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Leave the Door Open: Mental Incompetency and the Case for a Clear Standard of Equitable Tolling in Immigration Cases

Claire M. Wheeler

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Leave the Door Open: Mental Incompetency and the Case for a Clear Standard of Equitable Tolling in Immigration Cases

Claire M. Wheeler*

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I. INTRODUCTION

Imagine a man with severe mental disabilities. This man is in the custody of immigration officials seeking to deport him from the United States. He has not worked for a number of years due to his disability and cannot afford an attorney. The man was given a list of legal clinics that could represent him for free, but they have too many clients and cannot take his case. His family (if he has any) is unable to cope with his disabilities and refuses to assist him. In any case, they cannot pay for an attorney either. So when the man goes before the immigration judge to plead his case, he goes alone. Our detainee cannot, of course, represent his own interests with any efficacy. He has no knowledge of immigration law, and his disability prevents him from fully understanding the nature of his circumstances. Unless the court assists him in pursuing his rights, our detainee will have no access to the full and fair proceeding to which he is entitled. The judge assigned to our detainee’s case is extremely overburdened.

In fact, he sees hundreds of detainees per week.¹ So, when our detainee exhibits unusual behavior, the judge does not recognize the signs for what they are and makes no accommodations for him. As a result, our detainee is unlawfully deported from the United States. Some time later, our detainee—now a deportee—reaches out to the United States government to reopen his case. Perhaps he has finally managed to acquire an attorney. But it has now been months (perhaps years) since the judge issued his final order. There is no legal mechanism to get his

¹ An average immigration judge sees over 1500 respondents over the course of the year. Daniel Costa, *Overloaded Immigration Courts*, ECON.POLICY INST. (July 24, 2014), <http://www.epi.org/publication/immigration-court-caseload-skyrocketing/>.

case reheard so far past the time of the decision. As a result, his unlawful deportation will stand.

As the hypothetical above illustrates, immigration courts do not automatically provide attorneys to immigration respondents.² Consequently, only 43% of immigration respondents had legal representation in 2010.³ It is also estimated that 15% of immigration detainees suffer from a mental disability,⁴ and Immigration and Customs Enforcement (“ICE”) performed almost 58,000 mental health interventions in 2011.⁵ While precise information is unavailable on how many unrepresented respondents suffer from a mental illness, it is not difficult to conclude from these numbers that a judge sees several respondents every week who are both unrepresented and have a severe mental illness or disability.

A respondent with a mental disorder, without counsel, is at a particular disadvantage in the immigration system,⁶ especially given the presumption of competency in the immigration courts.⁷ His condition may prevent him from properly communicating with the judge, which could then prevent the judge from making accurate findings of fact. In addition, a respondent’s mental illness may prevent him from meeting any burdens of proof that lie with him.⁸ The result is that many individuals with mental illness are likely deported pursuant to incorrect rulings.

In an ideal world, incorrect rulings will be reheard and overturned. However, a mentally disabled respondent likely cannot comply with case review deadlines the same way a fully competent adult can. It may be months or years before he has the capability, either personally or through counsel, to ask for further review of his case. At that point, most deadlines for getting the Board of Immigration Appeals (“BIA”) to take a

² 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2012) (recognizing the right to legal representation of both noncitizens and individuals claiming US citizenship, but indicating that counsel must be obtained at no government expense).

³ US DEP’T OF JUSTICE, *Exec. Office for Immigration Review*, FY 2010 Statistical Year Book G1 (2011).

⁴ HUMAN RIGHTS WATCH & THE ACLU, *DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE U.S. IMMIGRATION SYSTEM 3* (July 2010), https://www.aclu.org/files/assets/usdeportation0710_0.pdf.

⁵ *Detainee Health Care FY 2011*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (May 22, 2014), <http://www.ice.gov/factsheets/dhc-fy11>.

⁶ Even at the best of times, there is no guarantee that the judge will correctly apply the law to the facts at hand, illustrating the need for review mechanisms in the first place. *Holmberg v. Armbrrecht*, 327 U.S. 392, 394 (1946).

⁷ See *Matter of M-A-M-*, 25 I. & N. Dec. 474, 477 (BIA 2011).

⁸ See generally IMMIGRATION LEGAL RE R., *INADMISSIBILITY AND DEPORTABILITY* § 1.5 (3d. ed. 2013), available at http://www.ilrc.org/files/inadmiss_deport-2013-chapter_01.pdf (a useful summary of burdens of proof in immigration law).

second look at the judge's decision have passed. Thus, immigration law is currently in need of a framework for getting the cases of mentally disabled respondents reheard past the deadline—in legal terms, a framework of equitable tolling.

Equitable tolling is the doctrine that a statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, does not take action until after the deadline has passed.⁹ The effect is to suspend or toll the deadline until the impediment to filing is removed.¹⁰ Like other equity doctrines, the purpose of equitable tolling is to ensure judicial fairness; it recognizes that the mechanical deadlines peppering our legal authorities must occasionally bend in the interest of justice.¹¹ Mental illness is just such a circumstance where mechanical rules are neither useful nor just, and this article therefore advocates for a clear and accessible standard of equitable tolling in the immigration courts to protect respondents with a mental disorder.

It should be noted that while this article analyzes policies and practices in immigration law, its principle extends beyond that field. Any court proceeding in which a respondent may appear without counsel contains a heightened risk that an individual with a mental illness will not receive due relief from the court. Thus, without flexible mechanisms for rehearing proceedings, the mentally disabled may have no opportunity to receive the just and accurate outcome they are entitled to.

II. BACKGROUND

As general background, the Immigration and Nationality Act (“INA”)¹² is the primary authority on immigration law in the United States. Alleged violations of the INA are litigated in civil administrative courts housed within the Executive Office of Immigration Review (“EOIR”), a component of the Department of Justice (“DOJ”).¹³ A respondent accused of violating the INA will first go before an EOIR immigration judge, who generally can determine removability and adjudicate applications for relief from removal.¹⁴ In these proceedings, an attorney from Immigration and Customs Enforcement (“ICE”), a

⁹ BLACK’S LAW DICTIONARY 656 (10th ed. 2014).

¹⁰ *Id.*

¹¹ *See* Holmberg, U.S. 392 at 396 (“Equity eschews mechanical rules; it depends on flexibility A suit in equity may lie though a comparable cause of action at law would be barred”).

¹² Codified under 8 U.S.C. 12 (commonly cited to the corresponding INA section).

¹³ DEP’T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 1, 1-2 *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Practice_Manual_review.pdf#page=5

¹⁴ *Id.* at 4.

component of the Department of Homeland Security (“DHS”) acts as the federal government’s representative.¹⁵

After the immigration judge issues a ruling, the respondent then has the opportunity to appeal to the BIA, which issues precedential decisions.¹⁶ After the BIA, a respondent may also seek judicial review from the courts.¹⁷ As a result of these proceedings, a respondent may be removed against his will from the United States.¹⁸

A. Current Protections for Incompetent Respondents in the Immigration Courts: Why Many Immigration Cases Likely Need to be Reheard.

