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Tearing Down the Fence around Immigration Law: Examining the Lack of Judicial Review and the Impact of the Real ID Act While Calling for a Broader Reading of Questions of Law to Encompass Extreme Cruelty

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TEARING DOWN THE FENCE AROUND IMMIGRATION LAW: EXAMINING THE LACK OF JUDICIAL REVIEW AND THE IMPACT OF THE REAL ID ACT WHILE CALLING FOR A BROADER READING OF QUESTIONS OF LAW TO ENCOMPASS "EXTREME CRUELTY"

*Sarah A. Moore**

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.
>
> —REAL ID Act of 2005[1]

INTRODUCTION

One of the most consistent and often most frustrating themes in immigration law is its limitation on judicial review in order to give deference to the other branches of government,[2] possibly even when it sacrifices judicial review for the victims of "extreme cruelty."[3] Simi-

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1 Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (to be codified at 8 U.S.C. § 1252(a)(2)(D)). This section of the REAL ID Act created section 242(a)(2)(D) of the Immigration and Nationality Act (INA).

2 *See* Moosa v. INS, 171 F.3d 994, 1011–12 (5th Cir. 1999) ("[T]he power of courts to review deportation decisions is subject to the will of Congress. . . . 'The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as [C]ongress may see fit to authorize or permit. This power is, of course, subject to judicial intervention under the paramount law of the constitution.'" (quoting Carlson v. Landon, 342 U.S. 524, 537 (1952))).

3 Noncitizen victims of domestic violence who have suffered "extreme cruelty" may qualify for a special form of relief from removal. *See infra* notes 95–104 and

lar to the way in which Congress has sought to insulate the United States from undocumented immigrants by constructing a border fence,[4] Congress has sought to insulate decisions of the Immigration Judges (IJs) and the Board of Immigration Appeals (BIA) from judicial review by Article III courts by passing explicit jurisdiction-stripping statutory provisions. Historically, the courts have held that Congress has plenary power in the immigration context. Then, Congress more severely limited the courts' role with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[5] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[6] Congress, by delegating the primary adjudication of immigration cases to the executive branch, and by enacting jurisdiction-stripping statutes, has left Article III courts basically uninvolved until a possible petition for review to the courts of appeals. Yet, even the ability of a noncitizen to reach that distant chance of judicial review is explicitly barred in several broad, categorical cases, especially those regarding discretionary decisions.[7]

The passage of the REAL ID Act of 2005[8] significantly impacted several areas of immigration law.[9] Importantly, Congress explicitly restored judicial review over "constitutional claims or questions of law," despite any previous jurisdictional bars in this area of immigration law.[10]

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accompanying text. "Extreme cruelty" includes actual or threatened violence, psychological or sexual abuse, and possibly other abusive acts in an overall pattern of violence. *See* 8 C.F.R. § 204.2 (c)(1)(vi) (2006).

4 *See* Carl Hulse & Rachel L. Swarns, *Senate Passes Bill on Building Border Fence*, N.Y. TIMES, Sept. 30, 2006, at A10; David Stout, *Bush, Signing Bill for Border Fence, Urges Wider Overhaul*, N.Y. TIMES, Oct. 27, 2006, at A16.

5 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.).

6 Pub. L. No. 104-208 div. C, 110 Stat. 3009, (codified as amended in scattered sections of 8 & 18 U.S.C.); *see infra* notes 45–52 and accompanying text.

7 *See* 8 U.S.C.A. § 1252(a)(2) (West 2005).

8 Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified in scattered sections of 8 & 49 U.S.C.).

9 Jay M. Zitter, Annotation, *Validity, Construction, and Application of REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231*, 11 A.L.R. FED. 2D 1, § 2, at 14 (2006) ("Other portions of the REAL ID Act involve waiving laws that interfere with the construction of physical barriers at the borders . . . , updating and tightening the laws and procedures on applications for asylum, removal, and deportation of aliens for terrorist activity (8 U.S.C.A. §§ 1182, 1252 (West 2005)), funding some reports and pilot projects related to border security . . . , and changing visa limits for temporary workers (8 U.S.C.A. § 1184).").

10 *See* 8 U.S.C.A. § 1252(a)(2)(D) (West 2005); Linda S. Wendtland, *Review of Constitutional Claims and Questions of Law Under the REAL ID Act*, IMMIGR. LITIG. BULL.

The question remains how the courts have responded to this ebb and flow, this robbing and restoring of jurisdiction: Are the courts abdicating their right to judicial review in light of the statutory bars or reclaiming their traditional role as bodies of review? Are they narrowly interpreting prohibitions on judicial review of discretionary decisions and broadly reading "constitutional claims or questions of law" in order to find a role for the courts in an ever-controversial and mistake-prone field? The courts agree that discretionary decisions by the BIA are outside the courts' jurisdiction and are thus unreviewable,[11] but the REAL ID Act explicitly grants the courts the right to review "constitutional claims or questions of law."[12] Where the courts disagree is on which decisions are discretionary—thus nonreviewable—and which decisions are questions of law—thus reviewable. Further, even where the ultimate decision is discretionary—where the statute has specific provisions that must be met and then the Attorney General still has discretion to grant relief—some courts find the ability to review the underlying statutory criteria.[13]

The need for judicial review of BIA decisions persists after the REAL ID Act. Despite the fact that the courts repeatedly label deportation as a civil proceeding and not punishment—thus noncitizens are not given the same due process protection they would have if it were a criminal proceeding—deportation may result in harsh consequences and arguably warrants review.[14] With the immigration judges and the BIA swamped with cases[15] and the high stakes for noncitizens—especially those who have already been subjected to extreme cruelty—the arguments for judicial review gain more strength. Although the counterarguments, including Congress's plenary power over immigration, deference to Congress, and the need to increase efficiency all deserve attention, they do not overshadow the continued need for judicial review. Even though courts should give the required deference to discretionary decisions where it is statutorily required, the

(U.S. Dep't of Justice, Wash., D.C.), Aug.–Sept. 2005, at 1, *available at* www.usdoj.gov/civil/oil/9news8_9.pdf.

11 *See infra* note 146 and accompanying text.

12 8 U.S.C.A. § 1252(a)(2)(D).

13 *See* Jean v. Gonzales, 452 F.3d 392, 395–96 (5th Cir. 2006); Wendtland, *supra* note 10, at 4 ("For example, section 242(a)(2)(B)'s restriction on review of discretionary decisions had been held not to preclude review of threshold factual questions that are non-discretionary in nature, such as whether an alien has accrued the requisite 'continuous physical presence' for cancellation of removal . . . .").

14 *See infra* notes 164–67 and accompanying text.

15 *See* Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 295–96 (2006) (describing how the BIA's increasing caseload started in the 1990s, and that in 2001 the "BIA had more than 57,000 cases pending").

courts must retain jurisdiction over constitutional claims and questions of law. After all, judicial review is the special function of the courts,[16] and the courts have the power to determine their own jurisdiction.[17] The courts should hesitate to abdicate this role, especially given the consequences facing the petitioners who lose their appeals.[18] Thus, there is still a need for judicial review, and the Court should hold that the determination of extreme cruelty is within Article III jurisdiction.

This Note examines the extent to which the REAL ID Act has affected and should affect judicial review of BIA decisions by the circuit courts, specifically the courts' ability to review determinations regarding "extreme cruelty" in the context of battered spouses and children seeking relief in the special form of cancellation of removal.[19] Part I examines the organization of immigration courts and the impact of the REAL ID Act. Part II looks at the distinction between "discretionary decisions" and "questions of law." Part III turns to the judicial decisions of the Fifth, Ninth, and Tenth Circuits, on whether the determination of "extreme cruelty" is subject to judicial review or whether it is a discretionary decision. Part IV considers the common arguments that are proffered in favor of stripping the courts' jurisdiction over immigration decisions. Finally, Part V concludes that despite the argument against judicial review, the need for judicial review outweighs any drawbacks, and that the Supreme Court should adopt the view of the Ninth Circuit.

I. JUDICIAL REVIEW OF THE DECISIONS OF THE IMMIGRATION COURTS

This Part first examines the necessary background to understand the structure, the location, and the powers of the immigration courts. Second, it examines how the courts have traditionally reviewed immigration decisions. Third, this Part addresses the impact of the REAL ID Act of 2005.

A. The Organization of the Immigration Courts

The Immigration Courts are not Article III courts, but are Article I courts organized under the Department of Justice and the Attorney

16 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

17 United States v. United Mine Workers, 330 U.S. 258, 291 (1947) ("'[The Court] alone necessarily had jurisdiction to decide whether the case was properly before it.'" (quoting United States v. Shipp, 203 U.S. 563, 573 (1906))).

