



## AMERICAN IMMIGRATION LAW FOUNDATION

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### JUDICIAL REVIEW PROVISIONS OF THE REAL ID ACT

#### Practice Advisory<sup>1</sup>

By: AILF Legal Action Center  
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#### What is the REAL ID Act?

The REAL ID Act of 2005 was signed into law on May 11, 2005 as part of a military spending bill. This Practice Advisory will discuss the provisions of the REAL ID Act that pertain to judicial review of immigration decisions under the Immigration and Nationality Act (INA). These judicial review provisions became effective on May 11, 2005, the date that the President signed the Act. The new provisions apply to final orders of removal, deportation and exclusion issued before, on, or after the enactment date.

The REAL ID Act also includes amendments to the INA relating to: burdens of proof and procedure for asylum-seekers and for other forms of relief from removal; the definition and removability provisions for terrorism and terrorist-related activities; and requirements for federally approved identification cards. These provisions are not discussed here. A summary of these and other provisions of the REAL ID Act can be found at <http://www.aila.org/infonet/fileViewer.aspx?docID=18433>.

This Practice Advisory contains only a preliminary analysis of the judicial review provisions. At this early stage, there are many questions about exactly how the law will be interpreted and implemented. Future advisories will be posted as the law is implemented. The information contained in this practice advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a

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client's case. Moreover, suggestions and strategies relating to the REAL ID Act are likely to evolve as the law is implemented.

### **What changes to judicial review are included in the REAL ID Act?**

The REAL ID Act amends the judicial review provisions relating to immigration cases in the following ways:

- It purports to eliminate all habeas corpus review of final orders of removal, deportation, and exclusion;
- It does not address habeas corpus review of detention;
- It expands judicial review of final orders of removal, deportation and exclusion via a petition for review in place of habeas corpus review, allowing some review of previously non-reviewable cases and issues;
- It eliminates judicial review of certain immigration decisions by mandamus or the "all writs" statute, although it does not appear to eliminate all mandamus jurisdiction in the non-removal context; and
- It expands the bar on judicial review of discretionary decisions and actions to include certain agency decisions and actions outside of the removal context.

Section A below discusses the changes to habeas review; section B, the expansion of review by petitions for review; section C, the restrictions on review under the mandamus and all writs statutes; and section D, the expansion of the bar on review of discretionary decisions to the non-removal context.

#### **A. Habeas Corpus review**

The REAL ID Act purports to eliminate all habeas corpus review under 28 U.S.C. § 2241 of final orders of removal, deportation and exclusion. Congress has amended seven subsections of INA § 242 to include a specific restriction on review by habeas corpus.<sup>2</sup> These amendments will affect what issues, if any, may be reviewed via habeas corpus. They also will affect what happens to a habeas petition that is already pending. As discussed below, AILF believes that these amendments do not eliminate habeas jurisdiction over detention challenges.

#### **--Can I file a new habeas petition challenging a final order for my client?**

The amendments eliminating habeas corpus review of final orders of removal, deportation or exclusion apply upon enactment and apply to *all* final orders of removal, deportation or exclusion issued before, on, or after the enactment date. Thus, as of May 11, 2005, the REAL ID Act provides that challenges to final orders of removal, deportation or exclusion must be filed in the appropriate court of appeals via a petition for review. *See* § B, below.

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<sup>2</sup> These are: amended INA §§ 242(a)(2)(A), (B) and (C); new § 242(a)(4); new § 242(A)(5); amended § 242(b)(9); and amended § 242(g).

The REAL ID Act expands the jurisdiction of the courts of appeals so that they may review certain issues previously precluded by IIRIRA. A new INA § 242(a)(2)(D) states that nothing in the INA “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 the appropriate court in accordance with this section.” 8 U.S.C. § 1252(a)(2)(D) (as amended).

