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IMMIGRATION LAW AND FEDERAL COURT JURISDICTION THROUGH THE LENS OF HABEAS CORPUS

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The role of habeas corpus in immigration law underwent two major transformations from 1996 to 2005. In 1996, Congress changed the process whereby a noncitizen could appeal an order that he be

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removed from the United States.[1] These 1996 statutory amendments, as interpreted by the federal courts, including the Supreme Court in its 2001 decision in *INS v. St. Cyr*, combined to shape habeas corpus into a principal vehicle for federal court jurisdiction to review immigration removal orders.[2]

Then, in May 2005, the REAL ID Act became law as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief.[3] The new law seemed to eliminate habeas corpus review of final removal orders by providing that petitions for review in the federal courts of appeals be the exclusive path into court.[4] As a result, the REAL ID Act appeared simply to return petitions for review to the role they had played between 1961 and 1996, when a noncitizen could principally obtain judicial review of a deportation order by filing a petition in the federal courts of appeals.[5] On closer inspection, however, it is evident that the REAL ID Act could not simply have returned petitions for review to their pre-1996 status, for in the interim much had changed in the administrative decision-making procedure that is itself the focus of court review.[6]

The REAL ID Act's changes raise questions about adjudicating petitions for review in the federal courts of appeals. These questions include not only the scope and standard of review, but also the application of preclusion doctrines, the availability of stays of removal, remedies, and other aspects of adjudicating such petitions. The Act also raises the same questions regarding any habeas jurisdiction that federal courts may retain since passage of the Act. Given these new open questions, the federal courts' experience with immigration habeas from 1996 to 2005—the REAL ID Act notwithstanding—is not just a matter of historical interest.

This Article makes two central points. First, the federal courts' experience with immigration habeas from 1996 to 2005 is best analyzed in terms of four models of habeas corpus, as these models elucidate the choices the courts have made on key issues. Second, this experience, properly understood in light of these four models, should

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1 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 423, 110 Stat. 1214, 1272 (formerly codified at 8 U.S.C. § 1105a(e)(1) (1997)) (repealed 1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306, 110 Stat. 3009-546, 3009-607 to -612 (codified as amended at 8 U.S.C. § 1242 (West, Westlaw through Pub. L. No. 109-02, 2005)) [hereinafter IIRIRA].

2 *See, e.g.*, 533 U.S. 289, 298–300 (2001).

3 REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (codified at 8 U.S.C. § 1252 (West, Westlaw through Pub. L. No. 109-02, 2005)).

4 *Id.* § 106.

5 *See infra* notes 20–27 and accompanying text.

6 *See infra* notes 89–108 and accompanying text.

guide federal courts as they redefine their jurisdiction in immigration cases in light of the REAL ID Act. Part I begins by sketching how habeas corpus emerged as a principal path to the courthouse from 1996 to 2005. Part II presents the four basic models of habeas corpus reflected in court decisions during this period. Part III analyzes how the choice among models affects key features of immigration habeas. Part IV explains the lessons that this decade of habeas corpus teaches us about petitions for review and any surviving habeas jurisdiction after the REAL ID Act of 2005.

I
THE DECADE OF IMMIGRATION HABEAS CORPUS, 1996–2005

Although a full history of court review in immigration cases is beyond the scope of this Article, some background is necessary in order both to understand the emergence of habeas corpus in deportation cases from 1996 to 2005 and to derive lessons from that period that may be helpful in interpreting the REAL ID Act.

A. Before 1996

Federal courts are courts of limited jurisdiction.[7] They must ordinarily trace their power to hear a case to a specific congressional authorization.[8] Although general provisions for judicial review did not appear in federal immigration statutes until 1961,[9] federal courts nonetheless had long assumed jurisdiction in immigration cases because of the simple fact that physical restraint was inherently involved in the removal of an unwilling noncitizen.[10] Classically, such physical restraint—i.e., custody—has been the foundation for issuance of the writ of habeas corpus, the "Great Writ," a remedy guaranteed in the text of the Constitution.[11]

Could noncitizens get to court *without* habeas before 1961? At that time, habeas was understood to require that the noncitizen be in

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7 *See* U.S. CONST. art. III, § 2.

8 *See id.*

9 *See* Act of September 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651–53 (formerly codified at 8 U.S.C. § 1105a(a) (1995)) (repealed 1996).

10 *See, e.g.*, Heikkila v. Barber, 345 U.S. 229, 235 (1953); Delgadillo v. Carmichael, 332 U.S. 388, 390 (1947); Kessler v. Strecker, 307 U.S. 22, 35 (1939); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); Gegiow v. Uhl, 239 U.S. 3, 9 (1915); Chin Yow v. United States, 208 U.S. 8, 12–13 (1908); United States v. Jung Ah Lung, 124 U.S. 621, 626–27 (1888); *see also* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1965–69 (2000). For background on court review generally, see THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 751–53 (5th ed. 2003).

11 U.S. CONST. art. 1, § 9, cl. 2. The Suspension Clause states: "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." *Id.*

actual physical custody before he could petition for the writ.[12] Of course, noncitizens had an interest in contesting orders against them as soon as those orders issued, without waiting to be taken into physical custody. Neither the 1934 Declaratory Judgment Act[13] nor the 1946 Administrative Procedure Act (APA),[14] however, established federal jurisdiction to review such orders. This changed in 1955 with the Supreme Court's decision in *Shaughnessy v. Pedreiro*,[15] which held that the APA, in combination with the 1952 Immigration and Nationality Act (INA),[16] authorized federal courts to review deportation orders (to remove a noncitizen who had entered the United States) and to provide declaratory and injunctive relief when warranted.[17] The Court reached the same conclusion regarding exclusion orders (to remove a noncitizen who had not entered the United States) the next year in *Brownell v. We Shung*.[18] As a result of these two decisions, noncitizens could now contest deportation and exclusion orders without first going to jail.

Congress feared, however, that the availability of judicial review created by *Pedreiro* and *We Shung* would be abused to extend review beyond reasonable bounds.[19] For this reason, in 1961 Congress enacted section 106 of the INA, the first statute specifically governing review of exclusion and deportation orders.[20] For exclusion cases, section 106(b) reestablished habeas corpus as the exclusive means for review.[21] Habeas petitions were almost invariably filed in the federal district courts, with appeal available in the courts of appeals and via certiorari in the Supreme Court. For deportation, section 106(a) took a wholly new approach.[22] Rather than return to the pre-1955 reliance on habeas, Congress made the Hobbs Act[23] the "sole and exclusive

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12 *See* United States *ex rel.* Marcello v. INS, 634 F.2d 964, 967 (5th Cir. 1981) ("[I]n 1961, when the amending act was passed, 'custody' for habeas purposes meant primarily physical detention by the government.").

13 Pub. L. No. 343, 48 Stat. 955 (1934) (codified as amended at 28 U.S.C. § 2201 (2000)).

14 Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–59 (2000)).

15 349 U.S. 48 (1955).

16 *See* Act of June 27, 1952, ch. 477, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1557 (2000)).

17 *See Pedreiro*, 349 U.S. at 52 ("Our holding is that there is a right of judicial review of deportation orders other than by habeas corpus . . . .").

18 352 U.S. 180, 184 (1956) ("We conclude that . . . exclusion orders may be challenged either by habeas corpus or by declaratory judgment action.").

19 *See, e.g.*, H.R. REP. No. 87-1086, at 28–32 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2950, 2966–67.

20 *See* Act of September 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651 (formerly codified at 8 U.S.C. § 1105a(a)) (repealed 1996).

21 *See id.*, 75 Stat. at 653.

22 *See id.*, 75 Stat. at 651–52.

23 28 U.S.C. §§ 2341–51 (2000).

procedure" for judicial review of final deportation orders.[24] The Hobbs Act—which governs review for several other administrative agencies, such as the Federal Communications Commission—moves review out of the district courts and into the courts of appeals.[25]

Section 106(a)(9)—later renumbered as (a)(10)—provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."[26] While this provision appears to conflict with section 106(a)'s designation of the Hobbs Act as the "sole and exclusive procedure" for reviewing deportation orders, courts adopted several different ways of limiting the reach of section 106(a)(10), making habeas review of deportation available only in narrow circumstances as a supplement to petitions for review in the courts of appeals.[27]

B. From AEDPA (1996) to *St. Cyr* (2001)

1. *The 1996 Legislation*

In April 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA),[28] which significantly amended the 1961 scheme. AEDPA erected bars to judicial review in certain types of immigration cases.[29] Especially significant was section 440(a) of AEDPA, which provided that any final deportation order based on certain criminal convictions "shall not be subject to review by any court."[30] This language appeared to say that if an immigration judge found a noncitizen deportable for an enumerated crime, that noncitizen could appeal to the Board of Immigration Appeals (BIA) but no further—and in any event not to any court.

AEDPA's judicial review scheme was soon superseded by similar provisions in the Illegal Immigration Reform and Immigrant Respon-

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24 *See* § 5, 75 Stat. at 651.

25 *See* 28 U.S.C. §§ 2341–51.

26 § 5, 75 Stat. at 652.

27 *See* Orozco v. INS, 911 F.2d 539, 541 (11th Cir. 1990) (holding that an incarcerated noncitizen may not compel the INS, through habeas, to provide immediate disposition of deportation proceedings when the INS files a detainer, because filing the detainer does not cause the noncitizen to come within the custody of the INS); United States *ex rel.* Marcello v. INS, 634 F.2d 964, 967 (5th Cir. 1981) (holding that the issuance of a deportation order against a noncitizen does not place her in custody so as to entitle her to seek habeas corpus relief in district court in lieu of review in the court of appeals); Sotelo Mondragon v. Ilchert, 653 F.2d 1254, 1255 (9th Cir. 1980) (holding that in a habeas review of a deportation order the noncitizen may only challenge the propriety of the INS procedures that resulted in the order, and that district courts may only review exclusion orders in habeas when the noncitizen has exhausted all administrative remedies); *see also* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, IMMIGRATION: PROCESS AND POLICY 960–73 (3d ed. 1995).

28 AEDPA, *supra* note 1.

29 *See id.* §§ 423(a)–(b), 440(a), 110 Stat. at 1272–73, 1276–77.

30 *Id.* § 440(a), 110 Stat. at 1276–77.

sibility Act (IIRIRA), which became law in September 1996.[31] IIRIRA's judicial review scheme appeared in an entirely new section 242 of the INA, but it carried forward some of AEDPA's key features.[32] First, IIRIRA barred judicial review for most noncitizens who became deportable because of criminal convictions.[33] Reflecting the same policy evident in section 440(a) of AEDPA, section 242(a)(2)(C) of the INA provided: "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 [certain criminal offenses]."[34] Like similar language in AEDPA, this appeared to say that the BIA was the end of the process for many noncitizens deportable due to criminal convictions.

