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Gerald L. Neuman
Harvard Law School

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GERALD L. NEUMAN

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ABOUT THE AUTHOR: Gerald L. Neuman is the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School. This article was written for the conference *Seeking Review: Immigration Law and Federal Court Jurisdiction*, held on September 26, 2005.

Section 106 of the hurriedly-passed "REAL ID Act" of May 2005 makes major rearrangements of the jurisdictional structure for review of proceedings for the removal of aliens from the United States. It attempts to make direct review in the court of appeals the exclusive means of review of removal orders, and adopts explicit statutory preclusions of habeas corpus. The legislative history of the Act expresses the hope that the new structure complies with the Habeas Corpus Suspension Clause of the Constitution by providing an adequate and effective alternative remedy in the courts of appeals. This article describes the new statutory allocation of jurisdiction and some of the interpretive questions it raises, including problem areas where the constitutional adequacy of the remedy may be in doubt. At least some of these problems may be solved by careful interpretation of the statute to ensure that review is available and effective.

This article explores the effects of the REAL ID Act on direct review of immigration proceedings as follows: Part I describes the impetus for the REAL ID Act; Part II outlines what the REAL ID Act says about judicial review; and Part III explains in fuller context what these changes actually mean. Part IV inquires whether and how the new structure of judicial review resulting from the REAL ID Act can be construed to provide an adequate substitute for habeas corpus, focusing on problems raised by the statutory time period for direct review, the fact-finding capacities of the courts of appeals, and the availability of a judicial remedy for illegalities occurring after the entry of a removal order. Part V discusses how the expansion of direct review by the REAL ID Act requires courts of appeals to reconsider some of their previous jurisdictional precedents. Finally, Part VI calls attention to one area where a conclusion of unconstitutionality may be unavoidable: preclusion of review of expedited removal from the interior.

I. THE ORIGINS OF THE REAL ID ACT

The revision of section 242 of the Immigration and Nationality Act ("INA")[1] by the REAL ID Act responds to criticism of the haphazard structure of judicial review that resulted from the 1996 amendments to the immigration laws.[2] Those amendments had routed challenges to removal orders directly into the courts of appeals, on petition for review, but had precluded certain claims from direct review, including, most prominently, challenges by aliens removable for crimes and challenges to various discretionary acts.[3] Congress enacted these amendments without sufficient attention to its constitutional obligation to preserve a minimum level of judicial inquiry into the lawfulness of removal orders,

1. 8 U.S.C. § 1252 (2000).

2. The two crucial statutes were the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the more comprehensive Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

3. *See* § 1252(a)(2)(B) (precluding review of certain discretionary decisions); § 1252(a)(2)(C) (precluding review in cases involving certain crimes).

as required by the Habeas Corpus Suspension Clause of Article I, Section 9.[4] Consequently, most courts of appeals held, and the Supreme Court confirmed in *INS v. St. Cyr*,[5] that the preclusion of direct review in the courts of appeals did not bar aliens from bringing claims within the traditional scope of habeas corpus to challenge removal orders in the district courts. The *St. Cyr* decision rested on the strong presumption of judicial review, the presumption against repeals of habeas corpus jurisdiction, and ultimately on the need to avoid the serious constitutional question that would arise under the Suspension Clause if judicial inquiry were not available.[6]

The effect of the 1996 amendments, as interpreted in *St. Cyr*, was thus a new allocation of jurisdiction over challenges to removal orders as between the courts of appeals and the district courts. Even with regard to a single removal order, some issues needed to be raised on direct review in the court of appeals, other issues needed to go first to the district court (subject then to appeal by either side), and yet other issues outside the traditional scope of habeas corpus could be precluded from review altogether.[7] For aliens like St. Cyr, being removed because of criminal convictions, challenges to deportability belonged in the court of appeals, while challenges to denial of eligibility for discretionary relief as a matter of law belonged in the district court.

This peculiar division of responsibility arose largely because of the government's litigation strategy in the wake of the 1996 amendments. Essentially, the government rushed into the courts of appeals and urged them to dismiss petitions for review, favoring a maximalist interpretation of the 1996 preclusions, and at best leaving the habeas corpus consequences to be sorted out later. The government's initial victories became circuit precedent that it came to regret once it saw how seriously most courts of appeals took the constitutional problems when they were adequately briefed. By 2001, the Supreme Court confirmed the bifurcated solution in *St. Cyr*, fortified by a canon of statutory interpretation requiring a clear statement from Congress to withdraw jurisdiction under the federal habeas statute, which militated in favor of residual jurisdiction in the district court. In *St. Cyr*'s companion case, *Calcano-Martinez v. INS*, the Court rejected the alternative of permitting apparently precluded claims to proceed on direct review in the courts of appeals.[8]

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4. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.").

5. 533 U.S. 289 (2001).

6. *Id.*

7. *See, e.g.*, Latu v. Ashcroft, 375 F.3d 1012 (10th Cir. 2004) (holding that, although an alien contesting removal should challenge characterization as aggravated felon on direct review, once aggravated felon status is confirmed or conceded, jurisdiction over constitutional challenges to the removal procedure may be brought on habeas in district court; and further holding that review of discretionary venue decision was precluded altogether).

8. 533 U.S. 348 (2001).

Congress has criticized the post-*St. Cyr* regime on three grounds: the polemical argument that it *favors* criminal aliens by giving them more judicial review (in actuality, more layers of judicial review) than noncriminal aliens;[9] the inefficiency and delay that results from providing two layers of judicial review;[10] and the unnecessary confusion, both for litigants and courts, that the bifurcation produces.[11]

In *St. Cyr*, the Supreme Court had invited Congress to rethink the structure of judicial review for removal proceedings in light of its analysis, and Congress responded in the spring of 2005 by adopting the REAL ID Act ("the Act").[12] The Act contains a series of miscellaneous revisions to the immigration laws, and derives its name from provisions that establish minimum standards for state-issued drivers' licenses and identification cards.[13] The legislative history of the Act is meager because it was adopted in the House of Representatives without a report, amendment and debate about it were severely restricted, and it was later attached to a "must-pass" emergency supplemental appropriation bill. Initially, the Senate rejected all of the REAL ID Act provisions, but the House insisted on its version, and a compromise version was negotiated in conference.[14] The conference committee supplied a substantial Joint Explanatory Statement that addressed the judicial review provisions at length.[15]

II. WHAT THE REAL ID ACT SAYS ABOUT JUDICIAL REVIEW

The main thrust of section 106 of the REAL ID Act is to channel judicial review of removal orders, including some issues currently being reviewed on habeas corpus in the district courts, back into the courts of appeals, while leaving review of detention-related issues in the district courts on habeas. Several subsections of the Act attempt to meet the "clear statement" requirements applied by the Supreme Court in *St. Cyr* by adding explicit references to habeas corpus and

9. H.R. REP. NO. 109-72, 109th Cong., at 174 (2005) (Conf. Rep.) (citing INS v. St. Cyr, 533 U.S. 289, 327 (2001) (Scalia, J., dissenting)) *as reprinted in* U.S.C.C.A.N. 240, 298-99 [hereinafter Conf. Rep.].

10. *Id.*

11. *Id.* The Conference Report focuses on the difficulty for government lawyers and courts that the bifurcation process creates, but one might also be concerned about the difficulties created for private lawyers and pro se litigants attempting to challenge removal orders. *See id.*

12. *St. Cyr*, 533 U.S. at 314 n.38. The Conference Report expressly notes that invitation. Conf. Rep., *supra* note 9, at 175.

13. Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13, §§ 101-501, Div. B, 119 Stat. 231.

14. Two important aspects of the compromise were the omission of the word "pure" from the description "questions of law" for which review was preserved, discussed *infra* Part III; and the deletion altogether of a House provision that would have made it more difficult for courts to grant temporary stays of removal. Both of these changes are important to ensuring the adequacy of the petition for review as a substitute for habeas corpus.

