes proving eligibility for discretionary relief, previous lawful admission, and evidentiary burdens in most instances during immigration hearings.[66]

With this backdrop, the Eastern District of Virginia district judge in *United States v. Garcia* decided that while the Fourth Circuit had yet to address the question of which party bears the burden of proving a valid appellate waiver in the collateral attack context, the unpublished Fourth Circuit decision in *United States v. Lopez*—combined with the First and Third Circuit opinions in *United States v. Soto-Mateo* and *Richardson v. United States*—was sufficient precedent to support placing the burden on the alien.[67] The court made this decision despite the fact that the alien waived his appellate right via a provision he signed on the I-851 form,[68] which was written in English, a language with which the alien claimed to have limited understanding and proficiency.[69] Additionally, the alien provided the court with testimony from a Dr. Middlebrooks, who

63. *See Romero-Diaz*, 2023 WL 2775144, at *5 (citing United States v. Segura-Virgen, 390 F. Supp. 3d 681, 691 (E.D. Va. 2019), to explain "that a defendant bears the burden of establishing that he has met the elements of § 1326(d) by a preponderance of the evidence").

64. The First, Third, and Tenth Circuit Courts have explicitly stated that the alien bears the burden of proof. *See Soto-Mateo*, 799 F.3d at 121; *Richardson*, 558 F.3d at 222; United States v. Arevalo-Tavares, 210 F.3d 1198, 1200 (10th Cir. 2000).

65. *See* Patrick J. Glen, In re L-A-C*: A Pragmatic Approach to the Burden of Proof and Corroborating Evidence in Asylum Proceedings*, 35 GEO. IMMIGR. L.J. 1, 3 (2020) (citing to the language of 8 U.S.C. § 1229(a)(c) and 8 C.F.R. § 1240.8).

66. *See id.*

67. *Garcia*, No. 3:19-CR-29, 2019 WL 4195345, at *10 (E.D. Va. Sept. 4, 2019) (first citing United States v. Lopez, 667 F. App'x 837, 838 n.1 (4th Cir. 2016); then citing *Soto-Mateo*, 799 F.3d at 120-22; and then citing *Richardson*, 558 F.3d at 219-22).

68. The I-851 form is also known as the Notice of Intent form, specifically Notice of Intent to Issue a Final Administrative Deportation Order. *See* 8 C.F.R. § 1238.1(b) (2023).

69. *Garcia*, 2019 WL 4195345, at *11.

determined that the alien was proficient in English at "the lowest possible rating."[70]

In *United States v. Castro-Aleman*, another Eastern District of Virginia district judge came to a similar conclusion that the alien's burden to prove their waiver was invalid, basing the decision on an analysis akin to that in *Garcia*.[71] This was despite an ambiguous line of questioning in which it was difficult to see how the defendant could have realistically met the burden to prove their waiver was invalid.[72] The court determined that the burden rested on the alien and that he failed to meet this burden despite the record reflecting that when asked whether he wished to accept the immigration judge's decision as final or to appeal to a higher court, he replied only by saying, "No."[73]

Notably, the district judge in *United States v. Romero-Diaz* ultimately concluded that the alien met his burden of proving the invalidity of his appellate waiver.[74] The court based this decision on Romero-Diaz's own testimony during his removal proceedings that he did not speak or read English sufficiently, and determined that his waiver on the I-851 form was not knowingly or intelligently made.[75] Despite still putting the burden of proof on the alien, the court in *Romero-Diaz* at least applied a more common-sense approach in concluding that the alien lacked sufficient English proficiency to waive his right of appeal via an I-851 form.[76]

These three cases—*Casto-Aleman*, *Garcia*, and *Romero-Diaz*—encapsulate the approach taken by district courts in the Eastern District of Virginia, which places the burden of proof upon the alien to prove the invalidity of their appellate waiver.[77] Ultimately, this

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70. *Id.* at *11-12 (noting that the doctor's testimony regarding the alien's lack of English language proficiency in 2019 was not adequate to prove the alien's English proficiency in 2010 when the I-851 was signed).

71. No. 3:23-CR-51, 2023 WL 4937304, at *4 (E.D. Va. Aug. 2, 2023).

72. *See id.* at *2.

73. *Id.* at *4. ("[T]he question regarding the appeal was admittedly compound and thus potentially ambiguous.").