A more basic feature of IIRIRA was its consolidation of what had been "exclusion" and "deportation" proceedings into a single type of proceeding called a "removal" proceeding.[35] An order to leave the United States became known simply as a "removal order."[36] As part of this consolidation, new section 242 of the INA then replaced what had been separate systems of judicial review for exclusion and deportation orders with a single scheme for judicial review of most removal orders.[37] As a rule, review—if available at all—took place in the federal courts of appeals under the Hobbs Act procedure that the 1961 Act had applied to deportation orders.[38] Under section 242(b), a noncitizen could obtain court review of a final removal order by filing a petition for review with the court of appeals for the circuit in which the removal proceedings were completed.[39] Section 242(b) also set out rules for service and shortened the filing deadline to thirty days after a final removal order.[40]

2. *Immigration Habeas Before* St. Cyr

Noncitizens whose court access appeared to be blocked by section 440(a) of AEDPA challenged the judicial review bar using a variety of arguments, including the constitutional arguments that the bar

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31 *See* IIRIRA, *supra* note 1.

32 *See* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2000). Most provisions of section 242 did not take effect immediately. In the interim, transition rules that were not codified in the INA governed review. Although textual differences among AEDPA, the transition rules, and section 242 led courts to construe them differently, they shared basic themes including bars to judicial review in certain types of cases. *See* IIRIRA § 309(c)(4), 110 Stat. at 3009-626 to -627.

33 *See id.* § 306, 110 Stat. at 3009-607 to -608.

34 8 U.S.C. § 1252(a)(2)(C).

35 *See* INA § 240, 8 U.S.C. § 1229a.

36 *See* IIRIRA § 309(d)(2).

37 *See* INA § 242, 8 U.S.C. § 1252.

38 *See id.* § 1252(a)(1).

39 *See id.* § 1252(b)(2).

40 *See id.* § 1252(b)(1).

violated the Due Process Clause of the Fifth Amendment and the separation-of-powers principles embodied in Article III.[41] A number of federal courts rejected such challenges, holding that section 440(a) was consistent with both due process and separation of powers.[42] These decisions noted and sometimes expressly relied on the availability of habeas corpus as an alternative to the now-foreclosed petition for review in a court of appeals.[43] In response, noncitizens with final removal orders began to file habeas corpus petitions in federal district courts. Two main questions emerged. First, did AEDPA and IIRIRA leave habeas corpus intact to challenge a final removal order? Second, what is the scope and standard of review, if and when a federal district court sits in habeas to decide a challenge to a final removal order?

On the first question, it was clear that AEDPA repealed habeas jurisdiction under former section 106(a)(10) of the INA to review a deportation order.[44] No language authorizing habeas jurisdiction over removal orders appeared in new section 242 of the INA as enacted by IIRIRA.[45] The habeas corpus alternative in these cases was therefore not the habeas jurisdiction that had existed under the INA for review of exclusion and deportation orders. But neither AEDPA nor IIRIRA mentioned the general habeas corpus statute, 28 U.S.C. § 2241, which says 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—
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> (1) He is in custody under or by color of the authority of the United States or
>
> . . . .

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41 *See, e.g.*, United States v. Herrera-Blanco, 232 F.3d 715, 716 (9th Cir. 2000) (due process challenge); Mansour v. INS, 123 F.3d 423, 426 (6th Cir. 1997) (separation-of-powers challenge).

42 *See, e.g.*, *Herrera-Blanco*, 232 F.3d at 717–18; *Mansour*, 123 F.3d at 426.

43 *See, e.g.*, Kolster v. INS, 101 F.3d 785, 790 (1st Cir. 1996) ("[A]lthough AEDPA has repealed the previous statutory authorization for habeas review of final deportation orders contained in section 106(a)(10) of the INA, any habeas review that is required by the Constitution remains available."); *see also* Boston-Bollers v. INS, 106 F.3d 352, 354 n.1 (11th Cir. 1997) ("[T]he issue of whether section 440(a)(10) precludes judicial review of deportation orders via a writ of habeas corpus is not presented on this appeal."); Duldulao v. INS, 90 F.3d 396, 400 n.4 (9th Cir. 1996) ("The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us, and we need not decide whether section 440(a) purports to preclude it." (citation omitted)).

44 *See* AEDPA, *supra* note 1, § 401, 110 Stat. at 1268.

45 *See* IIRIRA, *supra* note 1.

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .[46]

Could a noncitizen barred from filing a petition for review in the court of appeals instead file a petition for a writ of habeas corpus in federal district court under § 2241? After almost all of the circuit courts of appeals had said that habeas jurisdiction did remain available,[47] the Supreme Court's 2001 decision in *INS v. St. Cyr* addressed both the question of whether AEDPA and IIRIRA left habeas corpus intact and the question of the scope and standard of review in immigration habeas.[48]

3. INS v. St. Cyr

Enrico St. Cyr was a Haitian citizen who became a permanent resident of the United States in 1986, when he was about nineteen years old.[49] St. Cyr's brother was also a lawful immigrant; his parents and sister were U.S. citizens.[50] Ten years later, St. Cyr pled guilty to selling drugs.[51] Although this conviction made St. Cyr deportable,[52] he was eligible for a discretionary form of relief from deportation, and he hoped to persuade an immigration judge to consider his ties to this country and let him stay.[53] St. Cyr applied for this relief in 1996,[54] but only after other parts of AEDPA had tightened the eligibility rules (and before IIRIRA superseded AEDPA with a similarly restrictive scheme).[55] The new AEDPA rules would make him ineligible for discretionary relief because of the conviction, but did those new rules apply? The immigration judge's answer, affirmed by the BIA, was that

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46 28 U.S.C. § 2241(a), (c) (West, Westlaw through Pub. L. No. 109-102, 2005).

47 *Compare* Mayers v. INS, 175 F.3d 1289, 1299–1300 (11th Cir. 1999) (holding that the district court had jurisdiction over a noncitizen's habeas petition under § 2241); Magana-Pizano v. INS, 200 F.3d 603, 609–10 (9th Cir. 1999) (same); Pak v. Reno, 196 F.3d 666, 673–74 (6th Cir. 1999) (same); Bowrin v. INS, 194 F.3d 483, 489 (4th Cir. 1999) (same); Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 305–06 (5th Cir. 1999) (same); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1145–46 (10th Cir. 1999) (same); Shah v. Reno, 184 F.3d 719, 723–24 (8th Cir. 1999) (same); Sandoval v. Reno, 166 F.3d 225, 238 (3d Cir. 1999) (same); Henderson v. INS, 157 F.3d 106, 130–31 (2d Cir. 1998) (same), *and* Goncalves v. Reno, 144 F.3d 110, 133 (1st Cir. 1998) (same), *with* LaGuerre v. Reno, 164 F.3d 1035, 1035 (7th Cir. 1998) (holding that the district court did not have such habeas jurisdiction).

48 *See* INS v. St. Cyr, 533 U.S. 289 (2001).

49 *Id.* at 293.

50 St. Cyr v. INS, 229 F.3d 406, 408 (2d Cir. 2000), *aff'd*, 533 U.S. 289.

51 *St. Cyr*, 533 U.S. at 293.

52 *Id.*; *see also* INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2000) (establishing deportability for crimes relating to controlled substances).

53 *St. Cyr*, 533 U.S. at 293.

54 *Id.*

55 *See* AEDPA, *supra* note 1, § 440(d), 110 Stat. at 1277; IIRIRA, *supra* note 1.

the new rules did apply and that St. Cyr was ineligible for discretionary relief.[56]

If St. Cyr had sought review on the ground that he was not deportable at all, he could have filed a petition for review in the court of appeals. But once it was settled that his conviction made him deportable, the conviction triggered section 440(d) of AEDPA, which barred him from filing a petition for review in the court of appeals on the issue of whether he was eligible for discretionary relief.[57] St. Cyr's only possible vehicle for court review on that issue was the habeas petition that he filed in federal district court. While the substantive question in *St. Cyr* was whether the new eligibility rules applied to conduct that predated the enactment of AEDPA, the Supreme Court faced a threshold question: Did the district court sitting in habeas have jurisdiction to decide Enrico St. Cyr's eligibility?[58]

The Court held five to four that AEDPA had left habeas corpus jurisdiction intact, at least to decide a "pure question of law," such as whether St. Cyr was eligible for relief.[59] Writing for the majority, Justice Stevens stated that for the government to prevail in its argument that AEDPA's reworking of judicial review repealed immigration habeas, it would have to "overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[60] He went on to note that "[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal."[61]

The Court then invoked two additional canons of statutory interpretation, which, it said, reinforced the plain statement rule. First,

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56 St. Cyr v. INS, 229 F.3d 406, 409 (2d Cir. 2000), *aff'd*, 533 U.S. 289.

57 AEDPA § 440(d); *see St. Cyr*, 533 U.S. at 297 ("In 1996, in § 440(d) of AEDPA, Congress identified a broad set of offenses for which convictions would preclude such relief. And finally, that same year, Congress passed IIRIRA. That statute, *inter alia*, repealed § 212(c) and replaced it with a new section that gives the Attorney General the authority to cancel removal for a narrow class of inadmissible or deportable aliens. So narrowed, that class does not include anyone previously 'convicted of any aggravated felony.'" (footnote omitted) (citations omitted)).

58 *See St. Cyr*, 533 U.S. at 292.

59 *Id.* at 308.

60 *Id.* at 298 (footnote omitted) ("'We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law.'" (alteration in original) (quoting *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 102 (1869)); *see* Felker v. Turpin, 518 U.S. 651, 660–61 (1996) (noting that "[n]o provision of Title I mentions our authority to entertain original habeas petitions," and the statute "makes no mention of our authority to hear habeas petitions filed as original matters in this Court").

61 *St. Cyr*, 533 U.S. at 299 ("'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.'" (quoting *Yerger*, 75 U.S. at 105)).

the Court wrote: "[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[62] Next, the Court invoked the canon of constitutional avoidance, explaining that "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."[63] The Court cited the Suspension Clause to draw support for its position. The majority wrote: "A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions. . . . Because of [the Suspension] Clause, some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'"[64]

On the second key question—scope and standard of review—*St. Cyr* decided that habeas jurisdiction as a historical matter, and therefore as a constitutional matter, encompassed review for "errors of law, including the erroneous application or interpretation of statutes."[65] So defined, habeas jurisdiction included review for legal errors, at least as to a "pure question of law" such as whether St. Cyr was eligible for relief.[66]

The Court concluded its jurisdictional analysis by rejecting the government's argument that four statutory provisions limiting judicial review—one from AEDPA and three from IIRIRA—expressed "a clear and unambiguous statement of Congress' intent to bar petitions brought under § 2241."[67] Key to the Court's reasoning was its observation that "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings."[68] (For this reason, this Article uses the term "court review," which I intend to include both judicial review and habeas corpus review.)

