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## Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996-2005)

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## I. INTRODUCTION

With the REAL ID Act of 2005 Congress once again turned its attention to revising the judicial review scheme set forth in the Immigration and Nationality Act (“INA”) for review of administrative orders to remove illegal aliens from the United States.<sup>1</sup> As the Third Circuit recently observed, “[u]nder the new judicial review regime imposed by the REAL ID Act, a petition for review is now the sole and exclusive means of judicial review for all orders of removal, except those issued pursuant to 8 U.S.C. § 1225(b)(1).”<sup>2</sup> Further, the REAL ID Act modifications “effectively limit all aliens to one bite of the apple with regard to challenging an order of removal, in an effort to streamline what Congress saw as uncertain and piecemeal review of orders of removal, divided between the district courts (habeas corpus) and the courts of appeals (petitions for review).”<sup>3</sup>

The “uncertain and piecemeal review” described by the Third Circuit was the direct result of judicial reaction to earlier congressional efforts to address the INA’s judicial review scheme. The first of these efforts was the Antiterrorism and Effective Death Penalty Act (“AEDPA”), enacted in April 1996, which expressly eliminated review opportunities previously available to non-citizens convicted of crimes in the United States.<sup>4</sup> The second was the more comprehensive Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), which effectively replaced the old judicial review scheme.<sup>5</sup> Taken together, these two statutes reflected a concerted effort by Congress to facilitate the removal of illegal aliens from the United States as expeditiously as possible.<sup>6</sup>

One of the major cornerstones of the dual congressional legislative efforts in 1996 was the attempt to streamline and/or eliminate time-consuming judicial review, especially for criminal aliens. Both AEDPA and IIRIRA included bars to judicial review for criminal aliens. As the Supreme Court commented in 1999, IIRIRA also included numerous provisions designed to protect the discretion of the Attorney General, especially as related to the removal of illegal aliens from the United States.<sup>7</sup> Notwithstanding these sweeping judicial review revi-

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1. REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.).
  2. *Bonhomie v. Gonzales*, 414 F.3d 442, 445 (3d Cir. 2005). The exception noted by the court is for judicial review of expedited removal orders, which the statute expressly specifies to be by way of habeas corpus.
  3. *Id.* (citing H.R. REP. NO. 109-72, at 173–75 (2005) (Conf. Rep.)).
  4. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
  5. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009.
  6. With the enactment of IIRIRA on Sept. 30, 1996, Congress expressed the clear intent that: Aliens who violate U.S. immigration law should be removed from this country as soon as possible. Exceptions should be provided only in extraordinary cases specified in the statute and approved by the Attorney General. Aliens who are required by law or the judgments of our courts to leave the United States are not thereby subjected to a penalty. The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement. S. REP. NO. 104-249 at 7, (1996).
  7. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999).

sions, Congress largely failed in its effort to avoid “uncertain and piecemeal review.” In *INS v. St. Cyr*, the Supreme Court held that IIRIRA did not bar criminal aliens from filing habeas corpus petitions to challenge their orders of removal, when those petitions raised “pure questions of law.”<sup>8</sup> The Supreme Court also decided the related case of *Calcano-Martinez v. INS*, holding that the Second Circuit lacked jurisdiction over a review petition filed by a criminal alien raising a statutory challenge to the denial of discretionary relief in his removal case.<sup>9</sup> These two cases culminated five years of litigation over which courts (the district courts or the courts of appeals) retained jurisdiction in light of AEDPA and IIRIRA to review deportation and removal orders. The litigation further focused on deportation and removal orders entered against criminal aliens, and what issues remained subject to review.<sup>10</sup> The REAL ID Act, in turn, represents congressional rejection of the judicial review scheme flowing from *St. Cyr* and *Calcano-Martinez*, a scheme allowing criminal aliens to file their challenges to removal orders in the district courts but arguably requiring all others to file their challenges in the circuits. Congress has, in effect, retreated from the more aggressive approach of AEDPA and IIRIRA in an effort to restore exclusive review in the circuit courts, one of the major features of the pre-1996 regime. Yet the REAL ID Act also carries forward major features of the 1996 reforms, such as limited review for criminal aliens and limited review of administrative discretion.

This article reviews the major developments in the litigation involving judicial review over the past ten years, developments that caused Congress to respond with the enactment of the 2005 REAL ID Act legislation. In section II, the article sets forth the historic context for the 1996 reforms by describing the judicial review schemes that pre-dated AEDPA and IIRIRA. Section III describes the 1996 scheme in detail. Section IV addresses how both litigants and the courts grappled with the many significant interpretive issues presented by the AEDPA and IIRIRA, especially as to those provisions precluding judicial review for criminal aliens. The circuit courts initially responded to the 1996 legislative scheme by dismissing petitions filed by criminal aliens, unless the petitions merely challenged the application of the jurisdictional bar.<sup>11</sup> The dismissal of these cases by the circuits caused aliens to file habeas corpus petitions, and the government opposed these petitions as contrary to the 1996 legislative scheme. The Supreme Court’s decisions ultimately resolved this dispute against the government in

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8. 533 U.S. 289, 314 (2001).

9. 533 U.S. 348, 351–52 (2001).

10. In “permanent rule” cases, seven circuits issued decisions before *St. Cyr* addressing the availability of judicial review for criminal aliens. Four circuits held that habeas corpus was the appropriate avenue for criminal aliens to challenge their removal orders.

11. See e.g., *Catney v. INS*, 178 F.3d 190 (3d Cir. 1999); *Mansour v. INS*, 123 F.3d 423, 427 (6th Cir. 1997); *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996).

2001, and allowed the petitions.<sup>12</sup> Litigation in the lower courts thereafter focused on such matters as the scope of available review in the district courts, and whether circuit court review was exclusive where it was available.<sup>13</sup> Section V describes the REAL ID Act amendments in detail. I will show that the enactment of the REAL ID Act rendered many of the major judicial pronouncements regarding the 1996 legislation obsolete, while at the same time clearly incorporating key aspects of the Supreme Court's *St. Cyr* decision into the new law.

Through this historic overview, this article demonstrates how Congress and the courts have appeared to differ in recent times regarding the nature and extent of the judicial review available in immigration cases, especially for non-citizens convicted of crimes. In 1996, Congress enacted legislation which it arguably viewed as a reaffirmation or return to historic principles regarding the limited role of the judiciary in immigration matters. The courts arguably perceived the matter much differently, as a severe encroachment upon the authority of the federal courts. They responded by construing the statute as insufficiently stating Congressional intent to encroach so severely on their authority, resurrecting in the process habeas corpus as a means of challenging the Executive's immigration decisions and arguably undermining much of what Congress set out to accomplish in 1996. The REAL ID Act's enactment perhaps signals that an equilibrium has been achieved — at a time when immigration cases comprise an ever-burgeoning percentage of the dockets of the federal courts. How the courts resolve the key issues arising under the new legislation will likely determine whether that equilibrium will be maintained, or whether new issues will manifest themselves in a continuing wave of litigation and legislation.

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12. *St. Cyr*, 533 U.S. at 305–14; *Calcano-Martinez*, 533 U.S. at 349.

13. *See e.g.*, *Rivera-Martinez v. Ashcroft*, 389 F.3d 207 (1st Cir. 2004) (applying principle of procedural default in affirming district court's refusal to consider in habeas proceedings a citizenship claim that the alien could have raised on direct review of his removal order but did not); *Latu v. Ashcroft*, 375 F.3d 1012 (10th Cir. 2004) (finding that alien was not barred from filing habeas petition because no direct review of the issues he sought to raise was available to him, but noting that a habeas petition is not a substitute for direct review and, as such, habeas corpus review does not include review of discretionary decisions); *Nunes v. Ashcroft*, 375 F.3d 805 (9th Cir. 2004) (precluding alien by doctrine of collateral estoppel from raising a challenge to removability that was previously decided by the court of appeals on direct review); *Acevedo v. Ashcroft*, 371 F.3d 539 (9th Cir. 2004) (applying exhaustion of judicial remedies doctrine and declining to transfer habeas petition where the petition was not filed within 30 days of the BIA's decision); *Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004) (finding an alien must exhaust "judicial remedies" available under INA section 242 before seeking review by way of habeas corpus proceedings); *Bakhtriger v. Elwood*, 360 F.3d 414 (3d Cir. 2004) (holding discretionary and factual findings are outside the scope of habeas corpus review, because such review does not encompass APA-style review); *Gutierrez-Chavez v. INS*, 298 F.3d 824 (9th Cir. 2003) (holding BIA's decision cannot be challenged under general habeas corpus statute absent claim of constitutional or statutory error); *Carranza v. INS*, 277 F.3d 65 (1st Cir. 2002) (finding the scope of habeas corpus review for criminal aliens extends only to colorable statutory or constitutional claims); *Sol v. INS*, 274 F.3d 648 (2d Cir. 2001) (finding the scope of habeas corpus review for criminal aliens does not extend to challenges to discretionary decisions of the BIA denying relief such as waivers under INA section 212(c)).

## II. HISTORICAL BACKGROUND

More than a century ago, the Supreme Court recognized the right of aliens denied admission to the United States to petition the courts for writs of habeas corpus in order to challenge the legal basis for immigration officers' decisions.<sup>14</sup> In the 1953 decision of *Heikkila v. Barber*,<sup>15</sup> the Supreme Court found that such habeas review was the sole mechanism available for review of deportation decisions, since the Immigration Act of 1917 (the "1917 Act")<sup>16</sup> precluded review of immigration decisions under the year-old Administrative Procedure Act of 1952 ("APA").<sup>17</sup> Like its predecessor immigration statutes, the 1917 Act made decisions of the Attorney General in immigration matters "final." The Supreme Court found that this provision "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution."<sup>18</sup> Significantly, the Court distinguished the scope of review available under the APA from the scope of review available in habeas corpus, noting that the purpose of habeas had always been to enforce due process requirements, and that this review "is very different from applying a statutory standard of review, e.g., deciding on 'the whole record' whether there is substantial evidence to support administrative findings of fact."<sup>19</sup> According to the Court, "deportation orders remain[ed] immune from direct attack" under the 1917 statute notwithstanding enactment of the APA.<sup>20</sup>

The Immigration and Nationality Act of 1952 (the "1952 Act")<sup>21</sup> superseded the 1917 Act under which *Heikkila* had been decided.<sup>22</sup> Like the 1917 Act, the 1952 Act merely provided that deportation orders of the Attorney General should

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14. *See* *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding the Immigration Act of 1891 did not deprive courts of jurisdiction to issue writs of habeas corpus); *United States v. Jung Ah Lung*, 124 U.S. 621, 628 (1888) (finding that Chinese Restriction Acts did not affect the jurisdiction of the courts to issue writs of habeas corpus).

15. 345 U.S. 229, 234–35 (1953).

16. Immigration Act of 1917, Pub. L. 64-301, § 19, 39 Stat. 874, 890 (1917) (repealed 1952).

17. Administrative Procedure Act of 1952, 60 Stat. 237 (1952) (codified at 5 U.S.C. § 500).

18. *Heikkila*, 345 U.S. at 234–35.

19. *Id.* at 236; *see also* *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) ("There is a vast gulf between the non-suspendable constitutional writ and the Administrative Procedure Act.") (citing *Heikkila*, 345 U.S. at 236); *United States ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*. But a want of due process is not established by showing merely that the decision is erroneous . . ."); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 132-34 (1924) ("Tisi's claim to be discharged on habeas corpus rests wholly upon the contention that he has been denied due process of law . . . [M]ere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process of law.").

20. *Heikkila*, 345 U.S. at 236.

21. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

22. *Heikkila*, 345 U.S. at 229.

be “final.”<sup>23</sup> In *Shaughnessy v. Pedreiro*, the Supreme Court reached a conclusion directly contrary to its decision in *Heikkila* — decided only two years before — and found that the 1952 Immigration Act did not preclude judicial review of deportation decisions under the APA.<sup>24</sup> Although observing that the identical 1917 Act provision “had long been interpreted as precluding any type of judicial review except by habeas corpus,” the Court declined to follow its earlier ruling in *Heikkila* regarding the unavailability of review of deportation orders under the APA.<sup>25</sup> The Court reasoned that the 1952 statute was enacted after the *Heikkila* case began and thus the precedent did not apply to it.<sup>26</sup> The Court found that the purpose of the APA was to “remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act.”<sup>27</sup> Noting the ambiguity in the provision making deportation orders of the Attorney General “final,” the Court found that:

It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the ambiguous word “final” in the 1952 Immigration Act as referring to finality in administrative procedure rather than as cutting off the right of judicial review in whole or in part. And it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court.<sup>28</sup>

Accordingly, after *Pedreiro*, aliens facing deportation were able to challenge their deportation orders under the APA, as well as in habeas corpus proceedings.

Congress responded six years after *Pedreiro* by passing the Immigration and Nationality Act of 1961 (the “1961 Act”),<sup>29</sup> which restructured the existing judicial review scheme and placed “sole and exclusive” power to review deporta-

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23. Immigration and Nationality Act of 1952 § 242(b), 8 U.S.C. § 1252(b) (1958).

24. 349 U.S. 48 (1955).

25. *Id.* at 50.

