Winter 1998

The 'New World' of Judicial Review of Removal Orders

Lenni B. Benson
New York Law School, lenni.benson@nyls.edu

THE NEW WORLD OF JUDICIAL REVIEW OF REMOVAL ORDERS

LENNI B. BENSON*

I. CONGRESS LIMITS JUDICIAL REVIEW OF IMMIGRATION PROCEEDINGS

In many respects the changes created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") dramatically alter immigration law.[1] The legislation contains major doctrinal alterations such as the attempt to eliminate the "entry doctrine" which would allow the INS to treat "illegal" entrants as if they were first time applicants for admission.[2] Yet perhaps the most important change is the Congressional attempt to eliminate or severely curtail judicial review of immigration decisions. The ability of Congress to insulate administrative decisions from federal court review is an important issue in administrative law, but it is particularly disturbing in the context of the removal of noncitizens because of the impact on the individual's life. Many of the people now statutorily prevented from seeking recourse to the judiciary are long-term lawful permanent residents of the United States. Yet even the newcomer may have his or her life irretrievably affected by the decision of an INS inspector. As this new law is beginning to be implemented, many are critical of the unchecked power

---

* Associate Professor of Law, New York Law School. This article was prepared with the assistance of Lisa Schatz and Martin Bloor, students at New York Law School. The author also wishes to thank Lucas Guttentag, Dan Kesselbrenner, Gerald Neuman, Stephen Yale-Loehr, R. Patrick Murphy, Gary Endelman, Michael Botein, Peter Schuck, Kathleen Sullivan and Steven Clark. The author has assisted in the preparation of amicus briefs on the issue of habeas jurisdiction in several of the cases discussed in this article. This article is adapted from an article which first appeared in the 1997 annual conference proceedings of the American Immigration Lawyer's Association. Portions reprinted with permission from 1997-98 IMMIGRATION AND NATIONALITY LAW Volume II—Advanced Practice 32-59.

1. The Anti-terrorism and Effective Death Penalty Act attempted to eliminate all judicial review for aliens who were deportable due to criminal activity. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 supersedes the provisions of AEDPA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (corrected in a technical corrections bill, Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996)) [hereinafter IIRIRA]. This article is scheduled for publication in the Spring of 1998. There will still be many cases which require careful analysis of the preexisting statute, AEDPA, and the transitional provisions of IIRIRA. As a general rule, these earlier statutes should be scrutinized in any case in which the INS commenced the removal proceeding prior to April 1, 1996. For an excellent discussion of the transitional provisions, *see* Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights*, 74 INTERP. REL. 245-60 (Feb. 10, 1997).

2. *See, e.g.*, Stanley Mailman, *"Admission" and "Unlawful Presence" in the New IIRIRA Lexicon*, 2 IMMIGRATION AND NATIONALITY LAW HANDBOOK 1 (1997-98).

Congress appears to have conferred upon the INS.[3] And given the scope and importance of these changes, understanding judicial review of administrative immigration decisions is much like exploring an unknown territory or a "new world."[4] Many of the issues raised by this legislation will require reexamination of fundamental constitutional principals such as the scope and power of Congress to eliminate federal court jurisdiction,[5] the constitutional requirement of judicial review, and the nature of the constitutional guarantee of the writ of habeas corpus.

This article will describe the statutes which create the "new world"of judicial review of removal orders, but it does not answer the pure question of whether or not Congress has the power to eliminate all federal court jurisdiction.[6] The main reason that I do not address this important question is that I believe Congress has not actually eliminated all avenues of review. The forms of review remaining may be less than optimal, but some form of review exists primarily in the form of a writ of habeas corpus. In a sense, habeas corpus is the ultimate escape route out of the statutory preclusions found in IIRIRA. This article will also briefly mention some of the strategies necessary to preserve issues for judicial review and to maximize the likelihood of review. Although administrative appeals are not addressed here, most

3. Anthony Lewis has written several articles on the Op-Ed page of the NEW YORK TIMES. *See, e.g.*, Anthony Lewis, *Is This America?*, N.Y. TIMES, Aug.18, 1997, at A19; *Kafka in America*, N.Y. TIMES, Sept. 26, 1997, at A27; *Mr. Smith Tells a Tale*, N.Y. TIMES, Mar. 10, 1997, at A15. Congressman Lamar Smith has responded to Mr. Lewis' critique by blaming the way in which the INS has implemented the statute: "It's not the fault of the laws .... It's the fault of the INS." Anthony Lewis, *A Generous Country*, N.Y. TIMES, Dec. 22, 1997, at A27. Yet the INS has little discretion in many of the situations because Congress has mandated specific exclusions or actions.

4. I put the phrase "new world" in quotes, for in reality, jurisdictional limits are a time-honored tradition in immigration legislation. Congress has a long history of attempting to make the administrative determinations in immigration proceedings "final" and not subject to judicial review. The system of judicial review which allowed for petitions for review to courts of appeal and writs of habeas corpus in other circumstances has only been part of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* (1997)[hereinafter INA] since 1961. Further, I use the term ironically, for as I will explain, much of what these new statutory preclusions do is return us to early forms of judicial review.

5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is usually cited for the principle that although Congress may create and enact legislation with the executive, it is for the courts to rule on the constitutional validity of the law. Few may recall that in that famous opinion, Justice Marshall ultimately found that the Supreme Court lacked original jurisdiction to consider the mandamus petition brought against the chief executive. The attacks on judicial review in IIRIRA begin with limits on federal court jurisdiction, and if a court lacks jurisdiction it may not be able to exercise the review function. Of course, it is unclear whether Congress has the ability to eliminate all federal court jurisdiction. The debate is excellently presented in the famous law review article by Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). That article was inspired in part by the immigration cases which upheld the ability of Congress to exclude aliens who allegedly posed a national security risk without a hearing. *See* Shaughnessey v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *See also* United States *ex rel.* Knauff v. Shaughnessey, 338 U. S. 537 (1950).

6. This article will also not address the specific motivation of Congress in limiting judicial review or the history of other Congressional attempts to curtail or eliminate federal court jurisdiction. For example, Congress apparently believed that judicial review was delaying removals. Yet by my estimates fewer than 2 percent of all cases were ever appealed. I discuss these motivations, legislative history, and the volume of appeals, *in* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1439-43 (1997).

cases will be resolved in immigration court proceedings and the subsequent appeal to the Board of Immigration Appeals ("BIA").[7]

II. PETITIONS FOR REVIEW—THE EXPRESS PROVISIONS OF JUDICIAL REVIEW IN THE INA

In adopting the new Immigration and Nationality Act ("INA") section 242, Congress preserved judicial review of final orders of removal with several important exceptions. The statute purports to eliminate judicial review if the case involves certain disfavored classes of removable noncitizens, or where the case arises in a specific procedural context such as expedited removal or an in absentia proceeding. Even where judicial review is generally preserved, the statute attempts to isolate from judicial review certain portions of a final order of removal such as the decision to grant discretionary relief from removal. Notwithstanding these important limitations and exceptions, in the "general case," the noncitizen may obtain judicial review by filing a petition for review in the court of appeals. This preserves much of the prior practice under former section 106. Roughly speaking, just as IIRIRA created a single consolidated removal procedure, the statute eliminates the distinctions between judicial review of exclusion orders and deportation orders.[8]

---

7. Frankly, the appeal to the Board of Immigration Appeals [hereinafter BIA] is now (and really always was) one of the most important stages in an immigration case. *See* 8 C.F.R. § 3.1(b) (defining the appellate jurisdiction of the BIA, as amended in the interim regulations effective Apr. 1, 1997, 62 Fed. Reg. 10311-10295 (Mar. 6, 1997)). (All future citations to the regulations include any relevant interim regulations). BIA review may not be available for noncitizens placed in expedited removal proceedings pursuant to INA § 235, 8 U.S.C. § 1225. These proceedings are discussed in section III.A below. Note that this regulation states that there is no administrative appeal which solely seeks to challenge the length of the grant of voluntary departure. *See* 8 C.F.R. § 3.1(b)(2), (3). The interim regulations relocated the former ban on administrative appeal of an in absentia order formerly found in this section in 8 C.F.R. § 240.53. The proper procedure in an in absentia case is to first file a motion to reopen seeking rescission of the in absentia order of removal. 8 C.F.R. § 3.23(b)(4)(ii). In absentia orders and judicial review are discussed in section III.C. below.

There is an automatic stay prohibiting removal for most aliens pending review of the removal order before the BIA. There is no automatic stay for motions to reopen or reconsider except for motions to rescind in absentia orders under 8 C.F.R. § 3.23. IIRIRA appears to create an exception to the stay of removal pending the initial removal hearing for "arriving aliens" seeking admission from a contiguous territory. *See* INA § 235(b)(2)(C), 8 U.S.C. § 1225(b)(2)(C). The statute contemplates that the alien may wait in that contiguous territory during the administrative adjudication. 8 C.F.R. § 3.4 provides that departure of aliens other than "arriving aliens" is a withdrawal of the appeal. *See* the discussion of the effect of departure in section V.D.2 below.

For more on administrative appeals, *see* "Administrative Review" *in* IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (5th ed. 1995). *See generally*, Theodore Ruthizer, *Administrative Appeals of Immigration Decisions: A Practitioner's Guide*, 88-1 IMMIGRATION BRIEFINGS (Jan. 1988), for a discussion of the variety of administrative appeals available and the special jurisdiction of the agency appellate units.

8. A noncitizen had to file a writ of habeas corpus in federal district court to seek judicial review of an exclusion order. The jurisdictional basis of this writ was expressly found in former INA § 106(a)(10).

A. *Review of a Final Order*

The petition for review is only of a "final order" of removal.[9] In the general case, the alien may seek judicial review of a final order of removal by filing an appeal called a "petition for review" in the United States circuit court of appeals.[10] The procedure for petitions for review is generally found in the Hobbs Act.[11] The noncitizen is the "petitioner" and the Attorney General becomes the "respondent."[12] The petition for review must be served on the Attorney General and on the officer or employee of the INS in charge of the district in which the final order of removal under new INA § 240 was entered.[13]

A petition for review of an order of removal must contain a copy of the final administrative order—the decision of the BIA. In addition, the petition must identify whether a court has previously upheld the validity of that administrative order, and if so, the petition must identify which court, the date of the court's ruling, and the type of proceeding.[14]

B. *Where is the Petition for Review Filed?*

IIRIRA altered the prior rules governing the venue for petitions for review. Previously, the noncitizen might file the petition for review in the circuit court of appeals where the immigration proceedings were completed, *or* in the circuit where he maintained a residence.[15] Now a noncitizen's residence is irrelevant. Venue is proper only where the immigration proceedings were completed. In all cases, unless the noncitizen can obtain a change of venue,[16] the INS will be able to select the venue by commencing proceedings in that

---

9. The definition of a final order of removal is not set out in the statute or regulations. There is a partial definition in 8 C.F.R. § 3.39 which concerns finality of orders of removal. But as will be discussed below, if an agency action can be described as outside the scope of a final order of removal, the limitations of INA § 242, 8 U.S.C. § 1252 might not apply. *See* section II.F.

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

11. 28 U.S.C. §§ 2341-51. The only change that IIRIRA made was to exempt out of the Hobbs Act the provision which allowed the taking of additional evidence, 28 U.S.C. § 2347(c). *See* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1). This section was used to allow the court of appeals to suspend the adjudication of the petition for review where a motion to reopen was pending. Litigants might look to other authority for staying the petition for review such as the All Writs Act, 28 U.S.C. § 1651, or the general ability of appellate courts to order a remand.

12. The terminology can be confusing because in the past, in deportation proceedings the alien was called the "respondent," since she was responding to an order to show cause (OSC) why she should not be removed from the United States. IIRIRA § 239 now refers to a "notice to appear" rather than an order to show cause. The interim regulations retain the practice of referring to the alien in removal proceedings as "respondent." *See* 8 C.F.R. § 3.13 (regarding the charging document) and § 3.15 (regarding the contents of the charging document).

13. IIRIRA § 306(a)(2); amended INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A). Service is made on the District Director.

