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Back to Back to the Future? Lessons Learned from Litigation Over the 1996 Restrictions on Judicial Review

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I. INTRODUCTION

Nine years ago, following the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[1] and the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"),[2] the Connecticut Law Review published a symposium issue focusing on how these statutory enactments affected immigrants. As part of that Symposium, Professor Lenni Benson wrote an article trying to predict the consequences of the new restrictions on the ability of immigrants to challenge deportation orders through petitions for review filed in the courts of appeals. In *Back to the Future: Congress Attacks the Right to Judicial Review in Immigration Proceedings,*[3] Professor Benson reviewed the history of Congress's efforts to restrict access to the courts over deportation matters and demonstrated how, despite these efforts, judicial review proved resilient. She reminded readers of Newton's Third Law of Motion: that for every action there is an equal and opposite reaction. With respect to the 1996 laws, she predicted that restrictions on petition for review jurisdiction would lead to a surge in habeas litigation, ultimately resulting in a more inefficient and cumbersome process of judicial review.

Professor Benson's predictions about habeas litigation were borne out. In fact, the 1996 laws did lead to a significant increase in habeas litigation throughout the country. It is fair to say that by the time a new Congress enacted the REAL ID Act of 2005,[4] the system of judicial review that the courts had cobbled

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1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C. and other titles).

2. Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and other titles).

3. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997).

4. The REAL ID Act is found in Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005). It was named for provisions creating new mandatory standards for state driving identification cards. It also changed the jurisdictional rules for challenging deportation (or removal) orders in court. This essay discusses the jurisdictional provisions included in section 106. Those provisions state:

   SEC. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

   (a) IN GENERAL.—Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended—
   (1) in subsection (a)—

   (A) in paragraph (2)—
   (i) in subparagraph (A), by inserting "(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" after "Notwithstanding any other provision of law";

   (ii) in each of subparagraphs (B) and (C), by inserting "(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 subparagraph (D)" after "Notwithstanding any other provision of law"; and
   (iii) by adding at the end the following:

   "(D) JUDICIAL REVIEW OF CERTAIN LEGAL CLAIMS.—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

together was far from ideal. Some issues decided by the Board of Immigration Appeals ("BIA") could be heard by the courts of appeals by petition for review[5] while others had to be heard in the first instance by district courts through habeas litigation.[6] From the government's perspective, the review system was cumbersome and delayed execution of deportation orders. From the immigration practitioner's perspective, it provided inadequate review and trapped the unwary at every turn. It is likely that thousands of lawful, permanent residents were deported unlawfully, in part due to confusion about the proper scheme for judicial review.

Despite the consensus that some revisions were in order, however, the solution enacted in the REAL ID Act was not the sober well-developed piece of legislation one would have expected. Instead, while fixing some of the problems

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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."; and
(B) by adding at the end the following:

"(4) CLAIMS UNDER THE UNITED NATIONS CONVENTION.—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, 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 any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).";

"(5) EXCLUSIVE MEANS OF REVIEW.—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, 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). 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, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).";

(2) in subsection (b)(9), by adding at the end the following: "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 section 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."; and

(3) in subsection (g), by inserting "(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" after "notwithstanding any other provision of law."

5. The standard system for review of an agency decision is through a petition directly to the court of appeals. 28 U.S.C. § 2347(a) (2000). Even when the 1996 laws barred review of some claims under 8 U.S.C. § 1252(a)(2), courts concluded that they had jurisdiction to review their own jurisdiction to hear those claims. *See, e.g.,* Gelman v. Ashcroft 298 F.3d 150, 151 (2d Cir. 2002). Thus they had jurisdiction over the threshold questions whether an individual was an "alien" subject to removal on one of the grounds that precluded jurisdiction. *See id*.

6. *See* INS v. St. Cyr, 533 U.S. 289, 314 (2001) (permitting district court habeas actions under 28 U.S.C. § 2241 notwithstanding bars to petition for review jurisdiction). *See infra* pp. 117–19.

with the 1996 law,[7] the REAL ID Act created a whole new set of possible unintended consequences involving issues of adequate access to the courts.[8] If these possibilities ripen into real obstacles, they will force the courts to delve once again into the difficult constitutional terrain of due process, the standards for suspension of the great writ of habeas corpus, and the inherent powers of the courts.

This essay explores one important set of lessons from the litigation over the 1996 restrictions on judicial review. Although jurisdictional issues are officially matters for courts and not parties to decide, the litigation positions adopted by the government after the enactment of AEDPA and IIRIRA played an important role in shaping jurisdictional litigation after 1996. By moving early to dismiss petitions for review in the federal courts of appeals, the government created its own worst nightmare — widespread district court habeas battles over deportation orders. By the time the government turned around and sought to preserve greater jurisdiction in the courts of appeals, the die was cast. The courts could not undo the complex system that had developed.

