NOTE

"MAKING AMERICA SAFE AGAIN": THE PROPER INTERPRETATION OF § 1101(A)(43)(S) OF THE IMMIGRATION AND NATIONALITY ACT FROM BOTH A *CHEVRON* AND A PUBLIC POLICY PERSPECTIVE

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INTRODUCTION

A recent Ninth Circuit decision, *Valenzuela Gallardo v. Lynch*, has created a three-pronged circuit split over the proper interpretation of statutory language in the Immigration and

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Nationality Act (INA). In *Gallardo*, the government initiated a deportation action against a Mexican alien residing in the U.S. due to his conviction as an accessory after the fact under California law.[1]

The INA provides that any alien convicted of an "aggravated felony" is "deportable."[2] The Act does not statutorily define the term aggravated felony, but instead provides a list of various types of criminal activities that would qualify an alien for deportation.[3] One of the provisions in the statute states that a crime "relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year" makes an alien deportable.[4] The precise meaning of this language, particularly "relating to obstruction of justice," is arguably vague.

The Board of Immigration Appeals (BIA or Board), the agency tasked with hearing appeals of decisions to begin deportation hearings under the INA, has found the phrase "relating to obstruction of justice" to be ambiguous and thus open for interpretation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[5] The Board has interpreted the phrase to refer to an "affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice, irrespective of the existence of an ongoing criminal investigation or proceeding."[6]

The Fifth Circuit has deferred to this interpretation as reasonable under the *Chevron* doctrine.[7] The Ninth Circuit in *Gallardo*, however, refused to defer to the BIA's interpretation. Instead, they applied the doctrine of "constitutional avoidance" to hold that Congress had no intention of allowing the Board to interpret the statute as stretching to the limits of the Constitution, and remanded the case back to the BIA.[8]

In contrast, the Third Circuit has read § 1101(a)(43)(S) of the INA as unambiguous and thus closed to agency interpretation.[9] This is the optimal answer from a statutory interpreta-

1 Valenzuela Gallardo v. Lynch, 818 F.3d 808, 811 (9th Cir. 2016).

2 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).

3 *See* 8 U.S.C. § 1101(a)(43) (2012).

4 *Id.* at § 1101(a)(43)(S).

5 *See In re* Valenzuela Gallardo, 25 I.&N. Dec. 838, 839–40 (B.I.A. 2012); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

6 *Chevron*, 467 U.S. at 838.

7 *See* United States v. Gamboa-Garcia, 620 F.3d 546, 549–50 (5th Cir. 2010).

8 *See* Valenzuela Gallardo v. Lynch, 818 F.3d 808, 823, 825 (9th Cir. 2016).

9 *See* Denis v. Att'y Gen. of the United States, 633 F.3d 201, 209–10 (3d Cir. 2011).

tion perspective. The distinct phrases "relating to" and "obstruction of justice" can be easily defined by looking to Supreme Court precedent and other statutes. "Relating to" requires a causal or logical connection between the crime committed and the crime enumerated in the statute.[10] "Obstruction of justice" is a heading in the U.S. Code, which contains a list of federal crimes that are considered "obstruction of justice" crimes.[11] Thus, there is no reason to allow the BIA to interpret the statute.

Further, a broader interpretation of § 1101(a)(43)(S), as this Note's straightforward textual analysis suggests, gives the government greater discretion to deport dangerous or otherwise undesirable aliens: a key concern of the drafters of the INA.[12] At the same time, the fact that the statute does not require deportation, but rather only makes an alien "deportable," acts as an important safety valve to prevent deportation for comparatively minor offenses.

Section I of this Note details the purpose and provisions of the INA. Section II provides a brief overview of the legal doctrine used to determine the appropriate level of judicial review of federal agency decisions. Section III provides an in-depth analysis of each of the varying approaches that circuit courts have employed in analyzing the issue of the "relating to obstruction of justice" language in § 1101(a)(43)(S). Finally, Section IV discusses which approach is best, from both a statutory interpretation and a public policy standpoint.

I
THE IMMIGRATION AND NATIONALITY ACT HAS A LONG HISTORY AND PURPOSE OF PROTECTING AMERICANS FROM DANGEROUS ALIENS

The United States has a long and storied past of restricting immigration. Historically, these concerns were rooted in distrust of foreign cultures and a desire to retain a single American cultural identity.[13] For example, the Immigration Act of 1924 reduced existing immigration quotas for many countries to 2% of that nation's immigrant population in the United

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10 *See id.* at 210–11.

11 *See id.* at 209.

12 The legislative history and the INA itself supports my view that the drafters of the INA were concerned with allowing greater government power to deport dangerous immigrants. This will be discussed further in Part I.

13 *See Milestones 1921–1936: The Immigration Act of 1924 (Johnson-Reed Act)*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1921–1936/immigration-act [http://perma.cc/A5WK-PJ4A].

States as of 1890,[14] and banned immigration from most Asian countries.[15]

The INA was passed in 1952.[16] The INA retained the existing immigration quotas that the Immigration Act of 1924 put in place, although it did remove the ban on Asian immigration and naturalization.[17] The primary concern of legislators in continuing to place heavy restrictions on Eastern European and Asian immigrants was this time anchored in national security.[18] Many of these nations had communist governments, giving rise to fears of a communist infiltration.[19] To protect America from communist subversion, legislators voted overwhelmingly for a system of immigration that was "limited and selective," circumventing President Truman's veto of the legislation.[20]

The INA is still in effect today, although several pieces of legislation over the years have significantly altered it. For example, the law was changed in 1965 to eliminate the quota system and instead prioritize family reunification and immigration of those with special job skills.[21] With that said, the INA still has a strong bend towards the protection of the American people from dangerous alien residents, which was particularly renewed in the aftermath of September 11, 2001. For instance, the law was amended to allow for the deportation of aliens who are terrorists or those who provide support to terrorist organizations.[22]

More specifically, and most relevant to this Note, is an INA provision which has consistently allowed for the deportation of alien residents who have committed certain "aggravated

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14 The previous law capped immigration at 3% of the foreign nation's population in the United States as of 1910. Considering that the majority of Eastern and Southern European immigrants had not yet arrived in 1890, this essentially eliminated immigration from these nations which were culturally distinct from "natives" of Western European descent. *See id.*

15 *Id.*

16 *See Milestones 1945–1952: The Immigration and Nationality Act of 1952 (McCarren-Walter Act)*, U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1945–1952/immigration-act [http://perma.cc/NDA4-7EWW].