Finally, the Court returned to the canon of constitutional avoidance:

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62 *Id.*

63 *Id.* at 299–300 (citation omitted) (citing Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 341, 345–48 (1936)) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62, (1932); United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)). This was the second time in one week that the Court applied the avoidance canon to reach a result favoring a noncitizen. *See* Zadvydas v. Davis, 533 U.S. 678, 689 (2001); *see also* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (discussing the avoidance canon in immigration law).

64 *St. Cyr*, 533 U.S. at 300 (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953)).

65 *Id.* at 302.

66 *Id.* at 308.

67 *Id.* at 308–14.

68 *Id.* at 311.

> If it were clear that the question of law could be answered in another judicial forum, it might be permissible to accept the INS' reading of [INA § 242]. But the absence of such a forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions. Accordingly, we conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA.[69]

In short, *St. Cyr* confirmed that although many noncitizens subject to final removal orders could not obtain review of pivotal issues in their cases by means of a petition for review in the courts of appeals, they nevertheless could challenge final removal orders by raising questions of law in habeas petitions filed in the federal district courts.[70]

II
FOUR MODELS OF IMMIGRATION HABEAS CORPUS

As soon as AEDPA became law, and especially since *St. Cyr*, federal courts have issued a vast number of decisions that together have shaped the contours of habeas corpus jurisdiction in immigration cases. This Part attempts to make sense of these decisions by viewing them as a reflection of judges' implicit choices from among four habeas corpus models: Two are what I call direct review models, and two are collateral review models. Even though the REAL ID Act appears to have eliminated habeas review of final removal orders, these models of immigration habeas are important for understanding the choices that courts will face as they interpret the REAL ID Act.

A. Direct vs. Collateral Review

An explanation of these four proposed models of immigration habeas must begin by addressing the basic distinction between collateral and direct review. I start with an attempt to avoid confusion in the use of these terms and in the notion of habeas corpus models. My usage differs from what appears in other, non-immigration law contexts. In the criminal law context, a rich body of commentary assesses various features of habeas corpus as a matter of preferred habeas models, which are typically described in phrasing—such as "full-review model," "appellate model," and "jurisdiction-only model"—that suggests placement on a spectrum from direct to collateral review.[71]

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69 *Id.* at 314 (footnote omitted) (citation omitted).

70 *See, e.g.*, Calcano-Martinez v. INS, 533 U.S. 348, 349–51 (2001).

71 *See, e.g.*, Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 983–1003 (2000); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997,

Much of the evolution of habeas corpus in criminal cases can be understood as the gradual shift from the more direct end of the spectrum in the Warren Court's habeas decisions[72] toward the collateral end of the spectrum in more recent years.[73]

This Article similarly evaluates immigration habeas as a matter of competing models, but the range of models is necessarily different. In cases like *St. Cyr*, statutory bars to petitions for review in the courts of appeals left immigration habeas as the only vehicle for courts to examine the lawfulness of a noncitizen's removal from the United States.[74] Criminal habeas, however, exists alongside—and typically comes into play after—a series of judicial proceedings at trial and appellate levels. For this reason, any characterizations of criminal habeas models as "direct" or "collateral" must take into account that criminal habeas exists alongside a system of criminal adjudication. This means that criminal habeas—no matter how direct or collateral it may seem within the criminal law context—is inherently more collateral than any form of immigration habeas, even if habeas within the immigration law context is sometimes called "collateral review."[75]

According to a traditional definition, direct review refers to multiple layers of review in the "same proceeding."[76] In an immigration case, this would typically include review by the BIA and then subsequent review by some combination of federal courts. These layers are typically defined by jurisdictional statutes and regulations that provide, for example, that the BIA hears appeals from removal orders issued by immigration judges,[77] or that final removal orders may then be reviewed by courts of appeals.[78] In contrast, collateral review pre-

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2009–10 (1992); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 582–87 (1993).

72 *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963).

73 *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989).

74 *See St. Cyr*, 533 U.S. at 300 ("Unlike the provisions of AEDPA that we construed in *Felker v. Turpin*, 518 U.S. 651 (1996), this case involves an alien subject to a federal removal order rather than a person confined pursuant to a state-court conviction.").

75 *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 984 (1998) ("[C]riminal convictions have not been absolutely immune from collateral attack, and the reach of habeas corpus in reviewing them has expanded over the years, while always remaining narrower than its reach in reviewing executive detentions."); Jonathan L. Hafetz, Note, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2543 (1998) ("In a fundamental sense, federal habeas review of an administrative deportation order is not collateral at all.").

76 *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 862 (4th ed. 2003) ("Technically, federal court consideration of the habeas corpus petition is not considered a direct review of the state court decision: rather, the petition constitutes a separate civil suit filed in federal court and is termed *collateral relief*.").

77 *See* 8 C.F.R. § 1003.1(b) (2005).

78 *See* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (West, Westlaw through Pub. L. No. 109-102, 2005).

supposes that decision making, including multiple layers of direct review by agencies and/or courts, is complete. Collateral review, according to this understanding of the term, refers to a "separate proceeding" that reassesses some aspects of the first proceeding, including its direct review stages.[79] Collateral review is quite literally extraordinary.

These definitions of direct and collateral review make some intuitive sense but are analytically limited. To say that direct review refers to the multiple layers of review in the same proceeding only begs the question: What is the "same proceeding"? To say that collateral review presupposes the completion of decision making and refers to a separate proceeding only begs the question: What is a "separate proceeding"?

One way to distinguish same from separate is to consider the boundaries between traditionally distinct systems of decision making—for example, the boundaries between state and federal courts or between courts and administrative agencies. The presence of state law issues in most federal habeas petitions filed in criminal cases reinforces the prevailing sense that criminal habeas, even in its more direct forms, is still collateral review because it is a creature of a distinct government authority.[80] However, this approach based on boundaries between decision-making systems also has limited analytical power. There are many counterexamples in which review crosses over from one decision-making system to another and yet is commonly believed to be direct review, such as Supreme Court review of the decisions of the highest court of a state and federal court review of the final decision of a federal administrative agency.

Let me suggest a way to distinguish collateral from direct review that may seem less precise but is ultimately more meaningful. I believe that two fundamental premises underlie what is typically understood to be collateral review. The first premise is that confidence in the outcome in a given case is open to doubt that differs in character or exceeds in degree the doubt that forms the typical basis for direct review. This altered confidence in the outcome might reflect concern that prior procedures were less reliable than the procedures that would apply upon collateral review. Or, this altered confidence might reflect concern that the prior institutional context renders the outcome suspect in a way that direct review might not correct but that collateral review can.

The second fundamental premise underlying collateral review is that the stakes in a given case may be high enough to call for a review

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79 *See* CHEMERINSKY, *supra* note 76.

80 *See* Hoffstadt, *supra* note 71, at 998 & n.218 (citing Estelle v. McGuire, 502 U.S. 62, 67 (1991)).

in addition to direct review. This premise explains why it seems natural to think of haheas corpus as providing for collateral review when it permits federal judicial review of state criminal convictions. Especially in death penalty cases, justice may demand reexamination of the first proceeding even when reexamination is redundant and lack of confidence in the first proceeding is insufficient to trigger the first fundamental premise.

Matters of confidence and stakes are largely matters of degree. My suggestion for distinguishing direct from collateral review must acknowledge a large gray area on the spectrum from direct to collateral review. This gray area—which is also elusive because the direct-to-collateral spectrum itself differs in immigration law and criminal law[81]—includes many cases that might reasonably be classified as direct or collateral within the context of immigration law or criminal law. Notwithstanding this imprecision, it seems clear that collateral review responds to a different set of doubts about the original outcome than the doubts typically addressed by direct review. These different doubts lead to a collateral review scheme whose key features differ from direct review schemes.

Put in general terms, collateral review involves certain costs. It weakens finality by undercutting repose and by questioning the authority of another government decision maker, and it adds to the judicial workload and thus imposes institutional and fiscal costs.[82] To conserve resources, the exercise of collateral review is quite limited as compared to the volume of potentially reviewable decisions.[83] Collateral review applies both more narrowly and more deeply than direct review—it is narrower in that it applies less often, but it is deeper in that it reexamines prior decisions in ways that direct review typically leaves untouched.

B. Direct Review Models

My two direct review models cast habeas corpus as a layer of appeal from an immigration judge's removal order. Such an order typically reflects three findings by an immigration judge: (1) that the individual is not a U.S. citizen; (2) that she either has not been admit-

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81 *See supra* text accompanying notes 74–75.

82 On the need for finality in criminal habeas, see Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 614–15 (1981). On finality as the basis of preclusion doctrines in civil actions, see DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 11–18 (2001).

83 On this point in the criminal habeas context, see Bator, *supra* note 82, at 635–36; Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1473 n.88, 1474 (2005) (citing Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 827 & n.6 (1986) (Brennan, J., dissenting)).

ted to the United States and is inadmissible,[84] or has been admitted and is deportable;[85] and (3) that she either is ineligible for discretionary relief or is eligible but denied such relief.[86] These two models cast habeas corpus as reviewing such immigration judges' findings by substituting for either (1) a federal court of appeals or (2) the BIA.

In the first direct review model, habeas review in federal district court is a surrogate for the court of appeals review that was eliminated by the judicial review bars in AEDPA[87] and IIRIRA.[88] This model takes seriously the idea that immigration habeas is different from criminal habeas, in that immigration habeas is the first and only chance for courts to examine the lawfulness of removing certain noncitizens. Accordingly, the scope and standard of review and other procedural aspects in immigration habeas should resemble—even if they do not equal—the scope and standard of review and other procedural aspects of petitions for review in the courts of appeals.

In the other, less obvious direct review model, habeas review in federal district court is a surrogate for the BIA itself. The factual predicate for this model is the restructuring of the BIA since 1999. As background, the BIA has been part of the Department of Justice (DOJ) since 1940.[89] Within the DOJ, the BIA and all immigration judges have been part of the Executive Office for Immigration Review (EOIR) since 1983, when restructuring made the BIA and the immigration judges directly accountable to the Attorney General under a chain of command separate from the Attorney General's authority over the Immigration and Naturalization Service (INS).[90] In 2002, the Homeland Security Act broke up the INS and transferred most of its components to the new Department of Homeland Security (DHS), but the EOIR stayed within the DOJ.[91]

Throughout the 1980s and 1990s, the BIA caseload grew steadily—the BIA heard 3630 cases in 1983, 8204 cases in 1987, 12,774 cases in 1992, 30,000 cases in 1997, and over 34,000 cases in 2002.[92]

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84 *See* INA § 212, 8 U.S.C. § 1182 (2000 & Supp. II 2002) (defining "classes of aliens ineligible for visas or admission").

