



# Removing Aliens from the United States: Judicial Review of Removal Orders

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September 25, 2009

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

RL34444

## Summary

Aliens may be removed from the United States for a variety of reasons, such as having entered the country unlawfully, overstaying a visa, or committing a crime. Prior to removal, however, aliens usually have access to a removal hearing or some other form of adjudication that determines whether they are subject to removal. Although judicial review by a federal court of appeals of a removal order is generally available, Congress has determined that review by the federal courts will not be available with respect to certain types of removals, such as expedited removal orders, crime-related removals, discretionary determinations, and matters involving prosecutorial discretion.

Jurisdictional issues related to removal are further complicated because of the constitutional requirement that some adequate substitute for habeas corpus be available for all removal orders. In order to satisfy this requirement, Congress specifically preserved the jurisdiction of the courts of appeals to review constitutional claims and questions of law for all removals, even those arising from types of claims in which judicial review is generally barred.

This report analyzes the jurisdictional issues in the Immigration and Nationality Act (INA) by focusing on the procedural mechanisms used to initiate judicial review and the reach of an Article III court's jurisdiction to review a removal order. Discussion concerning the procedures underlying removal hearings and administrative review is limited to their relation to judicial review and will not be discussed separately.

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## Introduction

Aliens may be removed from the United States for a variety of reasons, such as having entered the country unlawfully, overstaying a visa, or committing a crime. Prior to removal, however, aliens usually have access to a removal hearing or some other form of adjudication to determine whether they are subject to removal. If the removal hearing results in an order to remove an alien from the country, the alien may have recourse to seek administrative review of the removal order. If, after administrative review, the removal order becomes administratively final, further judicial review by an Article III court may be available. However, even though judicial review of administratively final removal orders is generally available, there are many exceptions to this rule, which depend on the facts and circumstances of the removal.

This report analyzes jurisdictional issues by focusing on the procedural mechanisms used to initiate judicial review and the reach of an Article III court's jurisdiction to review a removal order. Discussion concerning the procedures underlying removal hearings and administrative review is limited to their relation to judicial review and will not be discussed separately.

## General Procedural Framework for Judicial Review

### History

Prior to the enactment of the Immigration and Nationality Act (INA) in 1952, federal district courts reviewed removal cases via the federal writ of habeas corpus, which is a procedural mechanism that allows federal district courts to review the legality of a person's detention.<sup>1</sup> After the passage of the INA, the Supreme Court held that judicial review could be obtained by seeking declaratory judgment or injunctive relief under the Administrative Procedure Act (APA), which begins the judicial review process in the federal district courts.<sup>2</sup> Subsequently, in 1961, Congress replaced APA review of deportation orders with the "petition for review" offered by the Hobbs Act, a preexisting law that expedites judicial review by bypassing the district courts and placing review directly in the federal courts of appeals. The Antiterrorist and Effective Death Penalty Act (AEDPA), enacted in 1996, re-codified the petition for review mechanism in INA § 242.<sup>3</sup>

### Hobbs Act

The INA is the primary source for the bulk of the federal immigration laws, including the substantive law involving the removal of aliens from the United States. However, when outlining the procedural framework for the judicial review of removal orders, the INA adopts the procedures found in Chapter 158 of Title 28 of the U.S. Code, also known as the Hobbs Act.<sup>4</sup> The Hobbs Act, which governs the judicial review of a select group of administrative proceedings,

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<sup>1</sup> See generally, Henry Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harvard L. Rev. 1362, 1389-1396 (1953).

<sup>2</sup> *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

<sup>3</sup> See P.L. 104-132, 110 Stat. 1214 (1996).

<sup>4</sup> INA § 242(a)(1) (codified at 8 U.S.C. § 1252(a)(1)) ("Judicial review of a final order of removal ... is governed only by chapter 158 of title 28 of the United States Code ...").

gives exclusive jurisdiction to review all final administrative orders under its purview to the federal courts of appeals.<sup>5</sup> This effectively channels most judicial review of removal orders to the courts of appeals and bypasses review by the federal district courts.<sup>6</sup> The treatment of removal orders, however, largely differs from other administrative orders under the Hobbs Act because the INA subjects removal orders to additional procedures and rules.<sup>7</sup> One significant departure from the Hobbs Act is that the INA expressly forbids the court of appeals to take additional evidence even if it finds the new evidence material to the case and that there were reasonable grounds for failure to present the evidence before the agency.<sup>8</sup> Other differences include deadlines, choice of venue, and other procedural rules.<sup>9</sup>

## The Petition for Review

The principal vehicle for judicial review is a *petition for review*, which must be filed in the circuit in which the removal hearing was held.<sup>10</sup> Before a petition for review can be filed, an alien must first exhaust all administrative remedies that are available as of right.<sup>11</sup> Moreover, the principles of *res judicata*<sup>12</sup> and *collateral estoppel*<sup>13</sup> can bar the petition for review if the validity of the removal order was established in a prior judicial proceeding.<sup>14</sup> This bar to review can be overcome only if the petitioned court finds new grounds that could not have been presented in the prior proceeding or that the remedy provided by the prior proceeding was inadequate to test the validity of the removal order.<sup>15</sup>

Assuming the available administrative remedies have been exhausted and the review is not barred by *res judicata* or *collateral estoppel*, the petition for review must then be filed no later than 30 days after the date on which the removal order becomes administratively final.<sup>16</sup> The petition must also be served on the U.S. Attorney General, who is the respondent in this cause of action, and on “an officer or employee of the Service in charge of the Service district in which the final order of removal was entered,” which usually means the Immigration and Customs Enforcement (ICE) official in charge of detention and removal in the area where the order was made final.<sup>17</sup>

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<sup>5</sup> 28 U.S.C. § 2342.

<sup>6</sup> Although the Hobbs Act gives the federal court of appeals exclusive jurisdiction to review removal orders, aliens can still challenge some aspects of their removal in federal district court via a *habeas corpus* proceeding. See *infra* “Habeas Corpus” section.

<sup>7</sup> INA § 242(a)(1) (codified at 8 U.S.C. § 1252(a)(1)).

<sup>8</sup> *Id.*

<sup>9</sup> See INA § 242(b) (codified at 8 U.S.C. § 1252(b)).

<sup>10</sup> INA § 242(b)(2) (codified at 8 U.S.C. § 1252(b)(2)).

<sup>11</sup> INA § 242(d)(1) (codified at 8 U.S.C. § 1252(d)(1)).