26. *Id.*

27. *Id.* at 51. As the Court observed, section 10 of the APA provided that “[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.” In the subsequent 1952 Immigration and Nationality Act, the Court found, “there is no language which ‘expressly’ supersedes or modifies the expanded right of review granted by § 10 of the Administrative Procedure Act.” *Id.*

28. *Id.* Justice Minton dissented from the majority decision and was joined by Justices Reed and Burton. Justice Minton observed that the term “final” had been used in immigration legislation since 1891, and “has precluded judicial review except by habeas corpus.” *Id.* “In view of this long history and the reenactment of § 242 with only minor textual changes, I hesitate to impute to Congress an intention to change the method of review absent a clear showing.” *Id.* at 55 (Minton, J., dissenting). Reviewing the legislative history, Justice Minton found no such clear showing, and concluded instead that “the legislative history therefore, would seem to make it unmistakably clear that Congress, aware that the word ‘final’ as used in immigration legislation was not ambiguous, intended to preserve habeas corpus as the only escape from a deportation order. It was error to give relief under the Administrative Procedure Act.” *Id.* at 57.

29. Immigration and Nationality Act of 1961, Pub. L. 87-301, § 5, 75 Stat. 651 (1961).

tion decisions in the courts of appeals.<sup>30</sup> Section 106(a) of the INA, as amended by the 1961 Act, incorporated the Hobbs Administrative Orders Review Act for judicial review of deportation orders.<sup>31</sup> As subsequently amended in 1990, 1991, and 1994, the INA provided separate procedures for judicial review of deportation and exclusion orders.<sup>32</sup> The resulting review scheme, described below, afforded non-citizens judicial review more closely resembling APA review than the narrow habeas corpus review described in *Heikkila*.

### A. *Deportation Cases*

INA section 106(a) set forth the “sole and exclusive” procedure for judicial review of deportation orders.<sup>33</sup> Under section 106(a), most aliens had 90 days after entry of a final administrative deportation order to seek judicial review by filing a review petition in the court of appeals for the judicial circuit in which deportation proceedings took place, or in the circuit in which the alien resided.<sup>34</sup> Aliens convicted of aggravated felony offenses, as defined in section 101(a)(43)(A) of the INA, had only 30 days in which to seek judicial review and, unlike in the cases of other aliens, the filing of a review petition did not automatically stay the execution of an administratively final order against an aggravated felon.<sup>35</sup> The 1961 Act contained no specific bars to judicial review for cases and issues properly exhausted administratively, and allowed for review on the administrative record of legal rulings (with appropriate deference), discretionary decisions (for abuse of discretion), and factual determinations (for substantial evidence).<sup>36</sup> An exception to the judicial review scheme allowed detained deportable aliens to seek review of their deportation orders in habeas corpus proceedings in district courts rather the

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30. *See Foti v. INS*, 375 U.S. 217, 224 (1963) (“The fundamental purpose behind [placing exclusive review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.”); *see also Stone v. INS*, 514 U.S. 386, 399 (1995).

31. Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2341-2351 (2005). The Hobbs Act provides for judicial review of agency decisions in the courts of appeals. It sets forth general requirements for filing review petitions seeking judicial review based on administrative records.

32. Administrative proceedings governing the admission and removal of aliens from the United States historically have been termed “exclusion” or “deportation” proceedings respectively. Aliens in exclusion proceedings were deemed to be legally outside the United States seeking admission. Aliens in deportation proceedings were those who had made their way into the United States, whether or not their initial arrival in the country was by legal means. With the enactment of IIRIRA, Congress replaced these differing forms of proceedings with a single form called “removal proceedings.” A removal order results from administrative proceedings conducted under new section 240 of the INA.

33. Immigration and Nationality Act of 1961, § 106(a), 8 U.S.C. § 1105a(a) (1994); *see also Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996).

34. INA § 106(a)(1), 8 U.S.C. § 1105a(a)(1).

35. *See id.*; INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

36. INA § 106(a), (c), 8 U.S.C. § 1105a(a), (c).



circuit courts where there was exclusive review in all other circumstances.<sup>37</sup> Section 106(a)(10) was the only exception in the statute to the exclusive Hobbs Act review procedure for deportation orders.<sup>38</sup>

*B. Exclusion Cases*

Section 106(b) of the statute allowed excludable aliens to seek review of final exclusion orders in habeas corpus proceedings.<sup>39</sup> Section 106(b) did not provide a time limit for filing habeas corpus petitions challenging final exclusion orders. Therefore, even after the enactment of IIRIRA, aliens with exclusion orders issued before October 31, 1996, the effective date of the IIRIRA transitional changes in judicial review, theoretically could still challenge these orders in habeas corpus proceedings conducted under section 106(b).<sup>40</sup>

**III. OVERVIEW OF THE 1996 JUDICIAL REVIEW AMENDMENTS**

*A. The “Transition” Rules*

The 1996 amendments made many changes to the then-existing judicial review scheme for aliens seeking judicial review of their final administrative deportation and exclusion orders. These changes reinforced traditional principles of immigration law with respect to the limited involvement of the judiciary in immigration matters. Although the former judicial review scheme from the 1961 Act continued to apply to some aliens, subject to transitional changes in judicial review, these provisions were expressly repealed in 1996 by IIRIRA. In 2005,

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37. See INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (“[A]ny alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.”).

38. The legislative history of the habeas provision indicates that it was added to the 1961 Act out of concern that the “sole and exclusive” language of section 106(a) would be read to foreclose habeas corpus jurisdiction in the courts. See H.R. REP. NO. 87-1086 at 29 (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2973 (The 1961 Act “excepts habeas corpus from the language which elsewhere declares that the procedure prescribed for judicial review in circuit courts shall be exclusive.”). Courts interpreting section 106(a)(10) differed in their conclusions regarding the scope of review under the provision. See, e.g., *Nakuranurak v. United States*, 68 F.3d 290, 294 (9th Cir. 1995) (habeas corpus review of deportation order available only if alien did not deliberately bypass review in the court of appeals); *Galaviz-Medina v. Wooten*, 27 F.3d 487, 492 (10th Cir. 1994) (finding jurisdiction only over constitutional challenges to deportation orders); *Stevic v. Stava*, 678 F.2d 401, 404 n.5 (2d Cir. 1982) (finding jurisdiction only over collateral issues such as whether alien should be released from custody or afforded a stay of deportation); *Daneshvar v. Chauvin*, 644 F.2d 1248, 1250–51 (8th Cir. 1981) (finding jurisdiction only over collateral issues such as whether alien should be released from custody or afforded a stay of deportation); *United States ex rel. Marcello v. Dist. Dir.*, 634 F.2d 964, 968–70 (5th Cir. 1981), cert. denied, 452 U.S. 917 (1981) (finding challenges to deportation orders permissible so long as the alien was in custody).

39. See INA § 106(b), 8 U.S.C. § 1105a(b) (“Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provision of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.”); *Yi v. Maugans*, 24 F.3d 500 (3d Cir. 1994); see also *Hernandez-Rodriguez v. Pasquarell*, 118 F.3d 1034 (5th Cir. 1997) (post-AEDPA case).

40. See *supra* text accompanying notes 5–6 (discussing enactment of IIRIRA).

Congress formally brought an end to the “transition rules,” as it directed in REAL ID Act section 106(d) that all review petitions brought under the transition rules henceforth shall be treated as though they were brought under the permanent judicial review provisions.<sup>41</sup>

Before enactment of IIRIRA, AEDPA made two significant changes to the provisions governing judicial review of deportation orders in section 106(a) of the INA. These changes reflected congressional dissatisfaction with the pace of criminal alien removals under existing law.<sup>42</sup> First, AEDPA repealed section 106(a)(10), the former provision allowing detained deportable aliens to seek judicial review in the district courts by way of habeas corpus petitions. Second, AEDPA enacted a new section 106(a)(10), which provided that the deportation orders of serious criminal aliens were not subject to judicial review by any court.<sup>43</sup>

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41. REAL ID Act of 2005, § 106(d), Pub. L. 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.).

42. *See* *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997) (“Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals.”); H.R. REP. NO. 104-469, pt. 1, at 112 (1996) (“Existing procedures to deny entry to and remove illegal aliens from the United States are cumbersome and duplicative. Removal of aliens who enter the United States illegally, even those who are ordered deported after a full due process hearing, is an all-too-rare event . . . . For illegal aliens already present in the U.S., there will be a single form of removal proceeding, with a streamlined appeal and removal process.”); S. REP. NO. 104-249, at 2, (1996) (stating that one purpose of the proposed legislation was to “expedit[e] the removal of excludable and deportable aliens, especially criminal aliens”). The provisions restricting the access of criminal aliens to the courts reflected the view that criminal aliens “are a serious and growing threat to our public safety. They are also an expensive problem. Under even the most conservative of estimates, criminal aliens cost our criminal justice system hundreds of millions of dollars each year.” 142 CONG. REC. S4592-01 (daily ed. May 2, 1996) (statement of Sen. Roth). The Senate’s 1995 Report on “Criminal Aliens in the United States,” commented that the deportation process for criminal aliens “is byzantine,” and that “[t]here is little reason for the multiple levels of appeal and delay in the deportation process which current law permits.” S. REP. NO. 104-48 (1995). *See also* 142 CONG. REC. S3328-29 (daily ed. Apr. 15, 1996) (statement of Sen. Abraham) (language in proposed immigration reform bill which ultimately resulted in the enactment of IIRIRA would mean that “once the criminal alien had exhausted all appeals available under the criminal laws, the criminal alien would still have the full deportation administrative provisions to protect him, that is, a deportation hearing and the ability to appeal any order of deportation to the Board of Immigration Appeals, *but that would end the process as opposed to triggering a return to the court system*”) (emphasis added); 142 CONG. REC. S4363-64 (daily ed. Apr. 29, 1996) (statement of Sen. Abraham) (remarking that AEDPA section 440(a), which had been signed into law five days earlier, “denies judicial review of orders of deportation entered against criminal aliens” and thus “limit[s] the ability of non-citizens who have committed serious crimes in this country to avoid deportation by filing countless meritless court challenges to deportation”); H.R. CONF. REP. NO. 104-518, at 119 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 952 (explaining that § 440 of AEDPA was enacted in order to “enhanc[e] the ability of the United States to deport criminal aliens”).

43. *See* INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (as amended by AEDPA § 440(a)); *see also* AEDPA § 440(e) (repealing former INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (1994)).

## JUDICIAL REVIEW UNDER THE IMMIGRATION AND NATIONALITY ACT

The provisions governing judicial review after IIRIRA were complex, and all final administrative orders issued after October 30, 1996 were affected by IIRIRA:

- Aliens placed into removal proceedings by the INS on or after April 1, 1997, were subject to the new judicial review provisions set forth in INA § 242.
- Aliens whose exclusion and deportation proceedings were initiated before April 1, 1997, and whose final deportation and exclusion orders were issued on or after October 31, 1996, were directed to seek judicial review pursuant to former INA § 106, subject to special transitional judicial review provisions described in IIRIRA § 309(c)(4).<sup>44</sup>

Both the IIRIRA transitional rules and the permanent provisions specified that all judicial review of exclusion, deportation, and removal orders must take place in the court of appeals for the judicial circuit in which an alien's administrative proceedings were completed. All aliens were required to file their review petitions within 30 days of an administratively final order,<sup>45</sup> and the filing of a review petition no longer automatically stayed the execution of a final order in the case of any alien.<sup>46</sup> The IIRIRA transitional rules precluded judicial review of any discretionary decisions regarding waivers of inadmissibility,<sup>47</sup> suspension of deportation and voluntary departure,<sup>48</sup> adjustment of status,<sup>49</sup> and certain

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44. IIRIRA § 309(c)(4) included a total of seven transitional changes in judicial review: 1) exclusive review in the courts of appeals for both exclusion and deportation orders; 2) all petitions for review required to be filed within 30 days [IIRIRA § 309(c)(4)(C)]; 3) venue was proper only in the circuit in which immigration proceedings were completed [IIRIRA § 309(c)(4)(D)]; *see* *Hadera v. INS*, 136 F.3d 1338 (D.C. Cir. 1998); 4) no appeal permitted for serious criminal aliens [IIRIRA § 309(c)(4)(G)]; 5) no review of any discretionary decision under sections 212(c), 212(h), and 212(i), as well as under INA section 244 (suspension of deportation and voluntary departure) and 245 (adjustment of status) [IIRIRA § 309(c)(4)(E)]; 6) the filing of a petition does not result in an automatic stay of deportation or exclusion [IIRIRA § 309(c)(4)(F)]; and 7) the reviewing court may not order a remand for taking additional evidence under 28 U.S.C. § 2347(c) [IIRIRA § 309(c)(4)(B)].
  45. *See Malvoisin v. INS*, 268 F.3d 74 (2d Cir. 2001); *Torres v. INS*, 144 F.3d 472 (7th Cir. 1998) (rejecting alien's constitutional challenge to thirty-day time limit provision); *Hadera v. INS*, 136 F.3d 1338 (D.C. Cir. 1998) (dismissing untimely petition under transition rules); *Mayard v. INS*, 129 F.3d 438 (8th Cir. 1997) (dismissing untimely petition under transition rules); *Ibrik v. INS*, 108 F.3d 596 (5th Cir. 1997) (dismissing untimely petition under transition rules); *Narayan v. INS*, 105 F.3d 1335 (9th Cir. 1997) (dismissing untimely petition under transition rules).
  46. *See Lucacela v. Reno*, 161 F.3d 1055, 1059 (7th Cir. 1998) (rejecting constitutional challenge to IIRIRA "no stay" provision and finding that "Congress made it clear, by revoking the INA provision granting automatic stays upon filing of a petition for review, that public policy has now shifted to enforcing deportation orders immediately"); *see also Akinwunmi v. INS*, 194 F.3d 1340 (10th Cir. 1999) (denying alien's request to stay deportation because alien's remedy was to file a motion to reopen with the BIA).
  47. INA § 212(c), 8 U.S.C. § 1182(c) (1994).
  48. INA §§ 244(a), (e), 8 U.S.C. §§ 1254(a), (e).
  49. INA § 245, 8 U.S.C. § 1255.

