

CRS Report for Congress

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

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Yule Kim
Legislative Attorney
American Law Division



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Summary

Aliens may be removed from the United States for a variety of reasons, such as entering into the country unlawfully, overstaying a visa, or committing a crime. Prior to removal, however, aliens usually have access to a removal hearing or some other form of adjudication that determines whether an alien is subject to removal. Although judicial review by a federal court of appeals of a removal order is generally available, Congress has denied the federal courts jurisdiction to review many types of removals, such as expedited removal orders, crime-related removals, discretionary determinations, and matters involving prosecutorial discretion.

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

This report shall attempt to wend a way through the jurisdictional thicket created by the Immigration and Nationality Act (INA) by focusing on the procedural mechanisms used to initiate judicial review and the reach of an Article III court's jurisdiction to review a removal order. Discussion concerning the procedures underlying removal hearings and administrative review is limited to their relation to judicial review and will not be expatiated.

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

Introduction

Aliens may be removed from the United States for a variety of reasons, such as entering into the country unlawfully, overstaying a visa, or committing a crime. Prior to removal, however, aliens usually have access to a removal hearing or some other form of adjudication that determines whether an alien is subject to removal. If the removal hearing results in an order to remove an alien from the country, the alien may have recourse to seek administrative review of the removal order. Assuming, after administrative review, that the removal order becomes administratively final, even further judicial review by an Article III court may be warranted. However, even though judicial review of administratively final removal orders is generally available, there are many exceptions to this general rule that depend on the facts and circumstances of the removal. Consequently, there is now a convoluted skein of decisional law construing these exceptions working in conjunction with the already labyrinthine statutory regime governing judicial review.

This report shall attempt to wend a way through this jurisdictional thicket by focusing on the procedural mechanisms used to initiate judicial review and the reach of an Article III court's jurisdiction to review a removal order. Discussion concerning the procedures underlying removal hearings and administrative review is limited to their relation to judicial review and will not be expatiated.

General Procedural Framework for Judicial Review

History. Prior to the enactment of the Immigration and Nationality Act (INA) in 1952, federal district courts reviewed deportation¹ cases via the federal writ of habeas corpus, which is a procedural mechanism that allows federal district courts to review the legality of a person's detention.² After the passage of the INA, the Supreme Court held that judicial review could be obtained by seeking declaratory judgment or injunctive relief under the Administrative Procedure Act (APA), which

¹ The process of ejecting an alien from the United States used to be called "deportation," but is now primarily referred to as "removal" by the Immigration and Nationality Act.

² See generally, Henry Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harvard L. Rev. 1362, 1389-1396 (1953).

begins the judicial review process in the federal district courts.³ Subsequently, in 1961, Congress replaced APA review of deportation orders with the “petition for review” offered by the Hobbs Act, a preexisting law that expedites judicial review by bypassing the district courts and placing review directly in the federal courts of appeals. The Antiterrorist and Effective Death Penalty Act (AEDPA), enacted in 1996, re-codified the petition for review mechanism in INA Section 242.⁴

Hobbs Act. The INA is the primary source for the bulk of the federal immigration laws, including the substantive law involving the removal of aliens unlawfully present within the United States. However, when outlining the procedural framework for the judicial review of removal orders, the INA primarily references the framework of the Hobbs Act, found in chapter 158 of title 28 of the U.S. Code.⁵ The Hobbs Act, which governs the judicial review of a select group of administrative proceedings, gives exclusive jurisdiction to review all final administrative orders under its purview to the federal courts of appeals.⁶ This effectively channels most judicial review of removal orders to the courts of appeals and bypasses review from the federal district courts.⁷ The treatment of removal orders, however, largely differs from other administrative orders under the Hobbs Act because the INA subjects removal orders to additional procedures and rules.⁸ One significant departure from the Hobbs Act is that the INA expressly forbids the court of appeals to take additional evidence even if it finds the new evidence material and that there were reasonable grounds for failure to adduce the evidence before the agency.⁹ Others include changes in deadlines, choice of venue, and other procedural rules.¹⁰

The Petition for Review. The principal vehicle for judicial review is a *petition for review*, which must be filed in the circuit in which the removal hearing was held.¹¹ Before a petition for review can be filed, an alien must first exhaust all administrative remedies that are available as of right.¹² Moreover, the principles of *res judicata* or collateral estoppel can bar the petition for review if the validity of the

³ *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

⁴ See P.L. 104-132, 110 Stat. 1214 (1996).

⁵ INA § 242(a)(1) (codified at 8 U.S.C. § 1252(a)(1)) (“Judicial review of a final order of removal...is governed only by chapter 158 of title 28 of the United States code...”).

⁶ 28 U.S.C. § 2342.

⁷ Although the Hobbs Act gives the federal court of appeals exclusive jurisdiction to review removal orders, aliens can still challenge some aspects of their removal in federal district court via a *habeas corpus* proceeding.

⁸ INA § 242(a)(1) (codified at 8 U.S.C. § 1252(a)(1)).

⁹ *Id.*

¹⁰ See INA § 242(b) (codified at 8 U.S.C. § 1252(b)).

¹¹ INA § 242(b)(2) (codified at 8 U.S.C. § 1252(b)(2)).