17 Granted, this was basically in name only. Asian immigration was still highly disfavored, with quotas for some Asian nations set as low as one hundred persons. *See id.*

18 *See id.*

19 *See id.*

20 *Id.* President Truman perceived the INA as discriminatory and un-American. *See id.*

21 *See* Catherine Lee, *Family Reunification and Limits of Immigration Reform: Impact and Legacy of the 1965 Immigration Act*, 30 SOC. F. 528, 539 (2015).

22 *See* 8 U.S.C. § 1182(a)(3)(B) (2012).

felon[ies]."[23] The INA does not give a list of exactly which specific crimes in the state and federal codes are considered aggravated felonies, but instead lays out a series of general categories of criminal activity that would qualify an alien for deportation.[24] Included in this list is just about any sort of felony imaginable, including but not limited to murder, "crime[s] of violence," theft, fraud, forgery, drug trafficking, and operating a prostitution business.[25] This Note focuses specifically on one of the crimes in this parade of horribles: "an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year."[26] While the language referring to perjury and bribery of a witness is relatively straightforward, the phrase "offense relating to obstruction of justice" has generated a great deal of controversy between the BIA and the federal circuit courts that review BIA decisions, as to what this language means and which crimes it encompasses.[27]

II
JUDICIAL REVIEW OF AGENCY INTERPRETATIONS OF STATUTORY LANGUAGE: A BASIC FRAMEWORK

At this point, it is worth a brief discussion of the level of judicial review by the federal circuit courts over federal agencies' interpretations of the statutes they are tasked with enforcing. That discussion revolves around a landmark Supreme Court decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* In *Chevron*, pursuant to a statutory directive in the Clean Air Act, the Environmental Protection Agency (EPA) promulgated regulations requiring states that had failed to meet national air quality standards to issue permits that would regulate "stationary source" pollution.[28] The EPA interpreted "stationary source" to allow states to issue permits on a plant-wide basis, taking pollution output from each source within a facility into account as a whole rather than regulating each individual smoke stack.[29]

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23 8 U.S.C. § 1227(a)(2)(A)(iii) (2012).
24 *See* 8 U.S.C. § 1101(a)(43) (2012).
25 *See id.*
26 *Id.* at § 1101(a)(43)(S).
27 *See, e.g.*, *In re* Valenzuela Gallardo, 25 I.&N. Dec. 838, 839–40 (B.I.A. 2012) (finding that "offense relating to obstruction of justice" is ambiguous and, therefore, leaving it up to federal courts to interpret).
28 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 840–41 (1984).
29 *See id.* at 840.

In *Chevron*, the National Resources Defense Council (NRDC) challenged the EPA's interpretation of the statute as allowing the above-mentioned regulatory scheme.[30] The D.C. Circuit held that the agency's regulation was inconsistent with the statutory delegation of Congress, and set aside the regulation.[31] On review, the Supreme Court established a two-part test for determining when the judiciary should defer to an agency's interpretation of a statute it has been tasked with enforcing:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[32]

In *Chevron*, the Court determined that the statute and congressional intent were unclear as to whether the agency's interpretation of "stationary source" was the intended application of the statute.[33] Therefore, the Court held that the EPA's interpretation was reasonable and thus permissible under the statute.[34]

Chevron seems to generally give agencies a wide berth in interpreting the meaning of the statutes they are tasked with enforcing. However, *Chevron* has been qualified to some extent. For example, the Supreme Court in *United States v. Mead Corp.* held that *Chevron* deference only applies in cases where Congress intended for the agency to promulgate regulations carrying the force of law, and where the agency does in fact produce regulations carrying the force of law.[35] The *Mead* court suggested that *Chevron* deference should apply where the agency is interpreting statutory language while engaging in

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30 *See id.*
31 *See id.* at 842.
32 *Id.* at 842–44.
33 *See id.* at 851.
34 *See id.* at 866.
35 United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

rulemaking[36] or adjudication,[37] not to agency decisions that are reached through informal processes or that do not have binding legal effect (such as a guidance document or policy manual).[38] This practice of determining whether the agency action carries the force of law, and thus whether *Chevron* deference ought to apply, is commonly referred to as "*Chevron* step zero."[39]

Yet another possible stumbling block to *Chevron* deference is a somewhat undeveloped exception that recently appeared in *King v. Burwell*, also known as the landmark "Obamacare" case.[40] This case raised the possibility that *Chevron* deference may be denied in some cases involving "deep economic and political significance," even if the statutory language is vague and the agency is acting with the force of law.[41] For example, the Court considered the question of whether Congress intended tax credits to be available to those who purchased health insurance through the federal exchange, as an issue of "deep economic and political significance," and therefore did not give deference to the IRS's interpretation.[42] Instead, in these cases, the judiciary is to take the responsibility of interpreting the statute.[43]

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36 As a side note, rulemaking is the process by which agencies propose regulations pursuant to statutory delegations of power, take public comment on those proposals, and then promulgate final regulations. *See generally A Guide to the Rulemaking Process*, OFFICE OF THE FED. REGISTER, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf. [https://perma.cc/9L9N-BZVS] (describing the rulemaking process).

37 Adjudication is the process by which agencies make individual determinations on matters such as permitting, benefits decisions, etc. *See* Charles H. Koch Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 693 (2005). Adjudication can also create precedents which are used as broad agency policy. *See id.* at 695. Whether an agency chooses to use rulemaking or adjudication to create future regulations is generally a question left to the agency's preference. *See id.* at 696.