18 *See infra* notes 164–67.

19 *See* 8 U.S.C.A. § 1229b(b)(2) (West 2005 & Supp. 2006); *infra* note 95 and accompanying text.

General. The Immigration and Naturalization Service (INS) formerly filled this function,[20] but in 2003, a major reorganization under the Homeland Security Act of 2002 replaced the INS with the Department of Homeland Security (DHS). The DHS took over many of the roles of the INS—including prosecuting the government's cases against noncitizens—and took these functions out of the Attorney General's power.[21] Despite the creation of the DHS, the Department of Justice still maintains an active role in immigration law. The Executive Office for Immigration Review (EOIR), an agency within the Department of Justice, which the Attorney General "direct[s] and regulate[s]," is in charge of adjudicating immigration cases.[22] Under the EOIR are the Office of the Chief Immigration Judge (OCIJ), the BIA, and the Office of the Chief Administrative Hearing Officer (OCAHO). The immigration judges are organized under the OCIJ, and the BIA is in charge of hearing appeals from the immigration judges.[23] The BIA is still under the Attorney General, who holds the power to review and modify BIA decisions, "but typically exercises this power only when a case raises exceptionally important questions of law or policy."[24]

B. Judicial Review of BIA Decisions

A noncitizen must meet certain prerequisites to get judicial review of BIA decisions. The removal order must be administratively

20 From 1940 to 2003, the INS was the main authority regarding immigration, and its "functions included law enforcement, inspection of arriving passengers, prosecution at administrative hearings, detention of noncitizens in connection with immigration proceedings, and processing applications for various immigration benefits." STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 2 (4th ed. 2005).

21 *Id.* at 2–3. The DHS contains two enforcement agencies, the Bureau of Customs and Border Protection (CBP), which mainly functions at the border, and the Bureau of Immigration and Customs Enforcement (ICE), which mainly functions in the interior. *Id.* at 3. The DHS also has a service component, the U.S. Citizenship and Immigration Services (USCIS). *Id.* at 4. ICE is responsible for prosecuting cases against noncitizens before the Immigration Judges. *Id.* at 639–40. For a helpful organizational chart, see *id.* at 6.

22 *Id.* at 4 (citing Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1101, 1102(3), 116 Stat. 2135, 2273–74 (codified as amended at 6 U.S.C. § 521 (Supp. II 2002) and 8 U.S.C. § 1103 (Supp. II 2002)).

23 *Id.*

24 *Id.* at 642; *see id.* at 4–5 (describing this power); *see also* 8 C.F.R. § 1003.1(g) (2006) ("Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States."); *id.* § 1003.1(h)(1) (requiring that "[t]he Board shall refer to the Attorney General for review of its decision all cases that" the Attorney General requests).

final[25] and the noncitizen must file a petition for review within thirty days of the final removal order "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."[26] The noncitizen must exhaust all administrative remedies[27] and the noncitizen must not be statutorily barred from judicial review.[28]

Despite consular absolutism, which is the inability of courts to review the denial of visas,[29] "only occasionally—until recently—have courts held the immigration decisions of *administrative officials* immune from judicial review."[30] However, the courts have traditionally deferred to Congress's plenary power in the field of immigration law.[31] "The reasons for this extraordinary deference are indeed complex, but it would seem that they are bound up in the notion that the judiciary does not belong in areas of foreign policy which may impli-

25 8 U.S.C. § 1252(a)(1) (2000) (providing for judicial review of "final" removal orders).

26 *Id.* § 1252(b)(1)–(2).

27 *See* Yan Yan Chen v. Gonzales, 201 F. App'x 434, 436–37 (9th Cir. 2006) (dismissing one of the noncitizen's petitions for review because the circuit court did not have jurisdiction where the noncitizen failed to exhaust her claim before the BIA); Galvez Piñeda v. Gonzales, 427 F.3d 833, 837 (10th Cir. 2005) ("Failure to exhaust administrative remedies by not first presenting a claim to to the BIA deprives this court of jurisdiction to hear it."); 3 Immigr. L. Serv. 2d (West) § 15:13, at 15-16 (2006) ("In cases involving adjustment of status prior to removal proceedings, several courts have denied review based primarily on the doctrine of exhaustion of administrative remedies finding that review is barred because applicants could renew their requests during removal proceedings.").

28 *See infra* note 62 and accompanying text (describing the categories 8 U.S.C.A. § 1252(a)(2) (West 2005) bars from review).

29 *See* Saavedra Bruno v. Albright, 197 F.3d 1153, 1156 (D.C. Cir. 1999) (holding that consular officers have the "exclusive authority to review applications for visas" and citing 8 U.S.C. §§ 1104(a), 1201(a) (1994)); *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1619–23 (2000) (noting that it is well settled that the courts lack jurisdiction to review the denial of visas by consular officers under the doctrine of consular absolutism); Maria Zas, *Consular Absolutism: The Need for Judicial Review in the Adjudication of Immigrant Visas for Permanent Residence*, 37 J. MARSHALL L. REV. 577, 591 (2004) ("Almost all the courts upholding the consular absolutism doctrine argue that consular officers' decisions are political, and as such, are immune from judicial review.").

30 LEGOMSKY, *supra* note 20, at 727.

31 Legomsky, *supra* note 29, at 1616–19; Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531, 544 (2006) ("A cardinal doctrine of United States constitutional law is that Congress has an inherent, plenary power in matters of immigration."); *see also infra* notes 150–54 and accompanying text (discussing the courts' deference to Congress).

cate political questions."[32] Decisions regarding deportation—now called removal—orders were reviewable until 1996, usually through habeas corpus.[33] However, the shortcoming of habeas review was that the noncitizen could not seek this form of relief until he or she was "in custody."[34] In deportation cases, the noncitizen is often not detained until after an order of deportation is issued, but certain categories of noncitizens are mandatorily detained pending a removal hearing.[35]

The Immigration and Nationality Act (INA)[36] was enacted in 1952, and although it has been repeatedly amended, it "remains the centerpiece of United States immigration law, providing the modern statutory framework for controlling the exclusion, admission and removal of non-citizens."[37] In 1955, the Supreme Court recognized that "the legislative history of both the Administrative Procedure Act and the 1952 Immigration Act supports [the noncitizen's] right to full judicial review of . . . deportation order[s]"[38] and held "that there is a right of judicial review of deportation orders other than by habeas corpus and that the remedy sought here is an appropriate one."[39] Thus, under the INA, before 1996, noncitizens could get judicial

32 Jeffrey A. Bekiares, Note, *In Country, on Parole, out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 721 (2006); *see also* De Sandoval v. U.S. Att'y Gen., 440 F.3d 1276, 1279 (11th Cir. 2006) ("Deference to an agency's interpretation of a statute 'is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.'" (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999))).

33 Legomsky, *supra* note 29, at 1623; *see also* INS v. St. Cyr, 533 U.S. 289, 306 (2001) ("Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court.").

34 28 U.S.C. § 2241(c)(4) (2000); *see* Mojica v. Reno, 970 F. Supp. 130, 164 (E.D.N.Y. 1997) ("In the immigration context courts have also held that physical restraint is not required for habeas jurisdiction. Where the petitioner is subject to a final order of deportation, the 'custody' requirement is satisfied, particularly where the alien has been released on condition of posting a bond.").

35 For example, federal law requires the mandatory detention of noncitizens who are inadmissible or deportable for having committed certain criminal offenses, 8 U.S.C. § 1226(c)(1) (2000), and also requires the mandatory detention of noncitizen suspected terrorists. *Id.* § 1226a (Supp. IV 2004).