85 *See* INA § 237, 8 U.S.C. § 1227 (defining "classes of deportable aliens").

86 *See, e.g.*, INA § 240A(a), 8 U.S.C. § 1229b(a) (cancellation of removal for certain permanent residents).

87 AEDPA, *supra* note 1.

88 IIRIRA, *supra* note 1.

89 ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 10, at 251–52.

90 *See* 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. 3.0–.1); *see also* Anna Marie Gallagher, *Practice and Procedure Before the Board of Immigration Appeals: An Update*, IMMIGR. BRIEFINGS 1, 3 (Feb. 2003).

91 *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

92 *See* ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 10, at 252; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE FY 2003, STATISTICAL YEAR BOOK, at S2 (2004); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICAL YEAR BOOK 2001, at E1 (2002).

One response from the DOJ was to expand the BIA. The BIA started with five permanent members,[93] who heard all cases en banc, although with oral argument in only very few. In 1988, Attorney General Edwin Meese started the steady expansion of the BIA to twenty-three permanent members.[94] The BIA also came to decide most cases not en banc but in three-member panels.[95]

When even these changes could not keep up with the rising caseload, the BIA responded in November 1999 with new streamlining regulations that allowed a single BIA member to issue an affirmance, without opinion, of the appealed decision if that member found "that the result reached in the decision under review was correct [and] that any errors in the decision under review were harmless or nonmaterial."[96]

This streamlining allowed the BIA to significantly increase its output and reduce its backlog, but Attorney General John Ashcroft, who took office in 2001, found the progress unsatisfactory.[97] Regulations adopted in August 2002 made disposition of appeals by a single BIA member the norm.[98] A three-member panel hears a case only if it falls into one of six narrow categories spelled out in the regulations.[99] Single members may affirm with or without opinion and may also dispose of appeals on procedural grounds.[100] The regulations also impose presumptive time limits on BIA decisions and revise the standard of review to require greater deference to an immigration judge's findings of fact.[101] Following these procedures, the BIA boosted its output

93 *See* 8 C.F.R. § 3.1(a)(1) (2001); ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 10, at 252.

94 *See* 8 C.F.R. § 3.1(a)(1) (2002).

95 *See* 53 Fed. Reg. 15,659 (May 3, 1988) (codified at 8 C.F.R. § 3.1(a)(1)) ("This provision is necessary because it has become apparent that periodic substantial increases in the Board case load have created a need for additional members to assist in the efficient review of cases. This rule will effectively increase the Board's capacity to review cases since it will be possible to create two panels of three members, each one capable of reviewing cases.").

96 *See* 64 Fed. Reg. 56,135, 56,141 (Oct. 18, 1999). For additional information regarding BIA streamlining, see also ALEINIKOFF, MARTIN & MOTOMURA, *supra* note 10, at 251–53.

97 *See* Press Release, U.S. Dep't of Justice, Department of Justice Unveils Administrative Rule Change to Board of Immigration Appeals in Order To Eliminate Massive Backlog of More Than 56,000 Cases (Feb. 6, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/February/02_ag_063.htm.

98 *See* 67 Fed. Reg. 54, 878, 54,878–905 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

99 *See* 8 C.F.R. § 1003.1(e)(6) (2005).

100 *See id.* § 1003.1(e)(4).

101 *See id.* § 1003.1(d)(3) ("The Board will not engage in de novo review of findings of fact determined by an immigration judge."); Gallagher, *supra* note 90, at 2–3 ("The length of time that cases are pending before the Board will . . . be reduced.").

to a monthly average of 4,600 cases in the first five months of fiscal year (FY) 2003.[102]

The August 2002 regulations also reduced the size of the BIA by over half; it now has only eleven members.[103] Some critics have contended that the reduction was adopted at least in part so that the Attorney General could remove BIA members whom he considered too liberal.[104] Others have charged that streamlining and the pressure to dispose of cases have prevented proper consideration of appeals from immigration judge decisions.[105] What is clear is that the number of cases that noncitizens filed in court to review BIA decisions grew dramatically. For example, in the Ninth Circuit Court of Appeals, the number of immigration appeals filed by noncitizens not subject to the judicial review bars leapt from about 900 in 1999 to more than 5,000 in 2004.[106] One empirical study identifies as a possible cause the private immigration bar's loss of confidence in the BIA decision making as a result of streamlining.[107] It can only add to the inclination to seek court review that the percentage of published BIA decisions reversed by the Ninth Circuit climbed from about thirty in 2001, the last full year before streamlining, to almost sixty-five in the first nine months of 2005. The Ninth Circuit also reversed about twenty-five percent of BIA affirmances without opinion, which are supposedly cases in which the correctness of the original immigration judge's decision is clear.[108] With BIA decision making so streamlined that not only immigration lawyers but also federal judges see it as deeply troubled,[109] the second direct review model casts habeas in the federal district courts as a surrogate for the agency review that has largely disappeared since 2002.

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102 *See* David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 INTERPRETER RELEASES 578 (2003).

103 *See* 8 C.F.R. § 1003.1(a)(1).

104 *See* Eric Lichtblau & Lisa Getter, *Seeking Speedier Deportations, Ashcroft Plans Judicial Reforms*, L.A. TIMES, Feb. 7, 2002, at A11.

105 *See* DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 39–41 (July 22, 2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.; Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1; Lichtblau & Getter, *supra* note 104.

106 *See* John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *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* 85–93 (Cornell Legal Studies Research, Working Paper No. 05–022, 2005), *available at* http://ssrn.com/abstract=785824.

107 *Id.*

108 *See* Howard Mintz, *Legal Fight for Refugee*, SAN JOSE MERCURY NEWS, Sept. 18, 2005, at 1A.

109 *See, e.g.*, Iao v. Gonzales, 400 F.3d 530, 533–35 (7th Cir. 2005) (listing disturbing features of the immigration judge's handling of the case, and noting that these features were representative of the recent immigration cases that the court had reviewed).

C. Collateral Review Models

My two collateral review models treat habeas corpus not as a layer of direct review, but as a different type of check on an immigration judge's removal order. A federal district judge sitting in habeas in an immigration case might think of her role as that of a judge deciding a criminal habeas petition. The typical criminal case includes a state or federal trial court conviction, followed by one or two layers of review in state or federal appellate courts. Thus, in the criminal context, habeas corpus assumes that prior, direct appellate review of the conviction has already taken place in multiple courts. Habeas then may separately reexamine some aspects of the conviction.

Or, in the second collateral review model, a federal district judge sitting in habeas might think of her role as a reprise of a feature of pre-1996 immigration law—namely, pre-AEDPA section 106(a)(10) of the INA's authorization that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings."[110] From 1961 to 1996, noncitizens could challenge deportation orders by filing petitions for review in the federal courts of appeals. This made habeas jurisdiction under section 106(a)(10) into collateral review, in that it existed alongside federal court of appeals review of deportation orders.

To eliminate one source of possible confusion, I should explain that my distinction between these two collateral review models is not a functional distinction, like the distinction between the two direct review models based on the nature of habeas surrogacy. Instead, my two collateral review models reflect two bodies of law—criminal habeas and immigration habeas under old section 106(a)(10)—that federal district judges might have had in mind in hearing a habeas petition challenging a removal order. In this sense, one might alternatively think of my two collateral review models as only one collateral review model, but with two sets of illustrations in practice. If a judge has either of these two collateral review models in mind, they will guide his decisions about the scope and standard of review as well as other procedural aspects of immigration habeas.

III
USING THE MODELS TO UNDERSTAND THE CASES

A. Preclusion

These four models provide a way of understanding why judges reach many of their decisions about the contours of habeas corpus in immigration cases. As one example, an express or implied choice

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110 8 U.S.C. § 1105a(a)(10) (1995), *repealed by* IIRIRA, *supra* note 1, § 309, 110 Stat. 3009-546, 3009-626 to -627.

among these models can explain a judge's decision on the application of preclusion rules. Consider the 2004 decision of the Ninth Circuit in *Nunes v. Ashcroft*.[111] The case involved a final removal order against Jose Francisco Nunes, a citizen of Portugal, who was deportable because of his first-degree burglary conviction.[112] The immigration judge's ruling that first-degree burglary constituted an aggravated felony had a number of negative consequences, including a bar to court of appeals review and ineligibility for most forms of discretionary relief.[113]

Nunes filed a *pro se* petition for review in the court of appeals, which the court dismissed without explanation.[114] He then filed a habeas petition in district court, which was also quickly dismissed.[115] Nunes moved for reconsideration, arguing that his burglary did not rise to the level of an aggravated felony.[116] The district court denied the motion on the grounds that Nunes had "'fail[ed] to present new evidence, to identify a change in controlling law, or to identify any clear error.'"[117] Then, acting for the first time with a lawyer, Nunes appealed the denial of his motion for reconsideration.[118] A court of appeals panel affirmed the denial.[119] It agreed with Nunes that the bars to court of appeals review of criminal deportability do not apply to habeas petitions.[120] It reasoned, however, that the court of appeals's earlier dismissal of Nunes's petition for review must have been based on the finding that his burglary conviction was an aggravated felony, and that this finding precluded Nunes from arguing in his habeas action that the conviction was not an aggravated felony.[121]

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111 375 F.3d 810 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1395 (2005).

112 *Id.* at 812 (Tashima, J., dissenting).

113 *See id.*; INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2000) (defining as an "aggravated felony" any burglary offense for which the term of imprisonment is at least one year); INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) ("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 [any one of the] criminal offense[s enumerated in specified sections]."). For ineligibility for discretionary relief, see, e.g., INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).

114 *Nunes*, 375 F.3d at 812 (Tashima, J., dissenting).

115 *Id.*

116 *Id.*

117 *Id.* (alteration in original).

118 *Id.*

119 Nunes v. Ashcroft, 348 F.3d 815, 820 (9th Cir. 2003) ("The district court did not abuse its discretion when it denied Nunes' motion for reconsideration. Nunes failed to introduce new evidence, show a change in controlling law, or show that the district court committed clear error when it dismissed his habeas petition."), *amended and superseded by* 375 F.3d 805 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1395.

120 *Id.* at 819–20 ("It should be noted that our dismissal of Nunes' appeal on direct review does not by itself render habeas review unavailable to Nunes. It is well-established in this circuit that the statutory habeas remedy available under 28 U.S.C. § 2241 survived the jurisdiction-stripping provisions of IIRIRA.").

121 *Id.* at 819.