<sup>12</sup> “A ... defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.” Black’s Law Dictionary 1312 (7<sup>th</sup> ed. 1999). See also Restatement (Second) of Judgments §§ 17, 24 (1982).

<sup>13</sup> “A ... defense barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.” Black’s Law Dictionary 256 (7<sup>th</sup> ed. 1999).

<sup>14</sup> INA § 242(d)(2) (codified at 8 U.S.C. § 1252(d)(2)).

<sup>15</sup> *Id.*

<sup>16</sup> INA § 242(b)(1) (codified at 8 U.S.C. § 1252(b)(1)).

<sup>17</sup> INA § 242(b)(3)(A) (codified at 8 U.S.C. § 1252(b)(3)(A)).

After the petition for review is filed, an alien's brief to the federal court of appeals in support of his petition must be filed within 40 days after the administrative record becomes available; a reply brief must be served within 14 days of service of the Attorney General's brief.<sup>18</sup> The deadlines may not be extended except upon motion for good cause shown.<sup>19</sup> Failure to file a brief within the deadline will result in the court dismissing the appeal unless a manifest injustice would result.<sup>20</sup> The Attorney General, on the other hand, has no statutory deadline to file his brief, but instead relies on a deadline established by a rule of the court.<sup>21</sup>

## Stay of Removal

An alien's removal is not automatically stayed when he files a petition for review.<sup>22</sup> Rather, the alien must file a separate motion asking the court to order a stay.<sup>23</sup> As a matter of practice, aliens typically couple their petition for review with motions for stays of removal pending decision. At least one circuit, the Ninth, upon receipt of the motion, will grant a temporary stay until it rules on the motion.<sup>24</sup>

Historically, the substantive standard used to determine whether a court would grant a stay varied by circuit. The Ninth Circuit, for example, would grant a stay of removal if the alien showed "either (1) a probability of success on the merits and the possibility of irreparable injury or (2) that serious legal questions [were] raised and the balance of hardships [tipped] sharply in the petitioner's favor."<sup>25</sup> The First, Second, Third, Fifth, Sixth, and Seventh Circuits followed this approach.<sup>26</sup> The Eleventh Circuit, on the other hand, rejected this approach, instead requiring an alien to present clear and convincing evidence that the Board of Immigration Appeals' (BIA) decision to remove him was prohibited as a matter of law before granting a stay.<sup>27</sup> The Eleventh Circuit based this holding on § 1252 of the Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA), which stated that "no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law."<sup>28</sup> Based on this language, the Eleventh Circuit held that "the plain language of 'enjoin[ing] removal of an alien' in Section 1252(f)(2) encompasses the act of staying of removal."<sup>29</sup>

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<sup>18</sup> INA § 242(b)(3)(C) (codified at 8 U.S.C. § 1252(b)(3)(C)).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> INA § 242(b)(3)(B) (codified at 8 U.S.C. § 1252(b)(3)(B)).

<sup>23</sup> *Id.*

<sup>24</sup> *De Leon v. INS*, 115 F.3d 643, 644 (9<sup>th</sup> Cir. 1997).

<sup>25</sup> *Andreu v. Ashcroft*, 253 F.3d 477, 483 (9<sup>th</sup> Cir. 2001) (en banc).

<sup>26</sup> *See Bejjani v. INS*, 271 F.3d 670, 687-689 (6<sup>th</sup> Cir. 2001); *Mohammed v. Reno*, 309 F.3d 95, 99-100 (2<sup>d</sup> Cir. 2002); *Arevalo v. Ashcroft*, 344 F.3d 1, 8-9 (1<sup>st</sup> Cir. 2003); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3<sup>d</sup> Cir. 2004); *Hor v. Gonzales*, 400 F.3d 482, 485 (7<sup>th</sup> Cir. 2005); *Tesfamichael v. Gonzales*, 411 F.3d 169 (5<sup>th</sup> Cir. 2005).

<sup>27</sup> *Weng v. U.S. Attorney General*, 287 F.3d 1335 (11<sup>th</sup> Cir. 2002).

<sup>28</sup> IRIRA § 1252(f)(2).

<sup>29</sup> *Weng*, 287 F.3d at 1337-1338.

In 2009, the Supreme Court resolved this circuit split in *Nken v. Holder*, where it held that § 1252 did not apply to stays of removal.<sup>30</sup> Rather, the Court held that when determining whether to grant a stay of removal, federal courts must use the “traditional standard for a stay,” which involves weighing four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”<sup>31</sup> The Court reasoned that the traditional standard applied because § 1252 referred only to injunctions, which the Court concluded were, while similar, still distinct from stays because injunctions apply to individuals, while stays apply to the judicial proceeding itself.<sup>32</sup> Furthermore, the Court stated that when, in the past, Congress wanted to write legislation affecting the granting of stays, it would use the word “stay.” Thus, according to the Court, the absence of that word in § 1252 strongly suggested that stays were not meant to be covered.<sup>33</sup> However, although the provision was held not to affect stays of removal, the Supreme Court cautioned that a “court asked to stay removal cannot simply assume that ‘[o]rordinarily, the balance of hardships weighs heavily in the applicant’s favor.’”<sup>34</sup> Indeed, a concurring opinion goes so far as to assert that under the standard adopted by the majority opinion, “courts should not grant stays of removal on a routine basis.”<sup>35</sup>

## Standard of Review

If the petition for review overcomes the threshold procedural barriers, the federal court of appeals reviewing the case will base its decision on the merits on the findings of fact in the administrative record.<sup>36</sup> Furthermore, the administrative findings of fact are conclusive unless a “reasonable adjudicator would be compelled to conclude to the contrary.”<sup>37</sup> The federal courts of appeals appear to have interpreted this language to mean that the “substantial evidence” test should be used when reviewing administrative findings of fact.<sup>38</sup> The “substantial evidence” test is the standard of review the courts of appeal use when reviewing findings of fact made in other forms of formal administrative adjudications.<sup>39</sup> This deferential standard of review is meant only to assess the reasonableness of the agency fact-finding rather than its veracity; the inquiry is whether there is “such evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>40</sup> Although this standard is deferential and assumes the facts on the record are correct, it still

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<sup>30</sup> 556 U.S. \_\_\_\_ (2009), No. 08-681 at 6 (April 22, 2009, slip. op.).

<sup>31</sup> *Id.* at 14.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.* at 2 (J. Kennedy, concurring).