36 Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

37 Sara A. Rodriguez, Note, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 488 (2006).

38 Shaughnessy v. Pedreiro, 349 U.S. 48, 51–52 (1955).

39 *Id.* at 52.

review of deportation orders either by habeas corpus or "by seeking declaratory judgments or injunctions under the Administrative Procedure Act, 5 U.S.C. § 703."[40] In 1961, under former INA section 106,[41] Congress enabled noncitizens to file petitions for review directly with the courts of appeals.[42] Thus, under the INA, before 1996, noncitizens could get judicial "review of the agency's discretionary denial of relief from exclusion or deportation"[43] either through seeking habeas review in the district court or by filing a petition for review with the court of appeals.[44]

In 1996, with the enactment of AEDPA and IIRIRA, the congressional attitude greatly changed. AEDPA focused on limiting judicial review regarding criminal noncitizens. It enlarged the aggravated felony category to include more crimes and limited the relief available to criminal noncitizens.[45] "IIRIRA clearly intended to restrict federal court jurisdiction in the area of immigration enforcement."[46] IIRIRA severely limited the petition for review with provisions that

> purport[ed] to bar judicial review of whole categories of removal orders, prohibit review of most denials of discretionary relief, make several forms of action and other judicial remedies unavailable, and

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40 LEGOMSKY, *supra* note 20, at 728; *see also* Legomsky, *supra* note 29, at 1623 ("Before the emergence of positive statutory law on the subject, the courts assumed that deportation orders . . . were reviewable in court."). Previously, in *Heikkila v. Barber*, 345 U.S. 229 (1953), the Court acknowledged that the Immigration Act of 1917 limited judicial review of deportation to habeas corpus and held that "deportation orders remain immune to direct attack." *Id.* at 236.

41 Former INA section 106 was repealed in 1996 by IIRIRA. LEGOMSKY, *supra* note 20, at 728.

42 *Id.*

43 Aaron G. Leiderman, Note, *Preserving the Constitution's Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1369–70 (2006).

44 *See* INS v. St. Cyr, 533 U.S. 289, 306, 313 n.37 (2001).

45 1 Immigr. L. Serv., *supra* note 27, § 1:26, at 1-34 (noting that AEDPA provided for "preclusion of judicial review of final orders of deportation that are based on certain convictions (aggravated felony, controlled substances, firearms, certain miscellaneous crimes, and multiple crimes involving moral turpitude), [and] denial of INA § 212(c) [8 U.S.C.A. § 1182(c) (West 2005)] relief from deportation for such aliens, expedited deportation of such aliens, and expansion of the definition of an aggravated felony"); *see also* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 41 & n.10 (2007) (discussing how noncitizens convicted of an aggravated felony are barred from relief via petitions for review, and that the courts decide whether the crime is an aggravated felony within the meaning of the INA).

46 3 Immigr. L. Serv., *supra* note 27, § 15:13, at 15-18.

erect several other barriers to judicial review of administrative decisions in removal cases.[47]

Some of the categories explicitly excepted from judicial review included removal orders for crimes, denials of discretionary relief, expedited removal, and "other provisions limit[ing] the forms, methods, and timing of actions brought to challenge various types of removal-related decisions."[48] Despite these limitations, IIRIRA "does not preclude review of INS' determination that an alien is *statutorily* ineligible for a form of discretionary relief. Similarly, review should still be available to challenge INS' violation of its own regulations or operating practices or where INS fails to exercise its discretionary authority."[49] IIRIRA and AEDPA also attempted to ban review via habeas corpus, but the Court in *INS v. St. Cyr*[50] held that absent explicit language precluding habeas—which came later in the REAL ID Act[51]—the Court should interpret IIRIRA and AEDPA to avoid a conflict with the Suspension Clause.[52]

C. The Impact of the REAL ID Act of 2005

President Bush signed the REAL ID Act on May 11, 2005 as part of the Emergency Supplemental Appropriations Act.[53] The REAL ID Act contained five titles that respectively dealt with asylum and removal; drivers' licenses; border security; H-2B temporary worker provisions; and Australian E nonimmigrant and EB-3 nurses visas.[54] Some of the significant changes made regarding removal are that the REAL ID Act bars review of "any discretionary judgment, decision or

47 LEGOMSKY, *supra* note 20, at 728.

48 Legomsky, *supra* note 29, at 1624.

49 1 Immigr. L. & Def. 3d (West) § 10:22 (2006).

50 533 U.S. 289 (2001).

51 *See* Benson, *supra* note 45, at 43 ("[T]he REAL ID Act . . . explicitly bar[s] habeas corpus review of removal orders . . . . [This] has meant a transfer of all habeas petitions from the district court to the appeals courts."); Wendtland, *supra* note 10, at 3 ("In the REAL ID Act, Congress took the Supreme Court up on its invitation to provide criminal aliens with an adequate alternative to district court habeas review.").

52 *St. Cyr*, 533 U.S. at 305. The Court decided that although a provision of AEDPA was titled, "Elimination of Custody Review by Habeas Corpus," its text did not mention habeas corpus, but rather, "merely repeal[ed] a subsection of the 1961 statute amending the judicial review provisions of the 1952 Immigration and Nationality Act." *Id.* at 308–09. Further, IIRIRA addressed "judicial review" but did not "explicitly mention habeas, or 28 U.S.C. § 2241. Accordingly, neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." *Id.* at 312–13.

53 1 Immigr. L. Serv., *supra* note 27, § 1:88, at 1-21.

54 *Id.*

action made in removal proceedings" and "severely limit[s] judicial review of removal orders."[55] "It prohibits habeas corpus review of removal orders and makes the U.S. courts of appeals the only courts with jurisdiction over review of removal orders."[56] Whereas *St. Cyr* rejected AEDPA and IIRIRA's attempt to bar habeas corpus review for noncitizens in removal due to is lack of specificity,[57] the REAL ID Act answered the Court and explicitly made the petition for review the exclusive means of review.[58] Also, the REAL ID Act specifically provides for judicial review of "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."[59] In *Papageorgiou v. Gonzales*,[60] the court held that the REAL ID Act

> evidenced . . . [Congress's] intent to restore judicial review of constitutional claims and questions of law presented in petitions for review of final removal orders . . . . [With] passage of the Act, Congress . . . repealed all jurisdictional bars to . . . [the court's] direct review of constitutional claims and questions of law in final removal orders.[61]

As the law now stands, post-REAL ID, the courts cannot review certain matters. These prohibitions on judicial review include "[r]eview relating to section 1225(b)(1) of this title . . . [d]enials of discretionary relief . . . [and] . . . [o]rders against criminal aliens."[62] But, the statute also carves out a clear exception allowing for "[j]udicial review of certain legal claims . . . constitutional claims or questions of law."[63]

Thus, for a noncitizen to seek judicial review of a BIA decision, she must first exhaust all administrative proceedings, have a final removal order, and file a petition for review with the court of appeals

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55 *Id.*

56 *Id.*

57 *See supra* note 52.

58 8 U.S.C.A. § 1252(a)(5) (West 2005) (codifying the rule that, with some exceptions, the petition for review to the appropriate circuit court is the only available form of judicial review, "[n]otwithstanding any other provision of law (statutory or nonstatutory) including section 2241 of Title 28, or any other habeas corpus provision").

59 *Id.* § 1252(a)(2)(D).

60 413 F.3d 356 (3d Cir. 2005).

61 *Id.* at 358 (holding that although the court had jurisdiction to review the constitutional claim—a due process challenge to the BIA's summary affirmance of the IJ's decision—the court had previously held that these challenges are without merit); *see* Zitter, *supra* note 9, § 13.

62 8 U.S.C.A. § 1252(a)(2); *see generally* Wendtland, *supra* note 10.

63 8 U.S.C.A. § 1252(a)(2)(D); *see generally* Wendtland, *supra* note 10.

in the circuit in which the immigration judge sat within thirty days.[64] Further, she must get around the fence in immigration law that prohibits the review of discretionary decisions; she must frame her appeal as a constitutional claim or question of law,[65] for which the courts of appeals explicitly have a grant of jurisdiction from the REAL ID Act. The question remains how the courts have interpreted and how the courts should interpret "constitutional claims and questions of law" in the immigration context. How much wiggle room does the statutory grant give the courts to review certain types of decisions?

II. SEPARATING DISCRETIONARY DETERMINATIONS FROM QUESTIONS OF LAW SUBJECT TO REVIEW

The REAL ID Act's apparently simple language that a court cannot review discretionary decisions, but can review constitutional claims or questions of law, creates controversy because no statutory provision defines these terms. According to the legislative history, this jurisdictional grant was meant to be an adequate substitute for habeas review; thus, the statutory grant should cover at least those issues that were reviewable through habeas corpus, which are "constitutional and statutory-construction questions."[66] The legislative history suggests that a question of law "inquires into the meaning of statutory language in the context of undisputed or assumed facts."[67] "Definitions of law typically invoke the characteristic of generality . . . . [L]egal questions in the immigration context are traditionally understood as pertaining to challenges to agency statutory construction since such claims relate to the agency's administration of the statute generally."[68]

However, given that courts have the power to determine their own jurisdiction,[69] they are able to interpret what constitutes a legal claim and what is discretionary. The Fifth and the Tenth Circuits, respectively, have described discretionary decisions as decisions which are "not self-explanatory,"[70] or which "involve a 'judgment call.'"[71]

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64 *See supra* notes 25–28 and accompanying text.