Phrased more generally, the question in *Nunes* was whether preclusion applies in immigration habeas. Judge Tashima, joined by Judge Reinhardt, dissented from the denial of rehearing en banc. Arguing that preclusion should not apply, Tashima wrote: "[T]he panel opinion is wrong and contrary to binding precedent in treating dismissals of petitions for review for lack of jurisdiction as barring further litigation of the same claims on habeas."[122] He continued: "[S]trict res judicata does not apply in habeas proceedings."[123] Revealingly, Judge Tashima drew on precedents involving habeas corpus in criminal cases. He first cited the 1995 Supreme Court decision in *Schlup v. Delo*, which involved an inmate who claimed innocence and filed a habeas petition to contest his murder conviction and death sentence.[124] The key language in *Schlup* is the following: "This Court has consistently relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata."[125] The core of Tashima's thinking is captured in his reliance on an earlier Ninth Circuit decision, *Calderon v. United States District Court*, which he cited as "rejecting the use of res judicata in a habeas proceeding 'because it contravenes the longstanding rule that res judicata has no application in habeas corpus.'"[126] The passage in *Calderon* on which Tashima relied went on to explain: "The entire point of a habeas petition that challenges a state conviction is to relitigate issues that were raised in the state case and resolved against the petitioner."[127]

It is clear both from Judge Tashima's reliance on criminal habeas precedents and his insistence that strict preclusion does not apply that he was adopting a collateral review model of habeas corpus regarding the issue of whether Nunes's burglary conviction was an aggravated felony. It is, as Tashima said, central to criminal habeas that federal district courts not be bound in full measure by preclusion doctrines.[128] This freedom from preclusion is precisely what creates the relitigation and delay that have led to some discomfort with habeas corpus in criminal cases.[129] Judge Tashima was right in characterizing habeas review as collateral review of the aggravated felony issue. That issue had been taken to the court of appeals, which had jurisdiction, and decided there. He was arguing that any further review on habeas corpus was collateral review as to the aggravated felony issue. The

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122 *Nunes*, 375 F.3d at 813 (Tashima, J., dissenting).

123 *Id.*

124 *See id.*; Schlup v. Delo, 513 U.S. 298, 301 (1995).

125 *Schlup*, 513 U.S. at 319.

126 Calderon v. U.S. Dist. Court, 163 F.3d 530, 537 (9th Cir. 1998) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977)), *abrogated on other grounds by* Woodford v. Garceau, 538 U.S. 202 (2003); *see Nunes*, 375 F.3d at 814 (Tashima, J., dissenting).

127 *See Calderon*, 163 F.3d at 537.

128 *See Nunes*, 375 F.3d at 813–14 (Tashima, J., dissenting).

129 *See supra* note 82 and accompanying text.

Ninth Circuit majority, by rejecting a rehearing en banc, concluded that the circumstances did not warrant the extraordinary review that collateral review entails.[130]

This characterization of habeas review as collateral review applied *only* to the aggravated felony issue and not to all issues that Nunes might have raised in support of his habeas petition in federal district court. Assume, for example, that Nunes had argued in his habeas petition that his aggravated felony conviction did not bar him from certain forms of relief from removal. Once it was decided that his burglary conviction was an aggravated felony, section 242(a)(2)(C) of the INA would have kept the issue of eligibility for discretionary relief out of the court of appeals.[131] From that point onward, any habeas review of the eligibility issue would be direct review. Preclusion would not apply, but not because of Tashima's characterization of collateral review in criminal habeas. Rather, preclusion would not apply because preclusion never applies to successive steps in direct review. In short, a judge who adopts a direct review model of habeas corpus will examine prior findings in a case without regard to preclusion. In contrast, a judge who adopts a collateral review model of habeas corpus should assume that strict preclusion does not apply, but that reexamination is more limited than it would be on direct review.

B. Stays of Removal

Another key issue in recent immigration cases is the availability of a stay of removal while a court reviews a final removal order. Direct review models of habeas corpus suggest that stays of removal should not be extraordinary, but rather should be issued as necessary to preserve the efficacy of direct review. As between the two direct review models, it makes a difference for granting stays whether a federal district court adopts the court of appeals direct review model or the BIA direct review model. While stays in the federal courts of appeals are not extraordinary, they also are not automatic—most courts of appeals decide on stays by applying some version of the traditional standards for an injunction.[132] A district judge sitting in habeas with the

130 *See* Nunes v. Ashcroft, 348 F.3d 815, 820 (9th Cir. 2003), *amended and superseded by* 375 F.3d 805 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1395 (2005).

131 *See supra* note 113 and accompanying text.

132 *See, e.g.*, Nwaokolo v. INS, 314 F.3d 303, 307 (7th Cir. 2002) ("A movant seeking a stay of deportation must show (1) 'some' likelihood that her petition for review will succeed on the merits; (2) that irreparable harm will occur if the stay is denied; (3) that the potential harm to the movant outweighs the harm the INS will suffer if a stay is granted; and (4) that a stay serves the public interest."); Bejjani v. INS, 271 F.3d 670, 687–89 (6th Cir. 2001); Andreiu v. Ashcroft, 253 F.3d 477, 483 (9th Cir. 2001) (en banc). *But see* Weng v. U.S. Attorney Gen., 287 F.3d 1335, 1337–40 (11th Cir. 2002) (holding that section 242(f)(2) of the INA bars courts of appeals from issuing stays of removal pending appeal unless there is clear and convincing evidence that removal is prohibited as a matter of law).

court of appeals direct review model in mind would likely adopt the same approach.[133]

A district judge who adopts the BIA direct review model, however, may grant stays more readily, emulating the BIA's practice of issuing automatic stays while BIA review is pending.[134] This is a sensible difference between BIA and court of appeals practices, and in turn between the two direct review models. The court of appeals direct review model presupposes that two layers of agency decision making—the immigration judge and the BIA—have occurred. The BIA direct review model can presuppose only one layer of agency decision making—the immigration judge. Moreover, it is far more likely that a noncitizen will proceed without counsel before an immigration judge than before the BIA. Thus, it is logical to have an automatic stay pending habeas review if a judge adopts the BIA direct review model.

In contrast, a federal district judge who thinks of immigration habeas as collateral review, and therefore as extraordinary review, will be more cautious or even hostile when it comes to stays of removal orders.[135] Professor Nancy Morawetz has documented the Western District of Louisiana's practice of denying stays of removal in habeas cases and even of vacating stays that other federal district courts have issued in the same case.[136] The Western District's stated rationale for denying and vacating stays relies on section 242(g) of the INA, which seems to eliminate federal court 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."[137]

In criticizing this practice, Professor Morawetz observed that not even the government has urged this reading of section 242(g).[138] She also noted that these decisions support this reading of section 242(g) by citing cases in which habeas was used not to challenge removal orders, but rather to raise separate matters—such as a temporary stay of removal—without challenging removal itself.[139] It is highly re-

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133 *See, e.g.*, Wallace v. Reno, 194 F.3d 279, 285 (1st Cir. 1999) (holding that section 242(g) of the INA does not eliminate a federal district court's power to stay a removal while a habeas petition is pending).

134 *See* 8 C.F.R. § 1003.6(a) (2005).

135 The interjurisdictional conflict between the original state conviction and federal habeas corpus might give a federal district court sitting in habeas pause about issuing a stay, particularly in cases where the court has adopted the first collateral review model of immigration habeas, in which immigration habeas is analogized to criminal habeas.

136 *See* Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 18–30 (2005).

137 *See id.* at 18; INA § 242(g), 8 U.S.C. § 1252(g) (West, Westlaw through Pub. L. No. 109-102, 2005).

138 *See* Morawetz, *supra* note 136, at 23.

139 *See id.* at 24.

vealing that these decisions seem to see no meaningful difference between habeas challenges to removal orders and habeas petitions that raise such separate matters. The habeas model at work here is one in which *all* immigration habeas concerns separate matters, hence always involves collateral review. This rationale may not ultimately be persuasive, and in fact the Fifth Circuit's May 2005 decision in *Tesfamichael v. Gonzales* would seem to have ended the Western District's practice by announcing a more lenient standard for stays of removal.[140] But the collateral review model still explains why the district judges in the Western District of Louisiana could read section 242(g) as depriving them of jurisdiction to issue stays of removal. Again, my point is not that these decisions are right or wrong but that different models of habeas corpus can explain how judges could reach different results.

C. Remedies

Another issue in the context of immigration habeas is what remedies are available from a federal district court sitting in habeas to review a final removal order. Here, too, it matters whether federal courts think of habeas corpus as direct or collateral review. A good example is found in a case that Professor Morawetz discussed in her analysis of stays of removal—the 2004 Fifth Circuit decision in *Zalawadia v. Ashcroft*.[141] Jaysukh Zalawadia filed a habeas petition to challenge the lawfulness of his removal order. While the petition was pending, he was removed to India.[142] When the district court dismissed his petition,[143] Zalawadia appealed to the Fifth Circuit, which considered two issues: First, did Zalawadia's removal deprive the district court of jurisdiction to decide his habeas petition?[144] If not, and if the removal was unlawful, what remedies were available after the removal?[145]

The Fifth Circuit held that the district court still had jurisdiction after the removal and that the removal order was unlawful, but that its remedies were limited to vacating the defective order.[146] The court held that it lacked the authority to give Zalawadia the further remedy that he sought—a remand to the BIA with instructions to hold a new removal proceeding to consider Zalawadia's application for discretionary relief.[147]

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140 *See* 411 F.3d 169, 171–76 (5th Cir. 2005).

141 371 F.3d 292 (5th Cir. 2004); *see* Morawetz, *supra* note 136, at 30–31.

142 *Zalawadia*, 371 F.3d at 294.

143 *Id.* at 295.

144 *Id.* at 296–97.

145 *Id.* at 298.

146 *Id.* at 301.

147 *Id.*

The Fifth Circuit justified this conclusion by analyzing immigration habeas in terms that closely track my four models of habeas corpus. The panel explained: "This case is *not* the direct appeal of the BIA's decision, in which we could review the full scope of Zalawadia's claims and order the BIA to correct its mistakes."[148] The panel relied heavily on its view that the Supreme Court's decision in *St. Cyr* treated habeas corpus as distinct from direct review.[149] Deferring until Part IV my reasons for believing that *Zalawadia* misread *St. Cyr*, it is important to understand how the view of habeas as collateral review in *Zalawadia* shaped the court's analysis and ultimately led to its refusal to remand to the BIA. Addressing remedies, the court continued: "[H]abeas specifically is not a tool that can be broadly employed to restore the habeas petitioner to his or her *status quo ante* beyond freeing him from the restraints on liberty arising directly from the illegal order or judgment."[150] The *Zalawadia* court's reasoning shows that a judge who views immigration habeas as collateral review, and therefore extraordinary, tends toward a more limited view of available remedies.

