

# OVERCOMING THE LABYRINTH: EMBRACING ATTORNEY GENERAL MUKASEY'S *SILVA-TREVINO* DECISION

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## ABSTRACT

*One of Congress's early concerns in immigration law was the removal of aliens who commit crimes involving moral turpitude. Nevertheless, Congress did not address the procedure for identifying a crime involving moral turpitude in the Immigration and Nationality Act. The omission of this procedure by Congress resulted in federal circuit courts formulating their own procedures for identifying a crime involving moral turpitude. The disparity between the federal circuit court procedures results in the removal of aliens from the United States even though those aliens did not commit crimes involving moral turpitude. Furthermore, the disparity permits aliens who do commit crimes involving moral turpitude to evade removal due to loopholes in the varying federal circuit court procedures.*

*Attempting to establish a uniform and equitable procedure, Attorney General Mukasey articulated a three-part procedure for identifying a crime involving moral turpitude. Due to several federal circuit courts rejecting Attorney General Mukasey's procedure and due to recent Supreme Court decisions, Attorney General Holder vacated Attorney General Mukasey's procedure and charged the Board of Immigration Appeals with determining the procedure for identifying a crime involving moral turpitude. Despite its vacatur, the BIA should adopt Attorney General Mukasey's procedure because the procedure would (1) be consistent with traditional agency deference; (2) demystify the procedure for identifying crimes*

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*involving moral turpitude through the creation of a universal approach; and (3) avoid manipulations within the criminal system with respect to conviction records. Until the BIA adopts Attorney General Mukasey's procedure, aliens will continue to face both unequitable treatment and a labyrinth of procedures in removal proceedings for crimes involving moral turpitude.*

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## INTRODUCTION

In 1977, the Court of Appeals for the Second Circuit painted a picture of United States immigration law, noting that the law bears a “striking resemblance . . . [to] King Minos’s labyrinth in ancient Crete.”<sup>1</sup> Cristoval Silva-Trevino (Cristoval) is a recent victim of the immigration-law “labyrinth.”<sup>2</sup> In 2005, Cristoval sought discretionary relief from removal<sup>3</sup> through an adjustment of status to lawful permanent resident, contending that his “aggravated felony”

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1. *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977).

2. *See* Silva-Trevino, 24 I. & N. Dec. 687, 695 (Op. Att’y Gen. 2008), *vacated*, Silva-Trevino, 26 I. & N. Dec. 550 (Op. Att’y Gen. 2015) (exposing Cristoval to different evidentiary standards throughout his appeal process). A labyrinth is “something extremely complex or tortuous in structure, arrangement, or character.” *Labyrinth*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

3. The federal government initiated removal proceedings against Cristoval based on the Immigration and Nationality Act’s deportability provisions. *Silva-Trevino*, 24 I. & N. Dec. at 691. Cristoval was subject to deportability provisions because he was a lawful permanent resident and because he pled guilty to an “aggravated felony” under 8 U.S.C. § 1227. *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(iii) (2006)). Under the Immigration and Nationality Act, the federal government may initiate removal proceedings against an alien if the alien is (1) present in the United States; and (2) either inadmissible or deportable. 8 U.S.C. § 1229a(e)(2) (2012). Inadmissibility grounds apply if the alien was not “admitted” into the United States. *Id.* § 1182(a). Deportability grounds apply if the alien was “admitted” into the United States. *Id.* § 1227(a). An alien is “admitted” into the United States if the alien enters the United States “after inspection and authorization by an immigration officer.” *Id.* § 1101(a)(13)(A).

conviction did not entail a crime involving moral turpitude.<sup>4</sup> Attorney General Michael B. Mukasey (Mukasey),<sup>5</sup> noticing the inconsistent approaches within the Board of Immigration Appeals (BIA)<sup>6</sup> and the federal circuit courts, articulated a three-part procedure in *Silva-Trevino* for identifying a crime involving moral turpitude.<sup>7</sup> Noticing that several federal circuit courts refused to apply Mukasey's *Silva-Trevino* procedure, Attorney General Eric H.

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4. *Silva-Trevino*, 24 I. & N. Dec. at 691. Cristoval challenged that his crime was not a crime involving moral turpitude because he sought discretionary relief from removal based on an adjustment of status, under 8 U.S.C. § 1255(a), to lawful permanent resident. *Id.* at 691 (citing 8 U.S.C. § 1255(a)). 8 U.S.C. § 1255(a) read, and currently reads:

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa

The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and *is admissible to the United States for permanent residence*, and (3) an immigrant visa is immediately available to him at the time his application is filed.

8 U.S.C. § 1255(a) (2012) (emphasis added). Since the Immigration and Nationality Act does not define "moral turpitude," courts often rely on Black's Law Dictionary to ascertain the meaning of the term. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264 (2001). Black's Law Dictionary defines "moral turpitude" as:

shameful wickedness – so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people.

*Moral Turpitude*, BLACK'S LAW DICTIONARY (9th ed. 2009) (citation omitted).

5. Michael B. Mukasey was the Attorney General of the United States between 2007 and 2009. *Attorneys General of the United States*, U.S. DEP'T JUST., <http://www.justice.gov/ag/historical-bios> [<https://perma.cc/F9EZ-UDMX>] (last visited Feb. 25, 2016).

6. Immigration Judges, the BIA, and the Attorney General are part of the Department of Justice. Drew Marksity, *Judicial Review of Agency Action: Federal Appellate Review of Board of Immigration Appeals Streamlining Procedure*, 76 U. CIN. L. REV. 645, 652 (2008). The Immigration Judge makes the initial ruling in an immigration proceeding. *Id.* at 645. The decision of the Immigration Judge may be appealed to the BIA. *Id.* The BIA decision may be appealed to federal circuit court. *Id.*

7. *Silva-Trevino*, 24 I. & N. Dec. at 704.

Holder, Jr. (Holder)<sup>8</sup> vacated Mukasey's procedure and charged the BIA with determining the proper procedure for identifying a crime involving moral turpitude.<sup>9</sup> Holder's vacatur not only tolerated federal circuit court neglect of traditional judicial deference to agency action,<sup>10</sup> but also marked a continuation of the immigration-law labyrinth.<sup>11</sup>

Holder's vacatur coincides with a line of federal circuit court cases rejecting Mukasey's three-part procedure for identifying a crime involving moral turpitude.<sup>12</sup> However, the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Eighth Circuit have embraced Mukasey's procedure.<sup>13</sup> Consequently, "[a]n alien who resides in one circuit might be [admissible] even though he committed the same crime as an alien who lives in a different circuit and is [inadmissible]."<sup>14</sup> In light of Holder's mandate on the BIA to determine the procedure for identifying a crime involving moral turpitude, until the BIA articulates a uniform procedure and federal circuit courts adopt that procedure, federal circuit courts will continue utilizing different procedures for identifying a crime involving moral turpitude,<sup>15</sup> creating uncertainty for aliens<sup>16</sup> facing the grave danger of inadmissibility or deportation.<sup>17</sup>

Since neglecting Mukasey's procedure for identifying a crime involving moral turpitude undermines the goal of uniformity in immigration law and results in ineffective federal circuit court procedures that permit aliens to escape deportation despite committing crimes involving moral turpitude, the BIA should adopt

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8. Eric H. Holder, Jr. was the Attorney General of the United States between 2009 and 2015. *Attorneys General of the United States*, *supra* note 5. The current Attorney General of the United States is Loretta E. Lynch. *Id.*

9. Silva-Trevino, 26 I. & N. Dec. 550, 553 (Op. Att'y Gen. 2015).

10. See *infra* Section I.C.

11. See *infra* Section II.C.

12. See, e.g., Silva-Trevino v. Holder, 742 F.3d 197, 205 (5th Cir. 2014); Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012); Fajardo v. Att'y Gen., 659 F.3d 1303, 1306-07 (11th Cir. 2011); Jean-Louis v. Att'y Gen., 582 F.3d 462, 464 (3d Cir. 2009).

13. See, e.g., Sanchez v. Holder, 757 F.3d 712, 718 (7th Cir. 2014); Bobadilla v. Holder, 679 F.3d 1052, 1058-59 (8th Cir. 2012).

14. Silva-Trevino, 24 I. & N. Dec. 687, 695 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550.

15. See *infra* Section II.C.

16. An alien is any person who is "not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012).

17. Silva-Trevino, 24 I. & N. Dec. at 695.

Mukasey's procedure.<sup>18</sup> Although the BIA's adoption of Mukasey's procedure would break with the precedent of many federal circuit courts, Holder delegated the task of determining the proper procedure for identifying a crime involving moral turpitude to the BIA.<sup>19</sup> In turn, Congress imposes a duty on the Attorney General, not the courts, to determine and rule on questions of immigration law under the Immigration and Nationality Act (INA).<sup>20</sup> The BIA's adoption of Mukasey's three-part procedure for identifying a crime involving moral turpitude would (1) be consistent with traditional agency deference; (2) demystify the procedure for identifying crimes involving moral turpitude through the creation of a universal approach; and (3) avoid manipulations within the criminal system with respect to conviction records.<sup>21</sup>

Part I of this Note discusses the background and development of moral turpitude in immigration law, focusing on the plenary power of the federal government in immigration law, the INA, and judicial deference to agency action.<sup>22</sup> Part II examines the varied procedures of federal circuit courts in identifying a crime involving moral turpitude before Mukasey's *Silva-Trevino* decision, Mukasey's *Silva-Trevino* decision, and the reactions of both federal circuit courts and Holder to Mukasey's *Silva-Trevino* decision.<sup>23</sup> Part III proposes the BIA's adoption of Mukasey's three-part procedure for identifying a crime involving moral turpitude and discusses why the BIA should adopt this approach.<sup>24</sup>

## I. EXPLORING THE ROOTS: MORAL TURPITUDE IN THE DEVELOPMENT OF IMMIGRATION LAW

For over a century after the Declaration of Independence, the federal government of the United States was largely uninvolved in

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18. See *infra* Part III.

19. *Silva-Trevino*, 26 I. & N. Dec. at 553. The Attorney General is authorized by the Code of Federal Regulations to delegate determinations to the BIA. 8 C.F.R. § 1003.1(d)(1) (2015) ("The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it.").

20. 8 U.S.C. § 1103(a)(1) (2012).

21. See *infra* Part III.

22. See *infra* Part I.

23. See *infra* Part II.

24. See *infra* Part III.

the regulation and enforcement of immigration law.<sup>25</sup> Rather, the task was left to the states.<sup>26</sup> Over time, the federal government began to enter and to influence the field of immigration law.<sup>27</sup> One of the federal government's early concerns was the admissibility of aliens convicted of a crime involving moral turpitude.<sup>28</sup> This concern, shaped by the evolving (1) plenary power of the federal government; (2) INA; and (3) judicial deference to agency action, continues today.<sup>29</sup>

#### A. The Plenary Power of Congress

The power of Congress to regulate and to enforce inadmissibility based on a conviction of a crime involving moral turpitude is a subset of the federal government's plenary power in immigration law.<sup>30</sup> The power to regulate immigration law is not enumerated in the Constitution of the United States; rather, it is a power inherent in sovereignty.<sup>31</sup> Unlike an enumerated power, which provides the judiciary with guidance on whether the alleged governmental conduct falls within that enumerated power,<sup>32</sup> a power inherent in sovereignty provides no judicial guidance on whether the alleged governmental conduct falls within the power inherent in sovereignty.<sup>33</sup> The result is that the federal government has a plenary

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25. Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 335-36 (2011).

26. *Id.* at 335.

27. *Id.*

28. See Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1045-46 (2012).

29. See Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 340-47 (2011) (exploring the different approaches for identifying a crime involving moral turpitude).

30. See Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1572 (2008).

31. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (“The right . . . [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare . . .”).

32. See *United States v. Lopez*, 514 U.S. 549, 553 (1995) (acknowledging that “limitations on the commerce power are inherent in the very language of the Commerce Clause”).

33. See Stumpf, *supra* note 30, at 1572 (recognizing that in immigration law, courts “defer almost completely to the decisions of the federal legislature and the executive branch”).

power in immigration law.<sup>34</sup> The plenary power of the federal government in immigration law extends to both the exclusion and removal of aliens from the United States.<sup>35</sup> Despite the great leeway the plenary power affords the federal government in immigration matters, including matters concerning the procedure for identifying a crime involving moral turpitude, the Supreme Court largely left this power unbound.<sup>36</sup>

The Supreme Court established few limits on the plenary power of the federal government in immigration law.<sup>37</sup> One limit is that the federal government may not exercise its plenary power when it exceeds the civil nature of immigration law by imposing criminal punishment for immigration-law violations.<sup>38</sup> Nevertheless, the Supreme Court does not consider deportation a criminal punishment.<sup>39</sup> A second limit is that if an alien is “admitted”<sup>40</sup> to the United States, then the government’s actions are subject to due-process<sup>41</sup> limitations.<sup>42</sup> Despite this due-process requirement, the Supreme Court has not defined the amount of due process required in

34. *Id.* (defining plenary power as “profound discretion unrestrained by constitutional limitations”).

35. *Fong Yue Ting*, 149 U.S. at 711 (“The right to exclude or to expel all aliens . . . [is] an inherent and inalienable right . . . .”); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution . . . cannot be granted away or restrained on behalf of anyone.”).

36. *See Stumpf*, *supra* note 30, at 1579-80.

37. *Id.* at 1580.

38. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1097-98 (1994) (“[A]lthough the immigration power is extraordinarily broad, it must nevertheless be exercised within its own domain. That domain governs matters of admission, exclusion, and deportation; beyond it, the alien inhabits the domain of a territorially present persons where different and more protective rules against government power apply.”).

39. *See Wong Wing*, 163 U.S. at 237 (“No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land . . . .”).

40. The INA defines “admission” and “admitted” as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A) (2012).

41. The Fifth Amendment of the United States Constitution declares that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

42. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903).



immigration proceedings.<sup>43</sup> Rather, the Court established that the amount of due process required depends on the circumstances of each case.<sup>44</sup> Furthermore, the Court has traditionally deferred to the federal government in determining the amount of due process that an alien is afforded.<sup>45</sup> These few limits on the plenary power of the federal government in immigration law leave the federal government with great discretion, little guidance, and limited judicial review in articulating the procedure for identifying a crime involving moral turpitude during removal proceedings.<sup>46</sup>

The federal government possesses a largely unrestricted plenary power in immigration matters, which encompasses the articulation of the procedure for identifying a crime involving moral turpitude.<sup>47</sup> The federal government delegated a great portion of this largely unrestricted plenary power in articulating the procedure for identifying a crime involving moral turpitude during removal proceedings to regulatory agencies.<sup>48</sup> The scope of the delegation is embodied in the INA.<sup>49</sup>

## B. The Immigration and Nationality Act

Through the INA, Congress delegated its plenary power<sup>50</sup> in articulating the procedure for identifying a crime involving moral

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43. *Id.* at 101 (asserting that due process does not necessarily require “an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case”).

44. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (holding that in determining the amount of due process required, the Court must balance (1) the interest of the individual; (2) the interest of the government; and (3) “the risk of an erroneous deprivation of [the individual’s] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”).

45. *See Yamataya*, 189 U.S. at 100. For example, in *Yamataya*, the Court stated:

It is true that [the alien] pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a “pretended” one; and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts.

*Id.* at 101-02.

46. *See Stumpf*, *supra* note 30, at 1580.

47. *Id.*

48. 8 U.S.C. § 1103 (2012).

49. *See infra* Section I.B.

50. *See* 8 U.S.C. § 1103(a)(1) (2012). The statute reads:

turpitude<sup>51</sup> during removal proceedings to regulatory agencies.<sup>52</sup> In terms of delegated authority, the INA charges the Secretary of Homeland Security with its administration and enforcement.<sup>53</sup> Additionally, the INA charges the Attorney General with making determinations and rulings on all questions of immigration law that “shall be controlling.”<sup>54</sup> Although Congress left little guidance on what procedure to utilize for identifying a crime involving moral turpitude, the history of the INA indicates congressional intent.<sup>55</sup>

The history of the INA demonstrates that Congress likely intended a fact-based procedure for identifying a crime involving

(a) Secretary of Homeland Security

(1) The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter *and all other laws relating to the immigration and naturalization of aliens*, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however, that determination and ruling by the Attorney General with respect to all questions of law shall be controlling.*

*Id.* (emphasis added). The statute further provides:

(g) Attorney General

(1) In general

The Attorney General shall have such authorities and functions *under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review*, or by the Attorney General with respect to the Executive Office for Immigration Review, on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.

*Id.* § 1103(g)(1) (emphasis added).

51. *Id.* § 1182(a)(2)(A)(i). The statute reads:

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of . . . any law or regulation of a State . . . is inadmissible.

*Id.*

52. *Id.* § 1103.

53. *Id.* § 1103(a)(1).

54. *Id.*

55. See Simon-Kerr, *supra* note 28, at 1058.

moral turpitude.<sup>56</sup> The first immigration law concerning moral turpitude, passed in 1891, rendered excludable “persons who have been convicted of a felony or other infamous crime[s] or misdemeanor[s] involving moral turpitude.”<sup>57</sup> In 1917, Congress expanded the moral turpitude standard to deportability proceedings.<sup>58</sup> The intent of Congress, in terms of the procedure for identifying a crime involving moral turpitude, becomes clearer after an examination of the legislative history of the 1917 Immigration Act.<sup>59</sup> During the debate on moral turpitude deportations, Representative Sabath of Illinois explained that his goal was to protect the alien who commits a crime labeled as a crime involving moral turpitude without knowing, prior to carrying out the crime, that the crime was a crime involving moral turpitude.<sup>60</sup> Furthermore, Congressman Mann asserted that the issue of deportation for petty crimes involving moral turpitude was resolved by a provision in the 1917 Immigration Act that forbade deportation if the sentencing judge did not agree with the deportation.<sup>61</sup> Although that provision was repealed in 1990, the goal of repealing the provision was to increase the power of the federal government in deciding immigration consequences of criminal behavior.<sup>62</sup> Repealing the provision did not prohibit a fact-based inquiry for identifying crimes involving moral turpitude.<sup>63</sup> Despite hints of a fact-based procedure for identifying a crime involving moral turpitude, Congress never codified this procedure in the 1917 Immigration Act.<sup>64</sup> Furthermore, Congress never codified the fact-based procedure, nor denied the fact-based procedure, in subsequent amendments to immigration law.<sup>65</sup>

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56. *Id.*

57. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

58. Simon-Kerr, *supra* note 28, at 1047.

59. *See id.* at 1048.

60. 53 CONG. REC. 5167 (1916) (statement of Rep. Adolph Sabath).

61. 53 CONG. REC. 5169 (1916) (statement of Rep. James Mann).

62. Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 675-76 (2008) (asserting that in repealing the Judicial Recommendation Against Deportation (JRAD), “Congress wanted the power of deciding the immigration consequences of criminal behavior to rest exclusively with the federal authorities”).

63. *See id.*

64. *See* Immigration Act of 1917, ch. 29, 39 Stat. 874; *see also* Simon-Kerr, *supra* note 28, at 1058.

65. *See* Silva-Trevino, 24 I. & N. Dec. 687, 693 (Op. Att’y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att’y Gen. 2015) (“[The INA is] silent on the precise method that immigration judges and courts should use to determine if a prior conviction is for a crime involving moral turpitude.”).

The current version of the INA leaves many questions about the procedure for identifying a crime involving moral turpitude.<sup>66</sup> Much like the 1917 Immigration Act, the current version of the INA does not explicitly identify the procedure for identifying a crime involving moral turpitude.<sup>67</sup> Furthermore, the INA, like previous immigration legislation, does not define the term “moral turpitude.”<sup>68</sup> Nevertheless, the statute does define “conviction,”<sup>69</sup> which is a word used in the moral-turpitude-inadmissibility provision.<sup>70</sup> Ultimately, Congress leaves little guidance in the INA for articulating the procedure for identifying a crime involving moral turpitude.<sup>71</sup>

The legislative history of the INA and the current version of the INA do not explicitly articulate the procedure for identifying a crime involving moral turpitude.<sup>72</sup> Furthermore, given the legislative history of previous versions of the INA and the definitions within the current version of the INA, the implicit intent of Congress is not clear.<sup>73</sup> Without classifying the procedure for identifying a crime involving moral turpitude, Congress delegated the task of enforcing inadmissibility for a crime involving moral turpitude to regulatory agencies; these regulatory agencies are subject to limited judicial review.<sup>74</sup>

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66. *Id.*

67. *Id.*

68. Simon-Kerr, *supra* note 28, at 1046 (“As Congress continued to reenact the moral turpitude bar in immigration statutes over the course of the twentieth century, it continued to leave the term undefined, delegating the responsibility for fathoming moral turpitude’s meaning to immigration officials and the federal courts.”). Since a crime involving moral turpitude (1) is defined by immigration officials and federal courts; and (2) refers to moral standards, “its definition necessarily changes over time and from place to place.” Harms, *supra* note 4, at 265.

69. 8 U.S.C. § 1101(48)(A) (2012). The statute reads:

(48)(A) The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

*Id.*

70. *Id.* § 1182(a)(2)(A)(i).

71. See Silva-Trevino, 24 I. & N. Dec. 687, 693 (Op. Att’y Gen. 2008).

72. *Id.*

73. See Simon-Kerr, *supra* note 28, at 1044-69 (discussing the evolution of moral turpitude in immigration law).

74. See *infra* Section I.C.

## C. Court Review of Agency Interpretations

Since the Attorney General is responsible for making determinations on questions of immigration law under the INA,<sup>75</sup> a responsibility that the Attorney General may delegate to the BIA,<sup>76</sup> the judicial branch plays a limited role in reviewing the Attorney General's and the BIA's conclusions on questions of immigration law.<sup>77</sup> If the INA is ambiguous with respect to a particular immigration-law issue, then the role of the judiciary is limited to determining whether the Attorney General's or the BIA's interpretation of the INA is reasonable.<sup>78</sup> In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court established a two-part test for making this reasonable-interpretation determination.<sup>79</sup> First, a court must determine whether Congress has directly spoken on the precise issue.<sup>80</sup> If Congress has directly spoken on the precise issue, then the court must defer to the intent of Congress.<sup>81</sup> If Congress has not directly spoken on the precise issue, or if it is ambiguous whether Congress has directly spoken on the precise issue, then the court must continue the analysis onto the second step.<sup>82</sup> In the second step, the court must determine whether the agency's interpretation is based on a permissible construction of the statute.<sup>83</sup> A permissible construction is present when the interpretation is reasonable and not "arbitrary and capricious."<sup>84</sup>

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75. § 1103(a)(1).

76. 8 C.F.R. § 1003.1(d)(1) (2015).

77. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (stipulating that judicial review is limited "[w]hen a court reviews an agency's construction of the statute which it administers"); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))).

78. See *Chevron*, 467 U.S. at 843. The agency's construction of a statute need not be the best construction. *Id.* at 844-45.

79. *Id.* at 842-43.

80. *Id.* at 842.

81. *Id.* at 842-43 ("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.")

82. *Id.* at 843.

83. *Id.*

84. *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (accepting that "arbitrary and capricious" means that the rule "is rational, based on consideration of the relevant factors, and within the scope of

Furthermore, if the statute is ambiguous on a particular issue and the agency has not spoken to the issue, then federal circuit courts may impose their own interpretations of that issue.<sup>85</sup> However, once the agency renders an interpretation of the issue, federal circuit courts must rescind their interpretation and accept the agency's reasonable construction of the statute.<sup>86</sup>

In determining ambiguity within a statute, courts typically use a variety of traditional canons of construction.<sup>87</sup> Traditional canons of construction generally fall into one of two categories:<sup>88</sup> textual canons<sup>89</sup> and substantive canons.<sup>90</sup> Examples of textual canons

the authority delegated to the agency by the statute"). A rule is "arbitrary and capricious if the agency" (1) "has relied on factors which Congress has not intended it to consider"; (2) "entirely failed to consider an important aspect of the problem"; (3) "offered an explanation for its decision that runs counter to the evidence before the agency"; or (4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43.

85. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005).

86. *Id.* at 983-84. The Court rejected the argument that an agency's interpretation of a statute is invalid if it is inconsistent with the agency's past practice. *Id.* at 981. The Court stated:

Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice . . . . [I]f the agency adequately explains the reasons for a reversal of policy, "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."

*Id.* (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

87. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005) ("The phrase 'canons of construction' is understood to encompass a set of background norms and conventions that are used by courts when interpreting statutes.").

88. *Id.* at 12.

89. *Id.*

[Textual] canons consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes. These canons do not purport to convey a judge's own policy preferences, but rather to give effect to "ordinary" or "common" meaning of the language enacted by the legislature, which in turn is understood to promote the actual or constructive intent of the legislature that enacted such language.

*Id.*

90. *Id.* at 13. Substantive canons "are not predicated on . . . what a rational Congress presumptively must have meant . . . . Rather, substantive canons reflect judicially-based concerns, grounded in the courts' understanding of how to treat

include *noscitur a sociis*, which dictates that “words grouped in a list should be given related meaning,”<sup>91</sup> and *inclusio unius est exclusio alterius*, which specifies that “to include one item is to exclude other similar items.”<sup>92</sup> In terms of substantive canons, the constitutional avoidance doctrine prompts the court to refrain from interpreting a statute in a way that would render the statute unconstitutional.<sup>93</sup> Next, congressional silence is usually presumed to be a weak indicator of congressional intent.<sup>94</sup> Traditional canons of construction<sup>95</sup> aid in resolving ambiguity in statutes.<sup>96</sup> In turn, the resolution of ambiguity in statutes influences whether an agency’s statutory interpretation, such as the Attorney General’s or the BIA’s interpretation of the procedure for identifying a crime involving moral turpitude, will be upheld under the limited judicial review.<sup>97</sup>

The federal government has a plenary power in immigration law, which includes the plenary power to identify the procedure for identifying a crime involving moral turpitude.<sup>98</sup> The plenary power to identify this procedure was delegated to the Attorney General under the INA.<sup>99</sup> In turn, the Attorney General delegated the plenary power

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statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutory based policies.” *Id.*

91. *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989)).

92. *Holland v. Florida*, 560 U.S. 631, 648 (2010).

93. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

94. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 98-99 (1988). Due to the structure of Congress, inaction on a particular issue of law is far more likely than action on that particular issue of law. *Id.* at 98. The agenda of Congress is limited, and “to gain a place on that agenda, a measure must not only have substantial support, but be considered urgent by key people.” *Id.* at 99. Furthermore, even if an issue gains a place on the legislative agenda, “it is usually doomed if there is substantial opposition, whether or not most legislators favor it, because of the variety of procedural roadblocks opponents may erect.” *Id.*

95. The discussion of traditional canons of construction in this Note does not encompass all traditional canons of construction; there are additional traditional canons of construction that are likely irrelevant to the context of this Note. See, e.g., David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 41 (1999) (discussing federal Indian-law canons of construction); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) (discussing the rule of lenity).

96. See Brudney & Ditslear, *supra* note 87, at 7.

97. See *id.* at 112 (“[T]he canons are . . . one of many interpretive tools available to judges . . .”).

98. See *supra* Section I.A.

99. See *supra* Section I.B.

to determine this procedure to the BIA.<sup>100</sup> The Attorney General and the BIA are subject to limited judicial review.<sup>101</sup> These three factors—the plenary power of the federal government, the INA, and judicial deference to agency action—greatly influence courts in determining the proper procedure for identifying a crime involving moral turpitude.<sup>102</sup> All three factors influenced (1) the varying procedures for identifying a crime involving moral turpitude before Mukasey’s *Silva-Trevino* decision; (2) Mukasey’s *Silva-Trevino* decision; and (3) the varying procedures for identifying a crime involving moral turpitude after Mukasey’s *Silva-Trevino* decision.<sup>103</sup>

## II. MUKASEY’S *SILVA-TREVINO* DECISION: BEFORE, DURING, AND AFTER

Prior to Mukasey’s *Silva-Trevino* decision, federal circuit courts relied on circuit precedent to select the procedure for identifying a crime involving moral turpitude.<sup>104</sup> In Mukasey’s *Silva-Trevino* decision, Mukasey created a three-part procedure for identifying a crime involving moral turpitude.<sup>105</sup> Although this procedure was intended to resolve the inconsistencies among federal circuit courts in identifying a crime involving moral turpitude, the result was quite the opposite.<sup>106</sup> Some federal circuit courts completely rejected Mukasey’s procedure, some federal circuit courts completely accepted Mukasey’s procedure, and some federal circuit courts adopted parts of Mukasey’s procedure.<sup>107</sup> The continued disparity between federal circuit courts ultimately influenced Holder’s vacatur of Mukasey’s *Silva-Trevino* decision.<sup>108</sup>

### A. The Varying Standards Before Mukasey’s *Silva-Trevino* Decision

Before Mukasey’s *Silva-Trevino* decision, federal circuit courts used a variety of procedures for identifying a crime involving moral

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100. See *Silva-Trevino*, 26 I. & N. Dec. 550, 553 (Op. Att’y Gen. 2015).

101. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

102. See *infra* Part II.

103. See *infra* Part II.

104. See *infra* Section II.A.

105. *Silva-Trevino*, 24 I. & N. Dec. 687, 704 (Op. Att’y Gen. 2008), *vacated*, 26 I. & N. Dec. 550.

106. See *infra* Section II.C.

107. See *infra* Section II.C.

108. *Silva-Trevino*, 26 I. & N. Dec. at 553.



turpitude.<sup>109</sup> Prior to that decision, neither the Attorney General nor the BIA issued a uniform procedure for identifying a crime involving moral turpitude, leaving the federal circuit courts with great discretion on the issue.<sup>110</sup> The three categories of procedures used by federal circuit courts in identifying a crime involving moral turpitude before Mukasey's *Silva-Trevino* decision were the (1) categorical approach; (2) modified-categorical approach; and (3) fact-based approach.<sup>111</sup>

### 1. *The Categorical Approach*

The most widely applied procedure for identifying a crime involving moral turpitude prior to Mukasey's *Silva-Trevino* decision was the categorical approach.<sup>112</sup> The categorical approach prompts adjudicators to exclude underlying circumstances giving rise to a criminal conviction and to determine whether the crime, as defined by statute, "necessarily" involves moral turpitude.<sup>113</sup> That is, if all convictions under the criminal statute are crimes involving moral turpitude, then the alien's conviction under the criminal statute is also a crime involving moral turpitude.<sup>114</sup> In applying the categorical approach in the immigration-law context, courts rely on *Taylor v. United States*<sup>115</sup> and *Shepard v. United States*.<sup>116</sup> In both cases, the Supreme Court rejected an inquiry into extrinsic evidence in the context of recidivist enhancements in criminal proceedings.<sup>117</sup> Even

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109. See *infra* Subsections II.A.1-3.

110. See *Silva-Trevino*, 24 I. & N. Dec. at 688.

111. See *infra* Subsections II.A.1-3.

112. See *Silva-Trevino*, 24 I. & N. Dec. at 693-94. The categorical approach, in the immigration context, was established in *United States v. Uhl*, 203 F. 152, 154 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914). In *Uhl*, the Court examined the question of whether a conviction for criminal libel constituted a crime involving moral turpitude for inadmissibility. *Id.* at 153. In determining that criminal libel was not a crime involving moral turpitude, the judge declared "the offense of criminal libel does not in its inherent nature involve moral turpitude and that in classifying it under the immigration laws, it must be designed as one which does not possess that element." *Id.* at 155.

113. Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 993-94 (2008).

114. *Id.*

115. *Taylor v. United States*, 495 U.S. 575 (1990).

116. *Shepard v. United States*, 544 U.S. 13 (2005).

117. *Shepard*, 544 U.S. at 25-26; *Taylor*, 495 U.S. at 602.

though most federal circuit courts agreed on using the categorical approach, they used different tests within the categorical approach.<sup>118</sup>

Federal circuit courts utilizing the categorical approach used one of three tests in determining whether an alien's crime under the statute "necessarily" involved moral turpitude: the "least culpable conduct test," the "realistic probability test," or the "common case test."<sup>119</sup> The "least culpable conduct test," adopted by the Second Circuit,<sup>120</sup> Third Circuit,<sup>121</sup> and Fifth Circuit,<sup>122</sup> examined whether the minimum conduct necessary to sustain a conviction under the statute involved moral turpitude.<sup>123</sup> The "realistic probability test,"<sup>124</sup> used by the Ninth Circuit,<sup>125</sup> focused on whether there was a "realistic probability" that the criminal statute applied to conduct that does not involve moral turpitude.<sup>126</sup> Lastly, the "common case test," utilized by the First Circuit,<sup>127</sup> inquired whether the crime would be one of

118. Sharpless, *supra* note 113, at 995-96 ("The BIA and federal courts have applied *some* form of a categorical approach . . ." (emphasis added)).

119. See Dadhania, *supra* note 29, at 326 & n.66.

120. Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001) (asserting that, in applying the categorical approach, "any conduct falling within the purview of the statute must by its nature entail moral turpitude").

121. Knapik v. Ashcroft, 384 F.3d 84, 92 (3d Cir. 2004) (holding that under the categorical approach, "the elements of the underlying offense must necessarily establish that *all* convictions involve moral turpitude").

122. Amouzadeh v. Winfrey, 467 F.3d 451, 455 (5th Cir. 2006) (reasoning that a crime involving moral turpitude is found when "the minimum reading of the statute necessarily reaches only offenses involving moral turpitude").

123. See, e.g., *id.* at 455; Knapik, 384 F.3d at 92; Dalton, 257 F.3d at 204.

124. The Supreme Court established the "realistic probability test" in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In *Gonzales*, the federal government claimed that the alien was deportable because the alien was convicted of a theft for which the term of imprisonment is at least one year under 8 U.S.C. § 1101(a)(43)(G) (2006). *Id.* at 183. The Court, applying the categorical approach, asserted that in order to demonstrate that "a state statute creates a crime outside the generic definition of a listed crime in a federal statute," one must demonstrate "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* at 193.

125. Nicanor-Romero v. Mukasey, 523 F.3d 992, 1007 (9th Cir. 2008) ("[W]e conclude that there is a 'realistic probability, not a theoretical possibility,' that [the] misdemeanor conviction . . . does not rise to the level of a 'crime involving moral turpitude.'"). Despite the overturn of *Nicanor-Romero*, the case demonstrates an approach, prior to Mukasey's *Silva-Trevino* decision, of the federal circuit courts in applying the categorical approach. See *id.*

126. *Id.*

127. Pino v. Nicolls, 215 F.2d 237, 245 (1st Cir. 1954) ("If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude, neither the administrative officials . . . nor the courts on review of administrative action are under the oppressive burden of taking and

moral turpitude in common usage.<sup>128</sup> Thus, although most federal circuits agreed on using the categorical approach, the tests utilized within the categorical approach varied.<sup>129</sup> In contrast to the categorical approach, federal circuit courts were less cohesive in utilizing the modified-categorical approach.<sup>130</sup>

## 2. *The Modified-Categorical Approach*

Prior to Mukasey's *Silva-Trevino* decision, federal circuit courts disagreed on when, if ever, to utilize the modified-categorical approach.<sup>131</sup> Under the modified-categorical approach, the adjudicator examines the alien's record of conviction to determine whether the alien's specific conviction was for a crime involving moral turpitude.<sup>132</sup> Even if federal circuit courts agreed on using the modified-categorical approach, those federal circuit courts were split on (1) the circumstances giving rise to the application of the modified-categorical approach; and (2) what evidence could be examined within the "record of conviction."<sup>133</sup>

Federal circuit courts adopting the modified-categorical approach disagreed on when to apply the modified-categorical approach.<sup>134</sup> Some federal circuit courts utilized the modified-

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considering evidence of the circumstances."), *rev'd on other grounds*, *Pino v. Landon*, 349 U.S. 901 (1955).

128. *Id.* There is a possibility that the Eighth Circuit implicitly utilized the "common usage test." See Dadhania, *supra* note 29, at 318. In *Marciano v. Immigration & Naturalization Service*, the dissenting judge states that the majority implicitly adopts the "common usage" test of *Pino*. *Marciano v. Immigration & Naturalization Serv.*, 450 F.2d 1022, 1027-28 (8th Cir. 1971) (Eisele, J., dissenting).

129. See Sharpless, *supra* note 113, at 995-96.

130. See *infra* Subsection II.A.2.

131. See Sharpless, *supra* note 113, at 996-1000. Although the Second Circuit agreed with the Fifth Circuit in using the categorical approach, it rejected the Fifth Circuit's use of the modified-categorical approach. Compare *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) ("[I]f a statute encompasses both acts that do and do not involve moral turpitude, the BIA cannot sustain a deportability finding . . . ." (quoting *Michel v. Immigration & Naturalization Serv.*, 206 F.3d 253, 263 (2d Cir. 2000))), with *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (acknowledging that "[i]f a statute is divisible, [the adjudicator looks] at the alien's record of conviction to determine whether he has been convicted of a subsection that qualifies as a [crime involving moral turpitude]" (quoting *Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003))).

132. Sharpless, *supra* note 113, at 996.

133. *Id.* at 996-1000.

134. *Id.* at 996.

categorical approach only when the statute was “divisible.”<sup>135</sup> That is, if only some offenses under the statute were crimes involving moral turpitude, then the adjudicator would look to the record of conviction to determine if the alien was convicted for an offense that was a crime involving moral turpitude.<sup>136</sup> Other federal circuit courts utilized the modified-categorical approach regardless of whether the statute was “divisible” in order to ascertain the nature of the conviction.<sup>137</sup> In essence, there was no uniformity among the federal circuits with respect to the utilization of the modified-categorical approach.<sup>138</sup>

Federal circuit courts also disagreed on the standard regarding the set of documents that could be considered in the modified-categorical approach.<sup>139</sup> For example, the Second Circuit’s standard considered, among other things, “the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript.”<sup>140</sup> In contrast, the Third Circuit’s standard examined “the record of conviction, which includes the indictment, verdict, and sentence.”<sup>141</sup> Next, the Ninth Circuit was the only federal circuit court to explicitly state that “charging papers alone are never sufficient.”<sup>142</sup> Just as federal circuit courts disagreed on (1) whether to use the modified-categorical approach; and (2) the standard for the modified-categorical approach, they also disagreed on (1) whether to use the fact-based approach; and (2) the standard for the fact-based approach.<sup>143</sup>

### 3. *The Fact-Based Approach*

A minority of federal circuits approved of using facts beyond the conviction record in determining whether the alien committed a

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135. *Id.*

136. *Id.* at 997.

137. *Id.* at 999 (“[F]ederal courts appear to sanction recourse to the record of conviction even when a statute is nondivisible.”).

138. *See id.* at 996-1000.

139. *Id.* at 996.

140. *Wala v. Mukasey*, 511 F.3d 102, 108 (2d Cir. 2007) (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003)).

141. *Daibo v. Att’y Gen.*, 265 F. App’x 56, 59 (3d Cir. 2008).

142. *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1152 (9th Cir. 2003) (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002)).

143. *See infra* Subsection II.A.3.

crime involving moral turpitude.<sup>144</sup> For example, the Third Circuit, unable to conclude that a crime was a crime involving moral turpitude due to a discrepancy between an indictment and a plea colloquy, vacated a final order of removal and granted a petition for review.<sup>145</sup> Furthermore, the Seventh Circuit explicitly permitted the use of evidence beyond both the charging records and the record of conviction.<sup>146</sup> Thus, the precedent of the Third Circuit and the Seventh Circuit demonstrates that some federal circuit courts went beyond the modified-categorical approach by using facts outside of the conviction record.<sup>147</sup>

The categorical approach, the modified-categorical approach, and the fact-based approach composed the various procedures for identifying a crime involving moral turpitude prior to Mukasey's *Silva-Trevino* decision.<sup>148</sup> The varying procedures of federal circuit courts in identifying a crime involving moral turpitude prompted Mukasey to create a uniform approach.<sup>149</sup> This uniform approach is articulated in Mukasey's *Silva-Trevino* decision.<sup>150</sup>

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144. See, e.g., *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008); *Valansi v. Ashcroft*, 278 F.3d 203, 214, 217-18 (3d Cir. 2002).

145. *Valansi*, 278 F.3d at 217-18. In granting a petition for review, the Third Circuit implicitly granted an opportunity to investigate facts beyond the conviction record. See *id.*

146. *Ali*, 521 F.3d at 743. The court reasoned:

Instead of starting with the procedures used in criminal prosecutions, we think it best to recognize that there are at least two distinct questions in immigration proceedings. The first is the fact of the prior conviction, which usually is the only thing that needs to be established for recidivist sentencing in a criminal prosecution. The second is the appropriate classification of that conviction, which may require additional information. . . . [S]ince the charging papers . . . are not framed with such classifications in mind (for "moral turpitude" just isn't relevant to the criminal prosecution; it is not as if "turpitude" were an element of an offense).

*Id.* at 741-42.

147. See *id.*; *Valansi*, 278 F.3d at 217-18.

148. See Sharpless, *supra* note 113, at 979-1035 (describing the various approaches of the federal circuit courts in terms of the procedure for identifying a crime involving moral turpitude).

149. *Silva-Trevino*, 24 I. & N. Dec. 687, 694-95 (Op. Att'y Gen. 2008), vacated, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

150. *Id.* at 699.

## B. An Attempt at Justice and Unity: Mukasey's *Silva-Trevino* Decision

Noticing the varying procedures of federal circuit courts for identifying a crime involving moral turpitude, Mukasey created a uniform procedure for identifying a crime involving moral turpitude.<sup>151</sup> To formulate the uniform procedure as binding precedent, Mukasey certified the *Silva-Trevino* decision for review pursuant to 8 C.F.R. § 1003.1.<sup>152</sup> Furthermore, he cited 8 U.S.C. § 1103(a)(1) as statutory authority for establishing the procedure.<sup>153</sup>

Mukasey's three-part procedure for identifying a crime involving moral turpitude blended the pre-existing procedures of federal circuit courts in identifying these crimes and permitted the use of extrinsic evidence during the adjudication process.<sup>154</sup> The first part of Mukasey's procedure involves a categorical approach using the "realistic probability" standard.<sup>155</sup> Under this standard, an alien commits a crime involving moral turpitude if the crimes that are realistically prosecuted under the statute of conviction are always crimes involving moral turpitude.<sup>156</sup> The second part utilizes a modified-categorical approach, which limits the immigration judge's examination of the conviction record to "documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript."<sup>157</sup> The last part specifies that if the record of conviction is inconclusive, then "judges may, to the

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151. *Id.* at 694-95 (highlighting that due to the varying approaches of the federal circuit courts in adjudicating alleged crimes involving moral turpitude, "[a]n alien who resides in one circuit might be eligible for adjustment of status even though he committed the same crime as an alien who lives in a different circuit and is ineligible for such relief").

152. *Silva-Trevino v. Holder*, 742 F.3d 197, 198 (5th Cir. 2014) (citing 8 C.F.R. § 1003.1 (2014)).

153. *Silva-Trevino*, 24 I. & N. Dec. at 688-89 (asserting that the INA gives the Attorney General the authority to craft an approach for identifying a crime involving moral turpitude (citing 8 U.S.C. § 1103(a)(1) (2006))).

154. *See id.* at 704.

155. *Id.* at 689-90, 704.

156. *Id.* at 689-90.

