

INADEQUATE AND INEFFECTIVE: CONGRESS SUSPENDS THE WRIT OF HABEAS CORPUS FOR NONCITIZENS CHALLENGING REMOVAL ORDERS BY FAILING TO PROVIDE A WAY TO INTRODUCE NEW EVIDENCE

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INTRODUCTION

On May 11, 2005, Congress ordered federal district courts to transfer to the courts of appeals all pending petitions for writ of habeas corpus filed by noncitizens¹ challenging the government's decision to deport them.² Congress also decreed that noncitizens could no longer file such petitions for writ of habeas corpus and instead channeled all judicial review of deportation orders exclusively to the courts of appeals.³ This congressional action abrogated the longstanding practice of allowing noncitizens to challenge their detention and the grounds for their deportation orders in district court upon petitions for habeas corpus.⁴

What this change meant in practice was that noncitizens' habeas petitions were transferred to a court of appeals and transformed into a "petition for review."⁵ The Supreme Court has said that Congress may restrict access to the writ of habeas corpus, but in doing so, must provide an "adequate and effective" substitute to avoid violating the Suspension Clause.⁶ The Suspension Clause of the Constitution prohibits Congress from suspending the writ of habeas corpus except in times of rebellion or invasion.⁷ Although Congress provided a substitute remedy in the courts of

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1. I use the term "noncitizen" rather than "alien" because of the negative connotations associated with the latter. Accord Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1411 n.1 (1997). "I have adopted 'noncitizen' as a less prejudicial term. The term 'alien' unfortunately raises many negative images." *Id.*

2. See REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(c), 119 Stat. 302, 311 (to be codified as note to 8 U.S.C. § 1252) (ordering the transfer of any noncitizen's case pending on the date of enactment of the Act, brought pursuant to 28 U.S.C. § 2241, the general habeas statute, to the court of appeals for the circuit in which it could have been filed as a petition for review).

3. See *id.* § 106(a)(1)(A)(iii)(B), 119 Stat. at 310 (amending 8 U.S.C. § 1252 to provide that a petition for review in the court of appeals is the "sole and exclusive means" for judicial review of a deportation order, notwithstanding 28 U.S.C. § 2241 or any other habeas corpus provision).

4. See discussion *infra* Part I.

5. § 106(c), 119 Stat. at 311.

6. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

7. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be

appeals, a petition for review is not an adequate and effective substitute for the writ of habeas corpus because noncitizens do not have the right to introduce newly discovered evidence in the court of appeals where they could have done so in district court upon a habeas petition. For noncitizens who have newly discovered evidence that has a significant bearing on whether they are entitled to relief from deportation, the writ is unconstitutionally suspended.

This Article proves this thesis in a series of steps. First, Part I provides background on the history of judicial review of deportation orders. This Part explains what kind of federal court review has been historically available to noncitizens challenging agency decisions to deport them. Second, Part II takes a closer look at how petitions for writ of habeas corpus in district courts differed procedurally from petitions for review in the courts of appeals. This comparison brings to light the constitutional problem created by repealing habeas review for noncitizens without providing an adequate and effective substitute in the courts of appeals. Finally, Part III proposes possible solutions to the constitutional problem created by this new legislation. Part III promotes one solution, in particular, based on the solution's ability to cure the constitutional infirmity of the legislation as applied in certain cases and for the solution's practicality in application.

I. BACKGROUND

The new legislation takes away rights to judicial review that were historically available to noncitizens in federal court to challenge the government's decision to deport them. This Part provides background information on how the Immigration and Nationality Act of 1952⁸ guides deportation proceedings to explain how decisions are made at the agency level. It then discusses how these agency decisions have been reviewed in federal courts through both petitions for writ of habeas corpus in district courts and petitions for review in the courts of appeals. This Part closes by introducing legislation from both 1996 and 2005 that has narrowed noncitizens' access to judicial review in the federal courts.

A. *Removal Proceedings Against Noncitizens*

The Immigration and Nationality Act of 1952 (INA) provides the

suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

8. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in various sections of 8 U.S.C.).

statutory foundation for immigration law in the United States.⁹ It consolidated all earlier immigration laws into one comprehensive statute and, as amended, establishes the procedures governing the admission and expulsion of noncitizens. It guides immigration officials in making decisions about who may enter or stay in the United States and under what conditions.

The federal agency responsible for immigration is now the Department of Homeland Security (DHS), operating through three newly created subagencies, U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection. Although immigration matters were once the province of the Immigration and Naturalization Service (INS), the INS has since been abolished and immigration functions subsumed in the DHS.¹⁰ Since this changeover did not occur until 2003, in many instances this Article refers to the INS as the relevant governmental agency.