In contrast, a direct review model of immigration habeas suggests a more expansive view of remedies. A district court judge who sees immigration habeas as direct review would go further toward putting a noncitizen who prevailed in a removal order challenge in the same position as he would have been if the government had never initiated removal proceedings in the first place. Such a judge would be more willing to declare the prior removal order to be null *ab initio* for purposes of any criminal illegal reentry prosecution.[151] She would also be more willing to give the wrongly removed noncitizen a discretionary relief hearing—the very relief denied in *Zalawadia*—even though such hearings are ordinarily available only to persons in the United States.[152] Moreover, a direct review model suggests that the inadmissibility grounds based on unlawful presence in the United States, which are triggered only if a noncitizen leaves,[153] should not apply if an unlawful removal order was the reason for departure. A direct review model also suggests that the government should pay to bring the noncitizen back to the United States, since that is what is required to

148 *Id.* at 298.

149 *Id.* at 299–300.

150 *Id.* at 300.

151 *See* INA § 276, 8 U.S.C. § 1326 (West, Westlaw through Pub. L. No. 109-102, 2005) (describing the class of aliens subject to criminal penalties for reentering the United States after removal).

152 *See Zalawadia*, 371 F.3d at 296.

153 *See* INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) (establishing that aliens who were unlawfully present in the United States for specified lengths of time and who seek admission to the United States after departure or removal are inadmissible for up to ten years).

return the noncitizen to the same position as he would have been in if the government had never tried to remove him. I am not suggesting that a court sitting in habeas to review a removal order should always grant these remedies, but I believe that a judge adopting a direct review model would be much more inclined to do so.

D. Other Issues

There are many other examples of how a judge's choice between the direct and collateral review models will influence how she answers key questions regarding the contours of her jurisdiction to review removal orders. I will mention only a few to reinforce the point that a judge's assumed model of immigration habeas matters a great deal.

Location and proper respondent. Where is the proper location of a habeas challenge to a final removal order? A judge who views habeas as direct rather than collateral review would assume a closer tie between the location of the challenge and the location of the removal proceeding before the immigration judge or the BIA review. By similar reasoning, a direct review model of immigration habeas would also suggest that the respondent should be the Attorney General, whose Executive Office for Immigration Review issued the removal order.

The two collateral review models, however, suggest that there should be a closer connection between the location of the challenge and the actual location of physical confinement. By definition, collateral review is separate—in time, for example—from the procedure that resulted in the removal order. Since the purpose of collateral review is to reexamine separately, there is less reason under a collateral review model than under a direct review model to tie venue to the original proceeding. Under a collateral review model, it becomes more logical to argue that habeas must be filed where the noncitizen is physically confined. This is the relevance to immigration habeas of the Supreme Court's 2004 decision in *Rumsfeld v. Padilla*, which held that "in habeas challenges to present physical confinement—'core challenges'—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official."[154] The Court distinguished cases not involving immediate physical custody—which describes many habeas challenges to final removal orders.[155] It becomes more logical to argue that habeas must be filed where the noncitizen is physically confined.

Departure from the United States. Different habeas models also give different answers to the question of how the nature of the noncitizen's departure from the United States affects habeas jurisdiction. Such de-

154 542 U.S. 426, 435 (2004).

155 *Id.* at 435 n.8.

parture might be involuntary or voluntary, and ranges from formal removal to departure under varying degrees of government influence or coercion. Since the 1960s, it has been well settled that a final removal order against a noncitizen satisfies the threshold requirement that he be "in custody" before he may file a habeas petition.[156] It is also well settled that the departure of a noncitizen who has filed a habeas petition challenging a final removal order does not deprive the court of jurisdiction.[157] Put more generally, the in-custody requirement must be satisfied only at the time the petition is filed.[158] If a noncitizen leaves the United States before filing a habeas petition, however, the general rule says that it is too late to do so because the noncitizen will no longer be able to satisfy the in-custody requirement.[159]

Both direct review models cast habeas as a normal part of the chain of review. If the purpose of review is to provide an ordinary check on the immigration judge's initial decision, then the argument is stronger that a noncitizen's physical location at any point in the habeas action is irrelevant to jurisdiction. If, however, immigration habeas is collateral, and therefore extraordinary review, it may be reasonable to devote resources to the most active cases—i.e., those in which noncitizens are about to be removed—because these are the cases in which judicial intervention will have the most practical impact. Thus, a collateral review model may suggest requiring a noncitizen to be in the United States when she files a habeas petition, and even requiring that she remain in the United States while the court adjudicates it.

Filing deadlines. The choice among habeas models will also affect the timing of review, particularly as enforced by filing deadlines. The court of appeals direct review model suggests imposing the same thirty-day deadline as would apply to petitions for review in the court of appeals.[160] The BIA direct review model also suggests a thirty-day deadline, as this is the deadline that would apply to an appeal to the

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156 *See* Hensley v. Mun. Court, 411 U.S. 345, 348–49 (1973); Jones v. Cunningham, 371 U.S. 236, 240–43 (1963); Rosales v. Bureau of Immigration & Customs Enforcement, 426 F.3d 733, 735 (5th Cir. 2005); Simmonds v. INS, 326 F.3d 351, 354–56 (2d Cir. 2003); Aguilera v. Kirkpatrick, 241 F.3d 1286, 1291 (10th Cir. 2001); Mustata v. U.S. Dep't of Justice, 179 F.3d 1017, 1021 n.4 (6th Cir. 1999); Nakaranurack v. United States, 68 F.3d 290, 293 nn.2–3 (9th Cir. 1995).

157 *See* Zegarra-Gomez v. INS, 314 F.3d 1124, 1126 (9th Cir. 2003); Leitao v. Reno, 311 F.3d 453, 455–56 (1st Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 428 (4th Cir. 2002); Chong v. Dist. Dir., INS, 264 F.3d 378, 382 (3d Cir. 2001); Max-George v. Reno, 205 F.3d 194, 196 (5th Cir. 2000), *rev'd on other grounds*, 533 U.S. 945 (2001).

158 *See* Spencer v. Kemna, 523 U.S. 1, 7 (1998); Carafas v. LaVallee, 391 U.S. 234, 237–38 (1968).

159 *See, e.g.*, Patel v. U.S. Attorney Gen., 334 F.3d 1259, 1263–64 (11th Cir. 2003).

160 *See* INA § 242(b)(1), 8 U.S.C. § 1252(b)(1) (2000).

BIA.[161] But a judge who adopts the BIA direct review model might be more willing to consider the likelihood that a noncitizen will not be represented by counsel before the immigration judge and the possibility that the noncitizen could not reasonably have been expected to file by the deadline; such a judge might also be inclined more generally to take into account the fact that the BIA would be the first layer of review from an immigration judge's decision. These factors might lead a federal district judge who adopted the BIA direct review model to find that any such deadline is subject to equitable tolling for good cause in the same way that the deadline for motions to reopen may be equitably tolled.[162] Such a judge might alternatively order the BIA to reissue the decision so that the thirty-day clock would restart,[163] notwithstanding pre–REAL ID Act case law saying that the thirty-day deadline is jurisdictional and therefore may not be equitably tolled.[164] The court of appeals direct review model suggests a less flexible attitude toward the thirty-day deadline, recognizing that the very nature of direct review requires that it end within a reasonable time, even if it affords fuller review while it is available. In contrast to the court of appeals direct review model, but somewhat more like the BIA direct review model, the collateral review models of immigration habeas tend to tolerate habeas filings well beyond the thirty-day deadline, even if the collateral review that takes place is more limited.

Exhaustion of remedies. A final issue to mention is the requirement that noncitizens exhaust administrative remedies before seeking court review. As a general matter, both direct and collateral review models suggest that exhaustion should be required. It is well settled in criminal habeas that petitioners must exhaust state remedies before filing a federal habeas petition.[165] This criminal law requirement is usually explained as a matter of comity and deference to state courts.[166] A federal court's collateral review of federal agency action involves similar considerations: preserving agency authority and promoting judicial efficiency.[167] The basic idea is to give the first decision-making

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161 *See* 8 C.F.R. §§ 1003.3(a)(1), 1003.38(b), 1240.15, 1240.53(a) (2005).

162 *See, e.g.*, Pervaiz v. Gonzales, 405 F.3d 488, 490–91 (7th Cir. 2005); Harchenko v. INS, 379 F.3d 405, 409–10 (6th Cir. 2004); Riley v. INS, 310 F.3d 1253, 1258 (10th Cir. 2002); Socop-Gonzalez v. INS, 272 F.3d 1176, 1188–90 (9th Cir. 2001) (en banc); Iavorski v. INS, 232 F.3d 124, 129–30 (2d Cir. 2000).

163 *See, e.g.*, Dearinger *ex rel.* Volkova v. Reno, 232 F.3d 1042, 1044 (9th Cir. 2000).

164 *See, e.g.*, Malvoisin v. INS, 268 F.3d 74, 75–76 (2d Cir. 2001).

165 *See* 28 U.S.C. § 2254(b)(1)(A); *Ex parte* Royall, 117 U.S. 241, 250–53 (1886).

166 *See, e.g.*, CHEMERINSKY, *supra* note 76, at 883–84; LARRY W. YACKLE, FEDERAL COURTS 499–502 (2d ed. 2003).

167 *See* McCarthy v. Madigan, 503 U.S. 140, 145 (1992); McKart v. United States, 395 U.S. 185, 194 (1969) ("And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the

process a chance to function correctly before allowing the extraordinary intervention that is inherent in collateral review.

The direct review models of immigration habeas suggest the same result, but they pose more complex issues. A federal district judge who adopts the court of appeals direct review model would probably require exhaustion. Petitions for review in the courts of appeals expressly require exhaustion under section 242(d) of the INA, which provides in pertinent part 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."[168] Under the BIA direct review model, however, a federal district judge sitting in habeas may be more willing to waive exhaustion or recognize that it is futile, just as the BIA might when acting as the first layer of review of an immigration judge decision. At that stage of direct review, it is more likely that the record has been made with less experienced counsel or without any counsel at all. The same considerations that suggest flexibility with regard to deadlines may suggest a similar attitude toward exhaustion of remedies.

IV
MODELS OF HABEAS CORPUS AND THE REAL ID ACT

Thus far, I have shown that my four habeas models can illuminate the outcomes and reasoning in the body of case law defining immigration habeas since 1996. The two remaining questions, which this Part addresses, are: (1) Which model makes the most sense, and (2) which model did the Supreme Court endorse in *INS v. St. Cyr*? But first, I need to explain the sweeping changes that occurred in May 2005 with the REAL ID Act. This Part may then address those two questions, and finally explore the implications of the four models of immigration habeas for court review of final removal orders after the REAL ID Act.

A. The REAL ID Act

When the REAL ID Act became law on May 11, 2005, it amended section 242 of the INA and thus revised the current system of court review of immigration decisions.[169] The Act established petitions for review in the courts of appeals as the principal vehicle for court review of final removal orders and certain other immigration decisions by the

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administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.").