[I]n evaluating whether an alien's prior offense is one that categorically involves moral turpitude, immigration judges must determine whether there is a "realistic probability, not a theoretical possibility," that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude.

*Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

157. *Id.* at 690.

extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction.”<sup>158</sup> Nevertheless, the consideration of evidence beyond the formal record of conviction is constrained by the factual findings and determinations of earlier proceedings.<sup>159</sup> Thus, although Mukasey’s procedure permitted a more factual analysis for identifying a crime involving moral turpitude, it did not necessarily involve elements that were completely foreign to federal circuit courts.<sup>160</sup>

Mukasey provided extensive reasoning for his three-part procedure for identifying a crime involving moral turpitude.<sup>161</sup> First, recognizing the paramount consequences of deportation<sup>162</sup> and the lack of uniformity among federal circuit courts in identifying crimes involving moral turpitude,<sup>163</sup> Mukasey asserted a need for a uniform

158. *Id.*

159. *Id.* (“The goal of this inquiry is to discern the nature of the underlying conviction where a mere examination of the statute itself does not yield the necessary information; it is not an occasion to relitigate facts or determinations made in the earlier criminal proceeding.”).

160. *See, e.g.,* *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008) (permitting the use of evidence beyond the record of conviction).

161. *See Silva-Trevino*, 24 I. & N. Dec. at 694-95.

162. *Id.* Deportation results in many severe consequences. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 513 (2007). Legomsky elaborates:

[Deportation consequences] include not only all the obvious traumas associated with forcible separation from family, friends, and community, loss of property, and loss of a livelihood, but also a bar on returning for at least ten years and sometimes forever; the loss of social security benefits for which the deportee has paid and on which he or she might depend; and the emotional and financial losses for U.S. citizens and other family members who are left behind.

*Id.* Furthermore, aliens are unlikely to effectively defend themselves from deportation because aliens are not entitled to legal representation in immigration proceedings, which forces the aliens to “proceed alone through a truncated and severe removal process with its tight deadlines, limited defenses, and countless traps for the unwary.” Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1141 (2002).

163. *Silva-Trevino*, 24 I. & N. Dec. at 693-94. First, Mukasey pointed to the different tests of the federal circuit courts within the categorical approach, which included the “least culpable conduct” test, the “realistic probability” test, and the “common usage” test. *Id.* Mukasey also drew attention to the variety of approaches utilized after the application of the categorical approach; some federal circuit courts applied a modified-categorical approach that limited inquiry into the record of conviction while other federal circuit courts permitted the use of all relevant evidence. *Id.* at 694.

procedure.<sup>164</sup> Next, Mukasey argued that many of the procedures of federal circuit courts were poorly designed to distinguish between an offense that is a crime involving moral turpitude and an offense that is not a crime involving moral turpitude.<sup>165</sup> That is, some procedures were likely an over-inclusive application of inadmissibility for a crime involving moral turpitude while other approaches were likely an under-inclusive application of inadmissibility for a crime involving moral turpitude.<sup>166</sup> Over-inclusive applications resulted in the deportation of aliens who did not commit crimes involving moral turpitude.<sup>167</sup> On the other hand, under-inclusive applications resulted in aliens avoiding deportation despite the fact that those aliens committed crimes involving moral turpitude.<sup>168</sup> Furthermore, Mukasey reasoned that restricting the moral turpitude analysis to either the statute or the record of conviction is not compelled by the INA.<sup>169</sup> Rather, Mukasey argued, the INA invites an analysis of extrinsic evidence because the moral-turpitude-inadmissibility provision explicitly states that “any alien convicted of, or who admits having committed, or who admits committing *acts* which constitute the essential elements of a crime involving moral turpitude” is

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164. *Id.* (“[B]ecause our immigration laws ‘often affect individuals in the most fundamental ways,’ those laws ‘to the greatest extent possible . . . should be applied in a uniform manner nationwide.’” (quoting Cerna, 20 I. & N. Dec. 399, 408 (B.I.A. 1991))). The Supreme Court endorses uniformity in the application of federal law. See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1580-81 n.34 (2008) (addressing the Supreme Court’s policy of resolving circuit splits and discussing Supreme Court decisions promoting uniformity in the application of federal law). Uniformity in immigration law is particularly important because it may “serve systematic and expressive interests by conveying a unified sense of how the United States will interact with the people of the world. . . . [It] also provides a foundation for the protection of immigrants’ rights by advancing a clear conception of how the country conceptualizes the value of immigration . . . .” Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J.F. 499, 501 (2014).

165. *Silva-Trevino*, 24 I. & N. Dec. at 695.

166. *Id.*

167. *Id.* As an example, Mukasey pointed to the “common case” test. *Id.* In the “common case” test, over-inclusion would result from the immigration judge applying the moral turpitude provisions to aliens whose crimes did not in fact involve moral turpitude. *Id.*

168. *Id.* As an example, Mukasey pointed to the “minimum conduct” test. *Id.* “Such an analysis would require a judge to refrain from applying those provisions with respect to criminal offenses that *do* involve moral turpitude if the judge simply hypothesizes some theoretical situation in which the statute *might* be applied to conduct that does not involve moral turpitude.” *Id.*

169. *Id.* at 699-700.



inadmissible.<sup>170</sup> Lastly, Mukasey asserted that the word “involving” in “a crime involving moral turpitude” demonstrates that “involving moral turpitude” modifies “crime.”<sup>171</sup> In addition to providing his underlying reasoning, Mukasey addressed potential counter-arguments in the opinion.<sup>172</sup>

Mukasey attacked the reasoning that the various federal circuit courts used to support their respective moral turpitude procedures.<sup>173</sup> First, Mukasey downplayed the application of *Taylor* and *Shepard*, Supreme Court cases rejecting an inquiry into extrinsic evidence in the context of recidivist enhancements in criminal proceedings, to immigration proceedings.<sup>174</sup> Mukasey reasoned that those cases revolved around the application of the Sixth Amendment to criminal proceedings.<sup>175</sup> Since immigration law is civil, not criminal, the Sixth Amendment does not apply.<sup>176</sup> Furthermore, Mukasey attacked the reasoning of the courts concerning an increased administrative burden arising from a factual inquiry by asserting, “how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself rather than the judiciary.”<sup>177</sup> Despite Mukasey’s efforts of qualifying his three-part procedure and addressing the possible counter-arguments to that procedure, federal

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170. *Id.* at 699 (quoting 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006)).

171. *Id.* at 693. If “involving moral turpitude” modifies “crime,” then this would invite a factual inquiry into each alleged crime involving moral turpitude to determine whether the crime did in fact consist of moral depravity. *See id.*

172. *Id.* at 700-02.

173. *Id.*

174. *Id.* at 702.

175. *Id.* at 701. In criminal proceedings, the defense council has a duty to inform the client of potential deportation consequences of pleading guilty to the alleged crime. *Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2009). Additionally, the prosecutor has an advantage in plea negotiations because “the criminal prosecutor is the one who has the discretion to determine the type and severity of the criminal charge that triggers the removal.” Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. REV. 1281, 1351 (2010) (elaborating on the significant advantage of the prosecution in criminal proceedings implicating removal).

176. *Silva-Trevino*, 24 I. & N. Dec. at 701. Mukasey also mentioned that limiting the inquiry in criminal convictions makes sense because an inquiry into the record will usually result in an answer; however, in the case of moral turpitude, the “charging papers that led to the prior conviction are not framed” for immigration purposes. *Id.* (quoting *Ali v. Mukasey*, 521 F.3d 737, 741-42 (7th Cir. 2008)).

177. *Id.* (quoting *Ali*, 521 F.3d at 741). Mukasey acknowledged that “administrative efficiency is undeniably important, [but] it is ‘secondary to the determination and enforcement of’ statutory language and ‘obvious legislative intent.’” *Id.* at 702 (quoting *Marciano v. Immigration & Naturalization Serv.*, 450 F.2d 1022, 1029 (8th Cir. 1971) (Eisele, J., dissenting)).

circuit courts were hesitant to accept the procedure, resulting in Holder's vacatur of Mukasey's *Silva-Trevino* decision.<sup>178</sup>

### C. The Varying Standards After Mukasey's *Silva-Trevino* Decision and Holder's Vacatur

The reactions of federal circuit courts to Mukasey's three-part procedure for identifying a crime involving moral turpitude were swift.<sup>179</sup> Contrary to the intentions of Mukasey in issuing *Silva-Trevino*, the decision resulted in even greater disparity between federal circuit courts in terms of the procedure for identifying a crime involving moral turpitude.<sup>180</sup> Some federal circuit courts completely resisted Mukasey's procedure, while others either partially or completely accepted the procedure.<sup>181</sup> This disparity among federal circuit courts prompted Holder to vacate Mukasey's *Silva-Trevino* decision.<sup>182</sup>

#### 1. Federal Circuit Courts Rejecting Mukasey's *Silva-Trevino* Decision

The Third Circuit, Fourth Circuit, Fifth Circuit, and Eleventh Circuit rejected Mukasey's three-part procedure for identifying a crime involving moral turpitude.<sup>183</sup> The reasoning for rejecting the

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178. See *infra* Section II.C.

179. See Dadhania, *supra* note 29, at 340-46.

180. See *infra* Subsections II.C.1-2.

181. See *infra* Subsections II.C.1-2.

182. See *infra* Subsection II.C.3.

183. The Third Circuit currently uses the "least culpable conduct" test for both the categorical approach and the modified-categorical approach. *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 466 (3d Cir. 2009) (specifying that when a statute of conviction contains elements "sufficient for conviction of the federal offense and others of which are not," the court "examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted"). The Fourth Circuit also applies the "least culpable conduct" test in the categorical approach and permits the use of a modified-categorical approach; however, the Fourth Circuit limits the examination of the record of conviction to "the charging document, the plea agreement, the plea colloquy, and any explicit findings of fact made by the trial judge." *Prudencio v. Holder*, 669 F.3d 472, 485 (4th Cir. 2012). The Fifth Circuit utilizes the "least culpable conduct" test and looks to the alien's record of conviction "in the case of divisible statutes." *Silva-Trevino v. Holder*, 742 F.3d 197, 200 (5th Cir. 2014). Lastly, the Eleventh Circuit is not explicit as to which categorical approach it utilizes; nevertheless, within the modified-categorical approach, it limits inquiry to "the charging document, plea, verdict, and sentence." *Fajardo v. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011).

procedure mainly encompassed textual arguments.<sup>184</sup> Additionally, some federal circuit courts discussed practical concerns with Mukasey's procedure.<sup>185</sup>

The textual concerns for rejecting Mukasey's three-part procedure focused on provisions within the INA.<sup>186</sup> The Third Circuit pointed to the fact that the INA defines "conviction" as a "formal judgment of guilt"<sup>187</sup> and, under 8 U.S.C. § 1229a(c)(3)(B),<sup>188</sup> "limits the inquiry to the record of conviction or comparable judicial record evidence."<sup>189</sup> While the Fifth Circuit also relied on the definition of "conviction" and 8 U.S.C. § 1229a(c)(3)(B), it analyzed the section further by claiming that in 8 U.S.C. § 1229a(c)(3)(B) there "is no mention of any additional evidence, and the introductory phrasing, 'any of the following documents or records,' gives no indication that extrinsic evidence is contemplated."<sup>190</sup> Further, to counter the assertion that the word "involving" in "a crime involving moral

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184. See, e.g., *Jean-Louis*, 582 F.3d at 480.

185. See, e.g., *Silva-Trevino*, 742 F.3d at 202.

186. See, e.g., *Jean-Louis*, 582 F.3d at 480.

187. For a complete definition of "conviction" under the INA, see *supra* note 69.

188. 8 U.S.C. § 1229a(c)(3)(B) reads:

(B) *Proof of convictions*

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

- (i) An official record of judgment and conviction.
- (ii) An official record of plea, verdict, and sentence.
- (iii) A docket entry from court records that indicates the existence of the conviction.
- (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
- (v) An abstract of a record of conviction prepared by the court in which the conviction was entered . . . that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
- (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
- (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

8 U.S.C. § 1229a(c)(3)(B) (2012).

189. *Jean-Louis*, 582 F.3d at 474, 480.

190. *Silva-Trevino*, 742 F.3d at 201 (quoting 8 U.S.C. § 1229a(c)(3)(B)).

“turpitude” dictates an inquiry into the facts, the Third Circuit and the Fourth Circuit cited to *Jordan v. De George*<sup>191</sup> for the proposition that “crime involving moral turpitude” is a term of art; that is, “involving moral turpitude” does not modify “crime.”<sup>192</sup> In addition, the Fourth Circuit believed that a plain reading of 8 U.S.C. § 1182(a)(2)(A)(i) demonstrated that the section is split into two parts; one part addresses moral turpitude admissions while the other part addresses moral turpitude convictions.<sup>193</sup> Utilizing this interpretation as a premise, the Fourth Circuit reasoned that Mukasey’s emphasis on “committing acts” appears only in the section addressing admissions.<sup>194</sup> Next, the Fifth Circuit identified that Congress allows extrinsic evidence in other sections of the INA, including 8 U.S.C. § 1227(a)(7)(B), where the INA explicitly states that the immigration judge “shall consider any credible evidence.”<sup>195</sup> Thus, the Fifth Circuit reasoned, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>196</sup> Federal circuit courts were also concerned about the practicality of Mukasey’s procedure.<sup>197</sup>

The practical concerns of federal circuit courts for rejecting Mukasey’s three-part procedure focused on the intent of Congress and the negative externalities resulting from the application of Mukasey’s procedure.<sup>198</sup> The Third Circuit mentioned that nothing in

191. *Jordan v. De George*, 341 U.S. 223, 227 (1951). While the Court in *De George* did use the phrase “crime involving moral turpitude,” it also used “involving moral turpitude” to modify “crime.” *Id.* at 230 (“[O]ne question of the case was whether the crime of counterfeiting involved moral turpitude.”).

192. *Prudencio v. Holder*, 669 F.3d 472, 481 (4th Cir. 2012) (“[T]he participle ‘involving’ cannot be divorced from the unitary phrase ‘crime involving moral turpitude,’ which is a term of art . . . .”); *Jean-Louis*, 582 F.3d at 477 (asserting that a crime involving moral turpitude “refers to a specific class of offenses, not to all conduct that happens to ‘involve’ moral depravity, because of an alien’s specific acts in a particular case”).

193. *Prudencio*, 669 F.3d at 481. For the exact text of the statutory provision, see *supra* note 51.

194. *Prudencio*, 669 F.3d at 481.

195. *Silva-Trevino*, 742 F.3d at 201 (quoting 8 U.S.C. § 1227(a)(7)(B) (2012)).