38 *See Mead*, 533 U.S. at 229. With that said, there has been some muddying of the waters on this issue. Courts have afforded *Chevron* deference in some instances where formal procedures are not involved, but where the agency has clearly dedicated a great deal of thought to the matter and brings a significant amount of expertise to bear on the issue. *See* Cass R. Sunstein, *Chevron Step Zero* 25–26 (U. OF CHI. PUB. LAW & LEGAL THEORY, Working Paper No. 91, 2005), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1053&context=public_law_and_legal_theory [https://perma.cc/6QK5-8NYN].

39 *See* Sunstein, *supra* note 38, at 3.

40 King v. Burwell, 135 S.Ct. 2480, 2489 (2015).

41 *Id.*

42 *Id.*

43 *See id.*

Now that the basic framework for how judges are to review agency interpretations of statutory language is on the table, we turn to the specific question of how the phrase "relating to obstruction of justice" has been interpreted by the BIA and the various federal circuits that review its decisions. Unsurprisingly, the circuits disagree with one another over the proper interpretation of the statute and/or the level of deference that should be afforded to the BIA's interpretation. The next section of this Note will analyze the various positions in this complicated circuit split.

III
A THREE-PRONGED CIRCUIT SPLIT

A. The Board of Immigration Appeal's Interpretation

The best place to start in surveying the circuit split is to lay out exactly how the BIA has interpreted the statutory language "relating to obstruction of justice." The BIA's current precedent on this issue comes from its ruling in *In re Espinoza-Gonzalez*. In that case, the BIA was tasked with determining whether the crime of misprision of a felony[44] was a crime relating to obstruction of justice under § 1101.[45] Although there is no specific crime in the U.S. Code entitled "obstruction of justice," there is a list of various offenses that are organized under the heading "obstruction of justice,"[46] which the court reviewed.[47] Misprision of a felony is not one of the crimes listed under the heading, and according to the BIA the crimes that are listed involve as elements: "either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice."[48] Thus, the BIA held that misprision of a felony should not be considered a crime relating to obstruction of justice:

> We do not believe that every offense that, by its nature, would tend to "obstruct justice" is an offense that should properly be classified as "obstruction of justice." The United States Code delineates a circumscribed set of offenses that consti-

[44] "Elements of the crime of misprision of a felony are that the principal committed and completed the felony alleged and that the defendant had full knowledge of that fact, failed to notify the authorities, and took an affirmative step to conceal the crime." *In re* Espinoza-Gonzalez, 22 I.&N. Dec. 889, 890 (B.I.A. 1999). In this case, the underlying felony was "conspiracy to possess marijuana with intent to distribute." *Id.* at 889.

[45] *See id.* at 889–90.

[46] 18 U.S.C. §§ 1501–1518 (2015).

[47] *See* 22 I.&N. at 890–91.

[48] *Id.* at 893.

> tute "obstruction of justice," and although misprision of a felony bears some resemblance to these offenses, it lacks the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice.[49]

The BIA would later clarify its interpretation after the Ninth Circuit held in *Valenzuela Gallardo v. Lynch* that *Espinoza-Gonzalez* stood for the proposition that a criminal act constitutes an obstruction of justice crime "when it interferes with an ongoing proceeding or investigation."[50] A three-judge panel of the BIA said the Ninth Circuit's rendering of the existing BIA interpretation as requiring the obstruction of an ongoing proceeding or investigation was incorrect,[51] and clarified its interpretation of the "relating to obstruction of justice" language as follows:

> [T]he affirmative and intentional attempt, with specific intent, to interfere with the process of justice— demarcates the category of crimes constituting obstruction of justice. While many crimes fitting this definition will involve interference with an ongoing criminal investigation or trial, we now clarify that the existence of such proceedings is not an essential element of an "offense relating to obstruction of justice."[52]

B. The Ninth Circuit: Defer to the Agency, but Use the Constitutional Avoidance Doctrine in this Case to Invalidate the Interpretation as it Stands

The Ninth Circuit clashed with the BIA once again, recently deciding in *Valenzuela Gallardo v. Lynch* that although the statutory language of § 1101(a)(43)(S) is vague under *Chevron* step one, the agency's clarified interpretation is impermissible

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49 *Id.* at 893–94.

50 Valenzuela Gallardo v. Lynch, 818 F.3d 808, 812 (9th Cir. 2016) (emphasis omitted).

51 In re Valenzuela Gallardo, 25 I.&N. Dec. 838, 842 (B.I.A. 2012). A court's interpretation of statutory language delegated to an agency is only binding on the agency if the court is interpreting the language from the position that the statute is unambiguous, and the agency has no authority to interpret it itself. Where the court is interpreting a statute itself, or interpreting the agency's interpretation, from the position that the language is ambiguous, the agency is not bound by the court's interpretation in future cases and may alter its interpretation over time with changes in political administrations, policy goals, etc. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 982–83 (2007). This sort of situation can be thought of as similar to a federal court applying state law in an *Erie* case.

52 25 I.&N. at 841.

because of the constitutional avoidance canon of statutory interpretation.[53]

Mr. Valenzuela Gallardo is a Mexican citizen with permanent resident status in the United States.[54] He was arrested in 2007 when he was found in a stolen vehicle with methamphetamine, ecstasy, and a loaded firearm.[55] Ultimately, Mr. Valenzuela Gallardo was convicted as an accessory to a felony under California state law.[56] An immigration judge ordered that Mr. Valenzuela Gallardo be removed to Mexico in 2010 on the grounds that the crime of accessory to a felony should be considered an aggravated felony related to obstruction of justice under § 1101(a)(43)(S).[57] Mr. Valenzuela Gallardo appealed the decision to the BIA, where it was upheld, and he subsequently appealed to the Ninth Circuit.[58]

The Ninth Circuit applied the *Chevron* test because the BIA had interpreted the statutory language of the INA with the force of law (an adjudicatory precedent).[59] While the Ninth Circuit had deferred to the BIA in the past, the court refused to do so in this instance. Although the language itself was ambiguous in the court's view, the court used a canon of statutory interpretation called "constitutional avoidance" when interpreting the statutory language.[60] Constitutional avoidance is a rule of statutory interpretation that says courts should avoid interpreting statutes, when possible, in such a way as to raise constitutional questions.[61] Essentially, the court will not allow an agency to interpret a statute in a constitutionally suspect manner unless Congress has clearly expressed an intention that the agency do so.[62]

According to the Ninth Circuit, the BIA's interpretation raises serious constitutional questions.[63] Because the agency's interpretation of obstruction of justice as applying to crimes involving "interference with the process of justice" gives no parameters of what exactly this means, potential violators

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53 *Valenzuela Gallardo*, 818 F.3d. at 815–16.