65 *See* Benson, *supra* note 45, at 52 ("Knowing there is no judicial review of the discretionary decision, an attorney may now recharacterize litigation to raise constitutional or statutory issues. Barring review of the act of discretion has frequently only shifted the litigation strategy not eliminated litigation.").

66 H.R. REP. NO. 109-72, at 175 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 240, 299–300; *see also* Wendtland, *supra* note 10 (discussing the REAL ID Act's legislative history).

67 Wendtland, *supra* note 10, at 5.

68 Leiderman, *supra* note 43, at 1382.

69 *See supra* note 17.

70 Wilmore v. Gonzales, 455 F.3d 524, 527 (5th Cir. 2006).

The courts of appeals agree that certain decisions are clearly discretionary. The courts have held that the determination of "exceptional and extremely unusual hardship"[72] is discretionary.[73] Even before the passage of the REAL ID Act, courts had held that reviewing claims of "exceptional and extremely unusual hardship" was discretionary.[74] Thus, their jurisdiction regarding this question was undisturbed by the REAL ID Act.[75]

While some courts are reluctant to call anything and everything a question of law,[76] which would completely tear down the fence prohibiting judicial review, the underlying justification for this position seems to rest on congressional intent: "[T]he REAL ID Act reflects a congressional intent to preserve [a] broad effort to streamline immigration proceedings and to expedite removal while restoring judicial review of constitutional and legal issues."[77] "'[T]he purpose . . . is to permit judicial review over those issues that were historically reviewable on habeas—*constitutional and statutory-construction*

71 Perales-Cumpean v. Gonzales, 429 F.3d 977, 982 (10th Cir. 2005) (quoting Sabido Valdivia v. Gonzales, 423 F.3d 1144, 1149 (10th Cir. 2005)).

72 *See* 8 U.S.C. § 1229b(b)(1)(D) (2000). For nonpermanent residents to qualify for cancellation of removal and adjustment of status, the noncitizen must have been continuously physically present for ten years, be of good moral character, not have been convicted of certain offenses, establish "that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence," and get the favorable discretion of the Attorney General. 8 U.S.C.A. § 1229b(b)(1) (West 2005 & Supp. 2006).

73 De La Vega v. Gonzales, 436 F.3d 141, 144 (2d Cir. 2006); *see also* Martinez-Rosas v. Gonzales, 424 F.3d 926, 930 (9th Cir. 2005) ("[W]e lack jurisdiction to review the IJ's subjective, discretionary determination that Martinez-Rosas did not demonstrate 'exceptional and extremely unusual hardship' under 8 U.S.C. § 1229b(b)(1)(D).").

74 *See* Romero-Torres v. Ashcroft, 327 F.3d 887, 888 (9th Cir. 2003); *see also* Gonzalez-Oropeza v. U.S. Att'y Gen., 321 F.3d 1331, 1333 (11th Cir. 2003) (holding that "the exceptional and extremely unusual hardship determination is a discretionary decision not subject to review").

75 *See* Tobar v. Gonzales, 200 F. App'x 796, 799 (10th Cir. 2006) (citing Ferry v. Gonzales, 457 F.3d 1117, 1130 (10th Cir. 2006)); *Martinez-Rosas*, 424 F.3d at 929 (citing *Romero-Torres*, 327 F.3d at 888, 890–91).

76 *See Tobar*, 200 F. App'x at 799; *see also* Higuit v. Gonzales, 433 F.3d 417, 420 (4th Cir. 2006) ("We are not free to convert every immigration case into a question of law, and thereby undermine Congress's decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive."), *cert. denied*, 126 S. Ct. 2973 (2006).

77 Grass v. Gonzales, 418 F.3d 876, 879 (8th Cir. 2005) *cert. denied*, 126 S. Ct. 1793 (2006); *see also Tobar*, 200 F. App'x at 799 (stating that Congress had a "clear intent to eliminate jurisdiction over discretionary decisions").

questions, not discretionary or factual questions.'"[78] However, some circuits are more willing than others to interpret this jurisdictional grant broadly and to label decisions discretionary less frequently.[79]

Overall, courts regard factual determinations as unreviewable (beyond the bounds of the fence around immigration law), but consider questions of law within their jurisdiction (on the court's side of the fence). The difference is that questions of law are general, but facts are "highly specific."[80] However, which category each type of decision fits into has largely been left up to the courts.[81] Regarding discretionary decisions, as the *St. Cyr* Court noted,

> habeas courts traditionally reviewed two types of discretionary decisions: first, an agency's failure to even *consider* exercising discretion based on its legal error in interpreting the eligibility requirements for a form of relief from removal (an eligibility decision) and second, an unfavorable exercise of that discretion (a merits decision).[82]

Courts have labeled the following decisions discretionary: denials of adjustment of status,[83] denials to grant continuances,[84] and "the existence of 'changed circumstances' that materially affect eligibility for asylum."[85] Once these decisions are labeled discretionary, they are beyond the fence and unreachable by the court's review.

Constitutional claims and questions of law clearly fall within the nondiscretionary category—and therefore are reviewable by Article III courts since they are on the court's side of the fence. The plain statu-

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78 Ramadan v. Gonzales, 427 F.3d 1218, 1222 (9th Cir. 2005) (quoting H.R. REP. No. 109-13, at 175 (2005) (Conf. Rep.), *as reprinted in* 2005 U.S.C.C.AN 240, 300).

79 *See infra* notes 86–93 and accompanying text.

80 Leiderman, *supra* note 43, at 1382.

81 "In all, the REAL ID Act restores a baseline of jurisdiction to review 'constitutional claims or questions of law' . . . to be fleshed out on a case-by-case basis in the circuit courts." *Id.* at 1376 (focusing on the inadequacy of the REAL ID Act in addressing the court's jurisdiction over mixed questions of law and fact and arguing that the court should consider many mixed questions since the REAL ID Act was meant to be an equal substitute for habeas corpus review).

82 *Id.* at 1378 (citing INS v. St. Cyr, 533 U.S. 289, 303–04, 307 (2001)).

83 Higuit v. Gonzales, 433 F.3d 417, 420 (4th Cir. 2006), *cert. denied*, 126 S. Ct. 2973 (2006).

84 Grass v. Gonzales, 418 F.3d 876, 877–78 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1793 (2006).

85 Ramadan v. Gonzales, 427 F.3d 1218, 1221–22 (9th Cir. 2005) ("Should there be any doubt about the meaning of the term 'questions of law' in the REAL ID Act, the legislative history makes it abundantly clear this term refers to a narrow category of issues regarding statutory construction.").

tory language of the REAL ID Act explicitly makes this exception.[86] The issue is what decisions this categorical exception encompasses. Due process claims are clearly within the purview of the statutory exemption, and are thus reviewable.[87] Heightened standards imposed by the Attorney General have also been defined as legal claims and are reviewable.[88] In *Succar v. Ashcroft*,[89] the First Circuit held that the issue—whether a regulation was promulgated within the scope of the Attorney General's authority—was a pure question of law and statutory interpretation, not discretion, and was therefore reviewable by the court.[90]

In *Benslimane v. Gonzales*,[91] the Seventh Circuit, in an opinion written by Judge Posner, decided that "[t]he final decision in this case is the order removing Benslimane, which is nondiscretionary and therefore reviewable by us."[92] The court further elaborated, in dicta, without sharing its own position on the issue, that

> [o]ther courts have recognized an even broader scope of judicial review of denials of continuances. They have pointed out that section 1252(a)(2)(B)(ii) closes the door only to the review of rulings "the authority for which is specified under this subchapter to be in the discretion of the Attorney General," and that rulings on motions for a continuance are not among those specified (that is, explicitly listed).[93]

Drawing this distinction is not always clear.[94] Thus, the key distinction between discretionary and nondiscretionary—constitutional

86 REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (to be codified at 8 U.S.C. § 1252(a)(2)(D)).

87 Contreras-Rodriguez v. U.S. Att'y Gen., 462 F.3d 1314, 1316 (11th Cir. 2006) (holding that the court could review the denial of a motion to reopen where there was a "constitutional challenge to the government's failure to provide [the deportee] with notice of the deportation hearing"); Martinez-Rosas v. Gonzales, 424 F.3d 926, 930 (9th Cir. 2005) (holding that the court did have jurisdiction to review the due process claims); Hamid v. Gonzales, 417 F.3d 642, 645 (7th Cir. 2005) (holding that the court could review the due process claim due to the jurisdiction exception for "constitutional claims or questions of law" in the REAL ID Act); Papageorgiou v. Gonzales, 413 F.3d 356, 358–59 (3d Cir. 2005) (deciding that the court had jurisdiction to review the constitutional due process claim).

