JUDICIAL REVIEW IN IMMIGRATION CASES AFTER *AADC*: LESSONS FROM CIVIL PROCEDURE

HIROSHI MOTOMURA*

---

* Nicholas Doman Professor of International Law, University of Colorado School of Law, e-mail: hiroshi.motomura@colorado.edu, website: http://spot.colorado.edu/~motomurh/

This is a revised version of a paper submitted for discussion at the Workshop on The Supreme Court and Immigration and Refugee Law, at the Georgetown University Law Center, October 8-9, 1999. I am grateful for comments by the Workshop participants, especially my commentators, Nancy Morawetz and Leti Volpp, as well as Alex Aleinikoff, Patty Blum, Linda Bosniak, David Cole, David Martin, Gerry Neuman, Nadine Wettstein, and Frank Wu. I also benefited greatly from careful readings of earlier drafts by Lenni Benson, Curt Bradley, Lucas Guttentag, Kathleen Sullivan, and Phil Weiser, and from excellent research assistance by Vini Nuon.

The Supreme Court decided *Reno v. American-Arab Anti-Discrimination Committee* ("*AADC*")[1] in February 1999, but the story begins in January 1987, when the federal government first tried to deport eight noncitizens affiliated with the Popular Front for the Liberation of Palestine. These noncitizens, who lived in Southern California and came to be known as the "L.A. Eight," responded by filing suit in federal district court. They alleged that the government was violating the U.S. Constitution by selectively enforcing the immigration laws against them for political activity protected under the First Amendment.

Twelve years later, after the case had bounced between the federal district court and the Ninth Circuit Court of Appeals, the Supreme Court held that the federal courts lack jurisdiction to hear the plaintiffs' selective prosecution claims until after the deportation orders against them become final—if that should ever happen. Writing for the majority, Justice Antonin Scalia addressed two topics. The first, and the focus of this article, is judicial review of the government's immigration decisions. The second topic, and the focus of Professor Neuman's article in this issue, is the constitutionality of selective enforcement of the immigration laws.

---

1. 119 S. Ct. 936 (1999).

While the events leading to the *AADC* decision began in 1987, the judicial review issues arose under new legislation that took effect while the case was pending in the lower courts. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[2] enacted in April 1996, made significant changes to the prior judicial review scheme. Several months later, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[3] sometimes also called "IIRIRA" or the "1996 Act," superseded the AEDPA judicial review provisions and reworked the role of the courts in immigration cases. In doing so, the 1996 Act gave new answers to some persistent and enduring questions about judicial review of administrative decisionmaking in immigration cases.

This article addresses these answers and questions, but it also has four broader purposes worth noting at the outset. First, I identify and analyze some fundamental choices about how to read jurisdictional statutes in immigration cases. Second, I illuminate the complex relationship between the timing aspects and the joinder aspects of these jurisdictional statutes. Third, I clarify the roles of "exhaustion of remedies" and "adequacy of the administrative record" in analyzing judicial review of immigration decisions. And fourth, I discuss the notion that judicial review must be "streamlined" to limit opportunities for "dilatory" appeals.

Of the key questions about judicial review that the 1996 Act addressed, one concerns timing: *when* does a federal court have jurisdiction to review an immigration-related decision by a government agency? Administrative finality in removal cases typically means that an immigration judge has ordered removal, and that the Board of Immigration Appeals ("BIA") has upheld that order (or that the time for appeals has expired). Must a noncitizen wait until an administrative removal order against him is final before he can go to court and claim that the government's actions against him are unlawful? Or can he go to court, while that proceeding or its appeal is still pending, to challenge government decisions in his case?

The stakes here are high. The *AADC* plaintiffs alleged that the government, by singling them out for deportation while rarely targeting similarly situated noncitizens, effectively kept them from engaging in political activity protected under the First Amendment. And, they argued, this chilling effect would last as long as the proceedings were pending, perhaps for years, whether the eventual outcome would mean staying in the United States or having to leave. Unless the eight had access to court while proceedings were pending, they faced a perverse choice.

As one option, they could raise a number of subconstitutional defenses in the proceedings. For example, they could argue that they were not deportable, or that even if deportable they should be granted discretionary relief.

2. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8 U.S.C.).

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

But if access to court requires a final removal order, the *AADC* plaintiffs faced a long wait before they would get a full airing of their First Amendment claims. Immigration judges and the BIA have only limited ability to consider a First Amendment challenge. They may decide constitutional challenges to procedures that they can correct administratively, for example by ordering a fuller hearing in order to correct a possible violation of procedural due process. But immigration judges and the BIA will not decide the constitutionality of immigration statutes or regulations, and one of the L.A. Eight's claims was that certain provisions of the Immigration and Nationality Act ("INA") were unconstitutional.[4] The First Amendment questions were at the core of their case, but the eight would get a full hearing on them only late in the process, in federal court.

As another option, the eight could have gotten into court more quickly, but only by bringing their administrative deportation proceedings to a swift but unfavorable conclusion. For example, they could have conceded that they were deportable under the grounds that the government invoked, even though their deportability might be open to question. In this way, they could allow removal orders to be issued against them, and then allow those orders to become administratively final. If access to court requires that the administrative proceedings be completed, then the eight could go to court quickly to get a full airing of their First Amendment claims only by conceding deportability and waiving possible defenses to removal.

Let's consider another situation in which delayed judicial review may be even more troubling than it was on the facts of *AADC*. What if the government detains a noncitizen while proceedings against him are pending—perhaps for years? When can he argue in court that his detention violates governing statutes or the Constitution? If judicial review is allowed only after the proceedings are over, he can go to court quickly to contest detention only if he concedes defenses in those proceedings. If he argues that certain deportability grounds do not apply to him at all, or if he applies for certain forms of discretionary relief that may be available to him, he will prolong the proceedings against him, and each day that those proceedings drag on is a day in detention. If the proceedings result in a final order that he be removed from the United States, a court could then hear and perhaps sustain his argument that it was unlawful to detain him pending proceedings. But this would happen only after a period of detention that might last for years.

But before the First Amendment and our aversion to unlawful imprisonment eclipse all else, we need to look at these same two examples from the government's viewpoint. Letting noncitizens go to court immediately to challenge government decisions, policies, and practices relating to immigration law enforcement can introduce serious inefficiencies—if not insurmount-

---

4. *See* INS v. Chadha, 462 U.S. 919, 928 (1983); Mohammadi-Motlagh v. INS, 727 F.2d 1450, 1452 (9th Cir. 1984); Matter of U-M-, 20 I & N Dec. 327, 333 (BIA 1991).

able obstacles—into an already overburdened system. "Administrative inefficiency" may ring hollow against counterarguments based on the First Amendment, but at some point the interest of the government (and of citizens and noncitizens) in a functioning system must carry some weight. This is true even assuming that most judicial review of agency action in immigration cases is sought in good faith and based on reasonable arguments that the agency erred. In addition, recently enacted restrictions on judicial review in immigration cases reflects Congress' apparent view that the ability to run into federal court is, for some noncitizens and their lawyers, an irresistible temptation for dilatory litigation meant to string out the procedures as long as possible.[5]

This timing question concerns "consolidation," because the issue is whether judicial review should take place only after issues related to the proceeding have been consolidated in a final order. But "consolidation" involves another question, closely related to timing—the question of multiparty joinder. When a noncitizen goes to court to challenge a government immigration decision, must she limit her suit to her own case? Suppose that she wants to challenge a pattern of selective enforcement against certain groups of noncitizens, or a practice of detaining noncitizens where access to counsel is difficult. May she widen the challenge to include others to argue that a broad pattern or practice of government immigration enforcement is unlawful? A 1991 Supreme Court decision, *McNary v. Haitian Refugee Center*,[6] acknowledged that courts have jurisdiction to hear such "pattern and practice" litigation notwithstanding apparent statutory restrictions on judicial review in individual cases, but the contours of jurisdiction under *McNary* remain unclear.

Here, too, the stakes are high. A reviewing court may have a cramped or even distorted view of the controversy if it examines only one person's case in isolation. Any government unlawfulness may be evident only as part of a broad pattern or practice. In *McNary*, the Supreme Court explained its recognition of jurisdiction over pattern and practice claims by noting that "[t]o establish the unfairness of the INS practices, respondents in this case

---

5. *See* 141 CONG. REC. S7822 (June 7, 1995) (statement of Sen. Abraham):

> Under the Immigration and Nationality Act, aliens who are convicted of felonies after entry are already deportable. They are rarely actually deported, however, because criminal aliens are able to request equitable waivers from the courts and other types of judicial review that were never meant to apply to convicted felons. Such abuse of process operates to prevent the order of deportation from becoming final.

See also H.R. REP. NO. 104-469(I), at 123 (1996) (expressing concern that "although only a small percentage of aliens appeal their deportation orders to the Board of Immigration Appeals or to the Federal courts, those who do can count on significant delays in the disposition of their appeal"). For similar congressional concerns, expressed in the debates leading up to the enactment of the 1961 judicial review scheme, see Foti v. Immigration and Naturalization Service, 375 U.S. 217, 226 (1963) (the purpose of the 1961 legislation was "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts").

6. 498 U.S. 479 (1991), discussed further at *infra* text accompanying notes 218-30.

adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application."[7] It is a time-honored tactic among defendants—not just government defendants—to limit plaintiff joinder, not only to cap the financial resources available to the other side, but also to shape the court's perception of the problem itself. Not only the characterization of the issues but also the factfinding in litigation that focuses on an individual case may be inherently inadequate.[8] In short, to force courts to consider individual cases in isolation may skew judicial decisionmaking on the merits. And it may be exceedingly inefficient to litigate multiple, similar suits when one case could settle the matter once and for all.

Again, there is another side to the story. From the government's viewpoint, class actions and other complex, multi-party lawsuits are disproportionately expensive to defend. Pattern and practice immigration litigation tends to attract particularly skilled advocates, often with more financial resources than the average solo immigration practitioner. The combination of public interest groups funded by foundations and volunteer representation from the private bar tends to reduce—though rarely does it eliminate—some of the government's frequent advantage in these respects. As a result, pattern and practice litigation often includes lengthy and compound discovery. Even discovery conducted in the utmost good faith may rest on speculation and conjecture about links between apparently similar cases. If a government objective is to minimize disruptions to immigration law enforcement, then pattern and practice litigation is considerably more threatening than judicial review in individual cases.

Questions of timing and joinder consolidation have been historically central not only to immigration law, and not only to administrative law, but also to procedural law generally. Courts in ordinary civil litigation have struggled with the rule that appellate courts have jurisdiction to review only "final decisions," not every order that a trial court may issue. Courts in ordinary civil litigation have struggled with joinder rules that try to balance the potential efficiency and comprehensiveness of multi-party lawsuits against their added expense and problems of manageability.

In immigration law, recent statutory changes have caused questions regarding judicial review to percolate with particular energy through the courts. AEDPA and the 1996 Act enacted several types of judicial review constraints. Some new provisions seem to eliminate judicial review for certain types of noncitizens, for example many with criminal convictions.[9] Other provisions seem to eliminate judicial review for certain types of

---

7. *Id.* at 497.
8. *Id.* ("Not only would a court of appeals reviewing an individual . . . determination therefore most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court.").
9. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. III 1998), *quoted in infra* note 45.

claims, for example decisions committed to the Attorney General's discretion.[10] These new bars generally operate in the context of attempts to obtain judicial review of final removal orders. The 1996 Act also reworked the judicial review scheme to pose novel versions of familiar timing and joinder questions. These questions, which generally affect judicial review of orders that are *not* final removal orders, are the focus of this article.

AADC was the first case under the 1996 Act to reach the Supreme Court, so observers expected that the decision would yield guidance on INA § 242, the main statutory section governing judicial review. Part I of this article explains the facts and procedural history of *AADC*. Part I also discusses the statutory changes that were enacted while the case was in the lower federal courts. Part I then examines what *AADC* decided. The government argued in *AADC* that one provision within § 242—subsection (g)—forecloses judicial review in several ways.[11] While the government prevailed on the facts of *AADC*, the Supreme Court read subsection (g) much more narrowly than the government urged. The Court thus put an end to the government's argument—which some lower federal courts had accepted—that (g) eliminates habeas corpus review in a broad range of immigration cases, not just cases in the unusual posture of *AADC*.

If *AADC* gave some answers, it raised even more new questions. Its exclusive focus on (g) left unclear the meaning of another judicial review provision—new INA § 242(b)(9)—that may matter more in the end.[12] Part II of this article discusses the meaning of subsection (b)(9) for orders other than final removal orders. This is a timing consolidation provision. It seems to force noncitizens to wait for final removal orders against them before they may go to court. Part II explains how (b)(9) sometimes allows judicial review before a final removal order. The only sensible reading of (b)(9) is a narrow one that lets courts hear matters under general federal question jurisdiction, if those matters are significant and independent of a decision to remove a noncitizen from the United States. In many cases, a noncitizen may file a court challenge without waiting for a final removal order.

This narrow reading of INA § 242(b)(9) has the notable practical consequence of making judicial review more accessible in immigration cases. But this article has four purposes broader than exploring this effect. First, (b)(9) implicates fundamental choices about how to read jurisdictional statutes in immigration cases, particularly regarding judicial review of orders other than final orders. My reasons for a narrow reading of (b)(9) rest on a premise that I articulate now and apply as the article proceeds. This premise is that courts, when they interpret jurisdictional and other procedural rules in immigration cases, should rely on the same procedural values that guide courts in

---

10. *See* INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (Supp. III 1998), *quoted in infra* note 46.
11. INA § 242(g), 8 U.S.C. § 1252(g) (Supp. III 1998), *quoted infra* text accompanying note 50.
12. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. III 1998), *quoted infra* text accompanying note 50.

interpreting similar rules outside the immigration context. There is some temptation to do the opposite—to assume that expressed legislative concerns about the costs of judicial review in immigration cases should prompt courts to pare down their role. But it is not at all clear why these occasional statements should override a much longer and deeper history of procedure in American law, where efficiency, substantive accuracy, and other procedural values have informed judicial interpretation. Courts should demand a clear statement before they attribute to Congress any approach to jurisdictional and other procedural rules that disregards these and similar procedural values or otherwise constrains the judiciary's traditional power over procedure.

My second purpose in discussing (b)(9) is to illuminate the complex relationship between timing and joinder consolidation. Timing rules and joinder rules share a potential to distort a court's substantive view of a controversy. A timing consolidation rule that keeps a noncitizen out of court until a final removal order may effectively but unjustifiably submerge claims—for example that detention is unlawful—that arise during the pendency of removal proceedings but do not challenge the removal order itself. A rule that bars multi-party joinder may unjustifiably undermine meritorious claims that will not prevail unless a court expands its perspective beyond one individual's case to a pattern or practice of unlawful government action. Further, timing and joinder rules interact. For example, Part II explains how a sensible rule that allows multi-party joinder for judicial review often allows court access at a time that might seem premature in an individual case. Rules that delay court access and rules that bar joinder can—alone or in combination—impair the substantive accuracy of judicial review, including an adequate remedy for violations of law. For this reason, courts should take special care to interpret such rules to maintain traditional judicial competence in procedural matters.

My third purpose is to clarify the analytical roles of "exhaustion of administrative remedies" and "adequacy of the administrative record" in interpreting jurisdictional statutes in immigration cases. Government lawyers often argue that noncitizens should be barred from court until they exhaust their administrative remedies. Lawyers for noncitizens often argue that they should have immediate access to court because any administrative record will be inadequate for meaningful judicial review. Part II explains how "exhaustion" and "adequacy" play only secondary roles in deciding when noncitizens should have immediate access to court and when they must wait, even if the concepts make for useful advocacy and *post hoc* reasoning. Nor do "exhaustion" and "adequacy" have independent analytical power in deciding when some noncitizens may join with others in pressing their claims against the government, and when they must go it alone.

My fourth purpose is to shed light on the notion that judicial review must be "streamlined" in order to limit opportunities for "dilatory" appeals. Judicial review is time-consuming, at least in that allowing judicial review takes more time than not allowing it. Any time-consuming process can appear dilatory. But whether it is truly dilatory depends entirely on our view of the merits, and that view is shaped by jurisdictional rules. A jurisdictional rule that constrains a court's view of the merits of a noncitizen's claim—for example by barring multi-party joinder—not only makes the claim hard to pursue. It can also make an individual claim seem nonmeritorious or even dilatory, even if the very same claim might prevail as part of a multi-party challenge to a government pattern or practice. In deciding whether efforts to seek judicial review are "dilatory," we need to understand how timing and joinder rules shape the view of the merits of cases in court—and in turn, in the public eye.

I. THE SUPREME COURT DECISION IN *RENO V. AADC*[13]

A. *The "L.A. Eight"*

In January 1987, the federal government arrested and began deportation proceedings against seven native Palestinians and one native Kenyan—Aiad Barakat, Naim Sharif, Khader Musa Hamide, Nuangugi Julie Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Bashar Amer. At the time, all lived in Southern California, and all were affiliated with the Popular Front for the Liberation of Palestine ("PFLP"), which the government regards as an international terrorist and communist organization. Six of the eight—Barakat, Sharif, Mungai, Ayman Obeid, Amjad Obeid, and Amer—were in the United States under nonimmigrant visas, either as students or visitors. Hamide and Shehadeh were lawful permanent residents of the United States.

Against all eight, the government initially invoked since-repealed deportation grounds that targeted aliens "who advocate the economic, international, and governmental doctrines of world communism."[14] Against the six nonimmigrants, the government also based deportation on non-ideological, technical visa violations, for example overstaying a nonimmigrant visa and failing to maintain student status. At about the same time, the government acknowledged that all eight were being deported for activity that would be protected under the First Amendment if undertaken by U.S. citizens. Former FBI director William Webster testified before Congress: "[a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation. . . ."[15] Webster added: "[I]f these individuals had been United States citizens, there would not have been a basis for their arrest."[16]

---

13. Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936 (1999).

14. INA § 241(a)(6)(D), 8 U.S.C. § 1251(a)(6)(D) (1988) (repealed 1996).

15. *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong. 94, 95 (1987), *quoted in* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1053 (9th Cir. 1995).