The INA and accompanying regulations contain limited provisions to protect the rights of respondents who suffer from incompetency;¹⁹ for example, the judge may not accept an admission of removability from an incompetent respondent who appears alone.²⁰ To determine who is in fact incompetent, the BIA laid out a test in *Matter of M-A-M*.²¹ According to *M-A-M*, a noncitizen is competent if he has a rational and factual understanding of the nature and object of the proceedings, can consult with an attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.²²

The *M-A-M* standard of incompetency is very similar to the general *Dusky v. United States* standard of incompetency laid down by the Supreme Court in the criminal context; that standard says that a

¹⁵ *Id.*

¹⁶ *Id.* at 9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Incompetency, generally, is the “lack of legal ability in some respect, esp. to stand trial or to testify.” BLACK’S LAW DICTIONARY 883 (10th ed. 2014).

²⁰ 8 C.F.R. § 1240.10(c) (2010).

²¹ *Matter of M-A-M*, 25 I. & N. Dec. 474, 479 (BIA 2011).

²² *Id.* In addition, the EOIR has released the first phase of a plan to implement *M-A-M* in the immigration courts and to protect the rights of respondents who suffer from mental illness; in this plan, the EOIR elaborates on the *M-A-M* definition of incompetency. DEP’T OF HOMELAND SECURITY, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDER 2 (2013)(hereinafter PHASE I) (stating that a competent respondent must have a rational and factual understanding of: (a) the nature and object of the proceeding, (b) the privilege of representation, including but not limited to, the ability to consult with a representative if one is present; (c) the right to present, examine, and object to evidence; (d) the right to cross-examine witnesses; and (e) the right to appeal. Furthermore, a respondent must also have a reasonable ability to (a) make decisions about asserting and waiving rights; (b) respond to the allegations and charges in the proceeding; and (c) present information and respond to questions relevant to eligibility for relief).

competency must have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.²³ The notable difference between the two standards is that unlike *Dusky*, *M-A-M-* requires a competent respondent to have a “reasonable opportunity to examine and present evidence and cross-examine witnesses.”²⁴ This, in effect, makes the *M-A-M-* standard harder to meet, perhaps because the immigration courts, unlike the criminal courts, do not provide state-funded counsel to indigent respondents.²⁵

Recognizing that a respondent with limited competency will have difficulty receiving any protections without assistance, the United States government has taken the progressive step of providing immigration attorneys to respondents who meet this definition of incompetency.²⁶ Furthermore, in addition to laying down the test, *M-A-M-* also sets out a framework for recognizing, evaluating, and safeguarding incompetency.²⁷ But while the higher standard of incompetency in immigration law is, in and of itself, positive for immigration respondents who suffer from incompetency, there is no guarantee that a judge will even recognize the respondent’s competency in the first place—and under the *M-A-M-* framework, an immigration respondent is not entitled to any special protections, including a state-funded attorney, until the court recognizes his incompetency.²⁸

1. Matter of M-A-M- laid out a framework for detecting and accommodating incompetency

There are a number of barriers within the *M-A-M-* framework before a respondent can be given counsel. The first challenge is detecting incompetency.²⁹ Because there is a presumption of competency in the immigration courts,³⁰ the judge must have reason to suspect that the respondent is in fact incompetent—in legal terms, *indicia of*

²³ *Dusky v. U.S.*, 362 U.S. 402, 402 (1960).

²⁴ *Matter of M-A-M-*, 25 I. & N. Dec. at 479.

²⁵ Compare 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2012) (recognizing the right to legal representation of both noncitizens and individuals claiming US citizenship, but indicating that counsel must be obtained at no government expense) with *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963).

²⁶ *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, THE U.S. DEP’T OF JUSTICE (Apr. 22, 2013), <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>.

²⁷ *Matter of M-A-M-*, 25 I. & N. Dec. at 474-75.

²⁸ *Matter of M-A-M-*, 25 I. & N. Dec. at 477; see also PHASE I, *supra* note 22, at 2-3.

²⁹ *Matter of M-A-M-*, 25 I. & N. Dec. at 477.

³⁰ *Id.* at 477.

incompetency must be present—before the judge can perform a competency evaluation or engage any safeguards.³¹

M-A-M- cites several indicators of incompetency to which the judge should be aware.³² Some indicators are obvious, such as medical and disability records, or direct statements from witnesses that the respondent suffers from a mental illness.³³ Other indicators, however, are more elusory—for example, a respondent may manifest his incompetency only by his confusion, or by his inability to stay on topic or answer questions.³⁴

ICE has an affirmative obligation to turn over materials that may inform the court about the respondent's competency, particularly where the respondent is detained.³⁵ Ideally, ICE will comply with this obligation and inform the court of any mental health issues discovered during its investigative or detention process. Nevertheless, it is inherently dangerous to depend on an adversarial party to take action that may favor the opposition, especially when the opposition is significantly disadvantaged.³⁶ The judge must be aware of this danger and should be ready to ask questions of both parties when determining the presence of indicia.

Once indicia are present, the second challenge is evaluating the respondent's competency level.³⁷ *M-A-M-* lists several mechanisms a judge may use to engage in that evaluation.³⁸ Perhaps the most important tool at the judge's disposal is ordering a psychiatric evaluation, which will likely provide the most complete information on the respondent's current mental health status.³⁹ Indicia of incompetency also triggers *Matter of E-S-I-*, which requires the government to serve additional persons besides the respondent, including family or friends, who may have knowledge about the respondent's condition.⁴⁰

³¹ *Id.*

³² *Matter of M-A-M-*, 25 I. & N. Dec. at 479-80.

³³ *See id.*

³⁴ *See id.* at 479; *see also* PHASE I, *supra* note 22, at 4.

³⁵ *Matter of M-A-M-*, 25 I. & N. Dec. at 480.

³⁶ *See generally* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

³⁷ *Matter of M-A-M-*, 25 I. & N. Dec. at 480.

³⁸ *Id.* at 480-81.

³⁹ *Id.* at 481; *see also* Kathleen Powers Stafford & Martin O. Sellbom, *Assessment of Competence to Stand Trial*, 11 FORENSIC PSYCHOLOGY, HANDBOOK OF PSYCHOLOGY 412, 427 (Irving B. Weiner ed., 2d ed. 2012) (describing the benefits of psychological evaluations to the competency evaluation process generally).

⁴⁰ *Matter of E-S-I-*, 26 I. & N. Dec. 136, 145 (BIA 2013) (holding that where indicia of incompetency are present, service must be made upon (1) the respondent, (2) a person with whom the respondent resides, and (3) a relative, guardian, or friend).

