



AMERICAN IMMIGRATION LAW FOUNDATION

JUDICIAL REVIEW PROVISIONS OF THE REAL ID ACT

Practice Advisory¹

**By: AILF Legal Action Center
June 7, 2005**

The REAL ID Act of 2005 was signed into law on May 11, 2005 as part of a military spending bill. This article discusses 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. Significantly, the amendments to INA § 242 expand the court of appeals jurisdiction so that many individuals who were barred from bringing petitions for review prior to the REAL ID Act (including individuals with certain criminal convictions) now may file petitions for review in the court of appeals.

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.

The information contained in this advisory is not legal advice and does not substitute for individual legal advice supplied by a lawyer familiar with a client's case. This article is accurate as of June 7, 2005. Moreover, suggestions and strategies relating to the REAL ID Act are likely to evolve as the law is implemented.

¹ Copyright (c) 2005, 2008 American Immigration Law Foundation. See www.aifl.org/copyright for information on reprinting this practice advisory. AILF thanks the REAL ID working group for assistance with this practice advisory, including Lee Gelernt, Nancy Morawetz, Lory Rosenberg, and David Leopold.

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; 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.

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.² 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. These amendments, however, do not eliminate habeas jurisdiction over detention challenges.

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

No. 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.

The REAL ID Act expands the jurisdiction of the courts of appeals so that they may review certain issues previously precluded by IIRIRA. *See Fernandez-Ruiz v. Gonzalez*, No. 03-74533, ___ F.3d ___ (9th Cir. May 31, 2005). 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

² 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).

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 happens to habeas corpus petitions challenging a final order that were 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 other petitions for review.

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. Practitioners with clients in this situation may want to consult AILF’s Practice Advisory that focuses on late-filed petitions for review. *See* “Suggested Strategies for Remediating Missed Petition for Review Deadlines or Filings in the Wrong Court” (April 20, 2005) http://www.ailf.org/lac/lac_pa_042005.pdf.

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

The REAL ID Act does not address detention challenges. Individuals may continue to challenge their detention by filing a habeas corpus petition in district court.

In cases where a petitioner had a pending habeas corpus petition pending on May 11, 2005 challenging both removability and detention, the transfer provision of the REAL ID

Act says that the district courts shall transfer only “the part of the case that challenges the order of removal, deportation, or exclusion” to the appropriate court of appeals. Thus, to the extent that a petitioner is challenging his or her detention, that part of the case should remain at the district court.³

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 (IIRIRA § 309) 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 Real ID 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. *See Fernandez-Ruiz v. Gonzalez*, No. 03-74533, ___ F.3d ___ (9th Cir. May 31, 2005). Thus, the following are examples of individuals who now may bring legal or constitutional claims in the courts of appeals:

- *Petitioners who were found removable based on a criminal conviction and also were denied relief from removal, such as a section 212(c) waiver, withholding of removal or CAT.* Under pre-REAL ID law, these petitioners could not challenge the denial of relief in a petition for review (INA § 242(a)(2)(C)).

³ The government has taken this position in numerous habeas corpus petitions that were pending on May 11, 2005.

- *Asylum applicants whose applications were denied because they did not file their applications within one year of entering the United States.* Under pre-REAL ID law, these petitioners could not seek judicial review of the decision to deny asylum based on the one year filing deadline (INA § 208(a)(3)).

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, even in situations where the decision-maker has to apply fact to law to reach a decision. AILF encourages practitioners to become familiar with existing case law on what constitutes a question of law; 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.

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).

-- 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. 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.⁴ This section 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

⁴ 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.

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.