16. *Id.*

The eight responded by asking a federal district court to issue an injunction against the deportation proceedings, alleging that the ideological deportation grounds were unconstitutional. The government then dropped the ideological deportation grounds against the six nonimmigrants but continued to charge them with technical visa violations. Against the two permanent residents, the government invoked a different ideological deportation ground, for any alien who was a member of an organization advocating "the duty, necessity, or propriety of the unlawful assaulting or killing of any [government] officer or officers" and the "unlawful damage, injury, or destruction of property."[17] While the formal charges changed, William Odencrantz, Regional Counsel for the Immigration and Naturalization Service ("INS"), said at a press conference "that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP."[18] In turn, the eight amended their complaint to allege unlawful selective prosecution in violation of their First Amendment rights. In a landmark 1989 decision, District Judge Wilson held that the charged provisions relating to "subversive" speech were unconstitutional, because the First Amendment protects noncitizens residing in the United States to the same extent that it protects citizens.[19]

The government appealed Judge Wilson's decision. In 1992, the Ninth Circuit reversed and remanded on the ground that the case was not yet ripe for judicial review.[20] The Ninth Circuit noted that a full factual record had not yet been developed, and that in 1990 Congress had repealed the deportation grounds that the INS had invoked.[21] The INS kept trying to deport the six nonimmigrants for overstaying and other violations of their status. The INS efforts against the two permanent residents (Hamide and Shehadeh) proceeded under the new anti-terrorist deportability grounds in what is now INA § 237(a)(4)(B). That provision makes deportable "[a]ny alien who has engaged, is engaged, or at any time after admission engages in terrorist activity."[22]

On remand, in 1994 Judge Wilson issued a preliminary injunction barring the proceedings against the six nonimmigrants as unlawful selective prosecution based on their political associations. He found that he lacked jurisdiction to enjoin deportation proceedings against the two permanent residents because their claims were not ripe for judicial review.[23] When the government again appealed, the Ninth Circuit upheld the exercise of jurisdiction over the six nonimmigrants' selective prosecution claims, and further ruled

17. INA § 241(a)(6)(F)(ii)-(iii); 8 U.S.C. § 1251(a)(6)(F)(ii)-(iii) (repealed 1990).
18. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1053 (9th Cir. 1995).
19. American-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989).
20. American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501 (9th Cir. 1992).
21. *Id.* at 512.
22. INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B) (Supp. III 1998).
23. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1058-59 (9th Cir. 1995) (summarizing district court decision).

that the district court had jurisdiction to consider Hamide and Shehadeh's selective prosecution claims.[24] The Ninth Circuit also rejected the government's argument that judicial review must follow a final deportation order. The Ninth Circuit then upheld Judge Wilson on the merits, in particular on the issue of First Amendment protections for noncitizens residing in the United States.[25] On remand, Judge Wilson stayed the proceedings against Hamide and Shehadeh as well.[26]

B. *Judicial Review Before 1996*

All of this took place under former INA § 106,[27] which set out the basic scheme for judicial review of immigration decisions that prevailed from 1961 until 1996. Section 106 was the first specific statutory provision governing judicial review of exclusion and deportation orders. Before 1955, courts reviewed the legality of exclusion and deportation through habeas corpus petitions filed in the federal district courts.[28] In 1955, the Supreme Court held that declaratory and injunctive relief under the Administrative Procedure Act[29] were available to test deportation orders under the INA.[30] In 1956, the Court extended this reasoning to exclusion orders.[31]

The enactment of § 106 in 1961 was an attempt by Congress to limit opportunities for judicial review that the Administrative Procedure Act had opened.[32] For exclusion cases, § 106(b) reestablished habeas petitions in district court as the sole judicial review channel. The loser could appeal to the court of appeals and, if unsuccessful there, could petition for certiorari in the Supreme Court. For deportation, the "sole and exclusive" procedure for judicial review became the Hobbs Act,[33] which governs review for several administrative agencies, for example the Federal Communications Commission.[34] The Hobbs Act takes review out of the district courts and places it in the courts of appeals. Another subsection, INA § 106(a)(10), provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."[35] Just how this

---

24. *Id.* at 1054-61.
25. *Id.* at 1063-66.
26. Reno v. American-Arab Anti-Discrimination Comm., 119 S.Ct. 936, 939-40 (1999) (summarizing district court decision).
27. *See* Act of Sept. 26, 1961, Pub.L. No. 87-301, § 5, 75 Stat. 651.
28. *See generally* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 927-33 (4th ed. 1998); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1419-32 (1997).
29. 5 U.S.C. §§ 551 *et seq.* (1994).
30. *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 50-52 (1955).
31. *See* Brownell v. Shung, 352 U.S. 180, 182-86 (1956).
32. *See* H.R. REP. No. 1086, at 28-32 (1961) (expressing concern about judicial review procedures made available under *Pedreiro*).
33. The Hobbs Act is now codified at 28 U.S.C. §§ 2341-2351 (1994).
34. INA § 106(a), 8 U.S.C. § 1105a(a) (repealed 1996), quoted in *infra* note 131.
35. INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (repealed 1996).

provision fit with INA § 106(a)'s "sole and exclusive" reliance on the Hobbs Act to review deportation orders posed some knotty issues, as courts struggled to limit § 106(a)(10)'s potential for allowing multiple review proceedings.[36]

One of the tough issues under § 106 was the scope of the exclusive courts of appeals jurisdiction to review orders in the deportation context. Suppose, for example, a noncitizen sought judicial review of a matter apart from the deportation order itself, for example a denial of a stay of deportation after the deportation order had issued. Was this part of § 106's exclusive grant of jurisdiction to the courts of appeals? According to the 1968 Supreme Court decision in *Cheng Fan Kwok v. INS*,[37] a post-order stay was not for the courts of appeals to examine as part of their review of "deportation orders." Rather, jurisdiction would lie in district court.

The jurisdictional issue that arose in *AADC* was similar. In 1995, the Ninth Circuit held that the district court—not the court of appeals under the Hobbs Act—had jurisdiction to hear the plaintiffs' selective enforcement claims, thus rejecting the government's argument that § 106(a) precluded judicial review until a deportation order issued.[38] The Ninth Circuit noted that a selective prosecution challenge to a deportation order would lack an adequate administrative record for meaningful judicial review.[39] Also crucial to this holding was the lack of authority in immigration judges and the Board of Immigration Appeals to hear the selective prosecution claims based on the First Amendment.[40] The government argued that the court of appeals could remand the case to the agency or transfer it to a district court for further factfinding, but the Ninth Circuit found that these options were unavailable. According to the court, allowing the selective prosecution claim to proceed in district court was the only way that plaintiffs could develop the facts necessary to support their selective prosecution claim.[41]

C. *Judicial Review After the 1996 Act*

In 1996, while the government was appealing the preliminary injunction—now in favor of all of the L.A. Eight—two separate pieces of legislation significantly changed judicial review of immigration decisions.[42] First,

---

36. For discussion of the principal cases interpreting former INA § 106(a)(10), see ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 28, at 933.

37. 392 U.S. 206 (1968), discussed more fully at text accompanying *infra* notes 131-40.

38. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1054-62 (9th Cir. 1995).

39. *Id.* at 1055 ("[B]ecause of the need for a factual record beyond that which can be developed in the agency proceeding, we ordinarily cannot review many discretionary decisions of the INS as part of our review of a final deportation order.").

40. *Id.* ("Both the [immigration judge] conducting the deportation proceeding and the Government agree that neither the [immigration judge] nor the BIA has jurisdiction to consider a selective enforcement claim during a deportation proceeding.").

41. *Id.* at 1056-57.

42. *See* INA § 242, 8 U.S.C. § 1252 (Supp. III 1998). *See generally* Benson, *supra* note 28, at 1144-65; Lucas Guttentag, *The 1996 Immigration Act: Federal Court Jurisdiction: Statutory Restrictions*

AEDPA limited judicial review, notably by eliminating it for most noncitizens deportable because of criminal convictions.[43] The 1996 Act continued the substance of these limits, but it also restructured judicial review in fundamental ways. The 1996 Act consolidated exclusion and deportation proceedings into a single "removal" proceeding and hence one form of removal order. The Act then replaced the separate review schemes for exclusion and deportation orders with a single scheme for most removal orders. Judicial review now occurs principally in federal courts of appeals under the Hobbs Act procedure that had applied to deportation orders under former § 106.[44]

New § 242 places several limits on the judicial role in immigration cases. Like AEDPA, § 242 eliminates judicial review in broad categories of cases. For example, any final removal order against an alien deportable under most of the crime-related deportation grounds (except for a single crime of moral turpitude) shall not be subject to review by any court.[45] Also specifically barred is judicial review of major categories of discretionary decisions: certain waivers, relief from removal, and discretionary adjustment to permanent resident status. A catch-all provision bars judicial review of any other decisions or actions—except for asylum grants—that are specified to be in

---

and Constitutional Rights, 74 INTERPRETER RELEASES 245 (1997), *updated and reprinted in* UNDERSTANDING THE 1996 IMMIGRATION ACT: THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, at 6-1 (Juan Osuna ed. 1997); Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850 (1997).

43. AEDPA § 440(a), which added a new INA § 106(a)(10), and as amended by section 306(d) of the 1996 Act, provided:

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

Pub. L. No. 104-132, §440(a), 110 Stat. 1214, 1276. AEDPA also repealed INA § 106(a)(10), which had authorized habeas corpus jurisdiction to review deportation orders against noncitizens in custody.

44. See INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (Supp. III 1998), which provides:

> (1) General orders of removal
> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28).

INA § 242(b) sets out the procedural requirements for filing, venue, and service.

45. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. III 1998) provides:

> (C) Orders against criminal aliens
> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).

Section 309(c)(4) of the 1996 Act also established a transitional rule, to be effective until the permanent provisions of the 1996 Act took effect, that similarly limited judicial review of deportation orders against most aliens based on criminal convictions.

the discretion of the Attorney General.[46] And the Attorney General's discretionary judgment in asylum cases "shall be conclusive unless manifestly contrary to the law and an abuse of discretion."[47]

These new bars to judicial review for certain noncitizens or certain claims—which generally operate in the context of attempts to obtain judicial review of final removal orders—are beyond the scope of this article. Rather, I focus on the timing and joinder consolidation provisions of the 1996 Act, which are more directly relevant to *AADC*, and which generally affect judicial review of orders that are *not* final removal orders. These provisions (1) may sometimes defer judicial review until after a final removal order, and (2) may sometimes curtail multi-party pattern and practice litigation. The extent of these effects is unclear, and a principal goal of this article is to analyze these uncertainties and their significance.

Three provisions of § 242 are especially relevant to these twin effects. INA § 242(b)(9) provides for consolidation as to timing:

> (9) Consolidation of questions 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.[48]

INA § 242 (f) addresses relief in multi-party pattern and practice cases. Entitled "Limit on injunctive relief," it provides in pertinent part:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II [INA §§ 231-244], as amended by the Illegal Immigration Reform and Immigrant Responsi-

---

46. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (Supp. III 1998) provides:

> (B) Denials of discretionary relief
> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
> (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or
> (ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).

Moreover, INA § 236(e), 8 U.S.C. § 1226(e) (Supp. III 1998), provides:

> (e) Judicial review
> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

47. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (Supp. III 1998).
48. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. III 1998).

> bility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.[49]

The third constraining provision is subsection (g), which became the interpretive focus of *AADC*. It provides:

> (g) Exclusive jurisdiction
>
> 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.[50]

These provisions took effect at different times under effective date rules in section 309(c)(1) of the 1996 Act. Former INA § 106[51] governs judicial review of final exclusion or deportation orders entered before or on October 30, 1996. The 1996 Act's transitional rules apply to judicial review of final exclusion or deportation orders entered after October 30, 1996.[52] But if a removal proceeding is initiated on or after April 1, 1997, new INA § 242 applies.[53] Under these effective date provisions, virtually nothing in the 1996 Act—neither transitional rules nor new INA § 242—applied to *AADC* as it went up through the federal courts. There was no final order entered after October 30, 1996—indeed there was no final order at all—so the transition rules did not apply, and former § 106 governed. When and if there is ever a final deportation order against the *AADC* plaintiffs, judicial review of that order will fall under the 1996 Act's transitional rules. The *AADC* proceedings began long before April 1, 1997, so new INA § 242 did not apply, except for § 242(g), which applied to *AADC* by virtue of a special effective date provision for (g) alone.

---

49. INA § 242(f), 8 U.S.C. § 1252(f) (Supp. III 1998).

50. INA § 242(g), 8 U.S.C. § 1252(g) (Supp. III 1998).

51. INA § 106, 8 U.S.C. § 1105(a) (repealed 1996).

52. *See* 1996 Act, Pub. L. No. 104-208, § 309(c)(4), 110 Stat. 3009-626 (applying transitional rules to cases "in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act").

53. 1996 Act § 309(c)(1), *as amended by* Pub. L. No. 104-302, § 2(2), 110 Stat. 3656, 3657 (1996), *and* Pub. L. No. 105-100, § 203(a)(2), 111 Stat. 2160, 2198 (1997) provides:

> (c) Transition for Aliens in Proceedings.—
>
> (1) General rule that new rules do not apply.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—
>
> (A) the amendments made by this subtitle shall not apply, and
>
> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

See also 1996 Act § 309(c)(4) (applying transitional rules to cases "in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act").

That special effective date is § 306(c)(1) of the 1996 Act, under which § 242(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings."[54] Courts have held that § 242(g) did not take effect until April 1, 1997, but that starting on that date it applies to any federal immigration litigation then pending, no matter when that litigation began.[55] In *AADC*, the government filed motions in both the district court and the Ninth Circuit, arguing that new § 242(g) deprived the federal courts of jurisdiction over the plaintiffs' claims. According to the government, the eight would have their day in court, but only after any deportation orders against them became final.

On the merits, the Ninth Circuit affirmed Judge Wilson's injunction against the deportation proceedings.[56] But first the court held that § 242(g) did not preclude jurisdiction, reasoning as follows.[57] Subsection (g) applies under the 1996 Act's effective date rules. However, (g) expressly states that it applies "except as provided in this section." This clause incorporates by reference other subsections of § 242, even though § 309(c)(1) of the 1996 Act says that those other subsections apply only to removal proceedings commenced on or after April 1, 1997. Among those other subsections is § 242(f). According to the Ninth Circuit, (f) affirmatively grants jurisdiction in its closing phrase, "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."[58] Any uncertainties in the statute should be resolved in favor of jurisdiction, to avoid the serious constitutional doubts that would arise if (g) foreclosed jurisdiction while (f) and the rest of § 242 was not yet in effect. Therefore, there is jurisdiction, according to the Ninth Circuit. The government petitioned for rehearing en banc, which the Ninth Circuit denied, with three judges dissenting.[59]

D. *The Supreme Court*

The government petitioned for certiorari, suggesting two questions presented. One concerned district court jurisdiction, and the other concerned the

---

54. 1996 Act § 306(c)(1), *as amended by* Pub. L. No. 104-302, § 2(1), 110 Stat. 3656, 3657 (1996) provides:

> Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

55. *See* Auguste v. Reno, 152 F.3d 1325, 1327-29 (11th Cir. 1998); American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367, 1371-72 (9th Cir. 1997), *rev'd on other grounds*, 119 S. Ct. 936 (1999); Ramallo v. Reno, 114 F.3d 1210, 1213 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999); Lalani v. Perryman, 105 F.3d 334, 336 (7th Cir. 1997).

56. *American-Arab Anti-Discrimination Comm.*, 119 F.3d. at 1374-76.

57. *Id.* at 1371-74.

58. American-Arab Anti-Discrimination Comm. v. Reno, 132 F.3d 531 (9th Cir. 1997).

59. *Id.*

merits of the plaintiffs' selective prosecution claims.[60] The Supreme Court granted certiorari, but limited to the first question: "Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation?"[61] To answer it, the Court had to work out the meaning of INA § 242(g).

1. *The "Interpretive Anomaly" in Section 242(g)*

Justice Scalia's majority opinion considered several possible readings. The government characterized (g) as "a channeling provision, requiring aliens to bring all deportation-related claims in the context of a petition for review of a final order of deportation filed in the court of appeals."[62] But the Court noted that this reading of (g) "creates an interpretive anomaly."[63] Under § 306(c)(1) of the 1996 Act, subsection (g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." But if (g)'s initial phrase—"except as provided in this section"—incorporates and thus renders effective the rest of § 242, then *all* of § 242—not just (g)—would apply "to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." This contradicts § 309(c)(1) of the 1996 Act, which delayed the general effective date of § 242 until April 1, 1997.[64]

But a different anomaly arises if (g)'s initial phrase does not incorporate and render effective the other jurisdictional provisions in § 242. Then, all that would apply to past and pending cases would be the rest of (g), which bars judicial review "except as provided in this section." There would be absolutely no interlocutory or final judicial review in deportation proceedings to which former § 106 or the 1996 Act's transitional rules applied—any proceedings initiated before April 1, 1997. This anomaly disappears only as § 242 gradually becomes effective, to apply to removal proceedings initiated on or after April 1, 1997. The Court seemed to dismiss as implausible the interpretation that the statute would completely eliminate both interlocutory and final judicial review.[65] At the very least, such a reading would raise the serious constitutional issue whether Congress can completely cut off judicial

60. Pet. for Writ of Cert. (Jan. 30, 1998), *reported at* 66 U.S.L.W. 3563, 3564 (Feb. 24, 1998):

> Questions presented: (1) Did courts below have jurisdiction to entertain respondents' challenge to deportation proceedings prior to entry of final order of deportation? (2) Did courts below err in concluding that respondents had shown likelihood of success on their claim of selective enforcement, when government had reason to believe that respondents had carried out funding activities for foreign terrorist organization?

61. 118 S. Ct. 2059 (1998).

62. Supplemental Br. for Appellants, *quoted in American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 941.

63. 119 S. Ct. at 941. For citations to lower court decisions that adopted different approaches to this apparent anomaly, see Haddam v. Reno, 54 F. Supp. 2d 588, 596 nn.37-41 (E.D. Va. 1999).

64. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 941.

65. *See id.*

review in this way, and this issue would in turn trigger the canon to construe statutes to avoid serious constitutional questions.[66]

To avoid these two anomalies, the government argued that "except as provided in this section" means "except as provided in former INA § 106." This would allow § 106 judicial review of deportation orders in transitional rule cases, while allowing § 242(g) to apply to them. This reading avoids the implausible complete bar to judicial review and keeps April 1, 1997, as the general effective date of § 242. But as the Court pointed out, it is "impossible to understand" how "except as provided in this section" could refer to former § 106.[67]

The plaintiffs argued for a different way of avoiding these anomalies: that (g) applies only in pending cases that the Attorney General has elected to terminate and reinitiate under all of § 242. Section 309(c)(3) of the 1996 Act allows this, but the government had not done so in *AADC*.[68] Under this reading, (g) would never apply without the rest of § 242. Like the government's reading, this avoids the implausible complete bar to judicial review, and it keeps April 1, 1997, as the general effective date of § 242. But as the Court pointed out, this reading contradicts § 306(c)(1) of the 1996 Act, which applies (g) not just to claims that the Attorney General has elected to terminate and reinitiate, but rather "to claims arising from *all* past, pending, or future exclusion, deportation, or removal proceedings."[69]

The Court also rejected the Ninth Circuit's reading: that (g) applies to past and pending cases, but that "except as provided in this section" incorporates and makes effective other provisions of § 242, including subsection (f), which the Ninth Circuit construed as an affirmative grant of jurisdiction. This reading of subsections (f) and (g) has several flaws, according to the Court. First, it contradicts § 309(c)(1) of the 1996 Act, which makes April 1, 1997, the effective date for all of § 242 except subsection (g). Second, as the Court noted: "By its plain terms, and even by its title, [subsection (f)] is nothing more or less than a limit on injunctive relief. . . . To find in this an affirmative grant of jurisdiction is to go beyond what the language will bear."[70]

---

66. *See* Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 465-66 (1989); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932). For immigration cases applying this canon, see Jean v. Nelson, 472 U.S. 846, 854 (1985); United States v. Witkovich, 353 U.S. 194, 201-02 (1957). For cases applying the canon to jurisdictional statutes, see Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 & n.12 (1986); Johnson v. Robison, 415 U.S. 361, 373-74 (1974). A related principle is that court jurisdiction is never assumed to be repealed, but rather requires an express statutory command. *See* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496-99 (1991).

67. 119 S. Ct. at 941.

68. *See id.*

69. 1996 Act, Pub. L. No. 104-208, § 306(c)(1), 110 Stat. 3009-612 (emphasis added).

70. 119 S. Ct. at 942.

2. *Eliminating the Anomaly*

The Court eliminated the apparent anomaly by focusing on the "unexamined assumption that [subsection (g)] covers the universe of deportation claims—that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.' "[71] This reading of (g) is what produced the apparent difficulty in reconciling §§ 306(c)(1) and 309(c)(1) of the 1996 Act. Instead, the Court read (g) much more narrowly, as limiting judicial review only with respect to "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.' "[72]

According to the Court, Congress had good reason to be especially concerned about litigation challenging the government's prosecutorial discretion in immigration cases.[73] Such litigation could impede immigration law enforcement, but former INA § 106 allowed some. The crucial clause in § 106 made the Hobbs Act "the sole and exclusive procedure for the judicial review of all final orders of deportation."[74] Courts often construed this clause not to reach matters collateral to final deportation orders. Noncitizens could go to federal district court to challenge government decisions on those matters.[75] The leading case, *Cheng Fan Kwok v. INS*,[76] found that the Hobbs Act did not govern judicial review of a denial of a stay of deportation. Among these matters outside the Hobbs Act were challenges to decisions to initiate

---

71. *Id.* at 943. The term "zipper clause" refers to a clause in a collective bargaining agreement that provides that it constitutes the complete agreement between the parties. For example: "This agreement includes the complete agreement among the parties. This agreement cannot be modified, expanded or amended except by a written stipulation properly signed by the authorized representative of the parties." Pegasus Broadcasting of San Juan, Inc. v. NLRB, 82 F.3d 511, 514 n.4 (1st Cir. 1996). Another example:

> Each party agrees that it shall not attempt to compel negotiations during the term of this agreement on matters that could have been raised during the negotiations that preceded this agreement, matters that were raised during the negotiations that preceded this agreement, or matters that are specifically addressed in this agreement.

Blackie v. Maine, 75 F.3d 716, 720 (1st Cir. 1996).

72. 119 S. Ct. at 943. The Court continued: "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting." *Id.*

Justices Stevens and Souter dissented on the interpretation of § 242(g). Stevens reconciled §§ 306(c)(1) and § 309(c)(1) by reading the initial phrase of (g), "Except as provided in this section," to mean "Except as provided in this Act." This would mean that in a case like *AADC*, (g) would still allow judicial review as provided by former INA § 106, which would continue to apply to proceedings until the other provisions of § 242 took effect. 119 S. Ct. at 951 (Stevens, J., concurring). Justice Souter took a different approach by finding that (g) did not apply. Seeing no way to reconcile §§ 306(c)(1) and 309(c)(1), he chose to apply the one that "avoids a potential constitutional difficulty." That was § 309(c)(1) and its general effective date of April 1, 1997, which Souter read to override the contradictory command of § 306(c)(1) that (g) apply to past, pending, and future cases. Souter reasoned that to apply (g) to past, pending, and future cases "would raise the serious constitutional question whether Congress may block every remedy for enforcing a constitutional right." 119 S. Ct. at 955 (Souter, J., dissenting).