After the evaluation procedures are completed, the judge determines whether the respondent is competent under the foregoing test.⁴¹ If incompetency is found, the third challenge is to implement appropriate safeguards.⁴² The EOIR instructs judges to provide unrepresented, incompetent respondents with a “qualified legal representative,”⁴³ although there are many other tools at the judge’s disposal to ensure a respondent is given a full and fair hearing.⁴⁴

2. Matter of M-A-M- is likely insufficient to protect incompetent immigration respondents

As indicated above, some indicia of incompetency are not obvious, and indicia may not be present at all. The judge, therefore, faces significant obstacles in identifying signs of mental illness. He may misinterpret indicia of incompetency as signs of poverty or lack of education. The judge may also conclude that the respondent is deliberately interfering with the judicial process. Even in *M-A-M-*, the respondent *told the judge* that he had schizophrenia (emphasis added).⁴⁵ Absent such obvious indicia presented to the court that case may never have gone forward. When the court either does not have or does not recognize indicia, DHS is left as the court’s only source of information about the respondent’s competency. And again, it is problematic to rely on DHS to take action that would favor their opposition.

Given the difficulties in its application, courts have rarely applied *Matter of M-A-M-* in a written decision. The limited case law on the subject likely exacerbates the problem. Judges (and counsel) are left with little or no legal guidance on how to implement *M-A-M-* in the day-to-day cases they work with. Thus, the problem becomes cyclical. A judge has limited ability to recognize indicia of incompetency, and implements no safeguards. The judge then renders an inappropriate ruling, which is almost never challenged. Even more dangerously, the lack of information may lead the judge to the erroneous conclusion that the problems surrounding mental illness are minor or nonexistent, so that the judge is not on guard. The result is that there are likely numerous cases of

⁴¹ Matter of *M-A-M-*, 25 I. & N. Dec. at 481.

⁴² *Id.* at 481.

⁴³ PHASE I, *supra* note 22, at 3

⁴⁴ See Matter of *M-A-M-*, 25 I. & N. Dec. at 483; see also PHASE I, *supra* note 22, at 15 (examples of other such safeguards may include, but are not limited to, managing the case to facilitate the respondent’s ability to obtain legal representation and/or medical treatment in an effort to restore competency; participation of a guardian; waiving the respondent’s appearance; actively aiding in the development of the record, including the questioning of witnesses; and reserving appeal rights for the respondent).

⁴⁵ Matter of *M-A-M-*, 25 I. & N. Dec. at 475.

respondents with a mental disorder who have been deported despite qualifying for legal relief from removal. Thus, these respondents need a legal mechanism to get their cases reheard.

B. How to Call a Do-Over: An Overview of Case Review Mechanisms in Immigration Law

There are several mechanisms to rehear an immigration case in which the judge has already ruled. The first and most obvious is an appeal to the BIA.⁴⁶ The filing deadline for an appeal is thirty days after the judge renders his decision.⁴⁷ This deadline is strictly enforced—late filings are generally not accepted.⁴⁸ Furthermore, the BIA does not follow the mailbox rule or accept electronic filings.⁴⁹ Thus, a physical copy of the appeal must be sent via mail and *received* by the BIA in Falls Church, VA⁵⁰ within thirty days; otherwise, the BIA will likely consider it to be late.

Other than an appeal, a respondent has the right by statute to file one motion to reopen and one motion to reconsider (“MTR”).⁵¹ Generally, a motion to reopen is based on new facts unknown at the time of the hearing.⁵² A motion to reconsider, on the other hand, is based on law.⁵³

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Congress amended the INA to codify in statute the Board’s authority to entertain MTRs.⁵⁴ The INA sets firm deadlines for MTRs: ninety days for a motion to reopen, and thirty days for a motion to reconsider.⁵⁵ A MTR should be filed with the entity in which

⁴⁶ 8 C.F.R. § 1240.15; *see also* 8 C.F.R. § 1003.1(b) for a complete list of the types of decisions that the BIA may review on appeal.

⁴⁷ 8 C.F.R. § 1003.38(b); *see also* BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 52 (2014), available at <http://www.justice.gov/eoir/vll/qapracmanual/BIAPracticeManual.pdf> (hereinafter PRACTICE MANUAL).

⁴⁸ 8 C.F.R. § 1003.38(b); *see also* PRACTICE MANUAL, *supra* note 47.

⁴⁹ PRACTICE MANUAL, *supra* note 47, at 14, 52, 126 (The only submission that the BIA will accept electronically is the EOIR-27 (Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals).

⁵⁰ *Id.* at 29.

⁵¹ 8 U.S.C. §§ 1229a(c)(7)(A), 1229a(c)(6)(B). “MTR” as used in this paper is intended to reference both a motion to reopen and a motion to reconsider. “MTR” as used in this paper is not intended to reference the following: (1) a motion to reopen and reconsider; (2) a joint motion to reopen; or (3) a joint motion to reconsider.

⁵² 8 U.S.C. §§ 1229a(c)(7)(B), 1003.2(c).

⁵³ 8 U.S.C. §§ 1229a(c)(6), 1003.2(b)(1).

⁵⁴ Pub.L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-593 (Sept. 30, 1996).

⁵⁵ 8 U.S.C. §§ 1229a(c)(7)(C)(1), 1003.2(c)(2), 1003.23(b)(1) (deadlines for motions to reopen before the BIA and the immigration court); 8 U.S.C. §§ 1229a(c)(6)(B), 1003.2(b)(2), 1003.23(b)(1) (deadlines for motions to reconsider before the BIA and the immigration court). Note that there are also several specific exceptions to the thirty and

jurisdiction has vested.⁵⁶ Jurisdiction usually remains with the judge until the appeal is filed with the BIA,⁵⁷ however in rare cases the Board may also hear a case by certification.⁵⁸ Thus, if jurisdiction still remains with the lower immigration court, then that court should be the one to hear the motion. On the other hand, if an appeal has already been filed, the motion should be filed with the BIA.