In the wake of the REAL ID Act, decisions by a range of actors, including government litigators, will have a profound impact on the path of future litigation and the need for courts to confront larger constitutional questions. We can only hope that these actors will learn from past experience and seek to assure adequate access to the courts. When we try to peer into the future, we wonder what lessons we can learn from the past. Does the REAL ID Act bring us "Back to the Future" again? We can only wish that Congress had considered that question or acted with greater deliberation in drafting legislation that will affect the courts, government litigation resources, and so many people's lives.

This essay will examine the results of litigation over the restrictions on judicial review found in the 1996 legislation, and extrapolate from them to suggest some of the problems the REAL ID Act may cause. Part II of this essay discusses the shifting statutory schemes for judicial review and the revisions enacted through the REAL ID Act. Part III discusses lessons that can be learned from litigation surrounding the 1996 laws about the importance of litigation positions regarding unclear aspects of the statutory scheme. Part IV discusses some of the issues lurking in the statutory scheme created by REAL ID and the implications of litigation positions and court interpretations of the new statute for the adequacy of that scheme. Part V discusses some early indications that parties litigating the application of REAL ID may have learned some lessons from the past.

7. For instance, by allowing for petition for review jurisdiction over all legal questions, the REAL ID Act now allows a single proceeding for some cases that previously had issues divided between petition for review and habeas proceedings. *See infra* pp. 123–24.

8. *See infra* pp. 123–29.

II. SHIFTING STATUTORY SCHEMES

A. Access to the Court Prior to the 1996 Laws

In 1996, prior to the enactment of AEDPA and IIRIRA, anyone facing a final order of deportation could challenge that order through a petition for review filed in the court of appeals.[9] In general, the petitioner had ninety days to file the petition. Habeas, in contrast, served as a backstop for unusual cases, such as cases where a stay of deportation was necessary to preserve the rights of a person who had filed a motion to reopen proceedings due to ineffective assistance of counsel.[10] To protect against repetitive litigation, the statute provided that any petition for review or petition for writ of habeas corpus state whether the order had been previously upheld. A second petition was permitted if there were grounds that could not have been presented in the prior proceeding or the court found that the remedy available in the prior proceeding was inadequate or ineffective.[11]

B. The 1996 Restrictions on Judicial Review

Congress enacted the AEDPA and IIRIRA as part of a package of antiterrorism provisions that were rushed through the legislature in 1996. At the time, Congress was considering changes to the judicial review scheme as part of comprehensive immigration reform.[12] Suddenly, as the anniversary of the Oklahoma City bombing drew near, a separate piece of legislation that contained numerous immigration provisions, moved to the forefront. That legislation, AEDPA, was signed into law on April 24, 1996. It contained provisions governing the jurisdiction of the courts on some classes of deportation and detention matters. Section 440(a) provided that any final order of deportation against a noncitizen who was deportable for one of a number of criminal grounds "shall not be subject to review by any court."[13]

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9. *See* 8 U.S.C. 1105a (1994) (repealed 1996).

10. *See, e.g.*, Motta v. Dis. Dir. of INS, 61 F.3d 117 (1st Cir. 1995) (habeas seeking emergency stay of deportation during pendency of agency appeal); Butros v. INS, 990 F.2d 1142 (9th Cir. 1993) (describing district court award of habeas to obtain a stay of deportation in case involving ineffective assistance of counsel); Anderson v. McElroy, 953 F.2d 803 (2d Cir. 1992) (upholding district court award of habeas corpus on the ground that the agency had abused its discretion in failing to grant a stay of deportation pending review by the Board of Immigration Appeals); Williams v. INS, 795 F.2d 738 (9th Cir. 1986) (habeas allowed to review refusal to reinstate voluntary departure).

11. *See* 8 U.S.C. § 1105a(c) (1994) (repealed 1996).

12. *See* Nancy Morawetz, INS v. St. Cyr*: The Campaign to Preserve Court Review and Stop Retroactive Deportation Laws*, *in* IMMIGRATION STORIES 279 (David A. Martin & Peter H. Schuck eds., 2005).

13. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C. and other titles). The Act provides:

> (a) Judicial Review. — Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

Later that year, Congress enacted yet another system for judicial review. IIRIRA specified classes of people and classes of issues that could not be heard in a petition for review.[14] These classes included lawful permanent residents who had been convicted of a wide array of crimes. Under the statutory provisions, for example, there was no petition for review jurisdiction if the individual was deportable for a drug crime, including minor possession offenses. In addition, this scheme precluded petition for review jurisdiction over classes of issues, such as decisions whether to award discretionary relief.

By the time Congress took up the REAL ID Act in 2005, there had been many years of litigation about the meaning of the 1996 restrictions, leading up to the Supreme Court's decision in *INS v. St. Cyr*.[15] The *St. Cyr* case concluded that the restrictions in the 1996 laws were best read as precluding petition for review jurisdiction, but not habeas jurisdiction. As a result, some issues (namely those for which there was no bar to relief) could be pursued in the circuits through petition for review jurisdiction, just as they had been prior to 1996. But other

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

14. Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 306, 110 Stat. 3009-546 (codified as amended in 8 U.S.C. § 1252). IIRIRA § 306 created new bars to judicial review, which were codified in 8 U.S.C. § 1252. The provisions on bars to review stated:

"(2) MATTERS NOT SUBJECT TO JUDICIAL REVIEW-"

"(A) REVIEW RELATING TO SECTION 235(b)(1)- Notwithstanding any other provision of law, no court shall have jurisdiction to review—"

"(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1),"

"(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,"

"(iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B), or"

"(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 235(b)(1)."