<sup>36</sup> INA § 242(b)(4)(A) (codified at 8 U.S.C. § 1252(b)(4)(A)).

<sup>37</sup> INA § 242(b)(4)(B) (codified at 8 U.S.C. § 1252(b)(4)(B)).

<sup>38</sup> *See, e.g.,* Ahmed v. Keisler, 504 F.3d 1183, 1191 (9<sup>th</sup> Cir. 2007) (reviewing for substantial evidence a decision that an applicant is not eligible for asylum, withholding of removal, or protection under the Convention Against Torture); Singh v. Ashcroft, 398 F.3d 396, 400 (6<sup>th</sup> Cir. 2005) (“We review administrative findings of fact, such as whether an alien qualifies as a refugee, under the substantial evidence standard ...”); Mendes v. INS, 197 F.3d 6, 13 (1<sup>st</sup> Cir. 1999) (“We review findings of fact and credibility by the BIA under a ‘deferential substantial evidence standard.’”); Balasubramaniam v. INS, 143 F.3d 157, 161 (3<sup>d</sup> Cir. 1998). *See also* H.Rept. 109-72, at 175-176 (2005) (Conf. Rep.) (equating the standard found in INA § 242(b)(4)(B) with the “substantial evidence” standard).

<sup>39</sup> 5 U.S.C. § 706(2)(E).

<sup>40</sup> Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

obligates the courts of appeals to consider the whole record, including the evidence that would detract from the agency's decision.<sup>41</sup> Evidence that a court of appeals must consider when reviewing an agency's decision includes the determination made by the Administrative Law Judge (ALJ),<sup>42</sup> even if the agency rejects the ALJ's findings.<sup>43</sup>

## Jurisdictional Bars on Judicial Review

### Judicial Review Generally Available

Judicial review of removal orders is generally available under the parameters of the Hobbs Act by a petition of review.<sup>44</sup> This general rule, however, is subject to numerous jurisdictional bars which can be triggered depending on the circumstances surrounding an alien's case. INA § 242(a)(2) enumerates the substantive grounds that bar the judicial review of removal orders: expedited removal orders, denials of discretionary relief, orders against criminal aliens, and matters involving prosecutorial discretion. Moreover, INA § 236 has a provision barring review of an alien's mandatory detention during a pending removal proceeding.

### Expedited Removal Orders

INA § 235(b) provides a set of expedited removal procedures that can be used to remove aliens arriving at the borders of the United States, whom immigration inspectors believe to be inadmissible because of fraud or for not possessing valid documents.<sup>45</sup> If an alien claims asylum after being determined to be inadmissible, he is sent to an asylum officer who, if he makes an adverse credibility determination, shall order the alien removed without further review.<sup>46</sup>

INA § 235(b) expedited removal orders are generally barred from judicial review.<sup>47</sup> The statute specifically bars: all claims arising from or relating to the implementation of an INA § 235(b) expedited removal order;<sup>48</sup> challenges to a decision by the Attorney General to invoke INA § 235(b) expedited removal, which includes the reasons the decision was made;<sup>49</sup> challenges to the actual use of INA § 235(b) expedited removal on an alien, including expedited removals of aliens

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<sup>41</sup> *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 464-465 (1951).

<sup>42</sup> Like ALJs, Immigration Judges (IJs) are subject to the "substantial evidence" standard. *See, e.g., Ahmed*, 504 F.3d 1191 (applying the "substantial evidence" standard when reviewing an IJ's determination of an applicant's ineligibility for asylum).

<sup>43</sup> *Universal Camera Corp.*, 340 U.S. at 493-494.

<sup>44</sup> INA § 242(a).

<sup>45</sup> INA § 235(b)(1) (codified at 8 U.S.C. § 1225(b)(1)). *See also* INA § 212(a)(6)(C) (codified at 8 U.S.C. § 1182(a)(6)(C)) (aliens inadmissible for misrepresentation or falsely claiming citizenship); INA § 212(a)(7) (codified at 8 U.S.C. § 1182(a)(7)) (alien inadmissible for not possessing valid visas, passports, or other immigration documents). The Attorney General, at his discretion, may also use expedited removal on an alien who has not been admitted or paroled into the United States and cannot show two years of continuous physical presence within the country. In practice, this discretion is rarely used. INA § 235(b)(1)(A)(iii) (codified at 8 U.S.C. § 1225(b)(1)(A)(iii)).

<sup>46</sup> INA § 235(b)(1)(B)(iii)(I).

<sup>47</sup> *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 818-819 (9<sup>th</sup> Cir. 2004).

<sup>48</sup> INA § 242(a)(2)(A)(i) (codified at 8 U.S.C. § 1252(a)(2)(A)(i)).

<sup>49</sup> INA § 242(a)(2)(A)(ii) (codified at 8 U.S.C. § 1252(a)(2)(A)(ii)).

found subject to expedited removal even when found in the interior of the country,<sup>50</sup> and challenges to the procedures and policies adopted by the Attorney General to implement INA § 235(b) expedited removal.<sup>51</sup> No courts, including the courts of appeals, can issue declaratory, injunctive, or other forms of equitable relief pertaining to an INA § 235(b) expedited removal order;<sup>52</sup> nor can they certify a class in an action challenging an INA § 235(b) expedited removal order.<sup>53</sup>

Notwithstanding this bar, several aspects of an INA § 235(b) expedited removal order can still be reviewed through habeas corpus. Habeas review is limited to determinations as to whether (1) the habeas petitioner is an alien; (2) he is the actual person named in the order; (3) he is lawfully admitted for permanent residence; (4) he has refugee status; or (5) he has been granted asylum.<sup>54</sup> Furthermore, challenges to the constitutionality of the law authorizing INA § 235(b) expedited removal or of regulations promulgated to implement INA § 235(b) expedited removals and challenges as to whether the regulations are inconsistent with or in violation of the law are also available, but can be heard only by the United States District Court for the District of Columbia.<sup>55</sup> The deadline to challenge the law or regulation is 60 days after the challenged law or regulation is first implemented.<sup>56</sup>

## Denials of Discretionary Relief

Under the INA, the Attorney General has discretion to grant various forms of relief from removal. The denial of such discretionary relief, however, is usually not subject to judicial review.<sup>57</sup> The INA specifically precludes from judicial review denials of the following forms of discretionary relief:

- waiver of inadmissibility based on (1) a crime of moral turpitude conviction; (2) multiple criminal convictions; (3) engaging in or procuring individuals for prostitution; (4) a marijuana possession conviction; or (5) immunity from prosecution after committing a serious criminal offense;<sup>58</sup>
- waiver of inadmissibility based on fraud or misrepresentation of a material fact when seeking either admission or documentation for admission into the United States;<sup>59</sup>
- cancellation of removal for permanent resident aliens;<sup>60</sup>

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<sup>50</sup> INA § 242(a)(2)(A)(iii) (codified at 8 U.S.C. § 1252(a)(2)(A)(iii)).