¹² INA § 242(d)(1) (codified at 8 U.S.C. § 1252(d)(1)).

removal order was established in a prior judicial proceeding.¹³ This bar to review can be overcome only if the petitioned court finds new grounds that could not have been presented in the prior proceeding or that the remedy provided by the prior proceeding was inadequate to test the validity of the removal order.¹⁴

Assuming that there was exhaustion of available administrative remedies and the review is not barred by res judicata or collateral estoppel, the petition for review must then be filed no later than 30 days after the date in which the removal order becomes administratively final.¹⁵ The petition must also be served on the Attorney General, who is the respondent in this cause of action, and on “an officer or employee of the Service in charge of the Service district in which the final order of removal was entered,” which usually means the ICE official in charge of detention and removal in the area where the order was made final.¹⁶ After the petition for review is filed, an alien’s brief to the federal court of appeals in support of his petition must also be filed within 40 days after the administrative record becomes available; a reply brief must be served within 14 days of service of the Attorney General’s brief.¹⁷ The deadlines may not be extended except upon motion for good cause shown.¹⁸ Failure to file a brief within the deadline will result in the court dismissing the appeal unless a manifest injustice would result.¹⁹ The Attorney General, on the other hand, has no statutory deadline to file his brief, but instead relies on a deadline established by a rule of the court.

Stay of Deportation. An alien’s removal is not automatically stayed when he files his petition for review.²⁰ Rather, the alien must file a separate motion to move the court to order a stay.²¹ As a matter of practice, aliens typically couple their petition for review with motions for stays of removal pending decision. At least one circuit, the Ninth, upon receipt of the motion, will grant a temporary stay until it rules on the motion.²² The substantive standard used to determine whether a court should grant a stay appears to vary by circuit; the Ninth Circuit, for example, grants a stay of removal if the alien shows “either (1) a probability of success on the merits and the possibility of irreparable injury or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner’s favor.”²³ Most of the other

¹³ INA § 242(d)(2) (codified at 8 U.S.C. § 1252(d)(2)).

¹⁴ *Id.*

¹⁵ INA § 242(b)(1) (codified at 8 U.S.C. § 1252(b)(1)).

¹⁶ INA § 242(b)(3)(A) (codified at 8 U.S.C. § 1252(b)(3)(A)).

¹⁷ INA § 242(b)(3)(C) (codified at 8 U.S.C. § 1252(b)(3)(C)).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ INA § 242(b)(3)(B) (codified at 8 U.S.C. § 1252(b)(3)(B)).

²¹ *Id.*

²² *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997).

²³ *Andreu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (en banc).

circuits seem to follow the Ninth Circuit.²⁴ The Eleventh Circuit, on the other hand, deviates from this practice by requiring the alien to present clear and convincing evidence that the Board of Immigration Appeals (BIA) decision to remove was prohibited as a matter of law.²⁵

Standard of Review. If the petition for review overcomes all of these procedural barriers, the federal court of appeals reviewing the case will base its decision of the merits solely on the administrative record.²⁶ Furthermore, the administrative findings of fact are conclusive unless a “reasonable adjudicator would be compelled to conclude to the contrary.”²⁷ The federal courts of appeals appear to have interpreted this language by using the “substantial evidence” test when reviewing administrative findings of fact.²⁸ The “substantial evidence” test is the standard of review the courts of appeal use when reviewing findings of fact made in other forms of formal administrative adjudications.²⁹ This deferential standard of review is meant only to assess the reasonableness of the agency factfinding rather than its veracity; the inquiry is whether there is “such evidence as a reasonable mind might accept as adequate to support a conclusion.”³⁰ Although this standard is deferential and assumes the facts on the record are correct, it still obligates the courts of appeals to consider the whole record, including the evidence which would detract from the agency’s decision.³¹ Evidence that a court of appeals must consider when reviewing an agency’s decision includes the determination made by the Administrative Law Judge (ALJ),³² even if the agency rejects the ALJ’s findings.³³

²⁴ See *Bejjani v. INS*, 271 F.3d 670, 687-689 (6th Cir. 2001); *Mohammed v. Reno*, 309 F.3d 95, 99-100 (2d Cir. 2002); *Arevalo v. Ashcroft*, 344 F.3d 1, 8-9 (1st Cir. 2003); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005).

²⁵ *Weng v. U.S. Attorney General*, 287 F.3d 1335 (11th Cir. 2002).

²⁶ INA § 242(b)(4)(A) (codified at 8 U.S.C. § 1252(b)(4)(A)).

²⁷ INA § 242(b)(4)(B) (codified at 8 U.S.C. § 1252(b)(4)(B)).

²⁸ See, e.g., *Ahmed v. Keisler*, 504 F.3d 1183, 1191 (9th Cir. 2007) (reviewing for substantial evidence a decision that an applicant is not eligible for asylum, withholding of removal, or protection under the Convention Against Torture); *Singh v. Ashcroft*, 398 F.3d 396, 400 (6th Cir. 2005) (“We review administrative findings of fact, such as whether an alien qualifies as a refugee, under the substantial evidence standard...”); *Mendes v. INS*, 197 F.3d 6, 13 (1st Cir. 1999) (“We review findings of fact and credibility by the BIA under a ‘deferential substantial evidence standard.’”); *Balasubramaniam v. INS*, 143 F.3d 157, 161 (3d Cir. 1998). See also H.Rept. 109-72, at 175-176 (2005) (Conf. Rep.) (equating the standard found in INA § 242(b)(4)(B) with the “substantial evidence” standard).

²⁹ 5 U.S.C. § 706(2)(E).

³⁰ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

³¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 464-465 (1951).

³² In the context of immigration law, ALJs are called Immigration Judges (IJs).

³³ *Universal Camera Corp.*, 340 U.S. at 493-494.