168 INA § 242(d)(1), 8 U.S.C. § 1252(d)(1) (2000); *see* Beharry v. Ashcroft, 329 F.3d 51, 56–63 (2d Cir. 2003). *See generally* Nancy Morawetz, *Practicing Defensively: Exhaustion of Administrative Remedies, in* IMMIGRATION AND NATIONALITY HANDBOOK 2005–06 EDITION 1033 (2005).

169 *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252 (West, Westlaw through Pub. L. No. 109-102, 2005)).

government.[170] The Act did this by making it clear—or at least clearer than Congress had been in 1996—that the various provisions that had previously eliminated judicial review also eliminated habeas corpus jurisdiction, mandamus jurisdiction, and jurisdiction under the All Writs Act.[171] The REAL ID Act expressly mentioned that these forms of jurisdiction no longer existed for review of removal orders,[172] though habeas corpus seemed to remain intact for certain issues, including detention issues and damage claims based on violations of constitutional rights, that are "independent of challenges to removal orders."[173]

This apparent elimination of habeas corpus to challenge removal orders responded to *INS v. St. Cyr* by enacting the explicit abrogation of 28 U.S.C. § 2241 that the Supreme Court in *St. Cyr* found lacking in section 242 of the INA as enacted by IIRIRA. At the same time, Congress largely eliminated the judicial review bars that had originally prompted noncitizens to file habeas corpus petitions in federal district courts to challenge removal orders. The REAL ID Act did this by adding section 242(a)(2)(D) of the INA, which provides:

> 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.[174]

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170 *Id.* § 106(a)(1)(B), 119 Stat. at 310–11.

171 *See id.* This Article does not discuss sections § 106(c) and (d) of the REAL ID Act, which addressed some but not all of the transitional issues concerning habeas petitions pending on the date of enactment.

172 Thus, section 242(a)(5) of the INA provides:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

Id.

173 H.R. REP. NO. 109-72, at 175 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 300; *see* Hernandez v. Gonzales, 424 F.3d 42, 42–43 (1st Cir. 2005); Sissoko v. Rocha, 412 F.3d 1021, 1033 (9th Cir. 2005).

174 § 106(a)(1)(A)(iii), 119 Stat. at 310. For cases holding that section 242(a)(2)(D) allows review of questions of law, see Papageorgiou v. Gonzales, 413 F.3d 356, 358 (3d Cir. 2005); Gattem v. Gonzales, 412 F.3d 758, 762–63 (7th Cir. 2005); Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005). For a case holding that section 242(a)(2)(D) allows review of constitutional claims, see Ramos v. Gonzales, 414 F.3d 800, 802 (7th Cir. 2005).

It is hard to speak of any real legislative history of the REAL ID Act, since it was passed by dispensing with committee process, suspending the rules on the floor, and attaching it to an urgent appropriations bill. But there is a Conference Report, which portrays the judicial review provisions of the Act as a congressional effort to overhaul a flawed system. A major concern focused on the noncitizens who had been the targets of the judicial review bars in AEDPA and IIRIRA. These noncitizens—whom AEDPA and IIRIRA seemed to give less access to courts to review removal orders—actually had more layers of access as a result of *INS v. St. Cyr* and the prior decisions of like-minded courts of appeals. The noncitizens who were subject to the judicial review bars could now first file a habeas petition in district court and then, if unsuccessful there, appeal to a court of appeals.[175] Other noncitizens with removal orders had to go straight to a court of appeals. Moreover, the system was confusing, sending some issues to the court of appeals on a petition for review and sending other issues in the same case to a district court on habeas.[176] For example, any deportability issue in *St. Cyr* could have gone to the court of appeals,[177] but the issue of eligibility for discretionary relief had to go to the federal district court on habeas. According to the Conference Report, the REAL ID Act responded "[b]y channeling review to the courts of appeals."[178]

As courts interpret the various provisions of the REAL ID Act in the coming years, much attention will be devoted to two broad areas of inquiry: (1) what sort of review is now available in the courts of appeals, and (2) whether and what sort of habeas corpus jurisdiction remains. The experience with habeas corpus in the decade from 1996 to 2005—and in particular an evaluation of immigration habeas during this period in terms of the four models I have sketched—will help to answer these key questions about review of removal orders after the REAL ID Act. As a threshold matter, however, it is important to assess immigration habeas from 1996 to 2005 without regard to the changes wrought by the REAL ID Act.

B. Assessing Collateral Review and Direct Review Models

Part III illustrated that the decisions that shape habeas jurisdiction can best be understood as reflecting tension and choice among

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175 *See* H.R. REP. NO. 109-72, at 173.

176 *Id.* at 174.

177 The question of whether St. Cyr was deportable, and if so, on what ground, needed to be resolved before the judicial review bars in section 242(a)(2)(C) would apply. For cases recognizing such jurisdiction to decide jurisdiction, see, e.g., Drakes v. Zimski, 240 F.3d 246, 247 (3d Cir. 2001); Tapia Garcia v. I.N.S., 237 F.3d 1216, 1220 (10th Cir. 2001); Mahadeo v. Reno, 226 F.3d 3, 9 (1st Cir. 2000).

178 H.R. REP. NO. 109-72, at 174.

four models of habeas corpus. The resulting body of decisions has not coalesced into a coherent and consistent set of rules for review of removal orders. But the most disturbing aspect of immigration habeas jurisprudence between 1996 and 2005 is not its inconsistency. Rather, it is the fact that too many decisions adopt a collateral review model. These decisions include the Fifth Circuit's view of remedies in *Zalawadia*[179] and the general policy toward stays in the Western District of Louisiana.[180]

One source of potential confusion is the close association between immigration law and criminal law. It has been well settled since the Supreme Court's 1893 decision in *Fong Yue Ting v. United States* that deportation is civil and not criminal in nature.[181] Removal, however, involves the same sort of custody that is inherent in and is the prerequisite for criminal law habeas jurisdiction.[182] Moreover, the stakes involved in removal from the United States are one of the fundamental premises for collateral review, as Part II explained. The accepted view of criminal habeas as collateral review, combined with a focus on the stakes involved in a noncitizen's removal, make it natural to think of immigration habeas, like criminal habeas, as a form of collateral review as well.

In fact, however, the only way to preserve habeas corpus as a guarantee against unlawful detention in the immigration setting is generally to think of habeas review as a form of direct review. Collateral review models are appropriate in the criminal law context only because habeas operates after a complete system of trial and appellate courts hear a case—typically a judicial trial and at least one layer of direct appellate review. The other collateral review model, immigration habeas to review deportation orders under former section 106(a)(10) of the INA, operated during the period before 1996, when as a general rule noncitizens could challenge deportation orders by filing petitions for review in the federal courts of appeals.[183] Because collateral review presupposes either direct review or a valid decision to eliminate it, collateral review models are appropriate in immigration law only when such prior court review has occurred. This was the case in *Nunes*, with the court of appeals's prior finding that Jose Francisco Nunes had been convicted of an aggravated felony.[184] A direct review model is more appropriate, however, in cases where no such prior court review has taken place, as was common in immigration law from

179 Zalawadia v. Ashcroft, 371 F.3d 292, 299–301 (5th Cir. 2004).

180 *See supra* notes 136–37 and accompanying text.

181 *See* 149 U.S. 698, 709, 730 (1893).

182 *See supra* notes 156–59 and accompanying text.

183 *See supra* text accompanying notes 26–27, 110.

184 *See* Nunes v. Ashcroft, 348 F.3d 815, 820 (9th Cir. 2003), *amended and superseded by* 375 F.3d 805 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1395 (2005).

1996 to 2005. Before Enrico St. Cyr filed his habeas petition, for example, no court had reviewed the BIA's finding that he was ineligible for discretionary relief.[185]

These differences between the reality of immigration habeas and the two collateral review models explain why the Supreme Court decision in *INS v. St. Cyr*[186] is best understood as endorsing a direct review model of immigration habeas. Here I return to the Fifth Circuit decision in *Zalawadia v. Ashcroft*,[187] which gives the wrong answer to the question of whether the *St. Cyr* Court saw immigration habeas review of final removal orders as direct or collateral review. The Fifth Circuit panel distinguished habeas review from direct review and evidently concluded that habeas review must therefore be a form of collateral review. The court appeared to rely on *St. Cyr*, but in so doing it fundamentally misread the Supreme Court's analysis.[188]

St. Cyr distinguished habeas review from judicial review—a distinction that was necessary for the Court to conclude that Congress's drafting of section 242 of the INA to eliminate judicial review (via petitions for review in the courts of appeals) left intact habeas review under 28 U.S.C. § 2241 in the federal district courts. But the Court never used the word "direct" to describe what judicial review is, or, by implication, what habeas review is not. More affirmatively, the Court emphasized that eliminating habeas corpus in immigration cases could completely eliminate the involvement of any courts.[189] On this basis, the Court distinguished criminal habeas from Enrico St. Cyr's day in court: "[T]his case involves an alien subject to a federal removal order rather than a person confined pursuant to a state-court conviction."[190]

After setting out these basic ideas, the Court adopted a broad reading of the scope and standard of review in immigration habeas that belies any characterization of habeas review of a final removal order as collateral in the sense that criminal habeas is collateral. The Court emphasized: "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention,

185 *See* INS v. St. Cyr, 533 U.S. 289, 297 (2001).

186 *See id.*

187 371 F.3d 292 (5th Cir. 2004).

188 Other courts may have made the same mistake in interpreting *St. Cyr* to reject direct review. *See, e.g.*, Antunez-Obregon v. Gonzales, No. 04-9529, 2005 WL 2328612, at *3 (10th Cir. Sept. 23, 2005) ("In *St. Cyr*, direct review of the removal order was statutorily barred, but the Supreme Court held that the statutory language did not abrogate habeas corpus review . . . .").

189 *See St. Cyr*, 533 U.S. at 300 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.").

190 *See id.*

and it is in that context that its protections have been strongest."[191] To be sure, the Court acknowledged that "the scope of review on habeas is considerably more limited than on APA-style review."[192] But immigration habeas, according to the Court, includes examination of questions of law involved with the removal order, as well as review to ascertain that "some evidence" supports any factual determinations[193]—a standard of review like the standard that typically applies to direct appellate review of factual determinations in trial courts. In other words, while the Supreme Court distinguished habeas review from judicial review, it adopted a version of habeas review that has key features of direct review. It also avoided narrower readings of habeas that might have, for example, limited review to preventing "fundamental miscarriages of justice."[194]

In short, the *St. Cyr* Court recognized habeas corpus review as a more ordinary, direct form of review of removal orders, because doing so avoided the serious constitutional doubts that would arise if noncitizens had no opportunity to test the lawfulness of a final removal order in some court. In other words, as long as the Suspension Clause preserves habeas corpus as a guarantee against unlawful detention, only viewing immigration habeas as direct review can give real meaning to that guarantee. And treating immigration habeas as collateral review can, as shown by *Zalawadia* and the stay practices in the Western District of Louisiana, rob that guarantee of meaning.