73. *See* 119 S. Ct. at 943.

74. INA § 106(a), 8 U.S.C. § 1105a(a) repealed 1996).

75. *See* 119 S. Ct. at 944.

76. 392 U.S. 206 (1968), discussed at *infra* text accompanying notes 131-40.

deportation proceedings.[77] This interpretation of § 106 allowed district courts to hear challenges to decisions involving prosecutorial discretion. According to the Court, (g) "is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings."[78] Therefore, Congress could logically apply (g) even to past and pending cases, while applying the rest of § 242 only to future cases.

The Court also noted that its reading of (g) made sense of the relationship between (g) and the timing consolidation provision, § 242(b)(9). Why have (g) bar judicial review of prosecutorial discretion, "since § 242(b)(9) channels judicial review of all of them anyway"?[79] The Court explained that these two subsections have different effective dates, reflecting Congress' special concern with insulating prosecutorial discretion from judicial review. Subsection (g) "performs the function of categorically excluding from non-final-order judicial review—even as to transitional cases otherwise governed by [§ 106] rather than the unmistakable 'zipper' clause of [§ 242(b)(9)]—certain specified decisions and actions of the INS,"[80] i.e., matters of prosecutorial discretion.

To conclude its analysis of subsection (g), the Court held that the plaintiffs' unlawful selective prosecution claim "falls squarely within [(g)]" and therefore there was no court jurisdiction to hear the case.[81] It added that (g) "seems to have been crafted with such a challenge precisely in mind."[82]

---

77. 119 S. Ct. at 944 (citing among other cases American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1055 (9th Cir. 1995)).

78. 119 S. Ct. at 945.

79. *Id.* at 943.

80. *Id.*

81. *Id.* at 945.

82. *Id.* The rest of the majority opinion rejected the argument that the Court should read (g) to allow immediate judicial review because otherwise serious constitutional doubts would arise in connection with the pending deportation proceeding's chilling effect on the plaintiffs' First Amendment rights. *Id.* at 945-47. The Court dismissed this argument with the following reasoning: "As a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 945. Justice Ginsburg's concurring opinion disagreed with the majority on this selective prosecution issue. *Id.* at 947-50 (Ginsburg, J., concurring).

This part of the majority opinion might be read to address the First Amendment rights of noncitizens. Some observers have criticized the Court for doing so. *See* Joan Biskupic & William Branigin, *Court Curbs Free Speech of Illegal Immigrants—Government Wins On Deportation Rules*, WASH. POST, Feb. 25, 1999, at A1; David Cole, *Supreme Court Denies First Amendment Rights to Legal Aliens*, LEGAL TIMES, Mar. 8, 1999, at 19; Editorial, *Deportation and Free Speech*, WASH. POST, Feb. 28, 1999, at B6; Margaret M. Russell, *Perspective on Deportation: Be Wary of the Court's "Protection"*, L.A. TIMES, Mar. 12, 1999, at B7. To be sure, the majority's language sweeps broadly: "When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity." *Id.* at 947. On closer inspection, however, the Court did not address First Amendment protections outside the selective enforcement context. Moreover, to reject the plaintiffs' argument based on constitutional doubt, it may have been enough for the Court to find that the constitutionality of selective enforcement was clear as to *some* of the plaintiffs—the nonimmigrants. Their inability to invoke the First Amendment would keep any of the *AADC* plaintiffs from arguing "constitutional doubt." Put differently, even if the permanent resident plaintiffs might invoke the First Amendment, the nonimmigrant plaintiffs could not, and as a result the Court would not allow First Amendment considerations to influence its reading of (g).

E. *Making Sense of AADC*

AADC involved all of the themes that are key to deciding how judicial review of immigration decisions should be structured. The facts of the case and the statutes raised these four issues: (1) timing consolidation, (2) joinder consolidation, (3) exhaustion of remedies, and (4) adequacy of the record. The Supreme Court's decision answered some important questions that had been percolating through the federal courts since the passage of the 1996 Act. Yet, *AADC* raised at least as many questions as it answered, as this Part I-E explains.

1. *Habeas Corpus Review of Final Removal Orders*

One important but unsettled question that had occupied the federal courts before *AADC* was whether in immigration cases § 242(g) eliminates review of final removal orders by writ of habeas corpus under 28 U.S.C. § 2241.[83] The possibility that habeas review might no longer be available in immigration cases first arose under the jurisdiction-limiting provisions of AEDPA, which preceded the 1996 Act by five months. AEDPA § 440(a) said that deportation orders against most noncitizens who were deportable because of criminal convictions "shall not be subject to review by any court."[84] Almost all federal courts of appeals held that § 440(a) barred judicial review under the INA, and that this was constitutional as long as courts might review deportation orders through habeas corpus petitions.[85] Next, the 1996 Act's transitional rules superseded but largely maintained the substance of AEDPA § 440(a)'s judicial review bars.[86] Other courts ruled that the 1996 Act's transitional rules eliminated INA judicial review of removal orders in certain categories of cases.[87]

---

83. 28 U.S.C. § 2241 (1994) provides in pertinent part:

> (a) writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.
>
> . . .
>
> (c) The Writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or
>
> . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

84. The text of AEDPA § 440(a) is set out in *supra* note 43.

85. *See* Mansour v. INS, 123 F.3d 423, 426 (6th Cir. 1997); Mendez-Morales v. INS, 119 F.3d 738, 739 (8th Cir. 1997); Williams v. INS, 114 F.3d 82, 83-84 (5th Cir. 1997); Fernandez v. INS, 113 F.3d 1151, 1154-55 (10th Cir. 1997); Chow v. INS, 113 F.3d 659, 668-70 (7th Cir. 1997); Yang v. INS, 109 F.3d 1185, 1195-96 (7th Cir.), *cert. denied*, 522 U.S. 1027 (1997); Figueroa-Rubio v. INS, 108 F.3d 110, 112 (6th Cir. 1997); Boston-Bollers v. INS, 106 F.3d 352, 354 n.1 (11th Cir. 1997); Kolster v. INS, 101 F.3d 785, 790-91 (1st Cir. 1996); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27, 30-31 (2d Cir. 1996); Duldulao v. INS, 90 F.3d 396, 400 n.4 (9th Cir. 1996).

86. *See* 1996 Act, Pub. L. No. 104-208, § 309(c)(4), 110 Stat. 3009-626.

87. *See, e.g.*, Briseno v. INS, 192 F.3d 1320, 1322 (9th Cir. 1999); Catney v. INS, 178 F.3d 190, 195 (3d Cir. 1999); Kalaw v. INS, 133 F.3d 1147, 1150-52 (9th Cir. 1997); Skutnik v. INS, 128 F.3d 512, 514 (7th Cir. 1997); Turkhan v. INS, 123 F.3d 487, 490 (7th Cir. 1997); Nguyen v. INS, 117 F.3d 206, 207 (5th Cir. 1997).

These early decisions concerned judicial review under the INA. What about jurisdiction under the habeas corpus statute, 28 U.S.C. § 2241? Did § 440(a)'s judicial review bar for most noncitizens deportable due to criminal convictions also bar habeas actions by them?[88] Section 2241 was the only remaining statutory authority for habeas corpus petitions in immigration cases, because AEDPA (and later the 1996 Act) eliminated habeas corpus review under the INA itself.

Most federal courts of appeals that faced the issue held that § 440(a), while it eliminated INA judicial review, did not repeal 28 U.S.C. § 2241.[89] These decisions relied heavily on *Ex Parte Yeager*[90] and *Felker v. Turpin*,[91] two Supreme Court cases—one from 1868 and one from 1996—that did not involve immigration or citizenship. *Yeager* established and *Felker* confirmed that implied repeals of habeas corpus jurisdiction are disfavored.[92] Because AEDPA § 440(a) did not specifically repeal 28 U.S.C. § 2241 in immigration cases, habeas corpus remained available.[93] By so holding, these courts avoided the difficult question whether reading the AEDPA § 440(a) to eliminate not only INA judicial review but also habeas corpus jurisdiction would be unconstitutional—as a matter of due process, separation of powers, or the Suspension Clause, Article I, Section 9, Clause 2, which provides:

---

88. *See generally* ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 28, at 941-57.

89. *See* Sandoval v. Reno, 166 F.3d 225, 235 (3d Cir. 1999); Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141 (1999); Jean-Baptiste v. Reno, 144 F.3d 212, 218-19 (2d Cir. 1998); Mansour v. INS, 123 F.3d 423, 425-26 (6th Cir. 1997); Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999); Fernandez v. INS, 113 F.3d 1151, 1154 n.4, 1155 (10th Cir. 1997). *But see* LaGuerre v. Reno, 164 F.3d 1035, 1038-41 (7th Cir. 1998) (AEDPA § 440(a) precludes habeas jurisdiction). *Cf.* Turkhan v. Perryman, 188 F.3d 814, 822-24 (7th Cir. 1999) (following *LaGuerre*, but allowing jurisdiction to prevent miscarriages of justice); Singh v. Reno, 182 F.3d 504, 507-11 (7th Cir. 1999) (same).

See generally Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998). I will not repeat Professor Neuman's analysis of habeas corpus as the particular forum for judicial involvement and oversight of removal, except to endorse his general conclusion that habeas corpus represents an irreducible constitutional minimum. *See also* Richard H. Fallon, *Response: Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 961 (1998); Note, *The Constitutional Requirement of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850 (1997); Trevor Morrison, Note, *Removed From the Constitution?: Deportable Aliens' Access to Habeas Corpus Under the New Immigration Legislation*, 35 COLUM. J. TRANSNAT'L L. 697 (1997).

90. 75 U.S. 85, 105 (1868).

91. 518 U.S. 651, 660 (1996).

92. *See id.* at 660 (following *Yeager*, 75 U.S. at 105 ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act.")).

93. On the scope of such habeas jurisdiction under 28 U.S.C. § 2241 (1994), most federal courts of appeals that have addressed the issue have found that habeas corpus jurisdiction includes not only constitutional but also statutory questions. *See* Bowrin v. United States INS, 194 F.3d 483, 489-90 (4th Cir. 1999); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 305-06 (5th Cir. 1999); Shah v. Reno, 184 F.3d 719, 724 (8th Cir. 1999); Sandoval v. Reno, 166 F.3d 225, 238 (3d Cir. 1999); Goncalves v. Reno, 144 F.3d 110, 124-25 (1st Cir. 1998); Magana-Pizano v. INS, 152 F.3d 1213, 1221-22 (9th Cir. 1998), *vacated on other grounds*, 119 S. Ct. 1137 (1999), *on remand*, 1999 WL 1249703, *5 (9th Cir. Dec. 27, 1999); *cf.* Mayers v. Reno, 175 F.3d 1289, 1301 (11th Cir. 1999) ("we do not decide whether every statutory claim raised by an alien is cognizable on habeas"); Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1141 (1999) (same).

"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."[94]

If AEDPA § 440(a) did not repeal 28 U.S.C. § 2241, did the analogous judicial review bars for certain claims or certain noncitizens in the 1996 Act's transitional rules or permanent provisions? They, like AEDPA § 440(a), eliminated ordinary judicial review under the INA. Did they also eliminate habeas corpus jurisdiction under 28 U.S.C. § 2241, especially when combined with new § 242(g), which applies to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings"? Viewed in isolation, the clause "no court shall have jurisdiction to hear" in § 242(g) might seem to. But so did the clause in AEDPA § 440(a), "shall not be subject to review by any court," which courts had found insufficient under *Yeager* and *Felker* to repeal § 2241. The text of § 242(g) did not repeal § 2241 any more clearly than AEDPA § 440(a) did. Most courts of appeals facing the issue before the Supreme Court decision in *AADC* found that § 242(g) did not repeal habeas corpus jurisdiction to contest final removal orders or related matters such as stays of removal.[95]

To read the clause in § 242(g), "no court shall have jurisdiction to hear," to repeal statutory habeas requires two things. First, the key clause in (g)—"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"—would have to be broad enough to include final deportation and removal orders. Second, (g), where it applies, would have to address 28 U.S.C. § 2241 expressly enough to repeal it under the *Yeager-Felker* requirement that any such repeal be clear.[96]

One important effect of *AADC* is to address the first of these two steps and make clear that § 242(g) is too narrow to repeal habeas corpus review of final removal orders. In narrowing (g), the Court gave examples of matters outside it: "many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of adjudication, and to refuse reconsideration of that order."[97] But might the phrase "execute removal orders" encompass any claim that the order itself was unlawful on subconstitutional or constitutional grounds?

---

94. U.S. CONST. art. I, § 9, cl. 2.

95. *See* Sandoval v. Reno, 166 F.3d 225, 236 (3d Cir. 1999); Henderson v. INS, 157 F.3d 106, 118-22 (2d Cir.1998), *cert. denied*, 119 S. Ct. 1141 (1999); Goncalves v. Reno, 144 F.3d 110, 119-23 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1140 (1999); *cf.* Magana-Pizano v. INS, 152 F.3d 1213, 1216-20 (9th Cir. 1998) (§ 242(g) repeals habeas jurisdiction under § 2241 but this result is unconstitutional; § 2241 remains available to assure constitutional minimum), *vacated and remanded*, 119 S. Ct. 1137 (1999), *on remand*, 1999 WL 1249703, *3-5 (9th Cir. Dec. 27, 1999) (§ 242(g) did not repeal habeas corpus jurisdiction over final orders). *But cf.* Richardson v. Reno, 162 F.3d 1338, 1356-60 (11th Cir. 1998), *judgment vacated*, 119 S. Ct. 2016 (1999) (§ 242(g) repealed habeas corpus jurisdiction).

96. For the key passage from *Yeager*, see *supra* note 92.

97. *American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 943.

After the Court's careful narrowing of (g), together with its examples of matters outside (g), the answer to this question must be "no." Subsection (g)'s bar to judicial review of any "decision or action" to "execute removal orders" does not bar judicial review of the orders themselves. To read "execute removal orders" that way would contradict *AADC* and resurrect the interpretive anomaly that the Court so mindfully avoided by reading (g) narrowly.

The federal courts of appeals have adopted this answer. For example, the Sixth Circuit's decision in *Mustata v. United States Department of Justice*[98] adhered to the narrow reading of (g). The Sixth Circuit noted that any broad reading of § 242(g) would include several of the actions that the Supreme Court explicitly listed as *not* within (g). Therefore, the Sixth Circuit concluded, § 242(g)—as narrowly read in *AADC*—does not eliminate habeas jurisdiction to hear a challenge to a deportation order based on ineffective assistance of counsel in presenting an asylum claim.[99] Similarly, the Eleventh Circuit held in *Mayers v. INS*[100] that (g) does not eliminate habeas review of final orders. Other post-*AADC* courts of appeals decisions have reached the same result,[101] consistent with the courts of appeals decisions that had so concluded before *AADC* narrowed the reach of § 242(g). In sum, now that *AADC* has read (g) to apply only to "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders,' " (g) could not generally repeal habeas review of final removal orders or any other removal-related matters that do not fit into the three enumerated categories.[102]

---

98. 179 F.3d 1017 (6th Cir. 1999).

99. *Id.* at 1021-23.

100. 175 F.3d 1289, 1297 (11th Cir. 1999).

101. *See* Sabhari v. Reno, 197 F.3d 938, 942 (8th Cir. 1999); Wallace v. Reno, 194 F.3d 279, 284 (1st Cir. 1999); Bowrin v. United States INS, 194 F.3d 483, 488 (4th Cir. 1999); Pak v. Reno, 196 F.3d 666, 671 (6th Cir. 1999); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 303-04 (5th Cir. 1999); DeSousa v. Reno, 190 F.3d 175, 181-83 (3d Cir. 1999); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1144-45 (10th Cir. 1999); Shah v. Reno, 184 F.3d 719, 722-23 (8th Cir. 1999); Selgeka v. Carroll, 184 F.3d 337, 341-42 (4th Cir. 1999); Reyes-Lechuga v. Reno, 183 F.3d 867, 867-68 (8th Cir. 1999); Hose v. INS, 180 F.3d 992, 994 (9th Cir. 1999).

Other court of appeals decisions have found that § 242(g) does not eliminate habeas jurisdiction to hear challenges to decisions other than final orders. *See* Zhislin v. Reno, 195 F.3d 810, 813-14 (6th Cir. 1999) (indefinite detention); Zadvydas v. Underdown, 185 F.3d 279, 285-86 (5th Cir. 1999) (indefinite detention); Stewart v. United States INS, 181 F.3d 587, 593-94 (4th Cir. 1999) (denial of motion to reopen); Parra v. Perryman, 172 F.3d 954, 956-57 (7th Cir. 1999); Haddam v. Reno, 54 F. Supp. 2d 588, 596-97 (E.D. Va. 1999) (§ 242(g) does not eliminate jurisdiction over challenge to use of secret evidence in removal proceeding or to detention).

102. Where, however, the government action being challenged is a decision to execute a final order, then (g) applies and would preclude INA judicial review. For example, *AADC* suggests that the District of Columbia Circuit was correct in its 1997 decision in Ramallo v. Reno, 114 F.3d 1210 (D.C. Cir. 1997), *cert. denied*, 119 S. Ct. 1139 (1999). (The Court denied certiorari in *Ramallo* shortly after deciding *AADC*.) *Ramallo* held that because of (g), a federal district court has no federal question jurisdiction under 28 U.S.C. § 1331 to hear a claim that the execution of a final deportation order would violate the government's agreement to restore her permanent resident status. Even under *AADC*'s narrow reading, (g) applies. Because *Ramallo* was a civil action under federal question jurisdiction, it did not raise the question whether § 242(g), where it applies, repeals habeas corpus jurisdiction under 28 U.S.C. § 2241. *Cf.* Botezatu v. INS, 195 F.3d 311, 313-14 (7th Cir. 1999) (§ 242(g) bars jurisdiction under both § 1331 and

2. *Timing Consolidation After AADC*

What about non-final orders that a noncitizen wants to challenge in court? A second major implication of *AADC* concerns timing consolidation. Must a court wait until a removal order is final before it has jurisdiction to examine the lawfulness of all of the government's removal-related decisions and actions? A case that raises the tough issues is the Eleventh Circuit litigation in *Richardson v. Reno.*[103] Ralph Richardson is a native and citizen of Haiti who has been a permanent resident since he was two years old in 1968. He lives in Georgia with his wife and three children, who are all U.S. citizens. Richardson owns and operates a successful cleaning business there. He has two criminal convictions, one in 1984 for carrying a concealed weapon, and one in 1990 for trafficking cocaine. Richardson could have been deported on the basis of these convictions, but the government never initiated proceedings. In October 1997, Richardson traveled to Haiti, his first trip outside the United States since he first immigrated here. Two days later, he tried to reenter the United States at Miami International Airport. The INS found that his criminal convictions made him inadmissible to the United States under INA §§ 212(a)(2)(A)(i)(I), 212(a)(2)(A)(i)(II),[104] and 212(a)(2)(C).[105] The INS arrested Richardson, detained him, and placed him in removal proceedings under INA § 240. Because proceedings began on or after April 1, 1997, all of INA § 242 applies.[106]

The INS district director refused Richardson's request to release him from detention pending removal proceedings. Richardson then asked the immigration judge for release on bond, but the judge declined to consider the request on the ground that Richardson, though a returning permanent resident, was

---

§ 2241 to hear challenge to denials of stay of deportation, reinstatement of voluntary departure, and deferred action status); Mapoy v. Carroll, 185 F.3d 224, 228-30 (4th Cir. 1999), *petition for cert. filed*, No. 99-961 (Dec. 6, 1999) (§ 242(g) bars jurisdiction under 28 U.S.C. § 2241 to hear challenge to denial of stay of deportation).

103. 162 F.3d 1338 (11th Cir. 1998), *application to withdraw mandate denied*, 175 F.3d 898 (11th Cir. 1999), *judgment vacated by* 119 S. Ct. 2016 (1999), *on remand*, 180 F.3d 1311 (11th Cir. 1999).

104. INA § 212(a)(2)(A)(i)(I) & (II), 8 U.S.C. § 1182(a)(2)(A)(i)(I) & (II) (Supp. III 1998), provide:

> (A) Conviction of certain crimes
> (i) In general
> Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), is inadmissible.

105. INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C) (Supp. III 1998) provides:

> (C) Controlled substance traffickers
> Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible.

106. On the effective dates of the provisions in § 242, see *supra* text accompanying notes 51-55.

"seeking admission" to the United States and therefore could be released only by the district director, not an immigration judge.[107] In November 1997, Richardson filed a habeas corpus petition in federal district court to challenge the legality of his continuing detention. He asserted that at a minimum he was entitled to a bond hearing before an immigration judge rather than mere consideration by the INS district director.