14. IIRIRA § 306(A)(2); amended INA § 242(c), 8 U.S.C. § 1252(c).

15. Former INA § 106(a)(2).

16. The regulations governing change of venue in the immigration court are found in 8 C.F.R. § 3.20(b). The immigration judge may grant a change of venue for good cause upon motion by one of the parties, but only after the other party has notice of the motion and an opportunity to respond. Recent cases discussing judicial review of a denial of change of venue are: *Maldonado-Perez v. INS*, 865 F.2d 328 (D.C. Cir. 1989) (finding no abuse of discretion where alien had two months notice of schedule hearing before

jurisdiction. IIRIRA also provides for increased use of detention,[17] and as the INS has the power to select the detention site, the INS has the power to select the ultimate jurisdiction for the appeal. Again, unless the alien is able to obtain a change of venue at the commencement of the immigration proceeding, detention will increase the ability of the INS to forum shop and choose those circuit courts of appeals where precedent is in the government's favor. The substantive interpretation of the immigration law may vary in significant ways in a variety of federal circuits.[18]

C. *When is the Petition for Review Filed?*

IIRIRA requires that a petition to review a final order of removal must be filed no later than thirty days after the date of the final order.[19] Note that this is a significant change from the previous rule under the INA, which required that petitions for review to the circuit court of appeals be filed within ninety days of issuance of the BIA's decision (thirty days in the case of an aggravated felon) or sixty days if the administrative order was issued following in absentia proceedings.[20] This change is but one of many aimed at expediting the judicial review process.

In an unusual provision, the statute specifies the briefing schedule for the respondent. The respondent must serve and file the opening brief in connection with the petition for judicial review no later than forty days after the date on which the administrative record is available, and may serve and file a reply brief no later than fourteen days after service of the government's brief.[21] In addition, the court of appeals may not extend these deadlines except when counsel files a motion demonstrating "good cause."[22] If the noncitizen fails to file a brief within the statutorily defined periods, the court shall dismiss the appeal unless a manifest injustice would result.[23] Notably, the new requirements do not impose statutory deadlines on the government's

---

requesting venue change), and *Portillo Barres v. INS,* 856 F.2d 89 (9th Cir. 1988) (finding abuse of discretion where denial of change of venue interfered with right to produce evidence).

17. *See* Margaret Taylor, *The 1996 Immigration Act: Detention and Related Issues,* 74 INTERP. REL. 209 (Feb. 3, 1997).

18. For example, in the past, the circuit courts varied widely in interpreting the term "lawful residence" in INA § 212(c), 8 U.S.C. § 1182(c). Some circuits allowed the client to continue to accrue time toward the seven-year requirement notwithstanding the commencement of proceedings, and other circuits cut off the lawful residence with the service of the OSC. Congress mooted these particular differences by repealing INA § 212(c), 8 U.S.C. § 1282(c) altogether and clarifying the calculation of the residency requirement in new INA § 240A, 8 U.S.C. § 1229b. Obviously new differences between circuit decisions will arise as other aspects of the new law are interpreted.

19. IIRIRA§ 306(a)(2); amended INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).

20. Former INA § 106(a)(1); former INA § 242B(c)(4), 8 U.S.C. § 1252B(c)(4).

21. IIRIRA § 306(a)(2); amended INA § 242(b)(3)(C), 8 U.S.C. § 1252(b)(3)(C).

22. The term "good cause" is not a new concept in general civil procedure. Lawyers might look for analogous terms and case law interpreting the FEDERAL RULES OF CIVIL PROCEDURE.

23. The meaning of "manifest injustice" is not clear except that it appears to set a higher standard than the traditional showing of "good cause."

submission of briefs.[24]

D. *Stay of Removal*

IIRIRA eliminates the automatic stay of removal upon service of a petition for review but still contemplates a court-ordered stay.[25] Prior to IIRIRA, an automatic stay of deportation attached once notice of the filing of a petition for review had been served on the district director of the INS district in which the clerk of the court of appeals was located, except in the case of aggravated felons.[26] As the new law removes the automatic stay in all petitions for review, it is of the utmost necessity to file a request for a stay of the order of removal pending the court's decision on the petition for review. In some cases, the INS may be statutorily barred from executing the order of removal, such as in any case where the "alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[27] This is the international law obligation of *non-refoulement,* formerly known as "withholding of deportation."

Given that the issuance of a stay is now discretionary, attorneys should file a memorandum of law listing any statutory bars to removal, explaining the hardship to the alien and the merits of the issues on appeal with any stay request.[28] Although the court of appeals will not lose its jurisdiction to consider the appeal if the noncitizen is removed,[29] there are, of course, other substantial harms to the noncitizen. Further, if the noncitizen ultimately prevails and is successful in reversing the order of removal, the government should bear the expense of returning the noncitizen to the United States.[30]

E. *New Limits on the Standard of Review in Petitions for Review*

1. *Scope*

IIRIRA limits the scope or standard of review in those situations where the INA expressly provides for judicial review.[31] But not all issues of the

---

24. This obvious inequity may result in due process and equal protection challenges to the statutory provisions.

25. IIRIRA § 306(a)(2); amended INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B). Judicial review of the denial of stays of removal which might be issued by administrative officers are not discussed here.

26. Former INA § 106(a)(3). Aggravated felons could seek a discretionary stay under the prior law.

27. INA § 241(b)(3), 8 U.S.C. § 1251(b)(3). *Nonrefoulement* or withholding of deportation was formerly found in INA § 243(h), 8 U.S.C. § 1253(h). To qualify for withholding, the alien must establish a "clear probability" of harm. *See* Stevic v. INS, 467 U.S. 407 (1984).

28. *See* De Leon v. INS, No. 97-70127 (9th Cir. May 22, 1997) (detailing procedure for discretionary stays).

29. Under the prior statutory scheme, departure could trigger the loss of jurisdiction. *See* former INA § 106(c).

30. Singh v. Waters, 87 F.3d 346 (9th Cir. 1996) (ordering INS to return alien after unlawful departure, impliedly at INS expense).

31. This article does not discuss judicial review of claims of U.S. nationality or the appropriate standard of review in those cases. *See* INA § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B). *See also* CHARLES

appropriate reviewing standard are addressed in the INA. For example, if an alien is raising a due process or other constitutional challenge, the court of appeals will consider this challenge on a *de novo* basis.[32]

The statute repeats a standard axiom that the courts of appeals shall rule on petitions for review based solely upon the administrative record on which the order of removal is based.[33] But the most important implication of this requirement is that attorneys do everything they can to present a full record for review. If necessary, the attorney should consider filing a motion to reopen to augment the record with additional evidence.

The second change that IIRIRA made was to state that the administrative findings of fact are conclusive unless "any reasonable adjudicator would be compelled to conclude to the contrary."[34] Is this a new tougher standard? I submit that it is simply a new way of saying the same thing Congress wrote in former INA § 106. The language in the former INA § 106 provided "that the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." In *Woodby v. INS*, the Supreme Court interpreted this language in the former INA § 106 and found that this language only governed the scope of review and did not alter the requirement that the finding of deportability had to be based on "clear, unequivocal, and convincing evidence."[35] But most interestingly, the *Woodby* decision quotes the legislative history surrounding the adoption of section 106 as establishing that "reasonable, substantial, and probative evidence" meant "where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed."[36] So it appears that the new language is

---

GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, 3 IMMIGRATION LAW AND PROCEDURE § 81.12 ("Determination of Claims to American Citizenship") (rev. ed. 1997) [hereinafter GORDON, MAILMAN & YALE-LOEHR].

32. *See, e.g.*, Anwar v. INS, 107 F.3d 339 (5th Cir. 1997) (granting *de novo* review of due process allegation and retention of jurisdiction to consider constitutional questions notwithstanding jurisdictional bar in AEDPA).

33. INA § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A). As noted previously, IIRIRA specifically bars the courts of appeals from taking additional evidence pursuant to 28 U.S.C. § 2347(c). This statutory provisions had been used by courts of appeals to remand to the INS for consideration of additional evidence. Litigants will have to find alternative statutory authority to seek remand for additional evidence. Perhaps the All Writs Act, 28 U.S.C. § 1651, could be used to stay the petition for review when a remand is necessary in the interest of justice or otherwise necessitated by due process. *See* Michael v. INS, 48 F.3d 657 (2d Cir. 1996) (pre-IIRIRA case granting a stay pending BIA adjudication of a motion to reopen).

34. INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B). The reason that Congress must expressly state the scope of review is that where the INA is silent, the provisions of review in the Administrative Procedure Act, 5 U.S.C. § 703 [hereinafter APA] apply. Such was the result in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), until Congress expressly exempted deportation proceedings from the APA.

35. Woodby v. INS, 385 U.S. 276 (1966). Note that the *Woodby* court set this standard notwithstanding the former statute INA § 242(b)(4), 8 U.S.C. § 1252(b)(4), which provided that no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. This is the same standard of deportability under the new INA § 240(c)(3)(A), 8 U.S.C. § 1230(c)(3)(A). Therefore the *Woodby* standard of clear, unequivocal, and convincing evidence should remain the ultimate burden of proof. If *Woodby* is read as a constitutional decision then the burden could not be altered by Congress.

36. *Woodby*, 385 U.S. at 284.

simply a return to what Congress thought they had said in 1961 with the adoption of former INA § 106.

The standard of review for decisions concerning admission is phrased differently. IIRIRA provides that a decision that an alien is not eligible for admission to the United States is conclusive unless "manifestly contrary to law."[37] Perhaps a decision could be manifestly contrary to law if it was not supported by "some evidence."[38] Alternatively, if the decision is wrong as a matter of law, it is also "manifestly contrary to law." This phrase was also used by the Supreme Court in *INS v. Elias-Zacharias*,[39] and yet it did not apparently alter the standard of review applied in lower court cases following this decision. Congress may have intended a more deferential standard of review, but in essence, "manifestly contrary to law" may be no different than the standard of review previously used.

The appropriate standard of review for issues of law is *de novo* review. The leading case in administrative law is *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,[40] where the Supreme Court required that reviewing courts give great deference to agency interpretation of the statutes the agency implements. But deference does not mean that courts fail to exercise *de novo* review. Even after *Chevron*, the Supreme Court has refused to defer to an erroneous INS interpretation of its own statutes.[41]

2. *Discretionary Relief*

In one of the most important changes, INA § 242 specifically attempts to preclude judicial review of any discretionary decision by the Attorney General except for the grant of asylum.[42] Although no formal statistics are available, my own calculations establish that the vast majority of immigration cases involved review of a discretionary form of relief.[43]

The statute provides that no court shall have jurisdiction to review "any judgment regarding the granting of relief under INA sections 212(h), 212(i), 240A, 240B, or 245."[44] The petition for review may still seek review of

---

37. INA § 242(b)(4)(C), 8 U.S.C. § 1252(b)(4)(C). If the case concerns asylum as relief the statute provides that the decision on asylum shall be conclusive unless it is both manifestly contrary to law and an abuse of discretion. *See* INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D).

38. It must be noted that some early immigration cases upheld exclusion orders where "any evidence" supported the decision. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 633, 637-41 (1988) (discussing these cases).

39. 502 U.S. 478 (1992).

40. 467 U.S. 837 (1984).

41. INS v. Cardozo-Fonseca, 480 U.S. 421 (1987).

42. INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). As previously mentioned, there are specific limits on judicial review in the asylum context found in INA § 208, 8 U.S.C. § 1158 itself.

43. *See* Benson, *supra* note 6, at 1439-43.