<sup>51</sup> INA § 242(a)(2)(A)(iv) (codified at 8 U.S.C. § 1252(a)(2)(A)(iv)).

<sup>52</sup> INA § 242(e)(1)(A) (codified at 8 U.S.C. § 1252(e)(1)(A)).

<sup>53</sup> INA § 242(e)(1)(B) (codified at 8 U.S.C. § 1252(e)(1)(B)).

<sup>54</sup> INA § 242(e)(2) (codified at 8 U.S.C. § 1252(e)(2)).

<sup>55</sup> INA § 242(e)(3) (codified at 8 U.S.C. § 1252(e)(3)). *See also* American Immigration Lawyers Association v. Reno, 18 F. Supp.2d 38 (D.C.C. 1998) (rejecting several types of constitutional and other legal challenges to INA § 235(b)).

<sup>56</sup> INA § 242(e)(3)(B) (codified at 8 U.S.C. § 1252(e)(3)(B)).

<sup>57</sup> INA § 242(a)(2)(B) (codified at 8 U.S.C. § 1252(a)(2)(B)).

<sup>58</sup> *See* INA § 212(h) (codified at 8 U.S.C. § 1182(h)).

<sup>59</sup> *See* INA § 212(i) (codified at 8 U.S.C. § 1182(i)).

<sup>60</sup> *See* INA § 240A (codified at 8 U.S.C. § 1229b).

- cancellation of removal and adjustment of status for certain nonpermanent resident aliens;<sup>61</sup>
- voluntary departure;<sup>62</sup> and
- adjustment of status of nonimmigrants to legal permanent resident status.<sup>63</sup>

Although judicial review of discretionary decisions is foreclosed, it appears that the federal courts of appeals have concluded that non-discretionary issues of law or fact that may arise out of these decisions may be reviewed.<sup>64</sup>

Another statutory provision also precludes from judicial review all other forms of discretionary relief related to inadmissibility or removal, with the exception of asylum.<sup>65</sup> Thus, this provision seems to exclude from judicial review:

- revocation of visa petition;<sup>66</sup>
- refugee admissions;<sup>67</sup>
- adjustment of status of refugees;<sup>68</sup>
- detention pending removal of arriving noncitizens;<sup>69</sup>
- changes of nonimmigrant status;<sup>70</sup> and
- record of lawful admission.<sup>71</sup>

However, this provision does not exclude other matters such as citizenship.<sup>72</sup>

Despite this provision's broad exclusion of discretionary decisions from judicial review, a court has held that only decisions that are entirely discretionary are barred from review.<sup>73</sup> Discretionary

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<sup>61</sup> *Id.*

<sup>62</sup> See INA § 240B (codified at 8 U.S.C. § 1229c).

<sup>63</sup> See INA § 245 (codified at 8 U.S.C. § 1255).

<sup>64</sup> *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9<sup>th</sup> Cir. 2003) (holding there was jurisdiction to review non-discretionary question whether an adult daughter qualified as a *child* for purposes of the exceptional and extremely unusual hardship requirement); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7<sup>th</sup> Cir. 2004) (holding that the meaning of the term *continuous physical presence* is a non-discretionary question and falls outside of the jurisdiction-stripping provision); *Mireles-Valez v. Ashcroft*, 349 F.3d 213, 216 (5<sup>th</sup> Cir. 2003) (holding that there was jurisdiction to review non-discretionary issue regarding the meaning of *continuous physical presence*); *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8<sup>th</sup> Cir. 2005) (holding that there was jurisdiction to review non-discretionary issues concerning the meaning of *continuous physical presence*).

<sup>65</sup> INA § 242(a)(2)(B)(ii) (codified at 8 U.S.C. § 1252(a)(2)(B)(ii)). This provision excludes from judicial review all forms of discretionary relief found in Title II of the INA. Title II predominantly contains statutes regarding inadmissibility and removal, but also some criminal provisions as well.

<sup>66</sup> See INA § 205 (codified at 8 U.S.C. § 1155).

<sup>67</sup> INA § 207(c) (codified at 8 U.S.C. § 1157(c)).

<sup>68</sup> INA § 209(b) (codified at 8 U.S.C. § 1159(b)).

<sup>69</sup> INA § 236(a), (c)(2) (codified at 8 U.S.C. § 1226(a), (c)(2)). See also INA § 236(e) (codified at 8 U.S.C. § 1226(e)) (excluding discretionary decisions made by the Attorney General under Section 236 from judicial review).

<sup>70</sup> INA § 248 (codified at 8 U.S.C. § 1258).

<sup>71</sup> INA § 249 (codified at 8 U.S.C. § 1259).

<sup>72</sup> *Id.* See also INA tit. III.

decisions that also require the application of legal standards are still open to review.<sup>74</sup> This approach is in accord with a provision in the INA specifically allowing the review of constitutional claims and questions of law that arise from cases generally barred from review.<sup>75</sup>

The federal courts of appeals appear split over whether discretionary decisions authorized by regulation rather than statute remain subject to judicial review. Some courts have ruled that decisions made pursuant to discretionary authority conferred by regulations are subject to judicial review.<sup>76</sup> Other courts, on the other hand, bar review of discretionary decisions made under powers conferred by regulations implementing INA Title II statutes.<sup>77</sup>

## Orders Against Criminal Aliens

Aliens who commit certain criminal acts while within the United States are removable.<sup>78</sup> Many of the criminal offenses that warrant removal also trigger a jurisdictional bar from judicial review.<sup>79</sup> These crime-related grounds are:

- two or more crime of moral turpitude convictions punishable by sentences of one year or longer;<sup>80</sup>
- aggravated felonies;<sup>81</sup>
- controlled substances offenses other than marijuana possession for one's own use;<sup>82</sup>
- firearm offenses;<sup>83</sup> or
- miscellaneous crimes related to espionage, sabotage, treason and sedition, threats against the President, military expedition against a friendly nation, violation of the Military Selective Service Act or Trading With The Enemy Act, immigration document fraud, or importation of an alien for an immoral purpose.<sup>84</sup>

Although there is a provision barring judicial review of removal orders based on crime-related grounds, in actuality, questions of law related to the order remain open to review. For example, if the crime-related ground for removal is an aggravated felony conviction, an appellate court may

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(...continued)

<sup>73</sup> *Nakomoto v. Ashcroft*, 363 F.3d 874, 880 (9<sup>th</sup> Cir. 2004).