other inadmissibility waivers.<sup>50</sup> The IIRIRA permanent provisions similarly precluded judicial review of “judgments” regarding these forms of relief (or their successors), and precluded review “of any other decision or action of the Attorney General the authority for which is specified to be in the discretion of the Attorney General, other than the granting of [asylum] under section 208(a).”<sup>51</sup> Under both the permanent provisions and transition rules, criminal aliens were expressly barred from obtaining judicial review.<sup>52</sup>

### B. *The “Permanent” Rules*

The procedural requirements for judicial review of removal orders are set forth in INA section 242. Only administratively “final” orders are reviewable.<sup>53</sup> All non-citizens seeking review of their removal orders must comply with the following requirements: 1) a 30-day time limit for seeking review;<sup>54</sup> 2) venue is exclusively in the court of appeals where the immigration judge completed the proceedings;<sup>55</sup> 3) the respondent is the Attorney General, and the petition must be served on the Attorney General and the Field Office Director for Immigration and Customs Enforcement, Department of Homeland Security;<sup>56</sup> 4) service of the petition does not stay removal for any alien; all petitioners must file a motion with the appropriate court of appeals in order to obtain a stay of removal pending judicial review;<sup>57</sup> 5) the petitioner’s brief must be filed no later than 40 days after the administrative record is available, and a reply brief must be filed no later than 14 days after the Attorney General’s brief is filed;<sup>58</sup> 6) the petitioner must attach a copy of the order and state whether any other court has upheld the validity of the order;<sup>59</sup> 7) no petitioner may seek review unless he or she has exhausted all administrative remedies.<sup>60</sup>

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50. INA §§ 212(h)-(i), 8 U.S.C. §§ 1182(h)-(i); *see, e.g.*, Bernal-Vallejo v. INS, 195 F.3d 56 (1st Cir. 1999); Kalaw v. INS, 133 F.3d 1147 (9th Cir. 1997).

51. 8 U.S.C. § 1252(a)(2)(B) (2000).

52. *See* IIRIRA § 309(c)(4)(G); 8 U.S.C. § 1252(a)(2)(C).

53. *See, e.g.*, Duvall v. Elwood, 336 F.3d 228 (3d Cir. 2003) (holding the district court lacked jurisdiction to hear habeas petition seeking to collaterally estop removal proceedings where there is no final order by the BIA); Aikens v. Reno, 330 F.3d 547 (2d Cir. 2003) (finding alien’s challenge to removal order not subject to review where BIA has remanded removal proceedings to Immigration Judge); Lopez-Ruiz v. Ashcroft, 298 F.3d 886 (9th Cir. 2002) (dismissing review petition for lack of finality after BIA granted alien’s motion to reopen removal proceedings).

54. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

55. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

56. INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).

57. INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B).

58. INA § 242(b)(3)(c), 8 U.S.C. § 1252(b)(3)(c).

59. INA § 242(c), 8 U.S.C. § 1252(c).

60. INA § 242(d)(1), 8 U.S.C. § 1252(d)(1).

The permanent rules, like the former provisions, allow only one challenge to an order of removal. In other words, another court must not have upheld the validity of the order before the alien seeks review in the court of appeals.<sup>61</sup> Moreover, the Department of Homeland Security may execute a final order before a review petition is filed. The statute specifies that the right to judicial review set forth in section 242 does not preclude the detention of any alien after entry of a final removal order, nor does it require the Secretary to defer the removal of any alien during the thirty-day period for seeking review.<sup>62</sup> As before, if a petitioner seeks review of a removal order and subsequently seeks review of a denial of a motion to reopen, the statute requires consolidation of the petition challenging the removal order (if still pending) with the petition challenging the denial of reopening.<sup>63</sup>

One notable change from prior law is that an alien's presence in the United States during judicial review is not required in order to confer jurisdiction on the reviewing court. Because the permanent provisions do not state that the reviewing court loses jurisdiction if an alien is no longer in the United States, the departure of an alien from the United States (including by execution of the removal order) no longer automatically destroys the court's jurisdiction over the removal order.<sup>64</sup>

The foregoing scheme evidenced the congressional intent to streamline and expedite judicial review for all aliens. The additional congressional effort to eliminate judicial review for criminal aliens set the stage for several years of litigation, culminating in 2005 with the next major legislative pronouncement by Congress on the subject of judicial review.

#### IV. CRIMINAL ALIEN REVIEW: 1996 AND BEYOND

Under both AEDPA and IIRIRA, judicial review of deportation, exclusion, and removal orders generally was made unavailable for aliens convicted of serious crimes. Crimes precluding judicial review included aggravated felonies, two or more crimes involving moral turpitude, drug offenses, firearms offenses, and certain miscellaneous offenses such as treason and sabotage.<sup>65</sup>

Section 440(a) of AEDPA first amended the judicial review provisions in section 106(a) of the INA to provide that the deportation orders of the specified criminal aliens "shall not be subject to review by any court."<sup>66</sup> As set forth above,

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61. INA § 242(d)(2), 8 U.S.C. § 1252(d)(2) (2000); *see Soberanes v. Comfort*, 388 F.3d 1305 (10th Cir. 2004) (refusing to consider BIA decision denying reopening because decision was on direct review in the 9th Circuit).

62. *See* INA §§ 242(b)(8)(A), (C), 8 U.S.C. §§ 1252(b)(8)(A), (C).

63. INA § 242(b)(6), 8 U.S.C. § 1252(b)(6).

64. *See* INA § 106(c), 8 U.S.C. § 1105a(c) (1994); *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001).

65. *See* AEDPA § 440(a), IIRIRA §§ 306(a), 309(c)(4)(G).

66. AEDPA § 440(a).

prior to this amendment, all aliens could file review petitions in the courts of appeals and detained aliens could challenge their deportation orders in habeas corpus proceedings. These avenues were eliminated in the 1996 legislation. Published decisions in almost all of the judicial circuits sustained the applicability, as well as the constitutionality, of the AEDPA jurisdictional bar for criminal aliens.<sup>67</sup>

In IIRIRA, Congress carried forward the AEDPA provision precluding judicial review for most criminal aliens. The transition judicial review provisions provide that “there shall be no appeal” permitted in the cases of criminal aliens in exclusion or deportation proceedings initiated before April 1, 1997, and whose orders of deportation or exclusion were issued on or after October 31, 1996.<sup>68</sup> As enacted, the permanent IIRIRA provision similarly provided that “no court shall have jurisdiction to review any final order of removal” against the same categories of criminal offenders as set forth in AEDPA and in the IIRIRA transition period judicial review rules.<sup>69</sup> Like the similar provision in AEDPA and the IIRIRA transition rules, this provision precludes review for deportable criminal aliens convicted of aggravated felonies, controlled substance and firearms offenses, multiple crimes involving moral turpitude, and other miscellaneous offenses.<sup>70</sup> Crimes rendering an alien inadmissible (and also subject to the judicial review bar) include crimes involving moral turpitude (one or more),<sup>71</sup> two or more non-

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67. *See* *Lafontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998); *Mansour v. INS*, 123 F.3d 423, 427 (6th Cir. 1997); *Mendez-Morales v. INS*, 119 F.3d 738 (8th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151 (10th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996); *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir. 1996). The Seventh Circuit found that AEDPA section 440(a) did not preclude review where the alien had a “colorable defense to deportability” and the change in jurisdictional rules “mousetrapped” his or her litigation strategies. *See* *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996). *But see* *Yang v. INS*, 109 F.3d 1185 (7th Cir. 1997); *Arevalo-Lopez v. INS*, 104 F.3d 100 (7th Cir. 1997). This rule was not followed by other circuits. *See e.g.*, *Daniel v. INS*, 138 F.3d 1102 (6th Cir. 1998); *Kolster*, 101 F.3d at 789; *Hincapie-Nieto*, 92 F.3d at 30.

68. *See* IIRIRA § 309(c)(4)(G); *see, e.g.*, *Ruckbi v. INS*, 159 F.3d 18, 20 (1st Cir. 1998) (applying section 309(c)(4)(G) to deportable alien determined to be inadmissible for purposes of an application for adjustment of status due to a single conviction for a crime involving moral turpitude); *Nguyen v. INS*, 117 F.3d 206 (5th Cir. 1997) (applying IIRIRA transition criminal alien jurisdictional bar); *Choeum v. INS*, 129 F.3d 29, 37 (1st Cir. 1997) (noting that the IIRIRA transition rule deprives court of jurisdiction over denial of motion to reopen).

69. *See* IIRIRA § 306(a) (creating INA § 242(a)(2)(C)). As originally enacted (and prior to its amendment in the REAL ID Act), section 242(a)(2)(C) provided that “notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii), for which both predicate offenses are, without regard to the date of commission, otherwise covered by section 237(a)(2)(A)(I).” *Id.*

70. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2000).

71. INA § 212(a)(2)(A), 8 U.S.C. § 1182 (a)(2)(A).

## JUDICIAL REVIEW UNDER THE IMMIGRATION AND NATIONALITY ACT

political offenses of any kind,<sup>72</sup> controlled substance trafficking offenses,<sup>73</sup> prostitution and commercialized vice,<sup>74</sup> and certain serious offenses (any felony, any crime of violence, and offenses involving driving under the influence which resulted in personal injury to another person) for which the alien departed after asserting immunity from prosecution.<sup>75</sup>

The broad preclusive language of the AEDPA and IIRIRA judicial review bars for criminal aliens raised significant interpretive issues. One question was whether the bars were absolute. That is, did they preclude all judicial review? Were there issues that the courts of appeals could continue to review notwithstanding the bars? Some of these issues were resolved rather easily by the courts.<sup>76</sup> Others proved to be more problematic, such as where to obtain review of constitutional claims and whether and where *statutory* challenges to removal orders (at least insofar as they were unrelated to questions of alienage and removability) could be reviewed.<sup>77</sup> Several years of litigation focusing on these

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72. INA § 212(a)(2)(B), 8 U.S.C. § 1182 (a)(2)(B).

73. INA § 212(a)(2)(C), 8 U.S.C. § 1182 (a)(2)(C).

74. INA § 212(a)(2)(D), 8 U.S.C. § 1182 (a)(2)(D).

75. INA § 212(a)(2)(E), 8 U.S.C. § 1182 (a)(2)(E).

76. *See, e.g.*, *Drakes v. Zimski*, 240 F.3d 246 (3d Cir. 2001) (finding jurisdiction under the permanent rules to determine whether criminal jurisdictional bar applies); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (finding the court has jurisdiction to determine whether the petitioner's pre-IMMACT conviction is an aggravated felony); *Nguyen v. INS*, 208 F.3d 528 (5th Cir. 2000) (finding the court retains jurisdiction to determine whether criminal is a citizen); *Maghsoudi v. INS*, 181 F.3d 8 (1st Cir. 1999) (finding jurisdiction to review question of deportability but not eligibility for discretionary relief); *Lettman v. Reno*, 168 F.3d 463 (11th Cir. 1999); *Hall v. INS*, 167 F.3d 852 (4th Cir. 1999) (finding the court has jurisdiction to determine its jurisdiction under transition rules); *Wittgenstein v. INS*, 124 F.3d 1244 (10th Cir. 1997) (applying AEDPA section 440(a)); *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997) (applying AEDPA section 440(a); bar includes reopening denial); *Mansour v. INS*, 123 F.3d 423, 427 (6th Cir. 1997) (applying AEDPA section 440(a) and sustaining the statute against constitutional attack); *Mendez-Morales v. INS*, 119 F.3d 738 (8th Cir. 1997) (applying AEDPA section 440(a)); *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996) (finding the court had no jurisdiction under AEDPA section 440(a)).

77. *See, e.g.*, *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) (finding that district courts have jurisdiction under transitional rules to review statutory challenges to denials of relief); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999) (finding the IIRIRA transition rules do not preclude habeas corpus jurisdiction for criminal alien cases); *Catney v. INS*, 178 F.3d 190 (3d Cir. 1999) (concluding that a court of appeals has no jurisdiction to review a criminal alien's claim of statutory and constitutional error in a review petition case); *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998) (finding the district courts lack habeas corpus jurisdiction to review criminal aliens' challenges to deportation orders); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998) (concluding that habeas corpus review available under 28 U.S.C. § 2241 for review of purely legal issues involving Attorney General's interpretation of the immigration laws), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998) (finding jurisdiction-stripping provision unconstitutional if it is construed to preclude judicial review under 28 U.S.C. § 2241 for criminal aliens who may not file review petitions in the court of appeals in accordance with AEDPA and IIRIRA jurisdictional bars), *amended by* 159 F.3d 1217 (9th Cir. 1998), *vacated and remanded*, 526 U.S. 1001 (1999); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) (finding the criminal alien judicial review bar in IIRIRA transition rules does not preclude review of constitutional and statutory claims in habeas corpus proceedings conducted pursuant to 28 U.S.C. § 2241).

issues ultimately resulted in the Supreme Court's decisions in *St. Cyr* and *Calcano-Martinez*.