196. *Id.* (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

197. See, e.g., *id.* at 202; *Fajardo v. Att’y Gen.*, 659 F.3d 1303, 1309 (11th Cir. 2011); *Jean-Louis*, 582 F.3d at 476.

198. See, e.g., *Silva-Trevino*, 742 F.3d at 202; *Fajardo*, 659 F.3d at 1309; *Jean-Louis*, 582 F.3d at 476.

the legislative history of the INA suggested a fact-finding role for either the BIA or the federal circuit courts.<sup>199</sup> In addition, the Fifth Circuit and the Eleventh Circuit asserted that if Congress embraced a fact-finding approach, then it would have amended the INA after the courts began excluding extrinsic evidence.<sup>200</sup> The Third Circuit was also concerned about the consequences of conducting investigations beyond the conviction record and relied on *Taylor* as support for the proposition that such an investigation is prohibited.<sup>201</sup> Lastly, the Fifth Circuit criticized Mukasey's procedure as being counterproductive to his stated purpose of unity; the court mainly relied on its opinion that there existed a general unity among federal circuit courts in prohibiting extrinsic evidence prior to Mukasey's *Silva-Trevino* decision.<sup>202</sup> Despite the Third Circuit, Fourth Circuit, Fifth Circuit, and Eleventh Circuit completely rejecting Mukasey's procedure, other circuit courts either partially or completely accepted Mukasey's procedure.<sup>203</sup>

## 2. Federal Circuit Courts Accepting Mukasey's *Silva-Trevino* Decision

After Mukasey's *Silva-Trevino* decision, two federal circuit courts completely accepted Mukasey's three-part procedure,<sup>204</sup> and one federal circuit court partially accepted the procedure.<sup>205</sup> Although

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199. *Jean-Louis*, 582 F.3d at 476.

200. *Silva-Trevino*, 742 F.3d at 202 (“[I]t seems that Congress would have given some indication if it wanted adjudicators to ‘abandon’ the longstanding categorical approach in favor of an ‘elaborate factfinding process.’” (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990))); *Fajardo*, 659 F.3d at 1309 (“[I]f Congress believed that the courts and the BIA had misinterpreted its intent, it could easily have amended the statute to allow adjudicators to consider the actual conduct underlying a conviction.”).

201. *Jean-Louis*, 582 F.3d at 476 (“[T]he practical evidentiary difficulties and potential unfairness associated with looking behind [an alien’s] offense of conviction [are] no less daunting in the immigration [context] than in the sentencing context.” (quoting *Dulal-Whiteway v. United States*, 501 F.3d 125, 126 (2d Cir. 2007))).

202. *Silva-Trevino*, 742 F.3d at 205 (“[T]here was broad consensus among the federal courts [before Mukasey’s three-part test] that the ‘convicted of’ language precludes consideration of evidence beyond the conviction record . . . [Thus], his interpretation has been counterproductive toward his own stated objective, [a uniform approach]”).

203. See *infra* Subsection II.C.2.

204. See *Sanchez v. Holder*, 757 F.3d 712, 720 (7th Cir. 2014); *Bobadilla v. Holder*, 679 F.3d 1052, 1059 (8th Cir. 2012).

205. See *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010).

the Seventh and the Eighth Circuits fully accepted Mukasey's procedure, neither court was detailed in the reasoning for following the procedure.<sup>206</sup> The Eighth Circuit pointed to the fact that an agency may alter its interpretation of the statute as long as that interpretation is permissible.<sup>207</sup> Furthermore, the Eighth Circuit reasoned that agency inconsistency is not a reason for declining a permissible interpretation of the statute.<sup>208</sup> Additionally, despite not completely accepting Mukasey's procedure, the Ninth Circuit currently uses the "realistic probability" categorical approach in identifying a crime involving moral turpitude.<sup>209</sup> Nevertheless, the Ninth Circuit fails to provide reasoning on why it chose to accept only part of Mukasey's three-part procedure.<sup>210</sup> Thus, three federal circuit courts currently conform, at least partially, to Mukasey's procedure for identifying a crime involving moral turpitude.<sup>211</sup>

Despite Mukasey's *Silva-Trevino* decision, disagreement remained among federal circuit courts on the proper procedure for identifying a crime involving moral turpitude.<sup>212</sup> Some federal circuit courts rejected Mukasey's procedure, while others either partially or completely accepted the procedure.<sup>213</sup> This disagreement among the federal circuits influenced Holder in vacating Mukasey's *Silva-Trevino* decision.

### 3. Holder's Vacatur of Mukasey's *Silva-Trevino* Decision

Noting (1) continued disagreement between federal circuit courts with respect to the proper procedure for identifying a crime involving moral turpitude after Mukasey's *Silva-Trevino* decision; and (2) recent Supreme Court decisions, Holder vacated Mukasey's

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206. *Sanchez*, 757 F.3d at 720 (remanding the case due to the BIA not utilizing Mukasey's three-prong procedure); *Bobadilla*, 679 F.3d at 1059 (remanding the case and dictating an application of Mukasey's three-prong procedure).

207. *Bobadilla*, 679 F.3d at 1057 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 568 F.3d 675, 683 (8th Cir. 2009)).

208. *Id.* (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011)).

209. *See Nunez*, 594 F.3d at 1129.

210. *See id.*

211. *See, e.g., Sanchez*, 757 F.3d at 720; *Bobadilla*, 679 F.3d at 1059; *Nunez*, 594 F.3d at 1129.

212. *See Dadhania, supra* note 29, at 340-46.

213. *Id.*

*Silva-Trevino* decision.<sup>214</sup> Relying on the continued disagreement between federal circuit courts, Holder noted that Mukasey's procedure "has not accomplished its stated goal of 'establish[ing] a uniform framework for ensuring that the [INA's] moral turpitude provisions are fairly and accurately applied.'"<sup>215</sup> As additional support for vacating Mukasey's decision, Holder cited *Carachuri-Rosendo v. Holder*<sup>216</sup> and *Moncrieffe v. Holder*,<sup>217</sup> which are two recent Supreme Court decisions rejecting the use of the fact-based approach in determining whether a particular drug conviction constitutes an aggravated felony<sup>218</sup> under the INA.<sup>219</sup> According to Holder, these two Supreme Court decisions "cast doubt on the continued validity" of Mukasey's *Silva-Trevino* decision.<sup>220</sup> Importantly, Holder noted that he did not disapprove of every aspect of Mukasey's decision.<sup>221</sup> Rather than articulating a procedure for identifying a crime involving moral turpitude, Holder charged the BIA with determining the procedure.<sup>222</sup> Since Holder's vacatur of Mukasey's decision, the BIA issued only one opinion, unpublished, regarding the procedure for identifying a crime involving moral turpitude; furthermore, instead of articulating a clear procedure for identifying a crime involving moral turpitude in that opinion, the BIA merely applied the first step of every crime-involving-moral-turpitude analysis: the categorical approach.<sup>223</sup>

Continued disagreement between federal circuit courts, Holder's vacatur of Mukasey's *Silva-Trevino* decision, and the BIA's silence result in uncertainty as to the procedure for identifying a

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214. *Silva-Trevino*, 26 I. & N. Dec. 550, 553 (Op. Att'y Gen. 2015).

215. *Id.* at 552 (quoting *Silva-Trevino*, 24 I. & N. Dec. 687, 688 (Op. Att'y Gen. 2008)).

216. *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581-82 (2010) (holding that adjudicators cannot consider uncharged conduct when determining whether an alien is "convicted of" illicit trafficking, which is an aggravated felony under the INA).

217. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690-92 (2013) (rejecting the use of a "circumstance-specific" analysis of a drug conviction for purposes of determining if the drug conviction constituted an aggravated felony).

218. Under 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."

219. *Silva-Trevino*, 26 I. & N. Dec. at 552-53.

220. *Id.* at 553.

221. *Id.*

222. *Id.*

223. *In re Moses*, No. A206 352 760, 2015 WL 4537073, at \*2 (B.I.A. June 10, 2015) ("To determine whether an offense constitutes a crime involving moral turpitude, we apply a categorical approach.").

crime involving moral turpitude.<sup>224</sup> The lack of a clear procedure for identifying crimes involving moral turpitude has great consequences for aliens facing the grave danger of inadmissibility or deportation.<sup>225</sup> The BIA's adoption of Mukasey's uniform procedure for identifying a crime involving moral turpitude would result in an equitable and reliable solution.<sup>226</sup>

### III. SIMPLIFYING THE LABYRINTH: A CASE FOR THE BIA'S ADOPTION OF MUKASEY'S *SILVA-TREVINO* DECISION

Due to the various procedures among federal circuit courts for identifying a crime involving moral turpitude, two aliens who commit the same crime may be subject to two different standards of removal based solely on the jurisdiction in which they reside.<sup>227</sup> As a result, one alien may face deportation even though he did not commit a crime involving moral turpitude, while another alien, who did commit a crime involving moral turpitude, may avoid deportation altogether.<sup>228</sup> The BIA's adoption of Mukasey's three-part procedure for identifying a crime involving moral turpitude would (1) be consistent with traditional agency deference;<sup>229</sup> (2) demystify the procedure for identifying crimes of moral turpitude through the creation of a universal approach;<sup>230</sup> and (3) avoid manipulations within the criminal system with respect to conviction records.<sup>231</sup>

#### A. Consistency with Traditional Agency Deference

The INA is ambiguous with respect to the procedure for identifying a crime involving moral turpitude.<sup>232</sup> Courts facing an ambiguous statute, like the INA, must defer to the reasonable interpretation of the statute by the agency charged with the statute's

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224. See Dadhanian, *supra* note 29, at 340-46.

225. See *Silva-Trevino*, 24 I. & N. Dec. 687, 695 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550.

226. See *infra* Part III.

227. See *supra* Part II (discussing the varying procedures of the federal circuit courts in identifying a crime involving moral turpitude).

228. See *Silva-Trevino*, 24 I. & N. Dec. at 695.

229. See *infra* Section III.A.

230. See *infra* Section III.B.

231. See *infra* Section III.B.

232. See *Silva-Trevino*, 24 I. & N. Dec. at 693 (acknowledging that the INA does not define the procedure for identifying crimes involving moral turpitude).



administration.<sup>233</sup> Since (1) the INA is ambiguous on the procedure for identifying a crime involving moral turpitude; (2) the legislative history of the INA does not clarify the intent of Congress on the procedure for identifying a crime involving moral turpitude; and (3) the BIA's adoption of Mukasey's procedure for identifying a crime involving moral turpitude would result in a procedure that is reasonable and not "arbitrary and capricious," the BIA should embrace Mukasey's procedure for identifying a crime involving moral turpitude.<sup>234</sup>

### 1. *The Text of the INA Is Ambiguous on the Proper Procedure*

The text of the INA does not resolve the issue of what procedure to utilize in identifying a crime involving moral turpitude.<sup>235</sup> Several federal circuit courts interpret the moral-turpitude-inadmissibility provision and other provisions within the INA in a way that allegedly reveals the unambiguous intent of Congress to (1) foreclose an inquiry into an alien's conduct; and (2) prohibit an examination of evidence beyond the conviction record.<sup>236</sup> Nevertheless, the analyses of these provisions by the federal circuit courts rejecting Mukasey's procedure (Rejecting Circuits) are flawed.<sup>237</sup> As a result, the text of the INA remains ambiguous on the procedure for identifying a crime involving moral turpitude.<sup>238</sup>

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233. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute . . . ."); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute.").

234. *See infra* Subsections III.A.1-2.

235. *Silva-Trevino*, 24 I. & N. Dec. at 693.

236. *See, e.g., Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014); *Prudencio v. Holder*, 669 F.3d 472, 481 (4th Cir. 2012).

237. *See infra* Subsections III.A.1.a-b.

238. *See infra* Subsections III.A.1.a-b.

a. Erroneous Interpretation of the Moral-Turpitude-Inadmissibility Provision

In interpreting the INA's moral-turpitude-inadmissibility provision, the Rejecting Circuits utilized erroneous reasoning.<sup>239</sup> The moral-turpitude-inadmissibility provision states that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude" is inadmissible.<sup>240</sup> The Rejecting Circuits utilized erroneous reasoning in interpreting the moral-turpitude-inadmissibility provision because the Fourth Circuit impermissibly utilized judicial policymaking in its interpretation,<sup>241</sup> the traditional canons of construction oppose the Rejecting Circuits' interpretation,<sup>242</sup> and "a crime involving moral turpitude" is not a term of art.<sup>243</sup>

The Fourth Circuit utilized erroneous reasoning by relying on judicial policymaking in interpreting the moral-turpitude-inadmissibility provision.<sup>244</sup> Contrary to the Fourth Circuit's assertion, the moral-turpitude-inadmissibility provision is composed of one part, not two parts.<sup>245</sup> The provision contains an assortment of three prerequisites; at least one of these prerequisites must be present for a finding of a crime involving moral turpitude.<sup>246</sup> That is, the alien has to (1) be convicted of a crime involving moral turpitude; (2) admit committing a crime involving moral turpitude; or (3) admit committing acts that constitute the essential elements of a crime

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239. See *Silva-Trevino*, 24 I. & N. Dec. at 699 (interpreting the moral-turpitude-inadmissibility provision as permitting extrinsic evidence in immigration proceedings).

240. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012).

241. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864-65 (1984) (discussing the policy behind judicial deference to agency action, which includes the fact that agencies are experts in their respective fields).

242. See *Brudney & Ditslear*, *supra* note 87, at 12-14 (discussing the various canons of construction).

243. See *Jordan v. De George*, 341 U.S. 223, 227 (1951) (avoiding the classification of "a crime involving moral turpitude" as a term of art).

244. See *Chevron*, 467 U.S. at 864-65.

245. See § 1182(a)(2)(A)(i)(I) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a crime involving moral turpitude . . . is inadmissible."). *But see Prudencio v. Holder*, 669 F.3d 472, 481 (4th Cir. 2012) (reasoning that 8 U.S.C. § 1182(a)(2)(A)(i) is split into two parts: one addressing moral turpitude admissions and one addressing moral turpitude convictions).