<sup>74</sup> *Id.* at 881 (“We do, however, retain jurisdiction to review the Attorney General’s decisions, where his or her exercise of discretion is guided by the application of legal standards to the facts in question.”).

<sup>75</sup> INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

<sup>76</sup> *See, e.g., Medina-Morales v. Ashcroft*, 362 F.3d 1263, 1270 (9<sup>th</sup> Cir. 2004); *Yu Zhao v. Gonzales*, 404 F.3d 295, 303 (5<sup>th</sup> Cir. 2005); *Singh v. Gonzales*, 404 F.3d 1024, 1026-1027 (7<sup>th</sup> Cir. 2005).

<sup>77</sup> *See, e.g., Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8<sup>th</sup> Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10<sup>th</sup> Cir. 2004).

<sup>78</sup> INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), (D) (codified at 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), (D)).

<sup>79</sup> INA § 242(a)(2)(C) (codified at 8 U.S.C. § 1252(a)(2)(C)).

<sup>80</sup> INA § 237(a)(2)(A)(ii) (codified at 8 U.S.C. § 1227(a)(2)(A)(ii)).

<sup>81</sup> INA § 237(a)(2)(A)(iii) (codified at 8 U.S.C. § 1227(a)(2)(A)(iii)).

<sup>82</sup> INA § 237(a)(2)(B) (codified at 8 U.S.C. § 1227(a)(2)(B)).

<sup>83</sup> INA § 237(a)(2)(C) (codified at 8 U.S.C. § 1227(a)(2)(C)).

<sup>84</sup> INA § 237(a)(2)(D) (codified at 8 U.S.C. § 1227(a)(2)(D)).

review the immigration court's determination of whether the crime in question constituted an aggravated felony.<sup>85</sup> Similarly, a court has also ruled that it has jurisdiction to review the determination whether an offense constitutes a crime of moral turpitude.<sup>86</sup> Courts have also indicated that they retain jurisdiction to review constitutional issues arising out of crime-related removal orders.<sup>87</sup> Congress also appears to have codified this holding by enacting a statutory provision that preserves judicial review of "constitutional claims or questions of law raised upon a petition for review."<sup>88</sup>

## Prosecutorial Discretion

INA § 242(g) expressly states that no court has "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision ... to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."<sup>89</sup> The Supreme Court appears to assume that this provision was meant to prevent prosecutorial decisions to pursue a removal from being judicially reviewed.<sup>90</sup> According to the Court, this would stop unmeritorious challenges to decisions denying discretionary relief, thus curtailing undue delay of removals.<sup>91</sup> In other words, this provision is "specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings."<sup>92</sup> Specifically, this provision was meant to obviate challenges to prosecutorial decisions to proceed with a removal even when certain humanitarian reasons exist that could have provided grounds to defer removal proceedings.<sup>93</sup> This purpose is also served by precluding review of non-discretionary determinations related to prosecutorial discretion, which would otherwise not be covered by the general jurisdictional bar of discretionary relief found in INA § 242(a)(2)(B).

## Detention Decisions

Notwithstanding some exceptions, administrative officials have the discretion to detain an alien while his removal from the United States is pending.<sup>94</sup> Moreover, "[n]o court may set aside any action or decision ... under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."<sup>95</sup> Although this provision purports to bar courts from setting aside "any action or decision" regarding detention, the Supreme Court has held that a

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<sup>85</sup> See, e.g., *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2<sup>d</sup> Cir. 2001); *Drakes v. Zimski*, 240 F.3d 246 (3<sup>d</sup> Cir. 2001); *Lewis v. INS*, 194 F.3d 539 (4<sup>th</sup> Cir. 1999); *Nehme v. INS*, 252 F.3d 415 (5<sup>th</sup> Cir. 2001); *Guerrero-Perez v. INS*, 242 F.3d 727 (7<sup>th</sup> Cir. 2001); *Penuliar v. Ashcroft*, 395 F.3d 1037, 1040 (9<sup>th</sup> Cir. 2005). See also *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (exercising jurisdiction to determine whether a state DUI offense without a *mens rea* element constituted an aggravated felony for deportation purposes).

<sup>86</sup> *Carty v. Ashcroft*, 395 F.3d 1081, 1082-1083 (9<sup>th</sup> Cir. 2005).

<sup>87</sup> See, e.g., *Calcano-Martinez v. INS*, 533 U.S. 348, 350 n.2 (2001).

<sup>88</sup> INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)). This codification was enacted by the REAL ID Act of 2005, P.L. 109-13, 119 Stat. 231 (May 11, 2005).

<sup>89</sup> INA § 242(g) (codified at 8 U.S.C. § 1252(g)).

<sup>90</sup> *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-485 (1999).

<sup>91</sup> *Id.* at 485.

<sup>92</sup> *Id.* at 487.

<sup>93</sup> *Id.* at 485.

<sup>94</sup> INA § 236(a) (codified at 8 U.S.C. § 1226(a)).

<sup>95</sup> INA § 236(e) (codified at 8 U.S.C. § 1226(e)).

federal habeas corpus action, challenging the constitutional validity of a provision mandating the detention of a criminal alien while his removal is pending, was not barred.<sup>96</sup> This was because “where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress’ intent,” a statement which this particular jurisdiction-stripping provision lacked.<sup>97</sup> Thus, it appears that at a minimum, habeas review may still be available when the claim challenges the constitutionality of the detention. Although the REAL ID Act<sup>98</sup> substantively diminished the availability of habeas review for removal orders, it does not appear to have affected the availability of habeas review with respect to challenging the legality of the detention itself.<sup>99</sup>

## Exceptions to the Jurisdictional Bars

### Constitutional Claims and Questions of Law

Although the jurisdiction-stripping provisions of the INA are comprehensive, judicial review of constitutional claims and questions of law remains preserved.<sup>100</sup> INA § 242(a)(2)(D) states that nothing in the INA eliminating review of discretionary decisions, crime-related removals, or any other provision of the INA which limits or eliminates judicial review “shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review.”<sup>101</sup> Thus, “constitutional claims” and “questions of law” are reviewable even if the underlying matter from which the constitutional claim or question of law arises is not. This, however, provides an additional step in the analysis—namely ascertaining what distinguishes a reviewable constitutional claim or question of law from a non-reviewable question of fact. While what constitutes a “constitutional claim” may appear self-evident,<sup>102</sup> determining what constitutes a “question of law” can be more difficult.