As discussed below, the courts had little trouble finding they still had jurisdiction under IIRIRA to review claims involving whether the criminal jurisdictional bar applied — that is, whether the petitioner was truly an alien subject to a removal ground.<sup>78</sup> The circuit courts split, however, on whether they could review constitutional claims in criminal cases on issues unrelated to alienage and removability,<sup>79</sup> and on the companion question of whether criminal aliens could file habeas corpus petitions to challenge the legality of their removal orders on statutory or constitutional grounds.<sup>80</sup> The Supreme Court in *Calcano-Martinez* did not expressly resolve the former question, regarding the ability of circuit courts to review constitutional claims.<sup>81</sup> On the latter question, however, the Court in *St. Cyr* ultimately sided with those circuits which had held that aliens subject to the criminal jurisdictional bar could seek review in the district courts by way of habeas corpus proceedings.<sup>82</sup> After *St. Cyr* resolved this question, four more years of litigation ensued over such issues as what was the scope of review

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78. See, e.g., *Murillo-Espinoza v. Ashcroft*, 261 F.3d 771 (9th Cir. 2001) (finding the court retains jurisdiction to determine whether jurisdictional bar applies in removal case); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (finding the court retains jurisdiction to consider removability questions); *Emile v. INS*, 244 F.3d 183 (1st Cir. 2001) (reviewing an alien's challenge to the BIA's finding that sexual assault and battery of a child under fourteen is an aggravated felony); *Nguyen*, 208 F.3d 528 (finding that the court retains jurisdiction to determine whether criminal is a citizen); *Terrell v. INS*, 157 F.3d 806 (10th Cir. 1998) (finding that the AEDPA and IIRIRA jurisdictional bars do not preclude review of citizenship claim).

79. The Fifth, Seventh, and Eleventh Circuits held that the permanent rules precluded criminal aliens from seeking judicial review of removal orders under the general habeas corpus statute (28 U.S.C. § 2241). See *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000); *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000) (finding that the IIRIRA permanent rules eliminate habeas corpus for criminal aliens); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999) (finding that habeas corpus does not survive enactment of section 242(b)(9)). The First, Second, Third, and Ninth Circuits found that habeas corpus survived the permanent rules because the permanent rules were insufficiently clear to demonstrate congressional intent to preclude jurisdiction under the habeas corpus statute. *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000) (finding that judicial review only available to criminal aliens under IIRIRA's permanent rules by way of habeas corpus), *aff'd*, 533 U.S. 348 (2001); *St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000) (concluding the district court had habeas jurisdiction to review criminal alien's removal order), *aff'd*, 533 U.S. 289 (2001); *Mahadeo v. Reno*, 226 F.3d 3, 10 (1st Cir. 2000) (finding the permanent rules lack clear statement to repeal habeas corpus jurisdiction); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000). The Supreme Court in *St. Cyr* also cited *Tasios v. Reno*, 204 F.3d 544 (4th Cir. 2000), as part of the circuit split on the jurisdictional issue, but *Tasios* actually involved review of a deportation order not subject to the permanent rules. See *St. Cyr*, 533 U.S. at 293 n.1.

80. See cases cited *supra* note 79.

81. 533 U.S. at 350 n.2 (discussing government's argument that courts could review constitutional claims notwithstanding jurisdictional bar).

82. 533 U.S. at 305-14.



available in district courts, and whether issues that still could be raised in the circuit courts had to be raised there.<sup>83</sup>

*A. The Judicial Review in the Circuit Courts: 1996 - 2001.*

Notwithstanding the broadly worded judicial review bars for criminal aliens, the government argued from the outset that these statutes did not preclude all judicial review in the circuit courts for aliens convicted of the specified jurisdiction-precluding criminal offenses.<sup>84</sup> The government's position was that while most issues regarding relief from removal could not be reviewed (including statutory eligibility issues), such aliens could still file review petitions to raise issues of alienage, inadmissibility and deportability (and later "removability"). Moreover, the government also argued that criminal aliens could still challenge their deportation and removal orders in the circuit courts on constitutional grounds.

In cases decided before *St. Cyr* and *Calcano-Martinez*, the courts that considered the issue were virtually unanimous in concluding that criminal aliens retained the ability — under both the permanent and transition rules — to raise issues of alienage, deportability and admissibility in their review petitions.<sup>85</sup>

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83. See cases cited *supra* note 13.

84. See *Calcano-Martinez*, 533 U.S. at 349; see also *Wallace v. Reno*, 194 F.3d 279 (1st Cir. 1999) (rejecting government's construction of transition rules); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999) (rejecting government's construction of transition rules); *Singh v. Reno*, 182 F.3d 504 (7th Cir. 1999) (holding that substantial constitutional claim entitled criminal alien to review in court of appeals); *Catney v. INS*, 178 F.3d 190 (3d Cir. 1999) (rejecting government's contention that courts of appeals retained jurisdiction to review criminal aliens' claims of constitutional error in a review petition case); *Wittgenstein v. INS*, 124 F.3d 1244 (10th Cir. 1997) (reviewing criminal aliens' allegations of constitutional error).

85. *Drakes v. Zimski*, 240 F.3d 246 (3d Cir. 2001) (finding the court has jurisdiction under the permanent rules to determine whether it has jurisdiction, and affirming the BIA's finding that the alien's conviction for second-degree forgery was an aggravated felony); *Sousa v. INS*, 226 F.3d 28 (1st Cir. 2000) (finding that criminal alien was deportable for an aggravated felony where IIRIRA explicitly applies the definition retroactively, and suggesting that an alien must exhaust a challenge to deportability even where the court has jurisdiction to determine its jurisdiction); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (finding the court has jurisdiction to determine whether the petitioner's pre-IMMACT conviction is an aggravated felony); *Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000) (finding the court had jurisdiction in permanent rule case to decide whether alien's conviction for rape is an aggravated felony); *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000) (concluding the court has broad authority to determine whether criminal bars apply); *Nguyen v. INS*, 208 F.3d 528, 531 (5th Cir. 2000) ("[I]t is a threshold question in the determination of our jurisdiction for this court to determine whether Nguyen is a citizen."); *Aragon-Ayon v. INS*, 206 F.3d 847 (9th Cir. 2000) (concluding the court has jurisdiction to decide whether application of aggravated felony definition is impermissibly retroactive); *Briseno v. INS*, 192 F.3d 1320, 1322 (9th Cir. 1999) (finding the jurisdictional bar will apply where alien charged with [a crime] rendering him deportable); *Pichardo v. INS*, 188 F.3d 1079 (9th Cir. 1999), *vacated and superseded*, 216 F.3d 1198 (9th Cir. 2000) (reviewing inadmissibility issue); *Maghsoudi v. INS*, 181 F.3d 8 (1st Cir. 1999) (reviewing question of deportability in order to determine whether jurisdictional bar applies, but not additional question regarding eligibility for discretionary relief); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999) (vacating BIA's deportation order); *Lettman v. Reno*, 168 F.3d 463 (11th Cir. 1999) (finding the court has jurisdiction to determine jurisdiction under criminal alien judicial review bar), *reh'g granted, opinion vacated in part by* *Lettman v. Reno*, 185 F.3d 1216 (11th Cir. 1999); *Hall v. INS*, 167 F.3d

The reasoning of these cases was that such issues remained reviewable because the courts retained jurisdiction to determine their own jurisdiction — that is, they could consider the question of whether the jurisdictional bars applied at all in individual cases. For this reason, even if an alien was otherwise precluded from obtaining judicial review of his removal order under IIRIRA, the courts ordinarily would examine the following jurisdictional facts: whether the petitioner is an *alien*,<sup>86</sup> and whether the alien is *removable* by reason of having *committed*<sup>87</sup> a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii),<sup>88</sup> for which both predicate offenses are, without regard to their date of commission, otherwise covered

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852 (4th Cir. 1999) (discussing deportability issue); *Okoro v. INS*, 125 F.3d 920, 925 (5th Cir. 1997) (finding the court has jurisdiction to determine jurisdiction); *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (reviewing and reversing a deportability finding); *Valderrama-Fonseca v. INS*, 116 F.3d 853 (9th Cir. 1997) (considering definition of aggravated felony); *Acuna-Perez v. INS*, 116 F.3d 405 (9th Cir. 1997) (addressing crimes involving moral turpitude ground and finding jurisdiction); *see also* *Yang v. INS*, 109 F.3d 1185, 1196 (7th Cir. 1997).

86. There was strong and related textual support for the proposition that review of issues regarding alienage remained in the circuit courts following enactment of IIRIRA. Like a similar provision in INA section 106(a), section 242(b)(5) of the permanent rule provisions requires transfer of nationality claims to district courts if the court finds that a genuine issue of material fact is presented. If there is no such issue, the court must decide the nationality claim. The statute provides (section 242(b)(5)(C)) that a petitioner may have a nationality claim “decided only as provided” in section 242(b)(5). At least one circuit suggested that the court of appeals on petition for review, not the district court in habeas corpus, was the only appropriate court able to consider a nationality claim. *See* *Baeta v. Sonchick*, 273 F.3d 1261, 1263 (9th Cir. 2001); *cf.* *Batista v. Ashcroft*, 270 F.3d 8, 12 (1st Cir. 2002). Similarly, in *Langborne v. Ashcroft*, 377 F.3d 175 (2d Cir. 2004), the Second Circuit reversed the district court’s determination that it had jurisdiction to consider a citizenship claim in a habeas corpus proceeding and, on appeal, deemed the habeas petition to be transferred to the court of appeals for proceedings under INA section 242 in order to cure the “jurisdictional defect” of filing in the district court. *Id.* at 177.
87. *See Lopez-Elias*, 209 F.3d at 788 (concluding that a conviction for a crime described within the jurisdictional bar will deprive the court of jurisdiction regardless of whether the INS charged the alien with deportability for the offense and regardless of any BIA finding of deportability); *see also* *Hernandez-Mancilla v. INS*, 246 F.3d 1002 (7th Cir. 2001) (ignoring the BIA’s finding that alien’s conviction for possession of a stolen vehicle was a burglary and instead determines that the conviction is a “theft offense” for purposes of the definition of aggravated felony); *Abdel-Razek v. INS*, 114 F.3d 831 (9th Cir. 1997) (finding no jurisdiction on basis of aggravated felony conviction even though alien was not charged as an aggravated felon). *But see Briseno*, 192 F.3d at 1320 (finding the crime must generally be a basis for deportation reflected in OSC, even if the specific charge is not one for a ground for which the criminal bar applies); *Xiong*, 173 F.3d at 608 (remanding case to allow alien to refute contention that criminal offense amounted to sexual abuse of a minor where the INS did not allege below that the alien’s crime satisfied this part of the aggravated felony definition); *Choem v. INS*, 129 F.3d 29 (1st Cir. 1997) (finding the INS may not argue that court is deprived of jurisdiction if alien was not charged with deportability for the criminal offense).
88. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(c) (2000). The referenced sections are to INA §§ 212(a)(2), 237(a)(2)(A)(ii) and (iii), (B), (C), and (D), 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)(A)(ii) and (iii), (B), (C), and (D).

by section 237(a)(2)(A)(i).<sup>89</sup> Some courts also held that when a court determined the presence of these jurisdictional facts, the Board of Immigration Appeal's ("BIA's") conclusions on these issues were to be given appropriate deference.<sup>90</sup> Where such review was available, it arguably precluded a petitioner from seeking review of the issue in district court.<sup>91</sup>

Only the Tenth Circuit held — in a transition rule case — that the courts could not review the BIA's finding of deportability regarding a criminal alien.<sup>92</sup> Notwithstanding its holding in *Berehe*, however, the Tenth Circuit later had no trouble considering a petitioner's argument with respect to alienage, *i.e.*, whether the alien was in fact a derivative citizen of the United States.<sup>93</sup> Moreover, the court thereafter reversed its transition rule holding in a permanent rule case and found that the court had jurisdiction to consider issues of removability as part of its role in considering its jurisdiction.<sup>94</sup>

Before *St. Cyr* and *Calcano-Martinez*, the government also argued that the jurisdictional bars for criminal aliens in AEDPA section 440(a), IIRIRA section 309(c)(4)(G), and INA section 242(a)(2)(C) did not preclude judicial review of all other claims, despite their apparently broad wording. In the government's view, the courts of appeals retained jurisdiction over "substantial constitutional questions" raised by criminal aliens in their review petitions.<sup>95</sup> This interpretation of the bars on judicial review was based on a theory that a statute should be read to avoid serious constitutional questions. Construing AEDPA and IIRIRA as permitting criminal aliens to raise constitutional challenges in circuit courts would avoid the serious constitutional issue that might be raised if the jurisdictional bars were read to preclude review of all claims by

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89. *Richardson v. Reno*, 162 F.3d 1338, 1375-76 (11th Cir. 1998), *vacated and remanded*, 526 U.S. 1142 (1999), *reaffirmed and reinstated*, 180 F.3d 1311 (11th Cir. 1999) (finding the availability of judicial review of these issues helped insulate the IIRIRA jurisdictional bars from constitutional attack).

90. *See Hall v. INS*, 167 F.3d 852, 856 (4th Cir. 1999) (considering jurisdictional facts but not probing the facts underlying the conviction if the criminal statute on its face fits one of the crimes described in IIRIRA); *Yang*, 109 F.3d at 1192 (holding that there was deference to the BIA's findings). *But see Lopez-Elias*, 209 F.3d at 788 (holding that there was no deference owed to the BIA's legal determinations when court deciding its own jurisdiction).

91. *See Santos v. Reno*, 228 F.3d 591 (5th Cir. 2000) (holding that criminal aliens could not challenge deportability in habeas corpus proceedings because opportunity existed to challenge deportability by way of review petitions); *Rivera-Sanchez v. Reno*, 198 F.3d 545 (5th Cir. 1999) (holding that an alien cannot file habeas corpus petition to challenge transition rule deportation order because his criminal conviction did not bar him from seeking judicial review in the court of appeals by review petition).