246. See § 1182(a)(2)(A)(i).

involving moral turpitude.<sup>247</sup> There is nothing in the provision, or in the INA, to suggest that these three prerequisites should be grouped into two categories.<sup>248</sup> The Fourth Circuit's grouping of these three prerequisites into two categories, one addressing moral turpitude admissions and one addressing moral turpitude convictions, is an attempt to camouflage judicial policymaking.<sup>249</sup> That is, concerned over the potential unfairness of a factual approach, the Fourth Circuit grouped these three prerequisites into two categories in order to fabricate additional support for rejecting Mukasey's procedure.<sup>250</sup> Judicial policymaking is contrary to the policy behind judicial deference to agency action; the policy encourages agencies, not courts, to partake in policymaking due to agency expertise in the specific areas of law.<sup>251</sup> As such, the Fourth Circuit utilized erroneous reasoning when it relied on judicial policymaking in interpreting the moral-turpitude-inadmissibility provision.<sup>252</sup>

The traditional canons of construction further demonstrate that the Rejecting Circuits are erroneous in their interpretation of the moral-turpitude-inadmissibility provision.<sup>253</sup> For example, the Fourth Circuit's grouping of the three prerequisites in the moral-turpitude-inadmissibility provision into two categories is contrary to *noscitur a sociis*.<sup>254</sup> This is because admitting the commission of a crime involving moral turpitude and admitting the commission of acts that constitute the essential elements of a crime involving moral turpitude

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247. *Id.*

248. *See* Silva-Trevino, 24 I. & N. Dec. 687, 692-93 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

249. *See Prudencio*, 669 F.3d at 481. In interpreting 8 U.S.C. § 1182(a)(2)(A)(i) as a two-category provision, the Fourth Circuit argued that Mukasey's emphasis on "committing acts" appears only in the section addressing admissions. *Id.* Therefore, the court reasoned, since *Silva-Trevino* dealt with a conviction, not an admission, Mukasey's finding of statutory ambiguity was misplaced. *Id.*

250. *See id.* at 484 (asserting that the "potential unfairness of the factual approach is daunting").

251. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864-65 (1984) ("Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences.").

252. *See id.*

253. *See* Brudney & Ditslear, *supra* note 87, at 12-14.

254. *See* *Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (identifying *noscitur a sociis* as a canon of construction prompting that "words grouped in a list should be given related meaning" (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989))).

seem to prompt a factual inquiry beyond the record of conviction.<sup>255</sup> For example, admissions may not always be accompanied by a record of conviction.<sup>256</sup> Nevertheless, an admission, even absent a record of conviction, supports inadmissibility under the moral-turpitude-inadmissibility provision.<sup>257</sup> As such, per *noscitur a sociis*, the prerequisite that an alien must be convicted of a crime involving moral turpitude also seems to invite a factual inquiry beyond the record of conviction.<sup>258</sup> The Fifth Circuit is correct in its *inclusio unius* argument<sup>259</sup> that the INA explicitly allows extrinsic evidence in other sections of the INA.<sup>260</sup> Nevertheless, this argument is not dispositive on the intent of Congress on the proper procedure for identifying a crime involving moral turpitude because the Fifth Circuit's interpretation is only one of several reasonable interpretations of the moral-turpitude-inadmissibility provision.<sup>261</sup> Furthermore, interpreting the provision in a way that renders the use of extrinsic evidence permissible does not violate the "constitutional avoidance" canon.<sup>262</sup> Congress's ability to use extrinsic evidence in identifying a crime involving moral turpitude remains unquestioned by the Supreme Court.<sup>263</sup> Because the Supreme Court is reluctant to find constitutional violations in immigration law, it is unlikely that the Supreme Court will determine the use of extrinsic evidence in identifying a crime involving moral turpitude unconstitutional.<sup>264</sup>

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255. See *Silva-Trevino*, 24 I. & N. Dec. 687, 699 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

256. *Id.*

257. 8 U.S.C. § 1182(a)(2)(A)(i) (2012).

258. See *Dole*, 494 U.S. at 36.

259. *Holland v. Florida*, 560 U.S. 631, 648 (2010) (identifying *inclusio unius* as a canon of statutory construction, which specifies that to include one item is to exclude other similar items).

260. See *Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014) (arguing that the INA explicitly permits the use of extrinsic evidence in 8 U.S.C. § 1227(a)(7)(B), which states that the immigration judge "shall consider any credible evidence" (quoting 8 U.S.C. § 1227(a)(7)(B))).

261. See *Silva-Trevino*, 24 I. & N. Dec. at 698-99 (interpreting the moral-turpitude-inadmissibility provision as permitting an inquiry into extrinsic evidence).

262. See *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (specifying that the constitutional avoidance doctrine prompts the court to refrain from interpreting a statute in a way that would render the statute unconstitutional).

263. See *Sanchez v. Holder*, 757 F.3d 712, 720 (7th Cir. 2014); *Bobadilla v. Holder*, 679 F.3d 1052, 1056 (8th Cir. 2012).

264. See *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (specifying that the immigration power of Congress is extraordinarily broad); *Bosniak*, *supra* note 38, at 1090 ("[T]he single most salient feature of the government's immigration power is the fact that it is substantially unconstrained as a constitutional matter.");

Therefore, the traditional canons of construction demonstrate the Rejecting Circuits' erroneous interpretation of the moral-turpitude-inadmissibility provision.<sup>265</sup>

Additionally, the Rejecting Circuits misinterpret the phrase "crime involving moral turpitude" in interpreting the moral-turpitude-inadmissibility provision.<sup>266</sup> To counter the idea that "involving" in "crime involving moral turpitude" dictates an inquiry into the facts, the Third Circuit and the Fourth Circuit made the assertion that "crime involving moral turpitude" is a term of art.<sup>267</sup> To support this assertion, both circuit courts relied on *De George*.<sup>268</sup> Nevertheless, while the Court in *De George* did acknowledge the deep roots of the phrase "a crime involving moral turpitude" in United States jurisprudence, the Court did not classify this phrase as a term of art.<sup>269</sup> The Court in *De George* also used "involving moral turpitude" to modify "crime" in the decision, which further discounts the notion that a crime involving moral turpitude is a term of art.<sup>270</sup> If a crime involving moral turpitude was a term of art, then the Court would have used the phrase consistently throughout the decision.<sup>271</sup> Despite the reliance of the Third Circuit and Fourth Circuit on *De George*, the decision does not establish that "a crime involving moral turpitude" is a term of art.<sup>272</sup> The Rejecting Circuits' analysis of INA provisions outside of the moral-turpitude-inadmissibility provision is also erroneous.<sup>273</sup>

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Stumpf, *supra* note 30, at 1572 (recognizing that Congress' immigration power is "unrestrained by constitutional limitations").

265. See Brudney & Ditslear, *supra* note 87, at 12-14.

266. See *Silva-Trevino*, 24 I. & N. Dec. at 693, *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

267. *Prudencio v. Holder*, 669 F.3d 472, 481 (4th Cir. 2012) ("The participle 'involving' cannot be divorced from the unitary phrase 'crime involving moral turpitude.'"); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 477 (3d Cir. 2009) (asserting that a crime involving moral turpitude "refers to a specific class of offenses, not to all conduct that happens to 'involve' moral depravity").

268. *Prudencio*, 669 F.3d at 481; *Jean-Louis*, 582 F.3d at 477.

269. See *Jordan v. De George*, 341 U.S. 223, 227 (1951).

270. *Id.* at 232 ("Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that *crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.*" (emphasis added)).

271. See *id.*

272. See *id.*

273. See *Silva-Trevino*, 24 I. & N. Dec. 687, 692-93 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015) (acknowledging that provisions outside of the moral-turpitude-inadmissibility provision permit an inquiry into extrinsic evidence in immigration proceedings).

b. Erroneous Interpretation of Other INA Provisions

The Rejecting Circuits' analysis of INA provisions outside of the moral-turpitude-inadmissibility provision contains several errors.<sup>274</sup> In interpreting the moral-turpitude-inadmissibility provision, the Rejecting Circuits primarily focused on the INA's definition of "conviction" and the INA's list of criminal-conviction documents.<sup>275</sup> Errors in the Rejecting Circuits' analysis of provisions outside of the moral-turpitude-inadmissibility provision stem from the misinterpretation of both the INA's definition of "conviction"<sup>276</sup> and the INA's list of criminal-conviction documents.<sup>277</sup>

First, the Rejecting Circuits misinterpret the INA's definition of "conviction."<sup>278</sup> The INA's definition of "conviction" as a "formal judgment of guilt" does not dictate what procedure may be used in identifying a crime involving moral turpitude.<sup>279</sup> Defining "conviction" simply defines one of the three prerequisites in the moral-turpitude-inadmissibility provision for a finding of a crime involving moral turpitude.<sup>280</sup> Even if the definition of "conviction" did have an impact on the procedure for identifying a crime involving moral turpitude, the provision defining "conviction" is disjunctive.<sup>281</sup> A "conviction" is not always "a formal judgment of guilt."<sup>282</sup> A "conviction" also occurs when (1) adjudication of guilt is withheld; (2) the alien admits sufficient *facts* for a finding of guilt; and (3) the judge orders a restraint on the alien's liberty.<sup>283</sup> Thus, the

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274. *Id.*

275. *See, e.g.,* *Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 480 (3d Cir. 2009).

276. *See* 8 U.S.C. § 1101(48)(A) (2012).

277. *See id.* § 1229a(c)(3)(B).

278. *See id.* § 1101(48)(A).

279. *See id.*; *see also* § 1182(a)(2)(A)(i).

280. *See id.* § 1182(a)(2)(A)(i).

281. *See id.* § 1101(48)(A). The statute reads:

(48)(A) The term "*conviction*" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, or if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

*Id.*

282. *See id.*

283. *Id.*

definition of “conviction” sheds no insight on the procedure for identifying a crime involving moral turpitude, which is contrary to the Rejecting Circuits’ conclusion that the definition prohibits a fact-based inquiry.<sup>284</sup>

Second, the Rejecting Circuits misinterpret the INA’s list of criminal-conviction documents.<sup>285</sup> The fact that the INA provides a list of documents constituting proof of a criminal conviction does not prohibit the use of extrinsic evidence in adjudicating a crime involving moral turpitude.<sup>286</sup> Section 240(c)(3)(B) of the INA begins, “any of the following documents or records . . . shall constitute proof of a criminal conviction.”<sup>287</sup> The section does not read, “[only] the following documents or records . . . shall constitute proof of a criminal conviction.”<sup>288</sup> Even if the list was exclusive in terms of what may constitute proof of a criminal conviction, the purpose of this list is to identify the criminal offense the alien committed, not to classify whether the criminal offense was a crime involving moral turpitude.<sup>289</sup> Therefore, the Rejecting Circuits’ analysis of provisions outside of the moral-turpitude-inadmissibility provision is flawed.<sup>290</sup>

The Rejecting Circuits utilized erroneous reasoning in interpreting both the INA’s moral-turpitude-inadmissibility provision

284. *See id.* § 1182(a)(2)(A)(i).

285. *See id.* § 1229a(c)(3)(B).

286. *See id.*

287. *Id.*

288. *See id.* But see *Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014) (claiming that 8 U.S.C. § 1229a(c)(3)(B) contains “no mention of any additional evidence” and “the introductory phrasing, ‘any of the following documents or records,’ gives no indication that extrinsic evidence is contemplated” (quoting 8 U.S.C. § 1229a(c)(3)(B))).

289. *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008). To clarify, the Seventh Circuit explained:

Section 1229a(c)(3)(B) does not include presentence reports among the documents that the agency may use to determine what crime [the alien] committed. That is not, however, how the agency used the report. The judgment of conviction itself contains what is required to that end (the crime is conspiracy to defraud the United States, in violation of § 371). The agency used the presentence report to ensure that the judgment was not a mistake (in other words, to ensure that there really *was* deceit, rather than just a conspiracy to violate a record-keeping law) and to make the moral-turpitude classification, a matter that stands apart from the elements of the offense.

*Id.*

290. *See Silva-Trevino*, 24 I. & N. Dec. 687, 692-93 (Op. Att’y Gen. 2008) (interpreting the INA provisions as supporting a fact-based approach).

and the other provisions within the INA.<sup>291</sup> As a result, the text of the INA remains ambiguous on the procedure for identifying a crime involving moral turpitude.<sup>292</sup> In addition to the ambiguity within the text of the INA, the legislative history of the INA does not clarify the intent of Congress for the procedure for identifying a crime involving moral turpitude.<sup>293</sup>

## 2. *The Legislative History of the INA Is Ambiguous on the Proper Procedure*

Much like the text of the INA, the legislative history of the INA is not clear on Congress's intent in terms of the procedure for identifying a crime involving moral turpitude.<sup>294</sup> On the one hand, the legislative history of the INA does not reject a fact-based procedure.<sup>295</sup> On the other hand, the legislative history of the INA supporting a fact-based approach is from a previous version of the INA, which decreases its value as persuasive authority.<sup>296</sup>

The legislative history of the INA does not reject Mukasey's fact-based procedure.<sup>297</sup> As the Third Circuit mentioned, it does not appear that there is anything in the legislative history of the INA to suggest a fact-finding role for the BIA or the federal circuit courts.<sup>298</sup> Nevertheless, it also does not appear that there is anything in the legislative history of the INA that prohibits a fact-finding role by the BIA or the federal circuit courts.<sup>299</sup> Thus, although the legislative history of the INA does not explicitly dictate that federal circuit courts and the BIA should use the fact-finding approach, the legislative history of the INA also does not explicitly dictate that federal circuit courts and the BIA should not use the fact-finding approach.<sup>300</sup> Next, the position of the Fifth Circuit and Eleventh Circuit on congressional inaction, that Congress would have amended the INA if it supported a fact-based approach, is

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291. *Id.*

292. *See id.*

293. *See infra* Subsection III.A.2.

294. *See Silva-Trevino*, 24 I. & N. Dec. at 692-93, 700.

295. *See id.* at 700 (arguing that restricting the moral turpitude analysis to either the statute or the record of conviction is not compelled by the INA).

296. *See Moore, supra* note 62, at 675-76 (discussing the repeal of JRAD).

297. *See Silva-Trevino*, 24 I. & N. Dec. at 693, *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

298. *See Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 476 (3d Cir. 2009).

299. *See Silva-Trevino*, 24 I. & N. Dec. at 693.