INA § 242(a)(2)(D) preserves judicial review of questions of law, only excluding questions of fact from review. An important threshold issue a court of appeals must resolve, therefore, is whether the matter before it is a question of law or fact. Questions of fact are questions about the actual events surrounding the case.<sup>103</sup> Questions of law, on the other hand, involve the application or interpretation of the law.<sup>104</sup> Initially, the courts construed “questions of law” as preserving

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<sup>96</sup> *Demore v. Kim*, 538 U.S. 510, 517 (2003).

<sup>97</sup> *Id.*

<sup>98</sup> See REAL ID Act of 2005, P.L. 109-13, Div. B., § 106, 119 Stat. 231, 310 (2005).

<sup>99</sup> See *Aguilar v. U.S. ICE*, 510 F.3d 1, 10-11 (1<sup>st</sup> Cir. 2007); *Sissoko v. Rocha*, 412 F.3d 1021, 1033 (9<sup>th</sup> Cir. 2005); H.Rept. 109-72, at 175 (2005) (Conf. Rep.) (“Moreover, section 106 would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders.”). See also P.L. 109-13, Div. B., § 106, 119 Stat. 231, 310 (2005).

<sup>100</sup> INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

<sup>101</sup> *Id.* (“Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals ...”).

<sup>102</sup> See, e.g., *Xiao Ji Chen v. United States Department of Justice*, 471 F.3d 315, 324 (2<sup>d</sup> Cir. 2006) (“The term ‘constitutional claim’ clearly relates to claims brought pursuant to provisions of the Constitution of the United States.”).

<sup>103</sup> *Black’s Law Dictionary* 610 (7<sup>th</sup> ed. 1999) (“An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation.”).

<sup>104</sup> *Id.* at 1260 (“An issue to be decided by the judge, concerning the application or interpretation of the law.”).

jurisdiction to review only statutory construction issues.<sup>105</sup> Thus, the courts only had jurisdiction to review how the agencies and administrative courts interpreted the meaning or scope of a term in a statutory provision. The courts later recognized that the term *questions of law* was also meant to encompass “the same types of issues that courts traditionally exercised in habeas review over Executive detentions.”<sup>106</sup> The courts came to this conclusion by analyzing the legislative history of the REAL ID Act,<sup>107</sup> which altered INA § 242(a)(2)(D) in order to allow review of constitutional claims and questions of law.<sup>108</sup> The House Conference Report for the REAL ID Act indicates that Congress sought to provide an “adequate and effective” substitute for habeas corpus.<sup>109</sup> Purportedly, this was because the Supreme Court had previously expressed some concern as to whether Congress could constitutionally strip from courts habeas review of removal orders without implementing an adequate replacement.<sup>110</sup> Thus, in order to provide an adequate replacement for habeas review, not only did INA § 242(a)(2)(D) preserve review of statutory construction, but it also encompassed review of “errors of law,” including the “erroneous application or interpretation of statutes,” “challenges to ‘Executive interpretations of the immigration laws,’” and “determinations regarding an alien’s statutory eligibility for discretionary relief.”<sup>111</sup> The Ninth Circuit characterized “questions of law” to include “questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.”<sup>112</sup> In other words, questions of law encompass:

- statutory construction;
- whether the correct legal standard has been stated;
- whether there was an erroneous application of a heightened legal standard despite having stated the correct legal standard;
- characterizations of the record.<sup>113</sup>

It is important to note that federal courts, while recognizing that INA § 242(a)(2)(D) preserves review of constitutional claims and questions of law, have also expressly refused to review claims that, while characterized as questions of law, “consist of nothing more than quarrels over the correctness of fact-finding and discretionary decisions.”<sup>114</sup> A “mere assertion that the IJ [Immigration Judge] and BIA [Board of Immigration Appeals] ‘failed to apply the law’ does not convert a mere disagreement with the IJ’s factual findings and exercise of discretion into a constitutional claim or a question of law.”<sup>115</sup> Thus, in the Second Circuit, before determining whether a claim is a reviewable question of law, a court must first “look to the nature of the argument being advanced in the petition and determine whether the petition raises ‘constitutional

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<sup>105</sup> *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9<sup>th</sup> Cir. 2007); *Xiao Ji Chen*, 471 F.3d at 326.

<sup>106</sup> *Xiao Ji Chen*, 471 F.3d at 326-327. *See also* *Jean-Pierre v. U.S. Attorney General*, 500 F.3d 1315, 1321 (11<sup>th</sup> Cir. 2007).

<sup>107</sup> The PASS ID Act, S. 1261, 111<sup>th</sup> Cong., does not affect any part of the REAL ID Act that addresses judicial review of removal orders.

<sup>108</sup> *Xiao Ji Chen*, 471 F.3d. at 326; *Ramadan*, 479 F.3d at 653.

<sup>109</sup> H.Rept. 109-72, at 174 (2005) (Conf. Rep.).

<sup>110</sup> *Xiao Ji Chen*, 471 F.3d at 326 *citing* *INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>111</sup> *Xiao Ji Chen*, 471 F.3d at 328 *quoting* *St. Cyr*, 533 U.S. at 314 n. 38.

<sup>112</sup> *Ramadan*, 479 F.3d at 650.

<sup>113</sup> *See* *Gui Yin Liu v. INS*, 508 F.3d 716, 721-722 (2<sup>d</sup> Cir. 2007).

<sup>114</sup> *Xiao Ji Chen*, 471 F.3d at 331.