15. Conf. Rep., *supra* note 9, at 94, 160, 172-76 (discussing REAL ID Act § 106).

to the general federal habeas section of the U.S. Code, 28 U.S.C. § 2241, in "notwithstanding" clauses and other provisions limiting judicial review. One such reference is an amendment to the consolidation provision of INA section 242(b)(9) specifying that any consolidation of issues in a petition for review should preclude habeas corpus.[16] Another is the first sentence of new section 242(a)(5), which makes the petition for review the "sole and exclusive means of judicial review of an order of removal," expressly notwithstanding "section 2241 . . . or any other habeas corpus provision."[17] Moreover, the second sentence of section 242(a)(5) redefines the terms "jurisdiction to review" or "judicial review," wherever those terms are used in the INA to preclude review as including review by habeas corpus.[18]

The REAL ID Act compensates for the preclusion of habeas corpus review of removal orders by clarifying or expanding the scope of review in the courts of appeals. It adds the following subparagraph to INA section 242(a)(2):

> (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 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.[19]

Most prominently, this subparagraph clarifies that the restrictions on review of discretionary decisions imposed by section 242(a)(2)(B) do not preclude review of legal (or constitutional) error in the denial of discretionary benefits, and it permits direct review of claims of legal (or constitutional) error in removal proceedings based on criminal convictions covered by section 242(a)(2)(C). Previously, many legal claims of aliens with criminal convictions had been relegated to habeas corpus under the reading of the 1996 amendments adopted in *St. Cyr* and *Calcano*. The parenthetical exception for preclusion under section 242 itself apparently relates to expedited removal proceedings under section 235(b), for which section 242(e) contains special rules.[20]

The REAL ID Act also makes partial provision for transition from the prior bifurcated jurisdictional regime to the new one. The replacement of district

16. 8 U.S.C. § 1252(b)(9) (2000). This provision has also been referred to as "a sort of 'zipper' clause." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

17. § 1252(a)(5). Section 106 also adds a new paragraph 242(a)(4), which makes petitions for review, rather than habeas corpus, the remedy for claims under the Convention Against Torture, except in cases involving expedited removal. The Conference Report describes this provision as granting, rather than barring, a remedy. Conf. Rep., *supra* note 9, at 176.

18. § 1252(a)(5).

19. § 1252(a)(2)(D).

20. *See* § 1252(e). Some of those rules raise serious constitutional questions, generally or in some of their applications. *See also infra* Part VII.

court habeas corpus by direct review in the courts of appeals takes effect immediately, regardless of the date of the removal order. Section 106(c) calls for transfer of habeas corpus cases pending in the district courts on the date of enactment (May 11, 2005), to the appropriate court of appeals as proceedings on petition for review, and specifies that the thirty-day filing period of section 242(b)(1) shall not apply.[21]

Section 106 is not the only provision of the REAL ID Act that addresses judicial review. Section 101 is designed to increase the discretion of immigration judges in rejecting asylum claims on credibility grounds due to lack of corroborating evidence, and includes an amendment to INA section 242 specifying the deference due to such rejections.[22] Another subsection decrees that the section 242(a)(2)(B) restrictions on review of discretionary decisions apply "regardless of whether the [discretionary] judgment, decision, or action is made in removal proceedings."[23]

III. WHAT THE REAL ID ACT MEANS

As the Supreme Court emphasized in *INS v. St. Cyr*, judicial review of removal orders takes place within a sphere structured by constitutional imperatives. The Habeas Corpus Suspension Clause of Article I, Section 9, requires a certain minimum level of judicial inquiry into the lawfulness of executive detention, including the enforcement of removal orders.[24] The Suspension Clause does not literally necessitate that the inquiry must be afforded in the procedural form of habeas corpus proceedings in the district court. But Congress cannot displace

21. Also, section 106(d) provides that petitions for review still pending in the courts of appeals under old INA section 106(a), 8 U.S.C. § 1105a (which was repealed prospectively in 1996), including petitions governed by the "transitional" judicial review provisions of IIRIRA, shall be treated as if filed under the REAL ID Act regime. *See* Elia v. Gonzales, 431 F.3d 268 (6th Cir. 2005); Sena v. Gonzales, 428 F.3d 50 (1st Cir. 2005). One subtle consequence of this change is that departure of the alien from the United States will no longer deprive the court of jurisdiction.

22. INA § 242(b)(4), 8 U.S.C. § 1252(b)(4) (2000), *amended by* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(e), 119 Stat. 231 (2005). This provision explicitly requires reviewing courts to defer to the conclusions of a trier of fact concerning the availability of corroborating evidence, unless they are unreasonable.

23. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B), *amended by* REAL ID Act § 101(f) (alteration in original). Courts had disagreed about whether that subparagraph applied outside removal proceedings. *See* ANA Int'l Inc. v. Way, 393 F.3d 886, 891 & n.3 (9th Cir. 2004) (observing that the issue was open in the Ninth Circuit and had been decided in several others); El Khader v. Monica, 366 F.3d 562 (7th Cir. 2004) (holding that section 242(a)(2)(B)(ii) applies outside removal proceedings).

The REAL ID Act leaves unresolved a circuit conflict over whether section 242(a)(2)(B)(ii) limits review only of discretion expressly conferred by the relevant subchapter of the INA, or also of discretion conferred by regulations adopted pursuant to that subchapter. *See, e.g.*, Zafar v. U.S. Att'y Gen., 461 F.3d 1357 (11th Cir. 2006) (holding that only statutorily conferred discretion is protected from review for abuse of discretion); Zhao v. Gonzales, 404 F.3d 295, 302-03 (5th Cir. 2005) (noting circuit conflict and holding that only statutorily conferred discretion is protected from review for abuse of discretion).

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

the habeas corpus method without providing an adequate and effective substitute remedy.

The Conference Report on the REAL ID Act expresses Congress's awareness of this imperative, and its intention to comply with it. Although the Report criticizes the particular remedial structure left in place by *St. Cyr*, which gave criminal aliens "more review than non-criminal aliens,"[25] it recognizes the need to "give every alien one day in the court of appeals, satisfying constitutional concerns," and to "provide a scheme which is an 'adequate and effective' substitute for habeas corpus."[26] The REAL ID Act must be construed in light of these goals, both for constitutional reasons, and out of fidelity to congressional intent.

The Conference Report makes clear that Congress intended for habeas corpus to continue to serve as the vehicle for review of pre-order and post-order detention issues.[27] Indeed, the report emphasizes twice that the bill would "not preclude habeas review over challenges to detention that are independent of challenges to removal orders," but rather "would eliminate habeas review only over challenges to removal orders."[28] It is important to observe, however, that the REAL ID Act does not add any statutory language expressly drawing such a distinction. In textual terms, the preservation of habeas corpus for detention results from the interaction of several factors, including the presumption that the writ has not been repealed, the absence of a substitute remedy, and the fact that section 236(e) does not include the specific phrases "judicial review" and "jurisdiction to review" that are redefined by section 242(a)(5).[29] Another factor necessary to this interpretation is the conclusion that the language of the consolidation provision, section 242(b)(9), does not include detention issues incidental to removal proceedings as among the "questions of law and fact . . . *arising from* any action taken or proceeding brought to remove an alien" that may be decided only upon petition for review.[30] Several years ago, Hiroshi Motomura argued in an illuminating article that the phrase "arising from" in section 242(b)(9) should be interpreted narrowly in order to permit separate review of matters, such as the duration of post-order detention, that were collateral to the removal order.[31] The clear statement rule of *St. Cyr* may have made reliance on this argument unnecessary for a time, because section 242(b)(9) did not expressly preclude habeas

25. Conf. Rep., *supra* note 9, at 174.

26. *Id.* at 175 (citing Swain v. Pressley, 430 U.S. 372, 381 (1977)).

27. *Cf.* Hernandez v. Gonzales, 424 F.3d 42 (1st Cir. 2005) (refusing transfer under REAL ID Act of habeas corpus challenge to pre-order detention).

28. Conf. Rep., *supra* note 9, at 175-76.

29. 8 U.S.C. § 1252(a)(5) (2000).

30. § 1252(b)(9).

31. *See* Hiroshi Motomura, *Judicial Review in Immigration Cases after* AADC*: Lessons from Civil Procedure*, 14 GEO. IMMIG. L.J. 385, 424-26 (2000) (analogizing to the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

corpus,[32] but after the REAL ID Act the issue has regained importance.[33] While it may be a foregone conclusion that detention challenges independent from the validity of the removal order are not covered by section 242(b)(9), the more interesting question is what *other* issues escape the mandate for consolidation, especially those that are effectively unreviewable on petition for review. Congress has not drawn the line, but has left it to be inferred.[34]

With regard to the actual review of removal orders, the Conference Report indicates Congress's desire to respect constitutional standards by maintaining the traditional scope of habeas inquiry as outlined by the Supreme Court in *St. Cyr*.[35] That purpose is reflected in REAL ID Act section 106(a)(1)(A)(iii), adding INA section 242(a)(2)(D), quoted above. For criminal aliens, the provision transfers to the courts of appeals the level of judicial review of removal orders that has heretofore been available on habeas in the district courts. That level includes review of issues of law, and due process review of baseless factual findings under the "some evidence" test, but does not include the APA review of factual findings under the "substantial evidence" test or review of the exercise of discretion.[36] As explained in *St. Cyr*,[37] these standards correspond to the scope of judicial review afforded on habeas corpus in the period prior to the Immigration and Nationality Act of 1952,[38] when the Court described judicial review as being precluded "to the fullest extent possible under the Constitution."[39] The *St. Cyr* opinion similarly demonstrated that courts must have authority to review legal error leading to the denial of discretionary relief.[40] By its wording — "Nothing . . . shall be construed as precluding . . ." — subparagraph (D) defines a floor, and not a ceiling, for the scope of review.[41]

Subparagraph (D) states one part of this standard by preserving judicial review of "questions of law." That phrasing rejects the language of the House

32. *See St. Cyr*, 533 U.S. at 313-14.