If the MTR deadlines have passed, a respondent can request either a regulatory *sua sponte* MTR on the Board's own authority⁵⁹ or a regulatory joint MTR with opposing counsel.⁶⁰ These motions have no time limits.⁶¹

C. Bending the Rules: The Basics of Equitable Tolling

Generally, to receive equitable tolling a party must establish: (1) that he has pursued his rights diligently; and (2) some extraordinary circumstance prevented timely filing.⁶² Courts have limited the doctrine's application to exceptional cases to ensure adversarial and judicial fairness, and to discourage petitioners from sleeping on their rights.⁶³

ninety day deadlines codified in both statute and regulation; *see also* INA § 240(c)(7)(C)(ii); 8 C.F.R. §§ 1003.2(c)(3)(ii), 1003.23(b)(4)(i), 1003.2(c)(3)(ii), 1003.23(b)(4)(i) (a motion to reopen to apply for asylum or withholding due to changed country conditions has no time limits where material evidence was unavailable and could not have been discovered at the previous proceeding); INA § 240(b)(5)(C) and 8 C.F.R. § 1003.2(c)(3), § 1003.23(b)(4)(ii, iii) (*in absentia* orders); INA § 240(b)(5)(C) and 8 C.F.R. § 1003.2(ac)(3), § 1003.23(b)(4)(ii, (iii)(A) (*in absentia* orders based on lack of notice, or noncitizen being in custody and failing to appear through no fault of his own); 8 C.F.R. § 1003.23(b)(4)(iii)(B) (*in absentia* exclusion orders); INA § 240(c)(7)(C)(iv) (battered spouses, children, and parents).

⁵⁶ Generally, jurisdiction vests with the immigration judge by filing a Notice to Appear. *See* 8 C.F.R. §§ 1003.14(a). Jurisdiction vests with the Board when an appeal is filed. *See also* PRACTICE MANUAL, *supra* note 47, at 49.

⁵⁷ PRACTICE MANUAL, *supra* note 47, at 49-50.

⁵⁸ 8 C.F.R. §§ 1003.1(c), 1003.3(d).

⁵⁹ 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1).

⁶⁰ 8 C.F.R. §§ 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).

⁶¹ 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1), 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).

⁶² *Holland v. Florida*, 560 U.S. 631, 632 (2010); *see also* *Pace v. DiGuglielmo*, 544 U.S. 408 (2005).

⁶³ *See* *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *see also* *Neves v. Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (characterizing equitable tolling as a "rare remedy" rather than a "cure all."); *see also* *Holmberg*, 327 U.S. at 396 ("Traditionally . . . statutes of limitations are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive . . . namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair."); *see also* *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants").

1. A statute may be equitably tolled if it is not jurisdictional

Equitable tolling is not applied to every deadline automatically; whether a deadline may be equitably tolled is a matter of congressional intent.⁶⁴ The Supreme Court has held that only non-jurisdictional limitations statutes—that is, statutes that do not restrict a court’s subject-matter or personal jurisdiction⁶⁵—may be equitably tolled.⁶⁶ In *Henderson v. Shinseki*, the Court expressed its intention to “bring some discipline” to the frequent misapplication of the term “jurisdictional.”⁶⁷ The *Shinseki* Court identified three factors to consider in determining whether a statute is jurisdictional: (1) the plain language of the statute; (2) the provision’s placement within the overall statute; and (3) the characteristics of the review scheme.⁶⁸

However, the Court in *Shinseki* reiterated that claim-processing rules are generally non-jurisdictional.⁶⁹ Claim-processing rules, like the statutes at issue in this article, “seek to promote the orderly progress of litigation by requiring parties to take certain procedural steps at specified times.”⁷⁰ Thus, there is no automatic bar against tolling claim-processing rules.⁷¹ Nevertheless, the ultimate question is Congressional intent, and Congress can attach jurisdictional attributes to statutes that would ordinarily look like claim-processing rules.⁷²

2. There is a general (but not universal) presumption that equitable tolling shall apply to a particular statute

There is a general, rebuttable presumption that a particular statutory deadline may be equitably tolled.⁷³ However, the Supreme Court has declined to apply that presumption to an agency’s internal filing deadlines.⁷⁴ Nevertheless, the absence of a presumption is not

⁶⁴ Holmberg, 327 U.S. at 395 (“If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter”).

⁶⁵ *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), 562 U.S. __ (2011).

⁶⁶ *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008).

⁶⁷ *Henderson*, 131 S. Ct. at 1202.

⁶⁸ *Id.* at 1204-06.

⁶⁹ *Id.* at 1203.

⁷⁰ *Henderson*, 131 S. Ct. at 1198.

⁷¹ *See John R. Sand & Gravel Co.*, 552 U.S. 130, 133-34 (2008).

⁷² *Henderson*, 131 S. Ct. at 1203; *see also Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 826-828 (2013) (holding that a statutory deadline was not jurisdictional but still not subject to equitable tolling).

⁷³ *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

⁷⁴ *Sebelius*, 133 S. Ct. at 827.

determinative—equitable tolling may still apply if Congress so intends equitable tolling to attach.⁷⁵

But without the presumption, there is no bright-line on how to evaluate Congressional intent. Though Congress may state its extent explicitly, thereby expressing its clear intent, the Supreme Court in *Sebelius v. Auburn Regional Medical Center* noted that it may consider context, and that Congress need not “incant magic words” to invoke equitable tolling.⁷⁶ Sotomayor’s concurrence advocates for consideration of exterior factors, such as the potential prejudice to the parties, in evaluating that context.⁷⁷ While Sotomayor joins the majority’s holding in full, she also writes separately to note that in another case, perhaps where the party sophistication was lower, she may jump ship in the interest of social justice.⁷⁸

III. ANALYSIS

Circuit courts have begun moving in the direction of a more generous application of immigration deadlines.⁷⁹ But although the principles of *stare decisis* generally require the Board to follow circuit court precedent in the appellate jurisdiction where a case lies,⁸⁰ the BIA has resisted some of the circuit courts’ efforts.⁸¹ Indeed, the BIA has been so unwilling to accept instruction on some issues that they have, on occasion, explicitly refused to follow circuit court precedent.⁸² The result is an ongoing conflict between the BIA and some circuits on whether and how a respondent may get his case reheard.

There are hints that the BIA is incorporating some flexibility into its procedural mechanisms.⁸³ However, the BIA has not yet laid down a framework for an equitable tolling claim based on an unrepresented

⁷⁵ *Id.* at 824.

⁷⁶ *Sebelius*, 133 S. Ct. at 824.

⁷⁷ *Id.* at 829 (Sotomayor, J., concurring).

⁷⁸ *Sebelius*, 133 S. Ct. at 829.

⁷⁹ *See, e.g.*, *Irigoyen-Briones v. Holder*, 644 F.3d 943 (9th Cir. 2011); *Neves v. Holder*, 613 F.3d 30, 33 (1st Cir. 2010); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011).

⁸⁰ *See* *Matter of Anselmo*, 20 I. & N. Dec. 25, 27 (BIA 1989) (interim decision 3105).

⁸¹ *See* *Matter of Liadov*, 23 I. & N. Dec. 990 (BIA 2006); *Matter of Armendarez*, 24 I. & N. Dec. 646 (BIA 2008).

⁸² *See, e.g.*, *Irigoyen*, 644 F.3d 943.