"(B) DENIALS OF DISCRETIONARY RELIEF- Notwithstanding any other provision of law, no court shall have jurisdiction to review—"

"(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or"

"(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a)."

"(C) ORDERS AGAINST CRIMINAL ALIENS- 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 their date of commission, otherwise covered by section 237(a)(2)(A)(i)."

15. 533 U.S. 289 (2001).

issues, such as eligibility for discretionary relief, could only be heard in the district courts through habeas. As Professor Benson had predicted, there was a surge in habeas litigation to challenge deportation orders for those who had been shut out of the petition for review process.

C. The REAL ID Act

The REAL ID Act's provisions on judicial review resulted in part from dissatisfaction with the bifurcated review scheme created by the 1996 laws. In 2004, Senator Orrin Hatch proposed legislation to put some issues about the legality of removal orders back into the courts of appeals, where they would be heard through petitions for review.[16] But he did not propose returning to the pre-1996 system. Instead, he sought to restore petition for review jurisdiction for narrow classes of issues that he thought necessary to honor the constitutional concerns that the Supreme Court had raised in *INS v. St. Cyr*. Later that session, Representative F. James Sensenbrenner proposed a similar set of restrictions in the House.[17] Neither House held hearings on the bills.

In the 109th Congress, provisions revamping judicial review sped through Congress without any hearings. In the House, the judicial review provisions were first introduced by H.R. 100,[18] a bill that was referred to committee and was never brought forward for a hearing.[19] The text of H.R. 100 was later added by a floor amendment to a different bill, H.R. 418, which would later be known as the REAL ID Act. This procedural maneuver was accomplished under House Resolution 75, which did not allow for any debate on the floor of the House.[20] As a result, the language passed by the House was never subject to mark-up, committee hearings, or debate in either committee or the House. In the Senate, the REAL ID bill was referred to the Senate Judiciary Committee.[21] But before the Senate Judiciary Committee could seriously review the bill, they faced the same language in an appropriations measure that was speeding through Congress on a fast track.[22] Because the appropriations measure concerned funds

16. Fairness in Immigration Litigation Act of 2004, S. 2443, 108th Cong., 150 CONG. REC. S5802-03, *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:S.2443:.

17. H.R. 4406, 108th Cong. (2004), *available at* http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.4406:.

18. H.R. 100, 109th Cong., 151 CONG. REC. H71-02 (2005).

19. The Library of Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00100:@@@L&summ2=M &#status (last visited Jul. 17, 2006) (showing the last congressional action as referring the bill to committee).

20. *See* H.R. REP. NO. 109-4 (Feb. 9, 2005) (providing for insertion of the text of the judicial review provisions, included as Part A of the amendment, and stating that "no further general debate shall be in order").

21. The Library of Congress, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00418:@@@R (last visited Jul. 17, 2006) (showing the last congressional action as referring the bill to the Senate Committee on the Judiciary).

22. *See* H.R. Res. 258, 109th Cong. (2005) (waiving points of order to attach bill to appropriations measure).

for the military in Iraq as well as tsunami relief operations, it was destined to pass. That bill was referred to the Senate Appropriations Committee, which stripped the REAL ID Act from the bill.[23] But in conference, the House insisted on provisions concerning a change in judicial review. The final language changing the judicial review scheme, once again, was sorted out in conference without the Senate ever having worked on its own proposal. The conference language was then enacted through passage of the appropriations bill.

The judicial review statute that emerged from REAL ID channels judicial review to the courts of appeals through petition for review jurisdiction. As is discussed in Part IV, there are a number of important questions that courts will face as they interpret and apply the new statute. These questions concern whether REAL ID will meet the promise of providing an adequate forum for judicial review of challenges to removal orders.

III. THE EXPERIENCE OF LITIGATION FROM THE 1996 LAWS

The experience with litigation over the 1996 laws indicates that the posture taken by the government in litigation around REAL ID could prove to be very important. Although jurisdictional issues are for courts rather than parties to decide, the positions taken by parties can have a major influence on the path under which case law develops. In the 1996 context, the government took positions early in its litigation that limited its options at a later stage. If it learns from this experience, it may be possible to avoid constitutional confrontations around the REAL ID Act.

Soon after AEDPA was enacted, the government acted quickly to take advantage of the statute's seeming preclusion of access to the courts. In case after case, it filed motions in the courts of appeals asking them to dismiss cases in which the petitioner had been found deportable on one of the enumerated criminal grounds that barred petition for review jurisdiction. These motions led many circuit courts throughout the country to conclude that they no longer possessed petition for review jurisdiction over the cases of people ordered deported on one of the designated criminal grounds.[24] While the courts found it easy to dismiss petitions for review, many decisions were careful to make clear that elimination of all review would raise serious constitutional issues.[25] These courts concluded that they did not need to concern themselves with constitutional issues because the issues could be considered in the context of habeas petitions.[26]

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23. *See* H.R. REP. NO. 109-072, § 106 (2005) (explaining that the Senate bill did not include any of the House provisions in the REAL ID Act).