33. The REAL ID Act expressly adds habeas corpus preclusion language to section 242(b)(9).

34. *See infra* Part IV-D.

35. Conf. Rep., *supra* note 9, at 175.

36. *See, e.g.*, Bakhtriger v. Elwood, 360 F.3d 414, 421-23 (3d Cir. 2004).

37. 533 U.S. at 306-07.

38. Act of June 27, 1952, ch. 477, 66 Stat. 166. In *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), the Supreme Court held that the enactment of the INA made the judicial review provisions of the APA applicable to deportation proceedings. The APA provides that subsequently enacted statutes do not supersede its judicial review provisions (inter alia) unless they do so expressly. *See* 5 U.S.C. § 559 (2000); *Shaughnessy*, 349 U.S. at 50-51.

39. Heikkila v. Barber, 345 U.S. 229, 234 (1953); *see also* INS v. St. Cyr, 533 U.S. 289, 304 (2001) (quoting *Heikkila*).

40. *See St. Cyr*, 533 U.S. at 302-04, 307-08, and cases cited therein.

41. 8 U.S.C. § 1252(a)(2)(D) (2000).

bill, which had specified only "pure questions of law."[42] The Conference Report minimizes the significance of this deletion, characterizing the adjective "pure" as "superfluous," but the change is potentially important to the application and the constitutionality of the statute.[43] The *St. Cyr* decision itself involved only a "pure question of law" — the retroactivity or nonretroactivity of a statutory provision, stated in the abstract — but case law of the pre-INA period[44] and post-*St. Cyr* cases in the courts of appeals[45] illustrate that the traditional scope of review also extends to "mixed" questions of law and fact, in the sense of the application of legal standards to the facts as found by the administrative agency. The Conference Report's suggestion that "[w]hen a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements,"[46] is actually consistent with this traditional practice, and belies the notion that omission of the word "pure" was inconsequential.[47]

The reviewable questions of law should include both statutory issues and issues arising under regulations with force of law, to the extent that they affect the validity of the removal order. The Conference Report passes over the subject of regulations, instead emphasizing the dichotomy between law and fact, and focusing on questions of statutory construction. But that silence should not affect the courts' scope of review with regard to regulations. The ambiguity of the legislative history should not detract from the broad, clear meaning of the statute. Decisions of the pre-INA period[48] and court of appeals cases since *St. Cyr*[49] confirm that violations of regulations are within the scope of habeas.

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42. *See* H.R. 1268, Div. B., § 105(a)(1)(A), 109th Cong. (as passed by House of Representatives on Mar. 16, 2005).

43. Conf. Rep., *supra* note 9, at 175.

44. *See* Delgadillo v. Carmichael, 332 U.S. 388 (1947) (holding on habeas that alien's return to U.S. under unusual wartime circumstances did not constitute an "entry"); Hansen v. Haff, 291 U.S. 559 (1934) (holding on habeas that alien did not enter for an "immoral purpose"); Mahler v. Eby, 264 U.S. 32 (1924) (holding on habeas that aliens' convictions satisfied the standard of "undesirable resident," but that express findings to that effect were required).

45. *See* Bakhtriger v. Elwood, 360 F.3d 414 (3d Cir. 2004) (Chertoff, J.); Cadet v. Bulger, 377 F.3d 1173 (11th Cir. 2004); Wang v. Ashcroft, 320 F.3d 130, 141-42 (2d Cir. 2003).

46. Conf. Rep., *supra* note 9, at 175.

47. *Cf.* Kamara v. Attorney General, 420 F.3d 202, 210-11 n.5 (3d Cir. 2005) (holding that REAL ID Act preserves judicial review of issues of application of law to undisputed fact, and noting that a narrower standard of review would raise a significant question under the Suspension Clause).

48. The classic statement of this principle, in the twilight of the pre-INA regime, was in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954): "The crucial question is whether the alleged conduct of the Attorney General deprived [the habeas] petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto." (alteration in original). *See also* United States v. Johnson *ex rel.* Shaughnessy, 336 U.S. 806 (1949) (invalidating on habeas corpus medical exclusion decision made in violation of Public Health Service regulations); Bridges v. Wixon, 326 U.S. 135, 150-53 (1945) (invalidating on habeas finding of Communist Party membership based on written statement admitted in violation of INS regulations).

IV. ENSURING THE ADEQUACY OF THE REMEDY

Will direct review in the courts of appeals, as reframed by the REAL ID Act, provide an adequate and effective substitute for the writ of habeas corpus sufficient to satisfy the requirements of the Suspension Clause? The answer depends on how the statutory structure will be interpreted, and on what the Suspension Clause requires. Here, I will try to identify a few of the problem areas, focusing on the effect of the thirty-day filing period in limiting the availability of review of removal orders, the fact-finding capacity of the courts of appeals, and the availability of review for questions that arise after a removal order has been issued. The 1996 amendments gave rise to these dilemmas, and the REAL ID Act increases their difficulty. Courts that recognize their seriousness are more likely to solve them by carefully interpreting the statute rather than by holding it unconstitutional.

The statutory window of opportunity for filing a petition of review of a removal order is fairly narrow under section 242(b)(1): only thirty days. In historical terms, this is a very recent development. Prior to 1961, the only time limit on review of deportation orders was that a petition for habeas corpus had to be filed before the alien was deported. The 1961 statute that created the petition for review imposed a six month limit, which persisted until 1988 when the INA was modified to provide an exceptional sixty-day period for deportation orders against aggravated felons.[50] The 1961 Act expressly recognized habeas corpus, without a stated time limit, as an additional remedy for aliens in custody.[51] The 1990 Immigration Act halved both the periods for direct review, from six months to ninety days for most aliens, and from sixty to thirty days for aggravated felons.[52] Then in 1996, Congress reduced the time limit for direct review of all removal orders to thirty days.[53] This process of reduction cannot go on forever without making the opportunity for review an illusion.

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49. *See, e.g.*, Auguste v. Ridge, 395 F.3d 123, 153 (3d Cir. 2005) (reviewing on habeas the application of regulations implementing the Convention Against Torture); Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) (same); Chong v. Dist. Dir., 264 F.3d 378 (3d Cir. 2001) (reviewing on habeas the BIA's violation of procedural regulations, but finding absence of prejudice); *cf.* Johnson v. Ashcroft, 378 F.3d 164 (2d Cir. 2004) (reviewing on habeas BIA procedural action inconsistent with BIA's own precedents). *But see* Baidas v. Jenifer, 123 F. App'x 663 (6th Cir. 2005) (expressing doubt on this question).

50. The category of aggravated felony was new in 1988, and was originally limited to very serious crimes. Congress has steadily expanded it over the years.

51. Immigration and Nationality Act of 1961, Pub. L. No. 87-301, § 106(a), 75 Stat. 650, 651 (1961) (formerly codified at 8 U.S.C. § 1105a(a) (repealed 1996); United States *ex rel.* Marcello v. Dist. Dir., 634 F.2d 964 (5th Cir. 1981), *cert. denied*, 452 U.S. 917 (1981); Sotelo Mondragon v. Ilchert, 653 F.2d 1254 (9th Cir. 1980); *cf.* Foti v. INS, 375 U.S. 217, 231 n.19 (1963) ("And, of course, our decision in this case in no way impairs the preservation and availability of habeas corpus relief.").

52. Immigration Act of 1990, Pub. L. No. 101-649, § 502, 104 Stat. 4978, 4979 (1990).

53. IIRIRA, Pub. L. No. 104-208, Div. C, §§ 306(a)(2), 309(c)(4)(C), 110 Stat. 3009-607. Also in 1996, AEDPA repealed the specific provision recognizing habeas corpus for aliens in custody, but the Supreme

The Supreme Court construed the predecessor provision strictly in 1995, resolving a circuit conflict by finding that the ninety-day period for direct review in former INA section 106 was not subject to tolling by the filing of a motion to reopen.[54] The Court described the time limit as "mandatory and jurisdictional" and "not subject to equitable tolling."[55] Under the 1996 amendments, the courts of appeals have agreed that the thirty-day limit of section 242(b)(1) is also "mandatory and jurisdictional" and not subject to tolling.[56] They have disagreed, however, about whether and when an alien who misses the thirty-day limit can seek habeas corpus review of the same removal order.[57] For an alien represented by competent counsel who receives timely notification of a removal order after May 11, 2005, thirty days is a short but not impracticable deadline for filing a simple notice to commence judicial review. Deviations from that paradigm, however, begin to raise questions.

