IMMIGRATION LAW—THE PENDENCY OF A MOTION TO REOPEN BEFORE THE BOARD OF IMMIGRATION APPEALS AND ITS EFFECT ON APPELLATE COURT JURISDICTION: REJECTING THE "SUSPENDED FINALITY" APPROACH IN DEPORTATION CASES

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NOTES

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INTRODUCTION

Deportation is the process by which the government expels aliens from the United States. The Board of Immigration Appeals (“BIA” or “Board”) is the administrative agency that issues the required “final” orders of deportation. The deportable alien may

2. The Board of Immigration Appeals (“BIA”) is an administrative appeals body under the Attorney General. The BIA and the immigration judges comprise the Executive Office for Immigration Review (“EOIR”) in the Department of Justice. The BIA is not a part of the Immigration and Naturalization Service (“INS”). 8 C.F.R. § 3.1 (1994); see generally T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 92 (1985). This BIA independence “is crucial to both the reality and the perception of fairness, because the INS is one of the two adversarial parties appearing before the BIA in a given case.” Stephen H. Legomsky, Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process, 71 IOWA L. REV. 1297, 1378 (1986). The immigration regulations define the Board’s jurisdiction. See 8 C.F.R. § 3.1(b).
3. A basic premise of this Note is that an immigration judge’s deportation decision becomes a final, appealable order of deportation once it is affirmed by the BIA. See infra note 55 and accompanying text for a discussion of the pertinent immigration regulations. Because this Note addresses only the narrow issue of whether an unadjudicated motion to reopen or reconsider suspends the finality of a BIA decision for purposes of appellate jurisdiction, it does not consider the full range of decisions appealable under § 106(a) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1105a(a) (1988 & Supp. V 1993).

Note, however, that the United States Supreme Court has discussed the meaning of “final orders” of deportation that are appealable to the courts of appeals. See INS v. Chadha, 462 U.S. 919, 938 (1983) (holding that “the term ‘final orders’ in § 106(a) includes all matters on which the validity of the final order is contingent,” not just those decisions made at the deportation hearing) (quoting Chadha v. INS, 634 F.2d 408, 412 (1980)); Cheng Fan Kwok v. INS, 392 U.S. 206, 211 (1968) (denial of a motion to stay deportation not included under § 106(a) jurisdiction); Giova v. Rosenberg, 379 U.S. 18 (1964) (per curiam) (jurisdiction included reviewing denials of motions to reopen deportation proceedings); Foti v. INS, 375 U.S. 217, 229 (1963) (orders reviewable under § 106(a) include “all determinations made during and incident to” the deportation proceeding, and reviewable by the BIA). For a more complete discussion of what consti-
administratively challenge a deportation order by filing a motion to reopen with the Board.4 Generally, a pending motion to reopen renders an agency decision nonfinal.5 Appellate courts sometimes refer to this rule as the “suspended finality” rule,6 because the finality of an agency’s order is suspended until the disposition of a motion to reopen. This rule, however, creates certain problems when applied in the context of immigration law.

Under section 106(a) of the Immigration and Nationality Act7 (“INA”), aliens faced with a final order of deportation may also file a petition for review in a court of appeals.8 This request for judicial review may even be sought simultaneously with a motion to reopen deportation proceedings. If the motion to reopen has not been ruled upon at the time of the judicial review petition, at least two possible scenarios exist: (1) concurrent jurisdiction, with the motion pending before the BIA and the petition for judicial review pending before the appellate court, or (2) lack of appellate court jurisdiction, where the court concludes that the pending motion to reopen suspends the finality of the otherwise final order of deportation. A nonfinal order cannot be appealed to a court.9

4. See infra note 31 for the text of the immigration regulations authorizing motions to reopen and motions to reconsider; 8 C.F.R. §§ 3.2, 3.8 (1994). Although motions to reopen and motions to reconsider are different, they are treated as interchangeable for purposes of this Note’s analysis. Hereinafter, the term “motion to reopen” also refers to a motion to reconsider unless stated otherwise.

5. See infra notes 21-24 and accompanying text for a discussion of the general rule that an unadjudicated motion to reopen or to reconsider renders an administrative order nonfinal.

6. See, e.g., White v. INS, 6 F.3d 1312, 1317 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994).


8. See infra note 44 and accompanying text for background on INA § 106(a).

9. Finality is a jurisdictional requirement. See infra note 17 and accompanying text.
The difficulty here is that deportation requires a final order. If an unadjudicated motion to reopen suspends the finality of the deportation decision, an alien could effectively delay his or her deportation by filing such motions.\(^\text{10}\) However, Congress sought to avoid such abuse of the deportation process when it amended the judicial review provisions of the INA.\(^\text{11}\)

The United States courts of appeals are divided as to whether they may exercise jurisdiction over an aggrieved alien’s case if a motion to reopen is pending when the alien seeks judicial review. Some courts conclude that an unadjudicated motion to reopen renders the Board’s decision nonfinal and, therefore, nonappealable.\(^\text{12}\) Other courts, seeking to prevent the use of “dilatory tactic[s] to postpone the execution of deportation orders,”\(^\text{13}\) hold that such a pending motion does not suspend the finality of the deportation order.\(^\text{14}\) Therefore, the order is reviewable if an appeal is filed within the 90-day period for seeking judicial review.\(^\text{15}\)

The circuit split raises the question of whether an unadjudicated motion to reopen should suspend the finality of a deportation order. This Note examines the strengths and weaknesses of the suspended finality rule and finds the rule incompatible with immigration law.

Section I discusses the general rule in administrative law that orders under reconsideration are nonfinal. This section also presents basic immigration policy concerns. Section II reviews the relevant decisions of the various United States courts of appeals that have considered the issue of whether motions to reopen suspend the finality of deportation orders. Section III analyzes the competing strengths and weaknesses of the different courts of ap-

\(^{10}\) See infra notes 115-22 and accompanying text for the Court of Appeals for the Eighth Circuit’s view, White v. INS, 6 F.3d 1312, 1316-17 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994), of how aliens can abuse the deportation process and other problems with suspended finality.

\(^{11}\) See infra notes 44-45 and accompanying text for legislative history of § 106(a).

\(^{12}\) See, e.g., Fleary v. INS, 950 F.2d 711, 713 (11th Cir. 1992); Chu v. INS, 875 F.2d 777, 779-80 (9th Cir. 1989); Hyun Joon Chung v. INS, 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984).

\(^{13}\) Alleyne v. INS, 879 F.2d 1177, 1181 (3d Cir. 1989).

\(^{14}\) See, e.g., Stone v. INS, 13 F.3d 934, 939 (6th Cir.), cert. granted, 114 S. Ct. 2098 (1994); Bauge v. INS, 7 F.3d 1540, 1542 (10th Cir. 1993); White v. INS, 6 F.3d 1312, 1317 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994); Akrap v. INS, 966 F.2d 267, 271 (7th Cir. 1992); Rhoa-Zamora v. INS, 971 F.2d 26, 33 (7th Cir. 1992), cert. denied, 113 S. Ct. 1943 (1993) and cert. denied, 113 S. Ct. 2331 (1993); Alleyne, 879 F.2d at 1181.

peals views, and concludes that the suspended finality rule conflicts with the immigration regulations and underlying policy concerns. Thus, the approach of courts that reject the suspended finality rule should be followed: appellate jurisdiction is appropriate despite an unadjudicated motion to reopen before the BIA. This Note concludes that it is both disruptive and premature to classify a decision as "nonfinal" on account of the filing of a motion to reopen.

I. Background

A. Finality of Administrative Orders and the Rule of Locomotive Engineers

"Final agency action"\(^\text{16}\) is a jurisdictional prerequisite to judicial review of an administrative order.\(^\text{17}\) In *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*,\(^\text{18}\) the United States Supreme Court stated that as a general rule, administrative orders under reconsideration are not final.\(^\text{19}\) According to the

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17. See, e.g., Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 745-46 (D.C. Cir. 1987) (noting that "finality is, where applicable, a jurisdictional requirement") (citing Bell v. New Jersey, 461 U.S. 773, 777-80 (1983); Mathews v. Eldridge, 424 U.S. 319, 326-28 (1976); Weinberger v. Salfi, 422 U.S. 749, 766 (1975)). "The core question is whether the agency has completed its decisionmaking process, and whether the result ... will directly affect the parties." Franklin v. Massachusetts, 112 S. Ct. 2767, 2773 (1992).


19. Id. at 284-85. *Locomotive Engineers* arose out of a railroad merger and its resulting labor dispute. On April 4, 1983, the Brotherhood of Locomotive Engineers ("BLE") filed a "Petition for Clarification," claiming that the Interstate Commerce Commission ("ICC") lacked jurisdiction over labor matters and asking the ICC to declare that its earlier order did not authorize tenant rail carriers to use their own crews on certain routes. The ICC denied the petition for clarification on May 18, 1983. *Id.* at 275.

Within the period for seeking administrative review, BLE and another union filed a motion for reconsideration of the ICC's refusal to clarify. *Id.* at 276. Reconsideration was denied on October 25, 1983. The unions petitioned for judicial review of the May 18 and October 25 orders, which the Court of Appeals for the District of Columbia vacated. Brotherhood of Locomotive Eng'rs v. ICC, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 475 U.S. 1081 (1986).