⁸³ *See, e.g.*, *Matter of Kim*, A035-127-124 (Oct. 12, 2011 and Jul. 30, 2012) (unpublished BIA decisions) (the BIA granted a special motion to toll a 212(c) deadline where the respondent filed it years late due his own gambling addiction and ineffective assistance of counsel); *but see* *Matter of A-A-*, 22 I. & N. Dec. 140 (BIA 1998) (refusing to toll the deadline for filing a motion to reopen an *in absentia* removal order based on ineffective assistance of counsel).

respondent's mental illness. As shown below, the BIA generally remains rigid in the enforcement of its deadlines.

*A. Circuit Courts and the BIA are at Odds With Each Other
on Whether the Thirty Day Deadline to File a Notice of
Appeal May Be Equitably Tolled*

The jurisdictional status of the thirty-day appeal deadline is unsettled. The BIA does not accept that the thirty-day appeal deadline may be tolled at all.⁸⁴ The circuits are split.⁸⁵ Thus, a respondent in a circuit that permits equitable tolling of the appeal deadline is at an advantage over a respondent who is in a circuit that does not, although any relief will likely come from the circuit level rather than the BIA.

The BIA extrapolated on its position in *Matter of Liadov*, a case in which the respondents missed the deadline because the post-office failed to deliver a guaranteed overnight delivery on time.⁸⁶ The BIA ruled on this case, in favor of the government and the respondents appealed to the Eighth Circuit.⁸⁷ However, after the BIA initially ruled and the respondents filed their appeal, the Ninth and Second Circuits both found that the BIA's appeal deadline could be equitably tolled where a post-office delivers the appeal late.⁸⁸ In light of this, the parties in *Liadov* agreed to remand the case to the BIA for further consideration.⁸⁹ But once again, the BIA refused to accept the appeal and reiterated that it would not accept late appeals.⁹⁰ Although the BIA also recognized that it could certify a case to itself in extraordinary cases, the BIA found that such circumstances were not presented in the *Liadov* matter.⁹¹ According to the BIA, a party should "anticipate the possibility that the guaranteed delivery might fail" rather than seeking assistance from the courts.⁹² The Eighth Circuit affirmed, finding that the BIA did not abuse its discretion to hold that the thirty-day deadline is mandatory and jurisdictional.⁹³

The BIA faced this issue again a few years later. In a Ninth Circuit case, the post-office again failed to deliver a notice of appeal on time,

⁸⁴ *Matter of Liadov*, 23 I. & N. Dec. 990, 993 (BIA 2006).

⁸⁵ Compare *Liadov v. Mukasey*, 518 F.3d 1003 (8th Cir. 2008) with *Irigoyen-Briones*, 644 F.3d 943.

⁸⁶ *Matter of Liadov*, 23 I. & N. Dec., at 990.

⁸⁷ *Id.*

⁸⁸ *Id.* at 990-91; *Oh v. Gonzales*, 406 F.3d 611 (9th Cir. 2005); *Zhong Guang Sun v. U.S. Dep't of Justice*, 421 F.3d 105 (2d Cir. 2005).

⁸⁹ *Matter of Liadov*, 23 I. & N. Dec. at 990.

⁹⁰ *Id.* at 993.

⁹¹ *Id.*

⁹² *Id.* at 992.

⁹³ *Liadov*, 518 F.3d at 1009-10.

and the BIA again called it late, ignoring the Ninth Circuit's earlier ruling in *Oh v. Gonzales*.⁹⁴ The Ninth Circuit overturned the BIA's decision and ruled for the respondent.⁹⁵ The court held that the 30-day appeal deadline was unambiguous and non-jurisdictional.⁹⁶ The court also chastised the BIA for refusing to accept e-filings, which could resolve the post-office issue with little inconvenience to anyone.⁹⁷

As a result of this conflict between the BIA and the split circuits, respondents are at an unfair disadvantage; if in a circuit such as the Eighth Circuit, they have little hope for relief. If in the circuit such as the Ninth Circuit, they still have to appeal to the BIA, where they will presumably be denied relief. Respondents will then have to appeal again to the appellate court before relief will be granted. At best, the respondents' relief will be unduly delayed or burdensome.

B. Circuit Courts and the BIA are at Odds Over How to Treat Motions to Reopen, Especially with Regard to the Post-Departure Bar

The BIA has given little guidance on whether the statutory MTR deadlines are jurisdictional and whether equitable tolling may apply.⁹⁸ On the circuit level, however, nearly every court has ruled that motion deadlines are non-jurisdictional claim-processing rules that can be tolled.⁹⁹ This is a positive step; but nevertheless, respondents may have trouble getting the BIA to rehear their case, particularly to the post-departure bar.

⁹⁴ Irigoyen-Briones, 644 F.3d at 944-45.

⁹⁵ *Id.* at 951.

⁹⁶ *Id.* at 947.

⁹⁷ *Id.* at 951.

⁹⁸ One of the few times it has come up is in *Matter of A-A-*, where the BIA ruled that the deadline for reopening an *in absentia* removal order may be tolled for ineffective assistance of counsel claims. *Matter of A-A-*, 22 I. & N. Dec. 140 (BIA 1998); 8 U.S.C. § 1154 (b)(5)(C)(i)(2014).

⁹⁹ The 1st, 2d, 3d, 4th, 6th, 7th, 8th, 9th, 10th, and 11th circuits have affirmatively held that the MTR deadlines may be equitably tolled. *Neves v. Holder*, 613 F.3d 30, 33 (1st Cir. 2010); *Iavorski v. INS*, 232 F.3d 124, 130 (2d Cir. 2000); *Alzaarir v. Att'y Gen. of the U.S.*, 639 F.3d 86, 90 (3d Cir. 2011), (citing *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005)); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) (citing *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004); *Yuan Gao v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (citing *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. Att'y Gen.*, 713 F.3d 1357 (11th Cir. 2013); *see also Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (finding that a request to reopen based on equitable tolling is a request to reopen on the Board's *sua sponte* authority).

In 1952, the Board's power to entertain motions was limited by the post-departure bar.¹⁰⁰ In 1961, Congress made the bar statutory.¹⁰¹ However, Congress repealed the post-departure bar from the United States Code in the 1996 amendments to the INA.¹⁰² The post-departure bar, as written today, is a non-statutory federal regulation that says:

A motion to reopen or [a motion] to reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion.¹⁰³

The BIA generally considers the bar to be jurisdictional; thus, it will not hear a motion once a respondent has left the United States, whether forcibly removed or otherwise.¹⁰⁴ The circuits, on the other hand, have generally found that the bar cannot apply to statutory MTRs.¹⁰⁵ Seven circuits reached this conclusion by applying a *Chevron, U.S.A. v. Natural Resources Defense Council* deference analysis,¹⁰⁶ finding that when Congress chose not to include the post-departure bar in the 1996 amendments that made 30/90 day MTRs statutory, Congress expressed

¹⁰⁰ 17 Fed.Reg. 11,469, 11,475 (Dec. 19, 1952) (codified at 8 C.F.R. § 6.2 (1953)).

