

7-1-2011

## **Vol. 2 No. 2, Summer 2011; Particularly Serious Crimes and Withholding of Removal: An Aggravating Question**

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### **Original Citation**

Jessica Fiocchi, Comment, Particularly Serious Crimes and Withholding of Removal: An Aggravating Question, 2 N. Ill. U. L. Rev. Online Supp. 67 (2011).

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# Particularly Serious Crimes and Withholding of Removal: An Aggravating Question

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## I. INTRODUCTION

El Salvador is a nation whose inhabitants have long suffered from violence, death, and a disregard of basic human rights that so many of us take for granted.<sup>1</sup> During its civil war, which stretched for twelve years from 1980 until 1992,<sup>2</sup> the Salvadoran government was the main violent actor, responsible for “extrajudicial executions, torture and forced disappearances.”<sup>3</sup>

When Hernan Ishmael Delgado entered the United States over twenty years ago, that Civil War was in full force.<sup>4</sup> Not only would Delgado have been justified in fearing for his life and safety due to the widespread occur-

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1. Nicole Hertvik, *El Salvador: Effecting Changes from Within*, UN CHRONICLE, Sept.-Nov. 2002, available at [http://findarticles.com/p/articles/mi\\_m1309/is\\_3\\_39/ai\\_93211770/](http://findarticles.com/p/articles/mi_m1309/is_3_39/ai_93211770/).

2. *The World Factbook: El Salvador*, CENT. INTELLIGENCE AGENCY (Jan. 19, 2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/es.html>.

3. See Hertvik, *supra* note 1 (describing that these acts were routinely committed by the military, death squads, and government security forces).

4. *Delgado v. Holder*, 563 F.3d 863, 866 (9th Cir. 2009), *reh’g granted*, 621 F.3d 957 (9th Cir. 2010).

rence of such brutality, but he also had personal history with such treatment.<sup>5</sup> He had “evidence that his mother, and probably his father, were victims of the rampant human rights violations that took place in El Salvador in the late 1970s and early 1980s,” which was early on in, and even before, the civil war.<sup>6</sup>

While the violence in El Salvador has decreased since the end of the war, it is still not gone.<sup>7</sup> Urban gang violence has been on the rise, mostly caused by locals feeling “fear, suspicion and discrimination” toward Salvadorans returning to the country from the United States, where they have been living for long periods of time.<sup>8</sup>

Because of the way United States law handles this situation in some districts, people like Hernan Ishmael Delgado are sent back to their native countries where they may be kidnapped, tortured, or murdered, for crimes that are not even considered serious enough to be aggravated crimes in the United States.<sup>9</sup> Delgado was sent back to El Salvador based on convictions for driving under the influence of alcohol.<sup>10</sup> These are not aggravated felonies in the United States, and yet they were enough to send him back to El Salvador, where his punishment may be death.<sup>11</sup>

While this interpretation of the relevant law is not an acceptable one, the burden on the United States’ system of justice makes it imperative that the most dangerous criminals be sent back to their native countries, as long as the situation complies with the United States’ international commitments (which are discussed in Part II of this Comment).<sup>12</sup> While these interests do compete with one another, they can be reconciled by keeping in mind that the United States has a duty both to its own citizens, by being responsible in the costs it allows on its justice system, and to the rest of the world, by keeping its word that it will be a protector of human rights.<sup>13</sup>

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5. *See id.* at 874.

6. *Id.* at 874.

7. *See* Hertvik, *supra* note 1 (stating that while government offenses have significantly decreased since the end of the war, private violence and killing has been on the rise).

8. *See id.* (describing that gang violence in urban areas has been especially prevalent since the U.S. has changed its policies and begun sending Salvadoran nationals back to their native country. The gangs are formed mostly from young men who have been living in the United States, who band together in gangs in order to protect themselves and gain acceptance due to suspicious attitudes with which the locals regard them when they return).

9. *Delgado*, 563 F.3d at 868.

10. *Id.* at 866.

11. *Id.* at 867.

12. *Impact of Fed. Immigration Policy and INS Activities on Communities: Hearings Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov’t Operations*, 103d Cong. 36 (1994) (statement of Joe Sandoval, Secretary, Youth and Adult Correctional Agency, accompanied by Tom Goggenhauer, California Department of Corrections).

13. United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

As illustrated in the example above, immigration and removal of criminal aliens back to their native countries are significant and controversial areas of United States law.<sup>14</sup> The far-reaching impact that the removal of aliens from the United States has on the person being removed, as well as the people in the alien's family and community, makes the issue one that touches home to many.<sup>15</sup> The aliens sent away from the United States and back to their native countries experience a separation from their family and friends in the United States, and the community in which they have lived.<sup>16</sup> They lose any property that they have acquired in the United States.<sup>17</sup> They also face a loss of the livelihood that they have been practicing while living in the United States.<sup>18</sup> On top of these losses that would be expected on any move to another country, the criminal alien that is removed is also prohibited from returning to the United States for a potentially indefinite period of time.<sup>19</sup> They lose any social security benefits that they have been receiving; benefits that they have paid for and that they may have depended upon.<sup>20</sup> Not only does the removal of aliens cause these hardships to the individual being removed, but there are also emotional and financial losses that the family members and others who are left behind have to face.<sup>21</sup> With all of these effects of an alien being removed from the United States, in addition to the human rights concerns discussed above, it is essential to have a policy to deal with these problems.<sup>22</sup>

To this end, the federal government has a statute in place called the Immigration and Nationality Act (INA).<sup>23</sup> The INA provides that the Attorney General may not remove an alien to a country where the alien's life or freedom would be threatened due to race, religion, nationality, membership in a particular social group, or political opinion.<sup>24</sup> However, the statute also provides an exception to this if the alien is convicted of a "particularly serious crime" and is a danger to the community of the United States.<sup>25</sup>

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14. NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, 1 IMMIGRATION LAW AND DEFENSE § 8:19 (3d ed. 2009).

15. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 513 (2007).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Legomsky, *supra* note 15, at 513.

21. *Id.*

22. Marilyn Achiron, *A 'Timeless' Treaty Under Attack*, 123 REFUGEES 4 (2001) (discussing the need for a solution to the world-wide refugee problem).

23. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

24. 8 U.S.C. § 1231(b)(3)(A).

25. 8 U.S.C. § 1231(b)(3)(B)(ii).

This Comment discusses the interpretation of the phrase “particularly serious crime” and argues that this term should only encompass crimes that are classified as aggravated felonies.<sup>26</sup> Part II discusses the background and history behind the term, and investigates the intent of the legislature when it passed the INA.<sup>27</sup> This Comment explains the circuit split between the Second, Seventh, and Ninth, Circuits (which held that crimes do not need to be aggravated felonies in order to be considered particularly serious), and the Third and Eighth Circuits, along with the dissenting opinion in the Ninth Circuit case, *Delgado v. Holder* (which held that only aggravated felonies should be considered particularly serious crimes).<sup>28</sup> The Comment then analyzes the legislative history, court cases, and statutes on point and explains that aggravated felonies are the only crimes that should be considered “particularly serious” in order to fit into the legislative intent and international commitments of the United States government.<sup>29</sup>

## II. HISTORY AND BACKGROUND

The legislature of the United States passed the INA in order to conform with the 1967 United Nations Protocol Relating to the Status of Refugees, which followed the United Nations Convention on the same subject.<sup>30</sup> The 1951 United Nations Convention Relating to the Status of Refugees is

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26. *Id.*

27. *See, e.g.*, H.R. REP. NO. 1459 (1993) (discussing the legislative intent of the INA).