The Court held that the ICC's denial of reconsideration was an unreviewable order. *Locomotive Eng'rs*, 482 U.S. at 277. The Court distinguished between motions based on "material error," which raise the same issue that could have been raised on appeal from the original order, and those based on "new evidence" or "changed circumstances," which are reviewable. *Id.* at 278-79. Where a petitioner seeks reconsideration on the ground of material error, on the same record that was originally before the agency, "‘an order which merely denies rehearing of . . . [the prior] order is not itself reviewable.’” *Id.* at 280 (quoting Microwave Communications, Inc. v. FCC, 515 F.2d 385, 387 n.7 (D.C. Cir. 1974)).
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Court, an unadjudicated motion to reopen suspends the finality of an administrative agency decision. If filed within the statutory time for seeking judicial review, the motion to reopen tolls the period for seeking judicial review of the original order. The under-

The Court next considered the Hobbs Act, 28 U.S.C. §§ 2341-2344 (1982), which permits aggrieved parties to seek judicial review of final ICC orders within 60 days of the order's entry. Locomotive Eng'rs, 482 U.S. at 277. The Court held that although BLE's appeal from the May 18 order was filed more than 60 days from the date of the order, the petition for judicial review was effective, because the seasonable motion for administrative reconsideration tolled the running of the Hobbs Act limitation period until the ICC's disposition of the motion. Id. at 284. See infra note 24, discussing how the Court reached this conclusion.

The Court further held, however, that despite the stay of the appeals period, the refusal to clarify was not an appealable order. Locomotive Eng'rs, 482 U.S. at 285. First, BLE was not aggrieved within the meaning of the Hobbs Act. Id. Second, even if the petition for clarification was treated as a motion to reopen, the denial was still not reviewable because BLE failed to bring any new evidence or changed circumstances. "[I]t merely urged the Commission to correct what BLE thought to be a serious error of law. That should have been sought many months earlier, by an appeal from the original order." Id. at 286. The Court therefore dismissed the review petitions for lack of jurisdiction. Id. at 287. Thus, the Court's proposition, that the filing of a motion to reconsider or to reopen suspends the finality of an agency order and tolls the statutory time period in which to appeal, was stated as a general rule, without regard to the particular facts of this case.

20. Id. at 284-85.

21. Whether the filing of a motion to reopen tolls the period in which to appeal, and whether the deportation order is appealable while the motion is unadjudicated, are separate issues. Thus, the jurisdiction issue discussed in this Note must not be confused with the closely related question of timeliness in filing appeals. See id. (filing of motion to reopen or reconsider renders administrative agency's decision nonfinal and tolls the statute for purposes of determining when the time to appeal to the court begins); accord Arch Minerals Corp. v. Director, Office of Workers' Compensation Programs, 798 F.2d 215 (7th Cir. 1986). Some courts have extended the rule of Locomotive Engineers to hold that a motion to reopen renders the order nonfinal for purposes of appellate jurisdiction. See United Transp. Union v. ICC, 871 F.2d 1114 (D.C. Cir. 1989) (motion for reconsideration filed by labor union after ICC's decision rendered that decision nonfinal as to union and not reviewable by court); West Penn Power Co. v. EPA, 860 F.2d 581, 587-88 (3d Cir. 1988) (court held it did not have jurisdiction over petition for review when motion to reconsider was pending; court could not distinguish between the concept of finality for purposes of triggering the running of a time limit for appeals with the concept of finality for the purpose of appellate jurisdiction); Winter v. ICC, 851 F.2d 1056, 1062 (8th Cir. 1988), cert. denied, 488 U.S. 925 (1988) (union's petition to reopen rendered ICC's decision nonfinal). But see Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986) (holding that pending motion had no effect on appellate court's jurisdiction). However, Northside's value as precedent is diminished because the court explicitly relied on American Trucking Associations v. ICC, 697 F.2d 1146 (D.C. Cir. 1983). The American Trucking court stated that 5 U.S.C. § 704 explicitly permits judicial review and a request for agency reconsideration to be sought simultaneously. 697 F.2d at 1148 n.*. After Locomotive Engineers, American Trucking may no longer be viable, but the Court of Appeals for the Seventh Circuit left that question unanswered after concluding that "the rule of Locomotive Engineers does not apply in the immigration context, whatever its effect on administrative law generally." Rhoa-
lying order is then appealable after the motion for reconsideration is denied. 22

This result, however, seems to conflict with the plain language of 5 U.S.C. § 704, 23 which states that agency action is final for purposes of judicial review "whether or not" there has been a motion to reconsider or to reopen. 24 Despite this plain language, the Locomotive Engineers Court remarked that section 704 "has long been construed . . . merely to relieve parties from the requirement of peti-


22. Locomotive Eng'rs, 482 U.S. at 284-85; see also Arch Mineral Corp. v. Director, Office of Workers' Compensation Programs, 798 F.2d 215, 218 (7th Cir. 1986). Timeliness and jurisdiction are technically separate issues; see supra note 21.


24. The APA is a general default scheme for review of agency action, relied on by courts if an enabling statute does not already provide for a review procedure. Section 106(a) of the INA provides for the judicial review of final deportation orders. See 8 U.S.C. § 1105a(a) (1988 & Supp. V 1993), infra note 44. Section 704 reads in full:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations [sic], or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.


Historically, however, courts have instead construed this language so that a motion to reopen or reconsider defeats the finality of the underlying agency order and tolls the period in which to petition for judicial review. Given this historical treatment, and the lack of any "basis for distinguishing the language of [the ICA] from that of § 704," the Court concluded that the filing of a motion to reopen or reconsider rendered the underlying ICC order nonfinal. Id. at 284-85.
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tioning for rehearing before seeking judicial review."25 However, when a motion to reopen is actually filed, such motion suspends the finality of the order to which it is directed.26 This rule is founded "on a notion of judicial economy."27 It is a waste of judicial resources to hear appeals from administrative action that may be checked by the agency on reconsideration.28

In the immigration context, however, Congress decided that judicial economy is secondary to the goal of curbing intentional abuse of the deportation process. For policy reasons, five United States courts of appeals now find the rule of *Locomotive Engineers* incompatible with the goals of immigration law.29

### B. General Immigration Policy Concerns

The principal immigration policy goals include preventing repetitive appeals, preventing frivolous and dilatory appeals, avoiding delay of deportation, and providing fairness to aliens.30 This subsection is divided into three parts. The first part discusses the regulations authorizing motions to reopen and motions to reconsider. The second part discusses judicial review under the INA, and the third part reviews the immigration regulations that implement congressional policy.

#### 1. Motions to Reopen and Motions to Reconsider

The administrative regulations authorize both motions to reopen and motions to reconsider.31 These motions serve entirely dif-
ferent purposes and have distinct requirements. The motion to reconsider is used when the petitioner challenges the administrative agency’s interpretation of the law. The motion to reopen is used to bring new, previously unavailable evidence before the administrative agency.32 These motions may be made at any time prior to an

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien’s right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

Id.

8 C.F.R. § 3.8(a) (1994) governs the form of each motion and reads in pertinent part:

Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

Id. (emphasis added).

alien's departure from the United States. The granting of a motion to reopen is discretionary.

Motions to reopen deportation proceedings are not appeals to the BIA; instead, they are described as "collateral attacks" on the Board's order. The United States Supreme Court disfavors motions to reopen deportation proceedings, because liberal granting of such motions permits "endless delay of deportation." Motions to reopen will not stay the execution of a pending deportation order; rather, aliens must move separately for a stay of deportation. Thus, aliens may be deported prior to the disposition of their motion to reopen.

Motions to reopen must be accompanied by a statement indicating whether "the validity of the unfavorable decision has been or is the subject of any judicial proceeding[']. This provision thus contemplates concurrent agency and court jurisdiction. Concurrent jurisdiction can only occur if the petitioner seeks review in both the administrative and judicial forums and if a final order remains final notwithstanding the request for agency rehearing. Thus, a second mechanism by which a deportable alien can challenge a final order of deportation is the statute authorizing judicial review.