Jurisdictional Bars on Judicial Review

Judicial Review Generally Available. Judicial review of removal orders is generally available under the parameters of the Hobbs Act by a petition of review.³⁴ This general rule, however, is subject to numerous jurisdictional bars which can be triggered depending on the circumstances surrounding an alien's case. INA Section 242(a)(2) enumerates the substantive grounds that bar the judicial review of removal orders: expedited removal orders, denials of discretionary relief, orders against criminal aliens, and matters involving prosecutorial discretion. INA Section 236 also has a provision barring review of an alien's mandatory detention during a pending removal proceeding.

Expedited Removal Orders. INA Section 235(b)³⁵ provides for a set of expedited removal procedures that can be used on aliens arriving at the borders of the United States, whom immigration inspectors believe to be inadmissible because of fraud or for not possessing valid documents.³⁶ If an alien claims asylum after being determined to be inadmissible, he is sent to an asylum officer who, if he makes an adverse credibility determination, shall order the alien removed without further review.³⁷

The federal courts of appeals do not have jurisdiction to review the merits of INA Section 235(b) expedited removal orders.³⁸ This bar to review extends to all claims arising from or relating to the implementation of an INA Section 235(b) expedited removal order.³⁹ The decision by the Attorney General to invoke INA Section 235(b) expedited removal, and presumably the reasons why the decision was made, is similarly barred from review.⁴⁰ Moreover, the application of INA Section 235(b) expedited removal to an alien, including aliens found subject to expedited removal even when found in the interior of the country, cannot be reviewed.⁴¹ Finally, the procedures and policies adopted by the Attorney General to implement

³⁴ INA § 242(a).

³⁵ The Attorney General, at his discretion, may also use expedited removal on an alien who has not been admitted or paroled into the United States and cannot show two years of continuous physical presence within the country. In practice, this discretion is rarely used. INA § 235(b)(1)(A)(iii) (codified at 8 U.S.C. § 1225(b)(1)(A)(iii)).

³⁶ INA § 235(b)(1) (codified at 8 U.S.C. § 1225(b)(1)). *See also* INA § 212(a)(6)(C) (codified at 8 U.S.C. § 1182(a)(6)(C)) (aliens inadmissible for misrepresentation or falsely claiming citizenship); INA § 212(a)(7) (codified at 8 U.S.C. § 1182(a)(7)) (alien inadmissible for not possessing valid visas, passports, or other immigration documents).

³⁷ INA § 235(b)(1)(B)(iii)(I).

³⁸ INA § 242(a)(2)(A) (codified at 8 U.S.C. § 1252(a)(2)(A)).

³⁹ INA § 242(a)(2)(A)(i) (codified at 8 U.S.C. § 1252(a)(2)(A)(i)).

⁴⁰ INA § 242(a)(2)(A)(ii) (codified at 8 U.S.C. § 1252(a)(2)(A)(ii)).

⁴¹ INA § 242(a)(2)(A)(iii) (codified at 8 U.S.C. § 1252(a)(2)(A)(iii)).

INA Section 235(b) expedited removal are not subject to review.⁴² No courts, including the courts of appeals, can issue declaratory, injunctive, or other forms of equitable relief pertaining to an INA Section 235(b) expedited removal order;⁴³ nor can they certify a class in an action challenging an INA Section 235(b) expedited removal order.⁴⁴

Notwithstanding this bar, several aspects of an INA Section 235(b) expedited removal order can still be reviewed through habeas corpus. Habeas review, while available, is limited to determinations as to whether the habeas petitioner is an alien, is the actual person named in the order, is lawfully admitted for permanent residence, has refugee status, or has been granted asylum.⁴⁵ Furthermore, challenges to the constitutionality of the law authorizing INA Section 235(b) expedited removal or of regulations promulgated to implement INA Section 235(b) expedited removals and challenges as to whether the regulations are inconsistent or in violation with the law are also available, but can be heard only by the United States District Court for the District of Columbia.⁴⁶ The deadline to challenge the law or regulation is 60 days after the challenged law or regulation is first implemented.⁴⁷

Denials of Discretionary Relief. Under the INA, the Attorney General may use his discretion in granting various forms of relief from removal. The denial of such discretionary relief, however, is largely not subject to judicial review.⁴⁸ Some forms of discretionary relief are expressly excluded from review:

- waiver of inadmissibility because of (1) a crime of moral turpitude conviction, (2) multiple criminal convictions, (3) prostitution grounds, (4) a marijuana possession conviction, or (5) immunity from prosecution after committing a serious criminal offense;⁴⁹
- waiver of inadmissibility because of fraud or misrepresentation of a material fact when seeking either admission, or documentation for admission, into the United States;⁵⁰
- cancellation of removal for permanent resident aliens;⁵¹

⁴² INA § 242(a)(2)(A)(iv) (codified at 8 U.S.C. § 1252(a)(2)(A)(iv)).

⁴³ INA § 242(e)(1)(A) (codified at 8 U.S.C. § 1252(e)(1)(A)).

⁴⁴ INA § 242(e)(1)(B) (codified at 8 U.S.C. § 1252(e)(1)(B)).

⁴⁵ INA § 242(e)(2) (codified at 8 U.S.C. § 1252(e)(2)).

⁴⁶ INA § 242(e)(3) (codified at 8 U.S.C. § 1252(e)(3)).

⁴⁷ INA § 242(e)(3)(B) (codified at 8 U.S.C. § 1252(e)(3)(B)).

⁴⁸ INA § 242(a)(2)(B) (codified at 8 U.S.C. § 1252(a)(2)(B)).