28. *See, e.g.*, *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009) (holding that because the defendant was convicted of an aggravated felony, he was removable from the United States); *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (holding that although some aggravated crimes are automatically considered to be particularly serious, this does not preclude the attorney general from finding that a non-aggravated crime is also particularly serious), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010); *Nethagani v. Mukasey*, 532 F.3d 150 (2d Cir. 2008) (holding that the Second Circuit defers to the decision of the BIA in that crimes do not need to be aggravated felonies in order to be considered to be particularly serious); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006) (holding that non-aggravated crimes may be considered to be particularly serious if the Attorney General so designates them); *Alaka v. Att’y Gen. of U.S.*, 456 F.3d 88 (3d Cir. 2006) (holding that the plain meaning of the applicable statute supports the conclusion that in order to be particularly serious crimes, the offense must be an aggravated felony).

29. *See, e.g.*, Immigration and Nationality Act § 243(h)(2), 8 U.S.C. § 1231 (2006); United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150 (describing the international obligations of the United States).

30. United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150; Achiron, *supra* note 22 (explaining that the United Nations Protocol expanded the United Nations Convention Relating to the Status of Refugees.) The Convention originally only applied to refugees in Europe before January 1, 1951. *Id.* The Protocol increased this application to eliminate the time constraints originally in place through the Convention. *Id.*

considered “the Magna Carta of international refugee law,” and is the controlling international human rights legislation dealing with refugees.<sup>31</sup> While it was not the first attempt the United Nations and other organizations have made at refugee protection, it has been the most far-reaching and successful program ever adopted.<sup>32</sup> Delegates from twenty-six countries met in Geneva in 1951 to solve the problem of hundreds of thousands of refugees after World War II.<sup>33</sup> Three weeks later, the Convention was adopted.<sup>34</sup> The scope of the Convention was limited to refugees in Europe and events that occurred before January 1, 1951, because it was difficult to get countries to agree to obligations for the future, as they would not know the number of refugees with which they would be dealing.<sup>35</sup> Also, the drafters of the Convention did not expect the refugee problem to be a major international problem for very long.<sup>36</sup> The issue they had originally met to deal with was the World War II refugees, rather than a large future worldwide problem.<sup>37</sup>

However, the crisis spread throughout the rest of the world after that, eventually leading to the 1967 Protocol Relating to the Status of Refugees.<sup>38</sup> The Protocol eliminated the time constraints the drafters had put on the Convention, due to the global need for a more far reaching solution to the refugee crisis.<sup>39</sup> There are 140 signatories to the Convention and the Protocol today, and according to a United Nations article, “more states helped draft the treaty—and have since ratified it—than have supported any other refugee instrument” to date.<sup>40</sup> The significance of the Convention and Protocol are emphasized by the fact that so many nations have followed and depended on them in the development of their own laws, including the United States as seen with the INA.<sup>41</sup>

The non-refoulement<sup>42</sup> provision of the Protocol, or the article requiring a prohibition on expulsion or return, states that no refugee shall be returned to a nation “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social

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31. Achiron, *supra* note 22.

32. *Id.*

33. *Id.*

34. *Id.* at 10.

35. *Id.* at 8.

36. Achiron, *supra* note 22, at 12.

37. *Id.*

38. *Id.*

39. *Id.* at 12-13.

40. *Id.* at 11.

41. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

42. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining non-refoulement as “[a] refugee's right not to be expelled from one state to another, esp[ecially] to one where his or her life or liberty would be threatened”).

group or political opinion.”<sup>43</sup> The Convention also provides an exception to this for refugees who are “convicted by a final judgment of a particularly serious crime” or “constitutes a danger to the community of the country.”<sup>44</sup>

The Convention and Protocol define the term “refugee” to include those who have a well-founded fear of being persecuted because of their “race, religion, nationality, membership of a particular social group or political opinion,” and are afraid to return to their native country due to this fear.<sup>45</sup>

This is almost the exact language that the United States later used in the INA in its “withholding of removal” exception, which states that the United States “may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion” unless the alien “having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.”<sup>46</sup>

The closeness of the language between the U.N. Convention Relating to the Status of Refugees and the statute suggest that the United States legislature intended to carry out the purpose of that provision of the Convention to protect the fundamental human rights and freedoms of refugees as stated in the Preamble of that document.<sup>47</sup> The intent to protect those who may be in danger in their own nation is one consideration in the interpretation of the language of the statute, as shown by the legislative history of the Fairness in Cocaine Sentencing Act of 2009, which amended the INA: “the bills should be reviewed in light of their implications for adherence to our obligations under the U.N. Refugee Convention and Protocol.”<sup>48</sup>

Human rights are not, however, the only concern involved in deciding which aliens should be removed from the United States.<sup>49</sup> The House of Representatives’ hearings reflect large concerns with the costs that fall on the state and local governments within the United States when criminal

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43. United Nations Convention Relating to the Status of Refugees, art. 33, July 25, 1951, 189 U.N.T.S. 150.

44. *Id.*

45. *Id.*

46. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

47. United Nations Convention Relating to the Status of Refugees, July 25, 1951, pmb1. art. 33, 189 U.N.T.S. 150; 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE §1.03 [5][e].

48. H.R. REP. NO. 1459 (1993).

49. *See Impact of Federal Immigration Policy and INS Activities on Communities: Hearings Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. 36 (1994) (statement of Joe Sandoval, Secretary, Youth and Adult Correctional Agency, accompanied by Tom Goggenhauer, California Department of Corrections).

aliens are kept in the country.<sup>50</sup> For example, costs for medical care, education, police forces, and prison systems add up.<sup>51</sup> Most relevant to the statute at issue is the cost to the criminal justice system of all felonies and misdemeanors committed by aliens, which could cost federal and state governments over one billion dollars in one year.<sup>52</sup> In the push to curb costs, the legislature faces pressure to remove as many of these non-citizens as possible.<sup>53</sup> Rather than causing the legislature to rethink its position on the human rights aspect of the statute, the legislative history reveals that these cost concerns are aimed at the Immigration and Naturalization Service and its effectiveness at enforcing the law.<sup>54</sup> The decisions made with respect to the INA are interpreted by the Board of Immigration Appeals (BIA), which decides if the INA has properly applied the statute.<sup>55</sup> The BIA issues interim decisions to “provide guidance to Immigration Judges, the INS, and the private sector.”<sup>56</sup> The BIA attempts to decide cases dealing with aliens charged with aggravated felonies within thirty days, but has had a large growth in the number of cases it is dealing with and so is not as efficient as it would like to be in dealing with these matters.<sup>57</sup> Slower decision-making on the part of the BIA slows the removal process, leaving the United States with more costs for longer periods of time, and leaving dangerous criminals within U.S. borders for longer stretches. If the BIA can become more efficient in its decisions, this could save federal and state governments millions of dollars and alleviate some of the burdens they are carrying.<sup>58</sup>

The exemption for aliens convicted of particularly serious crimes and those considered a danger to the community of the United States applies both to applications for asylum and applications for withholding of removal.<sup>59</sup> However, there is a difference in interpretation of the term “particularly serious crime” in the two statutes, as pointed out by the dissent in *Delga-*

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50. *Id.*

51. *Id.*

52. *See id.* at 173.