2. Section 106 of the Immigration and Nationality Act

Congress added section 106 to the Immigration and Nationality Act

33. See 8 C.F.R. § 3.2, supra note 31.
35. White v. INS, 6 F.3d 1312, 1315 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994) (citing 8 C.F.R. §§ 3.2, 3.8). A collateral attack is a post-judgment challenge other than a direct appeal, such as a criminal defendant's motion to vacate sentence. See, e.g., United States v. Frady, 456 U.S. 152, 165 (1982). A collateral challenge is not a substitute for an appeal. Id. But see Butros v. INS, 990 F.2d 1142, 1145 (9th Cir. 1993) (stating that the possibility of reopening or reconsideration has the same effect as the availability of appellate review—namely, that "what looks like a final status can well turn out not to be a final status").
36. See INS v. Abudu, 485 U.S. 94, 107 (1988). Motions to reopen are disfavored for the same reasons as are petitions for rehearing and motions for new trials based on newly discovered evidence. "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." Id.
37. Id. at 108 (quoting INS v. Jong Ha Wang, 450 U.S. 139, 144 n.5 (1981)).
38. See 8 C.F.R. § 3.8(a) (1994) ("Execution of such decision shall proceed unless a stay of execution is specifically granted . . ."); see also 8 C.F.R. § 3.6 (1994). Appeals taken from deportation hearings, except appeals taken from motions to reopen, will automatically stay execution of the deportation order while the appeal is pending. Otherwise, the BIA has discretion to stay deportation. See 8 C.F.R. § 3.6(b).
Act to create "a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." The procedures adopted in section 106 were based on those in the Hobbs Act, which established the framework for judicial review of final orders of certain administrative agencies. Aliens ordered deported may file a petition for judicial review in the appropriate United States court of appeals. Congress sought to limit the judicial process available to such aggrieved aliens:

The Committee on the Judiciary has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country. . . . It is undoubtedly now the fact that such tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act by repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the de-

42. 28 U.S.C. §§ 2341-2351 (1988 & Supp. V 1993). The Hobbs Administrative Orders Review Act does not define finality, nor does it address the effect of a pending motion to reopen or to reconsider. The United States courts of appeals are split over the effect of these motions on the finality of a BIA deportation order. In Interstate Commerce Commission v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987), the Court considered the effect of a motion for reconsideration for purposes of triggering the running of the Hobbs Act period in which to seek judicial review of an ICC order. Locomotive Engineers is discussed supra, notes 21-26 and accompanying text.

The procedure prescribed by, and all the provisions of chapter 158 of title 28 [the Hobbs Act, cited supra, note 42], shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) . . . .

Congress limited the judicial process by specifying the time limit in which to seek appellate relief. Aliens have ninety days (formerly six months) from the issuance of the final deportation order in which to file a petition for judicial review. After the BIA issues a final order of deportation, the alien must be deported within six months. If the Board’s order is judicially reviewed, the deportation period runs from the date of the court’s final order. A petition for judicial review provides the alien with an automatic stay of deportation pending the outcome of the appeal.

In 1990, Congress amended INA section 106(a) to require consolidation of the judicial appeal of a deportation order with the appeal of a denial of reopening. Courts disagree on the meaning of this statutory provision. The requirements of section 106(a), however, are only one part of the debate over finality and the effect of a pending motion to reopen. The administrative regulations must also be considered. Not only do the regulations specify what constitutes a final order, but they also promote congressional policy by stating unambiguously that motions to reopen will not stay deportation.

47. The INA provides:

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien’s departure from the United States . . .

49. Pub. L. No. 101-649, 104 Stat. 4978, 5065 (1990) (codified at 8 U.S.C. § 1105a(a)(6) (1988 & Supp. V 1993)) (“Whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order”). A denial of a motion to reopen is a reviewable order. See infra note 64 and accompanying text.
3. Finality as Expressed in the Immigration Regulations

In the immigration context, the statutory requirements of "final" orders and exhaustion of administrative remedies\(^\text{51}\) disallow review of interlocutory orders prior to the entry of the final order.\(^\text{52}\) Section 106(a) of the INA provides for "the sole and exclusive procedure for . . . judicial review of all final orders of deportation."\(^\text{53}\) Under the regulations, an immigration judge’s deportation order becomes a "final order of deportation" when the BIA dismisses an appeal, an appeal is waived, or the time for appeal expires.\(^\text{54}\) In addition, any decision of the BIA is administratively final\(^\text{55}\) and,}

\(^{51}\) See 8 U.S.C. § 1105a(c) (1988) (allowing for judicial review of deportation orders only after the petitioner has exhausted the administrative remedies available as of right). Exhaustion of administrative remedies is a threshold obstacle to judicial review. Courts decline jurisdiction and require exhaustion where judicial review would be significantly enhanced by further administrative decisionmaking. Davis & Pierce, supra note 16, § 15.2, at 310 (citing James v. HHS, 824 F.2d 1132, 1138 (D.C. Cir. 1987)). Additional agency action can result in a record better suited to judicial review, because agency decisions often require specialized expertise and may involve discretionary or policy determinations. Id. See infra note 100 for cases holding that a motion to reopen is not required to exhaust administrative remedies.

Finality and exhaustion, while closely related, are analytically discrete doctrines. The finality requirement refers to whether the agency has completed its administrative activity and reached a "definitive position on the issue that infllicts an actual, concrete injury:" the exhaustion requirement is concerned with the "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy." Darby v. Cisneros, 113 S. Ct. 2539, 2543 (1993) (quoting Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 193 (1985)). The exhaustion of remedies doctrine is designed to prevent unnecessary or premature judicial interference in the processes of administrative agencies. See generally Davis & Pierce, supra note 16, § 15.2, at 308-09 (citing McKart v. United States, 395 U.S. 185, 193-95 (1969)). Courts balance a variety of factors in determining whether to require exhaustion of administrative remedies. Id. These factors include: the desire to incorporate the agency’s expertise in solving the problem; the need for further factual development; the preference to allow the agency to correct its own errors; the likelihood that the agency will resolve the issue without appellate review; avoidance of needless interruption of the administrative process; and preservation of judicial resources by refraining from piecemeal litigation or interlocutory review. Id.

\(^{52}\) The BIA enters the final order of deportation. Gordon & Mailman, supra note 3, at 81-85.


\(^{54}\) Section 243.1 of the immigration regulations provides in part that an order of deportation . . . shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board’s decision.


\(^{55}\) Id. The regulations also state that "[t]he decision of the Board shall be final except in those cases reviewed by the Attorney General . . . . The Board may return a
therefore, judicially appealable. Generally, when a final deportation order is entered following an administrative appeal, an alien's deportation is not affected by a motion to reconsider where deportation is not stayed.\footnote{56} Deportable aliens may be deported despite a motion to reopen that is pending before the Board.\footnote{57} Because actual deportation is tantamount to a dismissal of the motion to reopen,\footnote{58} an order to surrender for immediate deportation is "final" and may be judicially reviewed.\footnote{59}

Thus, while the regulations state that motions to reopen will not stay deportation, they do not explicitly answer whether a pending motion at the administrative level suspends the finality of a "final order of deportation" so as to prevent appellate jurisdiction.\footnote{60} This question has divided the United States courts of appeals.

II. THE DIVISION AMONG THE UNITED STATES COURTS OF APPEALS

The courts of appeals that have considered whether an unadjudicated motion to reopen has any effect on jurisdiction can be divided into three basic groups. Section II is thus divided into three subsections: first, courts that hold that a pending motion to reopen renders a deportation order nonfinal; second, courts that hold that motions to reopen filed in good faith suspend the finality of the order; and third, courts that hold that motions to reopen have no effect on the finality or appealability of a deportation order.

A. Suspended Finality: The United States Courts of Appeals for the Ninth and Eleventh Circuits

The Court of Appeals for the Ninth Circuit holds that a motion to reopen filed prior to a petition for judicial review renders the BIA's deportation decision nonfinal and thus nonappealable.\footnote{61} If a case to the Service or Immigration Judge for such further action as may be appropriate, without entering a final decision on the merits of the case." 8 C.F.R. § 3.1(d)(2) (1994).

\footnote{56} Gordon & Mailman, supra note 3, at 81-31 (citing Say v. Del Guercio, 237 F.2d 715 (9th Cir. 1956). See also Roque-Carranza v. INS, 778 F.2d 1373 (9th Cir. 1985), in which the court granted a stay of deportation to allow time for a motion to reopen filed in good faith suspend the finality of the order; and third, courts that hold that motions to reopen have no effect on the finality or appealability of a deportation order.

\footnote{57} See 8 C.F.R. § 3.8(a) (1994), supra note 31.

\footnote{58} 8 C.F.R. § 3.2 (1994).

\footnote{59} Say v. Del Guercio, 237 F.2d 715, 717 (9th Cir. 1956).

\footnote{60} But see 5 U.S.C. § 704 (1988), supra note 24, the literal language which permits simultaneous jurisdiction.

\footnote{61} See, e.g., Ogio v. INS, 2 F.3d 959, 961 (9th Cir. 1993) (per curiam); Berroteran-Melendez v. INS, 955 F.2d 1251, 1254 (9th Cir. 1992); Chu v. INS, 875 F.2d 777,
motion to reopen is filed with the Board in a timely manner, "an otherwise appealable final order becomes no longer appealable in this court until the motion is denied or the proceedings have been effectively terminated." The Ninth Circuit does not exercise jurisdiction over the BIA's order of deportation until a motion to reopen is denied.

A denial of a motion to reopen is a new order independently reviewable by the courts of appeals under section 1105a(a). If a timely appeal is taken from the BIA's denial of reopening, the Ninth Circuit has jurisdiction to review both the order of deportation and the denial of the motion to reopen. The Ninth Circuit thereby provides a single appellate proceeding in which aliens retain the right to appeal the underlying order, even if the statutory time period in which to seek judicial review has expired.

Generally, aliens file motions to reopen with the BIA prior to seeking judicial review. In such a case, the Court of Appeals for the Ninth Circuit justifies the practice of suspending finality as one that "avoids duplication and waste of judicial and agency resources, and promotes the judicial policy of allowing administrative agencies the opportunity to correct their own mistakes." In the Ninth Circuit, however, a motion to reopen made after a petition for judicial review will not affect the finality of a deportation order.