The most fundamental of these questions is whether the thirty-day period for direct review continues to be jurisdictional and not susceptible to equitable tolling. Can the twin goals of Congress, to simplify judicial review while ensuring aliens access to the courts, be accomplished if the deadline is rigid? The following examples illustrate the difficulty.

A. Timing and Transition

One issue, which courts will presumably have resolved or finessed before the publication of this essay, is the problem of transition.[58] The REAL ID Act expressly excuses compliance with the thirty-day deadline for habeas corpus pro-

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Court held in *St. Cyr* that this repeal did not affect the availability of the writ under the general federal habeas corpus statute, 28 U.S.C. § 2241 (2000). *St. Cyr*, 533 U.S. at 308-10.

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

55. *Id.* at 405.

56. *See, e.g.*, Dakane v. U.S. Att' y Gen., 371 F.3d 771, 773 n.3 (11th Cir. 2004); Nahatchevska v. Ashcroft, 317 F.3d 1226, 1227 (10th Cir. 2003).

57. *See, e.g.*, Laing v. Ashcroft, 370 F.3d 994 (9th Cir. 2004) (applying a prudential exhaustion doctrine to bar habeas where the alien had failed to file a petition for review); Lopez v. Hainauer, 332 F.3d 507 (8th Cir. 2003) (holding that court of appeals jurisdiction was exclusive of habeas jurisdiction in district court); Liu v. INS, 293 F.3d 36 (2d Cir. 2002) (permitting an asylum applicant to file a habeas petition after the thirty-day period had run).

58. The above prediction, made in the fall of 2005, was too optimistic in failing to note the alternative that aspects of the problem would be ignored, particularly to the detriment of pro se litigants. *See, e.g.*, Chen v. Gonzales, 435 F.3d 788 (7th Cir. 2006) (dismissing late habeas petition seeking review of April 25, 2005 BIA order); Scott v. Att'y Gen., 171 F. App'x 404 (3d Cir. 2006) (dismissing habeas petition filed four days late for review of April 15, 2005 BIA order). For decisions expressing greater awareness of transition problems, see Hu v. U.S. Dep't of Justice, 177 F. App'x 95, 96 n.1 (2d Cir. 2006) (observing that the REAL ID Act "arguably requires this Court to alter its interpretation of the 30-day filing requirement as a jurisdictional prerequisite, which may allow the Court to hear untimely petitions when the government waives the deadline or when dismissal would raise constitutional concerns"); Okeezie v. Chertoff, 430 F. Supp. 2d 655 (W.D. Tex. 2006) (construing the REAL ID Act as preserving habeas jurisdiction over a pre-enactment BIA order for which no other remedy was available).

ceedings already pending in district courts on May 11, and converts them into viable petitions for review.[59] The statute overlooks the question of habeas cases that already had appeals pending on May 11, but appellate courts have treated them similarly.[60] The Act also fails to address the transition problem of late petitions for review or for habeas corpus filed in the first few days or weeks after its enactment, challenging removal orders issued in April or early May. Depending on the exact configuration of dates, compliance with the thirty-day limit may be extremely difficult, or literally impossible. In configurations where it would be possible but difficult for counsel to learn of and comply with the new deadline, it would be even more difficult for pro se litigants, especially those in custody, to comply. It remains to be seen whether courts of appeals will assume that Congress would have wanted them to fashion a reasonable grace period, as they did when Congress imposed a statute of limitations for post-conviction relief.[61]

B. The Brevity of the Period

Putting aside transition issues, applying the thirty-day limit requires an interpretation of the events necessary to begin the period, and the actions necessary to accomplish filing within it. In part, this inquiry involves questions about the adequacy of service on aliens and their counsel.[62] When the Board of Immigration Appeals ("BIA") provides the notice to counsel (or to non-attorney legal representatives) rather than to the alien, further barriers of ineffective or fraudulent conduct may arise.[63] Aliens in the custody of federal, state, or private detention facilities may face additional, government-imposed obstacles to communication that prevent them from receiving timely notice, obtaining legal advice, or achieving timely filing.[64] Some procedural rules can soften the impact of the filing deadline, such as the "prison mailbox rule" of Federal Rule of Appel-

59. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(c), 119 Stat. 231.

60. *See, e.g.*, Alvarez-Barajas v. Gonzales, 418 F.3d 1050 (9th Cir. 2005); Bonhometre v. Gonzales, 414 F.3d 442 (3d Cir. 2005).

61. *See* Johnson v. United States, 544 U.S. 295, 298 (2005); Duncan v. Walker, 533 U.S. 167, 183 & n.1 (2001) (Stevens, J., concurring in part and concurring in the judgment).

62. *See, e.g.*, Wilson v. Ashcroft, 350 F.3d 377 (3d Cir. 2003) (remanding for analysis of prejudice in a habeas case where a final removal order was not served on an alien in custody until after the appeal period had run); Martinez-Serrano v. INS, 94 F.3d 1256 (9th Cir. 1996) (holding that time limit for seeking review does not begin to run until the BIA mails its decision to the most recent address that counsel has supplied), *cert. denied*, 522 U.S. 805 (1997); Zaluski v. INS, 37 F.3d 72 (2d Cir. 1994) (holding that time limit for seeking review does not begin to run until the BIA mails its decision to the most recent address that counsel has supplied).

63. Decisions involving equitable tolling of administrative time limits illustrate well the manner in which some attorneys and other representatives sabotage rather than afford defense against removal. *See, e.g.*, Borges v. Gonzales, 402 F.3d 398 (3d Cir. 2005); Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002).

64. *See* Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1667-73 (1997).

late Procedure 25(a),[65] the statutory provision for the transfer of cases filed in the wrong court,[66] and the practice of generously construing pro se pleadings.[67]

A factual scenario derived from a recent case illustrates another way in which the brevity of the thirty-day period can defeat the adequacy of the remedy.[68] The Department of Homeland Security ("DHS") initiates removal proceedings against an asylum applicant who is confined in a state hospital as mentally ill throughout the pendency of the removal proceedings. Nonetheless, the immigration judge does not conduct a competency inquiry, and instead allows the respondent to proceed without representation or assistance, ultimately rejecting the asylum claim on the basis of inconsistencies in his testimony. More than thirty days after the removal order becomes final, the alien is put in contact with an attorney who challenges the fairness of the hearing for violation of procedural due process, and of the regulation requiring representation for mentally incompetent respondents. Imposing a filing deadline that made no allowances for such circumstances would raise very serious questions about unlawful suspension of the writ.

C. Fact-finding

Once a petition is filed, the adequacy of the court of appeals remedy may depend on the power of the court to make necessary inquiries. Two limitations of the courts' authority are particularly relevant: the directive in section 242(b)(4)(A) that the court "shall decide the petition only on the administrative record on which the order of removal is based,"[69] and the prohibition in section 242(a)(1) that "the court may not order the taking of additional evidence under section 2347(c) of Title 28."[70] The latter provision, part of the Hobbs Act on

65. *See* Arango-Aradondo v. INS, 13 F.3d 610 (2d Cir. 1994).

66. 28 U.S.C. § 1631 (2000); *see, e.g.*, Duran-Hernandez v. Ashcroft, 348 F.3d 1158 (10th Cir. 2003) (noting that habeas petition was transferred as petition for review by district court to court of appeals).

67. *See, e.g.*, Paul v. INS, 348 F.3d 43 (2d Cir. 2003) (deeming prisoner's motion for extension of time as a petition for review).

68. *See* Mohamed v. Tebrake, 371 F. Supp. 2d 1043 (D. Minn. 2005). The facts stated in the opinion are in part more complicated, and in part less fully specified. In the actual case, the district judge initially granted a late-filed habeas petition, relying on violation of a regulation intended for the protection of those unable to protect their own rights. *Id.* at 1046-47 (applying 8 C.F.R. § 1240.4 (2006)). Subsequently, in response to the REAL ID Act, the court amended its judgment and transferred the case to the court of appeals. Order granting motion to amend/correct, granting motion for leave to late file, *Mohamed*, 371 F. Supp. 2d 1043 (No. 03-CV-04325). As a habeas proceeding pending on May 11, 2005, the case was excused from the thirty-day filing period by the REAL ID Act. For a fuller description of the case, arguing that the court of appeals remedy would be inadequate because of limits on the court' s fact-finding capacity, see 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).

69. 8 U.S.C. § 1252(b)(4)(A) (2000).