<sup>115</sup> *Id.*

claims or questions of law’ or merely objects to the IJ’s fact-finding or exercise of discretion.”<sup>116</sup> The Ninth Circuit goes so far as to refuse to entertain mixed questions of fact and law unless all of the underlying facts are undisputed.<sup>117</sup>

An additional issue is whether INA § 242(a)(2)(D) preserves judicial review of constitutional claims or questions of law that arise from expedited removal orders. The provision that strips courts of jurisdiction to review expedited removal orders, INA § 242(a)(2)(A), states that, “notwithstanding any other provision of law,” no court shall have jurisdiction to review a claim arising from an expedited removal order “except as provided by subsection (e) of this section.”<sup>118</sup> On the other hand, the reach of INA § 242(a)(2)(D) appears to extend to “any other provision of this Act.”<sup>119</sup> The Tenth Circuit has addressed this issue, and it has held that INA § 242(a)(2)(A) controls whether a claim arising out of expedited removal orders is excluded from review.<sup>120</sup> It would seem that this court believes that the phrase “notwithstanding any other provision of law” found in INA § 242(a)(2)(A) operates to exclude that provision from the purview of INA § 242(a)(2)(D), consequently excluding most constitutional claims and questions of law arising from expedited removal orders from judicial review. Thus, the only issues arising from an expedited removal order that may be reviewed in the Tenth Circuit are those enumerated within INA § 242(e). INA § 242(e) only permits: (1) limited habeas review of specific issues related to the expedited removal;<sup>121</sup> (2) challenges to the constitutionality of the expedited removal procedure;<sup>122</sup> and (3) challenges to regulations or policy directives governing expedited removals as inconsistent with the INA or otherwise in violation of the law.<sup>123</sup>

## Habeas Corpus

The writ of habeas corpus protects individuals from wrongful and arbitrary imprisonment by providing a mechanism to test the legality of the detention.<sup>124</sup> Today, the forum that hears federal habeas corpus petitions is a federal district court.<sup>125</sup> Prior to American independence, habeas corpus was primarily a pre-trial protection found in common law that was available “(1) to compel adherence to prescribed procedures in advance of trial, (2) to inquire into the cause for commitment [reason for pre-trial detention] not pursuant to judicial process, and (3) to inquire whether the committing court had proper jurisdiction.”<sup>126</sup> Recognizing the importance of the writ, the Framers sought to protect habeas corpus by incorporating into the U.S. Constitution the

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<sup>116</sup> *Id.*

<sup>117</sup> *Ramadan*, 479 F.3d 646, 653. See also *Jean-Pierre*, 500 F.3d at 1322 (“[W]e have jurisdiction to review Jean Pierre’s claim in so far as he challenges the application of an undisputed fact pattern to a legal standard.”); *Ali v. Achim*, 468 F.3d 462, 465 (7<sup>th</sup> Cir. 2006) (“[W]e retain jurisdiction to examine whether the correct legal standard was applied to the alien’s claim for relief.”).

<sup>118</sup> INA § 242(a)(2)(A) (codified at 8 U.S.C. § 1252(a)(2)(A)).

<sup>119</sup> INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

<sup>120</sup> *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10<sup>th</sup> Cir. 2007).

<sup>121</sup> INA § 242(e)(2) (codified at 8 U.S.C. § 1252(e)(2)).

<sup>122</sup> INA § 242(e)(3)(A)(i) (codified at 8 U.S.C. § 1252(e)(3)(A)(i)).

<sup>123</sup> INA § 242(e)(3)(A)(ii) (codified at 8 U.S.C. § 1252(e)(3)(A)(ii)).

<sup>124</sup> See Erwin Chemerinksy, *Thinking About Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 749 (1987); CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview*, by Charles Doyle.

<sup>125</sup> 28 U.S.C. § 2241.

<sup>126</sup> *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (C.J. Burger, concurring).

Suspension Clause, which states, “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”<sup>127</sup> Later, the federal government enacted the federal habeas corpus statute in the Judiciary Act of 1789 which conferred upon federal courts the power to grant the writ to federal prisoners.<sup>128</sup> Federal habeas corpus was amended in 1867 to include state prisoners as well.<sup>129</sup> With the advent of the incorporation doctrine, which uses the Due Process Clause of the Fourteenth Amendment as a means to apply most of the provisions of the Bill of Rights to the states, federal habeas corpus evolved as a vehicle to remedy convictions made in violation of constitutional rights.<sup>130</sup>

Many provisions in INA § 242 expressly forbid the use of habeas corpus as a vehicle to review removal orders. For example, INA § 242(b)(9) states that “all questions of law and fact, including interpretation and application of constitutional and statutory provisions” arising from an action taken to remove an alien shall be made available only upon judicial review of a final order.<sup>131</sup> At first glance, this provision would only seem to impose an administrative exhaustion requirement before review of a constitutional or statutory violation affecting the removal process can commence. However, the statute also expressly prohibits the use of habeas corpus to obtain review from a federal district court.<sup>132</sup> A similar provision, INA § 242(g), prohibits the use of habeas corpus and generally denies to all courts, except as otherwise prescribed by INA § 242, jurisdiction to entertain claims arising from a decision by the Attorney General “to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.”<sup>133</sup> In addition, all of the express jurisdictional bars also expressly prohibit habeas corpus.<sup>134</sup>

As discussed above, INA § 242(a)(2)(D) preserves the federal courts of appeals’ jurisdiction to review constitutional claims and questions of law.<sup>135</sup> These courts, when exercising this jurisdiction, have viewed INA § 242(a)(2)(D) as a means to consolidate issues traditionally addressed through habeas corpus with those dealt with by a petition for review, thereby channeling these habeas issues directly to the courts of appeals.<sup>136</sup> Presumably, this would serve to streamline the removal process while still effectively maintaining the substantive protections of habeas corpus.<sup>137</sup> The reason Congress sought to preserve habeas protections in the petition for review was because of concerns the Supreme Court voiced in a prior case addressing Congress’s previous attempt to abolish all habeas review of removal orders.<sup>138</sup>

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<sup>127</sup> *St. Cyr*, 533 U.S. at 304. See also U.S. Const. Art. I, § 9, cl. 2.

<sup>128</sup> Act of September 24, 1789, ch. 20, § 14, 1 Stat. 82.

<sup>129</sup> Act of February 5, 1867, ch. 28, 14 Stat. 385.

<sup>130</sup> See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 754-755 (1987).

<sup>131</sup> INA § 242(b)(9) (codified at 8 U.S.C. § 1252(b)(9)).

<sup>132</sup> *Id.* (“Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.”).

<sup>133</sup> INA § 242(g) (codified at 8 U.S.C. § 1252(g)).

<sup>134</sup> See generally INA § 242(a)(2).