779-80 (9th Cir. 1989); Fayazi-Azad v. INS, 792 F.2d 873, 874 (9th Cir. 1986); Roque-Carranza v. INS, 778 F.2d 1373, 1374 (9th Cir. 1985); Hyun Joon Chung v. INS, 720 F.2d 1471, 1474 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); Bregman v. INS, 351 F.2d 401, 402-03 (9th Cir. 1965).

62. Hyun Joon Chung, 720 F.2d at 1474. This is a timeliness case; see supra note 21. The Hyun Joon Chung court held that the judicial review period for a deportation order was tolled while the motion to reopen remained pending before the BIA. The order was nonfinal because the administrative proceedings were "not effectively terminated." 720 F.2d at 1474.

63. Id.


65. The Court of Appeals for the Ninth Circuit noted the legislative history of INA § 106, and the congressional intent "to create a process in which there is a single judicial review of all questions relating to an alien's deportation." Hyun Joon Chung, 720 F.2d at 1474. The motion to reopen tolls the period in which to seek judicial review of the deportation order. The period begins to run upon disposition of the motion. Id.

66. Berroteran-Melendez v. INS, 955 F.2d 1251, 1254 (9th Cir. 1992). In the Ninth Circuit, if the BIA denies the motion to reopen, both the denial of that motion and the original deportation order may be reviewed if the appeal is sought within the proper time. Id. (citing Hyun Joon Chung, 720 F.2d at 1474).

67. "[T]he filing of a motion to reopen renders nonfinal only an order as to which a petition for review has not been filed." Ogio v. INS, 2 F.3d 959, 961 (9th Cir. 1993)
ple, in *Berroteran-Melendez v. INS*, the motion to reopen was submitted to the BIA *after* the petition for review was made to the court of appeals. Despite the unadjudicated motion, the *Berroteran-Melendez* court held that it had jurisdiction. However, for the court to adhere to its goal of judicial efficiency, the court would have had to hold the case in abeyance until disposition of the motion to reopen. Such suspension of the judicial process would create an automatic stay of deportation until the motion was decided, contrary to the regulations. In such a case, aliens could abuse the system and delay deportation by filing administrative motions after seeking judicial review. Thus, the Court of Appeals for the Ninth Circuit holds that in cases where aliens first file for judicial review and then seek reopening at the administrative level, outstanding motions to reopen will not suspend finality and the court of appeals has jurisdiction over the case.

The Court of Appeals for the Eleventh Circuit follows the Ninth Circuit view that a motion to reopen pending before the BIA defeats the finality of an otherwise final deportation order. Judicial review is precluded until the BIA's disposition of the motion to reopen.

**B. The "Good Faith" Approach: The United States Courts of Appeals for the Second, Fifth, and District of Columbia Circuits**

The Courts of Appeals for the Fifth and District of Columbia Circuits, recognizing the potential for abuse of the deportation process, adopted a modified version of the Ninth Circuit's rule: only motions to reopen filed in good faith render a deportation order nonfinal. In *Attoh v. INS*, the Court of Appeals for the District of Columbia Circuit examined the Ninth Circuit's decision in

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68. 955 F.2d 1251, 1254 (9th Cir. 1992).
69. *Id.*
70. *Id.* at 1255 (citing Chu v. INS, 875 F.2d 777, 779 (9th Cir. 1989)).
71. Motions to reopen will not stay deportation. 8 C.F.R. § 3.8(a) (1994). See *supra* note 38 and accompanying text.
72. *Berroteran-Melendez*, 955 F.2d at 1255.
73. See Fleary v. INS, 950 F.2d 711, 713 (11th Cir. 1992).
74. Pierre v. INS, 932 F.2d 418, 420-21 (5th Cir. 1991) (per curiam); *Attoh v. INS*, 606 F.2d 1273, 1275-76 n.15 (D.C. Cir. 1979) (per curiam).
75. 606 F.2d at 1275-76 n.15.
Bregman v. INS.\textsuperscript{76} The Attoh court concluded that the Ninth Circuit's approach could be "troubling" in a case involving multiple and frivolous motions for reopening or reconsideration, because aliens conceivably could file successive motions to reopen the denials of previous motions to reopen, thereby postponing deportation.\textsuperscript{77} Thus, the Attoh court adopted Bregman "only insofar as it implicitly recognizes that intervening good faith petitions for administrative relief may toll or suspend the running of the time limit" in which to seek judicial review.\textsuperscript{78}

Similarly, in Fu Chen Hsiung v. INS,\textsuperscript{79} the Court of Appeals for the Second Circuit adopted the Ninth Circuit's Bregman rule, but, nevertheless, refused to review the underlying deportation order because of the apparent "dilatory tactics."\textsuperscript{80} In Pierre v. INS,\textsuperscript{81} the Court of Appeals for the Fifth Circuit followed the Attoh court.\textsuperscript{82} Note, however, that these cases dealt with problems of the statute of limitations. Judicial review of the original deportation order was precluded unless the filing of the motion to reopen suspended the order's finality and tolled the period in which to appeal.\textsuperscript{83}

C. Courts Rejecting Suspended Finality: The United States Courts of Appeals for the Third, Sixth, Seventh, Eighth, and Tenth Circuits

In Alleyne v. INS,\textsuperscript{84} the Court of Appeals for the Third Circuit rejected the Ninth Circuit's rule of suspended finality and held that a motion to reopen did not defeat the finality of the BIA's order. Accordingly, the court allowed "simultaneous review" in both the judicial and administrative forums.\textsuperscript{85} The Alleyne court relied on its earlier ruling in Nocon v. INS,\textsuperscript{86} which sought to prevent "undue

\textsuperscript{76} 351 F.2d 401 (9th Cir. 1965).
\textsuperscript{77} Attoh, 606 F.2d at 1276 n.15.
\textsuperscript{78} Id.
\textsuperscript{79} 607 F.2d 996 (2d Cir. 1979) (unpublished text in LEXIS Genfed library, Courts file).
\textsuperscript{80} This case involved "multiple actions for review." \textit{Id.}
\textsuperscript{81} 932 F.2d 418 (5th Cir. 1991) (per curiam).
\textsuperscript{82} \textit{Id.} at 420-21.
\textsuperscript{83} See supra note 21 for further discussion of the timeliness matter.
\textsuperscript{84} 879 F.2d 1177, 1181 (3d Cir. 1989) (motion to reopen filed after petition for review).
\textsuperscript{85} \textit{Id.} at 1181 n.7; \textit{compare} Alleyne with Mortazavi v. INS, 719 F.2d 86, 87 (4th Cir. 1983) (motion to reopen filed after the review petition; alien asked that petition be held in abeyance while awaiting the disposition on the motion).
\textsuperscript{86} 789 F.2d 1028 (3d Cir. 1986). The Court of Appeals for the Third Circuit held
delay” in deportation once the alien’s status had been determined. The court reviewed the relevant legislative history, which showed that when the legislature enacted the INA.

Congress was especially sensitive to what it designated as “the growing frequency of judicial actions being instituted by undesirable aliens whose cases . . . are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country.” . . . Protracted litigation was viewed by Congress as a means of exploiting the judicial process. Thus, permitting aliens the benefit of additional time from their filing of motions to reopen or to reconsider would directly contravene congressional intent to prevent successive, piecemeal appeals from being used as a dilatory tactic to postpone the execution of deportation orders.

Consequently, the Alleyne court held that the rule of Locomotive Engineers did not apply in the immigration context, thereby giving effect to the legislative policy judgment that judicial efficiency was secondary to curbing the “potential for abusive appeals.” The court also noted that the regulations pertaining to motions to reopen do not allow aliens to delay deportation pending a decision by the BIA. Thus, motions to reopen do not destroy the finality of a

that filing a motion for reconsideration did not toll the period for seeking judicial review under the INA. Concluding that the immigration context differed from that of other administrative agencies, the court held that separate review petitions must be filed within six months of the specific order for which review is sought. Id. at 1033. See note 21 supra for a discussion of the timeliness issue.

Other courts have held that a separate petition for review need not be filed for jurisdiction to review the underlying order. See, e.g., Pierre v. INS, 932 F.2d 418, 420 (5th Cir. 1991) (per curiam) (jurisdiction to review Board’s denial of petition for rehearing because that was a final order within the meaning of § 1105a; court also concluded it had jurisdiction to review “underlying final deportation order,” following Attoh v. INS, 606 F.2d 1273, 1276 n.15 (D.C. Cir. 1979) (per curiam) (“[G]ood faith petitions for administrative relief may toll or suspend the running of the time limit.”)).

87. Nocon, 789 F.2d at 1033.


89. See supra note 21 and accompanying text for the rule of Locomotive Engineers.

90. Alleyne v. INS, 879 F.2d 1177, 1181 (3d Cir. 1989).

91. Id. at 1181-82 n.7 (citations omitted). The court also rejected Alleyne’s suggestion that it “defer decision until the Board has acted while retaining jurisdiction over the petition and the stay of deportation.” Id. at 1182 n.8. This idea would conflict with the immigration regulations to the extent that it gave petitioner “a longer stay than otherwise available,” as well as have a dubious effect in promoting judicial efficiency. Id. But see Gebremichael v. INS, 10 F.3d 28, 33 n.13 (1st Cir. 1993) (court deferred its decision until BIA’s disposition of motions to reopen and reconsider; this was held to
deportation order in the Third Circuit.