54 *Id.* at 811

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.* at 812.

59 *See id.* at 815.

60 *Id.* at 816.

61 *See* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN L. REV. 139, 140 (2012).

62 *See Valenzuela Gallardo*, 818 F.3d at 816.

63 *See id.* at 818–19.

are not put on notice regarding what conduct would violate the statute.[64] Although there is a clear mens rea requirement—a specific intent to interfere with the process of justice—potential criminals are left unaware of what the actus reus necessary to commit the crime is.[65] As the court was unable to find congressional intent that the agency interpret the statute in such a constitutionally questionable manner, it refused to defer to the agency's current interpretation.[66] Instead, the court remanded the case back to the BIA and demanded that it re-interpret the statute, preferably in such a way that would require that an aggravated felony relating to obstruction of justice involve a specific intent to interfere with a judicial proceeding or investigation.[67]

The dissent in *Valenzuela Gallardo* raises several compelling points. The dissent argues that even if the use of the constitutional avoidance canon is appropriate in a *Chevron* case, it should not be applied here because the BIA's interpretation of the statute does not raise any "'grave' constitutional . . . concerns."[68] Many obstruction crimes, such as those under the federal accessory after the fact statute,[69] do not require a nexus between the obstruction in question and a specific event or proceeding, but merely a general interference with the ability of a police officer or prosecutor to investigate criminal activity.[70] Finally, even if it were conceded that the BIA's interpretation pushed up against a constitutional boundary, the dissent argues that there is in fact congressional intent to allow such an interpretation based on the language "*relating to* obstruction of justice."[71] The "relating to" language implies that Congress is giving the agency wide latitude to interpret the statute to its constitutional limits.[72]

C. The Fifth Circuit: Defer to the Agency's Interpretation

Prior to the Ninth Circuit's recent analysis, there was an existing circuit split between the Fifth Circuit, which has adopted the stance that courts should defer to the agency's

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64 *Id.* at 821–22.
65 *See id.* at 821.
66 *See id.* at 823.
67 *See id.* at 824
68 *Id.* at 826
69 The BIA has previously held that a crime under the the federal accessory after the fact statute qualifies as an aggravated felony relating to obstruction of justice. *See In re* Espinoza-Gonzalez, 22 I.&N. Dec. 889, 891 (B.I.A. 1999).
70 *See Valenzuela Gallardo*, 818 F.3d at 826.
71 *Id.* at 832 (emphasis added).
72 *See id.*

interpretation, and the Third Circuit, which held that the statutory language was not ambiguous, and thus not open for agency interpretation. The defendant in *United States v. Gamboa-Garcia* (the Fifth Circuit case in which they deferred to the BIA) was an illegal immigrant who had been convicted of accessory to murder in 2001, deported, and charged with illegal re-entry in 2004.[73] She was removed to Mexico in 2007 upon completing her sentence, but was found once again in Texas in 2009 and again charged with illegal re-entry.[74]

A major issue in *Gamboa-Garcia* was the dispute over whether accessory to murder should be considered an aggravated felony for the purpose of enhancing the defendant's sentence.[75] The federal sentencing guidelines incorporate 8 U.S.C. § 1101(a)(43) and its categories of aggravated felonies for the purpose of determining whether a sentence should be enhanced.[76] The court deferred[77] to the BIA's interpretation of "relating to obstruction of justice" as "either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice."[78]

D. The Third Circuit: No Agency Deference

The Third Circuit has taken a completely different path than the Fifth and Ninth Circuits in reviewing BIA decisions, refusing to defer to the agency's interpretation of the "relating to obstruction of justice" language in *Denis v. Attorney General of the United States*.[79] Mr. Denis, a Haitian citizen, obtained permanent resident status in 1992.[80] Denis was convicted of manslaughter and tampering with physical evidence after he killed, dismembered, and disposed of the corpse of a client

73 United States v. Gamboa-Garcia, 620 F.3d 546, 547 (5th Cir. 2010).

74 *Id.*

75 *Id.* at 548.

76 *See id.*

77 *See id.* at 549. Interestingly, the court does not really explain why. The opinion does not offer a *Chevron* analysis.

78 *Id.* at 550. This is the BIA's interpretation prior to its clarification that interference with a judicial proceeding is not necessary to constitute obstruction of justice. It could be argued that this interpretation is somewhat different from what the Ninth Circuit was looking at in *Valenzuela Gallardo*, however, neither I (nor the dissent in *Valenzuela Gallardo*) believe that the interpretation is substantively different. There was no reason to view the BIA's original interpretation as requiring interference with a proceeding. The BIA was merely clarifying its interpretation in *In re Espinoza-Gonzalez*.

79 *See* Denis v. Att'y Gen. of the United States, 633 F.3d 201, 209 (3d Cir. 2011).

80 *Id.* at 203.

following an altercation in his place of business.[81] After his conviction, Immigration and Customs Enforcement (ICE) sought to have Mr. Denis removed to Haiti and brought a successful action before an immigration judge.[82]

The Third Circuit was unequivocal in its belief that the statutory language in question was not ambiguous, and therefore not open to agency interpretation: "The instant petition for review does not present an obscure ambiguity or a matter committed to agency discretion. Rather, the phrase 'relating to obstruction of justice' in Section 1101(a)(43)(S) includes two discrete phrases—'relating to' and 'obstruction of justice'—both of which are capable of definition."[83]

Similar to the BIA, the Third Circuit reviewed the listing of obstruction of justice crimes under 18 U.S.C. §§ 1501–1518, which according to the court, clarifies which sorts of conduct Congress wanted the language to encompass.[84]

Additionally, the court held that the phrase "relating to" must be read to broaden the statute's reach.[85] To do otherwise would be to not afford the words any effect at all.[86] The court referred to a recent Supreme Court holding that "relating to" should be defined as follows: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with."[87] As such, rather than merely perusing the listing of crimes under obstruction of justice in Title 18 and determining whether the crime the alien was charged with contains elements of one of those offenses,[88] the court will instead look for a logical connection between the crimes listed and the offense in question.[89]

In applying this to the facts of the present case, the court found that 18 U.S.C. §§ 1503 and 1512, which deal with efforts to obstruct the administration of justice and the destruction of evidence, respectively, covered Mr. Denis's conduct in dismembering and disposing of his client's corpse.[90] In the court's view, this was a straightforward application of the test, so the

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81 *Id.* at 204

82 *Id.* at 204–05.