53. *Id.*

54. *The Immigration and Naturalization Service: A Mandate for Change, Hearing Before the Info., Justice, Transp., and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. (1993).

55. *Subcomm. on Immigration and Claims Oversight Hearing on the Removal of Criminal and Illegal Aliens*, 104th Cong. 23 (1996) (statement of Anthony C. Moscato and Margaret M. Philbin).

56. *Id.*

57. *Id.*

58. *The Immigration and Naturalization Service: A Mandate for Change, Hearing Before the Info., Justice, Transp., and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. (1993).

59. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006); Asylum, 8 U.S.C. § 1158(b)(2)(A)(ii) (2009).



*do v. Holder*.<sup>60</sup> The asylum statute, Section 1158, allows the Attorney General to designate particularly serious crimes as such by regulation, whereas the withholding of removal statute, Section 1231, calls for this designation to be made on a case-by-case basis.<sup>61</sup> Also, for withholding of removal, the alien could be sent away to a third country and is not guaranteed a right to remain in the United States, whereas asylum guarantees a right to remain in the United States.<sup>62</sup> Along the same lines, withholding of removal is mandatory if the alien is eligible and does not fall into one of the exceptions in the statute, while asylum is discretionary.<sup>63</sup> The particularly serious crime exception in the withholding of removal statute includes all aggravated felonies with sentences over five years, whereas the asylum statute includes all aggravated felonies and others that may be so designated.<sup>64</sup>

The withholding of removal statute, then, is limited to crimes that are more serious in nature and is more strictly applied than the asylum statute.<sup>65</sup> This is consistent with the idea that the INS should try to be more efficient at enforcing immigration laws with more dangerous criminals.<sup>66</sup>

The discussion of a statute's legislative history is only necessary when the statute is ambiguous as written.<sup>67</sup> The definition of a "particularly serious crime" as defined by the withholding of removal statute is ambiguous, with varying interpretations among different circuits.<sup>68</sup> Although the United Nations Handbook suggests balancing the nature of the crime with the nature of the persecution to which the alien would be subjected if deported, the U.S. rejected this way of judging which crimes are particularly serious.<sup>69</sup> In *Matter of Frentescu*, the court laid out several factors to be considered in determining whether a crime should be particularly serious: "na-

60. *Delgado v. Holder*, 563 F.3d 863, 878 (9th Cir. 2009) (Berzon, J., dissenting), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010); GORDON ET AL., *supra* note 47, at 3:33.04 [7][b].

61. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2006); Asylum, 8 U.S.C. § 1158(b)(2)(B)(ii) (2009).

62. *Choeum v. INS*, 129 F.3d 29, 40 n.9 (1st Cir. 1997).

63. *Id.* at 40.

64. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B) (2006); Asylum, 8 U.S.C. § 1158(b)(2)(B) (2009).

65. *Id.*

66. *The Immigration and Naturalization Service: A Mandate for Change, Hearing Before the Information, Justice, Transportation, and Agriculture Subcomm. of the H. Comm. on Government Operations*, 103d Cong. (1993).

67. *Delgado v. Holder*, 563 F.3d 863, 883 (9th Cir. 2009) (Berzon, J., dissenting), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010).

68. See, e.g., *Tian v. Holder*, 576 F.3d 890 (8th Cir. 2009) (holding that because the defendant was an aggravated felon, he was removable under the Immigration and Nationality Act); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006) (holding that a crime does not need to be an aggravated felony to be a particularly serious crime).

69. GORDON ET AL., *supra* note 47, § 33.06 [4][c]; 87 A.L.R. FED. 646 § 5.

ture of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.<sup>70</sup> The INA set out aggravated felonies with a sentence of longer than five years as per se particularly serious, although it left an opening for the discretion of the Attorney General in categorizing other things as particularly serious.<sup>71</sup>

In discussing crimes that are per se particularly serious, the Immigration Law Service discussed drug trafficking crimes and the extraordinary and compelling criteria for drug trafficking not to be considered particularly serious.<sup>72</sup> The criteria were listed as follows: “small quantity, modest amount of money, peripheral involvement, absence of violence, absence of organized crime or terrorism involvement, absence of adverse or harmful effect of activity or transaction on juveniles.”<sup>73</sup> This emphasizes the fact that the categorization of certain crimes as particularly serious focuses on the extent of the harm that the crime will cause, and should be limited to only the most egregious offenses rather than allowing other less serious crimes into the same category.<sup>74</sup>

In order to get a better understanding of the meaning of this categorization, the legislative history of “aggravated felony” sheds some light on what the legislature intended.<sup>75</sup> Beginning in 1988, the Anti-Drug Abuse Act created the category “aggravated felony,” including only very serious crimes such as murder, drug trafficking, or any illicit trafficking in firearms or other destructive devices.<sup>76</sup> The legislation that followed the Anti-Drug Abuse Act served to broaden the definition of an aggravated felony, beginning with the Immigration Act of 1990, continuing through the Immigration and Nationality Technical Corrections Act of 1994, the Anti-Terrorism and Effective Death Penalty Act, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.<sup>77</sup> The IIRIRA and the Anti-Terrorism and Effective Death Penalty Act expanded “aggravated felony” to encompass less serious crimes, reduced the minimum sentence from five years to one year, and got rid of many defenses.<sup>78</sup> The IIRIRA also changed the name of “deportation proceedings” to “removal proceedings.”<sup>79</sup>

70. *In re Frentescu*, 18 I. & N. DEC. 244, 247 (BIA 1982).

71. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

72. 3 IMMIGR. L. SERV. 2d (West) §§ 13:406-13:407 (2011).

73. *Id.*

74. *Id.*

75. *Delgado v. Holder*, 563 F.3d 863, 883-84 (9th Cir. 2009) (Berzon, J., dissenting), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010).

76. 3 IMMIGR. L. SERV. 2d (West) § 13-37 (2011).

77. *Id.* at §§ 13-19, 13-37.

78. *Id.* at § 13-19; *Delgado*, 563 F.3d at 884 (Berzon, J., dissenting).

79. *Id.*

As the House of Representatives Report on the Criminal Alien Deportation Improvements Act of 1995 discussed, “only the most serious crimes” are meant to “render the alien deportable.”<sup>80</sup> This is meant to avoid the situation of “irrationally harsh sanctions for relatively minor crimes” as feared by the House of Representatives.<sup>81</sup> In order to maintain the international obligations of the United States in its cooperation with the United Nations Convention Relating to the Status of Refugees, the legislature limits the crimes that would fit into the exemption from withholding of removal to those that are more serious, rather than including crimes that are not serious enough to be considered aggravated felonies.<sup>82</sup> To give the statute an open interpretation that left an exemption completely up to the discretion of the Attorney General would defeat the purpose of identifying a crime as an aggravated felony or as particularly serious in the first place.<sup>83</sup>

From the creation of the category in 1988 with the Anti-Drug Abuse Act, through all of the progression discussed above, and up to the 1995 House of Representatives Report on the Criminal Alien Deportation Improvements Act, the definition of aggravated felonies has broadened, which broadened “particularly serious crimes” along with it.<sup>84</sup> In the context of asylum cases, this has been acceptable since the asylum statute is a discretionary one.<sup>85</sup> Contrastingly, withholding of removal is a statute with mandatory application, making the classification more definitive and significant.<sup>86</sup> Removal has been recognized as “a harsh consequence.”<sup>87</sup> In order to make the withholding of removal statute mandatory, the construction of the exemption should be narrower than the asylum statute’s exemption in order to keep such a drastic occurrence from happening in unnecessary situations.<sup>88</sup>

The burden of proof for the withholding of removal statute falls on the alien who is attempting to gain withholding.<sup>89</sup> The applicant has to show that it is more likely than not that his or her life or freedom would be threat-

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80. H.R. REP. NO. 104-22 (1995).