44. Amended INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). Outside of the context of a petition for review of a final order of removal, it may be that some of these forms of discretionary relief might still be subject to review in other administrative contexts. But as was discussed above in considering the example adjustment of status before the District Director, some of the relief and waiver sections carry their own independent prohibitions on judicial review.

statutory eligibility for such relief, if not review of the aspect of the decision committed to the discretion of the Attorney General. For example, consider cancellation of removal in INA § 240A. The applicant for cancellation must establish that she meets the statutory criteria for cancellation. One of the criteria is continuous residence for ten years. This is a legal determination. This interpretation which distinguishes between statutory eligibility and discretionary action was affirmed in *Kalaw v. INS.*[45] Another element is "exceptional and extremely unusual hardship" to a relative upon removal. Unfortunately, the court in *Kalaw* held that the determination of whether the alien has met her burden of proving hardship is a discretionary determination and thus, is unreviewable.[46] In my view, the standard of "exceptional and extreme hardship," is a legal issue, although it is one delegated to the Attorney General.[47] The statute says that the finding of "hardship" should be "in the opinion of the Attorney General." But it does not say "in the discretion of the Attorney General," and therefore, when the BIA is rendering an opinion as to hardship, it is defining a legal term. The agency's interpretation of the statutory criteria should remain reviewable.[48]

Further, when Congress uses different language in different parts of the statute, courts should view these differences as deliberate. If you compare INA § 242(a)(2)(B)(ii) with other provisions of the INA, you will find that where Congress wanted to preclude all review, they specifically said so. For example, in section 212(d)(12)(a), Congress precluded review of "a decision of the Attorney General to grant or deny a wavier under this paragraph." This language is much stronger than that found in section 242(a)(2)(B)(ii). Thus, if Congress intended to preclude all review, including statutory eligibility, it should have just done so with stronger language, as it had in other provisions of the Act.[49]

Unfortunately, although review of the statutory eligibility may be obtained, the review may be but an academic exercise. The immigration judge or the BIA may render decisions that simply rely on a denial of relief as an exercise of discretion and assume the noncitizen established statutory eligibility.[50] Moreover, if the alien were to convince a court that she met the

---

45. *See* 133 F.3d 1147 (9th Cir. 1997). *Kalaw* is a case decided under the transitional rules and interprets the former INA § 244 which concerned "suspension of deportation" not the new, similar form of relief found in new INA § 240A, 8 U.S.C. § 1229b(a), "Cancellation of Removal." The petitioners in *Kalaw* have filed a motion for rehearing.

46. *Kalaw*, 133 F.3d 1147 (9th Cir. 1997).

47. The statute specifically states: "that the alien has established, in the opinion of the Attorney General, that deportation would result in an extreme and exceptional hardship . . . ." INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D).

48. As the statute specifically reserves the finding of "hardship" to the "opinion" of the Attorney General, the standard of review would obviously be extremely deferential but that does not insulate it from all review. *But cf.* INA § 208(b)(2)(D), 8 U.S.C. § 1158(b)(2)(D) (stating that "there shall be no judicial review" of a determination of the Attorney General that a noncitizen is removable for "terrorist activity").

49. *See* STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 623 (1997).

50. The INS might even deny cases without determining whether the threshold statutory requirements were met. *See* Rios-Pineda v. INS, 471 U.S. 444, 449 (1985).

statutory elements, the court would simply remand, leaving the issue of discretion to the BIA.

Another argument to preserve judicial review in this context may be made based on the use of the phrase "granting of relief" in section 242(a)(2)(B)(i). This phrase might be construed to allow judicial review where the petitioner is *denied* relief.[51] This construction could be read as a statutory codification of the practice that existed under the former section 106, where the alien could appeal the denial of relief, but the government was bound by the grant of relief by the BIA.[52]

F. *Defining the Scope of a Final Order*

Some matters, such as the appeal of a denial of a visa petition, have traditionally been interpreted as outside the scope of a deportation or exclusion hearing, and thus might also continue to be outside the scope of a removal hearing.[53] In IIRIRA, Congress included several subsections which are designed to prevent preemptive judicial review,[54] to combine all of the issues for review into a single case,[55] and to foreclose other avenues of review.[56] Whether these subsections will be effective in reaching those goals will certainly be a matter of future litigation.

---

51. Lucas Guttentag makes this argument in *Federal Court Jurisdiction After the 1996 Act: Statutory Restrictions and Constitutional Rights*, *supra* note 1.

52. The government could seek to overturn the BIA decision by *de novo* review before the Attorney General. *See* 8 C.F.R. § 3.1(h)(iii). The most recent example of this type of review is found in the Attorney General's reversal of the BIA in *Matter of Soriano,* BIA Int. Dec. 3289 (1996) (*see* Op. Att'y Gen. Feb. 21, 1997).

53. The leading case is *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). *See* further discussion in section IV.

54. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) provides:

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

This section appears to be designed to prevent aliens from seeking declaratory judgments or injunctions in advance of removal proceedings. *See, e.g.*, Massieu v. Reno, 91 F.3d 416 (3d Cir. 1996) (finding that former INA § 106 precluded the district court, in advance of the deportation hearing, from declaring a ground of deportability unconstitutional because the statute contemplated only review from final orders of deportation). *See also* American-Arab Anti-Discrimination Committee v. Reno, 119 F.3d 1367, 1373 (9th Cir. 1997) (discussing the relationship between sections 242(b)(9), 242(g), and 242(f) and preserving jurisdiction to hear constitutional challenge).

55. INA § 242(b)(6), 8 U.S.C. § 1252(b)(6) provides:

> Consolidation with review of motions to reopen or reconsider—When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

See the discussion of this type of consolidation in the next paragraph of the accompanying text.

56. INA § 242(g), 8 U.S.C. § 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

The consolidation provision in section 242(b)(6) is aimed at the situation where a noncitizen is seeking not only judicial review of the final order, but additionally wishes to pursue a motion to reopen. In 1995 the U.S. Supreme Court, interpreting the former INA § 106, concluded that the filing of a motion to reopen did not affect the finality of the decision of the BIA.[57] Consequently, the Court ruled that the time period for the petition for review was not tolled by the filing of a motion to reopen or reconsider.[58] IIRIRA appears to follow the same approach and is similar enough to the former section 106 that attorneys should not assume that the thirty-day period to file the petition for review is tolled by any other application or filing. Therefore, the petition for review should be filed within thirty days even if the noncitizen may also be filing a motion to reopen with the BIA.

This interpretation means that the noncitizen might have one petition for review appealing the order of removal, and then a second petition seeking review of the denial of a motion to reopen or reconsider. The statute seeks to avoid that inefficient result by ordering consolidation. Ideally, the statute contemplates review of both the order and any motions to reconsider or reopen at the same time.[59] But the ideal may be impossible to achieve in all cases. The statute now allows the filing of a motion to reopen within 90 days of the final order. There are possible exceptions to the 90-day limit such as the exception allowing an application of political asylum due to changed country conditions.[60] Theoretically, the court of appeals might have ruled on the petition of review by the time the motion to reopen is filed. In that situation, if the BIA denied the motion to reopen, the noncitizen should file a second petition for review seeking review of that denial, which is a separate final order. The government will undoubtedly oppose the second petition for review, but to deny review when the statute and regulations grant express authority to file the motion to reopen would be to deny the express grant of statutory review in INA § 242 of all final orders.[61]

The more dramatic provisions, popularly labeled the "catch-all" subsections, are found in sections 242(b)(9) and 242(g). These subsections aim at eliminating judicial review outside the scheme of section 242 and its express provisions. The scope of the preclusive effect of these subsections is analyzed below, following a discussion of why noncitizens have been able to use the

---

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

58. *Id.*

59. *See* INA § 242(b)(6), 8 U.S.C. § 1252(b)(6). A similar consolidation clause also appeared in the former INA § 106. *See* Akrap v. INS, 966 F.2d 267 (7th Cir. 1992) (holding that the former provision does not remove the ability to file a petition for review of a final order denying the motion to reopen).

60. INA § 208, 8 U.S.C. § 1158. *See also* 8 C.F.R. § 3.2 (regulation concerning reopening before the BIA) and § 3.23 (regulation concerning reopening before the immigration judge).

61. If the noncitizen was ultimately found to have been foreclosed from a petition for review on her motion to reopen, the alien may seek judicial review in habeas corpus proceedings under 28 U.S.C. § 2241. *See* the discussion of habeas jurisdiction which follows in section V. *See, e.g.*, Chow v. INS, 113 F.3d 659 (7th Cir. 1997) (finding authority in IIRIRA that denials of motions to reopen are final orders usually subject to judicial review).

Administrative Procedure Act ("APA") and other grants of federal jurisdiction to review actions of the INS.

III. THE EXPRESS LIMITATIONS ON JUDICIAL REVIEW IN THE INA

For several disfavored groups, Congress eliminates the express right of judicial review under the INA. The new statute expressly prohibits judicial review of (1) expedited removal orders[62] (except for habeas corpus petitions by aliens asserting lawful permanent resident status);[63] (2) denials from certain forms of discretionary relief;[64] (3) orders of removal against certain criminal aliens;[65] and (4) medical certification.[66] This section will explore some of these express prohibitions and analyze the scope of the preclusion. Yet, removing the express grant of judicial review under the INA does not necessarily eliminate all jurisdiction to review the agency action. In section IV, this article will explore the forms of jurisdiction which might remain notwithstanding the limits found in section 242.

A. *Expedited Removal*

Congress has enacted an expedited removal process for aliens arriving in the United States where an immigration officer believes they are inadmissible under INA § 212(a)(6) or (7).[67] Therefore, an INS officer at the port of entry has unrestricted authority to order an alien removed if the officer determines that the alien lacks documentation, does not have the proper documentation, or has made a misrepresentation in attempting to enter the United States. Only three classes of aliens may derail the expedited procedure: lawful permanent residents, aliens who hold refugee or asylee status, and those who convince the inspector that they intend to apply for asylum or indicate a credible fear of persecution. Additionally, people who make a claim to citizenship are given limited administrative review.[68]

---

62. INA § 235(b)(1), 8 U.S.C. § 1225(b)(1). Congress has also allowed the INS to invoke expedited removal procedures in cases where the alien entered without inspection within the last two years immediately prior to the commencement of removal proceedings. In essence, this change is seeking to overcome the traditional entry doctrine. *See* Mailman, *supra* note 2.63.

63. INA § 242(e)(2), 8 U.S.C. § 1252(e)(2). Apparently, U.S. citizens could also use this habeas petition to challenge alienage.

64. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B). *See* discussion in section III.D.

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

66. INA § 242(a)(3), 8 U.S.C. § 1252(a)(3), referencing INA § 240(c)(1)(B), 8 U.S.C. § 1252(c)(1)(B).

67. Amended INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A). If an alien is removed under the expedited removal process, the alien is barred from reentering the United States for five years. *See* INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i). *See also* Michele Pistone & Phil Schrag, *The 1996 Act: Asylum and Expedited Removal—What the INS Should Do*, 73 INTERP. REL. 1565-80 (Nov. 11, 1996). *See also* Philip G. Schrag & Michele R. Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267 (1997).

68. Under the regulations, a person making a claim of U.S. citizenship which is not verifiable by the admission officer will be referred to an immigration judge for a review of the expedited removal order. There is no further administrative review of the immigration judge determination that the person is not a citizen. People who wish to challenge the INS determination of citizenship in an expedited removal proceeding should file in federal district court using the provisions of the Declaratory Judgment Act, 28

For the first two classes, lawful permanent residents and asylee or refugees, the statute contains two separate provisions which appear to take the case out of the expedited process. First, in INA § 235, the statute provides that the Attorney General may design regulations which will allow those aliens who claim lawful permanent resident, asylee, or refugee status to also have some administrative review of the expedited removal.[69] The INS has proposed that in these cases where the INS database does not verify the claim to such status, the alien will be given only review of the expedited removal before an immigration judge.[70] If the INS can verify the claim to lawful permanent resident, asylee, or refugee status, the admission officer may admit the alien or refer the alien for a regular removal hearing under section 240.[71]

If the immigration judge does not find that the alien was previously admitted as a lawful permanent resident, INA § 242(e)(4)(2) provides that lawful permanent residents may also file a special habeas petition in federal district court.[72] In this habeas petition, the alien must establish her status as a lawful permanent resident. If the federal district court agrees that she holds that permanent resident status, she is entitled to further administrative review as described in INA § 235. The lawful permanent resident appears to be entitled to a remand for a full hearing under INA § 240.[73]

U.S.C. § 2201, *et seq.*, and habeas corpus jurisdiction under 28 U.S.C. § 2241. Prior to IIRIRA, INA § 360, 8 U.S.C. § 1503 had not permitted a declaratory judgment challenge if the issue of citizenship arose in connection with "any exclusion proceeding." In a "housekeeping" provision of IIRIRA directed at conforming the new term of "removal," Congress amended INA § 360 to refer to "removal" proceedings. INA § 360 does not refer to "expedited removal." Congress appears to have failed to realize that citizenship claims might be made in expedited removal proceedings. On its face, the limits of INA § 360 do not apply. The absence of discussion of citizenship claims in INA § 235, 8 U.S.C. § 1225 might be a basis to argue that citizenship claims must be heard in regular INA § 240, 8 U.S.C. § 1230 hearings. However, the INS disagrees and the interim regulations provide for an extraordinarily streamlined administrative process with review only before an immigration judge. *See* 8 C.F.R. § 235.3(b)(5)(iv). Further, section 360 seems to be specifically contradicted in INA § 242(b)(5), 8 U.S.C. § 1252(b)(5), which provides for judicial review of citizenship claims in the court of appeals, and if a fact finding hearing is required, for remand to the federal district court. *See* INA § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B). As harsh as it may seem, in 1905 the Supreme Court ruled that Congress could bar judicial review of claims of citizenship made in an exclusion proceeding. *See* United States v. Ju Toy, 198 U.S. 253 (1905). *Cf.* Ng Fung Ho v. White, 259 U.S. 276 (1922) (finding judicial hearing required for persons making a citizenship claim inside the United States). For excellent material on citizenship claims, *see* Gary Endelman, *How to Prevent Loss of Citizenship*, 89-11 & 89-12, IMMIGRATION BRIEFINGS (1989).

69. INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C).

70. *See* 8 C.F.R. § 235.3(b)(5)(i) and (iv).

71. *See* 8 C.F.R. § 235.3(b)(5)(ii) and (iii).

72. INA § 242(e)(2), 8 U.S.C. § 1252(e)(2). This section provides that the habeas proceeding is limited to the following questions: (A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under [INA § 235], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence and is entitled to such further inquiry as prescribed by the Attorney General pursuant to INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C). But in reading this section with INA § 242(e)(4), 8 U.S.C. § 1252(e)(4), it may be that asylees and refugees may also use the habeas procedure and that all three classes are entitled to a remand for a full removal hearing under INA § 240 rather than only a form of administrative review.

73. INA § 242(e)(4), 8 U.S.C. § 1252(e)(4). There is a contradiction in the statute which in INA § 242(e)(2), 8 U.S.C. § 1252(e)(2) says the lawful permanent resident is entitled to judicial review of his or her lawful status, but INA § 242(e)(4), 8 U.S.C. § 1252(e)(4) says that lawful permanent residents, asylees and refugees are limited to a remand for full removal hearings under INA § 240, 8 U.S.C. § 1229a.

In the case of an alien who indicates an intention to apply for asylum, the inspector refers the case to an asylum officer for an interview.[74] That officer must determine if the alien has presented a "credible fear of persecution."[75] If the asylum officer agrees that the claim is credible, the alien will then be entitled to pursue her claim for asylum through the regular removal procedures. If the asylum officer rejects the claim of persecution, the alien is given a chance to have an immigration judge review her claim.[76] Only if the immigration judge finds the claim credible will the alien be referred for a regular removal hearing.[77] There is no appeal to the BIA from the immigration judge's review of credible fear, but an alien could potentially seek habeas review as discussed below.

Congress has clearly tried to insulate the expedited removal provisions from judicial review. First, the statute establishes a scheme that would limit judicial review of the statute and regulations within the first sixty days of implementation.[78] The statute also tries to bar injunctions, declaratory or equitable relief, and the use of class actions to challenge the validity of the law.[79] The statute does not expressly bar the use of the writ of habeas corpus under 28 U.S.C. § 2241. Although it may be difficult to get access to the client and to file a writ of habeas corpus before the alien is summarily removed, it may be that this avenue of judicial review remains open.[80]

A habeas challenge to an order of expedited removal was brought in *Li v. Eddy*.[81] Meng Li, a Chinese businesswoman, was placed in expedited removal when the admission officer challenged her facially valid business visitor visa and ordered her removed for using a fraudulent document under section 212(a)(6). It appears that the admission officer saw a record in an INS

---

74. *See* 8 C.F.R. § 235.3(b)(4). The admission officer must refer the alien for asylum officer interview. The alien may be detained pending the interview by the asylum officer but parole is possible. *Id.*

75. INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) defines "credible fear of persecution" as a

> significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section [208] of this title.

76. INA§ 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III). The immigration judge review may take place in person, by telephone, or by video conference. *See also* 8 C.F.R. § 3.25(c).

77. *See* 8 C.F.R. § 208.30(f)(2). Note that stowaways are treated differently and their credible claim would be filed immediately before the reviewing immigration judge. 8 C.F.R. § 208.30(f)(3).

78. INA § 242(e)(3)(B), 8 U.S.C. § 1252(e)(3)(B). AILA and the ACLU have filed a suit in the D.C. Circuit Court of Appeals. AILA v. Reno, 1997 WL 161944 (D.D.C. Mar. 31, 1997) (challenging expedited removal generally); Wood v. Reno, No. 97-CV001229, (D.D.C. Mar. 27, 1997) (challenging the application of expedited removal to those persons with facially valid visas, with grants of parole and others who might have exemptions from normal visa requirements). *See also* Liberians United v. Reno, No. 97-CV001237 (D.D.C. Mar. 1997) (challenging expedited removal as it applies to asylum seekers).

79. INA § 242(e)(1), 8 U.S.C. § 1252(e)(1).

80. Perhaps the airlines, who will be forced to bear the cost of removing the noncitizens, will file the writ of habeas corpus on behalf of the noncitizens. There is precedent for the involvement of transportation companies. *See* U.S. Lines v. Watkins, 170 F.2d 998 (2d Cir. 1948).

81. 1997 U.S. Dist. LEXIS 14431 (D. Alaska 1997). This case is on appeal to the Ninth Circuit. Margaret Stock, Ms. Li's attorney, was able to overcome the difficulty of gaining access to Ms. Li in time to file the habeas petition because due to a misinterpretation, the INS thought that she was applying for asylum and she was detained in a prison in the city of Anchorage.

computer that reflected that a U.S. employer had filed a nonimmigrant H-1B petition on Ms. Li's behalf which would have authorized her to work in the United States. Ms. Li had not accepted the U.S. employment and was seeking entry as a business visitor on behalf of her employer in China. The admission inspector did not believe her and must have thought she was seeking to avoid obtaining the H1-B visa stamp.[82]

The district court denied the writ of habeas corpus finding that section 242(e) eliminated the court's jurisdiction. The district court found that the provisions for habeas corpus in INA § 235(e)(2) are specific and control over 28 U.S.C. § 2241, thus severely limiting the scope of review in habeas. Meng Li has appealed to the Ninth Circuit Court of Appeals. The government takes the position that both *United States ex rel. Knauff v. Shaughnessey*[83] and *Shaughnessey v. United States ex rel. Mezei*[84] establish that noncitizens who have not yet been admitted are not entitled to judicial review. Although *Knauff* held that a non-citizen at the border had no right to review the government's denial of entry, her challenge to the procedures was still allowed to be heard and the case can be read as requiring that the INS, at minimum, provide the applicant for admission the procedures which Congress had prescribed.[85] Historically, an excluded non-citizen was able to challenge her detention in habeas corpus.[86]

Ms. Li is arguing that her right to judicial review is protected by a guarantee of procedural due process. In 1982, in *Landon v. Plasencia,*[87] the Supreme Court found that a returning lawful permanent resident was entitled to procedures which protected her due process interests even if she was making her claim in an exclusion hearing at the border. Justice O'Connor found that the exclusion procedures should be reviewed under the balancing test set forth in *Mathews v. Eldridge.*[88] Although *Plasencia* deals with a returning lawful permanent resident who briefly left the country, *Matthews* could be used as a benchmark for evaluating the expedited removal procedures.

Ms. Li is also arguing that section 242(e) is unconstitutional as it suspends the writ of habeas corpus. That statute requires that all challenges to the expedited removal process be filed within sixty days of the implementation of the law.[89] The statute also requires filing in the D.C. Circuit court of

---

82. Telephone interview with Margaret Stock, Esq., attorney for Meng Li (July 21, 1997).

83. 338 U S. 537 (1950).

84. 345 U.S. 206 (1953).

85. Ellen Knauff was excluded under a special provision concerning national security. It might be possible to limit the case to that unique factual scenario and to an interpretation of the specific statute involved.

86. *See* Benson, *supra* note 6, section II (discussing the history of judicial review in immigration cases).

87. 459 U.S. 21 (1982).

88. 424 U.S. 319 (1976).

89. The statutory provision became effective April 1, 1997, and the INS began implementing the statute on that date.

appeals.[90] If section 242(e) is read as a limit on habeas corpus, it would be in direct conflict with the Suspension Clause of the Constitution.[91] Alternatively, litigants might want to argue that the statutory scheme practically eliminates habeas corpus because of the inability of the alien to get access to counsel and to the courts. It may be that a court would find that the statutory scheme has thus removed or suspended habeas corpus and therefore the statute is unconstitutional.

B. *Aliens with Certain Criminal Convictions*

The limitations on judicial review for aliens convicted of crimes is consistent with other changes Congress has made which are targeted at the removal of criminal aliens.[92] Even relatively minor criminal offenses can trigger one of the bars or preclusions to federal court review of a removal order. The statutory provision in INA § 242(a)(2)(C) states that:

> notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reasons of having committed a criminal offense covered [in various sections of the INA].[93]

For example, conviction for minor drug possession would fall within the definition of section 237(2)(B), conviction relating to a controlled substance, and a final order of deportation on this ground would be foreclosed from judicial review.

Does this statute prevent a federal court from exercising its jurisdiction to determine if the noncitizen is within one of the classes of criminals described in section 242(a)(2)(C)? There appears to be a split of authority with the majority of the circuit courts of appeals finding that they have jurisdiction to determine whether the bar applies.[94]

---

90. Ms. Li has tried to join *Wood v. Reno,* CA 97 CV00597 (U.S.D.C. D.C. filed Mar. 27, 1997) which was filed to challenge the expedited removal system. The government has taken the position that she is precluded from joining the suit because sixty days has elapsed since the passage of the statute.

91. U.S. CONST. art. I, § 9, cl. 2.

92. There are other provisions of IIRIRA which would expedite the removal process for certain noncitizens convicted of aggravated felonies, section 238(b) or those ordered removed as part of the judicial criminal proceeding, section 238(c)(3)(A)(i). *See* Benson, *supra* note 6, at 1447-48 (discussing these provisions).

93. The remainder of INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) references criminal related sections of the INA and reads:

> . . . section [212](a)(2)[criminal grounds of inadmissibility] or [237](a)(2)(A)(iii) [aggravated felonies defined in § 101(a)(43)], B [controlled substances], C [certain firearm offenses] or D [convictions relating to sabotage] or any offense covered by section [237](a)(2)(A)(ii) [multiple criminal convictions] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section [237](a)(2)(A)(i)[certain crimes of moral turpitude].

The brackets are descriptive only.

94. *See, e.g.,* Choeum v. INS, 129 F.3d 29 (1st Cir. 1997) (review of the order of removal to determine if conviction was one which would preclude review); Anwar v. INS, 116 F.3d 140, 141-44 (5th Cir. 1997);

Does this statute prevent federal court review of the finding of removability itself? The Tenth Circuit Court of Appeals has held that Congress meant to preclude judicial review of both the finding of removability and to any forms of relief.[95] The Seventh Circuit has developed two possible exceptions to the preclusions. The most significant is discussed in *Yang v. INS,*[96] where Judge Easterbrook said that the agency's findings alone will not support a preclusion of judicial review:

> Whether Yang is an alien deportable by reason of certain crimes is open to review, although the answer "yes" brings proceedings to an end. We think it highly unlikely that Congress meant to enable the Attorney General to expel an alien with a clean record just by stating that the person is a criminal, without any opportunity for judicial review of a claim of mistaken identity or political vendetta.[97]

The Seventh Circuit Court of Appeals has also created a limited exception to preclusion of all review where the noncitizen can show that he or she was "mouse-trapped" into conceding deportability, and relied on relief from removal or judicial review of the denial of relief, which had since been eliminated.[98] Where a noncitizen can articulate a colorable defense to removal, the Seventh Circuit Court of Appeals would not apply the preclusion statutes retroactively and preclude judicial review.[99] Obviously, this defense will be short-lived and limited to cases where the bars to jurisdiction are applied retroactively.