⁴⁹ See INA § 212(h) (codified at 8 U.S.C. § 1182(h)).

⁵⁰ See INA § 212(i) (codified at 8 U.S.C. § 1182(i)).

⁵¹ See INA § 240A (codified at 8 U.S.C. § 1229b).

- cancellation of removal and adjustment of status for certain nonpermanent resident aliens;⁵²
- voluntary departure;⁵³ and
- adjustment of status of nonimmigrants to legal permanent resident status.⁵⁴

Although this jurisdiction-stripping provision forecloses judicial review of discretionary decisions, it appears that the federal courts of appeals have concluded that non-discretionary issues of law or fact that may arise out of these decisions do not fall within the ambit of the jurisdiction-stripping.⁵⁵

Similarly excluded from judicial review is a “decision or action of the Attorney General or Secretary of Homeland Security the authority for which is specified under [Title II of the INA] to be in the discretion of the Attorney General or the Secretary of Homeland Security,” other than the granting of asylum.⁵⁶ Although this provision purportedly strips jurisdiction over all matters left to the discretion of the Attorney General and the Secretary of Homeland Security, since it is restricted to Title II of the INA, discretionary matters codified outside of Title II, i.e., matters related to citizenship, may still be reviewed by courts.⁵⁷ Thus, this provision seems to exclude from judicial review:

- revocation of visa petition;⁵⁸
- refugee admissions;⁵⁹
- adjustment of status of refugees;⁶⁰
- detention pending removal of arriving noncitizens;⁶¹

⁵² *Id.*

⁵³ *See* INA § 240B (codified at 8 U.S.C. § 1229c).

⁵⁴ *See* INA § 245 (codified at 8 U.S.C. § 1255).

⁵⁵ *Romero-Torres v. Ashcroft*, 327 F.3d 887, 890 (9th Cir. 2003) (holding there was jurisdiction to review non-discretionary question whether an adult daughter qualified as a “child” for purposes of the exceptional and extremely unusual hardship requirement); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 423 (7th Cir. 2004) (holding that the meaning of the term “continuous physical presence” is a non-discretionary question and falls outside of the jurisdiction-stripping provision); *Mireles-Valez v. Ashcroft*, 349 F.3d 213, 216 (5th Cir. 2003) (holding that there was jurisdiction to review non-discretionary issue regarding the meaning of “continuous physical presence”); *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8th Cir. 2005) (holding that there was jurisdiction to review non-discretionary issues concerning the meaning of “continuous physical presence”).

⁵⁶ INA § 242(a)(2)(B)(ii) (codified at 8 U.S.C. § 1252(a)(2)(B)(ii)).

⁵⁷ *Id.* *See also* INA tit. III.

⁵⁸ *See* INA § 205 (codified at 8 U.S.C. § 1155).

⁵⁹ INA § 207(c) (codified at 8 U.S.C. § 1157(c)).

⁶⁰ INA § 209(b) (codified at 8 U.S.C. § 1159(b)).

⁶¹ INA § 236(a), (c)(2) (codified at 8 U.S.C. § 1226(a), (c)(2)). *See also* INA § 236(e) (continued...)

- changes of nonimmigrant status;⁶² and
- record of lawful admission.⁶³

Although the provision excludes discretionary decisions from judicial review, a court has held that only decisions that are entirely discretionary are barred from review.⁶⁴ Decisions that require the application of legal standards under this standard are still open to review.⁶⁵ This approach is in accord with a provision specifically allowing the review of constitutional claims and questions of law that arise from cases generally barred from review.⁶⁶

The federal courts of appeals appear split over whether discretionary decisions authorized by regulation rather than statute remain subject to judicial review. Some courts have ruled that decisions made pursuant to discretionary authority conferred by regulations are all subject to judicial review.⁶⁷ Other courts, on the other hand, bar review of discretionary decisions made under powers conferred by regulations implementing INA Title II statutes.⁶⁸

Orders Against Criminal Aliens. Aliens who commit certain criminal acts while within the United States are removable.⁶⁹ Many of the criminal offenses that warrant removal also trigger a jurisdictional bar from judicial review.⁷⁰ These crime-related grounds are

- two or more crime of moral turpitude convictions punishable by sentences of one year or longer;⁷¹

⁶¹ (...continued)

(codified at 8 U.S.C. § 1226(e)) (excluding discretionary decisions made by the Attorney General under Section 236 from judicial review).

⁶² INA § 248 (codified at 8 U.S.C. § 1258).

⁶³ INA § 249 (codified at 8 U.S.C. § 1259).

⁶⁴ *Nakomoto v. Ashcroft*, 363 F.3d 874, 880 (9th Cir. 2004).

⁶⁵ *Id.* at 881 (“We do, however, retain jurisdiction to review the Attorney General’s decisions, where his or her exercise of discretion is guided by the application of legal standards to the facts in question.”).

⁶⁶ INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

⁶⁷ *See, e.g., Medina-Morales v. Ashcroft*, 362 F.3d 1263, 1270 (9th Cir. 2004); *Yu Zhao v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Singh v. Gonzales*, 404 F.3d 1024, 1026-1027 (7th Cir. 2005).

⁶⁸ *See, e.g., Onyinkwa v. Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004); *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004).

⁶⁹ INA § 237(a)(2)(A)(ii), (A)(iii), (B), (C), (D) (codified at 8 U.S.C. § 1227(a)(2)(A)(ii), (A)(iii), (B), (C), (D)).