70. § 1252(a)(1).

review of agency action, authorizes a court to remand to an agency for further findings if a party presents additional material evidence, and shows reasonable grounds for failing to adduce it before the agency.[71] Congress eliminated that authorization in review of removal orders in 1996.[72] In the ordinary case where an alien raises challenges to findings of fact and law that Congress has authorized the executive adjudicator to make, these procedural restrictions are compatible with the traditional scope of review in habeas corpus, for legal error, and for the absence of "some evidence" to support the factual findings.[73] Moreover, the courts of appeals have not interpreted the restriction to the administrative record as all-encompassing, but have read in exceptions for established subjects of judicial notice, and for issues outside the administrative record such as those relating to the circumstances of filing the petition.[74]

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71. The full text of 28 U.S.C. § 2347 (2000) is as follows:

> Petitions to review; proceedings
>
> (a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.
>
> (b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall —
>
> (1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;
>
> (2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or
>
> (3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.
>
> (c) 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.

72. IIRIRA, Pub. L. No. 104-208, Div. C, §§ 306(a)(1), (a)(2), 110 Stat. 3009-607, 607-08 (1996) (codified as amended at 8 U.S.C. § 1252(a)(1) (2000)).

73. § 1252. Where the respondent raises questions of U.S. nationality, however, the statute itself provides alternative procedures. *See infra* text accompanying notes 85-92.

74. *See, e.g.*, Namo v. Gonzales, 401 F.3d 453, 458 (6th Cir. 2005) (taking judicial notice of regime change in Iraq); Singh v. Ashcroft, 393 F.3d 903, 905 (9th Cir. 2004) (taking judicial notice of the existence of an

The fact-finding problem becomes more complicated, however, with regard to less administrative questions such as constitutional challenges to agency procedures or statutes that are beyond the competence of the executive adjudicator. Before 1996, the Fifth Circuit pointed to the ability to supplement the record under § 2347(c) in order to adjudicate due process challenges as a factor making the petition for review a constitutionally adequate substitute for habeas corpus.[75] After the 1996 amendments, Supreme Court Justices in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*") expressed conflicting views about the effect of section 242(a)(1) on the ability of a respondent to build a record in order to challenge unconstitutional agency action.[76] Justices Breyer and Ginsburg accepted the Attorney General's argument that section 242(a)(1) permits judicial fact-finding on a constitutional challenge regarding which the agency did not afford a hearing, because that section prohibits resort to subsection 2347(c), but not to the preceding subsection, § 2347(b).[77] Justice Scalia for the majority provisionally cast doubt on that interpretation, suggesting that subsection 2347(b) could be employed only when the agency had not held a hearing at all, rather than when its hearing had not addressed an aspect of its action that was subject to constitutional challenge.[78] Since *AADC*, courts have invoked § 2347(b) in review of reinstatement orders under section 241(a)(5), which do not involve a hearing,[79] and one decision has held that the prohibition on use of § 2347(c) did not prevent a remand to the BIA for fact-finding relevant to determining the court's jurisdiction.[80]

Uncertainties about the statutory limits on judicial cognizance of fact combine with uncertainties about the degree to which the Constitution requires that

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intelligence agency in India); Lising v. INS, 124 F.3d 996, 998 (9th Cir. 1997) (taking judicial notice of agency's own records). The Eleventh Circuit in *Najjar v. Ashcroft* criticized the breadth of judicial notice exercised by its sister circuits, but then took judicial notice of the existence of other proceedings involving one of the respondents before the same agency. 257 F.3d 1262, 1280-83 (11th Cir. 2001).

75. Garcia v. Boldin, 691 F.2d 1172, 1182 (5th Cir. 1982).

76. 525 U.S. 471 (1999).

77. *Id.* at 496 & n.2 (Ginsburg, J., joined in relevant part by Breyer, J., concurring in part and concurring in the judgment); *see* 8 U.S.C. § 2347(b) (2000), *supra* note 71.

78. *AADC*, 525 U.S. at 488 n.10.

79. *See* Gallo-Alvarez v. Ashcroft, 266 F.3d 1123 (9th Cir. 2001) (transferring to district court under § 2347(b)(3) for fact-finding relevant to possible retroactivity of reinstatement order); *cf.* Gomez-Chavez v. Perryman, 308 F.3d 796 (7th Cir. 2002), *cert. denied*, 540 U.S. 811 (2003) (noting the transfer procedure used in *Gallo-Alvarez*, and INS's encouragement to use it, but concluding that fact-finding was unnecessary).

80. Cardenas-Uriarte v. INS, 227 F.3d 1132 (9th Cir. 2000) (holding that transitional rules did not bar remand for exploration of first offender status question relevant to whether direct review was precluded by criminal conviction).

a court have power to examine the factual dimension of a constitutional issue.[81] For example, it would be difficult to imagine that a court deciding a procedural due process challenge to an agency regulation under *Mathews v. Eldridge*[82] should be bound by the agency's assessment of the accuracy of its own procedures. These are not the type of facts addressed by the generalization that the scope of habeas inquiry does not normally extend to questions of fact. Rather, that general proposition relates to the fact-finding mission that Congress has assigned to the agency within the bounds of its authority, and not to constitutional matters beyond the agency's authority. The era of federal immigration law post-dates the expansion of the fact-finding capacities of the federal courts by the 1867 Habeas Corpus Act,[83] and the powers traditionally exercised by courts in the pre-INA period included factual inquiries, where necessary, into the constitutional fairness of administrative proceedings.[84]

One special category of facts, however, is covered by well-settled constitutional doctrine: in deportation proceedings, due process requires de novo judicial review of substantial claims of U.S. citizenship. The Supreme Court so held in *Ng Fung Ho v. White*,[85] and section 242 accommodates this category of cases — indeed, the broader category of claims of U.S. *nationality*,[86] by providing de

81. *See generally* Henry Paul Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing the practice of independently deciding factual issues critical to the resolution of constitutional questions, without specific focus on the habeas corpus context).

82. 424 U.S. 319 (1976).

83. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Federal regulation of immigration to the United States is conventionally regarded as beginning in 1875, with the Act of Mar. 3, 1875, ch. 141, 18 Stat. 477; the first habeas cases arose in the wake of further federal legislation in 1882.

The Supreme Court observed in *St. Cyr* that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'" 533 U.S. at 301 (emphasis added) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)). Even from the perspective of 1789, the common law rule against factually controverting the custodian's justification of detention in the return to the writ had exceptions, and they were in flux. *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 62-64 (1976); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 986 (1998). No specific exception for the determination of "constitutional facts" operated at that time, but that is because there was no conception that such a category of facts existed. The problem of "constitutional facts" is merely one illustration of why English practice in the absence of a written constitution cannot provide sufficient guidance to the proper interpretation of the Suspension Clause. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COL. HUM. RTS. L. REV. 555, 591 (2002).

84. *See, e.g.*, Chin Yow v. United States, 208 U.S. 8 (1908) (ordering a hearing on whether habeas petitioner had been denied opportunity to present witnesses); Sibray v. United States *ex rel.* Plichta, 282 F. 795 (3d Cir. 1922) (concluding from testimony that habeas petitioner had not been given notice of adverse evidence); *see also Accardi*, 347 U.S. at 260 (ordering a hearing to determine whether the BIA exercised its own discretion in accordance with regulations).

85. 259 U.S. 276 (1922).

86. The term "national of the United States" is defined in 8 U.S.C. § 1101(a)(22) (2000) as meaning either a "citizen" or a non-citizen who "owes permanent allegiance to the United States." The latter includes those who derive U.S. nationality from their link to the "outlying possessions of the United States," namely American Samoa and Swain's Island. §§ 1101(a)(29), 1408. Efforts have been made to extend this cate-

novo judicial review, with transfer to a district court for fact-finding if necessary, in section 242(b)(5).[87] However, this procedure is afforded only upon timely petition for review. Prior to the REAL ID Act, the courts of appeals struggled with the question whether respondents in removal proceedings who missed the thirty-day deadline could still bring citizenship claims on habeas corpus. Circuits (and judges) varied in their solicitude to prevent an unintended forfeiture of the benefits of citizenship.[88] After the REAL ID Act, at first glance, citizenship claims raised and rejected in the course of a removal proceeding would appear to be within the "exclusive means of review" and "consolidation of questions for judicial review" provisions of section 242(a)(5) and section 242(b)(9), which now expressly preclude resort to habeas corpus.[89] On the other hand, section 242(b)(5), which could be regarded as *lex specialis*, has not been amended to preclude habeas, and does not use the magic words "judicial review" and "jurisdiction to review" redefined by section 242(a)(5).[90] Moreover, section 242(b)(9) by its terms addresses only questions concerning proceedings "to remove *an alien*."[91] Courts that had decided before 2005 that thirty days was an adequate time frame for defaulting a citizen's right to contest removal may be unlikely to change their minds. However, other courts that had decided differently may consider whether the adequacy of a window for seeking review should vary depending on the constitutional value attached to the right at stake. Such courts may conclude that a time period that is at the borderline of adequacy for overseeing the constitutionally permissible activity of deporting aliens does not suffice for preventing the constitutionally forbidden activity of deporting citizens.[92]

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gory to include aliens who demonstrate their allegiance to the United States in various ways, such as unperfected naturalization applications. Most of these efforts that have reached the courts of appeals have failed. *See, e.g.*, Marquez-Almanzar v. INS, 418 F.3d 210 (2d Cir. 2005); Sebastian-Soler v. USAG, 409 F.3d 1280 (11th Cir. 2005); Perdomo-Padilla v. Ashcroft, 333 F.3d 964 (9th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004). In my view, this argument is fallacious, and aliens who make it have no constitutional right to de novo review under *Ng Fung Ho*, or special treatment under the Suspension Clause.