The Court of Appeals for the Seventh Circuit followed the Third Circuit and held that the BIA’s deportation order is final when issued and remains final despite a motion to reopen.92 In Akrap v. INS, the Seventh Circuit considered INA section 106(a), which provides that “Whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order.”93 This language refers to judicial review of both the underlying deportation order and the BIA’s denial of reopening or reconsideration. The court held that a deportation order remains final regardless of a pending motion to reopen.94 The language of section 106(a) also persuaded the Court of Appeals for the Tenth Circuit, in Bauge v. INS,95 that an unadjudicated motion be a “prudent alternative” to deciding whether unadjudicated administrative motions had any effect on finality of deportation orders.

92. Akrap v. INS, 966 F.2d 267, 271 (7th Cir. 1992) (court had jurisdiction to review order after timely petition for review). The Seventh Circuit’s rule that finality attaches upon issuance of the BIA opinion is consistent with the immigration regulations. See, e.g., 8 C.F.R. § 243.1 (1994) and 8 C.F.R. § 3.1(d)(2) (1994), supra notes 54 and 55.


94. Akrap, 966 F.2d at 270-71. In Fleary v. INS, 950 F.2d 711 (11th Cir. 1992), the Court of Appeals for the Eleventh Circuit reached the opposite conclusion when it decided that this provision supported the view of suspended finality. Id. at 713. The Court of Appeals for the Seventh Circuit rejected “the procedural pitfall suggested by Fleary,” that a motion to reopen destroys the finality of the original order, making it nonreviewable. Akrap, 966 F.2d at 271. Fleary referred to consolidation of two BIA “orders,” but the statute refers to consolidation of “reviews;” the Akrap court responded that “[i]f the filing of a motion to reopen were to render any previous orders non-final, only one final order would exist—and what then would be subject to ‘consolidation’ even in the Fleary view?” Id. In Stone v. INS, 13 F.3d 934 (6th Cir.), cert. granted, 114 S. Ct. 2098 (1994), the Court of Appeals for the Sixth Circuit stated that “[t]he logic of the Seventh Circuit’s Akrap decision strikes us as irrefutable.” Id. at 938. The Stone court held that a final order of deportation remains final despite the filing of a motion to reconsider within the period for seeking judicial review. Id. at 938-39.

However, the Court of Appeals for the Eighth Circuit rejected as irrelevant any inquiry based on the language of § 1105a(a)(6). White v. INS, 6 F.3d 1312, 1317 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994). The White court decided that this provision “means only that if both reviews are pending at the same time they should be heard together. We do not think Congress intended by this simple provision to interfere with the goal of expediting deportation once the alien’s status has been determined.” Id.

95. 7 F.3d 1540 (10th Cir. 1993). The Bauge court decided that this consolidation provision suggests that multiple reviewable orders can exist at the same time, an impossibility if a motion to reopen makes an order nonfinal and nonreviewable. Id. at 1542:

For example, consider the situation involving an original deportation order and a subsequent denial of reopening, which is also reviewable. If an alien requests the BIA to reconsider its denial of reopening, that order is unreviewable so long as the request
to reopen does not preclude judicial review.

In *Rhoa-Zamora v. INS*, the Court of Appeals for the Seventh Circuit again ruled that a pending motion to reopen did not render the BIA's order nonfinal for appeal purposes. In *Rhoa-Zamora*, the alien filed a motion to reopen with the BIA, which was unadjudicated when the alien petitioned for judicial review. The *Rhoa-Zamora* court noted that its jurisdiction could not attach if the filing of a motion to reopen rendered the BIA decision nonfinal and nonreviewable. The Court of Appeals for the Seventh
Circuit concluded that the rule of *Locomotive Engineers* did not apply in the immigration context, where the "efficient use of judicial resources is secondary to a different goal: preventing the use of ‘dilatory tactic[s] to postpone the execution of deportation orders.’" The *Rhoa-Zamora* court reasoned that if the motion to reopen suspended finality of the BIA’s order, the motion could delay deportation so long as it remained unadjudicated. Thus, *Locomotive Engineers* is fundamentally incompatible with the principal immigration policy goal of expediting the deportation process.

The *Rhoa-Zamora* court also disagreed with the Ninth Circuit’s interpretation that would allow an alien to obtain an automatic stay of deportation by petitioning for review of both the BIA’s order of deportation and the subsequent denial of the motion to reopen. Not only would such a result contravene the regulations, but it also would be “clearly contrary” to the congressional intent underlying the enactment of the INA.

In *White v. INS*, the Court of Appeals for the Eighth Circuit agreed with the Seventh Circuit that Congress intended to facilitate the deportation of deportable aliens. The court held that the pendency of a motion to reopen or to reconsider before the BIA “has no effect on the finality, or the ripeness for judicial review, of a

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101. See supra notes 21 and 26 for a discussion of *Locomotive Engineers*.
102. *Rhoa-Zamora*, 971 F.2d at 33 (quoting *Alleyne v. INS*, 879 F.2d 1177, 1180 (3d Cir. 1989) and citing *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1255 (9th Cir. 1992)). In *Leal-Rodriguez v. INS*, 990 F.2d 939 (7th Cir. 1993), the court cited both *Rhoa-Zamora*, 971 F.2d at 32-33 (motion to reopen filed before petition for judicial review) and *Berroteran-Melendez*, 955 F.2d at 1255 (motion to reopen filed after petition for review) for the proposition that a pending motion to reopen did not deprive the court of jurisdiction. *Id.* at 948 n.11.
104. See 8 C.F.R. § 3.8(a) (1994), supra note 31. The court also noted that the regulations contemplate the pendency of motions to reopen while the BIA’s decision is appealed. *Rhoa-Zamora*, 971 F.2d at 33 (citing 8 C.F.R. § 103.5a (1994)) (“Motions to reopen or reconsider shall state whether the validity of the order has been or is the subject of any judicial proceeding.”).
105. *Rhoa-Zamora*, 971 F.2d at 33 n.6. *But see* *Castaneda-Suarez v. INS*, 993 F.2d 142, 145-46 (7th Cir. 1993) (deportation order stayed until BIA addressed pending motion to reopen).
106. 6 F.3d 1312 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2162 (1994).
107. “Ripeness” refers to the fitness of issues for a judicial decision, and the hardship that would result to the parties if the court were to withhold a decision on the merits. *See* *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967). Issues are fit for
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To hold otherwise would increase the allowable time for seeking judicial review to ninety days after the BIA's denial of reopening.109 Suspended finality would also deny the courts jurisdiction until reopening was denied.110

To distinguish Locomotive Engineers, the White court looked to the INA and the immigration regulations, which support the finality of a BIA deportation order regardless of a pending motion to reopen or reconsider.111 Indeed, there is no indication in the INA or the relevant regulations that these discretionary motions affect the finality of a deportation order, no matter when the motions are filed or ruled upon.112 The White court described motions to reopen or to reconsider as analogous to motions for relief from judgment for mistake or for newly discovered evidence.113 These analogous motions do not suspend the finality of judgments.

The Court of Appeals for the Eighth Circuit further distinguished Locomotive Engineers because the INA is more generous than the Hobbs Act in providing for both administrative and judicial review.114 In addition, the suspended finality interpretation would foster abuse of the deportation process by allowing aliens to file motions to reopen or to reconsider "ad infinitum."115 Curbing judicial review, for example, when they involve purely legal questions or when the agency action directly and immediately impacts the party seeking relief. Id. at 149, 152.

108. White, 6 F.3d at 1317. The court noted that its decision did not affect the Eighth Circuit's discretionary option to accept jurisdiction over the petition for review and hold it in abeyance pending the BIA's ruling on the motion. Id. at n.5.


110. White, 6 F.3d at 1314.

111. Id. at 1314-15.

112. The court cited 8 C.F.R. § 243.1 (1993) (specifying when an order of deportation becomes final) and 8 C.F.R. § 3.1(d)(2) (1993) (exceptions to rule that Board decisions are final). White, 6 F.3d at 1315. These regulations appear supra at notes 54 and 55.

113. White, 6 F.3d at 1315 (citing Fed. R. Civ. P. 60(b) and Fed. R. Crim. P. 33).


115. White, 6 F.3d at 1316. The court explained that motions to reopen may be filed after any adverse BIA decision. If a deportation order lacks finality until the denial of any motion to reopen, an alien attempting to delay deportation conceivably "could wait until just before the ninety-day [judicial] appeal period expired and then
the potential for such abuse takes precedence over promoting judicial economy.116

According to the White court, the mandatory provision for an automatic stay of deportation with a petition for judicial review117 “is corrupted by the scenario of suspended finality.”118 The filing of a motion to reopen or reconsider does not stay deportation.119 This fact of deportability suggests that motions to reopen do not defeat the finality of a deportation order. The White court observed that the Ninth Circuit nevertheless maintains that a pending administrative motion renders the order “nonfinal.”120 If nonfinal for purposes of deportation, the deportation order could not be executed;121 if nonfinal only for appeal, an alien could be deported, but the court could not exercise appellate jurisdiction. Aliens de-

file a motion to reopen or reconsider.” Id. The denial of the motion may be judicially reviewed, and if the alien had not been deported by the time of the ruling on the motion, he or she could not only appeal the denial but also file a new motion to reopen the BIA’s denial of the first motion. Id.