¹⁰¹ Act of Sept. 26, 1961, Pub.L. No. 87-301, § 5(a), 75 Stat. 650, 651-53 (1961).

¹⁰² Pub.L. No. 104-208, 110 Stat. 3009.

¹⁰³ 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

¹⁰⁴ *Matter of Armendarez*, 24 I. & N. Dec. at 648; *but see Matter of Bulnes*, 25 I. & N. Dec. 57, 58-60 (BIA 2009) (holding that a judge may hear a motion to reopen an *in absentia* order post-departure where the respondent claims lack of notice).

¹⁰⁵ *Santana v. Holder*, 731 F.3d 50, 55-61 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85, 100 (2d Cir. 2011); *Prestol-Espinal v. Att'y Gen. of the U.S.*, 653 F.3d 213, 215-18 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329, 330-32 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257, 262-64 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234, 238-39 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591, 594 (7th Cir. 2010); *Coyt v. Holder*, 593 F.3d 902, 905-07 (9th Cir. 2010); *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 814-18 (10th Cir. 2012) (en banc); *Jian Le Lin v. U.S. Att'y Gen.*, 681 F.3d 1236, 1239-40 (11th Cir. 2012).

¹⁰⁶ *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (A court reviewing a federal agency's interpretation of a statute must give effect to Congress' unambiguously expressed intent. But if Congress is silent or its intent is ambiguous, the court should defer to the agency's interpretation, so long as that interpretation is permissible).

its intent to make the post-departure bar illegal for those MTRs.¹⁰⁷ Three circuits reached the same conclusion without relying on *Chevron*.¹⁰⁸ These courts concluded instead that the post-departure bar conflicts with the Supreme Court's ruling in *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs*.¹⁰⁹ According to these circuits, by promulgating the post-departure bar the DOJ had impermissibly contracted the jurisdictional authority that Congress had delegated to it.¹¹⁰

The Ninth Circuit has gone a step further. Like many of its sister circuits, the Ninth Circuit has found that the post-departure bar cannot apply to statutory MTRs.¹¹¹ However it has also found that the post-departure bar can only apply to a respondent who departs the United States *while proceedings are taking place* (emphasis added).¹¹² Therefore once a respondent has been removed the post-departure no longer applies to him because he is no longer the subject of exclusion, deportation, or removal proceedings.¹¹³ Since the Ninth Circuit has outlawed the post-departure bar with regard to statutory MTRs, this interpretation of the bar would only apply to *sua sponte* and joint MTRs.

It is important to note that the circuit cases outlawing the post-departure bar all arose in the context of statutory MTRs, rather than *sua sponte* or joint MTRs.¹¹⁴ The Second, Third, and Fifth Circuits have explicitly ruled that the bar still applies to *sua sponte* motions.¹¹⁵ No legal body has ruled on whether the bar applies to a joint motion.

¹⁰⁷ Santana, 731 F.3d at 55-61; Prestol-Espinal v. Att'y Gen. of the U.S., 653 F.3d 213, 217 (3d Cir. 2011); William v. Gonzales, 499 F.3d 329, 331-32 (4th Cir. 2007); Carias, 697 F.3d at 263; Coyt, 593 F.3d at 905-07; Contreras-Bocanegra v. Holder, 678 F.3d 811, 815-16 (10th Cir. 2012) (en banc); Jian Le Lin v. U.S. Att'y Gen., 681 F.3d 1236, 1239-40 (11th Cir. 2012).

¹⁰⁸ Luna, 637 F.3d at 100; Pruidze, 632 F.3d at 238-39; Marin-Rodriguez, 612 F.3d at 594.

¹⁰⁹ *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67 (2009).

¹¹⁰ Luna, 637 F.3d at 100; Pruidze, 632 F.3d at 238-39; Marin-Rodriguez, 612 F.3d at 594.

¹¹¹ Coyt, 593 F.3d at 905-07.

¹¹² Lin v. Gonzales, 473 F.3d 979, 982 (9th Cir. 2007) (concluding that the post-departure bar only applies to respondents who are presently in proceedings because the drafters used the language "is the subject of exclusion, deportation, or removal proceedings.") (emphasis added); see also Reynoso-Cisneros v. Gonzales, 491 F.3d 1001, 1002 (9th Cir. 2007).

¹¹³ Lin, 473 F.3d at 982; see also Reynoso-Cisneros, 491 F.3d at 1002.

¹¹⁴ Perez Santana, 731 F.3d at 51; Luna, 637 F.3d at 95; Prestol-Espinal, 653 F.3d at 214; William, 499 F.3d at 330; Carias, 697 F.3d at 261; Pruidze v. Holder, 632 F.3d at 236; Marin-Rodriguez, 612 F.3d at 592-93; Coyt, 593 F.3d at 906; Contreras-Bocanegra, 678 F.3d at 813; Lin, 473 F.3d at 982-83; Jian Le Lin, 681 F.3d at 1238.

¹¹⁵ Zhang v. Holder, 617 F.3d 650, 662 (2d Cir. 2010); Desai v. Att'y Gen. of the U.S., 695 F.3d 267, 268 (3d Cir. 2012); Ovalles v. Holder, 577 F.3d 288, 296-97 (5th Cir. 2009).

Despite the circuit court rulings, the BIA has tried to maintain its historical interpretation of the post-departure bar as a blanket ban on any MTR once a respondent has departed.¹¹⁶ In *Matter of Armendarez*, the BIA reiterated that it does not accept post-departure MTRs at all because it believes it does not have jurisdiction to hear the case of someone who is not in the United States.¹¹⁷ Although *Matter of Armendarez* resulted from a case that originated in the Fifth Circuit, the BIA in *Armendarez* explicitly stated that it would continue to apply the ban as it always has, regardless of any contradictory circuit court precedent.¹¹⁸

In sum, like with the appellate deadline, the BIA and the split circuits are at odds on how to treat a post-departure MTR, especially after the deadline has passed. And again, this leaves respondents at risk of undue prejudice in the immigration system.

C. Foul Ball: The Fifth Circuit Impermissibly Conjoins Equitable Tolling with the Board's Sua Sponte Power

The Fifth Circuit is the prime example of the jurisdictional quandary that surrounds MTR deadlines. In *Ramos-Bonilla v. Mukasey*, the Fifth Circuit found that a request to file a late MTR based on equitable tolling is essentially a request that the Board reopen the case *sua sponte*.¹¹⁹ Thus, the Fifth Circuit equates equitable tolling of MTR deadlines with the Board's authority to reopen a case on its own.