24. *See, e.g.*, *Williams,* 114 F.3d 82; Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996).

25. *See, e.g., Kolster*, 101 F.3d at 791; *Hincapie-Nieto*, 92 F.3d at 30-31; Duldalao v. INS, 90 F.3d 396, 400 (9th Cir. 1996).

26. *See, e.g., Kolster*, 101 F.3d at 791; *Hincapie-Nieto*, 92 F.3d at 30-31; *Duldalao*, 90 F.3d at 400.

After a petition for review was dismissed, the second stage of litigation proceeded largely in the district courts through habeas petitions filed affirmatively by persons who had been ordered deported. When these cases went to the courts of appeals, the courts faced the question of whether jurisdiction was available through district court habeas or, perhaps, through petition for review jurisdiction. At this stage, advocates for immigrants argued that jurisdiction could be either through petition for review or through habeas petitions. But the courts that were sympathetic to review were not writing on a clean slate. Due to their earlier rulings dismissing petitions for review, they concluded that review must be placed in the district courts through habeas petitions.[27] Judge Calabresi's opinion in *Henderson v. Reno*[28] made the consequences of the litigation path clear. In that case, Judge Calabresi noted that the panel was "strongly inclined" to find that "the proper mechanism for review was by direct appeal to the courts of appeals rather than by habeas review in the district courts."[29] But he concluded that the court was bound by its earlier rulings that section 440(a) precluded access to petition for review jurisdiction in cases with specific criminal grounds.

As time went on, the government shifted its litigation stance and emphasized that any review should be in the courts of appeals. Once the issues reached the Supreme Court in *INS v. St. Cyr*, the government's overriding concern was apparently to ensure that judicial review be restricted to the courts of appeals.[30] But by then it was too late to shift the focus from habeas jurisdiction under 28 U.S.C. § 2241,[31] as the primary route to review.

The Court's decision in *St. Cyr* gave the government its least favored solution: a system in which some issues could be pursued by petition for review and some issues could be pursued by habeas.[32] From the government's standpoint, this system led to duplicative litigation and denied it the ability to require adher-

27. *See, e.g.*, Jean-Baptiste v. Reno, 144 F.3d 212, 219 (2d Cir. 1999).

28. 157 F.3d 106, 119 n.9 (1998).

29. *Id*.

30. In its brief in *INS v. St. Cyr*, for example, the government first argued that petition for review jurisdiction was limited to substantial constitutional questions. But then it went on to state: "even if this Court were to conclude that the Constitution does require a judicial forum for respondent's effort to obtain discretionary relief from removal, it would be far more appropriate to conclude that Section 1252(a)(2)(C) should not be applied to bar that claim in the court of appeals—either as a matter of statutory construction or one of constitutional imperative—than to hold that the district court may entertain that claim under its habeas corpus authority." Brief for Petitioner, INS v. St. Cyr, 2001 WL 210189.

31. Section 2241 is the basic statutory vehicle providing for habeas corpus jurisdiction. *See* RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (4th ed. 2001).

32. The government's litigation strategy may also have backfired with respect to the substantive issues in *INS v. St. Cyr*. By taking the position that the law was fully retroactive, the government lost the opportunity to take advantage of the middle position on retroactivity that was first endorsed by the BIA. *See* Morawetz, *supra* note 12 at 286-87 (discussing government's tactical decision whether to seek Attorney General review in Matter of Soriano, 21 I & N Dec. 516 (BIA 1996; A.G. Feb. 21, 1997)).

ence to legislated time limitations for petitions for review.[33] In contrast, habeas reviews were only subject to equitable principles, which are governed by a more relaxed timeframe.[34] From the immigration practitioner's standpoint, it was also far from ideal. By 2005, when the REAL ID Act was enacted, immigrants faced an extremely complex procedural system. This was most dramatic in rulings about "judicial exhaustion." For example, consider an immigrant with a straightforward legal issue about whether a drug crime constituted an "aggravated felony" which barred relief from removal. He was told by the Seventh Circuit to file the claim in a habeas action,[35] yet the Ninth Circuit told him to first file the claim by a petition for review and then through habeas.[36] Those who followed the Ninth Circuit's instructions and filed twice were deemed to have exhausted their petitions. The Second Circuit was far more magnanimous, hearing these kinds of claims either though habeas or petition for review.[37] Such a system was not good for anyone because it was unclear what court could hear each kind of legal issue. Ironically, the need for multiple court filings can be traced back to the government's earliest motions asking courts of appeals to dismiss petitions for review, while recognizing that access to habeas was a separate matter for future cases.