81. H.R. REP. NO. 104-132, 213 (1996).

82. *Delgado v. Holder*, 563 F.3d 863, 885-86 (9th Cir. 2009) (Berzon, J., dissenting), *reh’g granted*, 621 F.3d 957 (9th Cir. 2010).

83. *Id.*

84. 3 IMMIGR. L. SERV. 2d (West) § 13-37 (2011).

85. Asylum, 8 U.S.C. § 1158(b)(2)(B) (2009).

86. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

87. *The Immigration and Naturalization Service: A Mandate for Change, Hearing Before the Info., Justice, Transp., and Agric. Subcomm. of the H. Comm. on Gov’t Operations*, 103d Cong. (1993) (letter from Richard J. Wilson to Gary A. Condit).

88. *Delgado v. Holder*, 563 F.3d 863, 878-79 (9th Cir. 2009) (Berzon, J., dissenting), *reh’g granted*, 621 F.3d 957 (9th Cir. 2010).

89. 8 C.F.R. § 208.16 (1998).

ened in the country of removal.<sup>90</sup> The factors by which to judge the applicant's testimony include past threats to life or freedom<sup>91</sup> as well as future threats to life or freedom.<sup>92</sup> The adjudicators should also consider the circumstances of the country to which the applicant would be removed and whether the applicant would face serious harm.<sup>93</sup> The burden of showing it is not reasonable to relocate is on the applicant, unless the persecutor is a government or government-sponsored, in which case the unreasonableness is presumed.<sup>94</sup>

One thing considered by the House of Representatives in its hearings on the INA was the difficulty of this standard of proof.<sup>95</sup> The goal of this higher standard was to "weaken incentives to file meritless applications."<sup>96</sup> This goal arose from concerns after the September 11, 2001 World Trade Center attacks that non-refoulement (also known as withholding of removal) was simply being used as a loophole by alien convicts attempting to avoid being removed from the United States.<sup>97</sup>

However, during the same hearing, the question of whether the standard of proof was too high was raised, with a concern that this was not humane treatment in accord with the United Nations Convention Relating to the Status of Refugees.<sup>98</sup> Going along with this concern, the House of Representatives brought up the fact that withholding of removal (or "the right of non-return") is a "federally created liberty interest of which an individual cannot be deprived without constitutional due process of law."<sup>99</sup> This shows

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90. *Id.*

91. 8 C.F.R. § 208.16 (1998) (explaining that past threats to life or freedom create a rebuttable presumption of a threat in the future in the same country based on the original claim. The presumption is rebuttable if it is shown by a preponderance of the evidence that there has been a change in circumstances or that the applicant could avoid the future threat. If the applicant shows a past threat, the burden of showing these things is on the Service. If the past threat is unrelated to the future threat, the burden is on the applicant to show it is more likely than not that there is still a threat).

92. 8 C.F.R. § 208.16 (1998) (stating that applicants claiming a future threat to life or freedom must establish that it is more likely than not that they would be persecuted. This cannot be shown if the threat is avoidable. The applicant does not have to provide evidence that they would be persecuted if there is a pattern of such persecution in which the applicant would be included due to his or her affiliation with a certain group).

93. *Id.*

94. *Id.*

95. *Asylum and Inspections Reform: Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the H. Comm. on the Judiciary, House of Representatives*, 103d Cong. 276 (1993).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Asylum and Inspections Reform: Hearing Before the Subcomm. on Int'l Law, Immigration, and Refugees of the H. Comm. on the Judiciary, House of Representatives*, 103d Cong. 276 (1993).

the significance of protecting the applicant in accordance with the United States' international obligations.<sup>100</sup>

### III. ANALYSIS

The Immigration and Nationality Act provides that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.”<sup>101</sup> The statute also provides an exception to this rule if “the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States.”<sup>102</sup> The INA clarifies with the explanation that:

[A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least five years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.<sup>103</sup>

#### A. PLAIN MEANING

The “plain meaning rule” of statutory construction insists on an interpretation of the statute based on the words used, or a “literal interpretation.”<sup>104</sup> The Third Circuit in *Alaka v. Attorney General of U.S.* recognized that the plain meaning rule is “perhaps the most fundamental principle of statutory construction.”<sup>105</sup> The dissenting opinion in *Delgado v. Holder*, a Ninth Circuit decision, included a thorough examination of the statutory language of the withholding of removal statute, including a list of cases from the same circuit that had previously made such an examination of the definition of particularly serious crimes.<sup>106</sup> The dissent then concluded that

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100. *Id.*

101. Immigration and Nationality Act, 8 U.S.C. § 1231 (b)(3)(A) (2006).

102. Immigration and Nationality Act, 8 U.S.C. § 1231 (b)(3)(B)(ii) (2006).

103. *Id.*

104. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 495 (1992) (stating that statutes should be interpreted using their literal meanings).

105. *Alaka v. Att’y Gen. of U.S.*, 456 F.3d 88, 104 (3rd Cir. 2006) (discussing the significance of the plain meaning rule of statutory interpretation).

106. *Delgado v. Holder*, 563 F.3d 863, 880-81 (9th Cir. 2009) (Berzon, J., dissenting) (citing *Singh v. Ashcroft*, 351 F.3d 435, 439 (9th Cir. 2003)), *reh’g granted*, 621 F.3d 957

after reading the statutory text and coming up with a clear interpretation, “there is nothing more to say.”<sup>107</sup>

As the above quoted text from the INA shows, non-aggravated felonies are not mentioned in the statute.<sup>108</sup> While the INA does not explicitly restrict its application to only aggravated felonies, as pointed out by the Seventh Circuit in *Ali v. Achim*,<sup>109</sup> the statutory construction implies such a limitation.<sup>110</sup> In the statute’s explanation of the definition of a particularly serious crime, the first sentence refers specifically to “aggravated felonies,”<sup>111</sup> an immediate suggestion that the statute is limited to such crimes.<sup>112</sup> The second sentence of this definition gives discretion to the Attorney General to determine which crimes are particularly serious, focusing on the length of the sentence imposed, rather than the type of crime.<sup>113</sup>

Both of the opinions discussed that focused on the language of the INA in interpreting its meaning concluded that crimes must be aggravated felonies to be considered particularly serious.<sup>114</sup> Since the second sentence describing particularly serious crimes qualifies the Attorney General’s power to designate the crime as such by referring back to the specific phrase regarding the sentence length, the crime would still have to be an aggravated felony to be considered a particularly serious crime, although it would not need to have an imposed sentence of five years.<sup>115</sup> Supporting this interpretation, the Immigration Law Service states that the INA gives the Attorney General the power to make a decision regarding convictions for aggravated felonies for which a lesser sentence has been imposed.<sup>116</sup>

Other courts have argued that the language of the INA supports giving the Attorney General full discretion to decide which crimes are particularly

(9th Cir. 2010); *Villegas v. Mukasey*, 523 F.3d 984, 987 (9th Cir. 2008); *Afridi v. Gonzalez*, 442 F.3d 1212, 1217 (9th Cir. 2006).