C. *In Absentia Proceedings*

Congress did not remove all judicial review of in absentia orders, but placed numerous obstacles to administratively overturning an in absentia order and narrowed the scope of review of the administrative action. Former INA § 242B, concerning the conduct of deportation proceedings, was stricken in its entirety by section 308(b)(6) of IIRIRA and incorporated into amended INA § 240. In general,

> any alien who, after written notice required under paragraph (1) or (2) of section 239(a) has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia.[100]

Coronado-Durazo v. INS, 108 F.3d 210 (9th Cir. 1996), *petition for reh'g denied and new opinion substituted*, 123 F.3d 1322 (9th Cir. 1997). *But cf.* Berehe v. INS, 114 F.3d 159 (10th Cir. 1997).

95. *See Berehe, supra* note 94.

96. 109 F.3d 1185 (7th Cir. 1997) (interpreting AEDPA provisions).

97. *Yang*, 109 F.3d at 1192.

98. *See* Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996) (interpreting AEDPA preclusion of review). *See also* Arevalo-Lopez v. INS, 104 F.3d 100 (7th Cir. 1997).

99. *Id.* at 492-93.

100. INA § 240(b)(5)(A), 8 U.S.C. § 1250(b)(5)(A).

The government must establish by clear, unequivocal, and convincing evidence that the statutory written notice describing the consequences of failure to appear was actually provided to the alien or the alien's counsel of record.[101]

IIRIRA imposes a limitation on the availability of discretionary relief for failure to appear.[102] Consequently, any alien against whom a final order of removal is entered in absentia (unless there was a failure to provide the notice or if exceptional circumstances are demonstrated), is precluded from relief under INA §§ 240A, 240B, 245, 248, or 249 for a period of ten years after the date of the entry of the final order of removal.[103] Thus the motion to rescind an in absentia order will be of great importance.

In absentia orders may be rescinded only by the filing of a motion to reopen.[104] In cases where the alien received the required notice, section 240 requires the motion to reopen to be filed within 180 days after the date of the order of removal.[105] The alien must demonstrate that the failure to appear was because of (1) "exceptional circumstances," such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien;[106](2) that the alien did not receive proper notice;[107] or (3) that the alien was in federal or state custody and did not appear through no fault of the alien.[108] The filing of the motion to reopen shall stay the removal of the alien pending disposition of the motion by the immigration judge.[109] This is the only provision in the regulations which creates an automatic stay with the filing of a motion to reopen.

The motion to reopen seeking rescission may be appealed to the BIA. If the BIA denies the motion to reopen seeking rescission, the alien then files a petition for review under INA § 242. Congress limited the scope of judicial review in these cases to (i) the validity of the notice provided to the alien; (ii) the reasons for the alien's not attending the proceedings; and (iii) whether or

---

101. *Id. See also* 8 C.F.R. § 3.26.

102. IIRIRA § 304; amended INA § 240(b)(7), 8 U.S.C. § 1250(b)(7).

103. *Id.*

104. *See* INA § 240(b)(5)(C), 8 U.S.C. § 1250(b)(5)(C).

105. *Id.* If the alien never received the statutory notice, the 180-day limit is ineffective. 8 C.F.R. § 3.23(4). Although the regulations are not clear on this point, I believe that the 180-day limit is also inapplicable to motions to reopen to rescind where the alien is reopening to seek asylum or withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1251(b)(3), provided that the application is based on a change in country conditions. *See* 8 C.F.R. § 23.3(4)(i) and (ii). But even in a case where the alien might have received notice or is not seeking asylum, she might still try to reopen her case. She should file the untimely motion, explaining the good cause for the delay and exhaust all administrative process before seeking judicial review. In my view, the alien may file a petition for review under INA § 242, notwithstanding the passage of 180 days. If the petition is dismissed, the alien might seek further judicial review in habeas proceedings. The regulations governing reopening are found at 8 C.F.R. § 3.23.

106. INA § 240(b)(5)(c)(i), 8 U.S.C. § 1250(b)(5)(c)(i), and INA § 240(e)(1), 8 U.S.C. § 1250(e)(1). *See also* 8 C.F.R. § 3.23(b)(4)(iii) (suggesting that exceptional circumstances beyond the control of the alien include but are not limited to such examples as "serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances").

107. INA § 240(b)(5)(C)(ii), 8 U.S.C. § 1250(b)(5)(C)(ii).

108. *Id.*

109. INA § 240(b)(5)(C), 8 U.S.C. § 1250(b)(5)(C).

not the alien is removable.[110] Notwithstanding this express limitation, the alien should also be able to challenge the sufficiency of the evidence submitted by the INS to establish deportability.[111]

D. *Miscellaneous Additional Restrictions on Judicial Review*

IIRIRA provides new provisions and amendments regarding district court challenges to the Immigration and Naturalization Service and Executive Office for Immigration Review policies and practices. First, IIRIRA amends INA § 279 to provide for federal district court jurisdiction only in claims by the United States.[112] This amendment applies only to cases filed after September 30, 1996.[113] Second, as of April 1, 1997, IIRIRA precludes courts (except the Supreme Court) from issuing injunctions except in individual cases against "the operation" of the provisions in sections 231-244 of the amended INA.[114] Section 242(f)(2) states that:

> no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution . . . is prohibited as a matter of law.

However, the limitation on injunctions does not preclude the filing of class action suits, and the prohibition against enjoining *removal* orders should not apply to orders of *deportation* or *exclusion*, since those are not issued "under this section" of the amended INA. Finally, IIRIRA § 377 denies jurisdiction over legalization claims filed under INA § 245A, enacted by the Immigration Reform and Control Act of 1986 ("IRCA"), unless the petitioner in fact filed a legalization application or attempted to file a complete application and fee with an INS legalization officer before May 5, 1988, and the application was refused. The Ninth Circuit upheld the constitutionality of section 377 on April 30, 1997, and dismissed the class action challenge.[115]

IV. IMPLIED OR DEFAULT GRANTS OF JURISDICTION OUTSIDE OF THE INA

Judicial review of final orders of removal is a special variant of the general issue concerning the power of Congress to limit judicial review of agency

---

110. INA § 240(b)(5)(D), 8 U.S.C. § 1250(b)(5)(D).

111. The requirement that a deportation order is supported by some evidence is a constitutional requirement. *See* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631 (1988).

112. IIRIRA § 381, amending INA § 279. Section 279 formerly conferred jurisdiction on the federal district courts over "all causes, civil and criminal, arising under any of the provisions" of title II, encompassing former INA §§ 201-93.

113. IIRIRA § 381(b).

114. INA § 242(f), 8 U.S.C. § 1252(f).

115. *See* Catholic Soc. Serv. v. Reno, 1997 WL 209158 (9th Cir. Apr. 30, 1997).

action.[116] The decisions, regulations, and actions of the INS are generally governed by the terms of the Administrative Procedure Act ("APA").[117] The APA allows for judicial review except where review is specifically prohibited in another statute,[118] and even then courts have preserved jurisdiction to consider constitutional challenges.[119] Courts will read the provisions of IIRIRA as carving out special limits on APA review. But many courts read these limitations on review very carefully.[120]

To understand the breadth of the exceptions to APA review, it becomes critical to examine the exact scope of administrative action which comes within the phrase "final order of removal." The prior statutory scheme for judicial review of deportation and exclusion orders expressly stated that the statute set forth the "sole and exclusive" procedure for judicial review of all final orders of deportation.[121]

---

116. *See* Richard Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988).

117. From 1946 to the 1961 adoption of former INA § 106, the APA and the Federal Declaratory Judgment Act governed all immigration matters. *See* Brownell v. Shung, 352 U.S. 180 (1956). *See also* Shaughnessey v. Pedreiro, 349 U.S. 48 (1955). Section 106 only removed APA review from those decisions within the scope of section 106.

118. *See* 5 U.S.C. § 702. But the APA does not contain a general grant of jurisdiction itself. *See* Califano v. Sanders, 430 U.S. 99 (1977). To obtain APA review, most litigants will turn to 28 U.S.C. § 1331 which provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *See, e.g.*, El Rescate Legal Serv., Inc. v. Executive Office of Immigration Review, 959 F.2d 742 (9th Cir. 1992) (upholding section 1331 jurisdiction to challenge systematic problems with translations in immigration court); Montes v. Thornburgh, 919 F.2d 531 (9th Cir. 1990) (allowing section 1331 jurisdiction to challenge action of an individual immigration judge who refused to accept documents); and Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd*, 472 U.S. 846 (1985) (using section 1331 to challenge failure to give notice of the right to apply for asylum, although no discussion of jurisdiction at Supreme Court).

In the past, some litigants used the grant of jurisdiction contained in INA § 279, 8 U.S.C. § 1329 which gave federal district courts power to hear cases arising under a subchapter of the INA. IIRIRA amended INA § 279 to make it clear that this section can only be used by the government to initiate proceedings. *See, e.g.*, Chen Chaun-Fa v. Kiley, 459 F. Supp.762 (S.D.N.Y. 1978) (refusing to exercise jurisdiction under section 279 because the issue was not within subchapter II of the INA and finding that Congress intended to limit 28 U.S.C. § 1331 through the language of section 279). *Cf.* Yim Tong Chung v. Smith, 640 F. Supp. 1065 (S.D.N.Y. 1986) (finding no jurisdiction under section 279 or 28 U.S.C. § 1331); Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979) (finding section 279 can limit the grant of federal question jurisdiction). Given that Congress has now made clear that section 279 is only a grant of jurisdiction to the U.S. government, perhaps courts would be willing to reconsider whether this section should truly be read as an implied limit on private litigants ability to use the general grant of jurisdiction in 28 U.S.C. § 1331.

The Declaratory Judgment Act, 28 U.S.C. § 2201, may not independently confer subject matter jurisdiction. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). *See also* Robertson v. Attorney General, 957 F.Supp. 1035 (N.D. Ill. 1997) (discussing subject matter jurisdiction under declaratory judgment and mandamus statutes, 28 U.S.C. § 1361). For a discussion of the Declaratory Judgment Act and proceedings under the APA, *see* GORDON, MAILMAN & YALE-LOEHR, *supra* note 31, § 81.05.119.

119. *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988) (preserving judicial review of constitutional challenge to administrative action); Lindahl v. Office of Personnel Mgm't, 470 U.S. 768 (1985) (preserving review of the legality of administrative decisions); Johnson v. Robinson, 415 U.S. 361 (1974).

120. A classic example of judicial protection of the power to review administrative action is found in *Shaughnessey v. Pedreiro, supra* note 116, where the Supreme Court refused to apply a literal reading to the language of the INA which made deportation orders "final." At least where the Supreme Court found that Congress had not clearly "intended" to bar all review, some form of judicial review remained.

121. Former INA § 106(a).

Yet where the Supreme Court found the government action was not part of the "final order," the limits of the former section 106 did not apply.[122] The reasoning of *Cheng Fan Kwok* provides a clear illustration of the narrow statutory interpretation the Supreme Court traditionally has applied to language aimed at restricting judicial review of administrative action. Scholars have critiqued *Cheng* and recognized that it created a hole in the unified design which had sought to restrict all judicial review to the former section 106 procedures.[123]

It is unclear if Congress has plugged the hole created by *Cheng Fan Kwok,* although Congress appears to have tried to design two subsections of section 242 to do just that. The language of the new statute varies from former section 106 by setting forth exclusive procedures for review of removal orders and for other types of decisions and actions under the INA. In an important subsection of the new statute, Congress tries to consolidate review of all "questions of law or fact . . . arising from any action taken . . . to remove an alien from the United States . . . shall be available only in judicial review of a final order under this section."[124] In another section, Congress tries to eliminate other forms of litigation by providing that:

> notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.[125]

But all of INA § 242 is concerned with review of matters within the scope of a *final order of removal.* The reference to "adjudicate cases" arises in the context of the entire provision which is captioned "Judicial Review of Orders of Removal."