It is of course impossible to know what would have happened if the litigation stances had been different. It is possible that courts would have felt compelled to dismiss petitions for review in the wake of AEDPA and then IIRIRA even if the government had not argued for dismissal. But it is also possible that different postures by litigants could have changed how the law developed. Perhaps a more sane system for preserving court review and avoiding larger issues about suspension of the writ of habeas corpus could have been developed. The government could have encouraged courts from the outset to preserve petition for review jurisdiction over the kinds of issues that ultimately were protected by the *St. Cyr* decision. Basic direct review could have remained in the courts of appeals, while habeas could have played its more limited role from the pre-1996

33. *See* Morawetz, *supra* note 12 at 289, 295, 307.

34. Habeas challenges are subject to the doctrine of laches. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) ("[T]here is no statute of limitations governing federal habeas, and the only laches recognized is that which affects the State's ability to defend against the claims raised on habeas . . . ."). In *St. Cyr*, for example, more than six months elapsed between the decision of the Board of Immigration Appeals and the filing of the habeas petition.

35. Yanez-Garcia v. Ashcroft, 388 F.3d 280 (7th Cir. 2004).

36. Laing v. Ashcroft, 370 F.3d 994, 995, 999-1001 (9th Cir. 2004) (rejecting habeas challenge to denial of eligibility for relief from removal because petitioner had not first challenged aggravated felony designation through a petition for review).

37. *See, e.g.*, Kamagate v. Ashcroft, 385 F.3d 144 (2d Cir. 2004) (hearing challenge to aggravated felony designation in habeas); Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004); Foster v. INS, 376 F.3d 75, 78 (2d Cir. 2004) (hearing challenge to aggravated felony designation in petition for review).

era: a last resort in cases in which the petition for review process failed to provide a meaningful opportunity for review.[38]

IV. APPLYING THE LESSONS OF THE 1996 LITIGATION TO EMERGING ISSUES IN THE INTERPRETATION OF THE REAL ID ACT

As with the 1996 statutes, the REAL ID Act's judicial review provisions are awkwardly written and leave many questions about the extent to which the courts will be available to those who have been ordered deported.[39] REAL ID preserves the bars to petition for review jurisdiction that were enacted in 1996. But then it adds a new clause that allows for review of questions of law and constitutional questions, notwithstanding the bars to review.[40] The new scheme also explicitly bars habeas, mandamus,[41] and all writs act jurisdiction[42] over removal orders.

In the wake of the REAL ID Act, a new set of questions about preserving meaningful access to judicial review will arise. Because the REAL ID Act contains language that explicitly precludes statutory habeas jurisdiction as well as all writs act and mandamus jurisdiction, there is considerable constitutional pressure on petition for review jurisdiction to provide jurisdiction whenever review is constitutionally required. If petition for review jurisdiction fails to meet this promise, the provisions precluding alternative forms of access to the courts could potentially force courts to consider constitutional issues about suspension of the writ of habeas corpus and due process.[43] Whether these constitutional confrontations happen will depend, to a significant degree, on the foresight with which litigants and the courts approach individual issues about access to the courts. A broad vision, which considers these issues in the context of Congress's apparent goal of protecting meaningful access to the courts, will help to forestall later constitutional confrontations.

Under the REAL ID Act, the courts of appeals once again have jurisdiction over all questions of law presented in cases on petition for review.[44] As a result, the statute provides an alternative to habeas jurisdiction for many of the kinds of

38. *See, e.g.,* Singh v. Waters, 87 F.3d 346 (9th Cir. 1996) (exercising habeas jurisdiction over case in which agency violated administrative stay order).

39. *See supra* text accompanying note 4.

40. *See supra* text accompanying note 4.

41. Mandamus jurisdiction is ordinarily available to compel an officer or employee of the United States to perform a duty. 28 U.S.C. § 1361 (2000).

42. The All Writs Act provides courts with the power to issue writs to protect their jurisdiction. 28 U.S.C. § 1651 (2000).

43. *See St. Cyr*, 533 U.S. at 298–314 (discussing constitutional issues implicated by restrictions on judicial review of removal orders).

44. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 231 (2005).

cases that had been forced into habeas as a result of the 1996 laws. Cases, for example, where there are questions about deportability and eligibility for relief can now be litigated through the petition for review process. In this way, Congress has simplified the court review process for cases in which petitioners had previously been forced to take their cases to two courts instead of one.

But while simplifying the system for direct review, Congress has created new uncertainties about the mechanism for handling cases that do not fit comfortably into the direct review scheme or for which direct review will continue to be circumscribed. Although probably smaller in number than the relief eligibility habeas cases that occupied the courts from 1996 through 2005, these cases raise fundamental issues about whether the deportation system will follow the rule of law. These issues, which are described in greater depth in the remainder of this paper, determine whether immigrants will in fact have meaningful access to the courts to ensure the lawfulness of a deportation order.

The House conference report on the REAL ID Act makes clear that the underlying purpose of the provisions on judicial review was to streamline the system of judicial review and not to create impediments to meaningful access to review. The conference report stated:

> Significantly, this section does not eliminate judicial review, but simply restores such review to its former settled forum prior to 1996. Under section 106, all aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals. No alien, not even criminal aliens, will be deprived of judicial review of such claims. Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of criminal aliens' removal orders, section 106 would give every alien one day in the court of appeals, satisfying constitutional concerns.[45]

Although the conference report promises to satisfy constitutional concerns through "one day in the court of appeals," the courts can be expected to face many issues that will shape the adequacy of the opportunity for this review. The more the post-REAL ID Act system delivers on its promise of review by the courts of appeals, the less likely it is that the new scheme will raise constitutional concerns.