107. *Delgado*, 563 F.3d at 881 (Berzon, J., dissenting).

108. Immigration and Nationality Act, 8 U.S.C. § 1231 (b)(3)(B)(ii) (2006).

109. *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006) (reasoning that a lack of language recognizing non-aggravated felonies does not necessarily preclude them from being considered particularly serious).

110. Immigration and Nationality Act, 8 U.S.C. § 1231 (b)(3)(B)(ii) (2006).

111. *Id.*

112. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 495 (stating that the language of the statute should be used to interpret the meaning of the statute).

113. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006) (“[N]otwithstanding the length of sentence imposed.”).

114. *Delgado v. Holder*, 563 F.3d 863, 880-81 (9th Cir. 2009) (Berzon, J., dissenting), *reh’g granted*, 621 F.3d 957 (9th Cir. 2010); *Alaka v. Att’y Gen. of U.S.*, 456 F.3d 88, 103 (3d Cir. 2006).

115. *Delgado*, 563 F.3d at 880-81 (Berzon, J., dissenting); *Alaka*, 456 F.3d at 103.

116. 3 IMMIGR. L. SERV. 2d (West) §§ 13:406-13:407 (2011); Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

serious on a case-by-case basis.<sup>117</sup> The *Ali* court discusses that the statute does not explicitly say that the Attorney General does not have discretion over non-aggravated crimes being considered particularly serious.<sup>118</sup> However, this interpretation would undermine the first sentence of the same definition and cast doubt on the reason behind ever using the phrase “aggravated felony” to describe particularly serious crimes in the first place.<sup>119</sup> In order to interpret the statute according to the plain meaning of the words used, the phrase that describes a particularly serious crime as an “aggravated felony” means that a crime must be an aggravated felony in order to be particularly serious.<sup>120</sup>

The plain meaning of the statute as read, focusing on the words that are in the statute as opposed to those that are missing, leads to a determination that crimes must be aggravated felonies to be considered particularly serious, as shown by both the Third Circuit opinion in *Alaka* and the dissenting opinion in the Ninth Circuit *Delgado* case.<sup>121</sup>

Considering the plain meaning of a statute also involves reading the statute in connection with the other statutes around it that involve the same subject matter, as statutes would not be likely to repeat the same intent twice in a row and also are not likely to completely contradict one another.<sup>122</sup> In this case, the withholding of removal statute in the INA can be read alongside the asylum statute, which is very similar in that both decide whether an alien is allowed to remain in the United States.<sup>123</sup> However, although both deal with the same subject matter, the withholding of removal statute has a mandatory application when applied, while the asylum statute has a discretionary application.<sup>124</sup> A statute with a mandatory application, like the withholding of removal statute, would likely be limited to a narrower and more specific type of crime such as an aggravated felony, whereas a discretionary statute would likely be interpreted more broadly as it can be judged on a case by case basis.<sup>125</sup> This suggests that while a particularly serious crime in the asylum statute may not be limited to aggra-

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117. *Delgado*, 563 F.3d at 868; *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006).

118. *Ali*, 468 F.3d at 470.

119. *Id.* (discussing that the use of certain language means that words not used are excluded) (citing *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 861 n.15 (7th Cir. 2002)).

120. *Id.*

121. *Delgado v. Holder*, 563 F.3d 863, 880-81 (9th Cir. 2009) (Berzon, J., dissenting), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010); *Alaka v. Att'y Gen. of U.S.*, 456 F.3d 88, 103 (3d Cir. 2006).

122. *Delgado*, 563 F.3d at 882 (Berzon, J., dissenting).

123. *Asylum*, 8 U.S.C. § 1158 (2009).

124. *Id.*; *Immigration and Nationality Act*, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006).

125. *Delgado*, 563 F.3d at 879 (Berzon, J., dissenting).

vated felonies, the withholding of removal statute may contain such a restriction without conflicting with the statutes around it.<sup>126</sup>

#### B. LEGISLATIVE HISTORY

While it is best to look at the plain meaning of statutes in order to determine their intent, when statutes are ambiguous in their use of language courts often use the legislative history to interpret the meaning of the law.<sup>127</sup> For example, in its analysis of the INA withholding of removal statute, the majority opinion in *Delgado v. Holder* skipped over the plain meaning of the statute right into an analysis of the legislative history.<sup>128</sup> Similarly, the Seventh Circuit in *Ali v. Achim* implied that the language of the INA's withholding of removal statute is ambiguous, after stating that if the statute "speaks clearly and directly to the question at hand" no further inquiry is necessary.<sup>129</sup> The court then rejected Ali's argument that the statute was unambiguous as written.<sup>130</sup> Even when looking into the legislative history of the withholding of removal provision, the intent of the statute seems to be to include only aggravated felonies in the classification of particularly serious crimes.<sup>131</sup>

#### C. BURDEN OF PROOF

The burden of proof in a withholding of removal case falls on the alien who is opposed to being removed from the United States back to his or her native country. As previously discussed, the alien has to show that it is more likely than not that his or her life or freedom would be threatened in the country of removal.<sup>132</sup> This makes it difficult for them, as evidence of prior inhumane treatment or death of close family members, as in *Delgado v. Holder*, may still not be considered enough evidence to be more likely

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126. *Id.*

127. *BedRoc Ltd. v. United States*, 541 U.S. 176, 186 (2004) (Stevens, J., dissenting) (discussing the use of legislative history in cases where the statutory language is ambiguous).

128. *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010).

129. *Ali v. Achim*, 468 F.3d 462, 468 (7th Cir. 2006) (mentioning that when a statute is unambiguous, the statutory interpretation does not go beyond the language of the statute).

130. *Ali*, 468 F.3d at 468 (discussing that the statute as written was ambiguous and that a further inquiry past the plain meaning of the statute was necessary).

131. *See, e.g., The Immigration and Naturalization Service: A Mandate for Change, Hearing Before the Info., Justice, Transp., and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. (1993) (letter from Richard J. Wilson to Gary A. Condit).

132. 8 C.F.R. § 208.16 (1998).



than not that the aliens would be subject to human rights violations themselves upon their return.<sup>133</sup>

If the burden of proof was on the United States government to show that the alien would not likely be subject to human rights violations when returned to their home country, this would be fairer. The United States government is in a better position than the alien to know the current situation of social and political groups, power struggles, and groups of people that are being threatened at certain points in time in countries around the world, whereas the alien has found refuge in the United States and has escaped the knowledge of such things while they have been away from their native country. The only source of such information that the alien would have to find out the situation in their native country would be if they still had family or friends in that nation, which may not be the case, especially when the alien came to the United States because they were facing a threat to their life or freedom in the first place.