92. *Berehe v. INS*, 114 F.2d 159 (10th Cir. 1997).

93. *Terrell v. INS*, 157 F.3d 806 (10th Cir. 1997) (reviewing petitioner's claim relating to the constitutionality of citizenship statute at 8 U.S.C. § 1409 notwithstanding her drug conviction, which the court found to preclude review of her challenge to the Board's denial of discretionary relief from deportation).

94. *See Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001).

95. *See Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000); *LaGuerre v. Reno*, 164 F.3d 1035, 1040 (7th Cir. 1998); *Richardson v. Reno*, 162 F.3d 1338, 1377 (11th Cir. 1998); *see also Wittgenstein v. INS*, 124 F.3d 1244 (10th Cir. 1997) (reviewing criminal aliens' allegations of constitutional error).

criminal aliens, in any court. This statutory construction derived in part from *Webster v. Doe*, in which the Supreme Court stated that the courts should not presume that Congress intended to preclude judicial review of constitutional claims absent a clear expression of congressional intent to do so.<sup>96</sup> As the government acknowledged, neither AEDPA nor IIRIRA expressly stated that a criminal alien's constitutional claims could *not* be reviewed in the courts of appeals; in fact, a new provision effective for aliens placed into removal proceedings after April 1, 1997, suggested the contrary. It stated that “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.”<sup>97</sup>

In the initial litigation arising under the transition rules, only one circuit definitively construed those rules to permit review of constitutional claims in the courts of appeals.<sup>98</sup> The nearly unanimous view was that the transition rules generally barred all circuit court review for criminal aliens — at least of issues related to relief from deportation and exclusion — but that criminal aliens who were otherwise precluded from seeking review in the courts of appeals could challenge their deportation orders on constitutional *and statutory* grounds by filing habeas corpus petitions in the district courts.<sup>99</sup>

The permanent judicial review provisions in IIRIRA section 242, as noted above, generally did not apply to aliens who were in administrative deportation and exclusion proceedings before April 1, 1997. Judicial review in such cases was governed generally by Section 106(a) of the INA,<sup>100</sup> except that the transitional changes in judicial review applied to aliens seeking judicial review of final deportation and exclusion orders entered after October 30, 1996.<sup>101</sup> As noted above, only the Seventh Circuit held that habeas corpus was not generally avail-

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96. 486 U.S. 592 (1988).

97. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (1994 & Supp. 1996).

98. See *LaGuerre*, 164 F.3d at 1041 (holding that district courts lacked habeas corpus jurisdiction to review criminal aliens' challenges to deportation orders); see also *Farquharson v. Ashcroft*, 246 F.3d 1317 (11th Cir. 2001) (finding, in transitional rule case, that it has jurisdiction via review petition to consider criminal alien's equal protection challenge to the denial of relief under section 212(c) of the INA).

99. *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Requena v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Mayers v. Reno*, 175 F.3d 1289 (11th Cir. 1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Henderson v. Reno*, 157 F.3d 106 (2d Cir. 1998); *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998), *amended by* 159 F.3d 1217 (9th Cir. 1998), *vacated and remanded*, 526 U.S. 1001 (1999); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998). *But see LaGuerre*, 164 F.3d at 1035 (finding the district courts lack habeas corpus jurisdiction to review criminal aliens' challenges to deportation orders because review is only available in the circuit courts).

100. 8 U.S.C. § 1105a (1994).

101. See IIRIRA §§ 309(a), (c)(1), (c)(4).

able during the transition rule period.<sup>102</sup> Ten circuits found to the contrary.<sup>103</sup> Thus, the overwhelming consensus of the circuits was that criminal aliens could challenge their deportation orders on constitutional and statutory grounds in district courts in transition rule cases.

The question proved to be somewhat closer in permanent rule cases, in light of provisions in the statute underscoring the “exclusivity” of section 242 review.<sup>104</sup> Two circuits, the Fifth and Eleventh, squarely held that habeas corpus remedies were unavailable under the permanent rules.<sup>105</sup> The Seventh circuit carried forward its analysis of the transition rules to permanent rule cases, and found that criminal aliens generally were limited to raising “substantial constitutional claims” by way of review petitions in the courts of appeals.<sup>106</sup> In contrast, the First, Second, Third, and Ninth Circuits found that criminal aliens could file habeas corpus petitions to challenge removal orders on constitutional and statutory grounds.<sup>107</sup> As discussed below, the government sought Supreme Court review in *St. Cyr* to resolve this circuit conflict.

*B. St. Cyr, Calcano-Martinez, and Habeas Corpus Review.*

Following enactment of AEDPA, several courts of appeals dismissed criminal aliens’ review petitions for lack of jurisdiction, but left open the possibility that these aliens could file habeas corpus petitions in the district courts to challenge their deportation orders.<sup>108</sup> As the preceding discussion suggests, such opin-

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102. See *LaGuerre*, 164 F.3d at 1040. The Seventh Circuit did opine, however, that to avoid constitutional problems, special attention should be paid to claims of citizenship, mistaken identity, political vendetta, or a “secret reason” other than a statutorily permissible one. See *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997).

103. See cases cited *supra* note 99.

104. See INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (stating that “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.”).

105. *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999).

106. *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001); *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000).

107. *Mahadeo v. Reno*, 226 F.3d 3, 10 (1st Cir. 2000) (holding that permanent rules lack clear statement to repeal habeas corpus jurisdiction); *Calcano-Martinez*, 232 F.3d at 330 (finding judicial review only available to criminal aliens under IIRIRA’s permanent rules by way of habeas corpus), *aff’d*, 533 U.S. 348 (2001); *St. Cyr*, 229 F.3d at 421 (concluding the district court had habeas jurisdiction to review criminal alien’s removal order), *aff’d*, 533 U.S. 289 (2001); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000).

108. See *Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir. 1998); *Mansour v. INS*, 123 F.3d 423, 427 (6th Cir. 1997); *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997); *Williams v. INS*, 114 F.3d 82 (5th Cir. 1997); *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997); *Kolster*, 101 F.3d at 785; *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996); see also *Ramallo v. Reno*, 114 F.3d 1210 (D.C. Cir. 1997).

ions resulted in many aliens filing habeas corpus petitions in district courts alleging that AEDPA and IIRIRA did not limit the availability or scope of habeas corpus under 28 U.S.C. § 2241 for their petitions as criminal alien offenders who were seeking to challenge their deportation and exclusion orders.<sup>109</sup> The government opposed these petitions, arguing that, in light of IIRIRA, no statutory habeas corpus jurisdiction existed any longer in district courts. As set forth above, the courts virtually unanimously rejected the government's position in transition rule cases.<sup>110</sup> Notably, nearly all of these cases raised *statutory* challenges to the deportation orders at issue; specifically, the petitions nearly always involved challenges to denials of discretionary relief on statutory eligibility grounds. In permanent rule cases, however, at least three circuits agreed that the permanent rules appeared to lay to rest any suggestion that criminal aliens could seek judicial review of removal orders under the general habeas corpus statute at 28 U.S.C. § 2241, regardless of the statutory or constitutional challenge raised.<sup>111</sup> Another four circuits found that habeas corpus survived the permanent rules because the permanent rules were insufficiently clear to demonstrate that Congress intended to preclude jurisdiction under the habeas corpus statute.<sup>112</sup> In order to resolve this circuit conflict, the government filed a petition for writ of certiorari in the *St. Cyr* case. The Supreme Court ultimately granted certiorari in *St. Cyr*, a habeas corpus case, and in the related *Calcano-Martinez* review petition case. The Supreme Court heard oral argument in the cases on April 24, 2001, and rendered decisions in both cases on June 25, 2001.<sup>113</sup>

By a five to four margin, the Supreme Court decided in *St. Cyr* that the permanent rule jurisdictional provisions do not preclude habeas corpus petitions by criminal aliens because the permanent rules do not expressly state that habeas corpus is unavailable.<sup>114</sup> Thus, the Court held that habeas corpus remained available for any criminal alien raising a "pure" question of law over which the court of appeals had no jurisdiction.<sup>115</sup>

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109. 28 U.S.C. § 2241 provides, in relevant part, that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts, and any circuit judge within their respective jurisdictions." It further states that the writ "shall not extend to a prisoner" unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241 (2000).

110. See cases cited *supra* note 99.

111. See *Morales-Ramirez*, 209 F.3d at 983; *Max-George*, 205 F.3d at 202 (holding that IIRIRA permanent rules eliminate habeas corpus for criminal aliens); *Richardson*, 180 F.3d at 1313 (holding that habeas corpus does not survive enactment of section 242(b)(9)).

112. *Mabadeo*, 226 F.3d at 10 (finding that permanent rules lack clear statement to repeal habeas corpus jurisdiction); *Calcano-Martinez*, 232 F.3d at 330 (finding that judicial review only available to criminal aliens under IIRIRA's permanent rules by way of habeas corpus), *aff'd*, 533 U.S. 348 (2001); *St. Cyr*, 229 F.3d at 421 (holding that the district court had habeas jurisdiction to review criminal alien's removal order), *aff'd*, 533 U.S. 289 (2001); *Flores-Miramontes*, 212 F.3d at 1133; *Liang*, 206 F.3d at 308.

113. *INS v St. Cyr*, 533 U.S. 289 (2001).

114. *Id.* at 305-14.

115. *Id.* at 300.

Like the majority of cases that heretofore had found habeas corpus remedies to be available following enactment of IIRIRA, *St. Cyr* involved a criminal alien who filed a petition for writ of habeas corpus challenging the BIA's conclusion that the petitioner was ineligible for discretionary relief on statutory grounds. Specifically, the issue was whether INA section 212(c) relief had been repealed for an alien who pleaded guilty to an offense before enactment of IIRIRA. Although the relief would have been available to the alien when he pleaded, at issue was whether IIRIRA would render him ineligible for relief under section 212(c) during his removal proceedings.<sup>116</sup> The District Court of Connecticut concluded that habeas jurisdiction remained as the available mechanism for raising such a claim.<sup>117</sup> The Second Circuit agreed.<sup>118</sup>

The Supreme Court held in *St. Cyr* that the district court had habeas corpus jurisdiction to review St. Cyr's removal order in spite of the various statutory limitations on review created by the INA's permanent judicial review statute. There were two primary considerations that appeared to drive the Court's conclusion: "the absence of . . . a forum" to review such claims under the INA if habeas were deemed to be unavailable, "coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas."<sup>119</sup> The Court thus concluded that the 1996 reforms did not bar a criminal alien's access to the courts through a petition for writ of habeas corpus for the purpose of raising a legal challenge regarding statutory eligibility for discretionary relief.<sup>120</sup> In *Calcano-Martinez*, the Supreme Court in a five to four decision held that the Second Circuit did not have jurisdiction to review the removal order of a criminal alien, and that habeas corpus was the proper avenue for the alien to raise his statutory challenge to his removal order in that case.<sup>121</sup>

The Supreme Court began its jurisdictional analysis in *St. Cyr* by stating that the government's argument that jurisdiction under 28 U.S.C. § 2241 did not exist had to overcome the strong presumption in favor of judicial review of administrative action, as well as the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.<sup>122</sup> The Court said that when Congress acts at the so-called "outer limits" of its authority, it must provide a

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116. *Id.* at 293.

117. *Id.*

118. *Id.*

119. *Id.* at 314.

120. *Id.* Justice Scalia filed a dissent, in which the Chief Justice and Justice Thomas joined and Justice O'Connor joined in part. Justice Scalia explained that the language of the new reforms, particularly INA section 242, were "utterly unambiguous" in barring the use of habeas corpus. *Id.* at 326-27 (Scalia, J., dissenting).

121. *Calcano-Martinez*, 533 U.S. at 349.

122. *St. Cyr*, 533 U.S. at 298.

clear statement of intent before a statute may be construed to “repeal” habeas corpus.<sup>123</sup> Importantly, the Court also invoked the canon of construction that a court should avoid an otherwise acceptable construction of a statute that would raise serious constitutional problems if an alternative construction is “fairly possible.”<sup>124</sup>

The Court determined that serious constitutional problems would be raised if the statute were read to preclude habeas jurisdiction in the case of an alien like *St Cyr*. “A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.”<sup>125</sup> Relying on the Suspension Clause as it existed in 1789, the Court found “substantial evidence” that pure questions of law could have been resolved at that time by a common law judge with power to issue the writ of habeas corpus.<sup>126</sup> Accordingly, the Court determined that the preclusion of habeas corpus would require an “unambiguous statement” of congressional intent before such construction would be deemed the correct one.<sup>127</sup>

The Supreme Court rejected the government’s argument that the 1996 reforms did represent such a clear, “unambiguous statement” to render review in the court of appeals “sole and exclusive” and to eliminate alternative remedies in district courts. First, the Court concluded that 28 U.S.C. § 2241 habeas had been available as a method of challenging deportation orders even before the 1996 amendments.<sup>128</sup> The Court determined that section 401(e) of AEDPA, which repealed the habeas corpus review offered by former INA section 106(a)(10), was ineffective to repeal habeas corpus under § 2241.<sup>129</sup> The Court also determined that INA sections 242(a)(2)(C) and (b)(9) did not repeal habeas corpus because those sections referred to “judicial review,” which the court concluded was categorically distinct from habeas corpus review.<sup>130</sup> The Court noted that both subsections failed to explicitly mention habeas by name or section.<sup>131</sup> Thus, the Court found, neither subsection was sufficient to bar habeas jurisdiction.<sup>132</sup>

With respect to whether Congress could provide an adequate alternative to habeas corpus review, the Court concluded its jurisdictional discussion by stating:

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123. *Id.* at 299.