Under the INA, the government can find a noncitizen removable from the United States on many different grounds.¹¹ Though the specific grounds for removal have been amended many times since the INA's enactment in 1952, the general bases have remained consistent. A noncitizen is subject to removal if he or she has failed to abide by the requirements for securing lawful status or if he or she has committed a criminal offense or posed some other national security threat after entering.¹² Within these broad categories there are many specific reasons for which immigration officials can find a noncitizen removable.¹³

Once a noncitizen is found removable, he or she is entitled to notice

9. *Id.*

10. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (abolishing the INS and transferring its responsibilities to the newly created Department of Homeland Security, effective March 1, 2003).

11. After the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered titles of U.S.C.), the INA no longer distinguished between “exclusion” decisions, those made to deny admission into the United States, and “deportation” decisions, those made to expel a noncitizen after entry into the U.S. Instead, such decisions are now referred to as “removal” decisions. This Article uses the term “removal” except in places where it cites to specific statutes, decisions, or in historical contexts where the use of the term “deportation” is more appropriate.

12. *See* Immigration and Nationality Act § 237(a), 8 U.S.C. § 1227(a) (2000) (detailing the six current classes of “deportable aliens:” (1) those inadmissible at entry or time of adjustment of status or who violated status; (2) those who committed criminal offenses; (3) those who failed to register or falsified documents; (4) those who pose a national security concern; (5) those who have become a public charge; and (6) those who have voted unlawfully).

13. *See id.* (providing the specific reasons for which a noncitizen may be found removable based on the six classes of “deportable aliens”).

and a hearing before an Immigration Judge (IJ).¹⁴ The IJ is an attorney appointed by the U.S. Attorney General to serve as an administrative judge and is not an employee of the Department of Homeland Security.¹⁵ Instead, the IJ is an employee of a different agency, the Executive Office for Immigration Review (EOIR), under the direction of the Attorney General.¹⁶ At the hearing before the IJ, a noncitizen has the right to examine the evidence against him or her, present evidence, and cross-examine the government's witnesses.¹⁷ The noncitizen can also present defenses and attempt to show that he or she is entitled to relief from removal based on specific statutory grounds, such as asylum.¹⁸ The government must show, "by clear and convincing evidence," that the noncitizen is removable.¹⁹ The IJ comes to a decision at the end of the removal proceeding "based only on the evidence produced at the hearing."²⁰

The noncitizen may then appeal the IJ's decision to the Board of Immigration Appeals (BIA).²¹ The BIA is an eleven-member panel of attorneys who are appointed by the Attorney General.²² Organizationally, the BIA also falls under the EOIR.²³ In practice, only a small percentage of IJ decisions are appealed to the BIA.²⁴ Those that are appealed receive either three-member panel treatment or treatment by one BIA member.²⁵ Streamlining procedures adopted in 1999 provide that a single BIA member, under certain conditions, may summarily affirm an IJ decision without writing an opinion.²⁶ Some critics have argued that this type of

14. *See id.* § 1229 (providing procedures for the initiation of removal proceedings including notice to the noncitizen informing him or her of the hearing before the IJ).

15. *See* 8 C.F.R. § 1001.1(l) (2006) (defining the term "immigration judge").

16. *Id.*

17. 8 U.S.C. § 1229a(b)(4)(B) (2000).

18. *See id.* § 1229a(c)(5) (detailing the procedures for application for relief from removal); *see also id.* § 1229b (providing procedures for discretionary relief through cancellation of removal and relief for certain lawful residents and victims of domestic violence).

19. *Id.* § 1229a(c)(3)(A).

20. *Id.* § 1229a(c)(1)(A).

21. *See* 8 C.F.R. § 1003.38(a) (2006) ("Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals as authorized by 8 C.F.R. § 1003.1(b)."). If the IJ finds that the noncitizen is entitled to relief from removal, the government may also appeal this decision to the BIA. The explanation in the text assumes that the IJ's decision is to remove the noncitizen.

22. *Id.* § 1003.1(a)(1).

23. *Id.*

24. According to Department of Justice statistics, in fiscal year 2005, noncitizens appealed only 12% of IJ decisions to the BIA. U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., FY 2005 Statistical Year Book Y1 (2006) available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

25. *See* 8 C.F.R. § 1003.1(e) (2006) (explaining the case-management system whereby cases receive either three-member or one-member review).

26. *See id.* § 1003.1(e)(4) (detailing circumstances where one BIA member may summarily affirm without opinion); *see also* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56135-01

affirmance without opinion has precipitated the flood of immigration appeals in the federal courts.²⁷ If the BIA affirms the IJ's finding of removability, the noncitizen has exhausted all administrative remedies, and the only recourse available is to look to the federal courts for relief from removal.²⁸

B. Judicial Review of Removal Orders in the Federal Courts

Before 1996, noncitizens challenging removal orders had access to two means of judicial review in the federal courts: direct review in the courts of appeals and collateral review in the district courts through petitions for writ of habeas corpus. Collateral review through habeas petitions filed pursuant to 28 U.S.C. § 2241 had been used throughout history to challenge deportation orders, long before there was any statutory grant of judicial review for noncitizens.²⁹ Direct review in the courts of appeals was a newer innovation, initially prompted by the passage of the Administrative Procedure Act (APA) in 1946.³⁰ Courts were not sure whether the APA's procedures applied in the immigration context, because the Supreme Court had held in 1953 that APA review was not available for deportation decisions made under the Immigration and Nationality Act of 1917, the predecessor statute to the Immigration and Nationality Act of 1952.³¹ Two years later, the Supreme Court concluded the opposite in *Shaughnessy v. Pedreiro*, holding that the Immigration and Nationality Act of 1952 did not preclude judicial review of deportation orders under the procedures

(Oct. 18, 1999) (codified at 8 C.F.R. § 1003.1(e)(4) (2006)) (adopting a final rule to allow a one-member panel to affirm without opinion).