Giving the alien the high burden of showing that such things are happening in their home country and, further, that they are likely to happen to them upon their return supports the interpretation that the exemption from withholding of removal should fall only on those who have committed the most serious of crimes. If the alien is able to meet such a high burden of proof to show that he or she will probably face human rights violations if returned to their home nation, the United States is obligated by its commitment to the United Nations Convention Relating to the Status of Refugees to protect them from this, except in the most egregious circumstances.<sup>134</sup>

#### D. COMPARISON TO CONVENTION

The INA was based on the 1967 United Nations Protocol Relating to the Status of Refugees and was passed to keep the United States in conformity with this international agreement.<sup>135</sup> Specifically, the “non-refoulement” provision of the Protocol is, as discussed in Part II of this Comment, the origin of the withholding of removal statute.<sup>136</sup> The similarities between the language used in the Convention and Protocol, as recognized in *Delgado*, suggest a desire on the part of the United States legislature to carry out the goal of the international community to protect people in the U.S. from torture or inhumane treatment in their native countries un-

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133. See *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010).

134. United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

135. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006); United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

136. See discussion *supra* Part II.

less that person has committed a crime that is serious enough to warrant such treatment.<sup>137</sup>

While the Convention does not give a definition of particularly serious crimes, the goal of the Convention to show “profound concern for refugees” and “to assure refugees the widest possible exercise of these fundamental rights and freedoms” implies that the bar for crimes to be considered particularly serious should be a high one.<sup>138</sup> If there were no limit on which crimes were particularly serious, this would not further the interests of the Convention and would defeat the purpose of the non-refoulement provision altogether by providing little protection to the refugee who fears for his life or safety.<sup>139</sup> Because it fits the purpose of the Convention to limit the crimes which can be considered particularly serious, and because the INA is based on and similar to the Convention, it also fits the purpose of the INA to limit the type of crime categorized as particularly serious.<sup>140</sup>

#### E. HISTORY OF “AGGRAVATED FELONY”

The history of the term “aggravated felony” shows varying definitions and is another reason that only aggravated felonies should be considered particularly serious crimes.<sup>141</sup> As the category broadened from 1988, with its initiation in the Anti-Drug Abuse Act, to 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), more crimes were considered to be aggravated felonies, including crimes that were less serious in nature.<sup>142</sup>

Because of the increased inclusiveness of the term aggravated felony, few, if any, crimes with a high degree of seriousness are not categorized as such.<sup>143</sup> For this reason, the INA went so far as to limit particularly serious crimes to aggravated felonies with a prison sentence of over five years, in order to make sure that more trivial crimes were not included in this classification and would not be included in the exception to withholding of removal.<sup>144</sup>

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137. *Delgado*, 563 F.3d at 869 (mentioning compliance with the 1967 United Nations Protocol Relating to the Status of Refugees).

138. United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

139. *Id.*

140. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006); United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

141. *Delgado v. Holder*, 563 F.3d 863, 883-84 (9th Cir. 2009) (Berzon, J., dissenting), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010).

142. 3 IMMIGR. L. SERV. 2d (West) §§ 13:37, 13:19 (2011).

143. *Id.*

144. Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(B)(ii) (2006) (limiting the classification of particularly serious crimes to “[a]n alien who has been convicted of an

Since the INA limits the application of the statute to crimes with a particular level of seriousness, and because most crimes of a serious nature are now classified as aggravated felonies, the INA is limiting the classification of particularly serious crimes to those that are already categorized as aggravated felonies.<sup>145</sup> While there is a qualifying sentence at the end of the exception to withholding of removal, this qualifier is referring to the length of the prison sentence in order to make sure the crime has reached a certain level of seriousness, and is not referring to the categorization of the crime as an aggravated felony, which would make the statute overbroad and ineffective for the purpose it is intended to serve.<sup>146</sup>

#### F. HISTORY OF “PARTICULARLY SERIOUS CRIME”

The history of the term “particularly serious crime” reveals a less detailed, but nonetheless enlightening, amount of information on how the term has been interpreted and defined in the past.<sup>147</sup> The Immigration Law Service contains a discussion of per se particularly serious crimes, including a list of crimes categorized as such and some criteria considered in developing that list.<sup>148</sup> Characteristics of crimes that preclude them from being classified as particularly serious include: small quantity, modest amount of money, peripheral involvement, absence of violence, absence of organized crime or terrorist organization involvement, and absence of adverse or harmful effect of activity or transaction on juveniles.<sup>149</sup>

These factors show that crimes with a less dangerous, less violent, or less serious nature should not be included in the particularly serious crime category.<sup>150</sup> As already discussed above, most crimes that do have a serious, dangerous, or violent nature are considered aggravated felonies.<sup>151</sup> Since the Immigration Law Service provided guidance on making sure that particularly serious crimes are serious enough in nature, and because those crimes are already considered to be aggravated felonies, particularly serious crimes should be limited to aggravated felonies so as not to include crimes that do not go along with the guidelines set out by the Immigration Law Service

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aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime”).

145. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

146. 8 U.S.C. § 1231 (2006).

147. 3 IMMIGR. L. SERV. 2d (West) §13:407 (2011).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at §§ 13:37, 13:19.

and punish more minor crimes in a way supposed to be limited to major crimes.<sup>152</sup>

#### G. BURDEN ON UNITED STATES SYSTEMS

While the considerations discussed (the United Nations Convention Relating to the Status of Refugees and the histories of the terms “aggravated felony” and “particularly serious crime”) lead to a determination that only the most serious crimes should be considered a bar to withholding of removal, one may also consider the costs to the United States system of justice when keeping criminal aliens in the country rather than sending them back to their native countries.<sup>153</sup> Costs imposed on both state and local governments include medical care, education, police forces, and prison systems.<sup>154</sup>

The criminal justice system has greatly increased costs for every criminal alien kept in the U.S. prison system rather than being sent off to another country.<sup>155</sup> In the Federal Bureau of Prisons Facilities, criminal aliens make up twenty-nine percent of prisoners and are the fastest growing segment of the federal prison population.<sup>156</sup> In 1999, the cost to state prisons of housing criminal aliens was \$624,000,000.<sup>157</sup> In 2002, the cost to federal prisons of housing criminal aliens was \$891,000,000.<sup>158</sup> In Illinois alone, criminal aliens cost over \$40,000,000 just for incarceration.<sup>159</sup>

With a greater number of aliens in the United States, along with the fact that they are the fastest growing segment of the federal prison population, one concern is a possible growing threat to public safety and national security, leading to increased costs for police forces.<sup>160</sup> Additionally, increased security systems, especially after the attacks on the World Trade

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152. 3 IMMIGR. L. SERV. 2d (West) §§ 13:37, 13:19 (2011).

153. *Impact of Fed. Immigration Policy and INS Activities on Communities: Hearings Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov't Operations*, 104th Cong. (1995).

154. *Id.*

155. *Impact of Federal Immigration Policy and INS Activities on Cmty.s.: Hearings Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. 36 (1994) (statement of Joe Sandoval, Secretary, Youth and Adult Correctional Agency, accompanied by Tom Goggenhauer, California Department of Corrections).