124. *Id.*

125. *St. Cyr*, 533 U.S. at 300.

126. *Id.* at 304–05.

127. *Id.* at 306–07.

128. *Id.* at 307–08.

129. *Id.* at 308–09.

130. *Id.* at 310–11.

131. *Id.* at 312–13.

132. *Id.*



## JUDICIAL REVIEW UNDER THE IMMIGRATION AND NATIONALITY ACT

If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS's 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>133</sup>

In a closing footnote, the Court again opined on the question of congressional authority to provide a substitute for habeas corpus review, and hinted at the limitations of its ruling. In taking issue with the dissent, which noted the potential anomaly of affording criminal aliens *more* review because such review would originate in the district courts (with an opportunity to appeal to the circuits), the court observed that:

The dissent argues that our decision will afford more rights to criminal aliens than to noncriminal aliens. However, as we have noted, the scope of review on habeas is considerably more limited than on APA-style review. Moreover, this case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not, as the dissent suggests, an objection to the manner in which discretion was exercised. As to the question of timing and congruent means of review, we note that Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.<sup>134</sup>

Accordingly, the Supreme Court's resolution of the habeas corpus issue was that, at a minimum, habeas corpus jurisdiction remained for criminal aliens raising "pure" questions of law relating to discretionary relief that could not be heard in the court of appeals on direct review.<sup>135</sup> The Court did not squarely address whether review of constitutional claims would be barred in the courts of appeals, an issue raised in *Calcano-Martinez*. In *Calcano-Martinez*, the Supreme Court in fact appeared to leave open the possibility that some review of constitutional claims might remain in the courts of appeals in permanent rule cases. Although it dismissed the claim raised by the alien in that case — a similar claim of statutory eligibility for discretionary relief from deportation — the court observed that the permanent rule criminal alien bar was "not without its ambiguities."<sup>136</sup> The Court acknowledged the government's contention that judicial review of substantial constitutional claims remained in the courts of appeals notwithstanding INA section 242(a)(2)(C), but the Court stated that "[a]s the petitions in this

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133. *Id.* at 314.

134. *Id.* at 314 n.38.

135. *Id.* at 314.

136. *Calcano-Martinez*, 533 U.S. at 350 n.2.

case do not raise any of these types of issues, we need not address this point further.”<sup>137</sup>

*C. Review in the Circuit Courts after St. Cyr and Calcano-Martinez.*

After *St. Cyr* and *Calcano-Martinez*, litigation again focused on what issues remained subject to review, and where they could be reviewed. As before, all of the courts addressing the issue in the aftermath of the Court’s decisions recognized the jurisdiction of the appellate courts to continue to consider questions of removability and deportability.<sup>138</sup> Thus, even before the REAL ID Act, such issues continued to be reviewed by the appellate courts by way of review petitions.

Whether the district courts could also claim jurisdiction to review such issues in light of *St. Cyr* was less clear. Some courts recognized the ability of some petitioners to obtain review of issues related to alienage and deportability in the district courts, albeit in apparently somewhat limited circumstances.<sup>139</sup> Other opinions appeared to suggest that such issues had to be raised in the circuit courts.<sup>140</sup> Adding further to the confusion, at least three courts extended the reasoning of *St. Cyr* to non-criminal cases, finding that non-criminal petitioners had recourse to habeas corpus proceedings notwithstanding the fact that they were not barred from seeking review by the IIRIRA jurisdictional limitations.<sup>141</sup>

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137. *Id.*

138. *Zavaleta-Gallegos v. INS*, 261 F.3d 951 (9th Cir. 2001) (finding that *Calcano-Martinez* permits judicial review over factual inquiries relating to whether the jurisdictional bar applies in removal case); *Murillo-Espinoza v. Ashcroft*, 261 F.3d 771, 773 (9th Cir. 2001) (retaining jurisdiction to determine jurisdiction in removal case); *Yousefi v. Ashcroft*, 260 F.3d 318 (4th Cir. 2001) (deportation case); *Fernandez-Bernal v. Attorney General*, 257 F.3d 1304 (11th Cir. 2001) (removal case); *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001) (removal case).

139. *See Garcia v. Ashcroft*, 394 F.3d 481 (7th Cir. 2005) (lacking jurisdiction to consider whether alien is an aggravated felon where the court is deprived of jurisdiction because the offense also renders the alien removable as a controlled substance offender); *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004) (same); *Salvador-Rivera v. Ashcroft*, 387 F.3d 835 (9th Cir. 2004) (finding constitutional right to review in habeas of non-frivolous claim to citizenship); *Flores-Garza v. INS*, 328 F.3d 797 (5th Cir. 2003) (lacking jurisdiction to review BIA order where alien removable for drug offense but sought to challenge alternative finding of deportability for aggravated felony based on second crime; such challenge was required to be raised instead in district court); *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002) (finding jurisdiction to review removability based on criminal conviction); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (retaining district court habeas jurisdiction over challenge to removability).

140. *See Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003) (finding that an alien’s due process claim regarding sufficiency of evidence used by the INS to establish his prior narcotics conviction was required to be raised on direct review of BIA’s removal order and not in habeas corpus proceeding); *Taniguchi v. Schultz*, 303 F.3d 950 (9th Cir. 2002) (declining to exercise habeas jurisdiction over an alien’s citizenship claim, in part because direct judicial review of the claim would have been available in the circuit court).

141. *See Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002) (finding that § 2241 habeas remains for non-criminal aliens under transition rules); *Liu v. INS*, 293 F.3d 36 (2d Cir. 2002) (holding that habeas corpus jurisdiction is not limited to criminal aliens after *St. Cyr*); *Chmakov v. Blackman*, 266 F.3d 210 (3d Cir.

Conversely, two other courts found that habeas was not available because the petitioner had recourse in the court of appeals.<sup>142</sup>

Whether the circuit courts had jurisdiction over constitutional questions after *St. Cyr* and *Calcano-Martinez* was never fully resolved before enactment of the REAL ID Act. After *Calcano-Martinez*, some courts recognized the possibility that they had jurisdiction to review claims raised by criminal aliens challenging provisions of the INA on constitutional grounds, or involving other constitutional challenges to removal.<sup>143</sup> In fact, the Seventh Circuit expressly held that it had jurisdiction to consider constitutional claims challenging removal orders, and declined to consider such a claim in a habeas corpus proceeding because the claim could have been raised on direct review of the removal order.<sup>144</sup> After *St. Cyr* and *Calcano-Martinez*, however, it appeared that habeas corpus review of constitutional and statutory claims generally would be available to criminal aliens, especially where those claims raised legal challenges to denials of discretionary relief and other matters unrelated to questions of removability.

#### D. Habeas Corpus Review After *St. Cyr*.

Although the Supreme Court in *St. Cyr* rejected the government's position that criminal aliens could not use habeas corpus petitions to challenge final orders of removal, the Court did not resolve all issues related to the use of habeas corpus petitions by criminal aliens or non-criminal aliens. Litigation in district courts thus turned to what issues remained subject to review by way of habeas corpus, and what procedural limitations applied.

One significant issue to be resolved was the scope of review available in habeas corpus petitions. As discussed above, habeas corpus review had historically been more limited in scope than direct review of removal orders in the circuits under the INA. Cases decided well before *St. Cyr* indicated that aliens

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2001) (finding that the rationale of *St. Cyr* is not limited to criminal cases and habeas corpus is available to non-criminals raising questions of law regarding removal orders); *cf. Chang*, 307 F.3d at 1192 (holding that the district court has jurisdiction to determine whether criminal alien bar applies).

142. *See Lopez v. Heinauer*, 332 F.3d 507 (8th Cir. 2003); *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667 (7th Cir. 2003).

143. *See Balogun v. Att'y Gen.*, 304 F.3d 1303 (11th Cir. 2002) (stating that judicial review may still be available for consideration of substantial constitutional challenges to removal even if the criminal bar to review applies); *Ramtulla v. Ashcroft*, 301 F.3d 202 (4th Cir. 2002) (assuming without deciding whether the court can review substantial constitutional challenges to removal because the petition raised no such challenge); *Vaquez-Velezmoro v. INS*, 281 F.3d 693 (8th Cir. 2002); *Flores-Leon v. INS*, 272 F.3d 433 (7th Cir. 2001); *Balogun v. Ashcroft*, 270 F.3d 274 (5th Cir. 2001); *Fernandez-Bernal v. Att'y Gen.*, 257 F.3d 1304 (11th Cir. 2001) (holding that court retains jurisdiction to determine its jurisdiction and can consider constitutional challenges to the INA).

144. *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 675 (7th Cir. 2003); *see also Dave v. Ashcroft*, 363 F.3d 649 (7th Cir. 2004) (holding that an alien's conviction for a firearms offense deprives the court of jurisdiction, and alien raised no substantial constitutional questions that could be reviewed by the court notwithstanding the jurisdictional bar).

had recourse through the writ of habeas corpus to raise specific types of challenges: (1) inquiries into “jurisdictional facts” such as alienage and citizenship; (2) inquiries into the denial of a fair hearing; (3) inquiries into findings made without any supporting evidence; (4) inquiries into whether there was an application of an erroneous rule of law relating to the alien’s deportability.<sup>145</sup>

Absent from the foregoing categories, however, was any mention of review of the exercise of administrative discretion, or even of administrative fact-finding. As the Supreme Court thus reminded in *St. Cyr*, habeas corpus review is not as broad in scope as direct “judicial review.”<sup>146</sup> Moreover, in *St. Cyr* the Court also specifically suggested that habeas corpus would not be available to entertain challenges to discretionary decisions of the Attorney General.<sup>147</sup> Thus, under *St. Cyr*, petitions filed under 28 U.S.C. § 2241 permitted the review of “pure questions of law” relating to the denial of discretionary relief from removal, but apparently not the review of the actual discretionary denial of such relief.<sup>148</sup>

In the years following *St. Cyr*, several circuits indeed held that the scope of habeas corpus did not encompass review of discretionary decisions.<sup>149</sup> Additionally, the Third Circuit held that habeas corpus review did not encompass review

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145. *See* *Bridges v. Wixon*, 326 U.S. 135 (1945) (using habeas proceedings as “safeguards against essentially unfair procedures”); *United States ex rel. Vajtauer v. Comm’r*, 273 U.S. 103, 106 (1927) (holding that due process errors may be corrected on habeas); *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 132–34 (1924) (holding that due process errors may be corrected on habeas); *Mahler v. Eby*, 264 U.S. 32, 44 (1924) (extending habeas corpus to “conditions precedent to deportation by statute”); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) (habeas corpus is available where findings were unsupported by evidence); *Ng Fung Ho v. White*, 259 U.S. 276, 281–82 (1922) (habeas corpus available for constitutional questions); *Kwock Jan Fat v. White*, 253 U.S. 454, 457–68 (1920) (habeas corpus may be used to entertain allegations that proceedings were “manifestly unfair,” “manifest abuse of discretion,” a violation of “due process,” or that a hearing was not “in good faith”); *Gegiow v. Uhl*, 239 U.S. 3, 9–10 (1915) (using habeas to review interpretation of law underlying exclusion order); *Chin Yow v. United States*, 208 U.S. 8, 13 (1908) (alien may use the writ to challenge deportation without the process of law); *Gonzales v. Williams*, 192 U.S. 1, 14 (1904) (suggesting habeas corpus was available to test the jurisdiction of the immigration officer); *Li Sing v. United States*, 180 U.S. 486, 488 (1901) (suggesting habeas corpus was available to test the jurisdiction of the immigration officer).

146. *St. Cyr*, 533 U.S. at 311–12 (“[T]he limited role played by courts in habeas corpus proceedings [is] far narrower than the judicial review authorized by the APA.”).

147. *Id.* at 314 n.38; *see also* *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 269 (1954) (Jackson, J., dissenting).

148. *St. Cyr*, 533 U.S. at 306–08.

149. *Nguyen v. Dist. Dir.*, 400 F.3d 255 (5th Cir. 2005) (holding an alien challenging removal order in collateral civil habeas case must meet narrow standard set forth in 8 U.S.C. § 1326); *Latu v. Ashcroft*, 375 F.3d 1012 (10th Cir. 2004) (finding that the scope of habeas corpus review does not include review of discretionary decisions); *Gutierrez-Chavez v. INS.*, 298 F.3d 824 (9th Cir. 2003) (holding that the BIA’s decision cannot be challenged under general habeas corpus statute absent claim of constitutional or statutory error); *Carranza v. INS.*, 277 F.3d 65 (1st Cir. 2002); *Sol v. INS.*, 274 F.3d 648 (2d Cir. 2001); *see also* *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004) (finding district court had jurisdiction to consider decision denying protection under the Convention Against Torture, but the court’s review in habeas extends only to constitutional issues and errors of law, and the application of law to undisputed or adjudicated facts; review does not include review of administrative factual findings or the exercise of discretion); *Bravo v. Ashcroft*, 341 F.3d 590 (5th Cir. 2003) (holding no judicial review by any court of Attorney

of some factual findings.<sup>150</sup> Thus, in light of *St. Cyr*, the outer boundaries of the writ appeared to include “pure questions of law” but not review for an agency abuse of discretion, or review for substantial evidence.