88 Jean v. Gonzales, 452 F.3d 392, 396 (5th Cir. 2006) (holding that a claim of ultra vires is a question of law because it is a claim regarding statutory construction).

89 394 F.3d 8 (1st Cir. 2005).

90 *Id.* at 19; *see* Bekiares, *supra* note 32, at 728–29.

91 430 F.3d 828 (7th Cir. 2005).

92 *Id.* at 831.

93 *Id.* at 832 (quoting 8 U.S.C.A. § 1252(a)(2)(B)(ii) (West 2005)).

94 Grass v. Gonzales, 418 F.3d 876, 878 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1793 (2006).

claims or questions of law—is left to the courts, which can lead to differing results as to the fence's boundaries, namely in the case of "extreme cruelty," to which we now turn.

III. Deciding on Which Side of the Fence to Put "Extreme Cruelty"

The courts of appeals are split about whether the BIA's determination of "extreme cruelty" is a discretionary determination or a question of law. They cannot agree where to build the fence on this issue. The Fifth and Tenth Circuits have held the "extreme cruelty" determination to be a discretionary decision and unreviewable by the courts, whereas the Ninth Circuit has held it to be a nondiscretionary legal standard, and thus reviewable.

> Pursuant to the special rule for a battered noncitizen spouse or child, the battered noncitizen may qualify for cancellation of removal if,
>
> (i)(I) the alien has been battered or subjected to extreme cruelty by a spouse or parent who is . . . a United States citizen . . . ; [or]
>
> (II) . . . who is or was a lawful permanent resident . . . ;
>
> (ii) the alien has been physically present in the United States for a continuous period of not less than 3 years . . . ;
>
> (iii) the alien has been a person of good moral character during such period . . . ;
>
> (iv) the alien is not inadmissible under [certain provisions]; . . . and
>
> (v) the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.[95]

The regulations define, in pertinent part, that "battery or extreme cruelty" includes, "but is not limited to, being the victim of any act or threatened act of violence" or "[p]sychological or sexual abuse."[96] The regulations further provide that "[o]ther abusive acts may also be acts of violence under certain circumstances, including acts that . . . may not initially appear violent but that are a part of an overall pattern of violence."[97]

This special rule for relief, formerly codified at INA section 244, became part of the INA with the enactment of the Violence Against Women Act of 1994 (VAWA),[98] to protect noncitizen spouses and chil-

95 8 U.S.C.A. § 1229b(b)(2)(A) (West 2005 & Supp. 2006).

96 8 C.F.R. § 204.2(c)(1)(vi) (2006).

97 *Id.*

98 Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18 & 42 U.S.C.).

dren who were victims of domestic violence.[99] The Ninth Circuit, in *Hernandez v. Ashcroft*,[100] has interpreted extreme cruelty as the "nonphysical aspects of domestic violence."[101] Since the definition of extreme cruelty includes acts that "are a part of an overall pattern of violence"[102] the court held that this "protect[ed] women against manipulative tactics aimed at ensuring the batterer's dominance and control" and "protected against the extreme concept of domestic violence, rather then mere unkindness."[103] In *Hernandez*, the court decided that although the egregious physical abuse—which would surely meet the standard of battery or extreme cruelty—took place in Mexico, the husband's seemingly nonviolent actions in the United States to lure his wife back to Mexico were part of the cycle of violence and rose to the level of extreme cruelty.[104] Thus, the focus of a determination as to whether there has been extreme cruelty is on extreme, nonphysical aspects of domestic violence, in order to cover those situations that may not amount to battery but are nonetheless part of an overall pattern of violence.

A. *The Fifth Circuit's Decision in* Wilmore v. Gonzales[105]

The Fifth Circuit, in *Wilmore*, dismissed an appeal to review a decision of the BIA "[b]ecause Congress has stripped courts of jurisdiction to review the Attorney General's discretionary decisions under [8 U.S.C.A. §] 1229b(b)(2)."[106] In *Wilmore*, the former INS served Kathleen Wilmore with a notice to appear in February 2003, after she had been continuously present in the United States since 1981, but out of

99 Hernandez v. Ashcroft, 345 F.3d 824, 832 (9th Cir. 2003).

100 345 F.3d 824.

101 *Id.* at 839.

102 8 C.F.R. § 204.2(c)(1)(vi) (2006).

103 *Hernandez*, 345 F.3d at 840.

104 *Id.* at 835–41. "Against this violent backdrop, . . . [his] actions in tracking Hernandez down and luring her from the safety of the United States through false promises and short-lived contrition are precisely the type of acts of extreme cruelty that 'may not initially appear violent but that are part of an overall pattern of violence.'" *Id.* at 840 (citing 8 C.F.R. § 204.2(c)(1)(vi) (2003)). The Ninth Circuit has continued to hold that extreme cruelty is not merely unkindness. Zhi Gang Wang v. Gonzales, 164 F. App'x 564, 565 (9th Cir. 2006) (ruling that although "Wang's wife verbally abused him, made him sleep on the couch, controlled his paychecks, screened his correspondence with China, and deprived him of the 'good parts' of food he purchased for the family table," this did not rise to the level of extreme cruelty).

105 455 F.3d 524 (5th Cir. 2006).

106 *Id.* at 525.

status since 1983.[107] She married a U.S. citizen in 1996 who then applied on her behalf for an adjustment of status to make her a lawful permanent resident, but her husband had since filed for divorce and withdrawn his application.[108] Wilmore, although conceding her deportability, sought relief through cancellation of removal under the special rule for victims of domestic violence.[109] The immigration judge determined that Wilmore had not met the "extreme cruelty" requirement and the BIA dismissed her appeal on the same grounds,[110] so Wilmore appealed to the Fifth Circuit to show "extreme cruelty." The Fifth Circuit stated the accepted standard that it "lack[ed] jurisdiction to review discretionary decisions under § 1229b but retain[ed] jurisdiction over purely legal and nondiscretionary questions."[111] Thus, the case turned on whether a determination of "extreme cruelty" was discretionary.

This presented a question of first impression for the Fifth Circuit.[112] The court analogized to its previous holding that the "extreme hardship" determination, under the same section, was discretionary, to also hold the "extreme cruelty" determination to be discretionary, because both terms were "'not self-explanatory and reasonable men could differ'" as to their meaning.[113] The court addressed the lack of uniformity and the arguments in the other circuits, namely the Ninth and Tenth Circuits, regarding whether deter-

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107 *Id.*

108 *Id.*

109 *Id.* at 526. Under the INA, the DHS has the burden of proving that a noncitizen is deportable, unless the noncitizen concedes deportability. The burden then shifts to the noncitizen, even if deportable, to prove that he or she is eligible for affirmative relief. 8 U.S.C.A. § 1229a(c) (West 2005 & Supp. 2006). Thus, it is not uncommon for noncitizens to concede deportability. Benson, *supra* note 45, at 49–51. Affirmative relief may cancel removal or even adjust the noncitizen to permanent resident status. *Id.* § 1229b(a)–(b).

110 *Wilmore*, 455 F.3d at 526.

111 *Id.* (citing Mireles-Valdez v. Ashcroft, 349 F.3d 213, 215–16 (5th Cir. 2003)).

112 The Fifth Circuit previously had opportunities to decide whether determining extreme cruelty was discretionary, but instead avoided the issue by pointing out that the same outcome—denial of relief—would be reached either way, such that the issue did not need to be decided. Garnica-Villarreal v. Ashcroft, 123 F. App'x 625, 626 (5th Cir. 2005) ("We need not resolve the jurisdictional question in this case because Garnica is not entitled to relief."); Luna-Ramirez v. Ashcroft, 111 F. App'x 737, 738 (5th Cir. 2004) ("[W]e need not resolve the jurisdictional question in this case as Luna is not entitled to relief.").