87. 8 U.S.C. § 1252(b)(5)(B) (2000).

88. *See, e.g.*, Rivera v. Ashcroft, 394 F.3d 1129 (9th Cir. 2005) (stretching habeas remedy to protect citizen who failed to appeal removal order); Rivera-Martinez v. Ashcroft, 389 F.3d 207 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 2963 (2005) (applying procedural default rule to late habeas petition based on derivative citizenship).

89. § 1252(b)(9).

90. In particular, INA section 242(b)(5)(C), titled "Limitation on Determination," provides: "The petitioner may have such nationality claim decided only as provided in this paragraph." That phrasing presupposes the existence of a petition for review, and does not contain language of the kind that has been considered necessary to preclude habeas corpus. The REAL ID Act did not amend section 242(b)(5)(C), and the Conference Report contains no reference to nationality claims. *See* Conf. Rep., *supra* note 9.

91. § 1252(b)(9) (emphasis added).

92. It is remarkable that the dissenting opinion in *Rivera v. Ashcroft*, which objected to the majority's refusal to invoke procedural default against a deported citizen, found it appropriate to characterize Rivera's weak defense of his rights as a voluntary relinquishment of citizenship. 394 F.3d at 1142.

D. Post-order Events

Another potential weakness of the petition for review is the inability of that procedure to address issues that arise too late to be the subject of challenge within the thirty-day period following the order of removal. For some of these issues, those concerning post-order detention, congressional intent to preserve the writ of habeas corpus as the applicable remedy is clear. For other late-arising issues, careful interpretation of the statute may be necessary to ensure that an adequate remedy is available.

Post-order events can be made subject to petition for review if the BIA permits a motion to reopen the removal order. Section 242(b)(6) specifically contemplates review of denials of motions to reopen, and instructs that they should be consolidated with the review of the removal order itself (if any).[93] There is a certain textual liberty in subjecting the denial of a motion to reopen to direct review; it is accomplished by treating the denial as if it were itself a final removal order, and reviewable as such, within a second thirty-day limit.[94] However, in 1996 Congress placed strict statutory limits on the respondent's ability to file a motion to reopen a removal order. With three stated exceptions, the motion must be filed within ninety days of the final removal order.[95] In addition, the agency maintains discretion to reopen at any time, either at the BIA's own motion, or with the consent of DHS.[96] The courts of appeals have regarded this power as an example of wholly unfettered and unreviewable discretion.[97] Thus, Congress has cut off a vehicle that would have empowered the alien to seek review in the courts of appeals for a variety of post-order developments.

If, for example, DHS belatedly decides to substitute a different country of removal for the country or countries designated in the removal order, the alien may have no ability to challenge the legality of the new destination before the BIA or the court of appeals on review of the removal order.[98] Deportation to a legally inappropriate destination is a statutory violation within the traditional

93. § 1252(b)(6).

94. *See* Stone v. INS, 514 U.S. 386, 395 (1995).

95. 8 U.S.C. § 1229a(c)(7)(C)(i) (2000). The stated exceptions are for changed country conditions giving rise to asylum or withholding of removal claims, reopening of in absentia removal orders (which have a separate deadline), and for self-petitioning battered spouses and children. *Id*. Some courts, however, have held that these limits on motions to reopen are not jurisdictional. *See* Socop-Gonzales v. INS, 272 F.3d 1176 (9th Cir. 2001) (en banc) (holding that ninety-day limit was subject to equitable tolling); *cf*. Joshi v. Ashcroft, 389 F.3d 732 (7th Cir. 2004) (holding that the numerical limit on motion to reopen in absentia removal order is not jurisdictional, but subject to waiver).

96. 8 C.F.R. §§ 1003.2(a), (c)(3)(iii).

97. *See, e.g.*, Harchenko v. INS, 379 F.3d 405 (6th Cir. 2004) (holding that failure to reopen sua sponte was unreviewable); Prado v. Reno, 198 F.3d 286 (1st Cir. 1999) (holding that failure to reopen sua sponte and refusal of INS to consent to reopening were both unreviewable).

98. Execution of Removal Orders; Countries to Which Aliens May Be Removed, 70 Fed. Reg. 661, 671 (Jan. 5, 2005) (to be codified at 8 C.F.R. pts. 241, 1240-41) ("acknowledg[ing]" this possibility).

scope of habeas corpus.[99] Where the BIA itself has ordered deportation to a different country without giving the respondent an opportunity to argue against it, courts have condemned this substitution as legal, or even constitutional, error.[100] Yet under current regulations, DHS reserves the right to make such changes, noting only the possibility that "[i]n appropriate circumstances, DHS *may* agree to join motions to reopen that would otherwise be barred by time and number limitations."[101]

Some solution must be found for this dilemma in order to reconcile the statutory scheme with the Suspension Clause. A number of interpretive possibilities exist, either permitting direct review or allowing resort to habeas corpus. For example, the DHS action modifying the removal order by specifying a substitute destination could be deemed a new removal order subject to review with a new thirty-day limit. Alternatively, the courts of appeals could make an exception to their case law regarding the unreviewability of denials of sua sponte reopening, instead finding that the BIA has a legal obligation to reopen in this context, subject to direct review under new subparagraph 242(a)(2)(D). Either of these solutions would keep review in the courts of appeals.

With regard to the second option, review of refusals to reopen, the possibility of reopening cannot provide a guarantee of the adequacy of the appellate remedy if the grant of reopening is subject to the discretion of the agency. Fundamentally, a procedure that gives the executive the discretion to control access to the courts for those challenging deprivation of their liberty is antithetical to the principle of habeas corpus. In those instances where the BIA does grant reopening, the result may be that the petition for review has on that occasion served as an

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99. Although the United States was not yet a party to an international refugee regime in the pre-INA period, immigration statutes specified the destinations to which deportable aliens could be removed. The Supreme Court and the lower federal courts used the writ of habeas corpus to inquire into the lawfulness of a chosen destination, sometimes requiring the substitution of a lawful destination, and sometimes ordering the release of the alien. *See, e.g.*, Wenglinsky v. Zurbrick, 282 U.S. 798 (1930) (ordering district court to sustain the writ); United States *ex rel.* Mensevich v. Tod, 264 U.S. 134, 137 (1924) (finding destination unlawful); Gorcevich v. Zurbrick, 48 F.2d 1054, 1055 (6th Cir. 1931) ("It is now well settled that if a deportation warrant is erroneous in the name of the country to which the alien is to be deported, the warrant is unlawful, and detention under it is invalid."); Yee Suey v. Berkshire, 232 F. 143 (5th Cir. 1916), *cert. denied*, 242 U.S. 639 (1916) (substituting destination); United States v. Ruiz, 203 F. 441, 445 (5th Cir. 1913) (clarifying that release was without prejudice to proper deportation proceedings); *see also* Bellaskus v. Crossman, 335 U.S. 840 (1948) (reversing on suggestion of Solicitor General).

In *Jama v. ICE*, the Supreme Court upheld on habeas corpus the removal of a concededly removable alien to Somalia, despite the lack of a functioning government that could consent to his removal. 543 U.S. 335 (2005). The Court did not analyze the source of its jurisdiction, but the Eighth Circuit had held that the removal was reviewable on habeas under *INS v. St. Cyr* because Jama's criminal conviction precluded direct review in the court of appeals. *See* Jama v. INS, 329 F.3d 630, 632 (8th Cir. 2003), *aff'd*, 543 U.S. 335 (2005).

100. *See* Kuhai v. INS, 199 F.3d 909 (7th Cir. 1999); Andriasian v. INS, 180 F.3d 1033 (9th Cir. 1999).

101. Execution of Removal Orders; Countries to Which Aliens May Be Removed, 70 Fed. Reg. at 671 (emphasis added).

adequate and effective substitute for habeas corpus. However, the mere existence of the possibility of reopening would not make the remedy adequate on those occasions when reopening has been denied. Thus, only a judicially enforceable obligation to reopen would provide a solution to the constitutional problem.