The Fifth Circuit's ruling in *Ramos-Bonilla* has two major implications. First, the BIA now has total discretion to grant or deny all late filed MTRs in Fifth Circuit cases.¹²⁰ Because the Board's discretion to grant or deny a MTR *sua sponte* is unreviewable, that discretion now extends to late-filed statutory MTRs.

Second, and less obviously, the post-departure bar likely now applies to both late-filed statutory MTRs and to *sua sponte* MTRs. Recall that in

¹¹⁶ See *Matter of Armendarez*, 24 I. & N. Dec. 646, 648 (BIA 2008) ("We have reiterated that construction of the rule in an unbroken string of precedents extending over 50 years, consistently holding that reopening is unavailable to any alien who departs the United States after being ordered removed.") (citing *Matter of G-N-C-*, 22 I&N Dec. 281, 288 (BIA 1998); *Matter of Okoh*, 20 I&N Dec. 864, 864-65 (BIA 1994); *Matter of Estrada*, 17 I&N Dec. 187, 188 (BIA 1979), rev'd on other grounds, *Estrada-Rosales v. INS*, 645 F.2d 819 (9th Cir. 1981); *Matter of Palma*, 14 I&N Dec. 486, 487 (BIA 1973); accord *Matter of Yih-Hsiung Wang*, 17 I&N Dec. 565 (BIA 1980)).

¹¹⁷ *Matter of Armendarez*, 24 I. & N. Dec., at 648; but see *Matter of Bulnes*, 25 I. & N. Dec. 57, 58-60 (BIA 2009).

¹¹⁸ *Matter of Armendarez*, 24 I. & N. Dec. at 653.

¹¹⁹ *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2007).

¹²⁰ *Id.*; see also *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 249-50 (5th Cir. 2004) (holding that the Fifth Circuit does not have the jurisdiction to review the Board's grant or denial of a *sua sponte* motion).

the Fifth Circuit the post-departure bar still applies to a *sua sponte* MTR.¹²¹ So if equitable tolling of a statutory motion is the same as a *sua sponte* motion, the post-departure bar now applies to an equitably tolled statutory motion.¹²² It does not, however, apply to statutory MTRs filed on time.¹²³

Ramos-Bonilla is very prejudicial to all Fifth Circuit respondents, but the decision is especially troublesome for post-departure respondents due to the new applicability of the post-departure bar to late-filed statutory motions. This means that, in the Fifth Circuit, a post-departure respondent's only chance of relief past the MTR deadlines is now a joint motion with opposing counsel. Of course, there is no guarantee that DHS will even consider joining such a motion. The illogical result is that a respondent who somehow manages to stay in the United States despite an adverse ruling may have his case reheard years past the deadline, while a respondent who was forcibly removed directly after the ruling may have no form of relief as soon as the deadline has passed, even if he otherwise qualifies for equitable tolling.

The Fifth Circuit's holding in *Ramos-Bonilla* is unique; no other circuit so equates equitable tolling of the MTR deadlines with a *sua sponte* motion. This is not a surprise, given that the opinion's foundation in logic and law lacks a sound foundation. Indeed the court provides virtually no analysis in its decision at all. The only explanation that the *Ramos-Bonilla* court gives for its decision is this:

This court has held that a request for equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is “in essence an argument that the BIA should have exercised its discretion to reopen the proceeding *sua sponte* based upon the doctrine of equitable tolling.” (emphasis added)¹²⁴

The single source that the Fifth Circuit uses to support its claim that it has held this way before is an unpublished case, *Jie Lin v. Mukasey*.¹²⁵ The *Jie Lin* court, partially cited in *Ramos-Bonilla*, says only this: “[b]ecause equitable tolling is not a basis for filing an untimely or

¹²¹ Ovalles, 577 F.3d at 296-97.

¹²² Compare *Ramos-Bonilla* 543 F.3d at 220 with Ovalles, 577 F.3d at 296-97.

¹²³ Compare *Ramos-Bonilla* 543 F.3d at 220 with *Carias v. Holder*, 697 F.3d 257, 262-64 (5th Cir. 2012).

¹²⁴ *Ramos-Bonilla* 543 F.3d at 220 (citing *Jie Lin v. Mukasey*, 286 Fed.Appx. 148, 150 (5th Cir. 2008)).

¹²⁵ *Ramos-Bonilla* 543 F.3d at 220.

numerically-barred motion under the statute or regulations, this argument is in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling.”¹²⁶ No citation follows this quote.¹²⁷ Thus, *Jie Lin* simply assumes that equitable tolling cannot be a basis for filing an untimely motion, and therefore a request for a late-filed motion must be a *sua sponte* motion.¹²⁸ Yet we know that in nearly every other circuit, equitable tolling *can* be a basis for filing such a motion.¹²⁹ But since *Jie Lin* provides no explanation for its assumption and *Jie Lin* is the only basis for *Ramos-Bonilla*, we can only speculate as to how the Fifth Circuit reached its conclusion.

Given the confusion, the Supreme Court recently granted certiorari in *Mata v. Holder*, an unreported Fifth Circuit case reaffirming *Ramos-Bonilla*.¹³⁰ Oral argument was heard in April of 2015.¹³¹ The Supreme Court opinion in the coming months will hopefully shed some much-needed light onto this very murky scenario.

IV. RECOMMENDATIONS

A. Proposed Recommendations for the BIA and Circuit Courts

The following are proposed recommendations that the BIA and Circuit Courts may implement for a more streamlined and fair process.

¹²⁶ *Jie Lin v. Mukasey*, 286 Fed.Appx. at 150.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Neves v. Holder*, 613 F.3d 30, 33 (1st Cir. 2010); *Iavorski v. INS*, 232 F.3d 124, 130 (2d. Cir. 2000); *Alzaarir v. Att’y Gen. of the U.S.*, 639 F.3d 86, 90 (3d. Cir. 2011) (citing *Borges v. Gonzales*, 402 F.3d 398, 406 (3d. Cir. 2005)); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008) (citing *Harchenko v. INS*, 379 F.3d 405, 409-10 (6th Cir. 2004); *Yuan Gao v. Mukasey*, 519 F.3d 376, 377 (7th Cir. 2008); *Hernandez-Moran v. Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Ghahremani v. Gonzales*, 498 F.3d 993, 999 (9th Cir. 2007) (citing *Iturribarria v. INS*, 321 F.3d 889, 897 (9th Cir. 2003); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo v. Att’y Gen.*, 713 F.3d 1357 (11th Cir. 2013)

¹³⁰ *Mata v. Holder*, No. 13-60253 (5th Cir. May 16, 2014).

¹³¹ *Mata v. Holder*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/mata-v-holder/>.