113 *Wilmore*, 455 F.3d. at 527 (quoting Moosa v. INS, 171 F.3d 994, 1013 (5th Cir. 1999)).

mining "extreme hardship" was discretionary, before ultimately siding with the Tenth Circuit.[114]

The court, in addition to an analogy to "extreme hardship" and the Tenth Circuit's interpretation, examined the statutory text and the impact of the REAL ID Act in reaching its conclusion. The court focused on the literal use of the word "may" in the statute, the title of the jurisdiction-stripping provision ("Matters not subject to judicial review"),[115] and the location of the "extreme cruelty" provision under "Denials of discretionary relief."[116] The court, although recognizing that the REAL ID Act gave the courts jurisdiction over "constitutional claims or questions of law,"[117] narrowly interpreted the Act as not granting jurisdiction in the present case.[118] It basically held that interpreting "extreme cruelty" was discretionary and not a question of law.[119]

B. The Tenth Circuit's Decision in Perales-Cumpean v. Gonzales[120]

The Tenth Circuit in *Perales-Cumpean*, which the Fifth Circuit relied on in *Wilmore*, held the determination of "extreme cruelty" to be a discretionary decision of the BIA beyond the court's jurisdiction, while rejecting the Ninth Circuit's view.[121] In *Perales-Cumpean*, the petitioner sought relief in the special form of cancellation of removal for battered spouses under 8 U.S.C.A. § 1229b(b)(2).[122] The immigration judge denied relief, and the BIA affirmed, because "petitioner had not satisfied the *statutory requirement* of showing that she had been subject to *extreme cruelty* or battery by her spouse."[123] The BIA decided that the petitioner's claims of name calling, insults, the use of derogatory language, and the lack of credible testimony regarding marital

114 *Id.* at 527–28; *see infra* Parts III.B–C.

115 8 U.S.C.A. § 1252(a)(2)(B) (West 2005).

116 8 U.S.C. § 1252(a)(2)(B)(i) (2000); *see Wilmore*, 455 F.3d at 528. However, according to *St. Cyr*, the title of the section is not controlling. INS v. St. Cyr, 533 U.S. 289, 308 (2001) (holding that even though the title of the section was "Elimination of Custody Review by Habeas Corpus," review via habeas corpus was still available because the statutory text did not clearly exclude habeas corpus).

117 8 U.S.C.A. § 1252(a)(2)(D).

118 *Wilmore*, 455 F.3d at 529.

119 *Id.* at 528.

120 429 F.3d 977 (10th Cir. 2005).

121 *Id.* at 979–80; *see Tenth Circuit Rules that It Lacks Jurisdiction to Review Determinations of Extreme Cruelty and Adverse Credibility in Special Rule Cancellation Case*, IMMIGR. LITIG. BULL. (U.S. Dep't of Justice, Wash., D.C.), Dec. 2005, at 14, *available at* www.usdoj.gov/civil/oil/9news12.pdf.

122 *See supra* note 95 and accompanying text.

123 *Perales-Cumpean*, 429 F.3d at 980 (emphases added).

rape did not meet the statutory requirement of "extreme cruelty."[124] In deciding whether the Tenth Circuit had jurisdiction to review the decision, the court looked to the jurisdictional statute and precedent to conclude that the court could not review discretionary decisions, but only nondiscretionary decisions.[125] The court interpreted *discretionary decisions* as those

> that involve a "judgment call" by the agency, or for which there is "no algorithm" on which review may be based. . . . [Whereas] [d]ecisions for which there is a clear standard, and for which no evaluation of non-discretionary criteria is required, by contrast, may be considered non-discretionary and thus reviewable.[126]

The court, like the Fifth Circuit in *Wilmore*, held that the determination of "extreme cruelty" was discretionary by analogizing to a previous decision holding that "exceptional and extremely unusual hardship" was discretionary since it was a "judgment call" and not a "pure question of law."[127] Overall, the court showed great deference to Congress and Congress's decision not to more specifically define what level of verbal abuse reaches "extreme cruelty" as evidence that it was intended to be a decision made in the discretion of the agency.[128] The court also expressly rejected the Ninth Circuit's reasoning in *Hernandez* that extreme cruelty can be objectively assessed[129] and held that the regulatory definition of "battery or extreme cruelty" itself called for discretion in its interpretation.[130]

C. *The Ninth Circuit's Decision in* Hernandez v. Ashcroft

The Ninth Circuit, in *Hernandez*—contrary to the later decisions of the Fifth and Tenth Circuits—held that it had jurisdiction to review the BIA's decision regarding "extreme cruelty" and to interpret for itself the meaning of "extreme cruelty," because it was a nondiscretionary decision.[131] In *Hernandez*, a noncitizen—a victim of domestic

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124 *Id.* at 981.

125 *Id.* at 982.

126 *Id.* (quoting Sabido Valdivia v. Gonzales, 423 F.3d 1144, 1149 (10th Cir. 2005)).

127 *Id.* (quoting Morales Ventura v. Ashcroft, 348 F.3d 1259, 1262 (10th Cir. 2005)).

128 *Id.* at 982–83.

129 *Id.* at 983; *see infra* note 135 and accompanying text.

130 *Perales-Cumpean*, 429 F.3d at 984; 8 C.F.R. § 204.2(c)(1)(vi) (2006).

131 Hernandez v. Ashcroft, 345 F.3d 824, 828 (9th Cir. 2003). It is important to note that *Hernandez* was decided under IIRIRA's transitional rules which stated that "'there shall be no appeal of any discretionary decision under section . . . 244 . . . of the Immigration and Nationality Act.'" *Id.* at 833 (quoting 8 U.S.C. § 1101 (2000)).

violence by her legal permanent resident husband—was denied relief by both the IJ and the BIA for failing to prove "extreme cruelty," and was also denied discretionary relief even after meeting the statutory requirements due to the petitioner's failing marriage.[132]

On the issue of "extreme cruelty," rather than dismiss for lack of jurisdiction, the Ninth Circuit ruled itself able to review the BIA's decision, but only after deciding that the "extreme cruelty" determination was not a discretionary decision.[133] The court examined its previous decisions holding continuous physical presence and per se categories of bad moral character nondiscretionary, whereas it had held general determinations of moral character and extreme hardship discretionary.[134] In determining whether interpreting "extreme cruelty" is discretionary, the court rejected drawing an analogy to "extreme hardship," but rather held that

> [t]he existence or nonexistence of battery is clearly a factual determination, readily resolved by the application of a *legal standard* defining battery to facts in question. Extreme cruelty provides an inquiry into an individual's experience of mental or psychological cruelty, an alternative measure of domestic violence that can also be assessed on the basis of *objective standards.*[135]

The court examined the statutory text to conclude that "nothing in the text of the statute indicates that the phrase at issue is discretionary" unlike the statutory text regarding "'extreme hardship' which is specifically committed to 'the opinion of the Attorney General.'"[136] Looking at the present statutory text, the special rule allows a noncitizen to demonstrate that she "has been battered or subjected to extreme cruelty."[137] However, at the time of this decision, the statutory text regarding "extreme hardship,"[138] required that the "applicant be 'a person whose deportation would, *in the opinion of* the

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Although decided before the REAL ID Act, *Hernandez* still decides the same issue, whether the "extreme cruelty" determination is discretionary, and both the Fifth and Tenth Circuits addressed it in their analyses.

132 *Id.* at 827–28; *see also supra* note 95 and accompanying text (explaining the statutory requirements for a battered spouse to seek relief).

133 *Hernandez*, 345 F.3d at 833 ("Although there is no jurisdiction to review the exercise of discretion under section 244, '[a]s to those elements of statutory eligibility which do not involve the exercise of discretion, direct judicial review remains.'" (quoting Kalaw v. INS, 133 F.3d 1147, 1150 (9th Cir. 1997))).

134 *Id.*

135 *Id.* at 834 (emphases added).

136 *Id.* (quoting 8 U.S.C. § 1254(a)(1), (3) (1994)).

137 8 U.S.C. § 1229b(b)(2)(i)(I) (2000).

138 8 U.S.C. § 1254(a)(1), (3) (1994) (current version at 8 U.S.C. § 1229b(b)(2)(i)(I) (2000)).

Attorney General, result in extreme hardship.'"[139] Although this clear difference in statutory language has been amended, the section regarding "exceptional and extremely unusual hardship" now more closely resembles the structure of the "extreme hardship" statute, as it is now and as it was at the time *Hernandez* was decided. Neither provision now has the phrase, "in the opinion of the Attorney General," making the determination of "extreme cruelty" still able to be read as nondiscretionary.[140]

Further, the court based its holding on congressional intent. Since this special rule for relief was originally enacted as a part of the Violence Against Women Act,[141] the court reasoned that Congress intended to "remedy the past insensitivity of the INS and other governmental entities to the dangers and dynamics of domestic violence, [thus] it appears quite unlikely that Congress would have intended to commit the determination of what constitutes domestic violence to the sole discretion of immigration judges."[142]

The second issue the court reviewed regarded the discretionary denial of relief even if the statutory requirements were met. "Although the eligibility determination is clearly reviewable, IIRIRA stripped us of jurisdiction to review the discretionary aspect of a decision to deny an application for adjustment of status."[143] However, the court noted that limitations on jurisdiction should be narrowly interpreted.[144] The court then reviewed the underlying reason that the BIA denied petitioner relief. Since the denial of discretionary relief was based on the nonviability of the marriage, which is not a sufficient reason to deny relief, the court held that "[t]he BIA has no discretion to make a decision that is contrary to law. . . . Thus, the regulations themselves limit the BIA's discretion to operating within the law."[145]

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139 *Hernandez*, 345 F.3d at 834 n.8 (quoting 8 U.S.C. § 1254(a)(1), (3) (1994)) (emphasis added).