<sup>135</sup> INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

<sup>136</sup> *Xiao Ji Chen*, 471 F.3d at 326-327; *Ramadan*, 479 F.3d at 653; *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 513 (5<sup>th</sup> Cir. 2006); *Jean-Pierre*, 500 F.3d at 1321.

<sup>137</sup> See *Ramadan*, 479 F.3d at 651. See also H.Rept. 109-72, at 175 (2005) (Conf. Rep.).

<sup>138</sup> H.Rept. 109-72, at 174 (2005) (Conf. Rep.).

In that prior case, *INS v. St. Cyr*, the Supreme Court held that federal courts had jurisdiction to hear an alien’s petition for habeas corpus notwithstanding a statutory provision that indicated that aliens would not have access to habeas corpus in removal proceedings.<sup>139</sup> Congress had passed a series of jurisdiction-stripping provisions that could have been interpreted to preclude either federal district courts or federal courts of appeals from reviewing “pure questions of law.”<sup>140</sup> The Court expressed concern that, in light of the Suspension Clause of the U.S. Constitution, a statute that “would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”<sup>141</sup> The reason a constitutional question could arise is that the Suspension Clause, at a minimum, protects habeas corpus “as it existed in 1789.”<sup>142</sup> Habeas corpus, at its historical core, “served as a means of reviewing the legality of executive detention” and could have encompassed challenges to “detentions based on errors of law, including the erroneous application or interpretation of statutes.”<sup>143</sup> The Court stated that significant constitutional issues would be raised if the jurisdiction-stripping provisions were read to deny habeas review of pure questions of law.<sup>144</sup> As a result, the Court thought this would require a closer look at whether habeas corpus, as it existed in 1789, could be used to review pure questions of law in order to determine whether an adequate substitute for such review was required.<sup>145</sup> Rather than begin this inquiry, the Supreme Court chose to exercise the constitutional avoidance doctrine and construed the jurisdiction-stripping provisions to allow habeas review of pure questions of law as it felt that Congress did not clearly express an intent to deprive aliens of habeas corpus.<sup>146</sup> As Justice Scalia noted, this presented a putative incongruity: criminal-aliens could get habeas review of their removals, at least with regards to questions of law, which included district court review and appellate review, while non-criminal aliens would only get review directly from the court of appeals. The Court, in reference to this argument, stated that Congress could remedy this incongruity by providing an adequate substitute for habeas corpus in the courts of appeals.<sup>147</sup>

Following this decision, Congress subsequently sought to respond to the *St. Cyr* decision by enacting the REAL ID Act, which expressly eliminated habeas review for many types of removals while preserving review of constitutional claims and questions of law in the federal courts of appeals.<sup>148</sup> In the legislative history of the REAL ID Act, Congress explicitly referenced the holding in *St. Cyr* while explaining the habeas-stripping provisions, expressing a belief that retaining habeas corpus for criminal-aliens unnecessarily delayed removal and created confusion

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<sup>139</sup> *St. Cyr*, 533 U.S. at 314 (“If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS’ reading of § 1252. But the absence of such a forum, coupled with the lack of a clear, unambiguous and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.”).

<sup>140</sup> *Id.* at 300.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 301 (quoting *Felker*, 518 U.S. at 663-664).

<sup>143</sup> *Id.* at 301-302.

<sup>144</sup> *Id.* at 305.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 314.

<sup>147</sup> *Id.* at 314, n. 38.

<sup>148</sup> P.L. 109-13, Div. B, § 106, 119 Stat. 310 (2005) (The REAL ID Act). *See also* INA § 242(a)(2), (a)(5), (b)(9) (expressly denying access to federal habeas corpus to review numerous types of removals); INA § 242(a)(2)(D) (expressly preserving review of constitutional claims and questions of law notwithstanding other jurisdiction-stripping provisions).

in the federal courts.<sup>149</sup> Congress, by expressly ending habeas review of these removals, believed that this would lead to less delay and greater fairness in the review process.<sup>150</sup> As a response to the Supreme Court's concern that there must be some "adequate substitute" for habeas review if recourse to federal habeas corpus is denied, Congress crafted its "constitutional claims and questions of law" exception to the otherwise broad jurisdiction-stripping provisions it had enacted.<sup>151</sup> Furthermore, Congress noted habeas corpus was still available for "challenges to detentions that are independent of challenges to removal orders."<sup>152</sup>

As it stands today, the petition for review appears to have replaced habeas corpus as the primary means to challenge a removal order. Preserving review of constitutional claims and questions of law for all removal orders seems that it may have satisfied Suspension Clause concerns from the federal courts,<sup>153</sup> which now routinely transfer petitions for habeas corpus into a petition for review.<sup>154</sup> Habeas corpus, however, still plays a relatively small role in expedited removals since a statutory provision expressly allows habeas corpus to be used as a vehicle to determine:

- whether the petitioner is an alien;<sup>155</sup>
- whether the petitioner was ordered removed under INA § 235(b)(1);<sup>156</sup> and
- whether the petitioner can prove by a preponderance of the evidence that he is an alien lawfully admitted for permanent residence, has been admitted as a refugee under INA § 207, or has been granted asylum under INA § 208, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to INA § 235(b)(1)(C).<sup>157</sup>

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<sup>149</sup> H.Rept. 109-72, at 174 (2005) (Conf. Rep.).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 175.

<sup>152</sup> *Id.*

<sup>153</sup> *See, e.g., Iasu v. Smith*, 511 F.3d 881, 886-887 (9<sup>th</sup> Cir. 2007); *Saavedra de Barreto v. INS*, 427 F.Supp.2d 51, 59-60 (D. Conn. 2006); *Jaber v. Gonzales*, 486 F.3d 223, 230 (6<sup>th</sup> Cir. 2007).

<sup>154</sup> *See, e.g., Pierre v. Upchurch*, 2005 U.S. Dist. LEXIS 15131 (N.D. Tex. July 25, 2005); *Martinez v. Ashcroft*, 2005 U.S. Dist. LEXIS 14940 (S.D.N.Y. July 25, 2005).

<sup>155</sup> INA § 242(e)(2)(A) (codified at 8 U.S.C. § 1252(e)(2)(A)).

<sup>156</sup> INA § 242(e)(2)(B) (codified at 8 U.S.C. § 1252(e)(2)(B)).

<sup>157</sup> INA § 242(e)(2)(C) (codified at 8 U.S.C. § 1252(e)(2)(C)).