74. No. 3:22-CR-177, 2023 WL 2775144, at *8 (E.D. Va. Apr. 4, 2023).

75. *Id.*

76. *See id.*

77. Although each case does not approach the question in the same exact manner, the frameworks and precedent used are overlapping and similar enough to categorize each of these cases as the same for purposes of this argument.

Note advocates for the opposite approach: placing the burden on the government, as described in the following section.

B. Arguments for the Government to Bear the Burden of Proof

District courts in the District of Maryland have come to the opposite conclusion and place the burden of proving the validity of the alien's appellate waiver squarely on the United States government.[78] These decisions ultimately drew support from Ninth Circuit precedent in *United States v. Reyes-Bonilla*,[79] along with other Ninth Circuit cases like *United States v. Ramos*.[80] The Ninth Circuit unquestionably places the burden of proving the validity of an underlying appellate waiver in the collateral attack context squarely on the government, noting that the court "'indulge[s] every reasonable presumption against waiver' and do[es] 'not presume acquiescence in the loss of fundamental rights.'"[81]

The Ninth Circuit framework, adopted by the district courts in Maryland, considers realities that are often at issue in immigration removal hearings.[82] For example, in *United States v. Merino-Hernandez*, the court noted that the alien "understood very little English and the Notice of Intent was not fully translated for him."[83] Additionally, when faced with contradictory evidence as to which portions were translated for the alien, the court leaned on the side of the alien and determined the government had not met its burden of proof.[84]

Similarly, in *United States v. Miranda-Rivera*, the district court found that the alien's waiver was invalid, and the government's burden was not met after reviewing the record from the immigration hearing in which the immigration judge "failed to provide Mr.

78. *See* United States v. Miranda-Rivera, 206 F. Supp. 3d 1066, 1070 n.2 (D. Md. 2016); United States v. Merino-Hernandez, 46 F. Supp. 3d 602, 607 (D. Md. 2014) ("The government bears the burden of showing that an alien's waiver of his rights is knowing and intelligent.").

79. 671 F.3d 1036, 1043 (9th Cir. 2012) ("The government bears the burden." (quoting United States v. Ramos, 623 F.3d 672, 680 (9th Cir. 2010))).

80. 623 F.3d at 680.

81. *Id.* (quoting United States v. Lopez-Vasquez, 1 F.3d 751, 753 (9th Cir. 1993)).

82. This is not to say that the district courts in the Eastern District of Virginia ignored these realities: in each of the previously discussed cases, the courts were aware of the impacts of the alien being pro se and not proficient in English.

83. 46 F. Supp. 3d at 608.

84. *See id.*

Miranda Rivera with information [the judge] was required to provide under federal law," depriving the alien of the opportunity to make an informed and intelligent waiver.[85]

Importantly, the Maryland courts also referenced the Fourth Circuit's language in *Narine v. Holder* to support the contention that the government bears the burden of proof.[86] While *Narine* does not explicitly assign a burden of proof, the language used by the Fourth Circuit ultimately can be used to support the idea that the government bears the burden.[87] The Fourth Circuit emphasized that "[t]he Government's arguments strain credulity," and that "[the court] cannot accept the Government's contention that Narine demonstrated a clear understanding of the consequences of accepting voluntary departure."[88] The court's high level of scrutiny towards the government—and its ultimate rejection of the government's attempts to prove validity of the waiver—suggests that the court placed the burden on the government.[89]

C. The Government Should Bear the Burden

The United States Court of Appeals for the Fourth Circuit should clear up the confusion in its district courts and extend the language of *Narine* to clearly assign the burden of proof to the government.[90]

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85. 206 F. Supp. 3d 1066, 1070-71 (D. Md. 2016). Notably, the alien was in great fear of the MS-13 gang if he returned to El Salvador, testimony that would have likely been sufficient to grant him asylum in the United States had he been informed of this eligibility by the immigration judge. *Id.* at 1071.

86. *See Merino-Hernandez*, 46 F. Supp. 3d at 607 (citing to *Narine* after asserting "[t]he government bears the burden of showing that an alien's waiver of his rights is knowing and intelligent"). The footnote for this statement also cites to the Ninth Circuit in *Reyes-Bonilla*. *Id.* at 607-08 n.7 (citing United States v. Reyes-Bonilla, 671 F.3d 1036, 1043 (9th Cir. 2012)). It is important to note that the Fourth Circuit's holding in *Narine* does not explicitly assign the burden of proof, which is why the district courts have come to opposite conclusions on this issue. *See* Narine v. Holder, 559 F.3d 246, 250 (4th Cir. 2009).