116. Id. (citing Alleyne v. INS, 879 F.2d 1177, 1181 (3d Cir. 1989)).
118. White, 6 F.3d at 1317.
119. See 8 C.F.R. § 3.8(a) (1994), supra note 31. See also 8 C.F.R. § 103.5(a)(1)(iv) (1994) (“Unless the Service directs otherwise, the filing of a motion to reopen or reconsider . . . does not stay the execution of any decision in a case or extend a previously set departure date.”).
120. White, 6 F.3d at 1317. The Ninth Circuit distinguishes between finality for appeal and finality for purposes of deportation. A problem with this view is that an alien (if unable to get a stay) can be deported while awaiting disposition of the motion to reopen. For example, in Roque-Carranza v. INS, the court held that an alien was required to comply with the INS regulations and file a motion to reopen with BIA, in order to avoid premature interference with the administrative processes. 778 F.2d 1373, 1374 (9th Cir. 1985). The court stated that this procedure would give parties the “benefit of the agency’s expertise” and result in a record suitable for appellate review. Id. The court therefore granted a stay of deportation to allow time for the motion to be filed and adjudicated. Id.

However, aliens are not required to file motions to reopen. Even if they were required, there is no basis in the INA or the regulations for the granting of a stay in this situation. The Ninth Circuit has acknowledged the lack of any “justification for the courts to create any new rights to a stay as a matter of federal common law.” Larimi v. INS, 782 F.2d 1494, 1497 (9th Cir. 1986) (noting that statute permits stay of deportation only while petition for review is pending; court had no authority to grant “indefinite stay;” Roque-Carranza distinguished as involving a limited stay “to allow an alien time to apply for relief to which he might be entitled”). The Ninth Circuit’s distinction between finality for appeal and finality for deportation is inherently inconsistent as well as incompatible with the statutory and regulatory scheme. See text accompanying notes 121-22. It makes more sense to hold that an order of deportation is final for judicial review at the same time that it is final for purposes of an alien’s deportation: upon decision of the BIA.

121. The deportation order would be void and §§ 3.8(a) and 103.5(a)(1)(iv) of the regulations would be superfluous. See supra notes 31, 119 for these regulations.
ported pursuant to a "nonfinal" order are thereby deprived of judicial review and its automatic stay of deportation. This choice presented by the "suspended finality" rule was unacceptable to the Eighth Circuit. By holding the deportation order final and appealable despite the unadjudicated motion to reopen, the court rejected the Ninth and Eleventh Circuits' view.

Furthermore, the White court declined to follow the reasoning espoused by the Fifth and District of Columbia Circuits, asserting it was "well beyond the scope of our role . . . to determine whether an alien has filed a motion to reopen or reconsider in 'good faith.'" In the court's opinion, declining jurisdiction effectively encourages exploitation of the deportation process, contrary to congressional intent as well as prudent judicial concerns. "In administering this country's immigration laws, the Attorney General and the INS confront an onerous task even without the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process." The Eighth Circuit therefore would not allow an alien to delay deportation by filing motions to reopen.

Finally, in Stone v. INS, the Court of Appeals for the Sixth Circuit held that a motion to reconsider filed within the 90-day appeal period did not toll the statutory time for seeking judicial review. The court found that this conclusion was required by the 1990 amendments to INA section 106(a), which added subsection (6). "This provision for consolidating review of the final deportation order with review of the Board's disposition of a motion to reopen or reconsider would make no sense at all unless separate

122. White, 6 F.3d at 1316.
123. Id. at 1314. See supra note 74 and accompanying text for the rule in the Fifth and District of Columbia Circuits.
124. Id. at 1317 (quoting INS v. Rios-Pineda, 471 U.S. 444, 450-51 (1985)).
125. 13 F.3d 934 (6th Cir.), cert. granted, 114 S. Ct. 2098 (1994).
127. Stone, 13 F.3d at 935. This case is a timeliness problem, which is related to, but separate from, the issue of whether an order is appealable pending the disposition of a motion for administrative relief. See supra note 21.
128. Id. at 938 (citing Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 4978, 5065 (1990)).
petitions for review could be filed.” The Stone court rejected the Ninth Circuit’s suspension of finality approach as inconsistent with the INA.

The Court of Appeals for the Sixth Circuit held:

It is true that Congress was concerned about dilatory tactics, but given the way in which the system works in practice the Ninth Circuit approach seems more conducive to dilatory tactics than does the Third Circuit approach. Under the Ninth Circuit’s [approach] . . . , an alien against whom a final deportation order has been entered can file a reconsideration motion, meritorious or not, and simply wait for however long it takes for the authorities to commence execution of the deportation order or for the Board to decide the motion for reconsideration. Normally, when one of those events finally occurs, the alien can then obtain a stay of the deportation order by filing a petition for judicial review. . . . Given the measured pace at which the I.N.S. often operates, the filing of a motion for reconsideration may, under the Ninth Circuit approach, mean that the day of judgment in the court of appeals—and actual deportation—will not arrive until months or years later than would otherwise have been the case.

The Stone court held that upon the BIA’s dismissal of the appeal, the deportation order became final. The petitioner then filed a motion to reconsider. This motion did not suspend the finality of the deportation order, and, therefore, the petition for judicial review came “too late” to give the court jurisdiction to review the underlying deportation order.

III. Analysis

Disagreement exists among the United States courts of appeals over whether a motion to reopen suspends the finality of a deportation order, preventing appellate court jurisdiction until the BIA

130. Stone, 13 F.3d at 938.
131. Id.
132. Id. The court added that “[i]t is not without significance . . . that it took the Board of Immigration Appeals more than 17 months to reject as frivolous the motion for reconsideration filed here by petitioner Stone.” Id.
133. Id. at 936 (citing 8 C.F.R. § 243.1 (1994)).
134. Id. Stone appeared pro se and filed a “Motion to Reopen and/or to Reconsider its Decision; Appeal to the Board of Immigration Appeals.” Because the motion did not set out any new facts, the Board treated it as a motion to reconsider. Id. (citing 8 C.F.R. § 3.8 (1994)).
135. Id. at 939. The court had jurisdiction to review only whether the BIA abused its discretion in denying the motion to reconsider. Id. at 935. Note that timeliness and jurisdiction are technically separate issues. See supra note 21.
rules on the motion. The courts are divided, and each position has some merit. The subject of this analysis is how courts should answer the question of what effect, if any, a pending motion for reopening or reconsideration has on the finality and appealability of deportation orders. After examining certain strengths and weaknesses of the various views, this Note concludes that those courts rejecting the Ninth Circuit's suspended finality rule have a stronger position that is more readily justified in terms of the applicable regulations and legislative policy goals.

Because final agency action is a jurisdictional requirement, courts lack jurisdiction over a case if the possibility of reopening or reconsideration at the agency level destroys an order's finality. The Courts of Appeals for the Ninth and Eleventh Circuits hold that a pending motion to reopen or reconsider renders an otherwise final order of deportation nonfinal for appellate purposes. However, the Courts of Appeals for the Third, Sixth, Seventh, Eighth, and Tenth Circuits hold that the pending motion has no effect on the finality or appealability of a deportation order, and, therefore, courts have jurisdiction. Comparing the relevant decisions shows that this latter group of courts espouses a more sensible rule: a motion to reopen does not affect finality.

A. Administrative Regulations and Legislative Policy

Courts give deference to an agency's interpretation of an ambiguous statute if the interpretation "is based on a permissible construction of the statute." Section 106(a) of the INA provides for judicial review of "final" orders of deportation, and the immigration regulations specifically define the point at which deportation orders become final. By specifying that a BIA order is final, the regulations designate what may be appealed to the courts. In ad-

136. There is some ambiguity as to which camp the Courts of Appeals for the District of Columbia, Second, and Fifth Circuits belong. While these courts follow an approach similar to that of the Ninth and Eleventh Circuits, they also recognize the inherent potential for abuse of the deportation process when allowing the filing of motions to reopen to suspend or defeat an order's finality. Eliminating this potential for abuse is the basis for the rule adopted by the Courts of Appeals for the Third, Sixth, Seventh, Eighth, and Tenth Circuits. See supra part II.A-C.


138. The decision of the BIA is final. See supra note 54. "Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first." 8 C.F.R. § 3.39 (1994).
dition, the regulations enumerate certain exceptions as to when a decision is final, without any reference to motions to reopen or their purported ability to suspend finality. In fact, the regulations explicitly state that motions to reopen or reconsider will not interfere with the execution of a deportation order. The regulations disallow petitioners to stay deportation by filing these motions, and thereby promote Congress' goal of eliminating unnecessary delay in the deportation process. The relevant regulations have never been challenged as inconsistent with the legislative will; administrative construction of a statute should be followed unless there are "compelling indications that it is wrong."