One of the key issues in both Richardson's removal proceedings and his habeas petition was whether he was "seeking admission" when he returned to the United States. Before the 1996 Act, a returning permanent resident's status depended heavily on the 1963 Supreme Court decision in *Rosenberg v. Fleuti*.[108] There, the Court said that a permanent resident who returns to the United States after "an innocent, casual, and brief excursion . . . outside the country" would be treated as if he or she had remained in the United States.[109] The 1996 Act adopted new INA § 101(a)(13)(C),[110] which addresses the question of when a returning permanent resident is not "seeking admission" to the United States. Later in 1996, the Board of Immigration Appeals held in *Matter of Collado*[111] that § 101(a)(13)(C) entirely supplanted *Fleuti*. If so, Richardson, having "committed an offense identified in section 212(a)(2)," would be "seeking admission" under § 101(a)(13)(C)(v). He would then be subject to the inadmissibility grounds in INA § 212[112] and not entitled to a bond hearing before an immigration judge. In contrast, an alien not "seeking admission" would be subject to deportability rather than inadmissibility grounds and entitled to ask an immigration judge for release on bond.

Richardson's removal proceedings concluded in January 1998 with findings that he was "seeking admission" and that he was inadmissible under INA § 212 due to his criminal convictions, and with an order that he be

107. *See* 8 C.F.R. § 236.1(c)(5), (d); 8 C.F.R. § 1.1(q) (limiting immigration judge authority to release "arriving aliens," including returning permanent residents who seek admission to the United States).

108. 374 U.S. 449 (1963). *See generally* ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 28, at 426-27.

109. 374 U.S. at 462.

110. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (Supp. III 1998) provides:

> (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
>
> (i) has abandoned or relinquished that status,
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
>
> (iii) has engaged in illegal activity after having departed the United States,
>
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings,
>
> (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a), or
>
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

111. Int. Dec. 3333 (BIA 1996).

112. INA § 212, 8 U.S.C. § 1182 (Supp. III 1998).

removed to Haiti. While his appeal of the removal order to the Board of Immigration Appeals was pending, the district court found that it had jurisdiction to hear his habeas petition. Contrary to the BIA's *Collado* decision, the court found that "[i]f one or more of the conditions [in § 103(a)(13)(C)] do apply, then the statute authorizes but does not require a finding that the alien is seeking admission."[113] The court concluded that under *Fleuti* Richardson was not "seeking admission," and that therefore the inadmissibility grounds in the INA did not apply. The district court further found that the government could not lawfully detain him, as an alien subject to deportability grounds, without a bond hearing before an immigration judge.

On appeal, the Eleventh Circuit declined to reach the merits in a decision ("*Richardson I*")[114] that came well before the Supreme Court decided *AADC*. Instead, the Eleventh Circuit held that § 242(g) eliminated jurisdiction to hear Richardson's constitutional and statutory challenge to his continuing detention. According to the court, § 242(g) abrogated habeas jurisdiction under 28 U.S.C. § 2241.[115] Further, "INA § 242 provides for judicial review for aliens only in the court of appeals and only after a final removal order."[116] Citing § 242(b)(9) and characterizing § 242 as a mandatory "exhaustion" requirement, the court noted: "the AEDPA and IIRIRA reflect Congress' clear intent to avoid unduly protracted litigation over removal orders against resident aliens by consolidating all judicial challenges in the courts of appeals under INA § 242(b)(2) after a final removal order, and by removing all district-court jurisdiction, including § 2241 habeas jurisdiction, over immigration decisions."[117] The court also expressly rejected Richardson's arguments that § 242(g) did not repeal habeas jurisdiction under 28 U.S.C. § 2241, and that (g) applies only to final removal orders and therefore does not bar jurisdiction to decide whether detention is lawful.[118]

Richardson petitioned the Supreme Court for certiorari, and while his petition was pending, the Court decided *AADC*. Given the Court's narrow reading of § 242(g), it came as no surprise when the Court vacated and remanded *Richardson* for further consideration in light of *AADC*. But more was to come. On remand, the Eleventh Circuit again found that there was no jurisdiction to hear Richardson's constitutional and statutory challenge to his continued detention.[119] In this decision ("*Richardson II*"), the Eleventh

113. 994 F. Supp. 1466, 1471 (S.D. Fla. 1998), *rev'd*, 162 F.3d 1338 (11th Cir. 1998), *application to withdraw mandate denied*, 175 F.3d 898 (11th Cir. 1999), *judgment vacated by* 119 S. Ct. 2016 (1999), *on remand*, 180 F.3d 1311 (11th Cir. 1999).

114. 162 F.3d 1338 (11th Cir. 1998).

115. *Id.* at 1355-59.

116. *Id.* at 1357.

117. *Id.* at 1358.

118. *Id.* at 1358 n.100.

119. Richardson v. Reno, 180 F.3d 1311, 1315 (11th Cir. 1999), *pet. for cert. filed*, No. 99-887 (Nov. 23, 1999).

Circuit relied exclusively on another part of § 242: subsection (b)(9), the text of which merits repeating here:

> (9) Consolidation of questions 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.[120]

The Eleventh Circuit's reading of § 242(b)(9) relied heavily on the Supreme Court's decision in *AADC*. Analyzing the link between subsections (g) and (b)(9), the Supreme Court majority asked: why should (g) be interpreted to constrain judicial review of some government decisions and actions, "since [§ 242(b)(9)] channels judicial review of all of them anyway"?[121] The Court's answer was that (g) and (b)(9) have different effective dates. But then it continued by explaining the functions of both (g) and (b)(9). According to the Court, (g) "performs the function of categorically excluding from non-final-order judicial review—even as to transitional cases otherwise governed by [§ 106] rather than the *unmistakable "zipper" clause* of [b)(9)]—certain specified decisions and actions of the INS."[122]

Put differently, the Court suggested in dictum that (b)(9) is a timing consolidation provision that forces noncitizens in removal proceedings to save all of their challenges to unlawful government decisions and actions until after a final removal order issues against them. The Eleventh Circuit's holding in *Richardson II* took the Supreme Court's suggestion one big step further by reading (b)(9) not only to bar ordinary judicial review without a final order, but also to bar habeas review without a final order:

> [W]e find that the 'unmistakable zipper clause' of INA § 242(b)(9), along with the overall revisions to the judicial review scheme enacted by INA § 242 et seq., constitute a sufficiently broad and general limitation on federal jurisdiction to preclude § 2241 jurisdiction over challenges to removal orders, removal proceedings, and detention pending removal.[123]

---

120. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. III 1998).

121. *American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 943.

122. *Id.* (emphasis added).

123. *Richardson II*, 180 F.3d at 1315. At least one federal district court has joined *Richardson II* in holding that (b)(9) eliminates habeas corpus jurisdiction to hear challenges to detention. *See* Edwards v. Blackman, 56 F. Supp. 2d 508, 510-13 (M.D. Pa. 1999). Several other district courts have held to the contrary, that (b)(9) does not eliminate habeas jurisdiction over detention challenges. *See* Bouayad v. Holmes, 74 F. Supp. 2d 471, 473-74 (E.D. Pa. 1999); Kiareldeen v. Reno, 71 F. Supp. 2d 402, 406 (D.N.J. 1999); Alikhani v. Fasano, 70 F. Supp. 2d 1124, 1126-28 (S.D. Cal. 1999). *Cf.* Sierra-Tapia v. Reno, 1999 WL 803898, *2-3 (S.D. Cal. Sep. 30, 1999) ((b)(9) allows limited habeas jurisdiction to hear constitutional challenges to post-final order detention). *See also infra* text accompanying notes 282-84.

The Eleventh Circuit specifically rejected the argument that detention pending removal proceedings fell outside the scope of subsection (b)(9).[124] The court also found it constitutional to extend the Court's dictum: "we conclude that IIRIRA's limitation on § 2241 habeas jurisdiction is not unconstitutional on its face or as applied to Richardson in this case."[125]

Richardson II makes clear that the government can no longer rely on § 242(g)—as narrowed by *AADC*—to argue that ordinary judicial review (and possibly habeas corpus review) are unavailable without a final removal order. In many cases now in the federal courts, (g) applies because § 306(c)(1) of the 1996 Act expressly made (g) retroactive, but (b)(9) does not apply because § 309(c)(1) of the 1996 Act deferred (b)(9)'s effective date. With time, cases in the courts will fall under all of § 242, including (b)(9). If the Eleventh Circuit's reading of (b)(9) in *Richardson II* wins acceptance in other circuits, the government will win back much of what it lost in *AADC* when the Supreme Court read § 242(g) narrowly. Will (b)(9) then force the consolidation that before *AADC* the government had tried to get through (g)? Part II begins by addressing this question.

II. JUDICIAL REVIEW BEYOND *AADC*: LESSONS FROM CIVIL PROCEDURE

Did the Eleventh Circuit read (b)(9) correctly in *Richardson II* to preclude both ordinary judicial review and habeas corpus jurisdiction over a challenge to detention pending removal proceedings? Part II first explores this question, but then it broadens the inquiry to the relationship between timing consolidation and joinder consolidation in judicial review of immigration agency decisions. Ultimately, the questions addressed in Part II concern various aspects of the general problem of judicial review of agency action, and then discusses how general procedural values elucidate the key issues.[126]

Other recent district court decisions have addressed an issue beyond the scope of this article, whether (b)(9) bars habeas jurisdiction to hear challenges to final removal orders. *Compare* Valdivia v. INS, 2000 WL 94617, *5-6 (D.N.J. Jan. 24, 2000) ((b)(9) does not bar habeas jurisdiction to hear challenges to final removal orders); Cuevas v. United States INS, 1999 WL 1270613, *4-6 (N.D.N.Y. Dec. 29, 1999); Jaafar v. INS, 1999 WL 1133682, *2 (W.D.N.Y. Nov. 12, 1999); Tan v. Reno, 1999 WL 969643, *3-4 (N.D. Cal. Oct. 15, 1999); Tam v. Reno, 1999 WL 163055, *5-7 (N.D. Cal. Mar. 22, 1999); *with* Rosas-Paniagua v. Reno, 76 F. Supp. 2d 1060, 1061-63 (N.D. Cal. 1999) ((b)(9) bars habeas jurisdiction to hear challenges to final removal orders); Guy v. Reno, 1999 WL 718554, *3-4 (E.D. Pa. Sep. 2, 1999); Maldonado v. Fasano, 67 F. Supp. 2d 1170, 1175-77 (S.D. Cal. 1999); Mahadeo v. Reno, 52 F. Supp. 203, 204-05 (D. Mass. 1999). *Cf.* Barca v. Holmes, 73 F. Supp. 2d 484 (M.D. Pa. 1999) ((b)((9) bars habeas jurisdiction over challenge to INS decision to reinstate removal order).

124. *Richardson II*, 180 F.3d at 1318 (" 'Any action taken' in INA § 242(b)(9) encompasses detention as the first step in the removal process.").

125. *Id.* at 1315.

126. *See generally* Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1300 (1986); Paul Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984); Paul Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 35-36 (1975).

Part II-A begins my analysis of (b)(9) by explaining that "arising from" in § 242(b)(9)'s timing consolidation rule can fairly be read narrowly or broadly. Second, the better reading is a narrow one that allows review of some matters without a final removal order under the same approach that courts use in applying the "final decision" rule for federal appellate jurisdiction. The core conceptual basis of this reading of (b)(9) is that some matters are sufficiently significant and independent of a removal proceeding that they should not be treated as part of the case or controversy for jurisdictional purposes. This core concept is part of the bedrock of American procedure, because it tries to interpret generally phrased jurisdictional statutes in a way that remains faithful to basic judicial concerns about efficiency and substantive accuracy in adjudication. Part II-B then illuminates the complex relationship between the timing aspects and the joinder aspects of these jurisdictional statutes, by discussing the link between (b)(9) and pattern and practice litigation against the government. Next, Part II-C clarifies the roles of "exhaustion of remedies" and "adequacy of the administrative record" in analyzing judicial review of immigration decisions. Finally, Part II-D addresses this question: even if (b)(9) defers ordinary judicial review, does it also defer habeas review under 28 U.S.C. § 2241 until a final removal order?

A narrow reading of § 242(b)(9) has important consequences, because it opens the door to immediate judicial review of some immigration decisions before a final removal order. It is important to remember, however, that even if (b)(9) does not compel deferring judicial review until after a final removal order, federal courts remain courts of limited jurisdiction, and plaintiffs must plead and prove their jurisdictional basis. The Administrative Procedure Act ("APA") establishes a broad presumption that administrative actions are reviewable. However, the APA does not itself constitute an independent grant of jurisdiction.[127] A litigant seeking district court review must anchor her claim elsewhere. Section 242(a)(1) is unavailable because it refers only to a "final order of removal."[128] The key jurisdictional foundation is 28 U.S.C. § 1331, which vests the district courts with general federal question jurisdiction (without an amount in controversy requirement). Section 1331 reads "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[129] Section 1331 does not override constraints on jurisdiction in other specialized arrangements for review of agency determinations, but if such constraints—for example, INA § 242(b)(9)—do not apply, then § 1331 provides federal subject matter jurisdiction.[130]

---

127. *See* Califano v. Sanders, 430 U.S. 99, 103 (1977).

128. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (Supp. III 1998), *quoted infra* text accompanying note 266.

129. 28 U.S.C. § 1331 (1994).

130. *See Califano*, 430 U.S. at 105; McNary v. Haitian Refugee Center, 498 U.S. 479, 494 (1991) ("the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remains unimpaired by § 210(e) [of the INA]"); *see also* Selgeka v. Carroll, 184 F.3d 337, 341-42 (4th Cir. 1999) (jurisdiction under both 28 U.S.C. §§ 1331 and 2241 to hear procedural due process challenge to

A. *Section 242(b)(9) and the Timing of Judicial Review in Individual Cases*

While the text of § 242(b)(9) may seem clear, it contains several crucial ambiguities. What does it mean for questions of law or fact to be ones "arising from any action taken or proceeding brought to remove an alien from the United States"? Does this include a decision regarding detention pending a removal proceeding? Or is a detention decision sufficiently separate from the removal proceedings to fail this "arising from" test? What about other decisions that have some connection to removal proceedings?

1. *Defining "Final Order" Before 1996*

History provides a good starting point for interpreting § 242(b)(9). The issue of what is included in a "final order" for judicial review purposes is not a new one. Before the 1996 Act, however, it arose in a form that differs somewhat from the timing consolidation issue that courts now face under (b)(9). Former INA § 106 provided that courts of appeals review under the Hobbs Act "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation."[131] The issue was not whether or when judicial review was available, but rather in which court. If a matter was included in a "final order," then § 106(a) applied, and judicial review was in the court of appeals. If a matter was not included in a "final order," then review was in the district court under the general federal question statute, 28 U.S.C. § 1331 and former INA § 279.[132]

The key cases interpreting the term "final orders" in § 106(a) were a trilogy that the Supreme Court decided in the 1960s.[133] In the first, *Foti v. INS*,[134] the noncitizen had sought discretionary suspension of deportation at his deportation hearing. The immigration judge denied suspension and ordered the noncitizen deported. The Court held that § 106(a) included review of the denial of suspension. "[A]ll determinations made during and incident to the administrative proceeding conducted by a special inquiry officer, and reviewable together by the Board of Immigration Appeals . . . are . . . included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a)."[135] The second case, *Giova v.*

---

asylum adjudication); Yu v. Brown, 36 F. Supp. 2d 922, 928-30 (D.N.M. 1999) (jurisdiction under 28 U.S.C. § 1331 to hear challenge to INS processing delays).

131. INA § 106(a), 8 U.S.C. § 1105a(a) (repealed 1996), provided:

> The procedure prescribed by, and all the provisions of chapter 158 of Title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) or pursuant to section 242A or comparable provisions of any prior Act . . . .

132. 8 U.S.C. § 1329 (Supp. III 1998).

133. *See generally* ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 28, at 925-85.

134. 375 U.S. 217 (1963).

135. *Id.* at 229.

Rosenberg,[136] reached a similar result. In *Giova*, the noncitizen had been ordered deported; he then moved before the BIA to reopen the deportation proceedings, and the BIA denied the motion. The Supreme Court held that exclusive court of appeals jurisdiction under § 106 included review of the BIA's denial.[137]

The third case, *Cheng Fan Kwok v. INS*,[138] presented a closer question. Cheng was a noncitizen whose deportation order was already final. He then sought a stay of deportation while he prepared an asylum application. The INS district director denied the stay. Did the court of appeals have exclusive jurisdiction under § 106(a) to review the denial of the stay? No, according to the Supreme Court, because the decision to deny a stay was not a determination "made during a [deportation] proceeding."[139] *Cheng Fan Kwok* thus prevented a court of appeals from reviewing a *post*-deportation-order decision by the immigration authorities when it was considering a petition under § 106(a) (unless that decision happened to arise on a motion to reopen or to reconsider). Such review would have to take place in federal district court.[140]

Later lower court decisions extended the *Cheng* principle to preclude § 106 review of *pre*-order determinations under the immigration laws, if they were made outside deportation proceedings. For example, in *Kavasji v. INS*,[141] a student had asked the INS to extend his nonimmigrant student status and let him transfer schools. The INS denied Kavasji's request and commenced deportation proceedings. Eventually, he was ordered deported. The Seventh Circuit found that it did not have jurisdiction under § 106 to review the extension and transfer denials.[142]

The only exception to the apparent bright line rule—that jurisdiction in the courts of appeals was limited to "orders entered during deportation proceedings"—was that § 106 would allow courts of appeals to hear a claim that the underlying statute is itself unconstitutional. Such a claim could not be raised before immigration judges and the BIA, who under their longstanding practice (similar to other administrative agencies) consider themselves to be without authority to hear or decide constitutional challenges to the statutes they administer.[143]

How relevant is this history to § 242(b)(9), which seems broader in some ways than former § 106? While § 106 put judicial review of "final orders" in the courts of appeals, § 242(b)(9) now consolidates for judicial review "all

---

136. 379 U.S. 18 (1964).
137. *Id.*
138. 392 U.S. 206 (1968).
139. *Id.* at 216.
140. *See generally* David Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. J. INT'L L. 803 (1987). *See also* Susan M. Akram, *Traps for the Unwary, or Major Issues on Judicial Review of Deportation Decisions Under INA § 106*, in 2 1995-96 IMMIGRATION & NATIONALITY LAW HANDBOOK 367 (1995).
141. 675 F.2d 236 (7th Cir. 1982).
142. *Id.* at 238-39.
143. *See supra* note 4 and accompanying text.

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." The different phrasing in (b)(9) undermines the actual holding of *Cheng Fan Kwok*,[144] which defined "final orders" under former § 106.[145] In fact, the government decision at issue in *Cheng*—denial of a stay of deportation after a deportation order—may be within the new timing consolidation provision in § 242(b)(9).

But what, if anything, is left of *Cheng* in a broader sense? In the (b)(9) context, *Cheng* suggests that a matter, while connected to a pending removal proceeding, may be sufficiently independent of the final removal order that it falls outside the consolidation rule in § 242(b)(9). Or is the phrase "arising from" in (b)(9) to be read as broadly as possible, and thus to bar judicial review of such matters? Such expansive readings might include and thus compel timing consolidation for any issue having any connection to a removal proceeding, or any issue that would not have arisen but for the removal proceeding.

As I explain momentarily, these expansive readings of "arising from" in (b)(9) are not faithful to the text of (b)(9). Nor are they faithful to (b)(9)'s place in INA § 242, as part of a subsection that applies to removal orders. The title of subsection (b) is "Requirements for review of orders of removal," and the text begins with this limiting language: "With respect to review of an order of removal under subsection (a)(1), the following requirements apply: . . . ."[146] Moreover, expansive readings of (b)(9) are not faithful to basic procedural values—among them efficiency and substantive accuracy, including an adequate remedy for violations of law—that have traditionally informed judicial interpretation of jurisdictional and other procedural rules.

2. *Lessons From Civil Procedure*

Reading (b)(9) is not as simple a task as might first appear. A range of readings from narrow to broad can all find textual support. To illustrate the range of options, but then to suggest that a narrow reading of (b)(9) makes more sense in the end, consider some jurisdictional problems concerning civil litigation in the federal courts.

a. *Federal question jurisdiction: "arising under"*

The ambiguity of "arising from" in INA § 242(b)(9) is evident from the complexity of interpreting the similar phrase "arising under" in the general

---

144. 392 U.S. 206 (1968).

145. *See* Benson, *supra* note 28, at 1456 ("[Section 242(b)(9)] does not directly forbid judicial review but rather tries to gather all other permissible claims and channel them into review of the final order of deportation.").