A. Scope of Review

Some of the issues raised by the REAL ID Act concern the degree to which it will restore review over legal questions. Although the text of the statute is clear that any "question of law"[46] can be considered, there may well be disputes over whether a particular question fits into this box. For example, what about a case

45. H.R. REP. NO. 109-72, at H2873 (2005) (Conf. Rep.).

46. 8 U.S.C. § 1252(a)(2)(D) (2000), *amended by* The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231, 305 (2005).

where the dispute concerns the application of law to fact? Alternatively, what about a situation in which there is no evidence to support a factual conclusion? More generally, how will courts approach mixed questions of law and fact?

Prior to the enactment of the REAL ID Act, courts recognized that direct review of mixed questions of law and fact should be allowed in habeas. In *Wang v. Ashcroft*, for example, the Second Circuit held that the court could review whether the agency had properly applied the law to the facts to determine whether a deportation order would violate the Convention Against Torture.[47] Otherwise, the BIA could state the proper legal test, but apply it in a way that was completely unlawful without any recourse to judicial review. Such a nominal nod to a legal rule would do little to satisfy the interest in applying the rule of law.[48]

With the REAL ID Act, the question is whether courts will treat the Act's placement of "questions of law" in the courts of appeals as including mixed questions of law and fact. On these types of questions, the government's litigation posture will be important. Will the government argue that questions are not covered? Will they say that the scope of review is restricted? The more robust the review the government endorses, the less the danger of the petition for review scheme failing to satisfy constitutional concerns.

In a sense, the government's litigation choice is similar to the one it faced with regard to the 1996 laws. At that time, the government took a strong stance that no court could review the statutory questions about eligibility for discretionary relief.[49] In doing so, it set up a situation in which it was more likely that the court which could hear these questions would be the district court on habeas, rather than the circuit on petitions for review. Its second best option — review in the courts of appeals — was hostage to its first best solution — no review at all. In the end, the courts concluded that review was only in district court habeas.[50] Once again, arguing for restricting petition for review jurisdiction over issues such as application of law to fact in cases under the Convention Against Torture could precipitate a constitutional confrontation leading to review in a court and under circumstances that the government would rather avoid.

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47. 320 F.3d 130, 142-43 (2d Cir. 2003).

48. Indeed, sources writing about the scope of the writ of habeas corpus in the nineteenth century observed that, at common law, courts hearing habeas in civil cases allowed for review of the factual claims made in a return to the writ. *See* James Oldham & Michael J. Wishnie, *The Historical Scope of Habeas Corpus and* INS v. St. Cyr, 16 GEO. IMMIGR. L. J. 485, 502 n.105 (2002) (citing Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 MICH. L. REV. 451, 454 n.20 (1966) (quoting ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT 271 (2d ed. 1865))).

49. *See supra* text accompanying notes 24–26.

50. *See supra* text accompanying note 27.

B. Counting Time

Another set of issues concerns time limitations. Prior to REAL ID, so long as petition for review jurisdiction was the primary, but not the sole method for obtaining access to the courts, application of the thirty day time limitation provisions in INA section 242(b)[51] posed no constitutional issues.[52] But if the post-REAL ID scheme contemplates that the petitions for review will serve as a sole method of review, the application of time limitations and other restrictions on review take on new meaning.

The statutory language on time limitations states that the petition must be filed not later than thirty days after the date of the final order.[53] If petitions for review are the only access to review, the application of this requirement becomes very important. What should happen if the person did not receive the BIA decision until well after the date it was issued? What should happen if the person tried to file, but the petition was not received on time? What if the person was in detention? What if the lawyer failed to file a promised appeal? What if the lawyer engaged in affirmative misconduct, such as agreeing to file an appeal and not filing it?

Issues of time limitations are extremely important in a world where those ordered deported are increasingly detained and have little control over their access to agencies or courts. Indeed, those who are detained may suffer multiple hindrances to filing within the thirty days of the date listed on a decision. For example, they may never be told of the decision; they may be transferred from one detention facility to another and not receive their mail; they may have no access to a library to learn the process for petitioning for review (which is not explained in the notice of decision); and when they mail a letter, they have no ability to monitor when and how it is received.

In the pre-REAL ID Act world, courts provided a variety of answers to questions about time limitations. For example, the Second Circuit recognized that for a *pro se* person in detention, the date that a petition for review was placed in the prison mailbox should constitute the date of filing.[54] Outside of the prison mailbox context, however, courts issued some strict rulings dismissing petitions for review. For example, in one case, the petitioner was in detention and did not learn of a BIA order dated December 1 until December 28. She succeeded in obtaining new counsel despite the holidays and new counsel filed a petition on

51. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2000) provides that "[t]he petition for review must be filed not later than 30 days after the date of the final order of removal."