87. *See Narine*, 559 F.3d at 250.

88. *Id.*

89. *See id.* at 251 ("Asking an unrepresented alien whether he or she accepts a decision as 'final' does not necessarily alert the alien to the fact that the ... answer will be construed as an irrevocable waiver of that right." (quoting Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1322 (BIA 2000))).

90. At least one of the district courts is aware of the silence in the Fourth Circuit as to this question and the differing stances taken by other district courts. *See* United States v. Castro-Aleman, No. 3:23-CR-51, 2023 WL 4937304, at *4 (E.D. Va. Aug. 2, 2023) ("[T]he Fourth Circuit has thus far been silent as to which party bears the burden.").

This conclusion is supported by policy arguments that are specific to the immigration context, as well as analogous waivers in criminal plea agreements.

One such policy argument that supports the government bearing the burden is the necessity of court-provided measures to assist aliens who are unrepresented and do not understand the English language well.[91] The fact that many aliens are unrepresented in removal or asylum hearings[92] is an important consideration when determining which party should bear the burden of proof in a subsequent collateral attack.

The Fourth Circuit emphasized certain considerations that are unique to the immigration context in *Narine* by citing a Board of Immigration Appeals (BIA) decision, *In re Rodriguez-Diaz*: "Where an alien is unrepresented, the need for an explicit explanation of a waiver of appeal rights is especially important."[93] Several of the referenced cases from the district courts in both Virginia and Maryland have similar fact patterns involving unrepresented aliens, aliens with little English language understanding, or both. The courts often acknowledged these challenging circumstances, regardless of to which party they assigned the burden of proof.[94]

Drawing upon similarities to waivers in the criminal plea bargain context can be helpful to support the argument that the government should bear the burden of proof in the removal order context. The Fourth Circuit approaches the review of a defendant's waiver of their right to appeal in a plea agreement context slightly differently than other circuit courts. The Fourth Circuit is concerned with determining whether the waiver was knowingly and intelligently made but evaluates the issue with "reference to the totality of the

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91. *See* Barak, *supra* note 38, at 217.

92. *See* Bryant, *supra* note 28.

93. *Narine*, 559 F.3d at 250-51 (citing *Rodriguez-Diaz*, 22 I. & N. Dec. at 1322); *see also id.* ("[T]he meaning and significance of this shorthand expression may not be apparent to the unrepresented alien.").

94. *See Castro-Aleman*, 2023 WL 4937304, at *1 (noting that the defendant appeared before the immigration judge pro se); United States v. Romero-Diaz, No. 3:22-CR-177, 2023 WL 2775144, at *3 (E.D. Va. Apr. 4, 2023) (pointing out that the heart of the issue was whether the alien, with little English language ability, understood the untranslated waiver he was signing); United States v. Miranda-Rivera, 206 F. Supp. 3d 1066, 1068 (D. Md. 2016) (noting that the defendant "appeared without counsel before an immigration judge" during the underlying removal hearing).

circumstances."[95] While this standard provides district judges with the ability to examine the particular facts of each case, this Note contends that the standard utilized by the Second and Eighth Circuits is a better fit within the immigration removal hearing context.

In *United States v. Andis*, the Eighth Circuit clearly articulated which party had the burden of proof in the criminal plea agreement context: "[T]he burden of proof is on the Government to demonstrate that a plea agreement clearly and unambiguously waives a defendant's right to appeal."[96] Similar to the duty of immigration judges, district court judges are required to "ensure that the defendant understands the host of rights that she is foregoing by pleading guilty" and may accept the plea "[o]nly upon finding that the defendant is entering her guilty plea knowingly and voluntarily."[97]

Additionally, in *Andis*, the Eighth Circuit adopted the Second Circuit's view that "while waivers of appellate rights are generally valid, these waivers 'are to be applied "narrowly" and construed "strictly against the Government."'"[98] Furthermore, the Eighth Circuit has articulated a catch-all type review regarding a plea agreement waiver: "We will not enforce an 'otherwise valid waiver if to do so would result in a miscarriage of justice.'"[99]

The Second Circuit's decision involved the application of a framework from United States Supreme Court and sister circuit decisions that involved the question of whether the defendant's plea agreement containing a waiver of appellate right was valid based on allegations of ineffective assistance of counsel.[100] While

95. United States v. Blick, 408 F.3d 162, 169 (4th Cir. 2005) (quoting United States v. General, 298 F.3d 389, 400 (4th Cir. 2002)).