1. The BIA should make it clear that case review deadlines, including appeal deadlines and MTR deadlines, may be equitably tolled and adopt a clear and precise test for applying such tolling to mental incompetency

The BIA should make it clear that both appellate deadlines and MTR deadlines are non-jurisdictional and may be equitably tolled. As laid out above, the circuits are already moving in that direction. The BIA should join the circuits in this movement in the interest of ensuring that all respondents have adequate procedural mechanisms at their disposal to ensure a full and fair proceeding.

It is important that both appellate deadlines and MTR deadlines be equitably tolled. Although most respondents seeking late relief likely will not need to toll the appellate deadline if they have access to an MTR, a respondent is only granted one motion to reopen and one motion to reconsider.¹³² If a respondent has used his motion previously, he may not have the option to utilize that mechanism at all, leaving an appeal as his only opportunity for relief. Thus, both the appeal deadlines and the MTR deadlines should be found to be non-jurisdictional and subject to equitable tolling.

The BIA should also adopt a test, such as the test for incompetency in *Matter of M-A-M-*, for how to apply equitable tolling to incompetency in the immigration context. Courts have found in other contexts that mental illness or incapacity can constitute an exceptional circumstance justifying equitable tolling.¹³³ This test must be clear and precise, and must be flexible enough that it does not preclude immigration respondents from meeting the test. The BIA should move in this direction, as well, in order to best protect respondents with mental disorders in immigration removal proceedings.

2. The BIA and the Circuits should remove the post-departure bar or, alternatively, adopt a less-restrictive interpretation of the bar

Again, the post-departure bar as currently interpreted by the BIA prohibits any respondent from filing an MTR after leaving the United

¹³² 8 U.S.C. §§ 1229a(c)(7)(A), 1229a(c)(6)(B)

¹³³ See e.g. *Barrett v. Principi*, 363 F.3d 1316 (Fed. Cir. 2004); *Bills v. Clark*, 628 F.3d 1092 (9th Cir. 2010); *Bolarwina v. Williams*, 593 F.3d 226 (2d. Cir. 2010).

States.¹³⁴ This means that a respondent who was unable to file pre-departure is prohibited from filing an MTR at all. A respondent with a mental disorder may not be able to meet this obligation. Therefore, all circuits and the BIA should come to the conclusion that most circuits have already reached and outlaw the post-departure bar.

If the courts are unwilling to remove the post-departure bar entirely, then they should find, as most circuit courts have, that the post-departure bar does not apply to statutory MTRs¹³⁵—this will provide at least one mechanism of relief for unlawfully deported individuals with a mental disorder.¹³⁶ But remember, an individual only has the statutory right to file one motion to reopen and one motion to reconsider.¹³⁷ If you have utilized that right, then your only other alternative is a regulatory *sua sponte* motion or joint motions.¹³⁸ Thus, courts should ban the post-departure bar in its entirety instead of leaving it applicable to *sua sponte* motions and potentially applicable to joint motions—this ensures that an individual who has already used his one statutory motion to reopen or his one statutory motion to reconsider is not precluded from bringing a post-departure motion.

If courts must leave the post-departure bar applicable to any motion, they should also accept the Ninth Circuit's interpretation that the post-departure bar only applies to respondents who leave the country while proceedings are taking place.¹³⁹ This interpretation at least permits respondents whose proceedings have come to a conclusion to still file an MTR because if their proceedings have been closed; the bar does not

¹³⁴ Matter of Armendarez, 24 I. & N. Dec. 646, 648; *but see* Matter of Bulnes, 25 I. & N. Dec. 57, 58-60 (BIA 2009) (holding that a judge may hear a motion to reopen an *in absentia* order post-departure where the respondent claims lack of notice).

¹³⁵ Santana v. Holder, 731 F.3d 50, 55-61 (1st Cir. 2013); Luna v. Holder, 637 F.3d 85, 100 (2d Cir. 2011); Prestol-Espinal v. Att'y Gen. of the U.S., 653 F.3d 213, 215-18 (3d Cir. 2011); William v. Gonzales, 499 F.3d 329, 330-32 (4th Cir. 2007); Carias v. Holder, 697 F.3d 257, 262-64 (5th Cir. 2012); Pruidze v. Holder, 632 F.3d 234, 238-39 (6th Cir. 2011); Marin-Rodriguez v. Holder, 612 F.3d 591, 594 (7th Cir. 2010); Coyt v. Holder, 593 F.3d 902, 905-07 (9th Cir. 2010); Contreras-Bocanegra v. Holder, 678 F.3d 811, 814-18 (10th Cir. 2012) (en banc); Jian Le Lin v. U.S. Att'y Gen., 681 F.3d 1236, 1239-40 (11th Cir. 2012).

¹³⁶ But remember, an individual only has the right in statute to file one motion to reopen and one motion to reconsider. 8 U.S.C. §§ 1229a(c)(7)(A), 1229a(c)(6)(B). If you have utilized that right, then your only other alternative is a *sua sponte* motion or joint motions. 8 C.F.R. §§1003.2(a), 1003.23(b)(1). To ensure that using your one statutory motion doesn't preclude you from bringing a claim post-departure, courts should just ban the post-departure bar in its entirety instead of leaving it applicable to *sua sponte* motions and potentially applicable to joint motions.

8 C.F.R. §§ 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).

¹³⁷ 8 U.S.C. §§ 1229a(c)(7)(A), 1229a(c)(6)(B).

¹³⁸ 8 C.F.R. §§1003.2(a), 1003.23(b)(1).

¹³⁹ Lin v. Gonzales, 473 F.3d 979, 982 (9th Cir. 2007).

apply to them since they are no longer “the subject of . . . proceedings.”¹⁴⁰ Unfortunately, this interpretation means that a respondent with a mental illness who did leave the United States before the judge issued his final ruling may still find the bar applicable to his case.¹⁴¹ Hence, removing the bar entirely is preferable.

V. CONCLUSION

The BIA has emphasized its devotion to its historical practices in its unwillingness to accept new policies and procedures.¹⁴² Its traditional dependence on bright-line rules and deadlines may promote administrative efficiency. But fairness requires flexibility, and whatever the BIA may seek to achieve through stringent application of deadlines is outweighed by the dangers to respondents, especially those with limited competency. Although historical interpretations should not be rejected at will, the law often must change to meet the growing standards of fairness in contemporary times. This article humbly beseeches the BIA and the judicial circuits to incorporate that fairness and flexibility in its interpretation of deadlines and to create clear and uniform mechanisms for granting post-decision equitable relief to respondents who suffer from a mental illness or disability.

¹⁴⁰ Lin, 473 F.3d at 982.; 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

¹⁴¹ Lin, 473 F.3d at 982.; 8 C.F.R. §§ 1003.2(d), 1003.23(b)(1).

¹⁴² See, e.g., *Matter of Armendarez*, 24 I. & N. Dec. 646, 647-48 (BIA 2008).