Thus, courts of appeals now will have jurisdiction to review *all* constitutional issues and questions of law related to a final order of removal. In a case involving removal based upon a criminal offense or a discretionary decision, review of legal issues will now be in the court of appeals rather than in the district court by habeas corpus. *See* § B below. Consequently, while habeas review has been eliminated, review over most – if not all – of the issues that would have been available in habeas proceedings under IIRIRA now should be available via petition for review in the courts of appeals.

**--What will happen to a habeas petition challenging a final order that was filed prior to enactment of the REAL ID Act and that is pending?**

The new law provides that district courts “shall” transfer pending habeas corpus petitions (or the part of the case challenging a final removal, deportation or exclusion order) to the court of appeals in which a petition for review could have been filed (i.e. the circuit having jurisdiction over the place the immigration judge completed proceedings). The courts of appeals must treat the transferred case as if it was filed as a petition for review, with one exception.

The one exception is that the requirement that a petition for review must be filed within 30 days of the final removal order does not apply to these transferred cases. This means that a habeas petition challenging a final order that was pending in district court on May 11, 2005 will be transferred to the court of appeals even if the habeas petition was not filed within 30 days of the final removal order. However, the 30 day deadline continues to apply to all petitions for review challenging final orders of removal issued on or after May 11, 2005.

This will create a serious problem for some individuals. Prior to the REAL ID Act, an individual barred from filing a petition for review might have been able to get review through a habeas corpus petition. For example, many individuals with criminal convictions were barred from filing a petition for review under INA § 242(a)(2)(C). However, these individuals previously could have filed a habeas corpus petition. There is no deadline for filing a habeas petition. There will be individuals who will not have filed a petition for review within 30 days of their final order because there would have been no jurisdiction under pre-REAL ID Act law. If, as of May 11, 2005, they did not file a habeas petition, they now may be barred from any judicial review under the REAL ID Act. They will no longer be able to file a habeas petition and will have missed the thirty-day deadline for filing a petition for review. They may file within the thirty days after enactment and argue that the effective date should not be read as applying retroactively.

There may also be other arguments to preserve review for those who did not previously file a petition for review. If you have a client in this situation, please contact [realidcourts@ailf.org](mailto:realidcourts@ailf.org) (see box at end of this practice advisory).

**-- How will the transfer from the District Court to the Court of Appeals occur?**

It is not yet clear how a pending habeas petition (or portion thereof) will be transferred from the district court to the court of appeals. The language of the new law – that district courts “shall” transfer pending habeas cases challenging final orders – suggests that transfer is automatic. However, courts will undoubtedly need guidance as to how to implement this section. AILF believes that certain habeas petitions that do not challenge a final order should not be subject to transfer at all. We believe that this would include, for example, a case challenging detention. Other habeas cases may involve review of the legality of both a final order and of the individual’s detention. In these cases, only the portion of the case challenging the final order should be subject to transfer.

There may be cases in which the court sends out a notice that the case is being transferred. In other cases, the government may move the court for an immediate transfer. If only part of a pending habeas petition is transferred, the government may also move to dismiss the remainder of the habeas petition.

Practitioners should be prepared to ask the district court for additional time to brief the transfer issue. If the court notifies the parties in advance of the transfer, or if the government moves for a transfer, practitioners should take the opportunity to file a motion seeking additional time to raise and brief the issues before the court transfers the case. The transfer provision is unprecedented and involves complex and novel questions. The court and the parties will need time to understand the new law and make decisions about how the law should be applied in the particular case. The petitioner’s attorney will need time to consult with other attorneys and national organizations working on these issues.

**-- What if I already briefed/argued my habeas corpus case before the district court?**

The law requires transfer of *all* pending habeas challenges to a final order of removal, deportation or exclusion, regardless of the litigation stage of the pending habeas. Thus, there will be habeas petitions subject to transfer that have already been fully briefed and even argued. We do not know how the courts of appeals will handle transferred habeas petitions that have been briefed or argued. Also, it is unknown whether the record before the district court will become part of the record in the court of appeals or whether new briefing will be required. Certainly, there is a good chance that the courts of appeals will have questions about the scope of their review under the REAL ID Act, separate and apart from any other issues involved in the case. Practitioners can use any opportunity for additional briefing to propose beneficial interpretations of the REAL ID Act.