146. INA § 242(b), 8 U.S.C. § 1252(b) (Supp. III 1998). *See, e.g.*, Alikhani v. Fasano, 70 F. Supp. 2d 1124, 1126-27 (S.D. Cal. 1999) (title and text of § 242(b) indicate that it applies only to review of removal orders).

federal question statute, 28 U.S.C. § 1331. This provision is the statutory authority for subject matter jurisdiction in the federal district courts pursuant to Article III, Section 2 of the Constitution, under which the federal "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[147] The prevailing reading of "arising under" in § 1331 comes from the Supreme Court's 1908 decision in *Louisville & Nashville Railroad v. Mottley*.[148] A federal issue in a case establishes federal question jurisdiction only if that issue appears on the face of a "well-pleaded complaint."[149] This is much narrower than an equally plausible reading of § 1331: that a federal issue in either the plaintiff's or the defendant's pleadings is enough to establish federal subject matter jurisdiction.

The precise application of the well-pleaded complaint rule has posed elaborate, vexing problems at least as far back as *Mottley*. My purpose here is not to recount or comment on the many nuances of these interpretive complexities,[150] but to offer two observations. First, the prevailing reading of "arising under," while narrow, is still faithful to the text of § 1331. I am not suggesting that § 1331 should be read to limit or not limit jurisdiction, but rather that either reading of § 1331 has textual support. Second, this narrow reading of § 1331 to limit jurisdiction reflects a number of important considerations that place federal question jurisdiction within the broader context of federal subject matter jurisdiction and the need for workable jurisdictional rules generally. In the context of INA § 242(b)(9), I later explain why this context and the need for workable rules suggest a reading that, unlike the prevailing reading of § 1331, does not limit jurisdiction.

Mottley's requirement that a federal question must appear on the face of a "well-pleaded complaint" has the important virtue that is comparatively certain and easier to administer. Less workable is an alternative reading of § 1331 that would base federal question jurisdiction on educated guesses about whether defendants would make arguments rooted in federal law. *Mottley* is also far more certain and easier to administer than reading § 1331 to defer a decision on federal question jurisdiction until after the defendant answers or later amends its answer. *Mottley* also reflects some basic principles that inform judicial interpretation of jurisdictional rules. The most prominent of these is the idea that federal courts are courts of limited jurisdiction.[151] Even if the constitutional language in Article III, Section 2,

---

147. U.S. CONST. art. III, § 2.
148. 211 U.S. 149 (1908).
149. *See id.* at 152-54; Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-11 (1983).
150. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 263-74 (2d ed. 1994); CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 108-13 (5th ed. 1994).
151. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); Willy v. Coastal Corp., 503 U.S. 131, 136-37 (1992).

would support federal subject matter jurisdiction based on a federal defense,[152] the narrower reading of identical statutory language in 28 U.S.C. § 1331 prevails without serious challenge.

b. Appellate jurisdiction: "final decision"

A narrow reading of INA § 242(b)(9) draws more specific support from another general provision governing federal court jurisdiction. Under 28 U.S.C. § 1291, the federal courts of appeals have jurisdiction over appeals from "final decisions of the district courts of the United States."[153] In practical effect, this provision prevents a party to civil litigation from being able to file an appeal from every adverse district court ruling. For example, adverse discovery rulings are generally subject to appellate review only after the district court has reached a "final decision" in the case.[154] Section 1291 is one of several provisions governing the jurisdiction of federal courts that asks whether a decision is "final."[155]

At first glance, § 1291 seems only loosely relevant to interpreting § 242(b)(9), which requires a final removal order before courts may review any matter "arising from any action taken or proceeding brought to remove an alien from the United States under this title." Section 1291's requirement of a "final decision" for appeal seems less close to § 242(b)(9) than it is to former INA § 106, which limited court of appeals jurisdiction to "final orders of deportation."[156] Section 1291 also resembles former INA § 106(b), under which "any alien against whom a final order of exclusion has been made heretofore or hereafter . . . may obtain judicial review of such order by habeas corpus proceedings and not otherwise." Arguably, the shift from "final orders" in former § 106 to "questions . . . arising from" in § 242(b)(9) has made it unimportant to decide what is part of a "final order." The

---

152. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494-95 (1983); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818-23 (1824).

153. 28 U.S.C. § 1291 (1994) provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

The precursor of § 1291 is the Judiciary Act of 1798, 1 Stat. 73, 84, which established the principle that only "final judgments and decrees" of the federal district courts are reviewable on appeal.

154. The Supreme Court explained in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981): "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." The Court continued: "Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system." *Id. Firestone* held that orders denying motions to disqualify counsel are not appealable final decisions under § 1291.

155. A similar provision governing federal court jurisdiction is 28 U.S.C. § 1257 (1994), which authorizes Supreme Court review of "final judgments or decrees" of the highest state courts in which review can be had. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). I examine § 1291 rather than § 1257 because the latter raises significant federalism issues that are typically present in neither § 1291 nor INA § 242(b)(9).

156. INA § 106(a), 8 U.S.C. § 1105a(a) (repealed 1996), *quoted in supra* note 131.

argument would continue: after the 1996 Act there is no judicial review before a final order, even if previously the government decision being challenged would have been reviewable in federal district court under *Cheng Fan Kwok.*[157]

On closer inspection, however, 28 U.S.C. § 1291 is quite similar to INA § 242(b)(9), in that both might operate to consolidate and defer judicial review of a lower tribunal. To be sure, § 1291 is not written in this way; rather, it resembles former § 106. But in context, former INA § 106 posed a totally different issue from § 1291. Under § 106, the party that failed to qualify for Hobbs Act judicial review in the court of appeals could file a challenge in federal district court under 28 U.S.C. § 1331 and former INA § 279. This is what the plaintiff did in *Cheng Fan Kwok.* In contrast, 28 U.S.C. § 1291 is a timing consolidation statute, as is INA § 242(b)(9). Unless a decision qualifies as "final" under § 1291, the losing side on any issue in district court generally must wait until a final decision is forthcoming. Otherwise, the federal court of appeals has no jurisdiction. The interpretive question under § 1291 is thus analogous to § 242(b)(9): what agency decisions may a court review even before the end of the proceedings to which they are somehow connected?

Courts have construed the "final decision" rule in § 1291 to allow appeals over "collateral orders." These are, in the phrasing of a leading Supreme Court decision, *Cohen v. Beneficial Industrial Loan Corporation*,[158] prejudgment orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[159] *Cohen* also required that the order sought to be appealed "presen[t] a serious and unsettled question."[160] *Cohen* itself involved an order declining to apply in federal court a state statute requiring the posting of bond in a shareholder derivative action. The Court held this order immediately appealable under 28 U.S.C. § 1291. In a later decision, the Court explained that the *Cohen* "collateral order" exception requires that three conditions be met: it must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."[161]

Combining well-established interpretations of 28 U.S.C. § 1331 and 28 U.S.C. § 1291, we see two things. First, the interpretation of "arising under" in the federal question statute suggests considerable latitude is possible in

---

157. *See supra* discussion at text accompanying notes 131-40.
158. 337 U.S. 541 (1949).
159. *Id.* at 546.
160. *Id.* at 547.
161. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); *see also* Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 431 (1985).

interpreting "arising from" in INA § 242(b)(9) while remaining faithful to the statutory text. Second, the prevailing reading of "final decision" in 28 U.S.C. § 1291 for purposes of federal appellate jurisdiction is one way of understanding how some matters may be sufficiently significant and independent from a pending removal proceeding to fall outside (b)(9). Further support for this inquiry into what is a significant and independent matter comes from one prominent rule-based exception to the "final decision" rule. Under rule 54(b) of the Federal Rules of Civil Procedure, district courts may allow appeal of some decided claims in a case if they are separable from the other, as yet undecided claims.[162]

In short, the case law under 28 U.S.C. § 1291 suggests that courts may and should read § 242(b)(9) narrowly, to permit immediate judicial review of significant and independent matters, even if they are in some sense questions "arising from" a pending removal proceeding. *Cohen* reflects basic procedural values that should not be overridden without a clear statement by Congress. The hard question—which I defer for the moment but revisit in Part II-A-3—is how to define precisely what is "significant and independent" in this sense.

c. *Appellate jurisdiction: injunctive relief*

Another rule of appellate jurisdiction, 28 U.S.C. § 1292(a)(1), differently supports the view that some matters are sufficiently significant and independent of a pending removal proceeding to warrant judicial review without a final decision. Section 1292(a)(1) allows federal appeals courts to hear appeals from district court orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.[163] The basis for this statutory exception to the "final decision" requirement in 28 U.S.C. § 1291 is the potential for harm inherent in injunctive relief that is

---

162. FED. R. CIV. P. 54(b) provides:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

163. 28 U.S.C. § 1292(a)(1) (1994) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

erroneously granted. This is a particular concern with preliminary injunctions, which by definition a court issues before a final decision in a case.[164]

One of the safeguards against the potential harm resulting from an erroneous grant or denial of a preliminary injunction is built into the traditional requirements that the party seeking a preliminary injunction must meet. Among these traditional requirements is that the party can show a likelihood of success on the merits, and that it would suffer "irreparable harm" unless the court issues or denies the preliminary injunction.[165] This preliminary examination of the merits before any interim disposition, combined with an "irreparable harm" requirement, amount to an inquiry into whether the stakes pending final decision are sufficiently significant and independent of the merits of the underlying claim that the court should act before a final decision.

The existence of an injunctive relief exception that undertakes this inquiry supports a narrow reading of INA § 242(b)(9) that permits judicial review of significant and independent matters without waiting for a final removal order. One possible rebuttal is that the very existence of an express statutory exception for injunctive relief suggests that there can be no further, implied exceptions to the "final decision" requirement. But it makes better sense of 28 U.S.C. § 1292(a)(1) to see it as eliminating debate over whether particular injunctions qualify for immediate appellate review under the *Cohen* collateral order rationale. Even without § 1292(a)(1), courts of appeals could review many grants or denials of injunctions under the prevailing view of § 1291. In the same way, the text of § 242(b)(9) should be read narrowly to allow some judicial review before a final removal order.

d. Supplemental jurisdiction: "case or controversy"

Another example of jurisdictional line-drawing in civil litigation sheds light on INA § 242(b)(9) in a different way, by showing that courts often must decide when a matter should be treated as part of the same case, or instead is separate. Under 28 U.S.C. § 1367, federal courts must determine the reach of their "supplemental jurisdiction."[166] This is subject matter jurisdiction to hear claims that have no independent basis for federal subject matter jurisdiction, but which are related to claims that federal courts clearly may hear. Under this statute and the abundant case law that preceded it (and which

164. *See* Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981) (appeal as of right under § 1291(a)(1) has the statutory purpose of "permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence") (quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)).

165. Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961, 1978 (1999); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

166. Cases before the enactment of 28 U.S.C. § 1367 in 1990 used the terms "pendent" and "ancillary" jurisdiction. Section 1367 uses "supplemental jurisdiction" to include pendent and ancillary jurisdiction, as well as "pendent party" jurisdiction and other situations that do not fit neatly into the pendent and ancillary jurisdiction categories.

it largely codifies), federal courts will hear such related claims. Yet, there is a point at which the connection becomes so attenuated that jurisdiction over the related claims no longer exists.

This inquiry into the crucial degree of attenuation is constitutionally compelled, since the federal judicial power extends only to a "case or controversy" within the constitutional bases of federal subject matter jurisdiction enumerated in Article III, Section 2. According to a leading Supreme Court case, *United Mine Workers v. Gibbs*,[167] a constitutional "case" "must derive from a common nucleus of operative fact."[168] Further, the claims must be "such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding."[169] Codifying this constitutional requirement, 28 U.S.C. § 1367(a) sets out this threshold rule: "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[170]

The rest of 28 U.S.C. § 1367 makes clear that the degree of attenuation that eliminates federal jurisdiction depends heavily on the significance of the matters over which the federal courts lack an independent jurisdictional basis. Thus, § 1367(c) provides that the "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" if, among other things, "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." This familiar reasoning pattern—in which efficiency and substantive accuracy help decide what is part of one "case"—applies in deciding the scope of the timing consolidation that INA § 242(b)(9) requires.

3. *Significant Independent Matters in Immigration Cases*

I now return to the hard question of how to define what matters are so "significant and independent" that a court should hear them immediately rather than wait until a final removal order has issued. The case law construing 28 U.S.C. § 1291 is helpful but cannot be the entire inquiry. Even before we reason by analogy from § 1291, we can draw guidance from the phrase "arising from" in § 242(b)(9). I start with two types of detention, both of which should be immediately reviewable in court in spite of (b)(9), but interestingly for different reasons. I then see if the general principles that justify immediate judicial review of detention issues suggest other categories in which judicial review should not require a final removal order.

---

167. 383 U.S. 715 (1966).
168. *Id.* at 725.
169. *Id.*
170. 28 U.S.C. § 1367 (1994).

a. Prolonged or indefinite detention after a final order and the meaning of "arising from"

Any court that applies (b)(9) will reach anomalous results if it does not appreciate the ambiguity in the phrase "arising from" and at least try to discern the boundaries of the removal proceeding that should be subject to (b)(9)'s timing consolidation rule. Consider a noncitizen whom the government detains *after* a final removal order, rather than detention pending removal proceedings as in *Richardson*. Assume further that post-removal order detention will be indefinite or prolonged because the noncitizen's own government is unwilling to accept him, or because for other reasons the noncitizen lacks the appropriate travel documents. A number of indefinitely detained noncitizens have challenged their detention on statutory and constitutional grounds, with mixed success.[171]

Do the questions of law or fact in a challenge to prolonged or indefinite post-order detention fit within the clause in (b)(9), "arising from any action taken or proceeding brought to remove an alien from the United States"? Consider the consequences if the answer is "yes." The factual basis for this type of challenge typically arises only long after a final removal order has issued. If the questions of law or fact in this claim are questions "arising from," then under (b)(9) judicial review "shall be available only in judicial review of a final order under this section."[172] But § 242(b)(1) sets a thirty-day deadline for filing a petition to review a final removal order.[173] As a result, a broad reading of (b)(9) to cover a challenge to indefinite or prolonged detention would eliminate ordinary judicial review altogether.

Why does it seem anomalous to read (b)(9) to eliminate court jurisdiction under § 242 to review the lawfulness of detaining a noncitizen indefinitely *after* she has been ordered removed? To be sure, a challenge to post-removal order detention can be made to fit under a broad reading of "arising from." To be sure, such a challenge is related in some sense to the removal proceeding. And the indefinite detention would not have occurred but for the removal proceeding. At some point, however, courts must give some meaning to Congress' choice to adopt the phrase "arising from" rather than "related to" or some other, broader language not found in (b)(9).

The Fifth Circuit's recent discussion in *Humphries v. Various Federal USINS Employees* offers some help.[174] *Humphries*, decided just one month

171. Some courts have upheld the lawfulness of indefinite or prolonged detention, but after acknowledging jurisdiction to hear the challenge to detention. *See, e.g.*, Ngo v. INS, 192 F.3d 390, 393, 395-99 (3d Cir. 1999); Zadvydas v. Underdown, 185 F.3d 279, 285-86, 288-97 (5th Cir. 1999). According to other decisions, the Constitution requires an individualized hearing to consider release from indefinite detention; these courts ordered the alien's release upon certain conditions. *See, e.g.*, Phan v. Smith, 56 F. Supp. 2d 1158, 1159 (W.D. Wash. 1999); Phan v. Reno, 56 F. Supp. 2d 1149, 1152, 1153-57 (W.D. Wash. 1999); Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 153, 155-63 (D.R.I. 1999).

172. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. III 1998).

173. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1), provides: "The petition for review must be filed not later than 30 days after the date of the final order of removal."

174. 164 F.3d 936 (5th Cir. 1999).

before the Supreme Court's *AADC* decision, construed "arising from" not in (b)(9), but rather in § 242(g). The Fifth Circuit held that (g) did not bar claims for involuntary servitude and mistreatment during detention because they did not fit within the bar in (g) to judicial review of causes or claims "arising from" a decision or action to "commence proceedings, adjudicate cases, or execute removal orders." *Humphries* also held, however, that a retaliatory exclusion claim did "arise from" such decisions or actions, and thus was barred under § 242(g). Reasoning by analogy from similar phrases in a variety of cases, the court explained: "As a general matter, 'arising from' does seem to describe a nexus somewhat more tight than the also frequently used phrase 'related to.' "[175] *Humphries* distinguished between "those claims with no more than a weak, remote or tenuous connection to a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders,' " and "those claims connected directly or immediately with a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders.' "[176]

In considering *Humphries* in the (b)(9) context, we should note one key difference between the "arising from" language in (g) and in (b)(9). INA § 242(g) refers to "any *cause or claim* . . . arising from . . . ."[177] In contrast, (b)(9) refers to "*all questions of law and fact*, including interpretation and application of constitutional and statutory provisions, arising from . . . ."[178] This difference matters because (b)(9)'s reference to "questions" rather than "claims" narrows the reach of the phrase "arising from" in (b)(9). It does this because the text of (b)(9) asks courts to focus first on a court challenge to a final removal order as a claim that must be brought in a federal court of appeals under INA § 242(a)(1) and the Hobbs Act.[179] Then, by a form of gravitational force, (b)(9) consolidates with that claim any sufficiently connected "questions of law or fact." If instead, (b)(9) expressly referred to "any cause or claim . . . arising from," then it would have a stronger gravitational attraction than the actual (b)(9) does. As enacted, (b)(9) seems to recognize that when a noncitizen seeks immediate judicial review of a matter that is not merely a related "question," but rather a significant and independent matter in its own right, then (b)(9) does not require a final order before judicial review.

If we consider (1) the textual analysis that follows from *Humphries* (and the many cases that *Humphries* cites), (2) the reference to "questions" in (b)(9), and (3) the consequences that would follow from interpreting "arising from" to require that any challenge to prolonged or indefinite post-order detention be consolidated with judicial review of the final order itself, then

175. *Id.* at 943.
176. *Id.*
177. INA § 242(g), 8 U.S.C. § 1252(g) (Supp. III 1998).
178. INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. III 1998).
179. *See supra* discussion at text accompanying note 44.

we should conclude that any such challenge should fall outside the ambit of (b)(9). To be sure, one might draw this simpler conclusion: that "arising from" in § 242(b)(9) covers any matter related to a removal proceeding or any matter that would have arisen but for a removal proceeding—*except* matters that arise long after a final removal order. This would eliminate the anomaly of judicial review of indefinite detention, but it would interpret (b)(9) to defer judicial review of detention *pending* removal proceedings—as did *Richardson*. But I doubt that timing is the explanatory principle. What really makes it anomalous to include indefinite detention within the timing consolidation rule in (b)(9) is that there is a point at which a significant matter becomes independent enough that it falls outside any rule intended to channel review of more closely related matters. This is the same concept that underlies the *Cohen* collateral order exception that the federal courts have used to apply the "final decision" rule in 28 U.S.C. § 1291, but it is a broader concept than *Cohen* itself. Post-final-order indefinite detention is a prime example of a significant and independent matter, but it is not the only one. I now return to *Richardson* and the general topic of detention pending removal proceedings, to see if challenges to pre-final-order detention should also fall outside "arising from" in (b)(9).

b. Detention pending removal proceedings and the analogy to Cohen *collateral orders*

Is Ralph Richardson's continuing detention pending final resolution of his removal proceeding sufficiently weighty to merit separate judicial review? Compared to a post-order detention challenge, the lawfulness of his detention is more closely connected to the proceedings initiated to remove him from the United States, in that both questions arise at the same time rather than at quite different times. With this degree of connection, textual analysis of the phrase "arising from" is less helpful, and we need to consider general principles that might inform our reading of INA § 242(b)(9) (or of any other timing consolidation statute) and help us decide whether to exclude certain matters from its reach.

We can draw guidance from the Supreme Court's approach to 28 U.S.C. § 1291 in *Cohen* and its progeny. Under the accepted understanding of these cases, three separate tests must be met before immediate judicial review is allowed. The decision to be reviewed must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment."[180] A court challenge to the lawfulness of detention should generally meet the first test. In *Richardson*, the continuing pendency or

180. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); *see supra* text accompanying notes 158-62.

ultimate outcome of removal proceedings will not undermine the conclusiveness of a judicial decision regarding the lawfulness of detention.

The second, "separate from the merits" test can pose a more complex problem for immediate judicial review of the lawfulness of detention. The question is whether the matter on which immediate review is sought can be decided without assessing the merits of the case, which will be reviewed only after a final order. A leading Supreme Court case held that an order disqualifying attorneys on the ground that they should testify at trial is not immediately appealable. The Court explained that such orders "are inextricable from the merits because they involve an assessment of the likely course of the trial and the effect of the attorney's testimony on the judgment."[181]

In many detention cases, this second *Cohen* test poses no problem. Take, for example, a challenge to the lawfulness of detention, based on the effective date of the detention statute that the government applies. This issue would be "completely separate from the merits of the action" in every sense, as it would not even arise in the removal proceeding itself. In *Richardson v. Reno*, however, the statutory question whether Richardson was "seeking admission" under the INA is relevant both to his detention challenge and to his argument that he is not removable (or in the alternative, that he may invoke defenses to removability).[182] If he was seeking admission, his removability would be decided under the inadmissibility grounds in the INA rather than the deportability grounds, and his detention challenge would be weaker. At least on first impression, this dual role played by the "seeking admission" issue suggests that a court challenge to detention in *Richardson* is the sort of claim that would fail the second *Cohen* test and thus not be immediately appealable in the context of 28 U.S.C. § 1291.