300. *See id.*



unpersuasive.<sup>301</sup> Using the logic of the Fifth Circuit and Eleventh Circuit, Congress would have amended the INA if it supported the federal circuit court approach of excluding extrinsic evidence.<sup>302</sup> Furthermore, due to the size of Congress and the magnitude of legislation in Congress, it is difficult for Congress to pass and to amend legislation.<sup>303</sup> Although the legislative history of the INA does not reject the use of a fact-based approach, the legislative history of the INA supporting a fact-based approach is outdated.<sup>304</sup>

Although the legislative history of the 1917 Immigration Act supports the position that Congress intended a fact-based procedure for identifying a crime involving moral turpitude, the persuasive authority of this legislative history is limited because the legislative history is derived from a previous version of the INA.<sup>305</sup> In the legislative history of the 1917 Immigration Act, Congressman Sabath aimed to prevent the deportation of aliens who committed a crime and who did not know, prior to executing the crime, that the crime was a crime involving moral turpitude.<sup>306</sup> Similarly, Congressman Mann sought to prevent deportation as a sanction for petty crimes involving moral turpitude.<sup>307</sup> Since Congress repealed the ability of judges to prevent deportation for criminal convictions when it issued the 1990 version of the INA, the persuasive authority of Congress's early intent to utilize a fact-based inquiry is limited.<sup>308</sup> The repeal of judicial ability to prevent deportation for criminal conviction limits judicial discretion; meanwhile, Mukasey's fact-based procedure

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301. See Eskridge, *supra* note 94, at 98-99 (indicating that congressional inaction is a poor indication of congressional intent). *But see* Silva-Trevino v. Holder, 742 F.3d 197, 202 (5th Cir. 2014) (reasoning that Congress would take affirmative action if it supported a fact-finding procedure); Fajardo v. Att'y Gen., 659 F.3d 1303, 1309 (11th Cir. 2011) (asserting that Congress could have "easily" amended the statute if it supported a fact-finding procedure).

302. See *Silva-Trevino*, 742 F.3d at 202; *Fajardo*, 659 F.3d at 1309.

303. See Eskridge, *supra* note 94, at 98-99.

304. See *supra* Section I.B (describing the legislative history of the 1917 Immigration Act).

305. See Moore, *supra* note 62, at 675-76.

306. 53 CONG. REC. 5169 (1916) (statement of Rep. Adolph Sabath) (explaining that his goal is to protect the alien who "without thinking and without really knowing it is an offense, does something which may be designated technically as a crime involving moral turpitude").

307. *Id.* (statement of Rep. James Mann) (asserting that the concern of aliens being deported for petty crimes involving moral turpitude was taken care of by the provision in the bill which forbid deportation if the judge who entered the sentence disagreed with the deportation).

308. See Moore, *supra* note 62, at 675-76.

would increase judicial discretion because the third step permits judges to determine the admissible evidence in each respective case.<sup>309</sup> The lack of guidance in the legislative history of the INA and the discounted support of the fact-based approach in the legislative history of the 1917 Immigration Act results in ambiguity on the procedure for identifying a crime involving moral turpitude.<sup>310</sup> Due to the ambiguity in both the text and the legislative history of the INA, the BIA should embrace Mukasey's reasonable interpretation of the proper procedure.<sup>311</sup>

### 3. *The BIA's Adoption of Mukasey's Procedure Would Not Be Unreasonable or "Arbitrary and Capricious"*

The BIA should adopt Mukasey's procedure for identifying a crime involving moral turpitude because the BIA's adoption would be reasonable and not "arbitrary and capricious."<sup>312</sup> When an agency's interpretation is reasonable and not "arbitrary and capricious," federal circuit courts are obligated to defer to the agency's interpretation.<sup>313</sup> The BIA's adoption would be reasonable and not "arbitrary and capricious" because Mukasey, in articulating his procedure, considered all relevant factors, including (1) statutory authority and public policy; and (2) the ineffective and irrational procedures of federal circuit courts for identifying crimes involving moral turpitude.<sup>314</sup> Furthermore, recent Supreme Court precedent does not undermine the fact that BIA adoption of Mukasey's procedure would be reasonable and not "arbitrary and capricious."<sup>315</sup>

The BIA's adoption of Mukasey's procedure would be reasonable and not "arbitrary and capricious" because Mukasey

309. *Silva-Trevino*, 24 I. & N. Dec. 687, 690 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015) (specifying that in the third step of his three-part procedure, "judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction").

310. *See id.* at 692-93.

311. *See infra* Subsection III.A.3.

312. *See Silva-Trevino*, 24 I. & N. Dec. at 704; *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

313. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42-43 (stating that an interpretation is not "arbitrary and capricious" when it is "rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute").

314. *See supra* Section II.B (explaining the rationale for Mukasey's procedure for identifying crimes involving moral turpitude).

315. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 570 (2010).

considered statutory authority and public policy.<sup>316</sup> Mukasey asserted that he had the power to create a procedure for identifying a crime involving moral turpitude pursuant to 8 U.S.C. § 1103(a)(1).<sup>317</sup> Next, noticing the varying approaches of the BIA and the federal circuit courts for identifying a crime involving moral turpitude, Mukasey identified that his purpose in establishing the procedure was to create a uniform standard.<sup>318</sup> He reasoned that a uniform standard was needed because immigration law often has severe consequences.<sup>319</sup> The Fifth Circuit's claim—that Mukasey's procedure is counter-productive to his stated purpose because there was a general unity among federal circuit courts in rejecting extrinsic evidence prior to Mukasey's *Silva-Trevino* decision—is erroneous.<sup>320</sup> Prior to Mukasey's *Silva-Trevino* decision, the Seventh Circuit unambiguously used extrinsic evidence in its procedure for identifying a crime involving moral turpitude.<sup>321</sup> Furthermore, in *Valansi*, the Third Circuit vacated a final order of removal and granted a petition for review, which implicitly granted an opportunity to investigate facts beyond the conviction record.<sup>322</sup> Even if Mukasey's procedure was counter-productive to his stated purpose of unity, Mukasey had another purpose: justice.<sup>323</sup> If Mukasey merely wanted uniformity, then he could have concluded his procedure at the categorical approach; however, Mukasey advocated for the fact-based procedure in order to ensure that those aliens who do commit

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316. See *supra* Section II.B.

317. *Silva-Trevino*, 24 I. & N. Dec. at 688-89, *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015) (citing 8 U.S.C. § 1103(a)(1)(2006)). Section 1103(a)(1) states that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1).

318. *Silva-Trevino*, 24 I. & N. Dec. at 694.

319. *Id.* For a discussion of the severe consequences of immigration law, see Legomsky, *supra* note 162, at 513.

320. See *Ali v. Mukasey*, 521 F.3d 737, 742 (7th Cir. 2008) (acknowledging that classifying a crime involving moral turpitude may require an inquiry into additional information because the charging papers are not created for purposes of such classification). *But see* *Silva-Trevino v. Holder*, 742 F.3d 197, 205 (5th Cir. 2014) (identifying a consensus among the federal circuit courts in rejecting extrinsic evidence before Mukasey's *Silva Trevino* decision).

321. See *Ali*, 521 F.3d at 743 (permitting the use of information beyond the record of conviction).

322. See *Valansi v. Ashcroft*, 278 F.3d 203, 217-18 (3d Cir. 2002) (granting a petition for review due to an inability to resolve a discrepancy between an indictment and a plea colloquy).

323. *Silva-Trevino*, 24 I. & N. Dec. at 695, *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015) (addressing the under-inclusive application of the moral-turpitude-inadmissibility provision in federal circuit courts).

crimes involving moral turpitude do not avoid deportation merely due to loopholes in the law.<sup>324</sup> Lastly, after considering the potential unfairness of investigations beyond the conviction record, Mukasey concluded that his procedure would not be unfair to aliens because “[t]he sole purpose of the inquiry is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.”<sup>325</sup> In addition to considering statutory authority and public policy, Mukasey considered the existing procedures of federal circuit courts for identifying a crime involving moral turpitude.<sup>326</sup>

The BIA’s adoption of Mukasey’s procedure for identifying a crime involving moral turpitude would be reasonable and not “arbitrary and capricious” because Mukasey addressed the ineffective and irrational designs of the federal circuit court procedures for identifying a crime involving moral turpitude.<sup>327</sup> The procedures of federal circuit courts often resulted in either an under-inclusive application of inadmissibility for a crime involving moral turpitude or an over-inclusive application of inadmissibility for a crime involving moral turpitude.<sup>328</sup> In addition, Mukasey dismissed the application of *Taylor* and *Shepard*—Supreme Court cases rejecting an inquiry into extrinsic evidence in the context of recidivist enhancements in criminal proceedings—to immigration law.<sup>329</sup> First, unlike recidivist enhancements in criminal law, immigration law is civil, and the Sixth Amendment does not apply.<sup>330</sup> Second, unlike recidivist enhancements in criminal law, an investigation of the record of conviction in immigration proceedings will not usually resolve an inquiry, in this case identifying a crime involving moral turpitude, because the record of conviction is not

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324. *Id.*

325. *Id.* at 703.

326. *Id.* at 693-96.

327. *See id.*

328. *Id.* As an example of an under-inclusive application, an alien who commits a crime that is a crime involving moral turpitude in a jurisdiction applying the “minimum conduct” test could avoid deportation if the judge hypothesizes a theoretical situation in which the statute of conviction could apply to conduct that is not a crime involving moral turpitude. *Id.* As an example of an over-inclusive application, an alien who commits a crime that is not a crime involving moral turpitude in a jurisdiction applying the “common case” test could be deported if the judge decides that the statute of conviction typically applies to crimes involving moral turpitude. *Id.*

329. *Id.* at 700-01 (citing *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990)).

330. *Id.*

framed for immigration purposes.<sup>331</sup> In terms of administrative backlog resulting from an inquiry into extrinsic evidence, the Attorney General and the BIA, not federal circuit courts, are experts on priorities in immigration law.<sup>332</sup> Although the Seventh Circuit and the Eighth Circuit did not provide extensive reasoning for adopting Mukasey's procedure, the two circuit courts did accept the expertise of the Attorney General and the BIA.<sup>333</sup>

Recent Supreme Court precedent does not disturb the fact that the BIA's adoption of Mukasey's procedure would be reasonable and not "arbitrary and capricious."<sup>334</sup> Although Holder asserted that recent Supreme Court decisions "cast doubt on the continued validity" of Mukasey's *Silva-Trevino* decision,<sup>335</sup> those recent decisions address deportability for aggravated felonies rather than inadmissibility for crimes involving moral turpitude; that is, in those recent decisions, the Supreme Court addressed a statutory provision of the INA distinct from the statutory provision of the INA Mukasey addressed in his *Silva-Trevino* decision.<sup>336</sup> While 8 U.S.C. § 1182(a)(2)(A)(i) renders "any alien *convicted of, or who admits having committed, or who admits committing acts*" of a crime involving moral turpitude inadmissible,<sup>337</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) renders "[a]ny alien who *is convicted* of an aggravated felony" deportable.<sup>338</sup> Although 8 U.S.C. § 1227(a)(2)(A)(iii) could be interpreted as foreclosing a fact-based inquiry,<sup>339</sup> interpreting 8 U.S.C. § 1182(a)(2)(A)(i) as foreclosing a

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331. *Ali v. Mukasey*, 521 F.3d 737, 741-42 (7th Cir. 2008).

332. *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (acknowledging agency expertise on the statute that the agency is charged with administering).

333. *Sanchez v. Holder*, 757 F.3d 712, 720 (7th Cir. 2014) (remanding the case to the BIA because the BIA did not apply Mukasey's three-part procedure for identifying a crime involving moral turpitude); *Bobadilla v. Holder*, 679 F.3d 1052, 1057 (8th Cir. 2012) (acknowledging that the Attorney General may change the agency's interpretation of the statute as long as that interpretation is permissible).

334. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 570 (2010).

335. *Silva-Trevino*, 26 I. & N. Dec. 550, 553 (Op. Att'y Gen. 2015).

336. *See Moncrieffe*, 133 S. Ct. at 1682 (addressing deportability for "aggravated felony" convictions under 8 U.S.C. § 1227(a)(2)(A)(iii) (2012); *Carachuri-Rosendo*, 560 U.S. at 570 ("[T]he Government argues that Carachuri-Rosendo . . . has been 'convicted' of an 'aggravated felony' within the meaning of the INA.").

337. 8 U.S.C. § 1182(a)(2)(A)(i) (emphasis added).

338. *Id.* § 1227(a)(2)(A)(iii) (emphasis added).

339. *See id.*

fact-based inquiry would be contrary to the explicit terms of 8 U.S.C. § 1182(a)(2)(A)(i).<sup>340</sup> Thus, the BIA's adoption of Mukasey's procedure would be reasonable and not "arbitrary or capricious."<sup>341</sup>

Adoption of Mukasey's procedure by the BIA would be reasonable and not "arbitrary or capricious" because Mukasey considered all relevant factors in creating his procedure for identifying a crime involving moral turpitude.<sup>342</sup> Furthermore, recent Supreme Court precedent does not disturb the fact that the BIA's adoption of Mukasey's procedure would be reasonable and not "arbitrary and capricious."<sup>343</sup> Aside from adopting Mukasey's interpretation of the procedure for identifying a crime involving moral turpitude due to the ambiguity of the INA, Mukasey's consideration of all relevant factors, and the absence of conflicting Supreme Court decisions, there are practical reasons for the BIA to adopt Mukasey's procedure.<sup>344</sup>

## B. The Practical Benefits of Mukasey's Procedure

The current disparity among federal circuit courts in terms of the procedure for identifying a crime involving moral turpitude results in grave consequences for the alien population of the United States.<sup>345</sup> Adopting Mukasey's procedure would demystify the procedure for identifying crimes involving moral turpitude and would prevent manipulation within the criminal system.<sup>346</sup> Both of these externalities would result in an equitable solution.<sup>347</sup>

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340. See *id.* § 1182(a)(2)(A)(i); see also *supra* Subsection III.A.1.a (discussing why the moral-turpitude-inadmissibility provision seems to prompt a factual inquiry).

341. See *Moncrieffe*, 133 S. Ct. at 1682; *Carachuri-Rosendo*, 560 U.S. at 570.

342. See *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

343. See *Moncrieffe*, 133 S. Ct. at 1682; *Carachuri-Rosendo*, 560 U.S. at 570.

344. See *infra* Section III.B.

345. See Legomsky, *supra* note 162, at 513.

346. See *infra* Section III.B.

347. See *infra* Section III.B.

1. *Demystifying the Procedure for Identifying a Crime Involving Moral Turpitude*

The BIA should adopt Mukasey's procedure for identifying a crime involving moral turpitude because the approach would demystify the procedure for identifying a crime involving moral turpitude.<sup>348</sup> Mukasey's approach would demystify the procedure through the creation of a clear, uniform procedure.<sup>349</sup> This clear, uniform procedure would result in equitable externalities for aliens, including the application of the same standard of removability, a reduced risk of erroneous deportation, and more effective legal representation.<sup>350</sup>

a. The Clear, Uniform Procedure

The BIA's adoption of Mukasey's procedure would demystify the procedure for identifying a crime involving moral turpitude by creating a clear, uniform process.<sup>351</sup> Currently, an alien navigating through the immigration-court system for an alleged crime involving moral turpitude faces a labyrinth.<sup>352</sup> First, the alien must be familiar with both the categorical approach utilized by the BIA and the categorical approaches utilized by the various federal circuit courts.<sup>353</sup> While some aliens are able to discern the applicable categorical approach by investigating the procedure of the federal circuit court of their residence, incarcerated aliens may be transported and their immigration cases may be reassigned to different federal circuits based on prison-capacity levels.<sup>354</sup> This creates great uncertainty in terms of which categorical approach will

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348. See Silva-Trevino, 24 I. & N. Dec. 687, 704 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015) (describing Mukasey's three-part procedure).