**-- What if the district court issued a stay in the habeas case, will it continue in effect after transfer?**

The REAL ID Act did not include any change to the stay provision of INA § 242. If the district court issued a stay, you may ask the district court to continue the stay pending resolution of the case before the court of appeals.

If a stay has not yet been granted, you may wish to ask the district court – before transfer – to issue a stay pending resolution of the case before the court of appeals. Because it is not yet clear whether a district court’s stay will continue in effect upon transfer, practitioners should also consider asking the court of appeals to issue its own stay as soon as the transfer is complete.

**-- Can I file a habeas corpus petition challenging my client’s detention?**

No one knows for sure how the courts will interpret the new law, but the REALID Act does not address detention challenges. In addition, strong legal arguments, policy concerns and legislative history support continued habeas corpus jurisdiction over detention challenges.

The REAL ID Act amends INA § 242 and IIRIRA § 309(c)(4) (discussed below) which apply to final orders of removal, deportation and exclusion. By stating that district courts shall transfer habeas cases “or the part of the case that challenges the order of removal, deportation, or exclusion” to the appropriate court of appeals, the text of the amendment implies that there may be a “part” of the case that cannot be transferred.

In addition, as the Supreme Court has stated “[t]he writ of habeas corpus has always been available to review the legality of executive detention.” *INS v. St. Cyr*, 533 U.S. 289, 364-65 (2001). Eliminating judicial oversight of executive detention would be a dramatic departure from this historical role of the courts. This is especially true considering that post-final order review is not a substitute for review of the process for pre-removal detention. Moreover, *Demore v. Kim*, 538 U.S. 510 (2003) and other recent Supreme Court cases that affirm judicial review over detention, remain valid.

Legislative history also indicates that Congress’ intended to retain habeas jurisdiction over detention challenges. In testimony to the Senate about the REAL ID Act, the Justice Department made clear that “the bill would not preclude habeas review over challenges to detention; the bill would eliminate habeas review only over challenges to a removal order.” Statement of Jonathan Cohn, Deputy Assistant Attorney General, Civil Division before the Subcommittee on Immigration, Border Security and Citizenship, April 14, 2005. In addition, the conference report twice states that the limitations on review do not extend to challenges to detention.

**B. Petitions for Review**

**-- If I would have filed a petition for review prior to REAL ID, do I still file a petition for review?**

Yes. All cases that would have been reviewed by a petition for review prior to the REAL ID Act will continue to be reviewed by a petition for review. Thus, in all cases in which – prior to the passage of the REAL ID Act – you would have filed a petition for review under INA § 242, 8 U.S.C. § 1252, you will continue to do so in the future. The general rules regarding when and where to file the petition for review remain unchanged, with one exception. The REAL ID Act states that a petition for review filed under IIRIRA’s transitional rules shall be treated as if it had been filed under INA § 242.

**-- If I would have filed a habeas petition prior to REAL ID, do I file a petition for review now?**

Yes, at least in the majority of cases. The REAL ID Act expands the jurisdiction of the courts of appeals to cover much – if not all – of the habeas review that is being eliminated. The Act adds a new section (a)(5) to INA § 242 (8 U.S.C. § 1252(a)(5)) that states that “a petition for review filed with the 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.” The only exception to this pertains to review of an order of expedited removal under INA § 242(e), 8 U.S.C. § 1252(e). Keep in mind that the petition for review, unlike the habeas petition, must be filed within 30 days of the final removal order.

The Act also adds a new section (a)(2)(D) to INA § 242 (8 U.S.C. § 1252(a)(2)(D)) which clarifies that review of all constitutional claims or questions of law shall be by petition for review. The courts of appeals retain jurisdiction over constitutional questions and questions of law regardless of any other restrictions on review contained in INA § 242. Thus, for example, while there is a general bar to any review (including habeas review) of an order of removal that is based upon certain criminal offenses (*see* INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C)), the courts of appeals now will have jurisdiction to review questions of law or constitutional challenges in such cases.