140 *See* 8 U.S.C. § 1229b(b) (2000).

141 *See supra* notes 98–99 and accompanying text.

142 *Hernandez*, 345 F.3d at 835.

143 *Id.* at 845 (citing 8 U.S.C. § 1101 note (2000)).

144 *Id.* (citing Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999)).

145 *Id.* at 846. Other courts have similarly reviewed the basis for the BIA's decision. *See* Rodriguez-Castro v. Gonzales, 427 F.3d 316, 319 (5th Cir. 2005) (holding that even after the REAL ID Act, the court can still review whether the BIA properly classified a state statute as a crime involving moral turpitude, because that is a pure question of law); Mireles-Valdez v. Ashcroft, 349 F.3d 213, 217 (5th Cir. 2003) (holding that since continuous presence is nondiscretionary, the court "has jurisdiction to review whether Mireles-Valdez was ineligible for cancellation because he lacked the required continuous presence").

Even though the Ninth Circuit will not review discretionary decisions of the BIA, here in *Hernandez*, it has more narrowly interpreted what decisions are discretionary and even has been willing to examine the underlying decision of the BIA to make sure that the BIA has not exceeded its authority and the bounds of the law in determining when it has cursorily labeled a decision discretionary.

Although the circuits are split about whether the "extreme cruelty" determination is discretionary, they do agree that the threshold issue is whether a decision is discretionary. While this initial decision can be outcome-determinative in that it strips the court of jurisdiction to review the decision,[146] effectively leaving the decision of the BIA undisturbed, the Ninth Circuit has even interpreted that limitation narrowly to allow for review of the underlying decision.[147] As a result, courts could broadly interpret "constitutional claims or questions of law" to allow them the opportunity to review the "extreme cruelty" decision while still holding to the statute. Thus, for some courts, the REAL ID Act significantly expands their jurisdiction by allowing them to review questions of law and constitutional claims, due to a broad interpretation of this jurisdictional "grant." However, courts have recognized that this grant also affects how noncitizens frame their appeals, and this makes courts hesitant to label anything a "constitutional claim or question of law."[148] The view that we ultimately accept—that of the Ninth Circuit or that shared by the Tenth and Fifth Circuits—depends a great deal on what interests we seek to promote.

IV. THE DRAWBACKS TO JUDICIAL REVIEW

Before defending judicial review, it is important to examine the possible arguments for stripping the court of this function by building a fence around some immigration decisions. Common arguments for insulating immigration law from judicial review range from judicial deference to Congress in a field that is better left to the political branches to the increased delay and monetary costs associated with review.[149] Thus, the two main arguments are first, the traditional plea of deference to Congress in this field, and second, the need for efficiency and streamlining of the process.

146 *See* Hadwani v. Gonzales, 445 F.3d 798, 800 (5th Cir. 2006) (collecting cases holding that the courts "lack jurisdiction over petitions for review concerning the discretionary denial of relief under 8 U.S.C. § 1255").

147 *See supra* note 145 and accompanying text.

148 *See supra* note 76 and accompanying text.

149 Legomsky, *supra* note 29, at 1628–30.

First, the courts have traditionally shown much deference to Congress in the area of immigration law due to Congress's plenary power in this field. This tradition reaches back to the nineteenth century when the Supreme Court decided two important cases that laid the foundation for deference to the political branches in immigration matters.[150] The basis for this deference is that immigration is related to other powers delegated to Congress:

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[151]

In *Ekiu v. United States*,[152] the Court based Congress's power over immigration on the inherent power of the sovereign, the Commerce Clause, the Naturalization Clause, the war power, and the Necessary and Proper Clause.[153] Further, the doctrine of consular absolutism—whereby the courts will not review visa denials—is another example of court's hands-off approach regarding certain issues in immigration.[154]

The second oft-cited reason for restricting judicial review in immigration law to limit judicial review is the need for efficiency. There is both the intention to increase efficiency, as evidenced in the recent reforms, and the need to do so, as evident from the increased number of appeals. The major reorganizations of the BIA and the appeals process evinced this intent to streamline the process. In 2002,

150 Ekiu v. United States, 142 U.S. 651, 659 (1892) (holding that the power to exclude foreigners is inherent in sovereignty and "belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress"); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (stating that the power to exclude was "not [a] question[ ] for judicial determination" and that "any just ground of complaint . . . must be made to the political department of our government, which is alone competent to act upon the subject").

151 Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

152 142 U.S. 651.

153 *Id.* at 659; *see also* Rodriguez, *supra* note 37, at 526–27 (noting that despite the lack of an "express provision in the United States Constitution delegating power to Congress over immigration matters," the sources of this power are the Commerce Clause, the Naturalization Clause, the "Migration or Importation" Clause, the war powers, and the Necessary and Proper Clause).

154 *See supra* note 29 and accompanying text.

the Attorney General changed the appeal process to the BIA.[155] The three-member panels that previously sat to hear an appeal were replaced by single-member hearings. At the same time, the Attorney General decreased the BIA from twenty-three to merely eleven members[156] by cutting out the more liberal judges.[157] To further reduce the backlog of 55,000 appeals, the Attorney General instituted the "'affirmance without opinion' by which most appeals are simply summarily affirmed without consideration of the actual merits of the appeal."[158] As a result of these changes, the number of appeals to the circuit courts has staggeringly increased.[159] To give an example, "[f]rom October 1999 through March 2002 there were a total of 4407 such petitions; from April 2002 through September 2004 there were 23,069—more than five times as many."[160]

Echoing this desire to speed up and increase efficiency in this process, President Bush, as part of his plan for immigration reform, previously asked Congress to "end the cycle of endless litigation that clogs our immigration courts and delays justice for immigrants."[161] However, without judicial review in the areas where it is needed most, justice may be permanently delayed. If the courts cannot see beyond

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155 Recent Cases, Wang v. Attorney General, *423 F.3d 260 (3d Cir. 2005) and* Benslimane v. Gonzales, *430 F.3d 828 (7th Cir. 2005)*, 119 HARV. L. REV. 2596, 2600 (2006).

> Congress and the Executive have further enhanced their freedom from judicial constraint through the tools of administrative law: the main structures of the immigration court system are regulations made, interpreted, and enforced by the Attorney General. As a result, lawsuits challenging the severe consequences of the 2002 BIA streamlining have failed. It may be the case that U.S. law does not guarantee a better immigration court system, even if it should.

Id. at 2601 (footnote omitted).

156 *Id.* at 2600.

157 Barbara Hines, *An Overview of U.S. Immigration Law and Policy Since 9/11*, 12 TEX. HISP. J.L. & POL'Y 9, 21 (2006).

158 *Id.*

159 *Id.* ("Because the majority of cases are simply administratively affirmed, the federal courts have been inundated with appeals of the cases for which federal jurisdiction still exists. Thus, the result of this policy has simply been to shift the appeal process to the federal courts.").

160 John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 44 (2005); *see also* Benson, *supra* note 45, at 47–48 ("Focusing on the period between 2000 and 2004, BIA appeals have soared almost 357% since 2000 and have more than doubled in every circuit since 2002.").

161 Francesco Isgro, *President Outlines Strategy to Enhance Homeland Security Through Comprehensive Immigration Reform*, IMMIGR. LITIG. BULL. (U.S. Dep't of Justice, Wash., D.C.), Nov. 2005, at 1, *available at* www.usdoj.gov/civil/oil/9news11.pdf.

the insurmountable fence that Congress has constructed around these areas of immigration law, how will we ever know if the BIA is getting it right? If the cases are being reversed forty percent of the time in some circuits,[162] are we willing to take that risk when it means certain removal—a very severe consequence—for noncitizens in general, or for the victims of domestic violence who may have truly suffered extreme cruelty? This is not a risk that promotes justice and not a risk that our courts—or the political branches—should be willing to take.