⁷⁰ INA § 242(a)(2)(C) (codified at 8 U.S.C. § 1252(a)(2)(C)).

⁷¹ INA § 237(a)(2)(A)(ii) (codified at 8 U.S.C. § 1227(a)(2)(A)(ii)).

- aggravated felonies;⁷²
- controlled substances offenses other than marijuana possession for one's own use;⁷³
- firearm offenses;⁷⁴ or
- miscellaneous crimes related to espionage, sabotage, treason and sedition, threats against the President, military expedition against a friendly nation, a violation of the Military Selective Service Act or Trading With The Enemy Act, immigration document fraud, or importation of an alien for an immoral purpose.⁷⁵

Although there is a provision barring judicial review of removal orders based on crime-related grounds, in actuality, questions of law related to the order remain open to review. For example, if the crime-related ground for removal is an aggravated felony conviction, an appellate court may review the immigration court's determination of whether the crime in question constituted an aggravated felony.⁷⁶ Similarly, a court has also ruled that it has jurisdiction to review the determination whether an offense constitutes a crime of moral turpitude.⁷⁷ Courts have also indicated that they retain jurisdiction to review constitutional issues arising out of crime-related removal orders.⁷⁸ Congress also appears to have codified these holdings in an express provision that preserves judicial review of "constitutional claims or questions of law raised upon a petition for review."⁷⁹

Prosecutorial Discretion. INA Section 242(g) is an express provision that states that no court has "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision...to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."⁸⁰ The Supreme Court has construed this provision as a means to insulate from judicial review prosecutorial discretion to pursue a removal of an alien.⁸¹ This would therefore prevent undue delay caused by what some considered frivolous challenges to decisions denying discretionary relief that was not meant to be available as a matter of right; primarily

⁷² INA § 237(a)(2)(A)(iii) (codified at 8 U.S.C. § 1227(a)(2)(A)(iii)).

⁷³ INA § 237(a)(2)(B) (codified at 8 U.S.C. § 1227(a)(2)(B)).

⁷⁴ INA § 237(a)(2)(C) (codified at 8 U.S.C. § 1227(a)(2)(C)).

⁷⁵ INA § 237(a)(2)(D) (codified at 8 U.S.C. § 1227(a)(2)(D)).

⁷⁶ See, e.g., Dalton v. Ashcroft, 257 F.3d 200, 203 (2d Cir. 2001); Drakes v. Zimski, 240 F.3d 246 (3d Cir. 2001); Lewis v. INS, 194 F.3d 539 (4th Cir. 1999); Nehme v. INS, 252 F.3d 415 (5th Cir. 2001); Guerrero-Perez v. INS, 242 F.3d 727 (7th Cir. 2001); Penuliar v. Ashcroft, 395 F.3d 1037, 1040 (9th Cir. 2005). See also Leocal v. Ashcroft, 543 U.S. 1 (2004) (exercising jurisdiction to determine whether a state DUI offense without a *mens rea* element constituted an aggravated felony for deportation purposes).

⁷⁷ Carty v. Ashcroft, 395 F.3d 1081, 1082-1083 (9th Cir. 2005).

⁷⁸ See, e.g., Calcano-Martinez v. INS, 533 U.S. 348, 350 n.2 (2001).

⁷⁹ INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

⁸⁰ INA § 242(g) (codified at 8 U.S.C. § 1252(g)).

⁸¹ Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 484 (1999).

challenges to a prosecutorial decision to proceed with a deportation notwithstanding certain humanitarian reasons that could have provided grounds to defer deportation proceedings.⁸² In other words, this provision is “specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.”⁸³ This purpose is also served by the provision precluding review of non-discretionary determinations related to prosecutorial discretion, which would not be covered by the general jurisdictional bar of discretionary relief found in INA Section 242(a)(2)(B).

Detention Decisions. Notwithstanding some exceptions, administrative officials have the discretion to detain an alien while his removal from the United States is pending.⁸⁴ Moreover, “[n]o court may set aside any action or decision...under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”⁸⁵ Although this provision purports to bar the court from setting aside “any action or decision” regarding detention, the Supreme Court has held that a federal habeas corpus action, challenging the constitutional validity of a provision mandating the detention of a criminal alien while his removal is pending, was not barred.⁸⁶ This was because “where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress’ intent,” which this particular jurisdiction-stripping provision lacked.⁸⁷ Thus, it appears that at a minimum, habeas review may still be available when the claim challenges the constitutionality of the detention. Although the REAL ID Act substantively diminished the availability of habeas review for removal orders, it does not appear to have affected the availability of habeas review with respect to challenging the legality of the detention itself.⁸⁸

Exceptions to the Jurisdictional Bars

Constitutional Claims and Questions of Law. Although the jurisdiction-stripping provisions of the INA are comprehensive, judicial review of constitutional claims and questions of law remains preserved.⁸⁹ INA Section 242(a)(2)(D) states that nothing in the INA eliminating review of discretionary decisions, crime-related removals, or any other provision of the INA which limits or eliminates judicial review “shall be construed as precluding review of constitutional claims or questions

⁸² *Id.* at 485.

⁸³ *Id.* at 486.

⁸⁴ INA § 236(a) (codified at 8 U.S.C. § 1226(a)).

⁸⁵ INA § 236(e) (codified at 8 U.S.C. § 1226(e)).

⁸⁶ *Demore v. Kim*, 538 U.S. 510, 517 (2003).