96. 333 F.3d 886, 890 (8th Cir. 2003).

97. Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 350 (2015) (citing FED. R. CRIM. P. 11(b)).

98. *Andis*, 333 F.3d at 890 (quoting United States v. Hernandez, 242 F.3d 110, 113 (2d Cir. 2001)).

99. United States v. Sisco, 576 F.3d 791, 796 (8th Cir. 2009) (quoting *Andis*, 333 F.3d at 891).

100. *See Hernandez*, 242 F.3d at 112-14 (first citing Strickland v. Washington, 446 U.S. 668, 688 (1984); then citing Hill v. Lockhart, 474 U.S. 52, 57-58 (1985); then citing United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995); and then citing Jones v. United States, 167 F.3d 1142, 1145 (7th Cir. 1999)).

there is much to say about ineffective assistance of counsel,[101] this Note only seeks to emphasize potential similarities between situations when counsel was ineffective in a plea agreement and when an alien does not have access to counsel in an immigration hearing. Perhaps the plea agreement waiver and burden of proof framework could be helpful in the collateral attack appellate waiver analysis and could justify assigning the burden of proof to the government. Additionally, the Eighth Circuit's emphasis on rejecting an otherwise valid waiver if it would result in a miscarriage of justice could also be helpful in other federal courts if applied to the immigration collateral attack context.[102]

While the Supreme Court has made it clear that removal is not a punishment and therefore immigration proceedings are not criminal in nature,[103] the finality and seriousness of removal certainly necessitates ensuring that an alien in removal proceedings understands the gravity of waiving any right to appeal. The comparison to criminal plea bargains and the burden of proof regarding the validity of a waiver resting on the government is a helpful framework for also assigning the burden in immigration collateral attack situations to the government. The finality and seriousness of a removal order is worthy of applying the justifications that the Second and Eighth Circuits applied to the criminal plea waiver of appeal when assigning the government the burden.

In *Andis*, the Eighth Circuit noted that "the right to appeal is not a constitutional right," but instead one of statute.[104] This applies to both criminal and immigration contexts. The court noted there are valid reasons for both parties (the government and the criminal defendant) to strike an agreement that includes a waiver of the defendant's right to appeal: the government ensures "speed, economy, and finality," and the defendant can "gain concessions from the government."[105] While the context is different, similar mutually beneficial principles apply in immigration removal contexts: the

101. Actual and perceived ineffectiveness of counsel is one reason why providing mandatory access to counsel in immigration hearings will not necessarily solve problems relating to collateral attacks, although it will likely mitigate them substantially.

102. *See Sisco*, 576 F.3d at 796.

103. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The order of deportation is not a punishment for crime.").

104. *Andis*, 333 F.3d at 889.

105. *Id.*

government may remove an alien quickly, with finality, and the alien may avoid lengthy detention and simply leave the country.[106] Ultimately, this Note contends the similar concerns and principles regarding the burden of proof resting with the government in criminal plea bargains is a helpful framework for justifying the same burden applying in the immigration removal and collateral attack context.

IV. MITIGATING THE IMPACTS OF THE GOVERNMENT BEARING THE BURDEN

Today, there is much debate regarding the current immigration system,[107] and this Note is advocating for a potentially unpopular burden shift that could only add stress to the increasingly overwhelmed and overburdened immigration docket. This Note discusses mitigation efforts of any such stress in detail because it is important to acknowledge potential negative externalities from assigning the burden of proof to the government and to discuss additional changes that could help offset these negative impacts.

Considering trends in recent years of increasing encounters on the southern border, long wait times for asylum hearings, and the already heavy burden of immigration on the United States government,[108] lawmakers should implement statutory and policy reforms that would help alleviate the impacts of assigning this appellate waiver burden on the United States. Providing mandatory access to counsel during immigration hearings would potentially alleviate some of the very questions of whether there was a valid waiver of appellate rights. Additionally, encouraging or requiring immigration judges to use specific, unambiguous language during removal

106. *See When Is an Order of Removal From an Immigration Judge Final?*, NOLO (Feb. 16, 2023), https://www.nolo.com/legal-encylclopedia/when-is-order-removal-final.html [https://perma.cc/ZYG2-FGVE] (explaining why some aliens may choose to "self-deport").