On closer inspection, however, "completely separate from the merits of the action" does not mean that the appealed order and the merits of the case may share no common issue. Here the Supreme Court cases on the appealability of district court rulings on immunity are helpful. In *Mitchell v. Forsyth*,[183] the district court denied a motion to dismiss based on a defendant's assertion of qualified immunity. The Supreme Court held that this order was immediately appealable under 28 U.S.C. § 1291, rejecting the argument that this order failed the second *Cohen* test because resolving the immunity issue required considering the plaintiff's factual allegations. The Court explained: "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue."[184] The conceptual separation is more important than overlapping issues: "it follows from the recognition that qualified immunity is in part an entitlement not to

---

181. Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 439 (1985).
182. *See supra* text accompanying notes 107-13.
183. 472 U.S. 511 (1985).
184. *Id.* at 528-29.

be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated."[185] By the reasoning in *Mitchell*, detention pending a removal proceeding is, for purposes of the second *Cohen* test, conceptually distinct from the merits of the removal proceeding itself, even if there is a common issue of fact or law.

Whether a detention challenge meets the third *Cohen* test—that the order be "effectively unreviewable"—depends first on the length of the detention period. Arguably, short-term detention for the minimum period necessary before a bond hearing can be held is merely part of the pending removal proceeding. But with detention longer than this irreducible minimum, the loss of liberty inherent in detention becomes effectively unreviewable if judicial review is delayed until after a final removal order. The 1989 Supreme Court decision in *Lauro Lines s.r.l.. v. Chasser*[186] explained: "an order is 'effectively unreviewable' only 'where the order at issue involves "an asserted right the legal practical value of which would be destroyed if it were not vindicated before trial." ' "[187] The Court gave some examples that are less compelling than physical custody pending removal proceedings:

> We have thus held in cases involving criminal prosecutions that the deprivation of a right not to be tried is effectively unreviewable after final judgment and is immediately appealable. Similarly, in civil cases, we have held that the denial of a motion to dismiss based upon a claim of absolute immunity from suit is immediately appealable prior to final judgment, "for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."[188]

A closer analogy to detention pending a removal proceeding is an order denying a motion to reduce bail in a criminal case. Is such an order immediately appealable under 28 U.S.C. § 1291? Yes, according to the Supreme Court in a 1951 decision, *Stack v. Boyle*.[189] Writing separately in *Stack*, Justice Jackson, who had authored the Court's opinion in *Cohen*, explained: "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried—and unless it can be reviewed before sentence, it never can be reviewed at all."[190] Referring to the holding in *Cohen*, Jackson continued: "The relation of an

---

185. *Id.* at 527-28.
186. 490 U.S. 495 (1989) (an order denying a defendant's motion to dismiss a damages action on the basis of a contractual forum selection clause is not immediately appealable under 28 U.S.C. § 1291 as a collateral final order).
187. *Id.* at 498-99 (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 799 (1989), in turn quoting United States v. MacDonald, 435 U.S. 850, 860 (1978)).
188. *Lauro Lines*, 490 U.S. at 499-500 (quoting Mitchell v. Forsyth, 472 U.S. 511, 525 (1985)).
189. 342 U.S. 1, 4 (1951).
190. *Id.* at 12 (Jackson, J., separate opinion).

order fixing bail to final judgment in a criminal case is analogous to an order determining the right to security in a civil proceeding."[191]

We should be cautious, however, before relying mechanically on *Cohen* itself to argue for immediate review of a detention order pending removal proceedings. In *Cohen*, the issue was the immediate appealability of a district court order *refusing* to require plaintiffs to post a security bond pending litigation.[192] The *Richardson* facts are the reverse. Ralph Richardson, the party seeking immediate judicial review, was the party *required* to post security in the form of his own body.[193] Some court of appeals decisions hold that orders requiring the posting of security in civil cases are not immediately reviewable. A typical decision explained why: "Orders granting security generally cause no irreparable loss in that parties posting security will be repaid with interest if they prevail."[194] But this reasoning does not apply to security in the form of detention. The broader understanding of *Cohen* that Justice Jackson articulated in *Stack*—as calling for immediate appealability of orders relating to security—therefore suggests that detention orders should be immediately reviewable by analogy.

The gravity of detention as the basis for immediate judicial review is further evident by comparison with situations in which the Court has not allowed immediate appeal of orders that subject a defendant to a civil suit. In *Van Cauwenberghe v. Biard*,[195] a 1988 decision, the Court held that an order denying a motion to dismiss on the ground that an extradited person is immune from civil process is not immediately appealable. The Court noted that the defense of a civil case "does not significantly restrict a defendant's liberty."[196] The Court continued with reasoning that strongly suggests physical custody *would* prompt immediate appealability: "Service of process merely requires that a defendant appear through an attorney and file an answer to the complaint to avoid default. There is no possibility that the defendant will be subject to pretrial detention or be required to post bail."[197]

The Eleventh Circuit's decision in *Richardson II* raises one possible counter to any argument for immediate judicial review that likens detention pending removal proceedings to detention pending criminal proceedings. *Richardson II* noted that detention of a noncitizen pending immigration proceedings is entirely within the noncitizen's control, in that he has the power to end detention by voluntarily leaving the United States.[198] While this

---

191. *Id.*
192. 337 U.S. at 543.
193. 162 F.3d at 1344.
194. Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Corp., 948 F.2d 111, 114 (2d Cir. 1991).
195. 486 U.S. 517 (1988).
196. *Id.* at 526.
197. *Id.*
198. *Richardson II*, 180 F.3d at 1317 n.7 ("he may obtain his release at any time he chooses by withdrawing his application for admission and leaving the United States"). The 1996 Act repealed former INA § 106(c), which provided: "An order of deportation or exclusion shall not be reviewed by any court if

is literally true, this approach to detention only puts Richardson in the position of substituting one form of "effectively unreviewable," irreparable harm for another.

This discussion of 28 U.S.C. § 1291 suggests two things. First, detention orders, even if they are arguably "arising from" removal proceedings, are precisely the sort of order that would be treated as immediately appealable collateral orders under 28 U.S.C. § 1291. Second, detention orders should therefore be treated as independent enough of the merits of proceedings to permit a federal district court to hear a challenge before a final order. This conclusion follows from a close analysis of the three tests set out in *Cohen*, but the real inquiry is more basic than any three-test rubric might suggest.

The Supreme Court has explained: "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction of it.' "[199] Similarly: "*Cohen* did not establish new law; rather it continued a tradition of giving § 1291 a 'practical rather than technical' construction."[200] This practical construction amounts to answering this question: does the matter have significance that is independent of a proceeding that is not yet "final," and is this significance enough to override the efficiency and comprehensiveness concerns that usually counsel timing consolidation? If this practical construction preserves the meaning of § 1291, then the same general reasoning should apply to interpreting INA § 242(b)(9) to decide what claims—even if within a broad reading of "arising from"—are subject to immediate judicial review before a final order. Indeed, a reason for immediate review to be more available under § 242(b)(9) than 28 U.S.C. § 1291 is that decisions not immediately reviewable under the latter provision may still be certified for immediate appellate review under 28 U.S.C. § 1292(b). The Supreme Court has cited the possibility of review under 28 U.S.C. § 1292(b) in finding that certain types of orders are not immediately appealable under 28 U.S.C. § 1291.[201]

c. *Other "significant and independent" matters*

I have identified the concept of significant and independent matters as tied first to the meaning of "arising from." Then, even if a matter "arises from"

---

the alien . . . has departed from the United States after issuance of the order." Now, a noncitizen may continue to seek judicial review after leaving the United States. As a corollary, there is no longer an automatic stay of removal pending judicial review. *See* INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B) (Supp. III 1998). A noncitizen subject to a removal order may apply for a discretionary stay pending appeal.

199. Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (citing *Cohen*, 337 U.S. at 546).

200. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981) (citing Bronson v. LaCross & Milwaukee R. Co., 67 U.S. 524, 530-31 (1862); Forgay v. Conrad, 47 U.S. 201, 203 (1848); Whiting v. Bank of the United States, 38 U.S. 6, 15 (1839)).

201. *See, e.g.*, *Van Cauwenberghe*, 486 U.S. at 529-30.

any action or proceeding to remove an alien, (b)(9) may not require a final order, under a practical construction similar to the collateral order doctrine under 28 U.S.C. § 1291. With these two limits on the phrase "arising from" in § 242(b)(9), we can now consider whether (b)(9) permits immediate judicial review of claims besides detention challenges without a final removal order.

One example is a Federal Tort Claims Act[202] or *Bivens*[203] claim for damages against individual government officials for unlawful conduct injuring a noncitizen.[204] These might arise when the government physically and forcibly apprehends noncitizens as part of the process of removing them from the United States.[205] If it were just a matter of applying the *Cohen* collateral doctrine from 28 U.S.C. § 1291, it is not clear that immediate court access would be available. Immediate court access would conclusively determine the claim, thus meeting the first *Cohen* test. As with detention challenges, there may be some common issues between these claims and the related removal proceeding, but the conceptual separation should be clear enough to meet the second *Cohen* "separate from the merits" test. The third test, that the matter be "effectively unreviewable," is more problematic. Damage suits against the federal government or federal officers do not raise the obvious problem of effective unreviewability that is present in detention challenges. Delay in paying damages may be closer to an order requiring the posting of security in a civil case. These orders, the Supreme Court has held, are not immediately appealable under *Cohen*.[206]

The real reason that Federal Torts Claims Act and *Bivens* suits are probably beyond the reach of (b)(9) is not *Cohen*, but rather the first limit — the meaning of "arising from." These claims, like the claims in *Humphries*, may be "related to" removal proceedings.[207] We should, however, give meaning to Congress' choice of "arising from" rather than the broader phrase "related to," and to its choice of "questions" rather than the broader term "claims." If we give meaning to this language, then these Federal Torts Claims Act and *Bivens* suits do not present "questions of law and fact . . . arising from any action taken or proceedings brought to remove an alien," as (b)(9) requires deferral of judicial review. For this reason, Federal Tort Claims Act and *Bivens* suits should be treated as significant and independent matters for purposes of allowing immediate judicial review in spite of (b)(9), without having to rely on the analogy to *Cohen* collateral orders.

A much harder case than a detention challenge or a damage suit would be an order permitting the use of undisclosed evidence in a removal proceeding.

---

202. *See* 28 U.S.C. §§ 2671-2680 (1994).

203. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

204. I am grateful to Professor Neuman for suggesting this example.

205. *See, e.g.*, Lynch v. Cannatella, 810 F.2d 1363, 1367 (5th Cir. 1987); Sanchez v. Rowe, 651 F. Supp. 571, 574 (N.D. Tex. 1986).

206. *See supra* text accompanying note 194.

207. *See supra* text accompanying notes 174-79.

Haddam v. Reno,[208] a recent district court case, found that the government's use of undisclosed evidence in an exclusion proceeding was not open to judicial review before the issuance of a final exclusion order. *Haddam* was a transitional rule case; so former INA § 106 applied rather than § 242(b)(9). However, its reasoning may anticipate how a court might decide whether (b)(9) precludes immediate judicial review of an order that a removal proceeding may rely on undisclosed evidence.

The *Haddam* court found that judicial review was not yet available, because "if a final order of exclusion issues, its validity will depend on the secret evidence."[209] The court noted that procedural defects were within the competence of the Board of Immigration Appeals to correct.[210] The court also summarily dismissed the argument that immediate judicial review of the use of secret evidence was necessary because of the chilling effect that the proceedings would have on the exercise of First Amendment rights.[211]

Whether (b)(9) bars immediate judicial review of the use of secret evidence depends on some case-specific variables. Rulings regarding evidentiary matters, like those regarding discovery, fall within the traditional understanding of orders in civil litigation that are not immediately appealable.[212] And compared to a challenge to prolonged or indefinite detention or to a damage suit against the federal government or federal officers, it is much harder to argue that an order permitting the use of undisclosed evidence does not present questions of law or fact "arising from" the removal proceeding.

The next question is whether reasoning by analogy from *Cohen* collateral orders takes this order outside the reach of (b)(9). The second *Cohen* test of "separate from the merits" poses a potential obstacle to immediate judicial review. The order allowing the use of undisclosed evidence would likely have issues in common with the merits of the removal proceedings. But depending on the facts, the approach in *Mitchell v. Forsyth*,[213] with its focus on what is "conceptually distinct," may support immediate judicial review by analogy to 28 U.S.C. § 1291.[214]

In applying *Cohen*, probably the most complex issue concerns the chilling effect on speech as a consequence of the pendency of removal proceedings. To the extent that this effect is substantial and provable, the third, "effectively unreviewable" test in *Cohen* would be met. It may be difficult in many

---

208. Haddam v. Reno, 54 F. Supp. 2d 588, 597-98 (E.D. Va. 1999).

209. *Id.* at 598.

210. *Id.* at 599 n.52 (citing Farrokhi v. United States INS, 900 F.2d 697, 701 (4th Cir. 1990)).

211. *Id.* at 599 n.55. In contrast, the court found that a challenge to the noncitizen's detention pending proceedings was "distinct from" the exclusion decision. The court observed, "nothing in the record suggests that any administrative steps remain to be taken with respect to the detention decision, which is final and administratively exhausted." *Id.* at 600 (acknowledging that *Richardson I* suggests otherwise under § 242(g)).

212. *See, e.g.*, Church of Scientology v. United States, 506 U.S. 9, 18 n.11 (1992) (discovery orders); Coursen v. A.H. Robins Co., 764 F.2d 1329, 1342 (9th Cir. 1985) (evidentiary rulings).

213. 472 U.S. 511 (1985), discussed at *supra* text accompanying notes 183-85.

214. For discussion of the "separate from the merits" test, see *supra* text accompanying notes 181-85.

cases to establish a chilling effect that rises to the level of the sort of immunity, the denial of which is immediately appealable under 28 U.S.C. § 1291.[215] Under some circumstances, however, precedent supports this reliance on chilling effect as the basis of immediate judicial review. In *Rafeedie v. INS*,[216] the District of Columbia Circuit upheld the district court's grant of a preliminary injunction against a summary exclusion proceeding based on undisclosed evidence. The noncitizen was a returning lawful permanent resident who was active in Palestinian causes. According to the court, the mere pendency of an ordinary exclusion proceeding under former INA § 236 did not have a chilling effect that would be an "irreparable injury" supporting a preliminary injunction. But the court had a different view of the chilling effect of a proceeding based on undisclosed evidence under INA § 235(c):

> Rafeedie's second point—that bringing the charge under § 235(c), rather than § 236, has had substantial incremental chilling effects—we accept. If he were subject only to a plenary proceeding before an [immigration judge], Rafeedie would know that he would be accorded fair procedures and that his exclusion would not be ordered arbitrarily or for illegal reasons. He would therefore feel free to continue his heretofore significant speaking and associational activities in opposition to United States policies in the Middle East. Because he is subject to a secret proceeding in which neither the substance underlying the charges against him nor the reason for any final order of exclusion need ever be disclosed, he is understandably concerned that he may be excluded not for terrorist or other illegitimate activities, but for his legitimate activities as an outspoken critic of the Government's foreign policy. The effects on his First Amendment rights of requiring him to undergo the § 235(c) proceeding before challenging it are therefore substantial.[217]

Analyzing § 242(b)(9) in this way shows that some claims are "significant and independent" enough to fall outside its reach as a timing consolidation provision. With time, litigation and court decisions will work out the contours of this concept. To guide that process in a different way, and to convey some sense of what is at stake, I now turn to some of the broader implications of the concept "significant and independent matters."

---

215. *See supra* text accompanying notes 186-98.

216. 880 F.2d 506 (D.C. Cir. 1989).

217. *Id.* at 517. Another lesson from *Rafeedie* is a point that I made earlier: that the "irreparable injury" element of the standard test for granting preliminary injunctions is highly instructive on the issue whether the pendency of proceedings is a significant independent matter. Whatever is "irreparable injury" for preliminary injunction purposes also tends to establish "significance" and "independence" for placing a court challenge outside (b)(9). *See supra* text accompanying note 165.

B. *The Link to Pattern and Practice Litigation and § 242(f)*

The concept of significant and independent matters that fall outside the timing consolidation rule in (b)(9) is important because the alternative—to read "arising from" in (b)(9) to cover such matters—would distort the court's view of the noncitizen's claim. By allowing judicial review without a final removal order, the court may be sacrificing some efficiency, but it gains back much more in substantive accuracy. Under the guise of a timing provision, a broad reading of (b)(9) that delays judicial review would recast a detention challenge (or a damage suit or a challenge to the use of secret evidence) as a challenge to a final removal order when that is not what those claims are. A broad reading of (b)(9) thus prejudges a claim, although not in the sense that it actually decides its merits. Rather, by deferring a claim, it prejudges what the substance of the claim must be.

The danger is that courts will interpret (b)(9) in way that will compromise and undermine their traditional authority to apply established procedural values like efficiency and substantive accuracy to jurisdictional and other procedural rules. The same danger arises in a context that seems somewhat distinct from timing consolidation, but actually poses a similar danger and therefore is quite closely related. This context is multi-party litigation that challenges a government pattern or practice as unlawful.

A leading 1991 Supreme Court decision, *McNary v. Haitian Refugee Center*,[218] endorsed pattern and practice litigation in spite of jurisdictional provisions that might be read to bar it. *McNary* concerned the special agricultural worker legalization program, codified in INA § 210, that was part of the Immigration Control and Reform Act of 1986.[219] The plaintiffs sued as a class, alleging a pattern and practice of procedural due process violations by the INS in its administration of the program. For example, the plaintiffs alleged that applicants were not given the opportunity to challenge adverse evidence, to present witnesses on their own behalf, or to communicate effectively through competent interpreters. The plaintiffs sought injunctive relief.

INA § 210(e)(1) provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status [legalization] under this section except in accordance with this subsection."[220] Then, § 210(e)(3)(A) provides: "There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 106."[221] The *McNary* plaintiffs sought to challenge INS practices before any individual plaintiff's case had been reduced to final order of exclusion or deportation, as § 210(e)(3)(A) might seem to require.

218. 498 U.S. 479 (1991).
219. Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).
220. INA § 210(e)(1), 8 U.S.C. § 1160(e)(1) (Supp. III 1998).
221. INA § 210(e)(3)(A), 8 U.S.C. § 1160(e)(3)(A) (Supp. III 1998).

But the Court rejected the government's argument that § 210(e)(3)(A) barred jurisdiction.

Part of the reasoning in Justice Stevens' majority opinion was that Congress enacted § 210(e)(3)(A) to avoid delays in adjudication, and that forcing plaintiffs to exhaust their administrative remedies first would delay ultimate resolution even longer.[222] Another aspect of the Court's reasoning was that review under the scheme for individual orders would not produce an adequate record on which to assess the merits of plaintiffs' claims.[223] The issue, apparently, was not just the factfinding and record-building ability of the court of appeals, but also the ability to compile an adequate record on a broad pattern or practice in the context of an individual case. Beyond the ability to make an adequate record, the Court was concerned that denial of district court jurisdiction would be "the practical equivalent of a total denial of judicial review."[224] The Supreme Court reaffirmed *McNary* in its pre-1996 Act decision in *Reno v. Catholic Social Services, Inc.*,[225] in which the Court construed what it characterized as "virtually identical" language governing judicial review in the general legalization program enacted in 1986. But as the 1996 Act including new INA § 242 takes effect, the status of *McNary* and its endorsement of pattern and practice litigation under the 1996 Act remain unclear.

One prominent case under the 1996 Act's transitional rules is *Tefel v. Reno*,[226] which challenged the government's interpretation of eligibility rules for discretionary relief from deportation. The issue concerned the rules for accrual of the time required to be eligible for "suspension of deportation," a form of discretionary relief that the 1996 Act replaced prospectively with "cancellation of removal" under new INA § 240A. The plaintiffs in *Tefel* were noncitizens who had been placed in deportation proceedings before the passage of the 1996 Act, and before they had accumulated the seven years of continuous physical presence in the United States that the pre-1996 Act law required for any noncitizen seeking suspension of deportation. Under new INA § 240A, a new "stop-time" provision deems a noncitizen's qualifying time period to end once he or she is served with a "notice to appear" for removal proceedings or commits any of certain criminal offenses.[227] The Board of Immigration Appeals held in *Matter of N-J-B*[228] that the new

222. 498 U.S. at 490.