83 *Id.* at 209.

84 *See id.* (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)).

85 *See id.*

86 *See id.*

87 *Id.*

88 This is the test that the BIA endorsed in its *Espinoza* precedent. *See supra* subpart III.A.

89 Denis, 633 F.3d at 212.

90 *See id.* at 212–13.

opinion provides another example of how it would apply this logical connection test.[91] The court pointed to 8 U.S.C. § 1101(a)(43)(R), which declares that crimes relating to forgery or counterfeiting constitute an aggravated felony for the purpose of deportation.[92] The court stated that a conviction for a crime such as trafficking in counterfeit goods would be considered an aggravated felony "relat[ing] to" forgery even though the person convicted of the crime may not have actually forged or counterfeited the goods himself.[93]

Recently, the Third Circuit has unfortunately narrowed its analysis of the logical relationship test. In *Flores v. Attorney General of the United States*, the court determined that accessory after the fact was not an aggravated felony related to obstruction of justice.[94] According to the court, accessory after the fact did not bear a logical connection to any of the crimes listed under the obstruction of justice header.[95] Essentially, the court held that the crime committed must involve the same core elements of one of the enumerated federal obstruction of justice crimes.[96] In the case at hand, the court determined that all of the obstruction of justice crimes require some connection to a judicial hearing or investigation. In contrast, accessory after the fact does not require that the perpetrator know about or intend to interfere with any official proceeding.[97]

The *Flores* dissent, on the other hand, would continue to advance the common-sense approach originally put forth in *Denis*.[98] The dissent argues that the crime of accessory after the fact is clearly logically related to obstruction of justice.[99] The act of assisting a felon and aiding him in escaping justice certainly has the effect of frustrating the ability of the court system to prosecute the principal offender.[100]

To summarize, there are four interpretations on the table: BIA/Fifth Circuit's interpretation requiring a specific intent to interfere with the process of justice (regardless of the existence of an ongoing judicial proceeding); the Ninth Circuit's proposed interpretation that would require interference with a specific,

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91 *See id.* at 210–12.
92 *See id.* at 210.
93 *See id.* at 211
94 *See* Flores v. Att'y Gen. of the United States, 856 F.3d 280, 292 (3d Cir. 2017).
95 *See id.* at 288, 292–94.
96 *See id.*
97 *See id.* at 292–93.
98 *See id.* at 297.
99 *See id.* at 300.
100 *See id.*

ongoing proceeding or investigation; the Third Circuit's broader interpretation requiring only a logical connection to one of the obstruction of justice crimes (but requiring interference with an ongoing proceeding or investigation); and the Third Circuit dissent's loose logical relationship test.

IV
WHAT IS THE BEST ANSWER TO THIS CIRCUIT SPLIT?

A. Why Do We Care? Or Why Should We Care?

As it stands, the law as to what constitutes an aggravated felony under the "relating to obstruction of justice" section of § 1101 is not only unclear, but worse, it may be inconsistently applied based on where one lives. It is true that in many instances we would see the same result no matter which of the interpretations we apply. For example, all of the circuits would agree that a crime like destruction of evidence is an aggravated felony. However, a crime such as accessory after the fact or accessory to a felony, is a more open question. According to the BIA's interpretation, accessory after the fact is an aggravated felony.[101] The same would be true under the Third Circuit's dissent in *Flores*.[102] But as we have seen, the Third Circuit and the Ninth Circuit have said that accessory after the fact is not an aggravated felony.[103]

The bigger problem is that the Ninth and Third Circuits have adopted a very narrow interpretation of the obstruction of justice category that fails to advance Congress's clear goal of adequately protecting the American people from enemies "foreign and domestic."[104]

The easiest solution to this problem would be to follow the lead of the Second and Eighth Circuits and "punt" on the issue.[105] Unfortunately, that is not a viable solution in the long run. So long as the Supreme Court has not addressed this matter, however, this Note will attempt to provide a satisfactory answer. This Note's analysis of what is the optimal solution will consider the issue from both a statutory interpretation perspective and a public policy standpoint.

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101 Valenzuela Gallardo v. Lynch, 818 F.3d 808, 812 (9th Cir. 2016).

102 *Flores*, 856 F.3d at 297.

103 *See id.* at 211; *Valenzuela Gallardo*, 818 F.3d at 823–24.

104 *See supra* Part I.

105 *See* Armenta-Lagunas v. Holder, 724 F.3d 1019, 1022 (8th Cir. 2013); Higgins v. Holder, 677 F.3d 97, 104 (2d Cir. 2012). Both cases concluded that there was no need to decide the issue at this time.

B. *Chevron* Step Zero

This Note will examine this issue through the prism of a hypothetical BIA ruling that an alien resident should be deported because he committed an aggravated felony relating to obstruction of justice. The defendant appeals the case to the appropriate circuit court of appeals. The first thing that the court of appeals needs to decide is whether to apply the *Chevron* test.