107. *See, e.g.*, Camilo Montoya-Galvez, *Could Biden "Shut Down" the Border Now? What to Know About the Latest Immigration Debate*, CBS NEWS (Feb. 1, 2024, 3:48 PM), https://www.cbsnews.com/news/immigration-biden-border-authority/ [https://perma.cc/ZAL6-TQJC].

108. *See supra* notes 7-13 and accompanying text; Colin Brady, Note, *Freedom in the Balance: Procedural Due Process Rights and the Burden of Proof in Detention Hearings in Immigration Removal Proceedings*, 31 WM. & MARY BILL RTS. J. 1241, 1242 (2023) (emphasizing the current situation has "stretched the immigration system beyond an ability to efficiently adjudicate all of the cases that come before it").

and asylum hearings could also decrease the potential for a later collateral attack regarding whether a waiver was knowingly and intelligently made. Finally, aligning the burden of proof across all aspects of the immigration system could help clear up confusion and reduce litigation through predictable applications of the burden of proof during immigration hearings.

A. Mandatory Access to Counsel During Immigration Hearings

As previously mentioned in the introduction and background sections of this Note, a large portion of aliens are unrepresented by counsel during immigration proceedings, including in removal and asylum hearings in which the stakes are quite high,[109] not to mention the lack of English proficiency and struggles of the courts to provide quality translation services.[110] If the Fourth Circuit (along with other circuits) adopted the District of Maryland and the Ninth Circuit's frameworks to impose the burden of proof on the government regarding appellate waivers during collateral attack proceedings, one way to mitigate the impacts of this would be to require mandatory access to counsel during immigration hearings. Because the Sixth Amendment right to counsel does not attach to immigration proceedings, requiring mandatory access to counsel during immigration hearings would be a creature of statute and would require Congress to amend the INA.

In many of the cases discussed in Part III from the Eastern District of Virginia and the District of Maryland, the now criminal defendant was unrepresented by counsel during the removal hearing, and then part of the later collateral attack analysis was whether there was a knowing and intelligent waiver of appellate review.[111] If aliens were guaranteed access to counsel during immigration proceedings, it would be logical to assume that there may be fewer questions later regarding whether there was a knowing and intelligent waiver of appellate rights.[112]

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109. *See supra* notes 16, 27-28 and accompanying text.

110. *See* Jaafari, *supra* note 58.

111. *See* cases cited *supra* Parts III.A-B.

112. *See, e.g.*, *Access to Counsel*, NAT'L IMMIGRANT JUST. CTR., https://immigrantjustice.org/issues/access-counsel [https://perma.cc/ZRH7-NKA7] ("Only 37 percent of all immigrants and 14 percent of detained immigrants go to court with lawyers on their side.... Legal counsel not

Whether there should be required representation during immigration proceedings is not a new question, and there are many different approaches taken, questions asked, and positions advocated regarding the impacts of representation during proceedings.[113] For example, in the years after Congress passed the statute including the collateral attack framework in 1976,[114] there were those who examined whether Congress's intent was to only allow unrepresented aliens the opportunity to utilize the collateral attack framework, arguing that "no due process issue is involved in a section 1326 trial when the defendant was represented by counsel at the deportation hearing."[115] While this Note does not advocate for it, this view represents a line of thinking that requiring representation during immigration proceedings would mitigate due process violations, thus resulting in efficiencies.

B. Encourage or Require Immigration Judges to Use Specific, Consistent Language

Another potential mitigating solution to placing the burden on the government to prove the validity of the appellate waiver would be to provide and require precise language for immigration judges to use during asylum and removal hearings, specifically during any questions regarding the finality of a decision and appellate implications. There are several BIA decisions that highlight the importance of precise language used by immigration judges to properly inform aliens of their rights.[116] Requiring judges to use specific language in

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only ensures that immigrants receive meaningful hearings, but makes immigration court proceedings more efficient.").

113. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (presenting data regarding the efficiency and efficacy of representation during immigration proceedings to inform the national conversation about this issue).

114. For a more in-depth examination of the statutory history, see Haynes, *supra* note 19.

115. *Id.* at 91.