V. THE CONTINUING NEED FOR JUDICIAL REVIEW: THE SUPREME COURT SHOULD ACCEPT THE INTERPRETATION OF THE NINTH CIRCUIT

Although the agreement between the Fifth and Tenth Circuits seems to favor labeling the "extreme cruelty" determination a discretionary decision and putting it beyond the reach of the courts' jurisdiction, the Supreme Court has not yet spoken to the issue and could still hold that the courts' jurisdiction encompasses review of "extreme cruelty" determinations. This issue may take a while to reach the Supreme Court, but when the Court speaks, it should decide that a determination of "extreme cruelty" is a question of law and therefore subject to judicial review by the courts. Despite arguments for barring review, four reasons for accepting the Ninth Circuit interpretation trump any of the drawbacks to judicial review. First, deportation, while technically a civil proceeding, carries harsh consequences and should carry more procedural protections, namely judicial review, as a result. Second, the statutory text is open to being read as allowing for the "extreme cruelty" determination to be nondiscretionary and thus a question of law. Third, the incredible number of errors in the system must be checked and replaced by consistency.[163] Fourth, there is a need to promote judicial independence within the structural bias of the system. Thus, the need for judicial review persists, in the interests of all parties, to promote justice and is not outweighed by concerns for efficiency or the traditional deference to Congress in this field.

First, the fallacy that removal is a civil proceeding is losing strength as a justification for the lack of procedural protections. The accepted view—as evidenced by majority opinions—has long been that deportation is not punishment.[164] However, merely labeling the procedure does not substantively change its nature. "A resident

162 *See infra* note 172 and accompanying text.

163 *See infra* note 172 and accompanying text.

164 *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 324 (2001); Flemming v. Nestor, 363 U.S. 603, 613–14 (1960); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

alien's right to due process should not be tempered by a classification of the deportation proceeding as 'civil,' 'criminal,' or 'administrative.' No matter the classification, deportation is punishment, pure and simple."[165] Especially in the sympathetic cases of battered spouses and children, deportation carries such harsh consequences for those who have already been victims. The somberly lucid words of James Madison, as quoted by Justice Field, illustrate just how heavy a consequence deportation can be:

> "If the banishment of an alien from a country . . . where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movabe and temporary kind; where he enjoys, under the laws, a greater share of blessings of personal security and personal liberty than he can elsewhere hope for; . . . if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied."[166]

Thus, even if not "punishment," the consequences are serious,[167] and judicial review should be allowed to protect the victims of domestic violence and give them a fair chance at relief in the form of cancellation of removal.

Second, the statutory text is open to being read as allowing for the determination of "extreme cruelty" to be discretionary. Examining the statutory interpretation arguments, the Ninth Circuit's distinction between the provisions regarding cruelty and hardship is persuasive. Determining "extreme cruelty" was not specifically committed to the opinion of the Attorney General under the transitional rule and also is not under the present statutory language.[168] Since the "extreme cruelty" determination is part of the special rule for relief for battered spouses and children, and was originally enacted as part of the VAWA,[169] the Ninth Circuit's focus on the congressional intent

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165 Aguilera-Enriquez v. INS, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J., dissenting).

166 *Fong Yue Ting*, 149 U.S. at 749 (Field, J., dissenting) (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555 (Jonathan Elliot ed., 1836)); *see also* United States v. Ju Toy, 198 U.S. 253, 269 (1905) (Brewer, J., dissenting) ("But it was not suggested, and indeed could not be, that the deportation and exile of a citizen was not punishment. The forcible removal of a citizen from his country is spoken of as banishment, exile, deportation, relegation or transportation, but by whatever name called it is always considered a punishment.").

167 Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999).

168 *See supra* notes 136–40 and accompanying text.

169 *See supra* notes 98–99 and accompanying text.

to "remedy the past insensitivity of the INS . . . to . . . domestic violence"[170] further strengthens the case for judicial review of "extreme cruelty" determinations. Given that the courts have the power to determine their own jurisdiction,[171] the statutory language stripping judicial review over discretionary decisions should be narrowly interpreted and the jurisdiction grants broadly construed to encompass the "extreme cruelty" determination.

Third, there are too many errors in the system which should be corrected and replaced with a more consistent and accurate voice. A prime example is the nearly forty percent reversal rate in the Seventh Circuit which confirms that the immigration courts too often get it wrong.[172] In the scathing words of Judge Posner,

> the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. . . . [I]t cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts . . . .[173]

The lack of resources available to the immigration judges is astonishing and plainly a factor in the percentage of reversals.[174] The increase in petitions to the courts of appeals, though partly caused by the increase in the number of cases heard by the BIA, is also due to the noncitizen's perception of errors in the system and, therefore, his or her desire to challenge the BIA's decision or its "affirmance without opinion."[175] It is evident that the Attorney General's 2002 structural changes to the BIA and the review process have exacerbated the

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170 Hernandez v. Ashcroft, 345 F.3d 824, 835 (9th Cir. 2003) (noting the Ninth Circuit's focus on congressional intent).

171 *See supra* note 17.

172 Recent Cases, *supra* note 155, at 2596–97. "The problem of bad immigration decisions was created by conditions among immigration judges; was magnified by changes to the Board of Immigration Appeals (BIA), which oversees those judges; and may be further exacerbated by measures to limit circuit court review." *Id.* at 2597; *see also* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (noting that the Seventh Circuit, in the past year, had "reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits").

173 *Benslimane*, 430 F.3d at 830.

174 Recent Cases, *supra* note 155, at 2599 (noting that in fiscal year 2005, the 215 immigration judges decided 352,287 cases, dealt with noncitizens of which only twelve percent spoke English, and two-thirds of which were not represented by counsel).

175 Palmer et al., *supra* note 160, at 51 (noting that the "BIA's output has increased by a factor of around two, the courts of appeals' input of petitions for review has increased by a factor of closer to five").

problem.[176] The State Bar of Texas has also considered the need for reform in this field via increased judicial review of removal decisions.[177]

Adding judicial review will help correct the errors while adding much valued consistency. As Professor Legomsky persuasively argues, "the mere *prospect* of judicial review hopefully encourages more thoughtful, and more rational, decisionmaking in the first instance."[178] "De novo review tends to further doctrinal coherence, the theory goes, by empowering courts to ensure that agencies are applying the law consistently."[179] Further, "agency-generated 'precedent' hardly provides clear rules to guide government officials and noncitizens."[180] Thus, judicial review may help to restore an appropriate standard of justice and consistency.

Fourth, an external independent check by Article III judges on the immigration judges and the BIA will help reassure the independence of their decisions. The immigration adjudication process is largely insulated from review due to its structural isolation under the Attorney General. Although the DHS is in charge of prosecuting the noncitizens, the majority of these decisions ultimately lie in the hands of the EOIR.[181] The crucial point is that "judicial review by Article III federal judges brings to the process a degree of independence that even relatively secure administrative adjudicators cannot bring."[182]

In light of the consequences facing noncitizens in deportation—especially the victims of domestic violence—and the ability to broadly interpret the statutory grant in order to replace the errors of the BIA with consistency and check the EOIR's independence, the need for increased judicial review to promote justice is not outweighed by concerns for efficiency or the traditional deference to Congress in this field. Thus, the Court should hold that the determination of "extreme cruelty" is not beyond the fence's boundary; but rather, is subject to review.

CONCLUSION

This Note has endeavored to examine why there is such a pervasive theme of insulating the context of immigration law while at the

176 *See supra* note 172.
177 *Proposed Annual Meeting Resolutions*, 69 TEX. B.J. 450, 450 (2006).
178 Legomsky, *supra* note 29, at 1631.
179 Leiderman, *supra* note 43, at 1399–400.
180 *Id.* at 1400.
181 *See supra* notes 21–24 and accompanying text.
182 Legomsky, *supra* note 29, at 1630.

same time arguing that this history of fencing off immigration issues needs to change. Looking at the historical development of the immigration courts and their traditional deference to Congress, it seems that much of the insulation is just a byproduct of history. However, when the underlying reasons for a policy are no longer applicable, simple tradition should not be enough to maintain an errant system. The courts should not simply defer to Congress because of a semantic distinction between administrative proceedings and criminal ones. Although the courts cannot possibly review every decision of the BIA, the present state of judicial review is insufficient. Looking at the specific and tragic plight of battered spouses and children, these are the victims that definitely need the added protection of the courts. Thus, correcting the errors for those most susceptible to abuse is a good starting point on the road to questioning whether we really want to keep up the fence in immigration law at all or whether we just want to give a key to the gates to those most in need of access to the courts.