To avoid the court-stripping effect of section 242(g), the early cases have used a variety of strategies. Some have primarily relied upon the strategy of *Cheng Fan Kwok*, finding that the issue is outside of the scope of a final order

---

122. *See* Cheng Fan Kwok v. INS, 392 U.S. 206 (1968).

123. David Martin, *Cheng Fan Kwok and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. J. INT'L L. 803 (1987).

124. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9). This is similar to the provisions concerning judicial review in cases filed under the "amnesty" or "seasonal agricultural worker" provisions of the Immigration Reform and Control Act of 1986 [hereinafter IRCA]. *Cf.* INA §§ 245A, 210, 8 U.S.C. §§ 1255, 1160. For example, section 210(3) provided that "[t]here shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 106." The same language appeared in INA § 245A(f)(4), 8 U.S.C. § 1255(f)(4) for amnesty cases. Note that in *Reno v. Catholic Soc. Serv.*, 509 U.S. 43 (1993), the Court used the ripeness doctrine, not the literal language of the statute, to avoid deciding a challenge to the regulations governing the amnesty program. *See* section III.D, concerning Congressional elimination of federal court jurisdiction in some pending class actions concerning the amnesty program.

125. INA § 242(g), 8 U.S.C. § 1252(g). *See* Rodriguez v. Wallis, No. 96-3518-Civ. Davis (S.D. Fla. Jan. 29, 1997) (finding that bond determinations are outside the scope of the actions covered by section 242(g)).

of removal and therefore that Congress did not intend to remove the court's jurisdiction.[126] Others have also applied the doctrine that even where Congress has generally removed jurisdiction, courts will retain jurisdiction to consider constitutional issues.[127] A few courts have found that Congressional intention to foreclose all review is clearly stated in section 242(g).[128] Undoubtedly, litigation will have to determine the ability of INA § 242 to block all arguments for jurisdiction, especially those based on alternative theories of jurisdiction such as the general grant of federal question jurisdiction, or preservation of jurisdiction to consider constitutional claims.

As an illustration of how these new sections may interact, consider the issue of challenging an INS District Director's denial of adjustment of status.[129] In some circuits, the courts of appeal have held that the denial of an application for adjustment of status pending before a District Director was not within the scope of review of an order of deportation.[130] Therefore, the noncitizen might have challenged the action of the District Director under the general federal question jurisdiction provided in 28 U.S.C. § 1331[131] and the provision of the APA, 5 U.S.C. § 702, which contemplates judicial review of administrative actions.

How will this type of INS action be treated in the future? Certainly, the noncitizen can still argue that the denial of adjustment by the District Director is not within the scope of a final order of removal and assert that it is not "an action taken to remove" the alien within the scope of INA § 242(b)(9). The provision found in INA § 242(a)(2)(B)(i) concerning review of adjustment of status would appear to only concern the application for adjustment of

---

126. *See, e.g.*, Wang Zong Xiao v. Reno, 963 F. Supp. 874 (N.D.Cal. 1997) (application for travel documents is outside the scope of section 242(g)); Thomas v. INS, 975 F. Supp. 840 (W.D. La. 1997) (challenges to the conditions of custody are not within the scope of section 242(g)).

127. *See, e.g.*, American-Arab Antidiscrimination Comm. v. Reno, 119 F.3d 1367 (9th Cir. 1997).

128. *See, e.g.*, Auguste v. Attorney General, 118 F.3d 723 (11th Cir. 1997) (rejecting review of denial of a stay of removal for a person who used the visa waiver program to enter the United States and had also as a condition of that admission waived rights to review); Ramallo v. Reno, 114 F.3d 1210 (D.C.Cir. 1997) (finding that section 242(g) precluded review of an alleged contract with the Department of Justice to suspend removal proceedings).

129. There is no administrative appeal of the District Director's decision although the application for INA § 245, 8 U.S.C. § 1255 adjustment may be renewed, in most cases, in a removal proceedings if one is begun by the INS. *See* 8 C.F.R. § 242.2(a)(5). Denial of adjustment of status before the immigration judge is within the scope of a final order of removal and may not be reviewable due to the bar on review of discretionary relief found in INA § 242 (a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i). Note that the language of INA § 242(a)(2)(b), 8 U.S.C. § 1252(a)(2)(b) refers to the "grant" of relief and perhaps might be read as a limitation on government appeals of grants of relief. Further, the issue of statutory eligibility for INA § 245, 8 U.S.C. § 1255 relief should also still be reviewable.

130. *See, e.g.*, Shahla v. INS, 749 F.2d 561 (9th Cir. 1984); Karim v. N.Y. Dist. Office of the INS, 1998 U.S. Dist. LEXIS 21917 (S.D.N.Y. Feb. 13, 1998) (pre-IIRIRA case); and Ijoma v. INS, 854 F. Supp. 612 (D. Neb. 1993).

131. In some cases the alien relied on INA § 279, 8 U.S.C. § 1329 which allowed district courts to hear matters governed by subchapter II of the INA which would include the application for adjustment of status which is governed by INA § 245, 8 U.S.C. § 1255. As noted previously, Congress amended INA § 279 to expressly limit the grant of jurisdiction for use solely by the U.S. government.

status made in a removal proceeding. The provision which follows in INA § 242(a)(2)(B)(ii) is the most difficult to overcome. This subsection states:

> (B) Denials of Discretionary Relief
> Notwithstanding any other provision of law, no court shall have jurisdiction to review ... (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be within the discretion of the Attorney General, other than the granting of relief under section [208](a).[132]

Again, one can argue that this subsection cannot apply to decisions which are not part of orders of removal because INA § 242 concerns limits on review of orders of removal, not general review of all INS action. Another argument is that this subsection, INA § 242(a)(2)(B)(ii), only concerns those specific actions which are expressly "in the discretion of the Attorney General" and within the scope of title II of the INA.[133] Adjustment of status is within Title II but INA § 245 uses different language. It reads "in his discretion and under such regulations as he may prescribe."[134] This difference in language and the reference to a source of authority, the regulations, which are outside of the scope of Title II, may lead a court to conclude that this bar on judicial review was not meant to preclude APA review of the District Director's actions in adjustment of status cases.

Similarly the catch-all barrier in INA § 242(g), which bars review whenever the Attorney General "adjudicates cases" under the INA, should also be limited to the context of removal proceedings as this catch-all bar is still but a subsection of the review of removal orders.[135] If Congress had meant to bar judicial review of administrative decisions concerning adjustment of status not arising in the context of a removal proceeding, they should have amended INA § 245 itself. This they did not do.[136] Courts will need to

---

132. INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

133. This argument was made by Lucas Guttentag, *supra* note 1, at 250-51.

134. INA § 245(a), 8 U.S.C. § 1255(a).

135. If INA § 242, 8 U.S.C. § 1252 is read to bar review of the District Director's decision concerning adjustment of status, then it might be seen as one of the exceptions to judicial review contemplated in APA § 702. Although it is also beyond the scope of this article to consider how the new statute might limit litigation which seeks to raise challenges such as the failure to promulgate or improper promulgation of regulations, or a claim that the regulation was contrary to the statutory authority, the catch-all provision does not directly contradict such suits which are brought pursuant to the APA and federal question jurisdiction. *See, e.g.*, McNary v. Haitian Refugee Cent., Inc., 498 U.S. 479 (1991) (upholding a challenge to the SAW program notwithstanding the judicial review limitations as challenge alleged a pattern and practice of violation of constitutional rights and did not seek to adjudicate individual rights). *See also* Rodriguez v. Wallis, No. 96-3518 Civ. Davis (S.D. Fla. Jan. 29, 1997) (interpreting section 242(g) narrowly and holding it does not govern bond determinations).

136. Note that this failure to amend INA § 245, 8 U.S.C. § 1255 is in contrast to other provisions of IIRIRA which contain their own limitations on judicial review. *See, e.g.*, INA § 208(a)(3), 8 U.S.C. § 1158 (a)(3) (precluding review of the INS determination of exceptions to the ability to file a claim for asylum); INA § 208(b)(2)(D), 8 U.S.C. § 1158(a)(3)(B) (limiting review of the INS characterization of an asylum applicant as a terrorist).

carefully consider whether or not various provisions of IIRIRA have actually limited APA review and lawyers should not assume that blanket declarations in INA § 242 will have completely blocked review.

Further, even if Congress may have believed that the statute successfully eliminated all judicial review for the disfavored groups, or blocked access to APA review, in reality, the elimination of the petition for review jurisdiction has instead revitalized the default jurisdiction for review residing in the writ of habeas corpus under 28 U.S.C. § 2241.[137] Habeas jurisdiction exists because of the way in which an order of removal must be executed. Eventually, the alien must be apprehended or seized. The custodial aspect of removal, both actual and constructive, provides the factual predicate necessary to support habeas corpus jurisdiction.

V. AVAILABILITY OF HABEAS CORPUS

A. *Constitutional Right of Alien to Seek Habeas Review*

In the beginning, there was the writ of habeas corpus. Until 1961 and the adoption of the first provisions for judicial review in the INA itself,[138] most aliens obtained judicial review of immigration matters through the writ of habeas corpus. In *Heikkila v. Barber*,[139] the Court discussed the history of judicial review of immigration orders. Although the 1891 and 1917 Immigration Acts had intended to preclude judicial review "to the fullest extent permitted under the Constitution," courts continued to review the legality of deportation and exclusion orders in habeas corpus proceedings.[140] Although habeas corpus jurisdiction was not expressly granted in the immigration laws at that time, the *Heikkila* Court held that the Constitution guarantees, as a constitutional minimum, habeas corpus review. The *Heikkila* opinion recounts many Supreme Court and lower court decisions involving review of deportation and exclusion orders issued under the 1891 and 1917 Acts despite language which sought to make the agency action final.[141]

---

137. The APA also contemplates use of the writ of habeas corpus but the APA provision is not an express grant of jurisdiction. *See* 5 U.S.C. § 703. *See also* discussion of the APA in text and *supra* note 115. Of course the writ of habeas corpus is also protected by the U.S. CONST. art. I, § 9, cl. 2. In one instance, IIRIRA creates a special form of habeas for lawful permanent residents and asylees who are challenging expedited removal under INA § 235. *See* INA § 242(e)(2), 8 U.S.C. § 1252(e)(2).

138. Former section 106 was created in 1961. This section specifically referred to habeas corpus as the form of review for exclusion orders and whenever an alien was in the custody of the INS. Under the former statute, an alien in deportation proceedings could file a petition for review and if she lost that petition, file a writ of habeas corpus once the INS moved to execute the final order of deportation. In cases where the alien did not have a stay of deportation, the writ of habeas corpus was filed under section 106(a)(10) to prevent the removal of the alien even while the petition for review was awaiting adjudication.

139. 345 U.S. 229 (1953) (considering the availability of habeas corpus review for aliens facing exclusion or deportation).

140. *Id.* at 235 (noting aliens historically have been able to "attack a deportation order" by habeas corpus).

141. For history of immigration statutes and "finality" *see* GORDON, MAILMAN & YALE-LOEHR, *supra* note 31, § 81.01. *See also* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE

B. *Statutory Authority for Habeas Review*

The statutory authority for the writ of habeas corpus is found in 28 U.S.C. § 2241. Section 2241 provides for jurisdiction to grant writs of habeas corpus for persons "in custody in violation of the Constitution or laws . . . of the United States" and for persons "in custody under or by color of the authority of the United States."[142] Neither IIRIRA nor the AEDPA expressly amended 28 U.S.C. § 2241, and the Supreme Court has consistently held that habeas corpus jurisdiction cannot be amended or repealed absent express language.[143] In litigation concerning the elimination of judicial review for aggravated felons and certain other aliens convicted of crimes under the provisions of the AEDPA,[144] the government conceded in several cases and numerous courts ruled that although the language of AEDPA eliminated the writ of habeas corpus provision which had formerly lodged in the INA, the statute had not eliminated the writ of habeas corpus pursuant to 28 U.S.C. § 2241.[145] These courts preserved the writ of habeas corpus even in the face of a statutory section which expressly barred review by stating that "any final order of deportation . . . shall not be reviewable by any court."[146] Similarly, the broad sweeping language in IIRIRA is also ineffective to remove all forms of judicial review.[147] Nevertheless, Judge Easterbrook of the Seventh

---

SHAPING OF MODERN IMMIGRATION LAW (1995); Benson, *supra* note 6, at 1429-30 (discussing the *Heikkila* decision).