The administration of § 1227(a)(iii), which allows resident aliens to be deported for certain aggravated felonies,[106] is assigned to the Department of Homeland Security under the supervision of the Department of Justice (the Attorney General signs off on deportations).[107] In using the formal adjudication process to determine whether a criminal resident alien has committed an aggravated felony and is ripe for deportation, there is no question that the agency is acting with the force of law. Thus, it seems clear that this action meets *Chevron* "step zero". This is not like the *Mead* case where the agency issued a mere guidance document.[108] Nor is it likely that this would fall under some version of the "deeply important economic and political issue" exception like the question of whether tax credits should be available to those purchasing healthcare on the federal exchange in *Burwell*.[109] "Obamacare," the centerpiece legislation of the Obama administration, has been a major political football for the last half decade and continues to have a massive impact on the American economy. It is not comparable to a relatively mundane question of whether a certain crime makes a resident alien deportable. With that said, this exception comes from a very recent Supreme Court decision and is not especially well-developed at this point. It is possible in the future that we could see more issues get pushed out of *Chevron* depending on what direction the Court takes this exception.

There is also an argument that courts should disregard *Chevron* "step zero" in cases where the agency's expertise is not implicated.[110] Rather than automatically deferring to the agency on its interpretation of ambiguous statutory language, the courts should instead exercise discretion, allowing the

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[106] *See supra* Part I.

[107] *See* 8 U.S.C. § 1227(a) (2008); 8 U.S.C. § 1227(d)(4) (2008).

[108] United States v. Mead Corp., 533 U.S. 239 (2005).

[109] *See supra* Part II.

[110] *See* Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U ANN. SURV. AM. L. 503, 564 (2013).

agency to answer questions it is uniquely qualified to answer, while the court interprets ambiguous statutory language that is unrelated to the expertise of the agency.[111] For example, the question of what "relating to obstruction of justice" means is not a question that the BIA is uniquely qualified to answer. Courts are arguably just as capable, if not more capable, of analyzing this language. According to proponents of this theory, allowing courts to interpret ambiguous language that is not uniquely related to an area of agency expertise creates uniformity in the application of immigration law because it avoids the problem of various circuits applying *Chevron* differently and reaching disparate results.[112]

This argument is not persuasive, however, and would make the current problem of circuit splits even worse. How will the circuits agree on the question of whether a piece of statutory language is within the expertise of the agency and when it is not? Some courts will say language ought to be left to the agency, and some will say that they should interpret it themselves. This is the same problem that already exists under *Chevron*, as seen through inconsistent interpretations leading to circuit splits. And even if the circuits manage to agree that the language in question should be interpreted by the courts and not the agency, they are likely to each interpret the language differently.[113] It makes more sense to follow *Chevron*. If the statute is genuinely unambiguous, the circuits should all apply the same interpretation (the unambiguous intent of Congress). If the statue is ambiguous, the agency will interpret the language and each circuit will defer to the agency. In a perfect world, where the courts are applying *Chevron* correctly, we should not see circuit splits. Although the argument that courts are better qualified to make this legal analysis than an agency bureaucrat is appealing, *Chevron* still protects against clearly incorrect interpretations in step two.[114] If the agency's construction of the statutory language is unreasonable, the court can reject it.[115]

111 *See id.* at 507.

112 *See id.* at 509–10.

113 One need look no further than the circuit split that is the subject of this Note to find an example of this proposition.

114 *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

115 *See id.*

C. *Chevron* Step One

Based on this "step zero" analysis, our hypothetical judicial review should proceed to *Chevron* step one. Again, *Chevron* step one requires the court to ascertain whether the intention of Congress is clear from the statute.[116] If it is, the court must apply the legislature's intended interpretation of the statute.[117] Making this determination is easier said than done, however. In *Chevron*, the Supreme Court said that a judge performing a step one analysis should employ "traditional tools of statutory construction."[118] Unfortunately, the Supreme Court has not provided guidance as to what tools should be used, in what order, etc.[119]

One of these potential statutory interpretation tools is the constitutional avoidance doctrine, which the Ninth Circuit applied in *Valenzuela Gallardo*.[120] Constitutional avoidance is a rule of statutory interpretation that says courts should avoid interpreting statutes, when possible, in such a way as to raise constitutional concerns.[121] The Ninth Circuit believed the agency's interpretation was constitutionally suspect (although it did not say it was patently unconstitutional) because "interference with the process of justice" may be too vague to inform an individual of what sort of activity the statute covers.[122] Additionally, there is no evidence that Congress wanted the agency to interpret the statute to its constitutional limit.

Whether courts should apply constitutional avoidance in the *Chevron* context is a significant bone of contention between courts, and one that the Supreme Court has not directly addressed.[123] I agree with courts and scholars who argue that constitutional avoidance should not be employed in a *Chevron* analysis.[124] Constitutional avoidance is about choosing between different viable interpretations. If there are such interpretations to choose from, then the statutory language is obviously ambiguous, and under *Chevron*, the court ultimately needs to defer to the agency if its interpretation is reasonable.

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116 *See supra* Part II.

117 *See id.*

118 *See Chevron*, 467 U.S. at 843 n.9.

119 *See* Melina Forte, *May Legislative History Be Considered at Chevron Step One: The Third Circuit Dances the Chevron Two-Step in United States v. Geiser*, 54 VILL. L. REV. 727, 728 (2009).

120 *See supra* subpart III.B.

121 *See id.*

122 *Id.*

123 *See* Walker, *supra* note 61, at 173.

124 *See id.* ("[A] court cannot trump a reasonable interpretation by [sic] the agency . . . by invoking constitutional avoidance at *Chevron* step one.").

That is not what happened in *Valenzuela Gallardo*, however. The Ninth Circuit majority never said that the agency's interpretation *was* unconstitutional.[125] It said that the interpretation raised constitutional questions that a different interpretation (requiring a connection to a hearing or investigation) could have avoided.[126] As the Supreme Court said in *Chevron*: "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[127]

Even if one insisted upon applying constitutional avoidance in a *Chevron* analysis, the dissent in *Valenzuela Gallardo* raises an excellent point. It seems that Congress wanted the statutory language to be interpreted broadly and to its constitutional limits by its inclusion of the phrase "relating to."[128] If Congress did not want the agency to do this, it should have just said "obstruction of justice" crimes, not crimes "relating to obstruction of justice."[129] Thus, I do not believe that constitutional avoidance should have a role to play in *Chevron*, and even if it did, it would be incorrect to use it in the context of this statute.