The only way a motion to reopen can stay deportation is if the motion suspends the finality of a deportation order. Thus, the regulations, which state that a motion pending before the BIA will not interfere with deportation, do not contemplate the suspension of finality. Assuming that the regulations are consistent with the language and purpose of the INA, the Ninth Circuit's suspended finality approach is inconsistent with congressional policy, at least to the extent that the suspended finality rule is inconsistent with the immigration regulations.

B. The Ninth Circuit's Approach to Suspension of Finality

In the Ninth Circuit, a motion to reopen that is pending when an alien petitions for judicial review will defeat the finality of the underlying deportation order and deprive the court of jurisdiction until the BIA's ruling on the motion to reopen. This practice is consistent with the rule of Locomotive Engineers. However, if the motion to reopen is filed after the court receives a petition for judicial review, the deportation order remains a final order and the

139. See 8 C.F.R. § 3.1(d)(2) (1994), supra note 55 ("The decision of the Board shall be final except in those cases reviewed by the Attorney General" or those returned to "the Service or Immigration Judge for such further action as may be appropriate").

140. See, e.g., 8 C.F.R. § 3.8(a) (1994), supra note 31.


142. See supra note 61 for the pertinent citations.

143. Interstate Commerce Comm'n v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 284-85 (1987). In Chu v. INS, the Ninth Circuit stated that there was "no principled basis upon which to distinguish Chu's case from Locomotive Engineers and its progeny," 875 F.2d 777, 780-81 (9th Cir. 1989).
court will not be divested of jurisdiction.\textsuperscript{144} Thus, the Ninth Circuit employs different finality rules depending on when the motion to reopen is filed with the BIA.\textsuperscript{145} The effect of this approach is to deny the court jurisdiction if the motion to reopen is filed before the petition for review, yet to allow simultaneous agency and court jurisdiction if the motion to reopen is made after the petition for judicial review, as in \textit{Berroteran-Melendez}.\textsuperscript{146}

\textit{Berroteran-Melendez} is just one example of how the Ninth Circuit's suspended finality rule encourages the use of dilatory tactics to forestall deportation. Although the petitioners initially had sought appellate review, they apparently filed a motion to reopen with the BIA in order to suspend the finality of the deportation order and preclude the court's jurisdiction.\textsuperscript{147} This strategy would postpone judicial review until the BIA's disposition of the motion and delay deportation. The whole purpose of amending INA section 106(a) was to eliminate judicial review procedures that encouraged abuse of the deportation process.

Despite petitioners' efforts, the Ninth Circuit held that it had jurisdiction irrespective of the pending motion to reopen.\textsuperscript{148} The court supported its decision by citing \textit{Wall v. INS},\textsuperscript{149} in which the court stayed the petition for review pending a decision on the motion to reopen.\textsuperscript{150} The practice of withholding a decision until disposition of the motion is consistent with the Ninth Circuit view that an order of deportation is final and appealable after a denial of the motion to reopen. However, rather than concluding it lacked jurisdiction to review, the court took jurisdiction while suspending the judicial process at the same time. The \textit{Berroteran-Melendez} court acknowledged that "[o]ther circuits have similarly exercised jurisdiction despite a pending motion to reopen."\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{144} See, e.g., \textit{Berroteran-Melendez v. INS}, 955 F.2d 1251, 1254-55 (9th Cir. 1992).
\item \textsuperscript{145} See \textit{Arango-Aradondo v. INS}, 13 F.3d 610, 614-15 (2d Cir. 1994) (noting that while the United States courts of appeals disagree as to whether jurisdiction is precluded by a motion to reopen filed before a petition for judicial review, the courts agree that a motion to reopen filed after a petition for review will not defeat appellate jurisdiction).
\item \textsuperscript{146} 955 F.2d at 1254-55.
\item \textsuperscript{147} See infra text accompanying notes 160-63 for the facts of \textit{Berroteran-Melendez}.
\item \textsuperscript{148} \textit{Berroteran-Melendez}, 955 F.2d at 1254.
\item \textsuperscript{149} 722 F.2d 1442 (9th Cir. 1984). In \textit{Wall}, the alien moved to reopen the BIA's dismissal of his case after filing a petition for judicial review. \textit{Id.} at 1443.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Berroteran-Melendez}, 955 F.2d at 1254.
\end{itemize}
After electing to exercise jurisdiction, the Berroteran-Melendez court then considered whether it should follow Wall and hold the case in abeyance pending the Board's disposition of the motion.\textsuperscript{152} According to the court, the decision to suspend appellate proceedings while awaiting the agency's ruling on the motion to reopen is purely discretionary.\textsuperscript{153} Under Ninth Circuit law,

there is no substantive difference between the filing of a motion to reopen \textit{before} the petition for review, in which case the time for filing the petition runs from the date of the decision on the motion to reopen, and where a motion to reopen is filed \textit{after} the petition for review and the appellate proceedings are suspended. The appellate process would not be further delayed.\textsuperscript{154}

The Berroteran-Melendez court recognized, however, that a suspension of appellate proceedings effectively creates an automatic stay of deportation while the motion remains unadjudicated. Such a result would be inconsistent with the immigration regulations.\textsuperscript{155} Thus, concluding that the potential for abuse outweighs concerns of judicial efficiency, the court chose not to suspend its appellate proceedings in this case.\textsuperscript{156}

Permitting concurrent jurisdiction in a case such as Berroteran-Melendez, however, contradicts the court's rationale in its suspended finality cases. Those cases in which the pendency of a motion to reopen rendered the deportation order nonfinal were justified by a policy of judicial economy. The court declined jurisdiction because it preferred to allow the administrative agency to correct its own errors. By disallowing simultaneous jurisdiction, the court avoided duplication and waste of administrative and judicial resources. In a case such as Berroteran-Melendez, the court is willing to tolerate jurisdiction in both forums, for no apparent reason

\textsuperscript{152} Id. (citing Lozada v. INS, 857 F.2d 10 (1st Cir. 1988)). In Lozada, the appellate proceedings were suspended pending the BIA's decision on the motion to reopen. The merits were decided after the BIA denied the motion. Lozada v. INS, 857 F.2d 10, 12 (1st Cir. 1988). \textit{But see} Figeroa v. INS, 886 F.2d 76, 77 n.1 (4th Cir. 1989) (merits decided despite pending motion which was filed after petitioning for review).

\textsuperscript{153} Berroteran-Melendez, 955 F.2d at 1254-55. For example, the Court of Appeals for the Third Circuit has refused to suspend its proceedings in this situation, consistent with its policy against delay in deportation. \textit{See} Alleyne v. INS, 879 F.2d 1177, 1181-82 n.7 & 8 (3d Cir. 1989) and discussion beginning supra note 84.

\textsuperscript{154} Berroteran-Melendez, 955 F.2d at 1255.

\textsuperscript{155} \textit{See} 8 C.F.R. § 3.8 (1994), \textit{supra} note 31 ("The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case.").

\textsuperscript{156} Berroteran-Melendez, 955 F.2d at 1255.
other than the timing of the motion to reopen. Yet nothing in the INA or the regulations even suggests that the timing of a motion to reopen has any bearing on finality. Whether the motion is filed before or after the appeal, if the case is in both forums, the court’s judicial efficiency justification is undermined.

The Court of Appeals for the Ninth Circuit justifies Berroteran-Melendez as consistent with the statutory framework established by section 106(a) of the INA. For example, if the BIA denies a motion to reopen, that denial could be judicially reviewed. Section 106(a)(6) of the INA provides that any review sought with respect to a motion to reopen must be consolidated with the review of the underlying deportation order. Assuming that 1) the alien appeals the BIA’s denial of his motion to reopen, and 2) the court has not ruled on the deportation order when the denial of reopening is appealed, the two reviews will be consolidated and heard together by the court of appeals. Thus, the court insists that Berroteran-Melendez is a case in which “an alien may validly seek review of both the original BIA decision and the denial of his motion to reopen.” This approach is consistent with the INA and Ninth Circuit decisions.

Although Berroteran-Melendez is arguably consistent with the court’s legal theory, the case seems anomalous and the holding perhaps limited to its facts. The court observed:

While suspending proceedings would promote judicial efficiency, ... the potential for abuse of the process to circumvent the BIA’s discretionary power to grant or deny a stay of deportation pending a motion to reopen outweighs concerns with efficiency. After balancing these concerns in the factual context of this case, we elect not to stay judicial proceedings.