In addition to issues of scope, there remained questions regarding what other “procedural” limitations existed on the use of habeas corpus in immigration cases, and what defenses could be raised. One lingering question was whether the failure to utilize direct review where it was available — such as when the petitioner sought to challenge only the determination that he or she was removable for a criminal offense — could serve to bar subsequent habeas corpus review. As is explained above, courts of appeals retained jurisdiction even in light of *St. Cyr* over questions such as alienage and removability in cases of criminal aliens subject to the review bar set forth in INA section 242(a)(2)(C).<sup>151</sup> In a case decided the same term as *St. Cyr*, the Supreme Court suggested that the failure to utilize such direct review could serve as a bar to later habeas review. In *Daniels v. United States*, a federal prisoner sought to use a petition brought under 28 U.S.C. § 2255 to challenge two earlier state convictions being used for federal sentencing purposes.<sup>152</sup> In rejecting the claim, the Court cited interests of finality and explained that limitations existed on the use of habeas corpus:

Our system affords a defendant convicted in state court numerous opportunities to challenge the constitutionality of his conviction. He may raise constitutional claims on direct appeal, in post-conviction proceedings available under state law, and in a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 (1994 ed. and Supp. V). . . . These vehicles for review, however, are not available indefinitely and without limitation. Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim.<sup>153</sup>

The Court went on to conclude that the petitioner, by failing to take advantage of direct review of his prior convictions, forfeited his constitutional claims regarding those prior convictions.<sup>154</sup> *Daniels* thus suggested that the decision to forego an

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General’s discretionary decision to deny cancellation for lack of exceptional and extremely unusual hardship).

150. *Bakhtriger v. Elwood*, 360 F.3d 414, 425 (3d Cir. 2004) (holding discretionary and factual findings are outside the scope of habeas corpus review, as such review does not encompass APA-style review).

151. *See supra* text accompanying note 138 (discussing courts retaining jurisdiction to review issues of alienage and removability).

152. 532 U.S. 374, 377–78 (2001).

153. *Id.* at 381 (citing *United States v. Olano*, 507 U.S. 725, 731 (1993)) (“No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.”) (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

154. *Daniels*, 532 U.S. at 384.

available judicial forum might not be without some cost to the potential habeas corpus petitioner, even in an immigration case. Indeed, the Supreme Court in *St Cyr* even appeared to suggest that the availability of judicial review might foreclose the use of habeas corpus, as the Court acknowledged that “[i]f 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.”<sup>155</sup>

The question was never fully resolved prior to the enactment of the REAL ID Act. As discussed above, some courts determined that habeas corpus would be available only in cases in which an alien was precluded from obtaining direct review in the circuit courts.<sup>156</sup> The Third Circuit appeared to take a different approach, however, ruling in the affirmative on the related question of whether *St. Cyr* made habeas corpus remedies available to non-criminals as well as criminal aliens.<sup>157</sup> The Second Circuit issued a similar ruling in *Liu v. INS*,<sup>158</sup> as did the Tenth Circuit in *Riley v. INS*.<sup>159</sup>

On the other hand, the Ninth Circuit and other courts appeared to embrace the view that an alien must exhaust “judicial remedies” available under INA section 242 before seeking review by way of habeas corpus proceedings.<sup>160</sup> In *Laing*, the Ninth Circuit held that an alien who failed to seek timely review in the court of appeals of the administrative finding that he was an aggravated felon did not properly exhaust his judicial remedies, and the court refused to find an exception to the exhaustion requirement in his case. “To allow a party to hopscotch over judicial review requirements by simply waiting for them to expire would eviscerate the exhaustion doctrine,” the court observed.<sup>161</sup> Moreover, in a

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155. *St. Cyr*, 533 U.S. at 314.

156. See *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002) (holding habeas corpus jurisdiction under *St. Cyr* is limited to cases in which the statute bars direct consideration of an alien’s claims); see also *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (finding that “jurisdiction was lacking in the district court for a determination of citizenship under § 2241 because another statutory remedy is available to establish citizenship” by way of review petition in the circuit court).

157. See *Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (finding the rationale of *St. Cyr* is not limited to criminal cases; habeas corpus is available to non-criminals raising questions of law regarding removal orders).

158. 293 F.3d 36, 37 (2d Cir. 2002) (holding that habeas corpus jurisdiction is not limited to criminal aliens after *St. Cyr*).

159. 310 F.3d 1253, 1256 (10th Cir. 2002).

160. *Laing v. Ashcroft*, 370 F.3d 994 (9th Cir. 2004); see also *Rivera-Martinez v. Ashcroft*, 389 F.3d 207 (1st Cir. 2004) (applying principle of procedural default in affirming district court’s refusal to consider citizenship claim in habeas proceedings that the alien could have raised on direct review of his removal order but did not); *Latu v. Ashcroft*, 375 F.3d 1012 (10th Cir. 2004) (finding that alien not barred from filing habeas petition because no direct review of the issues he sought to raise was available to him but noting that a habeas petition is not a substitute for direct review).

161. *Laing*, 370 F.3d at 999; see also *Acevedo v. Ashcroft*, 371 F.3d 539 (9th Cir. 2004) (applying exhaustion of judicial remedies doctrine and declining to transfer habeas petition where the petition was not filed within thirty days of the BIA’s decision); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874 (9th Cir. 2003) (sustaining district court’s dismissal of habeas petition where alien failed to seek direct review of the BIA’s

related ruling, the Ninth Circuit also found that the doctrine of collateral estoppel applied to prevent an alien from filing a subsequent habeas corpus petition to challenge his removability after the court of appeals, on direct review, had dismissed the petition for lack of jurisdiction because the alien was removable on criminal grounds.<sup>162</sup>

One issue that did appear settled before enactment of the REAL ID Act was that habeas corpus could not be employed where the petitioner failed to exhaust administrative remedies. Several circuits even went so far as to hold that the *statutory* exhaustion requirement in INA section 242 applied in habeas cases.<sup>163</sup> The Fourth Circuit similarly held that the failure to take an appeal to the BIA constituted a failure to exhaust remedies divesting a court of habeas jurisdiction under the transition rules.<sup>164</sup> The Fifth Circuit likewise instructed a district court to determine whether an alien had exhausted his remedies before accepting habeas corpus jurisdiction.<sup>165</sup> The Ninth Circuit even went so far as to decline jurisdiction to consider an alien's citizenship claim where the alien failed to exhaust administrative remedies by appealing his deportation order to the BIA.<sup>166</sup>

As the litigation continued to define the new, post-*St. Cyr* judicial review scheme, congressional dissatisfaction with that scheme caused Congress to intervene once again. On May 11, 2005, much of the developing law governing judicial review under the INA became obsolete, and a new phase of the litigation over judicial review began, again focusing on where to obtain review, and on the question of what issues are and will be subject to review.

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finding that he was an aggravated felon); *Taniguchi*, 303 F.3d at 955 (declining to exercise habeas jurisdiction over an alien's citizenship claim because the alien failed to exhaust administrative remedies by filing an appeal to the BIA, and because direct judicial review of the claim would have been available in the circuit court).

162. *See Nunes v. Ashcroft*, 375 F.3d 805 (9th Cir. 2004), *reh'g denied*, 375 F.3d 810 (9th Cir. 2004) (Tashima and Reinhardt, JJ., dissenting) (disagreeing with denial of rehearing en banc).

163. *See Soberanes v. Comfort*, 388 F.3d 1305 (10th Cir. 2004) (finding that exhaustion doctrine applies to habeas proceedings, and refusing to consider BIA decision denying reopening because the decision was on direct review in the 9th Circuit); *Sayyah v. Farquharson*, 382 F.3d 20 (1st Cir. 2004); *Sun v. Ashcroft*, 370 F.3d 932 (9th Cir. 2004); *Theodoropoulos v. INS*, 358 F.3d 162 (2d Cir. 2003); *Sundar v. INS*, 328 F.3d 1320 (11th Cir. 2003) (holding that an alien must exhaust administrative remedies by appealing to the BIA before seeking habeas review of IJ's removal order); *see also Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 53 (2d Cir. 2004) (finding exception to exhaustion based on "manifest injustice"); *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) (asserting that the futility of raising extreme hardship claim does not excuse an alien from exhausting his administrative remedies on the claim before filing a habeas petition).

164. *Kurfees v. INS*, 275 F.3d 332, 336 (4th Cir. 2001).

165. *See Cano-Miranda v. Ashcroft*, 262 F.3d 477, 478 (5th Cir. 2001); *see also Goonsuwan v. Ashcroft*, 252 F.3d 383 (5th Cir. 2001) (holding that a failure to file a motion to reopen to raise an ineffective assistance of counsel claim constitutes a failure to exhaust remedies).

166. *Taniguchi v. Schultz*, 303 F.3d 950, 956 (9th Cir. 2002).

## V. JUDICIAL REVIEW UNDER THE REAL ID ACT

Congress dramatically overhauled the INA's post-*St. Cyr* judicial review scheme in the REAL ID Act. Most significantly, section 106(a) of the REAL ID Act amended section 242(a)(2) of the INA to eliminate habeas corpus jurisdiction over removal orders for any alien. Thus, section 106 of the REAL ID Act directly responded to the Supreme Court's decision in *St. Cyr* by expressly removing habeas jurisdiction.<sup>167</sup>

Congressional intent in the REAL ID Act to eliminate habeas corpus and render review petitions the exclusive means of seeking review in fact could hardly be more clear. Perhaps most significantly, the REAL ID Act added section 242(a)(5) to the statute, which states that:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code [28 U.S.C. § 2241], or any other habeas corpus provision, and sections 1361 and 1651 of such title [28 U.S.C. §§ 1361 and 1651], a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e) of this section. For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, United States Code, [28 U.S.C. § 2241] or any other habeas corpus provision, sections 1361 and 1651 of such title [28 U.S.C. §§ 1361 and 1651], and review pursuant to any other provision of law (statutory or nonstatutory).<sup>168</sup>

Congress also amended section 242(b)(9) to reinforce its "channeling" of constitutional and statutory claims to the circuit courts. That section now provides that:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial

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167. *Ishak v. Gonzales*, 422 F.3d 22, 29 (1st Cir. 2005) ("The plain language of these amendments, in effect, strips the district court of habeas jurisdiction over final orders of removal, including orders issued prior to the enactment of REAL ID Act. . . . Congress now has definitively eliminated any provision for jurisdiction."); *see also Enwonwu v. Gonzales*, 438 F.3d 22, 29 (1st Cir. 2006) ("Congress has eliminated habeas review as to most types of immigration claims."); *Ramirez-Molina v. Ziglar*, 436 F.3d 508, 512 (5th Cir. 2006) ("The REAL ID Act thus supplies, in this context, the 'clear statement of congressional intent to repeal habeas jurisdiction' that the *St. Cyr* Court found lacking."); *Gittens v. Menifee*, 428 F.3d 382, 383 (7th Cir. 2005) ("The REAL ID Act 'eliminates habeas corpus review of orders of removal'") (quoting *Marquez-Almanzar v. INS*, 418 F.3d 210, 212 (2d Cir. 2005)).

168. INA § 242(a)(5), amended by REAL ID Act of 2005, § 106(a)(1)(B).



## JUDICIAL REVIEW UNDER THE IMMIGRATION AND NATIONALITY ACT

review of a final order under this section. *Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by sections 1361 or 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>169</sup>

Moreover, Congress similarly amended section 242(g) to address the potential of collateral claims being raised in other courts. Section 242(g) now provides that:

Except as provided in this section and notwithstanding any other provision of law (*statutory or nonstatutory*), including section 2241 of title 28, United States Code, or any other habeas corpus provision, by sections 1361 or 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.<sup>170</sup>

In addition to amending the foregoing “exclusivity” provisions to state unequivocally that review petitions in the appellate courts are the only means of obtaining judicial review of an order of removal, Congress likewise amended the criminal alien review bar at section 242(a)(2)(C) to expressly preclude habeas corpus review. That section now provides that:

Notwithstanding any other provision of law (*statutory or nonstatutory*), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in paragraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii), for which both predicate offenses are, without regard to the date of commission, otherwise covered by section 237(a)(2)(A)(i).<sup>171</sup>

In enacting the unequivocal restrictions on district court review outlined above, Congress did not ignore the concerns expressed in *St. Cyr* over the elimination of all review for criminal aliens. Although section 106(a)(1)(B) of the REAL ID Act (adding 242(a)(5)) stated that a petition for review filed in the

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169. INA § 242(b)(9), amended by REAL ID Act of 2005, § 106(a)(2) (emphasis added).

170. INA § 242(g), amended by REAL ID Act of 2005, § 106(a)(3) (emphasis added).

171. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), amended by REAL ID Act of 2005, § 106(a)(1)(A)(ii) (emphasis added). REAL ID Act section 106(a)(1)(B) was also added to the INA as section 242(a)(4), and to the U.S. Code as § 1252(a)(4), in order to underscore that review petitions are the appropriate means of judicial review “of any cause or claim” under the United Nations Convention Against Torture.

court of appeals “shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act,” the REAL ID Act also addressed suspension clause concerns evident in *St. Cyr* by amending section 242. The new section 242(a)(2)(D) of the INA provides:

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 in accordance with this section.<sup>172</sup>

As the Third Circuit observed, Congress with the foregoing amendment “evidenced its intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final orders of removal.”<sup>173</sup>

In order to underscore its intention to eliminate habeas corpus review as an alternative to review under section 242 of the INA, Congress provided in section 106(c) of the REAL ID Act that cases pending in district courts on May 11, 2005, should be transferred to the circuit court where the petition could have been filed. The REAL ID Act instructs that “[t]he court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under section 242,” except that such transferred cases would be exempt from the normal thirty-day deadline for filing review petitions.<sup>174</sup> Courts construing the REAL ID Act and its transfer provision have concluded that it requires courts to treat even habeas corpus appeals as petitions for review of removal orders.<sup>175</sup> Although the latter result was not directly commanded by the REAL ID Act, the Third Circuit observed that:

Despite this silence, it is readily apparent, given Congress’ clear intent to have all challenges to removal orders heard in a single forum (the court of appeals), [H.R. CONF. REP. No. 109-72, at 174 (2005)], that those habeas petitions that were pending before this Court on the effective date of the REAL ID Act are properly converted to petitions for review and retained by this Court.<sup>176</sup>

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172. INA § 242(a)(2)(D), amended by REAL ID Act of 2005, § 106(a)(1)(A)(iii).