One of the most basic tools of statutory construction is to look to the plain meaning of the statute's text, as the court did in *Chevron*.[130] The Ninth Circuit and Fifth Circuit do not discuss the process they used to interpret the text, but simply state that they thought the text was ambiguous (again we do not know why they think this; they must not have thought it important enough to explain).[131] In contrast, the Third Circuit's step one analysis revolves entirely around textual analysis.[132] The Third Circuit in *Denis* and the *Flores* dissent says there are two distinct phrases: "relating to" and "obstruction of justice."[133] Both of these phrases have meanings that can easily be defined.[134] "Relating to" means a logical connection, and there is a list of crimes that the federal government groups

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125 *See supra* subpart III.B.

126 *See id.*

127 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

128 *See* Valenzuela Gallardo v. Lynch, 818 F.3d 808, 832 (9th Cir. 2016); *supra* subpart III.B.

129 *See supra* subpart III.B.

130 *See Chevron*, 467 U.S. at 859–62.

131 *See supra* subpart III.B; subpart III.C.

132 *See supra* subpart III.D.

133 *See id.*

134 *See id.*

together as "obstruction of justice" crimes.[135] The phrase "relating to" has to mean something given the presumption that all of the words in a statute have meaning.[136] Thus, the statutory language is not ambiguous. It means that crimes that bear a logical connection to the ones listed in the obstruction of justice grouping are aggravated felonies, and there is no room for the agency to interpret the language differently. I find this analysis to be especially persuasive.

A final tool of statutory interpretation often applied is to review extrinsic evidence of congressional intent to determine how Congress would have wanted the language to be construed.[137] Similar to constitutional avoidance doctrine, it is unclear whether courts are meant to apply this tool in a *Chevron* analysis. There is currently a circuit split on this, with some saying it should be used and some saying it should not.[138] Although the courts disagree today on the appropriateness of looking to legislative intent when performing a *Chevron* analysis, the court in *Chevron* did look at legislative history, finding it "unilluminating" in its quest to interpret the "stationary source" language.[139] Many conservative judges and scholars are opposed to using this method because legislative history is unreliable, mixed, and is not necessarily reflected in the final statutory product due to intervening compromises.[140]

With that said, extrinsic evidence can be useful (though not dispositive) where Congress's intent is relatively clear. In the case of the INA's aggravated felony language, it is easy to glean Congress's intent. The INA was passed at a time when Americans were deeply afraid, rightly or wrongly, of Communist subversion.[141] Given these concerns, Congress passed a law that placed tight restrictions on immigration from Eastern European and Asian nations, and that authorized the federal government to deport resident aliens convicted of a broad swath of crimes.[142] Though the ethnic restrictions are not in place today, the ability to deport alien criminals has been expanded in our post-9/11 world to remove people who support

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135 *See id.*

136 *See id.*

137 *See* Marguerite M. Sullivan, Brown and Williamson v. FDA*: Finding Congressional Intent Through Creative Statutory Interpretation—A Departure from* Chevron, 94 NW. L. REV. 273, 284–85 (1999).

138 *See* Forte, *supra* note 119, at 730.

139 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 862–64 (1984).

140 *See* Forte, *supra* note 119, at 738–39.

141 *See supra* Part I.

142 *See id.*

terrorism.[143] There is a common denominator in all of this congressional activity: a desire to keep Americans safe from criminal alien residents. Additionally, given that the INA's aggravated felony section references just about every crime imaginable, it seems that Congress wanted this protection to be applied broadly.[144]

Putting all of this together, the optimal interpretation of the "relating to obstruction of justice" language within the INA is to apply the common-sense textual interpretation that the Third Circuit dissent in *Flores* advocates. The use of legislative history is also useful, though not dispositive, to justify this broad reading. The goal of the INA is to protect Americans, and the *Flores* dissent's broad reading of the statutory language best reflects that intent. Finally, the doctrine of constitutional avoidance as applied by the Ninth Circuit has no place here because the statutory language is not vague and open to multiple interpretations. Even if one insisted on using the constitutional avoidance doctrine, it seems that Congress did want the statute to stretch the limits of the Constitution based on the language "relating to."

There is a question, which the Ninth Circuit alludes to in *Valenzuela Gallardo*, as well as the Third Circuit in *Flores*, as to whether the construction this Note advocates for would be constitutional. The Ninth Circuit said that the BIA's and Fifth Circuit's interpretation, requiring a specific intent to interfere with the process of justice, raised questions of constitutional vagueness. The Ninth Circuit raised the issue that it is not clear what constitutes the "process of justice."[145] Although it did not discuss this Note's approach, the Ninth Circuit would likely find similar concerns with our "logically related" analysis.

Constitutional vagueness is admittedly a valid issue. As the Ninth Circuit correctly points out, the Supreme Court recently struck down part of a different federal categorical crime.[146] The term "crime of violence" is used in several federal statutes and is one of the categories of aggravated felonies. It is defined as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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143 *See id.*

144 *See id.*

145 *See* Valenzuela Gallardo v. Lynch, 818 F.3d 808, 821–822 (9th Cir. 2016).

146 *See id.* at 819.

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[147]

The Supreme Court held in *Johnson v. United States* that the residual language[148] of § 16(b) was unconstitutionally vague.[149] The Fifth Amendment prohibits the application of criminal statutes that do not provide a potential criminal with fair notice of the type of conduct it seeks to punish.[150] The major problem with this statutory language is that it leaves open the question of what is a "substantial risk" that the crime will involve the use of physical force against another?[151] How is a potential violator supposed to evaluate whether his actions will contravene this law? Does carrying a sawed-off shotgun involve such a risk? What about robbing a bank?

The interpretation this Note advocates for may seem to raise similar problems. How is a potential violator of the statute supposed to know what sort of crimes are logically related to the crimes listed under obstruction of justice? Although this is a valid concern, the "relating to obstruction of justice" category is significantly different from the "crime of violence" category in at least one respect: there is a listing of specific behavior that constitutes obstruction of justice that potential violators of the law can look to. In the crime of violence case, there was no such listing. Although the "relating to" language expanding the list to include logically related crimes dilutes that clarity somewhat, I think it is much clearer what sort of conduct should be avoided here than in the crime of violence scenario.