A third possibility would be to construe the legality of the post-order designation as not being among those "questions of law and fact . . . *arising from* any action taken or proceeding brought to remove an alien" within the meaning of the consolidation provision, section 242(b)(9).[102] From this perspective, the alien is not seeking review of the removal order, nor judicial action inconsistent with the removal order, but rather review of a distinct administrative act. As previously mentioned, the phrase "arising from" in section 242(b)(9) requires an interpretation that preserves habeas corpus jurisdiction over challenges to detention. Thus, the same technique that permits the district courts to reach detention issues might be used to preserve habeas jurisdiction over other post-order actions that would escape direct review.

This third possibility should not be obstructed by section 242(g), which places limits on jurisdiction — now expressly including habeas jurisdiction — over "the decision or action by the Attorney General to . . . execute removal orders against any alien under this Act."[103] The Supreme Court held in *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*") that this provision is directed at the executive's discretionary decision whether or not to execute a removal order.[104] Several circuits have accordingly held that section 242(g) protects the exercise of discretion, and does not bar review of whether the executive has transgressed the legal limits that bound that discretion.[105] Other circuits had not clarified their interpretations since *AADC*, in part because the *St. Cyr* clear statement rule made such rulings unnecessary.[106] Now that section 242(g) expressly addresses habeas corpus, these circuits should also conclude that it restricts review of discretion, not of illegality.

Whether a general solution is found for achieving review of post-order violations of rights, or particular solutions are tailored to differing situations,[107] courts must ensure the adequacy of the array of remedies.

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102. 8 U.S.C. § 1252(b)(9) (2000).

103. § 1252(g).

104. 525 U.S. 471, 482-84 (1999).

105. *See* Moussa v. Jenifer, 389 F.3d 550, 553-54 (6th Cir 2004); United States v. Hovsepian, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc); Jama v. INS, 329 F.3d 630, 632 (8th Cir. 2003), *aff'd on other grounds*, 533 U.S. 335 (2005).

106. *See* Latu v. Ashcroft, 375 F.3d 1012, 1019 (10th Cir. 2004) (observing that INA section 242(g) did not preclude habeas corpus); DiPeppe v. Quarantillo, 337 F.3d 326, 334 n.19 (3d Cir. 2003) (same).

107. For another example, consider an alien who is hospitalized more than ninety days after a final order and cannot be transported without serious immediate damage to life or health. If DHS insists on immediate execution of the removal order, the courts must provide a forum for the alien's constitutional challenge to the government-inflicted injury. *Cf. Moussa*, 389 F.3d at 555 (rejecting as insubstantial a substantive

The problem of post-order events, along with other issues discussed above, may suggest that Congress should not be understood as intending the thirty-day filing deadline to operate without exception as "mandatory and jurisdictional." The interpretation appropriate for a regime of judicial review in which district court habeas remains available as a fall-back may no longer be suitable after Congress has sought to eliminate the delays inherent in a two-layer system. The concern that criminal aliens should not be "able to ignore the thirty-day time limit"[108] could be accommodated by prudently applying doctrines of equitable tolling or procedural default, especially if the alternative is to render the appellate remedy constitutionally inadequate in predictable categories of cases.

V. OTHER QUESTIONS REQUIRING REEVALUATION

The courts of appeals will need to be open to reconsideration of their pre-REAL ID Act precedents now that district court habeas is presumptively unavailable. In part, this proposition is obvious: for aliens with criminal convictions, appellate judges have been instructed to proceed beyond the threshold jurisdictional question of enumerated convictions to reach the merits of other legal challenges to the removal order. But the proposition goes further, and relates to the attitude toward jurisdiction. Prior to *St. Cyr*, some analyses did not sufficiently consider the constitutional context in which the jurisdictional rulings occurred. In the period between *St. Cyr* and the REAL ID Act, judges could assume that district court habeas provided a residual jurisdiction that operated as a safety valve for restrictive interpretations of the scope of direct review. That interpretive strategy is no longer viable now that Congress has expressed its vigorous preference for keeping review of removal orders in the courts of appeals.

Especially given the volume of immigration appeals, courts will need to guard consciously against the reflex of letting earlier precedents carry over into the new statutory context. Their task will not be lightened by government attorneys who rely inappropriately on favorable holdings and individuals litigating pro se or with deficient counsel.

One important area for reevaluation of precedents concerns review of discretionary acts, partly precluded by section 242(a)(2)(B), and partly guaranteed by new section 242(a)(2)(D). Some circuits have long interpreted section 242(a)(2)(B) as barring review only of the exercise of discretion within legal constraints, while permitting review of legal and constitutional challenges. That approach is reinforced by new subparagraph (D). Other decisions have read the preclusion more broadly,[109] and those decisions must be reexamined.[110] That does

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due process claim for stay of removal based on alleged lack of adequate medical care for alien's heart condition in Syria).

108. Conf. Rep., *supra* note 9, at 174.

109. *See* Leyva v. Ashcroft, 380 F.3d 303 (7th Cir. 2004) (finding that INA section 242(a)(2)(B)(i) bars direct review of challenges to denial of cancellation of removal, including constitutional claims).

not mean that all discretionary acts are necessarily reviewable for error of law. There may still be other reasons for withholding review, such as where administrative law unreviewability doctrines apply.[111]

One example of case law drawn into question involves denials of voluntary departure under INA section 240B. Before the REAL ID Act, courts of appeals concluded that such denials are precluded from direct review by both section 240B(f) and section 242(a)(2)(B)(i). The Ninth Circuit, however, noted the possibility that under *St. Cyr* these preclusions did not bar inquiry into legally erroneous denials of eligibility for voluntary departure on habeas corpus.[112] After the REAL ID Act, the courts of appeals should recognize that subparagraph (D) lifts the preclusion for errors of law under both of these jurisdictional provisions.

Subparagraph (D) also requires a reevaluation of the reviewability of decisions denying eligibility for asylum because of the one-year deadline and the other exceptions in section 208(a)(2). Such decisions are initially made unreviewable by section 208(a)(3),[113] but subparagraph (D) specifies that no provision of the INA outside section 242 should be understood as precluding review of questions of law. Thus, issues concerning the construction of the one-year deadline, and the regulations implementing it, as well as "mixed" questions of law applying them, should be subject to direct review. A more quantitatively significant question concerns review of the statutory exception to the exception: Section 208(a)(2)(D) permits asylum applications if the applicant demonstrates "to the satisfaction of the Attorney General" either changed circumstances affecting eligibility or extraordinary circumstances justifying the delay.[114] Direct review of such determinations was previously barred by section 208(a)(3), but courts will now have to decide to what extent subparagraph (D) opens them to examination. Courts might still find review precluded if they regard the reference to "satisfaction" as making the entire exceptional determination discretionary. Review may also remain precluded if courts construe the concept of "extraordinary circumstances" as

110. *See* Schroeck v. Gonzales, 429 F.3d 947, 951 (10th Cir. 2005) (finding that subparagraph (D) expands direct review over decisions formerly viewed as precluded by INA section 242(a)(2)(B)); Hamdan v. Gonzales, 425 F.3d 1051, 1057 (7th Cir. 2005) (same).

111. *Cf.* Merida Delgado v. Gonzales, 428 F.3d 916, 920 (10th Cir. 2005) (declining to review the Attorney General's denial of permission for an alien to receive flight training on grounds of risk to aviation or national security) (citing Webster v. Doe, 486 U.S. 592, 600 (1988)).

112. Alvarez-Santos v. INS, 332 F.3d 1245, 1255 n.6 (9th Cir. 2003).

113. 8 U.S.C. § 1158(a)(3) (2000) ("No court shall have jurisdiction to review any determination by the Attorney General under paragraph (2)."). Because the provision uses the term "jurisdiction to review," the preclusion of review in removal proceedings also applies to habeas corpus under INA section 242(a)(5), 8 U.S.C. § 1252(a)(5). *See supra* text accompanying note 18.

114. 8 U.S.C. § 1158(a)(2)(D).

pervasively discretionary, the way they have construed various "extreme hardship" criteria in the INA.[115]

The courts of appeals might also take subparagraph (D) as an occasion to modify some of their decisions treating particular legal standards as discretionary for preclusion purposes. For example, the circuits have disagreed on whether a finding of lack of good moral character based on INA section 101(f), generally rather than on its enumerated paragraphs, should be characterized as legal or discretionary.[116] The courts have a valuable role to play in overseeing the interpretation of this criterion, particularly where the executive attributes bad moral character to the exercise of legal rights and entitlements. The circuits have also split on whether the determination under INA section 216(c)(4)(B) that a now-terminated marriage was entered into in good faith presents a nonreviewable discretionary judgment or a reviewable eligibility requirement for a discretionary waiver.[117] Similarly, some courts have held that the criterion of "particularly serious crime" barring an alien from asylum or withholding of removal constitutes an unreviewable discretionary standard,[118] notwithstanding the serious personal consequences and the potential violation of U.S. treaty obligations.[119]

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115. *See* Vasile v. Gonzales, 417 F.3d 766 (7th Cir. 2005) (finding that the extraordinary circumstances exception remained discretionary after REAL ID Act); Mehilli v. Gonzales, 433 F.3d 86, 93 (1st Cir. 2005) (citing *Vasile*, 417 F.3d at 768); Ignatova v. Gonzales, 430 F.3d 1209, 1214 (8th Cir. 2005) (observing that discretionary decisions under the extraordinary circumstances exception remained unreviewable).