142. 28 U.S.C. § 2241(c)(1), (3).

143. *See* Felker v. Turpin, 518 U.S. 651 (1996) (holding that under the well established "clear statement" rule, section 2241 jurisdiction cannot be repealed by "implication").

144. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

145. Former section 106(a)(10) which provided for habeas review of aliens "in custody" was modified in AEDPA § 440(a). Of course all of former INA § 106 was removed in IIRIRA. The main AEDPA decisions are: Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996), *cert. denied,* 117 S.Ct. 1842 (1997); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996), *cert. denied,* 117 S. Ct. 694 (1997); Anwar v INS, 116 F.3d 140 (5th Cir 1997) (finding that notwithstanding section 440a the court had jurisdiction over constitutional issues); Williams v. INS, 114 F.3d 82 (5th Cir. 1997) (finding that some opportunity to apply for habeas relief remains; however, does not define the scope); Mansour v. INS, 123 F.3d 423 (6th Cir. 1997) (finding AEDPA's limits on review constitutional because of the continued availability of habeas review); Figueroa-Rubio v. INS, 108 F.3d 110 (8th Cir. 1997); Arevalo-Lopez v. INS, 104 F.3d 100 (7th Cir. 1997); Chow v. INS, 113 F.3d 659 (7th Cir. 1997) (upholding judicial review limits and not deciding what type of habeas jurisdiction exists); Yang v. INS, 109 F.3d 1185 (7th Cir. 1997) (acknowledging habeas corpus but limits the types of claims); Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996) (acknowledging preservation of habeas review although issue was not before the court); Fernandez v. INS, 113 F.3d 1151 (10th Cir. 1997) (dismissing petition for review but finding that habeas exists for "substantial" constitutional errors); Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) (per curiam); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) (finding some form of habeas review remains notwithstanding express prohibition in section 440a of AEDPA); Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996) (referring to 28 U.S.C. § 2241). Following the Ninth Circuit decision dismissing his petition for review, Mr. Duldulao sought habeas review in the federal district court in Hawaii. *See* Duldulao v. Reno, 958 F. Supp. 476 (D. Haw. 1997) (allowing habeas under 28 U.S.C. § 2241 but limiting the scope of review available and denying the petition). *See also* Yesil v. Reno, 958 F. Supp. 828 (S.D.N.Y. 1997) (granting habeas under 28 U.S.C. § 2241 for aggravated felony); Eltayeb v. Ingham, 950 F. Supp. 95 (S.D.N.Y. 1997) (habeas jurisdiction for aggravated felony); Mbiya v. INS, 930 F. Supp. 609 (N.D. Ga. 1996) (habeas review). The scope of review in habeas corpus is discussed in section V.D.4 of this article.

146. AEDPA § 440(a).

147. *See* Szilagyi v. INS, 131 F.3d 148 (9th Cir. 1997) (finding habeas remained under section 2241 for constitutional claims); United States v. Zadvydas, 986 F. Supp. 1011 (E.D. La. 1997) (finding that 28

Circuit found in *Yang v. INS*[148] that section 242(a) of the IIRIRA does, in fact, preclude review under 28 U.S.C. § 2241. According to Judge Easterbrook, "effective April 1, 1997, § 306(a) of [IIRIRA] abolishes even review under § 2241, leaving only the constitutional writ unaided by statute."[149] In striking contrast to Judge Easterbrook's opinion in *Yang*,[150] Judge Weinstein of the Eastern District of New York not only found that statutory habeas continued to be available under 28 U.S.C. § 2241, but also that it could be used to challenge the agency's interpretation of the statute.[151] Although the petitioner in *Mojica v. Reno* raised constitutional issues regarding the retroactive application of AEDPA to his application for section 212(c) relief, Judge Weinstein ultimately found, on statutory grounds, that the Attorney General had misinterpreted the statute in her decision in *Matter of Soriano*.[152] Another New York judge, this time in the Southern District, also disagreed with Judge Easterbrook's analysis. Judge Chin held in *Yesil v. Reno*[153] that statutory habeas was still available to the petitioner. Judge Chin did not define the exact scope of statutory habeas available, but held that the allegation of an erroneous statuory violation depriving a long-term resident of any possibility of relief from deportation could constitute a due process violation, thus presenting a constitutional claim that clearly supports statutory habeas review.[154]

In *U.S. ex rel. Morgan v. McElroy*,[155] Judge Sprizzo of the Southern District of New York distinguished *Mojica* and *Yesil*,[156] and held that 28 U.S.C. § 2241 was no longer available after the passage of IIRIRA. According to Judge Sprizzo, the new section 242(g) effectively bars all review of claims arising from the "action or decision of the Attorney General

---

U.S.C. § 2241 remained despite the limits of IIRIRA codified in section 242(g)); Jurado-Gutierrez v. Green, 977 F. Supp. 1089 (D. Col. 1997) (finding habeas corpus remained to adjudicate constitutional claims; appeal pending in the 10th Circuit); Padilla v. Caplinger, 1997 WL 564008 (E.D. La. Sept. 5, 1997) (finding that habeas corpus remained under art. 1, § 9, cl. 2 of the Constitution for constitutional claims, but finding that the petitioner failed to raise a colorable constitutional claim). *But see* U.S. *ex rel.* Morgan v. McElroy, 981 F. Supp. 873 (S.D.N.Y. 1997) (finding that section 242 barred all review, including habeas except as provided in the INA).

148. 109 F. 3d 1185 (7th Cir. 1997).

149. *Id.* at 1195. I believe that Judge Easterbrook's evaluation of the impact of section 242 on the availability of habeas corpus must be viewed as dicta because he was ruling on a case governed by AEDPA and the issue was not properly before the Court.

150. *See also* Sandoval v. Reno, 1997 U.S. Dist. LEXIS 20976 (E.D. Pa. Dec. 30, 1997) (exercising habeas jurisdiction under section 2241, finding miscarriage of justice based on a legal error); Jurado-Gutierrez v. Green, 1997 U.S. Dist. LEXIS 15057 (D. Col. Sept. 29, 1997) (finding review was available under section 2241 to review colorable, substantial constitutional violations).

151. *See* Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997).

152. 1997 WL 159795 (Feb. 21, 1997) (Op. Att'y Gen.) (reversing the vacated decision by the BIA, Int. Dec. 3289 (BIA 1996)). Judge Weinstein's opinion has been appealed to the Second Circuit, and oral arguments were presented on January 21, 1998.

153. 985 F. Supp. 828 (S.D.N.Y. 1997).

154. This case is also on appeal to the Second Circuit Court of Appeals. Oral argument was consolidated with the appeal in *Mojica* and heard on January 21, 1998.

155. 1997 WL 736512 (S.D.N.Y. Nov. 24, 1997).

156. Judge Sprizzo distinguishes the cases by stating that they were interpreting the provisions of AEDPA and were not considering the effect of the new section 242(g).

to commence proceedings . . . ." In this particular case, the court characterized the denial of adjustment of status as within the preclusion intended by section 242(g). Judge Sprizzo took the position that the only form of habeas corpus review available to aliens is that which is set forth in the INA itself.[157] He noted that even if there is some form of habeas corpus guaranteed by the Constitution, the merits of the peitioner's claim do not rise to a constitutional level.[158]

The conflict between these decisions reflects the failure of the statutory reforms to adequately address the role of habeas corpus review in immigration cases. The confusion about the jurisdictional basis for habeas is closely connected with issues surrounding the appropriate scope of habeas review, which is discussed below in section D.4.

On the very day that this article was going to print, the First Circuit Court of Appeals ruled in *Goncalves v. Reno,* 1998 WL 236799 (1st Cir. May 15, 1998) that nothing in the recent immigration legislation had specifically amended 28 U.S. C. § 2241 and therefore, District Courts had habeas corpus jurisdiction to review immigration matters. The First Circuit also found that habeas review included jurisdiction to consider challenges to the agency's statutory interpretations.

C. *Constitutional Grant of Habeas Review*

If IIRIRA could be read to eliminate the statutory right to a writ of habeas corpus, the right to habeas should be available as a matter of constitutional right. The writ of habeas corpus is guaranteed by the Constitution and cannot be suspended except where "in Cases of Rebellion or Invasion the Public Safety may require it."[159] One circuit court has referred to a "free standing" power in the federal courts to hear a constitutional writ of habeas corpus.[160]

However, if IIRIRA is read as blocking the statutory basis for habeas corpus jurisdiction then we must ask: What federal court has jurisdiction to hear constitutional claims of habeas corpus? The government might argue that Congress must expressly create a grant of federal court jurisdiction for the court to be able to hear the writ.[161] My own view is that if IIRIRA is read

---

157. *See, e.g.,* INA § 242(e), 8 U.S.C. § 1252(e). This section limits habeas to determinations of whether the petitioner is an alien, whether the petitioner was ordered removed under INA § 235 (b)(1), 8 U.S.C. § 1225(b)(1) and whether the petitioner is a lawful resident, refugee or asylee. In *Li v. Eddy,* 1997 U.S. Dist. LEXIS 14431 (D. Alaska July 2, 1997), the court held that the determination of whether the petitioner was ordered removed under the provision of INA § 235(b)(1), 8 U.S.C. § 1225(b)(1) does not include a "good faith" determination. Therefore the court may not determine if section 235(b)(1) is being used as a pretext. This rasies the question of whether this limited form of habeas review could be deemed a *pro se* violation of the Suspension Clause of the Constitution. In limiting review to a point of essentially no review at all, Congress has, arguably, suspended the writ of habeas corpus in violation of the Constitution.

158. *Id.*

159. U.S. CONST. art. I, § 9, cl. 2.

160. *See* Kolster v. INS, 101 F.3d 785, 790-91 n.4 (1st Cir. 1996).

161. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 100-01 (1807) (discussing, in dicta, limits on the Supreme Court's original jurisdiction to grant a writ of habeas corpus and implying that the writ can only be issued by a court which is expressly granted jurisdiction).

to repeal the statutory basis for habeas, then this reading constitutes a suspension of the writ of habeas corpus and the statute is unconstitutional.[162]

D. *Procedural Considerations in Habeas Corpus*

1. *Venue and Personal Jurisdiction*

This is another complex area in habeas litigation. The federal statutes do not specify the precise venue. Rather, courts have interpreted the statutes to require that the petition be filed in the jurisdiction where the officer has custody over the person seeking the writ.[163] The appropriate venue is where the alien is in the custody of the INS. But where is an alien in custody? And who is the custodian, the District Director or the Attorney General? In a recent habeas case under 28 U.S.C. § 2241, the federal district court ruled that venue was appropriate in the Southern District of New York where the alien was residing.[164] This same case also addressed the issue of whether the court had personal jurisdiction over the District Director in Oakdale, Louisiana. The government had opposed the writ on the ground that the Southern District of New York lacked personal jurisdiction. The court ruled that actions of the District Director in New York in requesting that the alien surrender for deportation were sufficient to allow the assertion of personal jurisdiction over the Oakdale, Louisiana District Director.[165]

2. *Custody and Effect of Departure*

In the past, most habeas cases named the District Director as the officer having custody over the alien. In a few recent cases, courts have accepted jurisdiction over the Attorney General.[166] Some courts required actual custody of the alien before the writ could be issued. In cases interpreting the former section 106(a)(10), the custody determination may have been more

---

162. A theoretical argument to avoid reading the statute as a suspension would be to read it as eliminating federal court jurisdiction but allowing state courts to hear writ of habeas corpus claims. However, in *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), the Supreme Court held that no state court has the power to release an individual from federal custody. Section 242 also seems to intend exclusive federal court jurisdiction to review immigration cases, although the exclusivity language is only used to head a subsection which in itself precludes review. *See* INA § 242(g), 8 U.S.C. § 1252(g).