Additionally, the court's ruling in *Johnson* was closely divided, 6–3, as to whether the language in question was unconstitutionally vague. The three dissenters (Kennedy, Thomas, and Alito) remain on the Court, and the author of the opinion, Justice Scalia, is deceased.[152] President Trump ran on a "law and order" platform that was also highly suspect of immigration.[153] He will probably nominate anywhere from one to four

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[147] 18 U.S.C. § 16 (1984).

[148] This would be the language "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* at § 16(b).

[149] Johnson v. United States, 135 S.Ct. 2551, 2554 (2015).

[150] *See id.* at 2556–57.

[151] *See id.* at 2558.

[152] *Id.* at 2555.

[153] Jose DelReal, *Trump Ratchets Up Nationalist and Law-and-Order Rhetoric on Campaign Trail*, WASH. POST (Sept. 22, 2006), https://www.washingtonpost.com/politics/trump-ratchets-up-nationalist-and-law-and-order-rhetoric-on-

Supreme Court justices in the coming years. It is likely (though impossible to predict) that the makeup of the Court will change in a direction that is less favorable to criminal defendants, which bodes well for the interpretation this Note advocates.

D. Public Policy Considerations

This broader reading of the "relating to obstruction of justice" language is not only optimal from a statutory interpretation perspective, but also is best for public policy reasons. Many of the resident aliens in this country are decent, law-abiding people who contribute to the economic and cultural well-being of our nation. At the same time, there are definitely plenty of "bad hombres."[154] There are people like Mr. Denis, who after killing a customer in his place of business, cut her body into pieces and buried them in a suitcase under his basement floor.[155] Or Ms. Gamboa-Garcia, who attempted to help a murderer escape justice by driving and subsequently cleaning the getaway car.[156]

We have enough *citizens* in this country who are derelicts. We do not need to allow resident aliens to continue to stay here if they do not follow our laws. It makes sense to give the government all the tools possible so that it can maintain law and order. Some may argue that the people who are convicted of a crime "relating to obstruction of justice" are not likely to be violent, or if they are, they are probably deportable under a different crime (remember, the list of aggravated felonies is quite inclusive). The problem with that theory is two-fold. First, even if a criminal alien resident is not violent, the types of crimes involved under the obstruction of justice banner involve attacks on our system of law enforcement and judicial process (witness tampering, accessory after the fact, perjury). An attack on the integrity of our justice system is arguably even worse than violent crime.

Second, while the argument that many of these criminals would likely be deportable under a different offense seems logical, and is perhaps correct in many cases, this would not always be true. Looking back at the accessory after the fact

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campaign-trail/2016/09/22/73d708a8-80c3-11e6-b002-307601806392_story.html?utm_term=.8f0bd0d6efd4. [https://perma.cc/TNU4-XY2A].

154 Vivan Salama, *Trump to Mexico: Take care of the 'bad hombres' or US might*, ASSOCIATED PRESS (Feb. 2, 2017), https://apnews.com/0b3f5db59b2e4aa78cdbbf008f27fb49 [http://perma.cc/G5GU-QPQL].

155 *See* Denis v. Att'y Gen. of the United States, 633 F.3d 201, 204 (3d Cir. 2011).

156 *See* United States v. Gamboa-Garcia, 620 F.3d 546, 547 (5th Cir. 2010).

example, someone who makes a conscious effort to assist a murderer would not be deportable under the Ninth or Third Circuits' interpretations because that crime does not require interference with a judicial proceeding. Someone who consciously assists a felon, even if they did not have the specific intention of interfering with an investigation or judicial proceeding, should be considered equally culpable as someone who commits perjury (a deportable offense).

Additionally, a recent post on the *Michigan Journal of Race & Law* website discussing the *Valenzuela Gallardo* decision expressed support for the Ninth Circuit's position that the BIA's interpretation was invalid under the constitutional avoidance doctrine.[157] The author believes that the BIA's and Fifth Circuit's interpretation, and presumably[158] the Third Circuit's position on this issue, essentially exposes resident aliens to a risk of deportation for relatively minor crimes.[159] It is certainly true that the interpretation this Note advocates for would make it easier to deport criminal resident aliens who commit certain offenses. But to suggest that it would open them up to deportation for relatively minor crimes is an overstatement. Under the interpretation this Note is advocating for, the criminal alien still must have committed a crime that is logically connected to one of the "obstruction of justice" crimes listed in the U.S. Code. These are not minor crimes—they are serious ones that do great damage to the integrity of our justice system. Additionally, it is important to remember that the statute also requires that for an offense to make an immigrant deportable, it must entail a term of imprisonment of at least one year.[160]

Finally, just because someone is "deportable" does not mean that they will be deported. The Attorney General must pursue deportation.[161] It is generally unlikely, and in fact undesirable, for the Attorney General to expend resources in the pursuit of deportations for minor crimes. The Attorney General is more likely to use his limited resources to pursue serious or politically relevant criminal activity.

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157 Amy Luong, *Ninth Circuit Rejects Board of Immigration Appeals' Interpretation, Creates Circuit Split*, MICH. J. OF RACE & LAW, https://mjrl.org/2016/09/12/9th-circuit-rejects-board-of-immigration-appeals-interpretation-creates-circuit-split/ [https://perma.cc/YBP6-94B2].

158 The article does not discuss the Third Circuit's interpretation, i.e. the interpretation I am advocating for. However, it is safe to say the author would likely find the same problems and be equally opposed.

159 *See* Luong, *supra* note 157.

160 8 U.S.C. § 1227(a)(2)(A)(iii) (2008).

161 *See id.* at § 1227(a); *id.* at § 1227(d)(4).

FINAL THOUGHTS

The law must give our government every opportunity to protect Americans from the actions of criminal alien residents. This includes interpreting our existing statutes to provide the government with the broadest authority possible to deport resident aliens who violate our laws. As such, the optimal interpretation of the "relating to obstruction of justice" language within the INA is to implement the common sense textual interpretation applied by the Third Circuit, reading the statute broadly to encompass crimes that are listed in the obstruction of justice heading in the U.S. Code, as well as other logically related crimes.