⁸⁷ *Id.*

⁸⁸ *See* H.Rept. 109-72, at 175 (2005) (Conf. Rep.) (“Moreover, section 106 would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders.”). *See also* P.L. 109-13, Div. B, § 106, 119 Stat. 310 (2005).

⁸⁹ INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

of law raised upon a petition for review.”⁹⁰ Thus, “constitutional claims” and “questions of law” are reviewable even if the underlying matter from which the constitutional claim or question of law arises is not. This, however, provides an additional burden in the analysis — namely ascertaining what distinguishes a reviewable constitutional claim or question of law from a non-reviewable question of fact. While what constitutes a “constitutional claim” may appear self-evident,⁹¹ determining what constitutes a “question of law” can be more difficult.

Because INA Section 242(a)(2)(D) preserves judicial review of questions of law, it also operates upon the other jurisdiction-stripping provisions of the INA by only excluding questions of fact from review. Thus, an important threshold issue a court of appeals must resolve is whether the matter before it is a question of law or fact. Questions of fact are questions about the actual events surrounding the case.⁹² Questions of law, on the other hand, involve the application or interpretation of the law.⁹³ Initially, the courts construed “questions of law” as only preserving jurisdiction to review statutory construction issues.⁹⁴ Thus, the courts only had jurisdiction to review how the administrative courts interpreted the meaning or scope of a term in a statutory provision. The courts later recognized that “questions of law” was also meant to encompass “the same types of issues that courts traditionally exercised in habeas review over Executive detentions.”⁹⁵ The courts came to this conclusion by analyzing the legislative history of the REAL ID Act, which altered INA Section 242(a)(2)(D) to allow review of constitutional claims and questions of law.⁹⁶ The House Conference Report for the REAL ID Act indicates that Congress sought to provide an “adequate and effective” substitute for habeas corpus.⁹⁷ Purportedly, this was because the Supreme Court had previously expressed some concern as to whether Congress could constitutionally strip from courts habeas review of removal orders without implementing an adequate replacement.⁹⁸ Thus, in order to provide an adequate replacement for habeas review, not only did INA Section 242(a)(2)(D) preserve review of statutory construction, but it also encompassed review of “errors

⁹⁰ *Id.* (“Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals...”).

⁹¹ *See, e.g.,* *Xiao Ji Chen v. United States Department of Justice*, 471 F.3d 315, 324 (2d Cir. 2006) (“The term ‘constitutional claim’ clearly relates to claims brought pursuant to provisions of the Constitution of the United States.”).

⁹² *Id.* at 610 (“An actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation.”).

⁹³ *Black’s Law Dictionary* 1260 (7th ed. 1999) (“An issue to be decided by the judge, concerning the application or interpretation of the law.”).

⁹⁴ *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007); *Xiao Ji Chen*, 471 F.3d at 326.

⁹⁵ *Xiao Ji Chen*, 471 F.3d at 326-327. *See also* *Jean-Pierre v. U.S. Attorney General*, 500 F.3d 1315, 1321 (11th Cir. 2007).

⁹⁶ *Xiao Ji Chen*, 471 F.3d. at 326; *Ramadan*, 479 F.3d at 653.

⁹⁷ H.Rept. 109-72, at 174 (2005) (Conf. Rep.).

⁹⁸ *Xiao Ji Chen*, 471 F.3d at 326 (citing *INS v. St. Cyr*, 533 U.S. 289 (2001)).

of law, including the “erroneous application or interpretation of statutes,” “challenges to ‘Executive interpretations of the immigration laws,’” and “determinations regarding an alien’s statutory eligibility for discretionary relief.”⁹⁹ The Ninth Circuit characterized “questions of law” to include “questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law.”¹⁰⁰ In other words, questions of law encompass

- statutory construction;
- the use of an incorrect legal standard;
- the articulation of the correct legal standard, but the erroneous application of a heightened legal standard; and
- an unambiguous mischaracterization of the record.¹⁰¹

It is important to note that these courts, while recognizing INA Section 242(a)(2)(D) preserves review of constitutional claims and questions of law, have also expressly refused to review claims that, while characterized as questions of law, “consist of nothing more than quarrels over the correctness of fact-finding and discretionary decisions.”¹⁰² A “mere assertion that the IJ [Immigration Judge] and BIA [Board of Immigration Appeals] ‘failed to apply the law’ does not convert a mere disagreement with the IJ’s factual findings and exercise of discretion into a constitutional claim or a question of law.”¹⁰³ Thus, in the Second Circuit, before determining whether a claim is a reviewable question of law, the court must first “look to the nature of the argument being advanced in the petition and determine whether the petition raises ‘constitutional claims or questions of law’ or merely objects to the IJ’s fact-finding or exercise of discretion.”¹⁰⁴ The Ninth Circuit goes so far as to refuse to entertain a mixed question of fact and law unless all of the underlying facts are undisputed.¹⁰⁵

An additional issue is whether INA Section 242(a)(2)(D) preserves judicial review of constitutional claims or questions of law that arise from expedited removal orders. The provision that strips courts of jurisdiction to review expedited removal orders, INA Section 242(a)(2)(A), states that, “notwithstanding any other provision of law,” no court shall have jurisdiction to review a claim arising from an expedited

⁹⁹ *Xiao Ji Chen*, 471 F.3d at 328 (quoting *St. Cyr*, 533 U.S. at 314 n. 38).

¹⁰⁰ *Ramadan*, 479 F.3d at 650.

¹⁰¹ *See Gui Yin Liu v. INS*, 508 F.3d 716, 721-722 (2d Cir. 2007).