349. See *infra* Subsection III.B.1.a.

350. See *infra* Subsection III.B.1.b.

351. See *Silva-Trevino*, 24 I. & N. Dec. at 694.

352. See *supra* Section II.C.

353. See, e.g., Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001) (applying the "least culpable conduct" test); Pino v. Nicolls, 215 F.2d 237, 245 (1st Cir. 1954) (applying the "common case" test), *rev'd on other grounds*, Pino v. Landon, 349 U.S. 901 (1955).

354. See *supra* Subsection II.A.1 (analyzing the various procedures used by the federal circuit courts in applying the categorical approach).

ultimately be applicable to the alien.<sup>355</sup> Second, even if an alien is familiar with the categorical approach utilized by the relevant federal circuit court, the alien will have to determine when, if ever, that federal circuit court utilizes the modified-categorical approach.<sup>356</sup> If the relevant federal circuit court does utilize the modified-categorical approach, then the alien will have to determine what evidence the federal circuit court considers within “the record of conviction.”<sup>357</sup> Third, the alien must be aware of whether the relevant circuit court would consider extrinsic evidence.<sup>358</sup> In stark contrast to the current maze of uncertainty that an alien must face in determining the applicable procedure for identifying a crime involving moral turpitude, Mukasey’s procedure establishes a clear standard.<sup>359</sup>

Mukasey’s three-part procedure greatly simplifies the procedure by creating a clear, uniform approach.<sup>360</sup> Under Mukasey’s approach, all courts apply the “realistic probability” categorical approach.<sup>361</sup> If the categorical approach does not resolve the issue of whether the alien committed a crime involving moral turpitude, then the courts apply the modified-categorical approach by investigating

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355. See *supra* Subsection II.A.1. In fact, in some cases, it is not clear which categorical approach the federal circuit courts are applying. See Dadhania, *supra* note 29, at 318. For example, in *Marciano v. Immigration & Naturalization Services*, the dissenting judge asserted that the case implicitly adopted the “common usage” test. 450 F.2d 1022, 1028 (8th Cir. 1971) (Eisele, J., dissenting).

356. See, e.g., *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) (applying the modified-categorical approach to “divisible” statutes); Sharpless, *supra* note 113, at 999 (stating that several “federal courts appear to sanction recourse to the record of conviction even when a statute is nondivisible”).

357. See, e.g., *Fajardo v. Att’y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (specifying that the record of conviction encompasses “the charging document, plea, verdict, and sentence”); *Daibo v. Att’y Gen.*, 265 F. App’x 56, 59 (3d Cir. 2008) (permitting the use of “the record of conviction, which includes the indictment, verdict, and sentence”); *Wala v. Mukasey*, 511 F.3d 102, 108 (2d Cir. 2007) (permitting the use of “the charging document, a plea agreement, a verdict or judgment of conviction, a record of the sentence, or a plea colloquy transcript” (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003))).

358. See, e.g., *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008) (explicitly permitting the use of evidence beyond both the charging records and the record of conviction); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1060 (9th Cir. 2006) (rejecting the use of charging papers); *Valansi v. Ashcroft*, 278 F.3d 203, 217-18 (3d Cir. 2002) (granting a petition for review, which implicitly granted an opportunity to investigate facts beyond the conviction record).

359. *Silva-Trevino*, 24 I. & N. Dec. 687, 704 (Op. Att’y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att’y Gen. 2015).

360. *Id.*

361. *Id.*



the record of conviction, which is limited to “documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript.”<sup>362</sup> Third, if neither the categorical approach nor the modified-categorical approach resolves the issue of whether the alien committed a crime involving moral turpitude, then the courts may look beyond the record of conviction.<sup>363</sup>

While the third step of Mukasey’s procedure leaves great discretion for courts in determining which factual evidence to use during the procedure, the third step is only reached if the question is not resolved in the first two steps.<sup>364</sup> Furthermore, the third step is limited by the factual findings and determinations of the criminal proceedings.<sup>365</sup> Even assuming *arguendo* that there is potential unfairness in investigating an alien’s crime beyond the record of conviction, as the Third Circuit argues,<sup>366</sup> the Attorney General and the BIA have the plenary power to make findings on all issues of immigration law under the INA.<sup>367</sup> Long-established Supreme Court precedent demonstrates that the plenary power of Congress often results in unjust, though permissible, consequences upon aliens.<sup>368</sup> Therefore, even if a factual inquiry into the alien’s crime is unfair, the plenary power of the Attorney General and the BIA on issues of immigration law under the INA permits such an inquiry.<sup>369</sup> In addition to establishing a clear, uniform procedure, the BIA’s

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362. *Id.* at 690.

363. *Id.* at 704.

364. *See id.*

365. *Id.* at 690.

366. *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 476 (3d Cir. 2009).

367. 8 U.S.C. § 1103(a)(1) (2012) (“[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.”); 8 C.F.R. § 1003.1(d)(1) (2015) (“The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it.”).

368. *See Yamataya v. Fisher*, 189 U.S. 86, 101-02 (1903) (holding that a deportation hearing of a non-English speaker in English meets the due-process requirement); *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (affirming a law requiring a white witness for purposes of obtaining a certificate of residence, which served as proof of legal residence in the United States); *Chae Chan Ping v. United States*, 130 U.S. 581, 609-10 (1889) (affirming a newly ratified law prohibiting the re-entry of Chinese immigrants into the United States despite the fact that it was legal for the Chinese immigrants to re-enter the United States at the time the Chinese immigrants departed the United States).

369. *See id.*; *see also Stumpf, supra* note 30, at 1572 (recognizing the high deference of the judiciary to Congress on immigration matters).

adoption of Mukasey's procedure would result in equitable externalities.<sup>370</sup>

b. The Equitable Externalities

The BIA's adoption of Mukasey's procedure for identifying a crime involving moral turpitude would result in equitable externalities for aliens, including the application of the same standard of removability, a reduced risk of erroneous deportation, and more effective legal representation.<sup>371</sup> First, two aliens who commit the same crime should not be subject to two different standards of removability.<sup>372</sup> The Supreme Court promotes uniformity in the application of federal law.<sup>373</sup> Uniform application of immigration law is particularly important because it provides a foundation for the protection of alien rights, projects the views of the United States on immigration to other nations, and illuminates how the United States will interact with individuals from other nations.<sup>374</sup> While creating a uniform approach to identifying a crime involving moral turpitude may not resolve all circuit splits on issues of immigration law, it would be a step in the right direction.<sup>375</sup>

Second, adopting Mukasey's procedure for identifying a crime involving moral turpitude would reduce the risk of erroneous deportation.<sup>376</sup> The current procedures of federal circuit courts result in aliens being deported for crimes that are not crimes involving moral turpitude.<sup>377</sup> On the other hand, the current procedures result in aliens avoiding deportation even though the crimes of those aliens are crimes involving moral turpitude.<sup>378</sup> Deportation has grave

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370. See *infra* Subsection III.B.1.b.

371. See *Silva-Trevino*, 24 I. & N. Dec. 687, 704 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

372. See *Dadhania*, *supra* note 29, at 346 (“The immigration consequences of criminal convictions should not depend on the jurisdiction in which the removal proceedings are initiated.”); *Sharpless*, *supra* note 113, at 993 (“Immigration law adjudicators aspire to employ a uniform and strictly ‘legal’ methodology for determining whether a noncitizen’s criminal conviction triggers removal.”).

373. See *Frost*, *supra* note 164, at 1579-80.

374. See *Rodríguez*, *supra* note 164, at 501.

375. See *Dadhania*, *supra* note 29, at 347 (identifying that accepting Mukasey’s “realistic probability” categorical standard would decrease disparity among federal circuit courts because the standard would align with the Supreme Court’s “realistic probability” categorical standard for aggravated felony removals).

376. *Silva-Trevino*, 24 I. & N. Dec. at 695.

377. *Id.*

378. *Id.*

consequences on aliens.<sup>379</sup> These consequences may include separation from friends and family, loss of employment, loss of property, loss of government benefits, loss of personal identity, and bars to reentering the United States.<sup>380</sup> Rather than permit aliens who commit crimes involving moral turpitude to remain in the United States due to loopholes in the law, while deporting aliens who do not commit crimes involving moral turpitude, immigration law should remain consistent with the unambiguous intent of Congress to deport aliens who commit crimes involving moral turpitude.<sup>381</sup>

Third, the adoption of Mukasey's procedure would result in more effective legal representation for aliens.<sup>382</sup> Rather than forcing the alien to rely solely on precedent or on the record of conviction, which the alien is likely not capable of analyzing effectively, Mukasey's procedure for identifying a crime involving moral turpitude would allow the alien to introduce factual evidence to prove that the alien did not commit a crime involving moral turpitude.<sup>383</sup> Despite the Third Circuit's concerns regarding practical difficulties and potential unfairness of investigating an alien's crime beyond the record of conviction,<sup>384</sup> Mukasey stipulated that the consideration of evidence beyond the conviction record is constrained by the factual findings and determinations of the criminal court.<sup>385</sup> Furthermore, in terms of the administrative burden that may arise from the consideration of evidence beyond the conviction record, the agency, not the federal circuit court, is best positioned to determine the allocation of available time and resources for the prosecution of crimes under the INA.<sup>386</sup> Next, even if aliens do obtain legal representation in an immigration proceeding, the varying standards may interfere with the defense council's duty to inform the client of potential deportation consequences of pleading guilty to an alleged crime.<sup>387</sup> In addition to demystifying the procedure for investigating a crime involving moral turpitude, which

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379. See Legomsky, *supra* note 162, at 513.

380. *Id.*

381. See 8 U.S.C. § 1182(a)(2)(A)(i) (2012).

382. See Taylor & Wright, *supra* note 162, at 1141.

383. See Silva-Trevino, 24 I. & N. Dec. 687, 704 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

384. Jean-Louis v. Att'y Gen., 582 F.3d 462, 478-79 (3d Cir. 2009).

385. *Silva-Trevino*, 24 I. & N. Dec. at 690.

386. *Ali v. Mukasey*, 521 F.3d 737, 741 (7th Cir. 2008) (“[H]ow much time the agency wants to devote to the resolution of particular issues is, we should suppose, a question for the agency itself rather than the judiciary.”).

387. See *Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010).

results in significant equitable factors, Mukasey's approach would prevent manipulation in criminal proceedings.<sup>388</sup>

## 2. *Avoiding Manipulation in Criminal Proceedings*

The varying approaches of federal circuit courts for identifying a crime involving moral turpitude provide a strong incentive for prosecutors in criminal court to leverage an alien's potential removability in plea negotiations.<sup>389</sup> Since the Rejecting Circuits prohibit an inquiry into the facts of a crime, the prosecutor may have the discretion, depending on the alien's conduct leading up to the charge, to pursue a conviction under a statute that solely encompasses crimes involving moral turpitude.<sup>390</sup> If an alien is convicted under such a statute, then the alien would likely be deported because a majority of federal circuit courts currently rely on circuit precedent to apply the "least culpable conduct test."<sup>391</sup> While not all criminal prosecutors have adverse incentives against aliens, it is clear that some prosecutors leverage their discretion in order to deport aliens who are viewed unfavorably by either the prosecutor or society.<sup>392</sup> Furthermore, knowledgeable of the alien's vulnerability to deportation due to the rejection of the fact-based approach by a majority of federal circuit courts, a criminal prosecutor may pursue a higher criminal sanction during criminal plea negotiations than the criminal prosecutor would otherwise.<sup>393</sup> To eliminate bias and promote equal bargaining power during criminal plea negotiations, the BIA should adopt Mukasey's three-part procedure for identifying a crime involving moral turpitude.<sup>394</sup>

The text of the INA and the legislative history of the INA are ambiguous on the proper procedure for identifying a crime involving

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388. See *infra* Subsection III.B.2.

389. See Eagly, *supra* note 175, at 1351 (acknowledging that criminal prosecutors have "the discretion to determine the type and severity of the criminal charge that triggers the removal").

390. See *id.* at 1299-300, 1354.

391. See *supra* Section II.A.

392. See Eagly, *supra* note 175, at 1300-03, 1354 (analyzing prosecutions where immigration law granted aliens the legal right to remain in the United States, and the criminal law intervened to deport all those who were targeted by criminal prosecutors).

393. *Id.* at 1354.

394. See Silva-Trevino, 24 I. & N. Dec. 687, 704 (Op. Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Op. Att'y Gen. 2015).

moral turpitude.<sup>395</sup> Furthermore, the BIA's adoption of Mukasey's procedure would be reasonable, not arbitrary and capricious,<sup>396</sup> and equitable.<sup>397</sup> Thus, the BIA should adopt Mukasey's procedure for identifying a crime involving moral turpitude.<sup>398</sup>

#### CONCLUSION

The various procedures of federal circuit courts for identifying a crime involving moral turpitude have great consequences on the alien population in the United States.<sup>399</sup> Since the rejection of Mukasey's procedure for identifying a crime involving moral turpitude (1) promotes the disparate treatment of aliens; and (2) results in ineffective federal circuit court procedures that permit aliens to escape deportation despite committing crimes involving moral turpitude, the BIA should adopt Mukasey's procedure.<sup>400</sup> The BIA's adoption of Mukasey's three-part procedure for identifying a crime involving moral turpitude would (1) be consistent with traditional agency deference; (2) demystify the procedure of identifying crimes involving moral turpitude through the creation of a universal approach; and (3) avoid manipulations within the criminal system with respect to conviction records.<sup>401</sup> While Mukasey's procedure would not cure all procedural issues in identifying a crime involving moral turpitude, it would draw the BIA and federal circuit courts one step closer to overcoming the immigration-law labyrinth.<sup>402</sup>

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395. See *supra* Subsections III.A.1-2.

396. See *supra* Subsection III.A.3.

397. See *Silva-Trevino*, 24 I. & N. Dec. at 704.

398. See *id.*

399. See Legomsky, *supra* note 162, at 513.

400. See *supra* Part III.

401. See *supra* Part III.

402. See *Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977).



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