163. *See, e.g.*, Braden v. 30th Judicial Cir. Ct. Ky., 410 U.S. 484 (1973) (reviewing of a state criminal conviction). The statute says that the writ should be "directed to the person having custody of the person detained." 28 U.S.C. § 2243.

164. Yesil v. Reno, 958 F.Supp. 828, *mot. to reconsider denied*, 973 F. Supp. 372 (S.D.N.Y. 1997).

165. *Id.*

166. *See, e.g.*, Nwankwo v. Reno, 828 F. Supp. 171 (E.D.N.Y. 1993) (finding that the Attorney General was appropriate officer where writ presented solely questions of law and did not require production of the alien); Yesil v. Reno, *et al.*, *supra* note 83, (holding that the court had personal jurisdiction in New York over the district director from Oakdale). In *Nwankwo*, the alien was in detention in Oakdale awaiting deportation. He had originally begun detention for a criminal conviction and sentence issued by the Eastern District. The court treated his request as a writ of habeas corpus challenging his continued detention in excess of six months after an order of deportation. The former section INA § 242(c) was repealed in IIRIRA. The court also noted that the Western District of Louisiana had been flooded with habeas filings "as a result of lengthy delays in processing detainees for deportation." 828 F. Supp. at 174. Many practitioners choose to name both the District Director and the Attorney General.

rigidly defined because habeas review was allowed in addition to the other forms of review once the alien was placed in custody.[167] Other courts have recognized that the alien can show a form of constructive custody due to restraints on her liberty.[168]

In the former judicial review statute, if an alien had departed the country or was legally removed from the country, the courts lost jurisdiction.[169] The new statute is silent on the effect of departure. If we look to cases decided before the 1961 judicial review provisions, we find some cases that allowed the court to continue to exercise habeas jurisdiction even after removal of the alien but the habeas had begun before the removal.[170] In a recent case, the Ninth Circuit held that the district court had habeas jurisdiction nine months after the alien had been deported because the removal was unlawful.[171] The better practice will be to assume that you must file the writ of habeas corpus *before* the INS removes the alien.

3. *Habeas and Order to Show Cause Proceedings*

There are two routes for the courts and the government to respond to a writ of habeas corpus. In the first, the government must produce the alien and respond immediately by establishing the lawfulness of the detention. In the second, the government may request that the court issue an order to show cause which will allow for motions and argument before the alien must be

---

167. U.S. *ex rel.* Marcello v. District Director, INS, 634 F.2d 964 (5th Cir.) *cert. denied*, 452 U.S. 917 (1981) (requiring actual custody although alien was only under order of supervision and habeas review allowed). The Fifth Circuit may have read in a strict custody requirement because the court was trying to understand why Congress allowed both a petition for review and habeas jurisdiction to review deportation orders under the former INA § 106. The Fifth Circuit coupled a strict custody requirement with a broad scope of review in habeas to reconcile the "streamlining" goals of Congress in adopting section 106 in 1961. *See* El-Youssef v. Meese, 678 F. Supp. 1508, 1513-16 (D. Kan. 1988) (addressing the scope of review in habeas corpus under former section 106).

168. *See, e.g.*, Galaviz-Medina v. Wooten and U.S. Immigration Review Bd. of Appeals, 27 F.3d 487 (10th Cir. 1994) (finding custody where alien was held in state prison pursuant to an INS detainer and an outstanding final order of deportation; but case was interpreting former section 106(a)(10)). The law concerning writs of habeas corpus evolves like any other body of law. The modern trend has been to recognize general constraints on liberty as sufficient to create habeas corpus jurisdiction. *See generally*, JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 8.2(b)(1004). *See* Hensley v. Municipal Court, 411 U.S. 345 (1973) (finding release pending trial was sufficient constraint); Jones v. Cunningham, 371 U.S. 236 (1963) (finding state release on parole was sufficient restraint on liberty to justify habeas review). The government will undoubtedly try to establish a very strict custody requirement to narrow the ability of aliens to seek judicial review and even to avoid review. Even if the alien has been removed, theoretically habeas jurisdiction should still be available especially now that the provision which terminated jurisdiction upon the departure of the alien has been repealed. *See, e.g.*, Singh v. Waters, 87 F.3d 346 (9th Cir. 1996) (unlawful deportation equaled continuing restraint on alien and thus court had habeas jurisdiction, interpreting former INA § 106).

169. Former INA § 106(c).

170. *See, e.g., Ex parte* Endo, 323 U.S. 283 (1944) (allowing continued habeas); *Ex parte* Catanzaro, 138 F.2d 100 (3d Cir. 1943) (allowing continued habeas). *See* cases cited in GORDON, MAILMAN & YALE-LOEHR, *supra* note 31, § 81.04[2][c] fn. 4. For cases which held that the habeas had to begin before the removal of the alien, *see* Terrado v. Moyer, 820 F.2d 920 (7th Cir. 1987); U.S. *ex rel.* Smith v. Warden of Philadelphia City Prison, 87 F. Supp. 339 (E.D. Pa. 1949) *aff'd per curiam*, 181 F.2d 847 (2d Cir. 1950).

171. Singh v. Waters, 87 F.3d 346 (9th Cir. 1996). *See also* Mendez v. INS, 563 F.2d 956 (9th Cir. 1977) (creating the unlawful deportation exception to loss of jurisdiction under the former section 106). Not every circuit agreed with the *Mendez* exception.

released or produced. The alien must contravene the government's assertions in the response in a pleading known as a "traverse." Any government allegation not contravened in the traverse is deemed to be true.

4. *Scope of Review*

The exact scope of review under a writ of habeas corpus is debated.[172] Prior to the 1961 judicial review provisions, the writ was used in a wide variety of circumstances and the standard of review varied with the allegations of illegality in the seizure of the alien. The changes created by IIRIRA have returned the courts to the pre-1961 habeas jurisprudence. In these early habeas cases, courts were willing to hear constitutional challenges such as an attack on the immigration law itself or on the procedure afforded under the statutes.[173] But habeas was also used to hear non-constitutional claims such as the appropriateness of the agency interpretation of the statute or challenges to the sufficiency of the evidence presented in the administrative hearing.[174] As this article was going to print, the First Circuit Court of Appeals concluded in *Goncalves v. Reno,* 1998 WL 236799 (1st Cir. May 15, 1998) that habeas review included review of pure statutory or legal issues such as the failure to exercise discretion. The case left open the issue of whether habeas could be used to review decisions made in the exercise of agency discretion. (See note 17.)

Unfortunately, in some recent federal court decisions, the district courts concluded that the appropriate standard for review was whether the case presented a "miscarriage of justice"[175] or "grave constitutional error."[176] These courts appear to have accepted the government's argument that habeas review could not be an equal substitute for the direct review which Congress

---

172. The scope of review depends in part on whether the habeas petition is based on 28 U.S.C. § 2241 or whether it is a pure constitutional habeas. For a discussion of some of the distinction between constitutional habeas and habeas under section 2241, *see* Benson, *supra* note 6, at 1465-78.

173. *See* Yamataya v. Fisher, 189 U.S. 86 (1903) (hearing challenges to the grant of plenary power to the inspection officer in the 1891 immigration laws).

174. For challenges to the interpretation of the statute *see* Haw Tan v. Phelan, 333 U.S. 6 (1948) (rejecting executive's interpretation of multiple criminal conviction deportation provision); Delgadillo v. Carmichael, 332 U.S. 388 (1947) (rejecting executive's interpretation of "entry"); Kessler v. Strecker, 307 U.S. 22 (1939) (rejecting executive's interpretation of ideological deportation provision); Mahler v. Eby, 264 U.S. 32 (1924) (rejecting executive's interpretation of findings necessary for deportation after conviction under espionage act); Gegiow v. Uhl, 239 U.S. 3 (1915) (rejecting executive's broad interpretation of public charge exclusion provision). *See also* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (rejecting executive's interpretation of procedural regulation); Wong Yang Sung v. McGrath, 339 U.S. 908 (1950) (rejecting executive's interpretation of APA procedural requirements). For cases dealing with the sufficency of evidence, *see Ex Parte* Fierstein, 41 F.2d 53 (9th Cir. 1930) (finding no evidence); Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928) (unfair procedure); United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103 (1927); Tang Tun v. Edsell, 223 U.S. 673 (1912); Chin Yow v. United States, 208 U.S. 8 (1908). *See also* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 637-41 (1988).

175. *See* Eltayeb v. Ingham, 950 F. Supp. 95 (S.D.N.Y. 1997); Mbyia v. INS, 930 F. Supp. 609 (N.D. Ga. 1996). In *Eltayeb*, the court recites a miscarriage of justice standard, yet appears to conduct a form of review analogous to abuse of discretion review.

176. *See* Duldulao v. Reno, 958 F. Supp. 476 (D. Haw. 1997).

eliminated in the AEDPA. But even with the adoption of the "miscarriage of justice or grave constitutional error" standard, the district courts have applied a varied interpretation of the types of claims which can fall within the scope of that phrase. In *Yesil* the district court granted a writ of habeas corpus in a case where the alien alleged the INS had improperly interpreted his length of lawful residence for statutory eligibility for the section 212(c) waiver.[177] Judge Chin found that this allegation of incorrect statutory interpretation amounted to a due process violation.[178] In contrast, in *Eltayeb,*[179] the court said it would only conduct review for a miscarriage of justice but appeared to conduct a form of "abuse of discretion" review.[180] In *Duldulao,*[181] the district court judge held that a claim of abuse of discretion in denying section 212(c) relief did not present any constitutional claims, nor did it represent a miscarriage of justice and the habeas corpus petition was denied.[182]

The obvious result of these decisions is that litigants will now endeavor to present a habeas petition which articulates constitutional claims.[183] Of course, not every case will contain a strong constitutional claim, but where it is possible to fashion a legitimate allegation of a constitutional violation, attorneys will do so to support the court's exercise of jurisdiction.[184] The unintended result may be that some judges, in an effort to overturn abusive discretionary actions or erroneous statutory interpretations, may couch their decisions in constitutional terms and create new constitutional rights for aliens in general.[185]

5. *Appellate Review of Habeas Corpus*

The decision of the U.S. district court in granting or denying the writ of habeas corpus may be appealed to the circuit court of appeals pursuant to 28 U.S.C. § 2253. The decision of the court of appeals may be appealed to the U.S. Supreme Court via the writ of certiorari. The Supreme Court also has original jurisdiction to consider a writ of habeas corpus under 28 U.S.C. § 2241.

---

177. 985 F.Supp. 828 (S.D.N.Y. 1997).

178. *Id.*

179. *See* Eltayeb v. Ingham, 950 F.Supp. 95 (S.D.N.Y. 1997).

180. *Id.*

181. Duldulao v. Reno, 958 F.Supp. 476 (D. Haw. 1997).

182. *Id.* The district court also rejected Mr. Duldulao's objection to the admission of hearsay evidence, finding that in the "instant case," the evidence did not present a Fifth Amendment due process claim. *Id.* at 481.

183. *See, e.g.,* Chow v. INS, 113 F.3d 659 (7th Cir. 1997) (reading Chow's claims as presenting a due process challenge to the nature of the deportation hearing itself and suggesting habeas review would be available but not deciding the jurisdictional authority for habeas).

184. *See* Lenni Benson, *Surviving to Fight Another Day: Preserving Issues for Appeal,* 1995-1996 IMMIGRATION AND NATIONALITY LAW HANDBOOK 353-66 VOL. II (AILA 1995). In that article I discuss how to preserve constitutional claims in administrative hearings before an agency not empowered to rule directly on such claims.

185. For a discussion of the "constitutionalization" of immigration law *see* Benson, *supra* note 6, at 1484-94.

VI. CONCLUSION

The attacks on judicial review of removal orders represents an extraordinary assertion of Congressional power to control the jurisdiction of the federal courts and of its power over aliens. Although both of these powers have been called "plenary," the central issue remains whether our constitution will allow Congress to empower the INS with unfettered discretion to both interpret and implement the immigration laws.

Although Congress has the power to define the vessel for judicial review and to streamline the procedures, it cannot constitutionally eliminate the vessel altogether. The right to habeas corpus review and to review of constitutional claims will reshape the contours of immigration practice and raise the stakes of litigation.