52. *See, e.g.,* Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001) (permitting habeas action under 1996 scheme where time limit for petition for review jurisdiction had expired).

53. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2000).

54. Arango-Aradondo v. INS, 13 F.3d 610, 612 (2d Cir. 1994); *see also* FED. R. APP. P. 25(a) (codifying prison mailbox rule).

January 3. The Second Circuit concluded that the deadline was January 2, thirty days from the date stamped on the BIA order and dismissed.[55]

In the pre-REAL ID Act world, application of these time limits did not have the same significance as it does today. Before the REAL ID Act was enacted, district court habeas jurisdiction under 28 U.S.C. § 2241 served as a safety net for cases that were dismissed by the circuits. In *Liu v. INS*,[56] for example, the Second Circuit held that there was habeas jurisdiction over a case in which an asylum applicant had missed the deadline for a petition for review. Similarly, in *Chmakov v. Blackmun*,[57] the Third Circuit found habeas jurisdiction when ineffective assistance of counsel had resulted in missing the time deadline for a petition for review. Although courts suggested that the habeas route was subject to a showing that there was no procedural default,[58] habeas was available as a remedy for cases in which the petition for review scheme proved inadequate.

With the REAL ID Act, however, courts must assess whether there is any mechanism by which the petition for review process can accommodate situations in which a blind application of time limitations would deprive the individual of any access to judicial review. Although the time limitation is jurisdictional,[59] the decisional law makes clear that there is play in how the courts read the date on which the time limitation begins to run (for example where there has not been notice of a decision) and the actions that constitute filing by the deadline (as in the prison mailbox rule). If the petition for review process is to bear the entire weight of the constitutional guarantees of access to the writ of habeas corpus, these questions take on a completely different meaning. Once again, choices made in deciding how to apply the petition for review scheme will determine the pressure placed on constitutional arguments concerning access to the writ of habeas corpus.

C. In Absentia *Orders*

A third set of issues arises with respect to *in absentia* orders. *In absentia* orders are a matter of significant enforcement concern because they are presumed to involve persons who have failed to appear at their immigration hearings. But in some cases, the person with the *in absentia* order never knew about the immigration court hearing because a notice was sent to the wrong address or never sent at all.[60] These cases can present the most frightening exercise of government power. The person may be arrested in the middle of the night, detained and told

55. Malvoisin v. INS, 268 F.3d 74, 75 (2d Cir. 2001).

56. 293 F.3d 36, 41 (2d Cir. 2002).

57. 266 F.3d at 216.

58. *See, e.g.*, Kuhali v. Reno, 266 F.3d 93, 100-01 (2d Cir. 2001) (dictum).

59. Stone v. INS, 514 U.S. 386 (1995).

60. *See, e.g.*, Rantescalu v. Cangemi, 2004 WL 898584 (D. Minn. 2004).

that an order was issued in his or her case without their ever having known of the deportation proceeding. In these cases, the person who is arrested needs some mechanism to stop the execution of a deportation order that never should have been issued.

The administrative mechanism for fixing improper *in absentia* orders is a motion to reopen to the agency.[61] But time is short and if the agency does not rule on a stay request promptly, the individual ordered deported may be placed on a plane and deported. Once deported, the motion to reopen will be deemed "withdrawn"[62] and the case will be over. In the pre-REAL ID scheme, habeas served as a safety valve for these kinds of cases. For example, in *Rantesalu v. Cangemi,*[63] a Christian asylum seeker from Indonesia faced imminent deportation due to an *in absentia* order. Despite assurances that he would not be deported while his motion to reopen was pending, he was placed on a plane. Through a writ of habeas corpus, he was permitted to return to the United States to allow for proper adjudication of his asylum claim. In the post-REAL ID world, the question is where a case such as Rantesalu's will go. Will courts of appeals step in and play the role of habeas courts to protect against unlawful deportations?

D. Cases Involving Factual Issues that are Outside the Record

In the typical immigration case, the administrative record will contain all of the necessary facts for judicial review. In addition, application of exhaustion doctrines may mean that facts that were not presented to the agency may not be presented in court. But there are situations in which the administrative record will not include relevant facts and exhaustion doctrines should not apply. In those situations, habeas has served as a safety valve that allowed these issues to be pursued. In the wake of REAL ID, however, there are questions about how the courts will accommodate these kinds of cases, and whether limits on petition for review jurisdiction will render that forum inadequate.

Tom Hutchins recently published an article offering an example of such a case.[64] In this particular case, the legal issue was whether a removal order was valid when the respondent was not mentally competent and the immigration judge had not assessed the respondent's competency before allowing him to proceed

61. 8 U.S.C. § 1229a(b)(5)(C) (2000).

62. 8 C.F.R. § 1003.2(d) provides: "Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion."

63. 2004 WL 898584 (D. Minn. 2004).