The court did not explain its concern with superseding the BIA’s discretionary power, but it did set out the factual basis of the case. The case involved a deportation decision affirmed by the BIA, a petition for judicial review of the BIA’s order of deportation, a motion to reopen submitted to the BIA, and a motion to suspend judicial proceedings pending the BIA’s decision. After the court denied the motion to suspend judicial proceedings, the petitioners filed a motion for reconsideration; that request for reconsideration

157. See Ogio v. INS, 2 F.3d 959, 960 (9th Cir. 1993) (per curiam).
159. Ogio, 2 F.3d at 960.
160. Berroteran-Melendez, 955 F.2d at 1255 (emphasis added).
was also denied. 161

In short, the case was pending before the court with an outstanding request for agency reopening. The petitioners attempted to rely on the Ninth Circuit's rule that a pending motion to reopen suspends the finality of an order and precludes the court's jurisdiction. They argued that the Court of Appeals for the Ninth Circuit lacked jurisdiction over the appeal because of the unadjudicated motion to reopen. The INS, 162 however, argued that the court had jurisdiction because the BIA's dismissal of the administrative appeal was a "final order of deportation." 163 To the extent that aliens cannot be deported on a nonfinal order of deportation, petitioners' argument against the court's jurisdiction looks like an attempt to buy time. Such attempts contravene the expressed congressional policy against delay in the deportation process. By taking jurisdiction in Berroteran-Melendez, the court expressly disavowed judicial efficiency as the controlling principle by which to guide these jurisdictional decisions. This nonreliance on judicial economy is an important reason for finding the rule of Locomotive Engineers inapplicable in immigration cases.

Other reasons for rejecting the rule of Locomotive Engineers include the more generous provisions of the INA as compared to the Hobbs Act, 164 and the fact that the Locomotive Engineers Court did not deny jurisdiction because of a pending administrative motion. The Court stated that a request for agency reconsideration suspended the finality of an ICC order and tolled the running of the Hobbs Act statutory period in which to petition for judicial review of the underlying order. 165 The Court held, however, that both the denial of the motion to reconsider and the underlying denial of the petition for clarification were not appealable orders. 166 The Court distinguished between motions to reconsider that are based upon "material error" 167 and those based upon "new evidence" or

161. Id. at 1253-54.
162. The court referred to the "BIA" argument to support jurisdiction under § 1105a(a). Id. at 1254. The BIA, however, was not a party to the action; rather, the INS was a party. Id.
163. Id. This view is consistent with the regulations. See supra note 55 and accompanying text for reference to the relevant regulations.
164. See supra note 114 and accompanying text.
166. Id. at 277, 285.
167. A motion to reconsider on the ground of "material error" involves "the same record that was before the agency when it rendered its original decision." Id. at 280.
"changed circumstances." Denials of motions based upon new evidence or changed circumstances are appealable. The motion at issue, however, was based upon material error, and the Court concluded that "an order which merely denies rehearing of ... [the prior] order is not itself reviewable." Similarly, the denial of the petition for clarification was not an appealable order. Construed as a motion to reopen, it included no new evidence or changed circumstances.

Ultimately, then, the Court denied jurisdiction because the orders were unreviewable, not because they were nonfinal. Other courts subsequently extended Locomotive Engineers to preclude appellate jurisdiction, reasoning that if an order is nonfinal for determining when the time to appeal begins, it must be nonfinal and nonappealable until disposition of the motion to reopen. This suspension of finality rule thereby induces delay.

Thus, Locomotive Engineers is inconsistent with the immigration policy goal of facilitating deportation once an alien's status has been determined. Congress has expressly mandated that judicial economy is subordinate to the goal of curbing the potential to delay deportation. The United States Supreme Court demands that courts give effect to the clearly expressed intent of the legislature. Therefore, if certain finality rules facilitate the legislative will, courts should adhere to them. Conversely, rules that thwart immigration policy ought to be repudiated.

C. Suspended Finality Is Inapplicable in Immigration

The Courts of Appeals for the Third, Sixth, Seventh, Eighth, and Tenth Circuits disagree that filing a motion to reopen or reconsider suspends the finality of a deportation order and renders judicial review premature. These courts cite the immigration regulations, which state that the BIA's order of deportation is final on the date issued, except in certain specified cases. The ex-
ceptions do not include cases in which motions to reopen or reconsider are filed.

When filed, motions to reopen must state whether the challenged order "has been or is the subject of any judicial proceeding."177 Concurrent jurisdiction can arise only where the finality of a deportation order is intact and unaffected by a pending motion. Filing a request for administrative reopening or reconsideration will not stay deportation.178 "These motions are . . . analogous to motions for relief from judgment for mistake or for newly discovered evidence," which leave the finality of judgments intact.179 In federal civil cases, a party has one year in which to seek reopening, but the motion "does not affect the finality of a judgment or suspend its operation."180 Similarly, a "collateral habeas corpus attack," made in a criminal case after exhaustion of direct appeals, has no effect on a conviction's finality throughout the pendency of the action.181 Aliens need not even file motions to reopen or reconsider, which are granted only in the court's discretion.182 The design of the regulations thus suggests that a BIA decision remains final and appealable despite an unadjudicated motion to reopen.

In addition to the regulatory structure, the consequences of adhering to the rule of Locomotive Engineers illustrate how the suspended finality rule is misplaced in the immigration context. First, it makes no sense to hold that the filing of a motion to reopen renders the deportation order nonappealable but has no effect on final-

178. See supra note 38 and accompanying text.
179. White v. INS, 6 F.3d 1312, 1315 (8th Cir. 1993), cert. denied, 114 S. Ct. 2162 (1994).
180. FED. R. CIV. P. 60(b). See also FED. R. CRIM. P. 33, providing that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." Id.
181. White, 6 F.3d at 1315.
182. According to the Court of Appeals for the Seventh Circuit, the BIA appropriately identifies the criteria it will use in exercising discretion to reopen cases:

The power to reopen a case . . . is a power to dispense mercy. No one is entitled to mercy, and there are no standards by which judges may patrol its exercise. . . . In order to tell whether [the petitioner] . . . deserves merciful treatment, one must know not only the facts of her case but also the circumstances of the tens of thousands of other aliens seeking relief. If the Board is doing its job well, it is comparing the applicants against each other as well as evaluating them under moral and prudential standards. That comparison entails the assessment of thousands of aliens who are invisible to judges when a single alien seeks judicial review.

Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985).
ity for purposes of deportation. Courts all seem to agree that motions to reopen will not stay deportation, as is consistent with the regulations. However, courts adhering to the suspended finality rule deny appellate jurisdiction while the motion is pending before the Board. It is inconsistent and impossible to hold that motions will not delay deportation, but will suspend finality and deny the court jurisdiction. By definition, postponing judicial review until the BIA’s disposition of the motion to reopen results in inevitable delay of deportation.

Second, if a pending motion to reopen were to destroy finality of the order so as to preclude only appellate jurisdiction, yet permit deportation, an alien might be deported before ever obtaining judicial review. Once an alien departs the United States, he or she may no longer seek either administrative rehearing or judicial review. 183

Third, if the possibility of reopening or reconsideration was allowed to negate finality, courts “would recognize no finality” 184 other than the alien’s actual departure from American soil. Such an interpretation fosters abuse of the administrative and judicial processes because it permits the mere filing of motions to reopen to disrupt deportation. 185 Congress has expressly forbidden that option. 186 “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.” 187

CONCLUSION

In sum, there are substantial reasons for holding that the final-

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183. 8 U.S.C. § 1105a(c) (1988); 8 C.F.R. § 3.2 (1994).
184. See Butros v. INS, 990 F.2d 1142, 1152 (9th Cir. 1993) (quotations and citations omitted) (Trott, J., dissenting). The Butros majority held that the status of a petitioner for purposes of discretionary relief is not finally determined so long as the BIA may reopen or reconsider the case. Id. at 1145. The dissent criticized the holding of Butros as one that “raises more questions than it answers:”

Would a motion to reconsider the denial of a motion to reopen prevent the quickening of finality? Will a series of such motions made by an alien fighting deportation stave off the ripening of appellate jurisdiction under Chu? Will these proceedings ever come to a conclusion?... It would appear, as it does to the INS, that this new rule “would recognize no finality (other than the ‘physical deportation’ of the alien from the United States) to an alien’s right to seek reopening of deportation proceedings....”

Id. at 1152 (citation omitted) (Trott, J., dissenting).
185. Sanctions for meritless filings are possible. See, e.g., Muigai v. INS, 682 F.2d 334, 337 (2d Cir. 1982) (attorney sanctioned for filing frivolous petition for review).
186. See supra note 45 and accompanying text.
ity and appealability of a deportation order remain unaffected by the pendency of a motion to reopen or reconsider. This approach is consistent with the immigration regulations, as well as congressional policies such as facilitating deportation and avoiding dilatory practices. The Courts of Appeals for the Third, Sixth, Seventh, Eighth, and Tenth Circuits each have rejected the suspended finality rule in immigration law. These courts agree that filing a motion to reopen or reconsider should not be allowed to interfere with the deportation process.

The fact that the regulations provide for reopening does not mean that a petitioner will meet his or her burden to warrant such relief. It therefore makes more sense to say that the BIA decision is final at least until the proceeding is in fact reopened. Where a motion to reopen is granted, the order is “nonfinal” to the extent that a reopened proceeding has a real and not just theoretical possibility of culminating in a different result. It might then be prudent for a court to hold the case in abeyance pending the outcome of the reopened proceeding. While the motion to reopen remains unadjudicated, however, there is no compelling reason to depart from the immigration regulations, which state that motions to reopen will not interfere with deportation. Accordingly, a final order of deportation is appealable, despite a pending motion to reopen.

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