156. *Criminal Aliens*, FED'N FOR AM. IMMIGR. REFORM (October 2002), [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters0b9c](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0b9c).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Center on September 11, 2001, have been implemented nationwide, imposing additional costs and requiring additional police forces to run them.<sup>161</sup>

Aside from the criminal justice system, there are also great costs to the United States system of public schools.<sup>162</sup> As more immigration occurs and more aliens enter the country, more school-aged children enter also, contributing to a problem of school overcrowding.<sup>163</sup> The number of school children who are immigrants and children of immigrants has tripled in the past thirty years, leading to a current number of 55,000,000 school-aged immigrants or children of immigrants.<sup>164</sup> These great numbers have necessitated more money to go toward new schools to accommodate the great number of students as well as bilingual education to accommodate the increasing group of students who do not speak English.<sup>165</sup> There has also been great concern recently over the issue of foreign students taking the limited number of spots offered in United States colleges, graduate programs, and doctoral programs rather than United States citizens getting them.<sup>166</sup>

These costs are daunting, and make a convincing case for limiting the number of aliens that should be allowed to remain in the United States. However, interpreting the Immigration and Nationality Act to include only aggravated felonies in the particularly serious crime category does not mean that any alien who commits a non-aggravated crime will remain in the United States.<sup>167</sup> This only applies in the limited circumstances when it is more likely than not that the "alien's life or freedom would be threatened in their native country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."<sup>168</sup> In another more common situation, where the alien is from a nation in which his or her human rights would not likely be violated, the alien would still be sent back to his or her native country and would no longer be placing a burden on the United States system of justice, or any other United States system.<sup>169</sup>

When the less common situation occurs that the criminal alien is from a nation in which his or her human rights are at risk, while the costs to the

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161. *Criminal Aliens*, FED'N FOR AM. IMMIGR. REFORM (October 2002), [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters0b9c](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0b9c).

162. *Immigration and School Overcrowding*, FED'N FOR AM. IMMIGR. REFORM (October 2002), [http://www.fairus.org/site/News2?page=NewsArticle&id=16935&security=1601&news\\_iv\\_ctrl=1010](http://www.fairus.org/site/News2?page=NewsArticle&id=16935&security=1601&news_iv_ctrl=1010).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

168. 8 U.S.C. § 1231(b)(3)(A) (2006).

169. 8 U.S.C. § 1231(b)(3) (2006) (The statute only applies when the alien's life or freedom is threatened.).

United States are still real and significant, they do not excuse turning away from international commitments and human rights considerations.<sup>170</sup> The concerns of resources for our criminal justice system are outweighed by the possibility of unnecessary torture and death for criminal aliens that have not committed crimes of a severity that warrants a classification of at least aggravated felony and, further, particularly serious crime.<sup>171</sup> The United States also committed itself to the goal of protecting those who have not committed crimes of that seriousness through the United Nations Convention Relating to the Status of Refugees.<sup>172</sup> To bring the enforcement of this agreement down to the level of undermining its effect would lower the value of such a commitment, and prestige of a promise from the United States of America.

The withholding of removal statute does not necessarily require that the criminal alien remain in the United States, but prohibits the alien from being returned to his or her native country.<sup>173</sup> Rather than keeping the criminal alien in the United States, the alien could be sent away to a third country where the cost is not borne by the United States and the alien is not deprived of his basic human rights.<sup>174</sup> For these reasons, the costs on the criminal justice system of the United States do not justify a more relaxed interpretation of the particularly serious crime exception of the INA.<sup>175</sup>

#### H. *FRENTESCU* FACTORS

*Delgado v. Holder*, *Ali v. Achim*, and *Tian v. Holder* each discuss the use of “*Frentescu* factors” in determining on a case-by-case basis which crimes should be considered particularly serious.<sup>176</sup> These factors include the “nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”<sup>177</sup> While these factors may be helpful in deter-

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170. United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

171. *Id.*

172. *Id.*

173. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

174. *Choeum v. INS*, 129 F.3d 29, 40 (1st Cir. 1997) (discussing the differences between the withholding of removal statute and the asylum statute and mentioning the possibility of sending criminal aliens to a third country rather than their country of origin).

175. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

176. *Tian v. Holder*, 576 F.3d 890, 897 (8th Cir. 2009); *Delgado v. Holder*, 563 F.3d 863, 868 (9th Cir. 2009), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010); *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006) (citing *In re Frentescu*, 18 I. & N. Dec. 244 (BIA 1982)) (discussing the *Frentescu* factors for determining whether a crime should be categorized as particularly serious).

177. *In re Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

mining the seriousness of crimes, this analysis would not be necessary in every case if it could be determined that aggravated felonies were a minimal requirement for particularly serious crimes. This requirement would cancel out any other crimes from even needing to be considered, saving court resources and time. Using the *Frentescu* factors on their own without limiting them to analyzing only aggravated felonies would result in an unnecessary use of the court's time and resources, which would lead to fewer criminal aliens being removed due to a slow down of the trial process.<sup>178</sup> Although proponents of these factors' usage outside of aggravated felonies are in favor of removing more criminal aliens who have committed less serious crimes, their position would actually have the potential to remove fewer criminal aliens who have committed more serious crimes.<sup>179</sup>

While there should not always need to be a case-by-case determination for particularly serious crimes, when there is an aggravated felony with a sentence of less than five years, the *Frentescu* factors could be used to determine whether it is particularly serious, as pointed out by the Eighth Circuit in *Tian v. Holder*.<sup>180</sup> The *Frentescu* factors are aimed at narrowing crimes down to the most serious ones, as is the "aggravated crime" classification.<sup>181</sup> Using the two together would be an effective way to combine the analyses of the different circuits' interpretations of the INA, and gain a good way to limit particularly serious crimes to only the most serious ones, as intended.<sup>182</sup> This use of the *Frentescu* factors would maintain the correct interpretation of the Immigration and Nationality Act (by excluding non-aggravated crimes from the particularly serious crime classification), save the courtroom resources that would have been wasted with unnecessary considerations of less serious crimes, and guide the determination of which aggravated felonies with lesser sentences should be categorized as particularly serious crimes.<sup>183</sup>

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178. *The Immigration and Naturalization Service: A Mandate for Change, Hearing Before the Info., Justice, Transp., and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. (1993).

179. *Id.*

180. *Tian*, 576 F.3d 890 (discussing the use of the *Frentescu* factors in the determination of whether aggravated felonies with sentences of less than five years should be considered particularly serious crimes).

181. *Frentescu*, 18 I. & N. Dec. at 247 ("[A] 'particularly serious crime' is more serious than a 'serious nonpolitical crime' . . ."); 3 IMMIGR. L. SERV. 2d (West) § 13:19 (2011); *Delgado*, 563 F.3d at 884 (Berzon, J., dissenting).

182. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).

183. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006); *The Immigration and Naturalization Serv.: A Mandate for Change, Hearing Before the Info., Justice, Transp., and Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. (1993).

## IV. RESULTS

## A. EFFECTS OF ADOPTION

1. *Non-Refoulement*

In the event of the implementation of this interpretation of the Immigration and Nationality Act, the pool of people who would face removal would be more limited than it is today.<sup>184</sup> Today, in circuits such as the Seventh and Ninth Circuits, where withholding of removal may be denied even in the absence of the commission of an aggravated felony, more people who have committed less serious offenses are sent away from the United States to native countries in which they may face persecution, torture, or even death.<sup>185</sup> By interpreting the INA to preclude those who have not committed aggravated crimes from being sent back to such nations, those who have committed less serious crimes—crimes that are not considered to be particularly serious due to their non-aggravated classification—will no longer have to fear that their lives in the United States will be uprooted. Instead, these criminals will face punishments within the justice system here in the United States, rather than penalties that are excessive for the severity of the crime committed.