Based upon the legislative history of the REAL ID Act, there is a strong argument that Congress did not intend to exclude from review by the courts of appeals mixed questions of law and fact, which many circuit courts recognize as being entitled to review as a question of law. The final bill deleted an amendment that would have qualified the term “questions of law” with the word “pure.” Because Congress deleted the term “pure” from the final bill, it can be argued that its intent was to insure that *all* questions of law remained subject to review.

In addition, courts retain jurisdiction to determine whether they have jurisdiction over the petition for review. Such issues may include, but are not limited to: (1) whether petitioner has been charged with and found deportable for a criminal offense; (2) whether the offense constitutes an aggravated felony or a crime involving moral turpitude; and (3) whether petitioner meets certain non-discretionary statutory eligibility requirements for

discretionary relief. AILF believes that such questions are reviewable regardless of how the courts ultimately construe the phrase “questions of law” in new subsection D of section 242(a)(2).

In other contexts, numerous courts have considered what constitutes a “question of law” in an immigration case. AILF encourages practitioners to become familiar with existing case law on this issue; to note differences in how courts interpret the phrase depending on the context in which the term is being used; and to propose a broad definition to suit the context of the REAL ID Act. AILF and others will provide additional guidance on this issue in the future. In the interim, if a case arguably involves a question of law or constitutional issue, file a petition for review within the 30 day deadline and write to us at the email address below.

**-- How can I challenge the denial of a CAT claim?**

The REAL ID Act also amends INA § 242 by adding a new section (a)(4). 8 U.S.C. § 1252(a)(4). This section provides that a petition for review will be the sole and exclusive means for reviewing a CAT claim. The REAL ID Act eliminates review of CAT claims by habeas.

**-- Has there been any change to the standard for getting a stay of removal?**

No. While amendments to the standard for a stay were proposed in the REAL ID Act, these were deleted from the final bill.

**C. Mandamus and other types of petitions**

The Act also purports to eliminate a court’s jurisdiction under the mandamus statute (28 U.S.C. § 1361) and the “all writs” statute (28 U.S.C. § 1651) in all of the sections of INA § 242 in which habeas jurisdiction is eliminated. Where such jurisdiction might previously have existed with respect to cases involving final orders, jurisdiction will now be by petition for review.

There are arguments that this provision will not eliminate mandamus jurisdiction in all non-removal cases, such as a mandamus action to compel CIS to adjudicate a long-delayed application.

**D. Non-removal cases and discretionary relief**

The Act also amends INA § 242(a)(2)(B) which limits judicial review of certain discretionary decisions and actions. The amended language purports to eliminate review by habeas and mandamus over these discretionary decisions and actions.<sup>3</sup> This section

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<sup>3</sup> A mandamus action is only appropriate where the challenged action is non-discretionary. Because of this, it is unclear how significant this restriction on mandamus will actually be.

also states that judicial review is eliminated “regardless of whether the judgment, decision, or action is made in removal proceedings.” It is not yet clear what impact this change will have on the jurisdiction of the courts to review immigration cases outside of the removal context, such as cases challenging the denial of family or employment-based applications and petitions. In the removal context, a number of courts have narrowly construed the scope of this provision in accord with the specific language chosen by Congress. These decisions should help define exactly what type of discretionary decisions or action in the non-removal context are covered by this amendment.

If the government seeks to dismiss a challenge to an immigration decision that does not involve a removal proceeding, be sure to ask for additional time to file a brief in response to their motion. You can also contact [realidcourts@ailf.org](mailto:realidcourts@ailf.org) about the case.

**AILF EMAIL BOX FOR REAL ID JUDICIAL REVIEW QUESTIONS:** If you have questions about how the REAL ID Act will impact a case that you are handling, email your questions to [realidcourts@ailf.org](mailto:realidcourts@ailf.org). Please be sure to include the following information in your email:

1. Your name
2. City, State where you work
3. Email Address
4. Telephone Number
5. A short paragraph about your case and/or question