¹⁰² *Xiao Ji Chen*, 471 F.3d at 331.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Ramadan*, 479 F.3d 646, 653. *See also Jean-Pierre*, 500 F.3d at 1322 (“[W]e have jurisdiction to review Jean Pierre’s claim in so far as he challenges the application of an undisputed fact pattern to a legal standard.”); *Ali v. Achim*, 468 F.3d 462, 465 (7th Cir. 2006) (“[W]e retain jurisdiction to examine whether the correct legal standard was applied to the alien’s claim for relief.”).

removal order “except as provided by subsection (e) of this section.”¹⁰⁶ On the other hand, the reach of INA Section 242(a)(2)(D) appears to extend to “any other provision of this Act.”¹⁰⁷ The Tenth Circuit has addressed this issue and it has held that INA Section 242(a)(2)(A) excludes review of all claims arising out of expedited removal orders, including constitutional claims and questions of law.¹⁰⁸ It would seem that this court believes that the phrase “notwithstanding any other provision of law” found in INA Section 242(a)(2)(A) operates to exclude that provision from the purview of INA Section 242(a)(2)(D), thus excluding constitutional claims and questions of law arising from expedited removal orders from judicial review. Thus, the only issues arising from an expedited removal order that may be reviewed under this analysis are those enumerated within INA Section 242(e). INA Section 242(e) only permits: (1) limited habeas review of specific issues related to the expedited removal,¹⁰⁹ (2) constitutional claims related to expedited removal,¹¹⁰ and (3) challenges to regulations or policy directives governing expedited removals as inconsistent with the INA or otherwise in violation of the law.¹¹¹

Habeas Corpus. The writ of habeas corpus protects individuals from wrongful and arbitrary imprisonment by providing a mechanism to test the legality of the detention.¹¹² Today, the forum that hears a federal habeas corpus petition is a federal district court.¹¹³ Prior to American independence, habeas corpus was primarily a pre-trial protection found in common-law that was available “(1) to compel adherence to prescribed procedures in advance of trial, (2) to inquire into the cause for commitment [reason for pre-trial detention] not pursuant to judicial process, and (3) to inquire whether the committing court had proper jurisdiction.”¹¹⁴ Recognizing the importance of the writ, the framers sought to protect habeas corpus by incorporating into the U.S. Constitution the Suspension Clause, which states that “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”¹¹⁵ Later, the federal government enacted the federal habeas corpus statute in the Judiciary Act of 1789 which conferred upon federal courts the power to grant the writ for federal

¹⁰⁶ INA § 242(a)(2)(A) (codified at 8 U.S.C. § 1252(a)(2)(A)).

¹⁰⁷ INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

¹⁰⁸ *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007).

¹⁰⁹ INA § 242(e)(2) (codified at 8 U.S.C. § 1252(e)(2)).

¹¹⁰ INA § 242(e)(3)(A)(i) (codified at 8 U.S.C. § 1252(e)(3)(A)(i)).

¹¹¹ INA § 242(e)(3)(A)(ii) (codified at 8 U.S.C. § 1252(e)(3)(A)(ii)).

¹¹² See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 749 (1987); CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview*, by Charles Doyle.

¹¹³ 28 U.S.C. § 2241.

¹¹⁴ *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (C.J. Burger, concurring).

¹¹⁵ *St. Cyr*, 533 U.S. at 304. See also U.S. Const. Art. I, § 9, cl. 2.

prisoners.¹¹⁶ Federal habeas corpus was amended in 1867 to also include state prisoners.¹¹⁷ With the advent of the incorporation doctrine, which found most of the provisions of the Bill of Rights to be applicable to the states through the Due Process Clause of the Fourteenth Amendment, federal habeas corpus evolved as a vehicle to remedy convictions made in violation of constitutional rights.¹¹⁸

Many provisions in INA Section 242 expressly forbid the use of habeas corpus as a vehicle to review removal orders. For example, INA Section 242(b)(9) states that “all questions of law and fact, including interpretation and application of constitutional and statutory provisions” arising from an action taken to remove an alien shall be made available only upon judicial review of a final order.¹¹⁹ At first glance, this provision would only seem to impose an administrative exhaustion requirement before review of a constitutional or statutory violation affecting the removal process can commence. However, the statute also expressly prohibits the use of habeas corpus to obtain review from a federal district court.¹²⁰ A similar provision, INA Section 242(g), prohibits the use of habeas corpus and generally denies to all courts, except as otherwise prescribed by INA Section 242, jurisdiction to entertain claims arising from a decision by the Attorney General “to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.”¹²¹ In addition, all of the express jurisdictional bars also include express prohibitions of habeas corpus.¹²²

As discussed above, INA Section 242(a)(2)(D) preserves the federal courts of appeals’ jurisdiction to review constitutional claims and questions of law.¹²³ These courts, when exercising this jurisdiction, have viewed INA Section 242(a)(2)(D) as a means to consolidate issues traditionally dealt with by habeas corpus with those addressed by a petition for review, thereby channeling these habeas issues directly to the courts of appeals.¹²⁴ Presumably, this would serve to streamline the deportation process while still effectively maintaining the substantive protections of habeas corpus.¹²⁵ The reason why Congress sought to preserve habeas protections in the petition for review was because of concerns the Supreme Court voiced in a prior case

¹¹⁶ Act of September 24, 1789, ch. 20, § 14, 1 Stat. 82.

¹¹⁷ Act of February 5, 1867, ch. 28, 14 Stat. 385.

¹¹⁸ See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 Case W. Res. L. Rev. 748, 754-755 (1987).