C. The Models and the BIA

Having established that the immigration habeas is best understood as a form of direct rather than collateral review, and also that the Supreme Court endorsed this view of immigration habeas in *St. Cyr*, the next issue is the choice between the two direct review models. Both respond to recent developments since 1996. The first model—

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191 *Id.* at 301; *see also id.* at 301 n.14 ("At common law, '[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention.'" (alteration in original) (quoting Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1238 (1970))).

192 *Id.* at 314 n.38; *see id.* at 311–12 (citing Heikkila v. Barber, 345 U.S. 229, 236 (1953)).

193 *Id.* at 302 ("[T]he issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes."); *id.* at 306 (describing the immigration habeas jurisdiction thus: "[O]ther than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive. However, they did review the Executive's legal determinations." (footnote omitted) (citation omitted)).

194 *See, e.g.*, Mbiya v. INS, 930 F. Supp. 609, 612 (N.D. Ga. 1996) ("[T]he Constitution requires only that the writ of habeas corpus extend to those situations in which the petitioner's deportation would result in a fundamental miscarriage of justice.").

immigration habeas as a surrogate for review in the courts of appeals—responds to the judicial review bars in section 242 of the INA. The second model—immigration habeas as a surrogate for BIA review—responds to the drastic reduction in review of removal orders by the BIA.

Viewing the choice strictly as a matter of constitutional requirements might favor an argument for the court of appeals direct review model. The argument that the Constitution requires some access to courts to test the lawfulness of removing a person from the United States is stronger than the argument that the Constitution requires a second layer of agency review either by the BIA or a BIA surrogate. Moreover, courts have uniformly held that BIA affirmances without opinion and other aspects of BIA streamlining do not violate due process.[195] Nothing in the Constitution compels a federal district court sitting in habeas to view itself as a BIA surrogate as opposed to a court of appeals surrogate.

Policy considerations, however, favor the BIA direct review model over the court of appeals direct review model. While the availability of habeas jurisdiction in the federal district courts filled the void created by the judicial review bars in section 242 of the INA, the absence of meaningful BIA review became just as significant. Even without considering the dramatic increase in efforts to get court review discussed in Part II,[196] more basic is the fact that by the time the REAL ID Act became law in May 2005, approximately one-third of BIA appeals were resulting in affirmances without opinion.[197] This means that the immigration judge's opinion in these cases became the final statement of agency reasoning for purposes of court review.[198] Under these circumstances, it has become reasonable for district court judges sitting in habeas to take seriously their new role as the first layer of review of removal orders issued by immigration judges, and to think of themselves as substituting not for the courts of appeals, but for the BIA.

Of course, federal district court judges—even those who took the BIA direct review model to heart—could not function entirely like the BIA, because they are not part of the administrative agency authorized by Congress to interpret and enforce the federal immigration laws.

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195 *See, e.g.*, Mendoza v. U.S. Attorney Gen., 327 F.3d 1283, 1288–89 (11th Cir. 2003); Albathani v. INS, 318 F.3d 365, 375–79 (1st Cir. 2003). *But cf.* Lanza v. Ashcroft, 389 F.3d 917, 932 (9th Cir. 2004) (remanding the case to the BIA, because affirmance without opinion prevented the court from deciding jurisdiction when one ground for the BIA's decision would eliminate jurisdiction, while another ground would allow jurisdiction).

196 *See supra* notes 106–09 and accompanying text.

197 *See* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BIA RESTRUCTURING AND STREAMLINING PROCEDURES (rev. 2004), *available at* http://www.usdoj.gov/eoir/press/04/BIAStreamlining120804.pdf.

198 *See, e.g.*, Kaur v. Gonzales, 418 F.3d 1061, 1064 (9th Cir. 2005); Desta v. Ashcroft, 365 F.3d 741, 745 (9th Cir. 2004).

Their decisions are not given the deference to reasonable agency interpretations of law that the BIA frequently merits under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[199] The question, however, is not whether immigration habeas can duplicate BIA review, but whether federal judges shape immigration habeas mindful that they are acting for the BIA.

D. Lessons from the Four Models for the REAL ID Act

Why does the choice of a direct review model of immigration habeas, and more specifically a BIA direct review model, matter after the REAL ID Act? After all, the Act repeals immigration habeas, or at least it seems to do so. In a nutshell, my answer is that the choice among the four models matters because understanding (1) that immigration habeas in the decade from 1996 to 2005, especially in *St. Cyr*, generally adopted (and should have adopted) a direct review model, and (2) that as between the two direct review models the BIA version better responds to changes in the agency decision making that courts are set up to review, helps answer two key questions: (1) What will review of final removal orders by way of petitions for review in the federal courts of appeals look like after the REAL ID Act?; and (2) what will any surviving habeas corpus jurisdiction to review final removal orders look like after the REAL ID Act? With respect to both of these questions, the danger is that the answers will be influenced too strongly by a collateral review model of immigration habeas.

For petitions for review after the REAL ID Act, the danger is that some courts will adopt a begrudging reading of new section 242(a)(2)(D) of the INA. The false logic that could lead to this reading would go something like this: (1) *St. Cyr* rejected direct review and adopted collateral review, and therefore (2) courts should look to criminal habeas (as practiced in recent years, not the Warren Court's fuller version) as they shape immigration habeas after the REAL ID Act. This reading of new section 242(a)(2)(D) would then assume (1) that the grant of jurisdiction to review "constitutional claims or questions of law" permits only the review that had taken place in immigration habeas before the REAL ID Act became law, and (2) that the contours of such immigration habeas should be defined in light of a collateral review model of immigration habeas.

As for the first of these propositions, some courts of appeals seem to have said that the REAL ID Act, by adding section 242(a)(2)(D) of the INA, only granted them via petitions for review the same jurisdiction, and nothing more, that had previously been available in habeas

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199 467 U.S. 837 (1984).

in the federal district courts.[200] According to the Conference Report, "The purpose of [section 242(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas."[201] This view of the relationship between pre–REAL ID Act habeas corpus and post–REAL ID Act petitions for review by noncitizens who are subject to the criminal bar in section 242(a)(2)(C) draws support from section 242(a)(2)(D), which limits review to "constitutional claims and questions of law." Such noncitizens do not get court of appeals review of purely discretionary or factual determinations.[202] This limitation reinforces any intuition to define petitions for review by these individuals after the REAL ID Act by reference to habeas corpus before the REAL ID Act.

Even if petitions for review adopt at least as broad a scope and standard of review for the direct review model of immigration habeas as that which the Supreme Court adopted in *St. Cyr*, there is still the danger that other attributes of petitions for review will erroneously reflect a collateral review model. It is important that the return of review to the courts of appeals avoid these dangers and ameliorate the negative consequences of changes at the BIA level. This assumes, of course, that the BIA changes are not reversed. Better would be a restoration of BIA review, which would eliminate the need that I identify for the BIA direct review model of immigration habeas. In this sense, the need for courts to adopt the BIA direct review model of immigration habeas is a way of understanding the real institutional costs of BIA streamlining and its logical consequences.

As along as the BIA fails to conduct meaningful review in a large number of cases, however, courts of appeals should absorb the approaches developed by the federal district judges who have adopted the BIA direct review model. Applying the analysis in Part III, this would mean that they (1) should not apply preclusion doctrines to issues not yet heard by any court, (2) should consider themselves authorized to grant a broad range of remedies to undo the effects of unlawful removal orders, and (3) should issue stays of removal as if they were the BIA. There are also implications for the other issues briefly discussed at the end of Part III: the location of a

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200 *See* Kamara v. Attorney Gen. of the United States, 420 F.3d 202, 210–11 (3d Cir. 2005) ("A review for 'constitutional claims or questions of law,' . . . mirrors our previously enunciated standard of review over an alien's habeas petition." (citation omitted)).

201 *See* H.R. REP. No. 109-72, at 175 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 300.

202 *See* Grass v. Gonzales, 418 F.3d 876, 878 (8th Cir. 2005); Vasile v. Gonzales, 417 F.3d 766, 768 (7th Cir. 2005); Gattem v. Gonzales, 412 F.3d 758, 767 (7th Cir. 2005); *see also* H.R. REP. No. 109-72, at 175 ("[W]hile the reforms in section 106 would preclude criminals from obtaining review over non-constitutional, non-legal claims, it would not change the scope of review that criminal aliens currently receive, because habeas review does not cover discretionary determinations or factual issues that do not implicate constitutional due process.").

habeas challenge, the effect of a noncitizen's departure from the United States, the timing of review, and the exhaustion of administrative remedies—as well as other matters.

Admittedly, my reasoning contains this apparent paradox: I am using *St. Cyr*—understood in light of my four models of habeas corpus—as the principal guide for petitions for review after the REAL ID Act. Yet, as Part IV.A explained, a principal purpose of the Act was to repudiate *St. Cyr*.[203] But this paradox is more apparent than genuine. While the REAL ID Act repudiated *St. Cyr*'s *channeling* of immigration cases into the federal district courts via habeas, the Act did nothing to repudiate or even question the basic lessons of *St. Cyr* about the *substance* of court review in immigration cases—that some court review of final removal orders is required, and that in immigration cases such court review is direct review.

Beyond the lessons of pre–REAL ID Act immigration habeas for petitions for review after the REAL ID Act, there is also the possibility of habeas jurisdiction that survives the Act, even with the Act's apparent repeal of immigration habeas. In this regard, the key question is this: What is the constitutionally adequate substitute for habeas corpus in the context of court review of final removal orders? Again, it is important for courts to remember that the legislative history of the REAL ID Act indicates Congress's intent to maintain habeas review as the Supreme Court defined it in *St. Cyr*, and that *St. Cyr* adopted a direct review model of immigration habeas. In implementing the REAL ID Act, the courts of appeals can interpret the scope and standard of review as well as other features of petitions for review in ways that appropriately reflect a direct review model as it emerged before the REAL ID Act. If the courts of appeals do so, Congress will have succeeded in providing a constitutionally adequate substitute for, and thus have justified repealing, habeas corpus jurisdiction to review final removal orders.[204] But if courts shape petitions for review in begrudging ways that reflect a collateral review model of immigration habeas, Suspension Clause problems will arise, and habeas jurisdiction to review final removal orders will remain as a matter of constitutional command.

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203 *See supra* text accompanying notes 174–78.

204 *See* INS v. St. Cyr, 533 U.S. 289, 314 n.38 (2001); Swain v. Pressley, 430 U.S. 372, 381 (1977); *see also* H.R. REP. NO. 109-72, at 175 ("By placing all review in the courts of appeals, Division B would provide an 'adequate and effective' alternative to habeas corpus.").