223. *Id.* at 493.

224. *Id.* at 497; *see also* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212-13 (1994) (claims are "collateral" when all meaningful judicial review would otherwise be foreclosed); Campos v. Nail, 43 F.3d 1285, 1291 (9th Cir. 1994).

225. 509 U.S. 43, 55 (1993). For recent applications of *McNary* and *Catholic Social Services* to permit pattern and pattern litigation, see Proyecto San Pablo v. INS, 189 F.3d 1130, 1136-37 (9th Cir. 1999); Abdullah v. INS, 184 F.3d 158, 162-64 (2d Cir. 1999); Ortiz v. Meissner, 179 F.3d 718, 722 (9th Cir. 1999).

226. 180 F.3d 1286, 1297 (11th Cir. 1999).

227. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (Supp. III 1998).

228. Int. Dec. 3309 (BIA 1997).

stop-time rule applies to noncitizens whose applications for suspension of deportation were pending when the 1996 Act took effect. The *Tefel* plaintiffs raised a number of statutory and constitutional objections to the application of the new stop-time rule to them.

In the district court, the government responded in part by arguing that INA § 242(g) deprived the district court of jurisdiction to hear the case. This argument depended on reading (g) broadly, to cover all matters that might arise in deportation or removal proceedings. This was the broad reading that *AADC* later rejected. Unsurprisingly, the Eleventh Circuit, which decided the appeal after the Supreme Court decision in *AADC*, held that § 242(g) as read in *AADC* does not bar district court jurisdiction over "pattern and practice" litigation against the government.[229] According to the Eleventh Circuit, the plaintiffs' claims "are within the narrow category of claims that the [pre-1996 Act] INA did not exclusively commit to the jurisdiction of the court of appeals."[230]

Tefel arose under the 1996 Act's transitional rules. Therefore, § 242(g) applied, but not (b)(9). Might (b)(9), once it takes effect, do what until *AADC* the government hoped (g) would do: deprive the court of jurisdiction to hear pattern and practice litigation because final removal orders had not issued in any individual case? It is hard to say definitively whether (b)(9) is broader than § 210(e), narrower, or essentially the same. The application of *McNary* to permit pattern and pattern litigation under § 242(b)(9) centers on differences between the statute in *McNary* and (b)(9).

The legalization statute at issue in *McNary* has two pertinent provisions. INA § 210(e)(1) limits administrative and judicial review of "a determination respecting an application." Subsection (e)(3)(A) defers judicial review "of such a denial" until "judicial review of an order of exclusion or deportation." The deferral of judicial review in (e)(3)(A) refers only to a "denial" of a legalization application. Taken alone, this language in § 210(e)(3)(A) might be read as narrower than the corresponding phrase in § 242(b)(9): "questions of law or fact . . . arising from any action taken or proceeding brought to remove an alien from the United States." The flaw in this argument, however, is that the broader language in § 210(e)(1) refers to "a determination respecting an application." The combined breadth of

---

229. *Tefel*, 180 F.3d at 1286.

230. *Id.* at 1296 (citing McNary v. Haitian Refugee Center, 498 U.S. 479 (1991); Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985); Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982)). The Eleventh Circuit explained:

> Plaintiffs do not challenge the specific result in any single case and do not argue that any of the individual plaintiffs would receive suspension of deportation if their applications received full consideration. . . . Thus, Plaintiffs assert a "program, pattern or scheme by immigration officials to violate the constitutional rights of aliens" that is similar to the due process claims in *Smith* and *Jean*.

180 F.3d at 1297. The Court concluded: "INA § 242(g) does not alter the jurisdiction, recognized by this Court in *Smith* and *Jean*, over class-wide allegations of constitutional violations by the INS." *Id.* at 1298.

§ 210(e)(1) and § 210(e)(3)(A) suggests that *McNary*'s reasoning applies at least as strongly to § 242(b)(9) as it does to § 210(e)(1) and § 210(e)(3)(A). Moreover, two other aspects of § 242 combine to suggest that (b)(9) does not limit jurisdiction to hear pattern and practice litigation. First, § 242(f) directly addresses multi-party litigation by restricting relief but not joinder.[231] Second, (b)(9) is in a section labeled "Requirements for review of *orders of removal*," suggesting (as did the statute in *McNary*) that (b)(9) does not address pattern and practice litigation.[232]

In short, the enactment of the new judicial review scheme in § 242, including (b)(9), probably does not supersede *McNary*. Curiously, the Supreme Court's decision in *AADC* did not mention *McNary*. And even if the literal meaning of *McNary* does not apply to § 242, the decision's underlying premises still have explanatory and persuasive power. The essence of *McNary* is the same idea that explains why detention challenges in individual cases should be regarded as significant and independent matters outside the reach of (b)(9). To be sure, there is a difference between detention challenges, which involve timing consolidation, and pattern and practice litigation, which involves joinder consolidation. But they share the fundamental problem of avoiding substantive distortion. It distorts the court's view of the noncitizens' claims in a pattern and practice case if the court sees those claims only as challenges to the lawfulness of government decisionmaking in individual cases.[233] If the real issue is the lawfulness of a broader pattern and practice, it subverts the judicial process to limit a court's discretion to use multi-party joinder to take a comprehensive and efficient look at a case or controversy. And beyond these process values, this substantive distortion also inhibits the development of a coherent (or perhaps any) body of law on the issues that arise in such cases.

Seeing this common danger in timing consolidation and joinder consolidation sheds substantial light on the complex relationship between timing and joinder. A sensible rule that allows multi-party joinder for judicial review purposes will effectively allow judicial review of some matters at a time that that might seem too early if we were to focus only on the individual cases. Consider a class-action procedural due process challenge to a government policy that results in the transfer of detainees to remote detention centers, where access to counsel is severely limited. In the context of an individual case, it might be efficient—and not jeopardize a court's comprehensive and therefore substantively accurate view of the controversy—to require an

---

231. *See infra* text accompanying notes 234-42.

232. *See supra* text accompanying note 146.

233. *See McNary*, 498 U.S. at 492 (referring to "general collateral challenges to unconstitutional practices and policies used by the agency"); *see also* Mathews v. Eldridge, 424 U.S. 319, 330-31 (1976) (distinguishing litigants who sought review of agency's decision to award or deny benefits from litigants who raised colorable constitutional challenges to agency procedures); Weinberger v. Salfi, 422 U.S. 749, 756-67 (1975) (same).

individual detainee to wait until her removal proceedings are final before she asks a court to examine the lawfulness of her transfer. It makes much less sense to require multiple final removal orders before hearing a class action challenging a government transfer policy.

A broad, multi-party view of the merits produces efficiency. It also gives the court a comprehensive view of the merits that is more substantively accurate than a view that is limited to one person's case. These advantages of efficiency and comprehensiveness go a long way toward making up for any inefficiencies related to immediate review of government decisions in individual cases. If judicial review is warranted to examine the lawfulness of a policy or practice that affects a large group of noncitizens, it typically should matter much less that individual proceedings are still pending. For these reasons, pattern and practice litigation is an exception to the usual rule that those who challenge government actions in court must first exhaust their administrative remedies.

The next question is whether any other part of § 242 might restrict federal court jurisdiction over pattern and practice litigation even if (b)(9) does not. One possibility is § 242(f), which limits injunctive relief outside the context of individual removal proceedings, but not as to the entire Immigration and Nationality Act. It provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II [INA §§ 231-244], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.[234]

What does (f) mean? *AADC* began to answer this question by rejecting the Ninth Circuit's reading of subsection (f) as an affirmative grant of jurisdiction.[235] The Supreme Court noted that the ban on relief in (f) does not affect relief in individual cases.[236] For multi-party cases, the Court seemed to say that (f) concerns relief, not jurisdiction, and therefore that it does not bar multi-party joinder. The Court explained: "By its plain terms, and even by its title, that provision [§ 242(f)] is nothing more or less than a limit on injunctive relief."[237] Beyond this, *AADC* did not address exactly how (f) might limit multi-party joinder (and thus function as a joinder consolidation rule) or limit relief.

---

234. INA § 242(f), 8 U.S.C. § 1252(f) (Supp. III 1998).
235. *See supra* text accompanying note 70.
236. 119 S. Ct. at 942.
237. *Id.*

Some courts have accepted arguments that the relief sought in a particular case falls outside any bar in § 242(f) because the relief affected sections of the INA other than §§ 231-244. For example, the *Tefel* plaintiffs persuaded the district court that "[r]ather than seeking to enjoin the statute, they are seeking its implementation under the appropriate standard."[238] A recent Ninth Circuit decision rejected a similar argument in a case challenging the government's implementation of the legalization program pursuant to the Immigration Reform and Control Act of 1986.[239] Because the plaintiffs sought adjustment of status to permanent residency, they argued that (f) did not bar the classwide relief sought because the injunction addressed the adjustment provisions in part V of the INA, rather than part IV (§§ 231-244) as barred by (f). In rejecting this argument, the court explained that the injunction would also interfere with "the operation of the detention and deportation provisions of part IV."[240]

In the same decision, however, the Ninth Circuit avoided the apparent relief bar in (f) in a different way. While § 242(f) bars federal courts from granting classwide injunctive relief against the government's implementation and enforcement of certain sections of the INA, the court noted that the type of relief barred by (f) was unnecessary as a practical matter: "Class treatment is unnecessary; a ruling by this court in the review of an individual alien's deportation order would be dispositive in all similar cases within the circuit . . . ."[241] In the same vein is one federal district court's approach to the issues raised when noncitizens ordered removed cannot be repatriated because their home countries have refused to take them back. The federal district court for the Western District of Washington designated five "lead cases" out of more than 100 habeas petitions pending in that district. The court stayed all remaining cases pending decisions in the lead cases, which would "adopt a consistent legal framework to guide our individual consideration of these petitions."[242]

In short, (f) addresses multi-party pattern and practice litigation, but it does so in a limited manner. Decisions that narrow the practical effect of (f) as a restraint on multi-party joinder are consistent with a narrow reading of (b)(9) that (1) allows immediate judicial review of significant and independent matters, and (2) allows multi-party pattern and practice litigation without a final removal order in any individual case. In interpreting both (f) and (b)(9), courts should maintain traditional judicial prerogatives by ensuring that judicial review is meaningful. A large part of what makes judicial review meaningful is to shape and to time review so that the substance of the claim is not distorted and the substantive accuracy of judicial review is preserved.

---

238. Tefel v. Reno, 972 F. Supp. 608, 618 (S.D. Fla. 1997), *rev'd on other grounds*, 180 F.3d 1286 (11th Cir. 1999); *see* Benson, *supra* note 28, at 1454, 1461-63. This reading of (f) was unnecessary to the outcome, as the court also held that (f) did not apply at all.

239. Catholic Social Services v. INS, 182 F.3d 1053 (9th Cir. 1999).

240. *Id.* at 1062.

241. *Id.* at 1060 (citing Naranjo-Aguilera v. INS, 30 F.3d 1106, 1114 (9th Cir. 1994)).

242. Phan v. Reno, 56 F. Supp. 2d 1149, 1151 (W.D. Wash. 1999).

C. *Exhaustion, Adequacy, and Substantive Accuracy*

So far in this Part II, I have tried to make four principal points. First, "arising from" in § 242(b)(9)'s timing consolidation rule can fairly be read narrowly or broadly. Second, the better reading of (b)(9) is a narrow one that allows review of significant and independent matters before a final removal order. Third, this narrow reading of (b)(9) limits its effect as a timing consolidation rule. At least detention (whether pending removal proceedings or after a final removal order) and damage claims against the government should be immediately reviewable. Fourth, this narrow reading of (b)(9) also limits its effect as a restriction on joinder. Subsection (b)(9) places no restrictions on multi-party pattern and practice litigation against the government before final removal orders against the individual noncitizens involved.

The core conceptual basis of all four of these points is that some matters are sufficiently significant and independent of the final order in an individual removal proceeding that they should not be treated as part of the case or controversy for jurisdictional purposes. This core concept is part of the bedrock of American procedure, because it tries to interpret generally phrased jurisdictional statutes in ways that remain faithful to basic judicial concerns about efficiency and substantive accuracy in adjudication. Especially important is vigilance against the potential in a provision like (b)(9) to distort a court's substantive view of a controversy.

With these four points as a foundation, I now turn to two concepts that often appear in court decisions and commentary about judicial review of agency decisionmaking, both generally and in immigration cases. These are "exhaustion of remedies" and the need for an "adequate record." In my view, "exhaustion" and "adequacy" make for useful advocacy and *post hoc* reasoning, but they play only secondary roles in deciding when noncitizens should have immediate access to court and when they must wait. For the same reasons, "exhaustion" and "adequacy" have little independent analytical power in deciding when some noncitizens may join with others in pressing their claims against the government, and when they must go it alone.

1. *The Exhaustion of Remedies Requirement*

We can understand the timing consolidation requirement in § 242(b)(9)—that a noncitizen wait until a final removal order is issued against her—as a form of exhaustion requirement.[243] Put differently, before she may challenge any adverse administrative determination in court, she

---

243. INA § 242(d)(1) states

> (d) Review of final orders—
> A court may review a final order of removal only if—
> (1) the alien has exhausted all administrative remedies available to the alien as of right.

INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) (Supp. III 1998). This provision should not restrict judicial review of significant and independent matters, which by definition are not part of any "final order of removal."

must first let the administrative proceedings take their course. They may end in her favor, but if they do not and a final removal order issues against her, she may challenge it in court.

We can also understand pattern and practice litigation as avoiding any requirement to exhaust administrative remedies. On first impression, class actions and similar suits appear to be a problem of joinder consolidation, not timing consolidation. But in fact, as Part II-B discussed, to allow pattern and practice litigation is typically to decide not to require exhaustion of administrative remedies in each individual case.

The question that next arises is what role exhaustion of remedies plays in deciding when and how judicial review in immigration cases should take place. In my view, it plays very little independent role. If a court requires exhaustion of remedies, that court is defining the noncitizen's claim in a way that under (b)(9) would require a final order before judicial review. If, on the other hand, a court does not require exhaustion of remedies, that court is defining the claim under (b)(9) in a way that either views it as not "arising from" a removal proceeding, or views it as "arising from" but nonetheless a significant and independent matter for which immediate judicial review is available. Similarly, if a court does not require exhaustion of remedies, that court is defining the claim in a way that makes it appropriate for multi-party joinder.

An examination of standard doctrine regarding exhaustion of remedies supports this characterization of the relationship between exhaustion and (b)(9). Most pertinent are court decisions expressly acknowledging that exhaustion requirements are coextensive with provisions that vest exclusive jurisdiction in courts to review a "final order."[244] Put differently, once a matter is significant and independent enough to be outside the judicial review scheme for a final order, it makes little sense to require exhausting remedies as to that matter.

The standard exceptions to exhaustion thus suggest that the key question is whether the matter brought to court is significant and independent. The Supreme Court discussed the exhaustion requirement at some length in *McCarthy v. Madigan*,[245] decided in 1992. *McCarthy* held that a federal prisoner who sought to file a *Bivens* suit against four prison employees need not first invoke the Bureau of Prisons' internal grievance procedure. The Court began by noting that "[w]here Congress specifically mandates, exhaustion is required. . . . But where Congress has not clearly required exhaustion, sound judicial discretion governs."[246] In the context of § 242(b)(9), it is not

244. *See, e.g.*, Haddam v. Reno, 54 F. Supp. 2d 588, 598-99 (E.D. Va. 1999) (citing El Rescate Legal Services, Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 746 (9th Cir. 1991) ("exhaustion of administrative remedies is statutorily required only if appellees are seeking to attack a final order of deportation or exclusion.")).

245. 503 U.S. 140 (1992).

246. *Id.* at 144.

clear whether Congress has specifically mandated exhaustion, since it is not clear what "arising from" in (b)(9) means.

In discussing how courts should exercise their discretion, *McCarthy* noted that the exhaustion requirement reflects twin purposes: protecting administrative agency authority and promoting judicial efficiency.[247] The Court continued: "In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[248] According to the Court, the individual's interests weigh heavily against exhaustion in three situations. These are: first, when exhaustion "may occasion undue prejudice to subsequent assertion of a court action"; second, when an administrative remedy may be inadequate because it cannot resolve the issue at hand; or third, when the agency is either biased or has otherwise predetermined the issue.[249]

This inquiry into when exhaustion is required is remarkably close to the inquiry into whether a matter is sufficiently significant and independent that either immediate judicial review should be allowed, or that multi-party joinder is the best way to achieve substantive accuracy. In other words, a noncitizen who wants a court to hear a significant and independent matter before the end of the administrative process (i.e., before a final removal order) is also trying to fit himself into either the first situation ("effectively unreviewable" in the language of *Cohen*) or second situation ("separate from the merits" under *Cohen*), or both.

Illustrative on this point is the Third Circuit's 1996 decision in *Massieu v. Reno*, decided before the 1996 Act.[250] Plaintiff sought to enjoin deportation proceedings based on former INA § 241(a)(4)(C)(i) (now § 237(a)(4)(C)(i)), which made deportable any "alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States."[251] The district court struck down this provision as unconstitutional,[252] but the court of appeals reversed, ruling that these issues should not be addressed until Massieu exhausted his administrative remedies. Key to the court's reasoning was that the constitutionality of the deportability ground was "not collateral" to the deportation proceeding itself,[253] and thus would be subject to "meaningful judicial review" if and when a final deportation

247. *Id.* at 145.
248. *Id.* at 146 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976) (noting that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction)).
249. *McCarthy*, 502 U.S. at 147-48.
250. 91 F.3d 416 (3d Cir. 1996).
251. INA § 237(a)(4)(C)(i), 8 U.S.C. § 1227(a)(4)(C)(i) (Supp. III 1998).
252. 915 F. Supp. 681, 699-701 (D.N.J. 1996), *rev'd on other grounds*, 91 F.3d 416 (3rd Cir. 1996).
253. 91 F.3d at 422.

order issued.[254] A related point is that exhaustion is not required "if an alien seeks relief not inconsistent with an order of deportation."[255]

A remaining question is the significance of INA § 242(d)(1), which provides that a "court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right."[256] This provision seems to add little to the analysis, since it begs the question whether the matters on which the alien seeks judicial review are within a "final order."[257] Similarly, former INA § 106(c) provided in pertinent part: "An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations."[258] Yet, courts held that § 106(c) did not require exhaustion before bringing claims not involving review of an order of deportation or exclusion.[259]

2. *An Adequate Forum and an Adequate Record*

When noncitizens challenge the lawfulness of government action in a nonstandard forum—anything other than an individual court challenge to a final removal order—their choice of forum reflects their concern that the standard forum will be inadequate to hear their claims. On closer inspection, "adequate forum" is a broad label that covers several separate but related issues. One is a problem of subject matter expertise, in the sense of institutional knowledge gained through experience with similar cases. A related but different aspect of adequacy is formal jurisdictional competence. If by statute, regulation, or custom, an agency has only limited competence to hear constitutional issues and grant relief, then this is a problem of adequacy in this second sense. A third aspect of the adequate forum concerns the record available for judicial review. Section 242(a)(1) puts judicial review of final removal orders in the courts of appeals, but will that review take place on an adequate record?

The *AADC* plaintiffs argued that they could develop an adequate record on their selective prosecution and First Amendment claims only if they were allowed to sue the government in federal district court, and before final removal orders issued against them.[260] I doubt that this argument adds

254. *Id.* at 424.
255. Pastor-Camarena v. Smith, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997) (citing Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)).
256. INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) (Supp. III 1998).
257. As with (b)(9), there are as yet very few decisions interpreting (d)(1), since most recent cases have been decided under the transitional rules rather than under all of § 242. One such permanent rule case is Grant v. Zemski, 54 F. Supp. 2d 437 (D. Or. 1999), decided after *AADC*, which involved a habeas corpus challenge to mandatory detention. The court rejected the government's argument that the petitioner had failed to exhaust his administrative remedies as required. The court acknowledged § 242(d)(1), but characterized (d)(1) as an statutory exhaustion requirement only as to review of a final order itself. *Id.* at 441 n.5.
258. INA § 106(c), 8 U.S.C. § 1105a(c) (repealed 1996).
259. *See, e.g.*, Wang v. Reno, 81 F.3d 808, 813-15 (9th Cir. 1996).
260. For the Supreme Court's discussion of this issue, see 119 S. Ct. at 940.

anything to the arguments that I have already outlined for reading (b)(9) to permit judicial review of significant and independent matters.