173. *Papageorgiou v. Gonzales*, 413 F.3d 356, 358 (3d Cir. 2005). The REAL ID Act also eliminated the so-called transition rules of IIRIRA, specifying in section 106(d) that a review petition filed under the transition rules shall be “treated as if it had been filed as a petition for review under section 242 of the INA.” See *Joseph v. Att’y Gen.*, 421 F.3d 224, 229 (3d Cir. 2005); *Paripovic v. Gonzales*, 418 F.3d 240, 243 (3d Cir. 2005); *Elia v. Gonzales*, 418 F.3d 667, 672 (6th Cir. 2005). Section 106(d) of the Act likewise stressed that such “converted” petitions “shall be the sole and exclusive means for judicial review of an order of deportation or exclusion.” 8 U.S.C. § 1252.

174. REAL ID Act of 2005, § 106(c).

175. See *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005).

176. *Id.*; see also *Kamara v. Att’y Gen.*, 420 F.3d 202, 210 (3d Cir. 2005) (“Thus, in light of the peculiar procedural posture of the present case, and the intervening passage of the REAL ID Act, we are obliged to vacate and disregard the District Court’s opinion and address the claims raised in Kamara’s habeas peti-

Apart from the foregoing, the courts have thus far only begun to delve into the major issues surrounding the REAL ID Act, such as the scope of review for criminal aliens filing petitions for review and whether the remaining scope satisfies the constitutional concerns mentioned in *St. Cyr*. It seems clear, however, that review is limited to constitutional and legal claims, and courts thus far have been conscious of this fact.<sup>177</sup> As the Seventh Circuit explained in *Hamid*, while reviewing a challenge to a denial of protection under the United Nations Convention Against Torture (“CAT”), the REAL ID Act did not provide jurisdiction because Hamid’s claim boiled down to a simple claim that the immigration judge’s decision was not supported by substantial evidence. The court noted that although the REAL ID Act abolished habeas corpus review of such claims for aggravated felons like Hamid, and the new statute provides jurisdiction for review of constitutional claims and questions of law, his claim was neither.<sup>178</sup> “Unfortunately for Hamid,” the court observed, “his argument that the IJ wrongly denied him CAT relief does not depend upon any constitutional issue or question of law. Rather, it comes down to whether the IJ correctly considered, interpreted, and weighed the evidence presented — that is to say, whether the IJ’s conclusion was based on substantial evidence.”<sup>179</sup> Because there was no indication that the immigration judge misunderstood the legal standard applicable to CAT claims and no indication that his consideration of Hamid’s claim violated any constitutional standard, there was “no basis, within the limited scope of our jurisdiction to consider the claims of aggravated felons, to find that the IJ erred.”<sup>180</sup>

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tion as if they were presented before us in the first instance as a petition for review.”); *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050 (9th Cir. 2005) (treating habeas corpus appeal as petition for review); *Marquez-Almanzar v. INS*, 418 F.3d 210 (2d Cir. 2005) (treating habeas corpus appeal as petition for review).

177. *See Higuít v. Gonzales*, 433 F.3d 417, 419–20 (4th Cir. 2006) (finding that immigration judge’s denial of adjustment of status was discretionary, not legal, and therefore not subject to review); *Ramadan v. Gonzales*, 427 F.3d 1218, 1221–22 (9th Cir. 2005) (concluding that an immigration judge’s determination that petitioner was not eligible for asylum based upon his failure to file within the applicable one-year deadline is a factual question not subject to review, as is the related question of whether “exceptional circumstances” exist that justify waiving the one-year requirement); *Tovar-Alvarez v. Att’y Gen.*, 427 F.3d 1350, 1352 (11th Cir. 2005) (“Tovar-Alvarez’s equitable estoppel argument is such a question of law and therefore subject to our review.”); *Chacon v. Att’y Gen.*, 427 F.3d 954, 957 (11th Cir. 2005) (“The timeliness of an asylum application is not a constitutional claim or question of law covered by the REAL ID Act’s changes.”); *see also Martínez-Rosas v. Gonzales*, 424 F.3d 926, 929–30 (9th Cir. 2005); *Kamara v. Att’y Gen.*, 420 F.3d 202, 210–11 (3d Cir. 2005); *Grass v. Gonzales*, 418 F.3d 876, 878 (8th Cir. 2005); *Vasile v. Gonzales*, 417 F.3d 766, 768–69 (7th Cir. 2005); *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005) (distinguishing legal issues from non-legal issues).

178. *Hamid*, 417 F.3d at 647.

179. *Id.*

180. *Id.*

It remains to be seen whether other courts will construe the scope of review under section 242(a)(2)(D) in criminal alien cases the same way.<sup>181</sup> How they resolve the issue may largely determine whether the REAL ID Act will survive constitutional scrutiny.<sup>182</sup> Only then will it be clear whether Congress has this time achieved what it set out to do in 1996 — to protect the discretion of the Attorney General and Secretary of Homeland Security, to streamline judicial review for criminal aliens, and to ensure the INA’s judicial review mechanism truly is “sole and exclusive.”<sup>183</sup>

As discussed above, when Congress first enacted the INA in 1952, the Supreme Court ruled only three years later in *Shaughnessy v. Pedreiro* that Congressional intent was not sufficiently clear in the 1952 statute to preclude APA review and confine the review of deportation orders to the more limited review available under the habeas corpus statute.<sup>184</sup> In 1961 Congress adapted, and amended the INA to confine review generally to the circuit courts, albeit with a scope of review more akin to APA review than the more limited habeas review described in *Heikkila v. Barber*.<sup>185</sup> Nearly fifty years later, in *INS v. St. Cyr*, the Supreme Court again found Congressional intent insufficiently clear in the AEDPA and IIRIRA statutes to eliminate all habeas corpus review, even for non-citizens convicted of crimes. Congress again adapted with new legislation,

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181. Some courts have similarly rejected factual claims raised by criminal aliens. *See, e.g.*, *Hanan v. Gonzales*, 449 F.3d 834 (8th Cir. 2006) (finding no jurisdiction to review criminal alien’s challenge to the denial of a Torture Convention claim because no questions of law were presented, just factual challenges); *Boakai v. Gonzales*, 447 F.3d 1 (1st Cir. 2006) (finding no jurisdiction to review criminal alien’s factual challenge to denial of reopening, and rejecting Torture Convention claim in part because no question of law was presented); *Ramadan v. Gonzales*, 427 F.3d 1221, 1222 (finding no jurisdiction to review immigration judge’s factual determination that petitioner failed to meet one-year deadline for filing asylum application).

182. One of the first cases to directly address a constitutional challenge to the REAL ID Act was *Enwonwu v. Gonzales*, 438 F.3d 22, 33 (1st Cir. 2006). The court rejected *Enwonwu*’s challenge to the statute because “[t]his case presents only pure questions of law, and so the Act encompasses at least the same review and the same relief as to *Enwonwu* as were available under prior habeas law.” *Id.* The court also found *Enwonwu*’s challenge to the statute to be “ironic” in light of the fact that the REAL ID Act “gave *Enwonwu* greater rights than he had at the time he filed his habeas petition” in that the statute specifically affords “criminal aliens the right to seek judicial review” of decisions denying protection under the Convention Against Torture, and because the statute “reinstated his ability to seek standard appellate judicial review of the BIA’s decision although he missed the 30-day deadline.” *Id.* at 33 n.11. By attacking the REAL ID Act, he is attacking the hand which opened the door to let him back into court to seek judicial review.” *Id.*

183. One potentially looming issue could be whether criminal alien petitioners who did not file habeas corpus petitions in time to obtain transfers to courts of appeals under the REAL ID Act have any remedies available to them. The plain text of the REAL ID Act would suggest not, as the Act now plainly precludes habeas corpus, and the transfer provision only applied to habeas corpus cases pending on May 11, 2005. At least one circuit has said that a habeas case transferred to a circuit court, even though it was not pending on May 11, 2005, should be dismissed as untimely. *See, e.g.*, *Chen v. Gonzales*, 435 F.3d 788, 789 (7th Cir. 2006).

184. *See supra* text accompanying note 24 (discussing *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955)).

185. *See supra* text accompanying notes 29–32, 36–38 (discussing Congress’s 1961 amendment of the INA).

this time in the form of the REAL ID Act.<sup>186</sup> In that statute, congressional intent to eliminate habeas corpus review could hardly be more clearly expressed. Similar to the 1961 amendments, however, when Congress coupled circuit review with APA-style review, the congressional intent expressed in the REAL ID Act to have all review take place in the circuit courts was coupled with more expansive circuit court review for criminal aliens (as embodied in new section 242(a)(2)(D)) than was previously available in the circuit courts under the AEDPA and IIRIRA regime.

In enacting the REAL ID Act provisions, Congress sought to cure the potential anomaly created by *St. Cyr* — the anomaly that Congress in 1996 had intended to eliminate review opportunities for criminal aliens, but had created a scheme that the courts had construed in a fashion that arguably created more review opportunities for criminal aliens. Rather than being confined to a single level of review in the circuit courts, as non-criminal aliens arguably were under the INA, criminal aliens were virtually guaranteed an additional level of review by *St. Cyr* and its progeny, as they could seek initial habeas review in the district courts and file an appeal to the circuits if unsuccessful.<sup>187</sup> This no longer appears possible under the REAL ID Act amendments, as the statute directs all petitioners, whether criminal or non-criminal, to seek review in the circuit courts, and gives them only one opportunity to do so.<sup>188</sup> Nevertheless, as non-citizens of all varieties (criminal and non-criminal) continue to file circuit court challenges to removal orders in record numbers each year, Congress may again grow restless and attempt to further limit circuit court review, especially if the courts once again call into question the clarity of the most recent congressional effort to amend the jurisdictional provisions of the INA, or the constitutionality of the new provisions.<sup>189</sup>

Still, it appears for the moment that the REAL ID Act has restored order to the INA's judicial review procedures, and has eliminated the potential for confu-

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186. The Conference Committee Report on the REAL ID Act voiced Congressional dissatisfaction with *St. Cyr*. 151 CONG. REC. H2872 (daily ed. May 3, 2005). According to the Report, *St. Cyr* had the effect of “allow[ing] criminal aliens to delay their expulsion from the United States for years.” *Id.* at H2872.

187. The Conference Committee Report observed that criminal aliens could thus obtain review in two judicial forums, “whereas non-criminal aliens may generally seek review only in the courts of appeals.” *Id.* at H2872. According to the Report, this result was not only “unfair and illogical,” but it also “wastes scarce judicial and executive resources.” *Id.*

188. The Conference Committee Report states that the REAL ID Act “address[es] the anomalies created by *St. Cyr* and its progeny by restoring uniformity and order to the law.” *Id.* at H2873.

189. Public debate over new immigration legislation has in fact occurred during much of 2006, and immigration bills (though somewhat divergent from each other), passed both houses of Congress by mid-year. In December 2005, the House of Representatives acted first in passing H.R. 4437, 109th Cong. (2005) (entitled “Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005”) (*see* H.R. Rep. No. 109-345 (2005)), which included several provisions (at sections 801-808) addressing judicial review; the Senate bill (S. 2611, 109th Cong. (2006), entitled “Comprehensive Immigration Reform Act of 2006”) passed the Senate in May 2006.

sion arising from the often conflicting rulings of the circuit courts following *Sz. Cyr* and *Calcano-Martinez* regarding which claims could be raised, and in what courts. Regardless of whether the claim involves alienage, removability, or a constitutional or statutory challenge to BIA decisions denying discretionary relief, it now seems abundantly clear that the claim must be raised in the court of appeals by way of a petition for review. In that sense, Congress has already succeeded in resolving the ambiguities ultimately exposed by the courts following enactment of AEDPA and IIRIRA. Moreover, the issues arising thus far under the REAL ID Act, and those that may be looming, appear far less weighty than they appeared to be 1996, when AEDPA and IIRIRA called into question whether Congress had effectively precluded *any* judicial review for some classes of petitioners. With some confidence, it can perhaps be predicted that the flurry of litigation following enactment of AEDPA and IIRIRA, one that lasted nearly ten years, may not be repeated with the same vigor in litigation involving the REAL ID Act.

## VI. CONCLUSION

The past ten years of litigation involving AEDPA, IIRIRA, and now the REAL ID Act have demonstrated a dramatic tug-of-war between the habeas corpus and review petition mechanisms for seeking review of removal orders. In the face of a concerted congressional effort to target criminal aliens and eliminate review opportunities for them, the historic writ of habeas corpus re-emerged in the immigration arena to provide an alternative judicial review remedy. In the REAL ID Act, Congress has sought to reassert the supremacy of the INA's judicial review scheme. How that effort will continue to play out in the courts will likely define the next several years of immigration litigation.