While many will avoid removal in the event of interpreting the INA to preclude non-refoulement except in the case of aggravated felonies, others will still be sent away to their native countries to face potential persecution. Those who may still be denied withholding of removal will be only those who have committed a crime so severe in nature that it is considered to be an aggravated felony and a particularly serious crime.<sup>186</sup> If the INA is enforced effectively, the number of more serious criminals being removed from the United States should rise, even though the pool of people is limited. By being harsher on those who have committed the particularly serious aggravated felonies, the most dangerous criminals will continue to be taken out of the United States community, while allowing those who have

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184. See, e.g., *Delgado v. Holder*, 563 F.3d 863 (9th Cir. 2009) (holding that although some aggravated crimes are automatically considered to be particularly serious, this does not preclude the attorney general from finding that a non-aggravated crime is also particularly serious), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010); *Nethagani v. Mukasey*, 532 F.3d 150 (2d Cir. 2008) (holding that the Second Circuit defers to the decision of the BIA in that crimes do not need to be aggravated felonies in order to be considered to be particularly serious); *Ali v. Achim*, 468 F.3d 462 (7th Cir. 2006) (holding that non-aggravated crimes may be considered to be particularly serious if the Attorney General so designates them).

185. See, e.g., *Delgado*, 563 F.3d 863 (holding that *Delgado* would be sent back to El Salvador although he had not committed an aggravated felony).

186. Immigration and Nationality Act, 8 U.S.C. § 1231 (2006).



not been guilty of such serious offenses to live their lives without threat to their life or freedom. Sending away those who do not deserve such punishments while others who have committed more serious crimes are allowed to remain in the United States due to a lack of enforcement would be a larger problem to solve. Removing the criminals who have committed the most serious aggravated crimes from the United States is desirable in that the justice system will no longer bear the cost of dealing with them, and the United States will not have breached its international obligations through the United Nations Convention Relating to the Status of Refugees.<sup>187</sup> It is the right thing to do to remove the most serious criminals to their native countries even in the face of possible danger because the offense they have committed is serious enough to warrant such a punishment and is not excessive under the circumstances.<sup>188</sup>

## 2. *Reduced Power of Attorney General*

By interpreting the INA to mean that only aggravated felonies may be considered particularly serious crimes, the wide discretion currently given to the Attorney General in the circuits interpreting otherwise will be diminished. Rather than having the authority to send any criminal alien back to their native country, regardless of the circumstances that they will face there, the Attorney General would be limited in such punishments to those who have committed crimes serious enough to be both an aggravated felony and, further, a particularly serious crime.

This is similar to limiting discretion on judges, as both avoid unequal and unjust application of the law. The United States justice system has a long history of limiting the discretion of judges in favor of jury trials or laws that set a bright line rule that limits the power that one person's discretion may have over the law.<sup>189</sup> Beginning back in the eighteenth century with our English predecessors, judges were given little discretion in sentencing matters.<sup>190</sup> Laws were written to be "sanction-specific," giving a

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187. *Impact of Fed. Immigration Policy and INS Activities on Cmty.s.: Hearings Before the Info., Justice, Transp., & Agric. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong. 36 (1994) (statement of Joe Sandoval, Secretary, Youth and Adult Correctional Agency, accompanied by Tom Goggenhauer, California Department of Corrections); United Nations Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.

188. *Asylum and Inspections Reform: Hearing Before the Subcomm. on Int'l Law, Immigration, & Refugees of the H. Comm. on the Judiciary*, 103d Cong. 276 (1993).

189. See *Blakely v. Washington*, 542 U.S. 296, 314 (2004) (O'Connor, J., dissenting) (discussing that giving judges full discretion leads to inequitable results); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (discussing that judges have not historically been given discretion over serious matters except within statutory limits).

190. *Apprendi*, 530 U.S. at 479.

specific punishment for each crime that was committed.<sup>191</sup> Although judges were allowed discretion in some instances, due to the particularly serious nature of the crimes at issue in the INA, such discretion would not have been permitted in this type of circumstance.<sup>192</sup> Punishments of “smaller faults, and omissions of less consequence” were more likely to be swayed by a particular judge’s thoughts on the subject than something more serious.<sup>193</sup> It was permissible for judges to exercise their power “within statutory limits” and the “determination and sentence of the law,” but they could not go beyond this.<sup>194</sup> Rather than being an outdated method of legal interpretation, these principles have guided recent Supreme Court decisions and are alive and well today.<sup>195</sup>

Without such limitation on the discretion of one single person, inequality between the decisions different judges, or in this case, between different Attorneys General, in different situations would be the effect.<sup>196</sup> As pointed out in *Blakely v. Washington*, “unguided discretion inevitably result[s] in severe disparities in sentences received and served by defendants committing the same offense. . . .”<sup>197</sup> Without a law that gives one rule to be applied equally to similar situations in different places or with different decision-makers, there would be no uniformity in the United States justice system.<sup>198</sup> A person’s punishment for a crime would “depend on ‘what the judge ate for breakfast’ on the day of sentencing, on which judge you got, or on other factors that should not have made a difference . . . .”<sup>199</sup> By interpreting the INA to mean that only aggravated felonies may be considered to be particularly serious crimes, the U.S. justice system can avoid such unjust results and ensure a fairer and more uniform application of the law as it was intended to be enforced.<sup>200</sup>

## V. CONCLUSION

Although there are opposing interests to consider when determining how the INA withholding of removal statute should be applied, the most significant interests, as well as the strongest arguments for statutory interpretation, lend themselves to a minimal requirement of an aggravated felo-

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191. *Id.*

192. *Id.* at 480.

193. *Id.*

194. *Id.* at 479-80, 481.

195. *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi*, 530 U.S. 466.

196. *Blakely*, 542 U.S. at 315 (O’Connor, J., dissenting).

197. *Id.*

198. *Id.*

199. *Blakely*, 542 U.S. at 332 (Breyer, J., dissenting).

200. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 596 (1996) (Breyer, J., concurring) (discussing the importance of uniform application of the law).

ny in order to be considered particularly serious crimes. The plain language of the withholding of removal statute, the histories of the terms “aggravated felony” and “particularly serious crime,” and the commitment of the United States to promote the goals of the United Nations Convention Relating to the Status of Refugees, all support the interpretation that only aggravated felonies should be included in the category of particularly serious crimes.<sup>201</sup> The costs to the United States of maintaining the criminal alien that has not committed an aggravated felony is minimal compared to the cost of sending someone who has not committed a particularly serious crime back to a nation where they may be tortured or killed. Particularly serious crimes need a strict interpretation excluding any crimes other than aggravated felonies.

JESSICA FIOCCHI\*

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201. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1231 (2006); 3 IMMIGR. L. SERV. 2d (West) § 13:19 (2011); *Delgado v. Holder*, 563 F.3d 863, 884 (9th Cir. 2009) (Berzon, J., dissenting), *reh'g granted*, 621 F.3d 957 (9th Cir. 2010); 3 IMMIGR. L. SERV. 2d (West) §§ 13:406-13:407 (2011).

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