As David Martin has observed, factual issues are routinely resolved in a variety of administrative settings that do not conform to classic trial-type procedures. Indeed, the Administrative Procedure Act contemplates judicial review on the available administrative record of much such "informal" decisionmaking.[261] The leading Supreme Court on this point is the 1985 decision in *Florida Power and Light Co. v. Lorion.*[262] That case involved a challenge to a Nuclear Regulatory Commission decision—made without a formal hearing—not to initiate enforcement action requested by the petitioner. Partly for lack of a formal hearing, the court of appeals ruled that the petitioner must seek judicial review in the district court, notwithstanding the Hobbs Act court of appeals review that ordinarily applied to the Commission's decisions.

The Supreme Court reversed, explaining that court of appeals review need not be conditioned on a hearing before the agency:

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. . . . Moreover, a formal hearing before the agency is in no way necessary to the compilation of an agency record. . . . The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing has not occurred.[263]

As *Lorion* explains, a court of appeals may solve the problem of an inadequate record as a matter of factfinding capacity by remanding a case to the district court. In sum: "The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking."[264]

There is one problem with applying this reasoning to immigration cases. INA § 242(b)(4)(A) provides: "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based."[265] Further, INA § 242(a)(1) provides:

> Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1)) is governed only by [the Hobbs Act] except as provided in subsection (b) and except

261. Martin, *supra* note 140, at 809.
262. 470 U.S. 729 (1985).
263. *Id.* at 744.
264. *Id*; *see also* Camp v. Pitts, 411 U.S. 138, 139-43 (1973).
265. INA § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A) (Supp. III 1998).

> that the court may not order the taking of additional evidence under section 2347(c) of Title 28.[266]

28 U.S.C. § 2347(c) allows courts of appeals to remand to an agency for further factual development in certain circumstances. These provisions combine to limit a court of appeals' ability to solve the problem of an inadequate record when it hears a petition to review a final removal order. There is another possible mechanism for providing an adequate record. 28 U.S.C. § 2347(b)(3) allows a court of appeals reviewing an agency determination to transfer proceedings to a district court for additional factual development in certain circumstances. But in *AADC* itself, the Ninth Circuit found that § 2347(b)(3) is unavailable on review of a deportation proceeding.[267] The Supreme Court did not reach this issue in its decision in *AADC*.[268]

If the Ninth Circuit is wrong, and remand under § 2347(b)(3) is available to develop an adequate record, then inadequacy is no longer an independent reason to allow immediate judicial review. But suppose the Ninth Circuit is right, and § 2347(b)(3) is unavailable. Then it may follow that an inadequate record—because it cannot be fixed—should be enough by itself to take a claim outside § 242(b)(9) and allow immediate judicial review without a final removal order. This reading of § 2347(b)(3) would give the inadequacy of the record some independent analytical significance in deciding whether to allow immediate judicial review. But a closer look at the statutes suggests the opposite.

INA § 242(b)(4)(A), with its express reference to "the administrative record on which the order of removal is based," actually implies that (b)(9) cannot apply to significant and independent matters. The reason is that if the court of appeals must rely exclusively on the administrative record based on the removal proceeding, then courts must define the phrase "arising from" (b)(9) in a way that excludes matters for which the administrative record is inadequate. Otherwise, (b)(9) would be anomalous by extending its scope of consolidated review more broadly than the provision regulating what a court may consider on review. This adds another reason why courts must define "arising from" in (b)(9) to exclude significant and independent matters.

In short, the inadequacy of the record in a removal proceeding adds little analytically to the determination that a matter is significant and independent of the removal order. If the claim that the noncitizen seeks to bring in court is not significant and independent, then the inadequacy of the record should not matter. The record can be made supplemented through various means. If, however, the claim that the noncitizen seeks to bring in court is significant and independent, then an administrative record that will be adequate—which

266. INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (Supp. III 1998).
267. *See* American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1056-57 (9th Cir. 1997).
268. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 940.

will often not be produced if the claim is really significant and independent—should not bar immediate judicial review.

This is not to say that the adequacy of the record is completely immaterial; it can be a useful predictive factor. The inability to make an adequate record on a particular issue or set of issues strongly suggests that those issues are independent of a removal proceeding. But as an element of analysis, the adequacy of the record—like "exhaustion of remedies"—is subsumed under the "significant and independent" issue. Timing consolidation is not a problem that reflects the adequacy of the forum. Nor does it reflect the adequacy of the record that the forum is able to generate. Rather, it is a problem of defining a "case or controversy" too broadly when interpreting and applying § 242(b)(9).

3. *Shaping Judicial Review for Substantive Accuracy*

Thunder Basin Coal Co. v. Reich,[269] a 1994 Supreme Court decision, barred mining companies from going to district court to challenge administrative civil-penalty assessments before the administrative process had run its full course. The Court reasoned that allowing such challenges would seriously impair the collection of civil penalties to enforce mine safety regulations.[270] To be sure, the decision can be understood in terms of either exhaustion of remedies or adequacy of the record. The *Thunder Basin* Court reasoned that "neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation."[271] This suggested that allowing suit would allow the mining companies to circumvent an appropriate exhaustion requirement. The Court also pointed out that the matters subject to the administrative scheme (and outside district court jurisdiction) "fall squarely within the Commission's expertise."[272] Unlike the immigration judges and the Board of Immigration Appeals, the agency had addressed constitutional questions in previous enforcement proceedings. This suggested that a district court suit instead of the administrative procedure was not needed to create an adequate record for judicial review.

While these explanations seem sound, a more fundamental explanation for *Thunder Basin* is that the mining companies were raising the very issue that the administrative process was designed to address. There was nothing

---

269. 510 U.S. 200 (1994).

270. *Id.* at 210.

271. *Id.* at 216. The Court distinguished Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), which held that district courts had jurisdiction over pre-enforcement challenges to federal food and drug regulations. The Court explained that the statutory review provisions in *Abbott* were meant to be additional rather than exclusive, and that "[t]he prospect that federal jurisdiction might thwart effective enforcement of the statute also was less immediate" in that case. *Thunder Basin*, 510 U.S. at 212. The Court acknowledged that in other contexts it had upheld district court jurisdiction over claims wholly collateral to a statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion would foreclose all meaningful judicial review.

272. *Id.* at 214.

independent about their lawsuit at all. Put differently, there was no loss in substantive accuracy—including an adequate remedy for violations of law—by barring the suit in lieu of the administrative process. A court must analyze exhaustion of remedies and the adequacy of the administrative record with this more basic question in mind: is the court's view of the matter distorted because it remains cabined in an administrative process for which it is not designed? This only highlights the centrality of an inquiry into whether matters are significant and independent so that INA § 242(b)(9) allows immediate judicial review.

D. *Section 242(b)(9) and Habeas Corpus Jurisdiction*

Part II-A analyzed § 242(b)(9) and explained why the best reading of (b)(9) in individual cases is a narrow one that does not delay judicial review for significant and independent matters, which for jurisdictional purposes should not be treated as part of the same case or controversy as a final removal order. Part II-B explained why (b)(9) does not restrain multi-party pattern and practice litigation. These readings of (b)(9) are true to the statutory text, and they respect traditional judicial concerns about efficiency and substantive accuracy in adjudication. Part II-C further explained why exhaustion of remedies and the problem of an adequate record have no independent analytical significance in deciding when immediate judicial review should be available.

All of this has concerned judicial review in a civil action brought under general federal question statute, 28 U.S.C. § 1331.[273] I have focused on judicial review under § 1331 rather than habeas corpus jurisdiction under 28 U.S.C. § 2241 because the latter may be more limited in scope. To find federal question jurisdiction under § 1331 avoids the issue whether habeas jurisdiction excludes consideration of some claims or issues that might be heard in a civil action based on federal question jurisdiction under § 1331. It also avoids the issue whether a noncitizen is "in custody" for the purpose of establishing habeas jurisdiction.[274]

Assume, however, that §242(b)(9) sweeps broadly as a timing consolidation and a joinder consolidation provision, and that it therefore eliminates judicial review under § 1331 outside the final order review provided by INA § 242(a)(1). I have explained why such a broad reading of (b)(9) would be flawed, but what happens if courts adopt it? Would a broad reading of (b)(9) also eliminate habeas jurisdiction to hear a challenge to a non-final order by a

---

273. Judicial review under INA § 242(a)(1) is unavailable because it refers only to a "final order of removal." INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (Supp. III 1998), *quoted supra* text accompanying note 266; *see also supra* text accompanying notes 127-30.

274. I leave for another day the question whether it would be unconstitutional for § 242(b)(9) to defer judicial review until a final removal order if habeas corpus jurisdiction is unavailable because a noncitizen is not "in custody" for purposes of 28 U.S.C. § 2241 (1994). *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 948 (Ginsburg, J., concurring).

noncitizen who is "in custody in violation of the Constitution or laws or treaties of the United States," as § 2241 requires?[275]

This question is similar to those that have arisen in connection with other recently enacted bars to judicial review. As Part II-A discussed, AEDPA § 440(a) barred judicial review of many final deportation orders based on criminal convictions.[276] Most courts interpreting AEDPA § 440(a) have found that this provision did not repeal 28 U.S.C. § 2241.[277] Similarly, most courts interpreting the analogous bars in the 1996 Act's transitional rule and permanent provisions[278] and the more generally phrased § 242(g) have found that § 2241 habeas jurisdiction remains.[279]

As Part I-E-1 explained, *AADC*'s narrow reading of § 242(g) means that even if (g) repealed 28 U.S.C. § 2241, it did so only for challenges to a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders."[280] But might § 242(b)(9), where it applies, have the same repealing effect? Put differently, might (b)(9) eliminate habeas corpus jurisdiction over questions of law or fact "arising from" removal proceedings? Neither (g) nor (b)(9) expressly mentions 28 U.S.C. § 2241, but both have broad phrasing that could be read to foreclose all court jurisdiction, including habeas jurisdiction.

Even assuming that a court were to read "arising from" in (b)(9) broadly to eliminate judicial review under 28 U.S.C. § 1331, there are two reasons why (b)(9) offers a much weaker case than (g) for repeal of habeas corpus. The first reason is textual. Subsection (g) provides: "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear ...." A court sitting in habeas is "hearing" challenges to allegedly unlawful detention. Even though (g) does not expressly mention 28 U.S.C. § 2241, one might credibly argue that (g) repealed habeas corpus jurisdiction to hear claims within the ambit of (g). In fact, most courts did not so hold, even before *AADC* narrowed (g) considerably,[281] but at least with (g) the government could make a credible textual argument.

In contrast, (b)(9) channels only "judicial review," providing: "[j]udicial review . . . shall be available only in judicial review of a final order under this section." As several courts have noted, congressional limitations on "judicial review" are insufficient to curtail habeas corpus jurisdiction. The Third

---

275. 28 U.S.C. § 2241(c)(3). Beyond the scope of this article are provisions that might eliminate habeas jurisdiction over final orders in specific categories of cases. *See, e.g.*, INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (Supp. III 1998), *quoted in supra* note 45.

276. The text of AEDPA § 440(a) is set out in *supra* note 43. *See also supra* text accompanying notes 84-87.

277. *See* cases cited in *supra* note 89.

278. *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (providing that any final removal order against an alien deportable under most of the crime-related deportation grounds "shall not be subject to review by any court").

279. *See* cases cited *supra* note 95; *supra* text accompanying notes 83-102.

280. INA § 242(g), 8 U.S.C. § 1252(g) (Supp. III 1998); *see supra* text accompanying notes 98-102.

281. *See supra* text accompanying note 95.

Circuit recently explained: "in the immigration context, the Court has historically drawn a sharp distinction between 'judicial review'—meaning [Administrative Procedure Act] review—and the court's power to entertain petitions for writs of habeas corpus."[282] Even if (b)(9) is read broadly to eliminate ordinary judicial review under § 1331 over matters related to removal proceedings, (b)(9) does not suggest repeal of habeas jurisdiction. This is true even if the broader "jurisdiction to hear" language in (g) might be so read, as a minority of courts have.[283] Recently, a federal district court relied on this distinction in holding that (b)(9) does not repeal habeas corpus jurisdiction under 28 U.S.C. § 2241.[284] The court noted that the Supreme Court's statements in *AADC* regarding (b)(9)—which were already dicta because (b)(9) did not apply in *AADC*—addressed direct judicial review, not habeas corpus.

The second reason why (b)(9) offers a much weaker case than (g) for repeal of habeas corpus concerns the different functions of these two provisions. Within its narrow ambit, (g) *eliminates* court jurisdiction. This is why it is phrased, "no court shall have jurisdiction to hear . . . ." In contrast, subsection (b)(9) does not eliminate jurisdiction. It is a "channeling" provision; at most it *postpones* judicial review of non-final orders. Because of this difference in function, (b)(9) is conceptually consistent with residual habeas corpus review of significant and independent matters under 28 U.S.C. § 2241, while (g) is not.

Beyond these textual and functional reasons why (b)(9) should not be read to repeal 28 U.S.C. § 2241 lie a number of constitutional considerations that argue against finding repeal. These constitutional considerations play a dual role. The first and perhaps more obvious role of constitutional considerations is through a direct constitutional holding. Even if (b)(9) repeals 28 U.S.C. § 2241 as to matters within the ambit of (b)(9), such a repeal of habeas corpus jurisdiction may be unconstitutional under the Suspension Clause of the Constitution, Art. I, § 9, cl. 2.

More often, constitutional considerations influence the interpretation of jurisdictional statutes. This influence occurs partly through the presumption in *Ex Parte Yeager*[285] and *Felker v. Turpin*[286] against implied repeal of habeas corpus jurisdiction.[287] As I have explained, it is highly doubtful that (b)(9) eliminates ordinary judicial review under 28 U.S.C. § 1331 or

---

282. Sandoval v. Reno, 166 F.3d 225, 235 (3d Cir. 1999) (discussing Heikkila v. Barber, 345 U.S. 229, 235-36 (1953)); *see also* Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1146 (10th Cir. 1999); Shah v. Reno, 184 F.3d 719, 723 (8th Cir. 1999); Mayers v. Reno, 175 F.3d 1289, 1299 n.14 (11th Cir. 1999); Neuman, *supra* note 89, at 1002, 1010, 1019.

283. *See supra* note 95.

284. Kiareldeen v. Reno, 71 F. Supp. 2d 402, 406 (D.N.J. 1999). *See also* Bouayad v. Holmes, 74 F. Supp. 2d 471, 473-74 (E.D. Pa. 1999); Alikhani v. Fasano, 70 F. Supp. 2d 1124, 1126-28 (S.D. Cal. 1999); *but see* Edwards v. Blackman, 56 F. Supp. 2d 508, 510-13 (M.D. Pa. 1999).

285. 75 U.S. 85, 105 (1868).

286. 518 U.S. 651, 660 (1996).

287. *See supra* text accompanying notes 90-94.

statutory habeas corpus jurisdiction under 28 U.S.C. § 2241. More generally, if it would raise serious constitutional questions to read (b)(9) to repeal 28 U.S.C. § 2241 as to matters within (b)(9), then courts should resolve any doubts in statutory interpretation against repeal.[288]

Of course, the canon that statutes should be construed to avoid serious constitutional questions applies only if repeal of habeas corpus jurisdiction would in fact raise serious constitutional questions.[289] Outside the habeas context, the Ninth Circuit judges who dissented from the denial of rehearing en banc in *AADC* found no such serious questions.[290] Also outside the habeas context, the Supreme Court in *AADC* declined to adopt any noncitizens' constitutional challenge to selective enforcement of the immigration laws as a reason to interpret § 242(g) in their favor.[291] In *Richardson I*, the Eleventh Circuit declined to rely on the canon to interpret § 242(g) not to repeal habeas. *Richardson I* held instead that it is constitutional to repeal habeas corpus jurisdiction to hear a detention challenge.[292]

Professor Neuman has argued persuasively that the Constitution requires habeas corpus jurisdiction over final removal orders.[293] Habeas jurisdiction preserves constitutionally required review of the executive detention that is inherent in the execution of a final removal order. The constitutional problem with repealing habeas jurisdiction to review final orders is that without habeas corpus there will be no judicial review at all. INA § 242(b)(9) raises a related but distinct question: whether Neuman's analysis applies with equal force to orders other than final removal orders—for example, detention pending removal proceedings. Arguably, a less significant constitutional issue arises if Congress, through (b)(9), repeals habeas jurisdiction to review orders that are not final removal orders. In contrast to final orders, repealing habeas for the types of court challenges involved in disputes about the correct reading of (b)(9) will delay judicial review, perhaps for a long time, but at least as a formal matter not deny it altogether.[294]

---

288. *See supra* note 66.

289. Immigration law has a history of judicial decisions in which constitutional norms influence statutory interpretation even when those norms were not established enough to lead courts to strike down statutes and regulations as unconstitutional. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

290. American-Arab Anti-Discrimination Comm. v. Reno, 132 F.3d 531, 533 (9th Cir. 1997) (O'Scannlain, J., dissenting) ("No judicial review is guaranteed by the Constitution.") (citing Carlson v. Landon, 342 U.S. 524, 537 (1951)).

291. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 945-47; *see supra* note 82.

292. *See Richardson I*, 162 F.3d at 1378-79.

293. *See* Neuman, *supra* note 89.

294. *AADC* also left open questions about the scope of other jurisdiction-limiting provisions, full discussion of which is beyond the scope of this article. Most prominently, § 236(e) seems to limit judicial review of discretionary decisions regarding detention, but several courts have held that it does not eliminate habeas corpus jurisdiction under 28 U.S.C. § 2241 (1994). *See* Parra v. Perryman, 172 F.3d 954, 958 (7th Cir. 1999); Galvez v. Lewis, 56 F. Supp. 2d 637, 644 (E.D. Va. 1999); Grant v. Zemski, 54 F. Supp. 2d. 437, 439 (E.D. Pa. 1999). *But cf.* Jacques v. Reno, 73 F. Supp. 2d 477, 481 (M.D. Pa. 1999) (§ 236(e) bars habeas review of INS decisions "to detain or release any alien, or to grant, revoke, or deny release on bond or parole").

This brings us back to the statutory analysis in Part II-A. To argue that a matter is merely part of the removal proceedings, that it is subsumed under an eventual final removal order, and that therefore long-delayed judicial review is not constitutionally problematic under the Suspension Clause is to treat the matter on which review is sought as part of the same case or controversy as the final removal order itself. This, as Part II-A explained, is a more complex inquiry than a superficial reading of (b)(9) would suggest. To dismiss the constitutional significance of repealing habeas corpus jurisdiction to hear matters other than final orders is to assume without justification that they have no independent constitutional significance.

The doubtful constitutionality of repealing habeas corpus review of significant and independent matters, coupled with the character of § 242(b)(9) as a channeling provision rather than a preclusive provision, and coupled further with the absence of any express repeal of 28 U.S.C. § 2241 in immigration cases, suggests that the place for these constitutional doubts to make a difference would be in statutory interpretation. These constitutional doubts should lead courts to interpret § 242(b)(9) not to preclude habeas corpus over matters that are significant and independent of a final removal order.

III. CONCLUSION

Section 242(b)(9) of the Immigration and Nationality Act warrants sustained discussion for several reasons. Subsection (b)(9) has widespread practical implications, because it will shape access to federal courts in immigration cases. Beyond these practical implications, (b)(9) sheds considerable light on the relationship between timing consolidation and joinder consolidation, as well as on the role that exhaustion of remedies and the adequacy of the administrative record play in interpreting jurisdictional statutes in immigration cases.

All of this leads to one final point. It is difficult to approach in any value-neutral way the question whether judicial review should be "streamlined" in order to limit opportunities for "dilatory" appeals. Judicial review, like any time-consuming process, can be annoying, and it can seem dilatory. But Congress' choices in drafting jurisdictional statutes in immigration cases, as well as the courts' choices in interpreting those statutes, play an underappreciated role in shaping our view of the merits of a court challenge. Unless Congress and the courts fully understand this role, jurisdictional rules and

---

The decisions on the effect of § 236(e) on habeas corpus are instructive for cases like *Richardson*, where the problem with reading (b)(9) to require a final order before judicial review is that detention may be continuous and prolonged until then. In Van Eeton v. Beebe, 49 F. Supp. 2d 1186, 1188 (D. Ore. 1999), the district judge wrote: "If I were to construe [§ 236(e)] as an attempt to block all avenues of judicial review, including habeas petitions, the statute would violate the Suspension Clause of the Constitution." The effect of reading § 242(b)(9) to bar courts from hearing challenges to detention pending removal proceedings would be the same as reading § 236(e) to reach the same result, and presumably the same constitutional problems would arise.

their application may—without seeming to do so—submerge meritorious claims by assuming they are different from the claims intended. They will do so by delaying judicial review and by restricting joinder that might enhance the substantive accuracy of the court's deliberations. The risk of this highly troubling outcome is highest if Congress—and judges if Congress is silent—do not recognize that the understandings based on efficiency, substantive accuracy, and other procedural values, which judges bring to bear on jurisdictional and procedural statutes outside of immigration cases, are relevant and should be highly influential in immigration law as well.