116. *See, e.g.*, Rodriguez-Diaz, 22 I. & N. Dec. 1320, 1323 (BIA 2000) ("[W]e also recognize that, in cases involving unrepresented aliens, more detailed explanations are often needed. Thus, we are more likely to find a valid waiver where an Immigration Judge has adequately conveyed both the alien's appeal options and the finality associated with waiving appeal."). This opinion also supplied an example of appropriate language that could serve as a starting point for immigration judges when seeking specific, precise, and appropriate language for removal and asylum hearings. *See id.* at 1323 n.2.

asylum and removal hearing contexts is in line with an immigration judge's duty to develop the record and inform aliens of their eligibility of discretionary relief.[117] Similar to the previously mentioned solution to provide mandatory access to counsel,[118] this solution could help mitigate allegations of ambiguity regarding an appellate waiver, potentially reducing the number of aliens who are eligible to collaterally attack a removal order.

There are advocates for "liv[ing] with unequal justice" in terms of consistency in asylum adjudications, who note that while there are costs to inconsistent asylum outcomes, the need for "decisional independence" is important and outweighs these costs.[119] It is certainly true that the nation's immigration system benefits from judicial independence and judges' ability to navigate complex human experiences in asylum and removal proceedings.[120] But the need for efficiency and consistency in the immigration system calls for the use of precise language by judges making removal decisions.

A 2007 study of disparities in asylum outcomes highlighted widespread gaps in outcomes depending on the immigration judge assigned: "[O]ne judge is 1820% more likely to grant an application for important relief than another judge in the same courthouse."[121] While acknowledging that there are vast human effects involved in each asylum application denial,[122] the same study emphasized

117. *See* Cordova, 22 I. & N. Dec. 966, 970 (BIA 1999) ("An Immigration Judge has a duty to inform aliens of potential forms of relief for which they are apparently eligible.").

118. *See supra* Part IV.A.

119. Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 415-16 (2007).

120. *See id.* at 419 (citing Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372-75 (2006)).

121. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295-96, 301 (2007) (analyzing nearly four hundred thousand decisions rendered by asylum officers, judges, and BIA appeals during a mix of time periods varying from seven years to four years). More recent research has also demonstrated disparities in outcomes based on which immigration judge was assigned. *See Asylum Success Varies Widely Among Immigration Judges*, TRAC IMMIGR. (Dec. 9, 2021), https://trac.syr.edu/immigration/reports/670/ [https://perma.cc/55SC-Y3YL].

122. For example, Human Rights Watch noted that having a strict border deterrence policy increases the smuggling market and the susceptibility of individuals to kidnapping, extortion, rape, and violence. *See Statement of Human Rights Watch: The Human Cost of Harsh US Immigration Deterrence Policies*, HUM. RTS. WATCH (July 26, 2023, 3:00 PM), https://www.hrw.org/news/2023/07/26/statement-human-rights-watch-human-cost-harsh-us-immigration-deterrence-policies [https://perma.cc/M6KZ-6REQ].

"[t]he fact that the outcome of a case appears to be strongly influenced by the identity or attitude of the officer or judge to whom it is assigned is particularly discomfiting in asylum cases."[123] With asylum being such a consequential decision,[124] increasing the use of standardized language for certain parts of an asylum or removal hearing could help address parts of the disparities in outcomes.

Additionally, when the Biden administration sought to speed up the asylum process to address the growing backlog that occurred during the COVID-19 pandemic through the use of the "Dedicated Docket,"[125] the rate of successful asylum decisions decreased from 52 percent in fiscal year 2022 on the regular asylum docket to 28 percent on the "Dedicated Docket."[126] Based on the increased border crossings and applications for asylum in recent years,[127] efficiency is an important and laudable priority. Any policy change shifting the burden of proof regarding an appellate waiver could potentially impede efficiency, but requiring and providing specific language for judges to use when they explain the appellate waiver is one mitigating effort that could offset any impacts on efficiency.

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123. *See* Ramji-Nogales et al., *supra* note 121, at 302.

124. Generally, if an individual is denied asylum, they are not eligible to apply again, unless they can "demonstrate that there are changed circumstances which affect [their] eligibility." *Questions and Answers: Affirmative Asylum Eligibility and Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-frequently-asked-questions/questions-and-answers-affirmative-asylum-eligibility-and-applications [https://perma.cc/P4DH-RNDG].

125. The "Dedicated Docket" is meant to expedite the asylum process for families arriving at the border, with a goal of having a decision within three hundred days after the hearing is set. *5,000 Immigrants Assigned to Biden Administration's New "Dedicated Docket" for Asylum Seeking Families*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/657/ [https://perma.cc/UKK2-C2CS].