¹¹⁹ INA § 242(b)(9) (codified at 8 U.S.C. § 1252(b)(9)).

¹²⁰ *Id.* (“Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.”).

¹²¹ INA § 242(g) (codified at 8 U.S.C. § 1252(g)).

¹²² See generally INA § 242(a)(2).

¹²³ INA § 242(a)(2)(D) (codified at 8 U.S.C. § 1252(a)(2)(D)).

¹²⁴ *Xiao Ji Chen*, 471 F.3d at 326-327; *Ramadan*, 479 F.3d at 653; *Ramirez-Molina v. Zigliar*, 436 F.3d 508, 513 (5th Cir. 2006); *Jean-Pierre*, 500 F.3d at 1321.

¹²⁵ See *Ramadan*, 479 F.3d at 651. See also H.Rept. 109-72, at 175 (2005) (Conf. Rep.).

addressing Congress's previous attempt to abolish all habeas review of removal orders.

In *INS v. St. Cyr*, the Supreme Court held that federal courts had jurisdiction to hear an alien's petition for habeas corpus notwithstanding a statutory provision that indicated that aliens would not have access to habeas corpus in removal proceedings.¹²⁶ Congress had passed a series of jurisdiction-stripping provisions that could have been interpreted to preclude either a federal district court or a federal court of appeals from reviewing "pure questions of law."¹²⁷ The Court expressed concern that, in light of the Suspension Clause of the U.S. Constitution, a statute that "would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."¹²⁸ The reason a constitutional question would arise is because the Suspension Clause, at a minimum, protects habeas corpus "as it existed in 1789."¹²⁹ Habeas corpus, at its historical core, "served as a means of reviewing the legality of executive detention," and could have encompassed challenging "detentions based on errors of law, including the erroneous application or interpretation of statutes."¹³⁰ The jurisdiction-stripping provisions, if read to deny habeas review of pure questions of law without presenting an adequate substitute to review such questions, could raise significant constitutional issues that would require a closer look at whether habeas corpus, as it existed in 1789, could be used to review pure questions of law.¹³¹ Rather than begin this inquiry, the Supreme Court chose to exercise the constitutional avoidance doctrine and construed the jurisdiction-stripping provisions to allow habeas review of pure questions of law as it felt that Congress did not clearly express an intent to deprive aliens of habeas corpus.¹³² As Justice Scalia noted, this presented a putative incongruity: criminal-aliens could get habeas review of their removals, at least with regards to questions of law, which includes district court review and appellate review, while non-criminal aliens would only get review directly from the court of appeals. The Court, in reference to this argument, stated that Congress could remedy this incongruity by providing an adequate substitute for habeas corpus in the courts of appeals.¹³³

Following this decision, Congress subsequently sought to respond to the *St. Cyr* decision by enacting the REAL ID Act, which expressly eliminated habeas review

¹²⁶ *St. Cyr*, 533 U.S. at 314 ("If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS' reading of § 1252. But the absence of such a forum, coupled with the lack of a clear, unambiguous and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.").

¹²⁷ *Id.* at 300.

¹²⁸ *Id.*

¹²⁹ *Id.* at 301 (quoting *Felker*, 518 U.S. at 663-664).

¹³⁰ *Id.* at 301-302.

¹³¹ *Id.* at 305.

¹³² *Id.* at 314.

¹³³ *Id.* at 314, n. 38.

for many types of removals while preserving review of constitutional claims and questions of law in the federal courts of appeals.¹³⁴ In the legislative history of the REAL ID Act, Congress explicitly referenced the holding in *St. Cyr* while explaining the habeas-stripping provisions, expressing a belief that retaining habeas corpus for criminal-alien unnecessarily delayed removal and created confusion in the federal courts.¹³⁵ Congress, by expressly ending habeas review of these removals, believed that this would lead to less delay and greater fairness in the review process.¹³⁶ As a response to the Supreme Court’s concern that there must be some “adequate substitute” for habeas review if recourse to federal habeas corpus is denied, Congress crafted its “constitutional claims and questions of law” exception to the otherwise broad jurisdiction-stripping provisions it had enacted.¹³⁷ Furthermore, Congress noted habeas corpus was still available for “challenges to detentions that are independent of challenges to removal orders.”¹³⁸

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

- whether the petitioner is an alien;¹³⁹
- whether the petitioner was ordered removed under INA § 235(b)(1);¹⁴⁰ and
- whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under INA § 207, or has been granted asylum under INA § 208, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to INA § 235(b)(1)(C).¹⁴¹

¹³⁴ P.L. 109-13, Div. B, § 106, 119 Stat. 310 (2005) (The REAL ID Act). *See also* INA § 242(a)(2), (a)(5), (b)(9) (expressly denying access to federal habeas corpus to review numerous types of removals); INA § 242(a)(2)(D) (expressly preserving review of constitutional claims and questions of law notwithstanding other jurisdiction-stripping provisions).

¹³⁵ H.Rept. 109-72, at 174 (2005) (Conf. Rep.).

¹³⁶ *Id.*

¹³⁷ *Id.* at 175.

¹³⁸ *Id.*

¹³⁹ INA § 242(e)(2)(A) (codified at 8 U.S.C. § 1252(e)(2)(A)).

¹⁴⁰ INA § 242(e)(2)(B) (codified at 8 U.S.C. § 1252(e)(2)(B)).

¹⁴¹ INA § 242(e)(2)(C) (codified at 8 U.S.C. § 1252(e)(2)(C)).