116. *Compare* Bernal-Vallejo v. INS, 195 F.3d 56, 62-63 (1st Cir. 1999) (stating that the finding of a lack of good moral character was an unreviewable discretionary determination), *and* Kalaw v. INS, 133 F.3d 1147, 1151 (9th Cir. 1997) (same), *with* Ikenokwalu-White v. INS, 316 F.3d 798 (8th Cir. 2003) (holding that the "catchall" category of good moral character presents reviewable legal issues). The definitional provision INA section 101(f) lists seven characteristics that are inconsistent with a finding of good moral character and then specifies that the enumeration does not exclude other reasons for finding lack of good moral character. The courts agree that application of the enumerated grounds does not present a nonreviewable discretionary issue. *See Bernal-Vallejo*, 195 F.3d at 62; *Kalaw*, 133 F.3d at 1151.

117. *Compare* Oropeza-Wong v. Gonzales, 406 F.3d 1135 (9th Cir. 2005) (reviewable), *and* Cho v. Gonzales, 404 F.3d 96 (1st Cir. 2005) (reviewable), *with* Assaad v. Ashcroft, 378 F.3d 471 (5th Cir. 2004) (unreviewable).

118. *See* Singh v. Ashcroft, 351 F.3d 435 (9th Cir. 2003) (unreviewable). *But see* Chong v. Dist. Dir., 264 F.3d 378 (3d Cir. 2001) (reviewing and upholding BIA process for determining whether crime was "particularly serious"); Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001) (finding decision arbitrary where immigration judge and BIA failed to apply BIA's own standard for determining whether a crime was "particularly serious"); Choeum v. INS, 129 F.3d 29 (1st Cir. 1997) (reviewing and upholding BIA interpretation of "particularly serious crime" standard).

119. The "particular serious crime" exception to withholding of removal implements an exception to the prohibition on returning refugees to countries where they would be persecuted, which is expressed in Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 137, made binding on the United States by ratification of the Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6233, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

VI. AN AREA OF PERSISTING INADEQUACY: EXPEDITED REMOVAL

One serious constitutional problem, concerning expedited removal, not only persists under the REAL ID Act, but is likely to grow worse. "Expedited removal" involves a rudimentary procedure in which arrested aliens' right to remain in the country is adjudicated by the enforcement officers, without an opportunity to have legal representation, to call witnesses, or to gather evidence on their behalf.[120] Expedited removal formally applies only to aliens who have committed immigration fraud or lack valid documents, but what these complex concepts mean in practice depends on the opinion of the enforcement officer. INA section 242(a)(2)(A) precludes direct judicial review of expedited removal decisions under section 235(b)(1), and refers them instead to a skeletal form of habeas corpus under section 242(e) that actually forbids the courts to reach the merits of the removal decision, or the constitutionality of the procedure.[121] The REAL ID Act preserves and reinforces this preclusion.[122]

Courts have previously confronted this preclusion in the form of expedited removal of arriving aliens at airports and other ports of entry. While the evisceration of habeas corpus is questionable even in that context,[123] courts have upheld its constitutionality on the ground that aliens arriving at the border lack procedural rights under the *Knauff* doctrine.[124]

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120. *See* 8 U.S.C. § 1225(b)(1)(A)(I) (2000); s*ee generally* David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673 (2000) (explaining and giving qualified defense of procedure as applied at borders); U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ASYLUM SEEKERS IN EXPEDITED REMOVAL: A STUDY AUTHORIZED BY SECTION 605 OF THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998 (2005), http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/execsum.pdf (providing critical analysis of procedure at borders as applied to asylum seekers). The whole scheme is built on a vision in which the alien has no right to procedural due process. For further explanation, see *infra* note 124.

121. § 1252(e)(2). The statute provides additional procedures for individuals who claim to be a U.S. citizen, a lawful permanent resident, or an already admitted refugee or asylee, and the statute does permit them to raise those status questions on habeas. §§ 1225(b)(1)(C), 1252(e)(2)(C). The enforcement officers are also directed to refer aliens who express a fear of persecution to more formalized procedures. § 1225(b)(1)(A)(ii).

122. The wording of new subparagraph 242(a)(2)(D) preserving review of issues of law excludes subparagraph 242(a)(2)(A) and subsection 242(e) from its scope.

123. *See* Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1668-79 (2000).

124. *See* Am. Immigration Lawyers Assoc. v. Reno, 199 F.3d 1352 (D.C. Cir. 2000) (upholding expedited removal and limitation of review under *Knauff*); *see also* Brumme v. INS, 275 F.3d 443 (5th Cir. 2001) (finding habeas corpus precluded and constitutional issue waived); Li v. Eddy, 259 F.3d 1132 (9th Cir. 2001) (noting that arriving aliens have no procedural due process rights under *Knauff*, and finding habeas precluded), *vacated as moot*, 324 F.3d 1109 (9th Cir. 2003). *But see* American-Arab Anti-Discrimination Comm. v. Ashcroft, 272 F. Supp. 2d 650 (E.D. Mich. 2003) (finding that the statute does not preclude inquiry into whether section 235(b)(1) can be applied after an alien has already been inspected and paroled into the United States).

The Supreme Court held in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), that an alien arriving for the first time at the U.S. border had no procedural due process rights with regard to her

More recently, however, the executive has exercised the authority delegated by the statute to extend expedited removal to the interior,[125] where it sweeps in aliens who are unquestionably entitled under existing law to procedural due process rights and habeas corpus inquiry into the lawfulness of their deportation. The first extension concerned aliens alleged to have arrived illegally by sea within the preceding two years,[126] and the second involved aliens found within 100 miles of the U.S.-Mexico border and alleged to have arrived illegally within the preceding two weeks.[127] The latter regime has operated since September 2004, primarily targeting "OTMs" — aliens "other than Mexicans." In testimony to Congress, the Department of Homeland Security ("DHS") reported that it had removed over 14,000 aliens in this manner in the first year, and credited the rudimentary procedures with reducing the average detention time before removal to twenty-five days.[128] DHS plans further expansions of the program, and already has statutory authority to apply it to any alien anywhere in the United States alleged to have illegally entered within the preceding two years.[129] The preclusion of review is surely unconstitutional as applied to aliens found in the interior with a colorable claim of lawful presence or entitlement to relief; for those who have no claims to put forward, the denial of procedural rights is without prejudice.

VII. CONCLUSION

The goal of clarifying and simplifying the process for judicial review of removal orders is a worthy one. Unfortunately, the proponents of the REAL ID Act did not sufficiently examine the consequences of relying on the petition for review, in its current form, as an exclusive remedy. Their failure to make explicit provision for habeas corpus as a safety valve in any case where direct review does not afford an adequate and effective substitute creates a difficult

admission or exclusion. The Court confirmed the continuing validity of *Knauff* in *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982). For Henry Hart's classic condemnation of the *Knauff* doctrine, see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391-96 (1953).

125. *See* 8 U.S.C. § 1225(b)(1)(A)(iii) (2000) (authorizing the Attorney General to extend expedited removal to aliens who have not been admitted or paroled into the United States, and who do not persuade the immigration officer that they have been continuously physically present for the preceding two years).

126. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

127. Notice Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

128. *Solving the OTM Undocumented Alien Problem: Expedited Removal for Apprehensions along the U.S. Border: Hearing Before the Subcomm. On Economic Security, Infrastructure Protection, and Cybersecurity of the H. Comm. On Homeland Security*, 109th Cong. 2-3 (2005) (statement of John P. Torres, Acting Director, Detention and Removal Operations, U.S. Immigration and Customs Enforcement). The twenty-five day period is the average for those detainees not expressing credible fear of persecution upon removal.

129. 8 U.S.C. § 1225(b)(1)(A)(iii) (2000).

interpretive task for the courts. Judges will need to construe both new and existing statutory provisions in light of their place in the revised statutory scheme as a whole, and in light of the constitutional imperative recently recapitulated by the Supreme Court in *St. Cyr*. Careful adjustments may be necessary to ensure that the judicial remedy for unlawful executive action is adequate and effective, as both the Constitution and the legislature intended.