64. Thomas Hutchins, Mohamed v. Tebrake*: A Case Study on the Mentally Ill in Removal Proceedings, and an Example of how REAL ID Violates the Suspension Clause,* 82 INTERPRETER RELEASES 1297 (2005).

pro se.[65] The case arose prior to the REAL ID Act, and the issues had been fully presented to the district court on habeas. After REAL ID, however, the case was transferred to the circuit. Hutchins argued that the transfer violated the suspension clause because the circuit would be unable to consider crucial factual evidence that had not been included in the administrative record prior to the habeas proceeding. He relied in particular on INA section 242(a),[66] which states that the court of appeals hearing a petition for review may not order the taking of additional evidence under 28 U.S.C. § 2347(c).[67]

It is possible that the suspension issue could be avoided through some alternative mechanism that allows a court to consider evidence outside the record within the context of a petition for review or that treats the issue as falling outside the scope of issues for which statutory habeas is unavailable.[68] Once again, the question is whether courts of appeals will step in to take on this role, and how courts and litigators understand the scope of the limitations under 28 U.S.C. § 2347(c).

V. SOME HOPEFUL EARLY SIGNS

Some of the issues raised in this paper occur infrequently. They do not arise in the normal course of cases in which people are aware of orders and deadlines and have fair access to the system for judicial review in the circuits. But they will arise at some point, and many have probably already arisen in *pro se* filings. How the government chooses to litigate these questions will determine the degree to which the promise of fair access to the courts is realized.

Although each issue raises its own challenges, there are some hopeful early signs that the government litigation stance will be informed by Congress's apparent interest in streamlining but not foreclosing judicial review. The first issue that courts faced after REAL ID was whether the act addresses detention chal-

65. *Id.*

66. 8 U.S.C. § 1252(a)(1) (2000), *amended by* The REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231, 305 (2005).

67. Section 2347(c) provides: If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and
(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

68. For example, if a fact (such as mental competence) has not been the subject of a hearing, the court could take the view that the case falls under 28 U.S.C. § 2347(b), which allows for remand to the agency or to a district court. Although the majority cast doubt on this approach in *Reno v. AADC*, 525 U.S. 471, 488 n.10 (1999), it did not resolve this question.

lenges. On this issue, there has been significant consensus on the part of the courts and litigants, that REAL ID does not address detention challenges.[69] As a result of this consensus, detention challenges (to my knowledge) have continued without any effect from the REAL ID Act.

The consensus that REAL ID does not affect detention challenges is correct.[70] But after the experience of the years of litigation after 1996, it would not have been surprising for the government to argue otherwise. Government lawyers might have argued that the final sentence of the new section 242(a)(5) of the INA, which purports to read section 242's restrictions into every provision of the Act that refers to "judicial review," stripped courts of the ability to hear detention challenges. Had they done so, they would have triggered a constitutional confrontation over the REAL ID Act. This confrontation was avoided by preserving district court habeas jurisdiction over detention issues.

VI. CONCLUSION

Only time will tell how the REAL ID Act's provisions will be applied and affect the practice of immigration law. Unfortunately, as these issues play out in the next few years, they will do so in a context where the courts of appeals are already overloaded due to various factors, including the "streamlining" regulations that altered the quality of review at the Board of Immigration Appeals.[71] But the lesson from the litigation over the 1996 laws is clear. Early decisions and precedents that serve to clear dockets can create more work and a more complex system for court review. As courts take on the individual issues that arise regarding the scope of their powers, and government litigators make decisions about how to read a scheme that was enacted in the REAL ID Act, one without

69. *See, e.g.,* Hernandez v. Gonzales, 424 F.3d 42, 43 (1st Cir. 2005) (citing several concurring cases).

70. As explained above, the legislative history of the REAL ID Act is sparse because of the way the bill moved through Congress. The only available legislative materials are: (1) Senator Hatch's introductory remarks for the predecessor bill: The Fairness in Immigration Litigation Act (*see supra* note 16 and accompanying text); (2) hearing testimony on immigration enforcement that occurred shortly after REAL ID passed the house and before it was attached to the Senate's appropriations bill for the Iraq war and Tsunami relief (*Strenghthening Interior Enforcement: Deportation and Related Issues: Before the Subcomm. on Immigration, Border Security and Citizenshio of the S. Comm. on the Judiciary*, 109 Cong. (2005), *available at* http://judiciary.senate.gov/hearing.cfm?id=1440)); and (3) text of the conference report on the Iraq and Tsunami relief appropriations bill (H.R. REP. NO. 109-72, at H2872-73 (2005) (Conf. Rep.). All of these sources suggest that there was never any intention for the bill to cover detention challenges. Indeed, the Justice Department in its testimony went out of its way to explain that detention challenges would be unaffected by the bill. In addition, the provisions in the bill for transfer of cases reflected this assumption. The transfer provision stated that if a case challenging removal deportation or exclusion was pending in the district court, the court should transfer the case "or the part of the case" that challenged the order of removal deportation or exclusion. Implicit in this language was the assumption that the portion of a case challenging detention would not be transferred and was not subject to the changes in the law.

71. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54, 878-01 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

any committee process or careful consideration of cases in which habeas, mandamus, and the all writs act have served as a crucial safety valve, foresight to avoid unnecessary constitutional litigation will make all the difference.