126. *Speeding Up the Asylum Process Leads to Mixed Results*, TRAC IMMIGR. (Nov. 29, 2022), https://trac.syr.edu/reports/703/ [https://perma.cc/WUB2-9F2B]. Additionally, as discussed in the previous section regarding mandatory access to counsel as another mitigating effort, the same report noted that representation during asylum proceedings resulted in success rates two and a half times higher than in those of unrepresented applicants (49 percent success versus 18 percent).

127. *See* Collins, *supra* note 3.

C. Statutorily Defining the Burden of Proof in Various Immigration Contexts

Another solution to help offset negative impacts of assigning the burden of proof as to the validity of appellate waivers to the government would be to statutorily assign the burden of proof during immigration asylum and removal proceedings to the maximum extent possible to avoid any confusion as to who bears the burden. Currently, there are statutory and common law rules assigning the burden of proof on the alien or the government in different contexts.[128]

There is ambiguity as to which party bears the burden during various aspects of detention, removal, asylum, and other immigration procedures.[129] While this Note has largely argued for the government to bear the burden in the collateral attack context regarding an appellate waiver, in general, the entire immigration process could benefit from Congress updating the statutory authority to clearly assign the burden of proof to the appropriate party, removing any such doubt and reducing potential ambiguities that the courts are left to address.[130]

CONCLUSION

While much of the national conversation currently focuses on reforming the United States' immigration system,[131] there are

128. "The Government has the burden of proving that an alien, who was previously admitted to the United States, is deportable. However, the alien bears the burden of proof in most other contexts." Glen, *supra* note 65, at 3 (footnote omitted). There are other circuit splits regarding whether there are due process violations for requiring the alien to bear the burden of proof in a removal hearing. Additionally, during other aspects of detention of noncitizens, the applicable statutes do not assign the burden of proof to either the government or the defendant-alien. *See* Brady, *supra* note 108, at 1243-47.

129. *See* Brady, *supra* note 108, at 1247 ("Overall, the four sources of statutory authority to detain noncitizens are silent on which party explicitly bears the burden of proof in a detention determination.").

130. *See id.* at 1248 ("To resolve the ambiguity created by the statutory and regulatory framework of immigration detention, [immigration judges] and the BIA have repeatedly found it necessary to read requirements into the statutes, including which party bears the burden of proof.").

131. At the time of writing this Note, immigration reform has taken center stage within the national political conversation. Both sides of the aisle are calling for reforms as border crossings reach all-time highs, governors and mayors are grappling with an influx of

important procedural changes that Congress and courts could implement to help ensure aliens' claims for asylum and other discretionary relief receive proper and thorough adjudication. This Note focused on the district courts within the Fourth Circuit and contended that they should align with the Ninth Circuit and assign the burden of proof to the government during collateral attack proceedings regarding whether an alien's appellate waiver was valid.

While the position of this Note may seem contrary to calls to make the immigration system more efficient and limit the number of asylum seekers,[132] the United States must ensure that immigrants are treated fairly and afforded appropriate due process. Immigration will likely be a problem for generations to come, both practically and politically.[133] With that awareness, the government must do its part to ensure that due process rights and values are enshrined in the immigration system, and part of that is to ensure that if appellate waivers are involved, aliens have knowingly and intelligently agreed to such a waiver. If there is any doubt, the burden should be on the government to prove the validity of such a waiver, not the alien.

Jimmy Garner[*]

migrants, and Congress is tying immigration reform to foreign policy spending priorities of the Biden Administration. *See* Blake, *supra* note 7.

132. *See, e.g.*, Jon Baselice, *Calling on Congress: Fix America's Broken Immigration System*, U.S. CHAMBER COM., (Jan. 20, 2023), https://www.uschamber.com/immigration/calling-on-congress-fix-americas-broken-immigration-system [https://perma.cc/CP22-7G87] (emphasizing the need to curb illegal immigration and increase access to legal immigration, especially given workforce needs).

133. *See, e.g.*, Marcela Valdes, *Why Can't We Stop Unauthorized Immigration? Because It Works*, N.Y. TIMES MAG. (Oct. 5, 2023), https://www.nytimes.com/2023/10/01/magazine/economy-illegal-immigration.html [https://perma.cc/XHK7-2JRD].

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