27. See John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3–4 (2005) (explaining how the implementation of streamlining procedures by the BIA coincided with a rise in the volume of petitions for review in the federal courts).

28. Although a noncitizen may move for the BIA to reopen the proceedings or to reconsider its decision pursuant to 8 C.F.R. § 1003.2 (2006), this Article will assume that such motions have not been made and that the BIA's decision is therefore final.

29. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 989 (1998) (providing an overview of how the article discusses the role of habeas review throughout the history of immigration law as a means of inquiring into the lawfulness of exclusion and deportation orders); see also Benson, *supra* note 1, at 1466 (“Section 2241 was the jurisdictional basis for judicial review in the earliest immigration cases and continued to be the principal method of testing the legality of immigration orders until the 1952 Act allowed declaratory judgment actions and APA review.”).

30. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

31. *Heikkila v. Barber*, 345 U.S. 229, 236 (1953) (holding that the Immigration and Nationality Act of 1917 precluded direct attack on deportation orders through the APA). The Court held that *Heikkila* could attack a deportation order only through petition for writ of habeas corpus. *Id.* at 235.

provided in the APA.³² The Court reasoned that writs of habeas corpus were not the only means of review available to a noncitizen challenging a deportation order.³³

Congress resolved the confusion surrounding the APA's applicability in the immigration context when it amended the INA in 1961 to provide that judicial review of deportation orders was to be governed by the procedures provided in the Hobbs Act.³⁴ The primary effect of this amendment was to provide for direct review of deportation orders exclusively in the courts of appeals.³⁵ The same 1961 amendments to the INA also included a statutory grant of judicial review through habeas corpus proceedings for "any alien held in custody pursuant to an order of deportation."³⁶ Thus the INA expressly granted these two avenues of judicial review of deportation orders from 1961 to 1996.³⁷

The two different forms of judicial review, habeas review and direct review, differed in both form and substance. First, petitions for habeas review were made to the district courts, while petitions for direct review were made to the courts of appeals.³⁸ Second, each forum provided a different scope of review. In the courts of appeals on direct review, review was based solely on the administrative record below from the agency, with no additional fact-finding by the reviewing court.³⁹ Review was limited to questions of law and whether the government's determinations were supported by substantial evidence.⁴⁰ In the district courts on habeas review

32. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51–52 (1955). The Court distinguished *Heikkila* because the *Heikkila* decision construed the INA of 1917, whereas *Pedreiro's* claim was under the INA of 1952. *Id.* at 50.

33. *Id.* at 52.

34. See Pub. L. No. 87-301, 75 Stat. 650, 651 (1961) *repealed by* Antiterrorism and Effective Death Penalty Act of 1996 § 401(e)(3), 110 Stat. 1214, 1268 (1996) ("The procedure prescribed by, and all the provisions of the [Hobbs Act] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation"); see also Hobbs Act, 28 U.S.C. §§ 2341–51 (2000) (providing procedures for judicial review of specific agency decisions in the courts of appeals).

35. See 28 U.S.C. § 2342 (2000) (providing exclusive jurisdiction in the courts of appeals under the Act).

36. Pub. L. No. 87-301, 75 Stat. 650, 652 (1961) (codified as amended in 8 U.S.C. § 1105a(a)(9) (1964)).

37. See discussion *infra* Part I.C (explaining how the 1996 legislation narrowed judicial review of removal orders).

38. Compare 28 U.S.C. § 2241 (2000) (providing for habeas review by district courts) with 28 U.S.C. §§ 2341–51 (2000) (providing for direct review in the courts of appeals).

39. See 8 U.S.C. § 1105a(a)(4) (1964) ("[T]he petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive").

40. See *id.*; see also 5 U.S.C. § 706(2)(E) (2000) (providing "substantial evidence" as the scope of review of agency action on the record of an agency hearing).

pursuant to 28 U.S.C. § 2241, a noncitizen could introduce additional evidence or ask the court to look at both the sufficiency and competency of the evidence.⁴¹ There is some debate as to precisely what was the scope of review for a noncitizen challenging a deportation order on writ of habeas corpus,⁴² but in general, habeas review looked into the legality of the detention by considering whether the government had properly interpreted statutory criteria for deportation and whether “some evidence” supported the deportation determination.⁴³ Habeas review also included constitutional challenges to both the immigration laws and how they were implemented procedurally.⁴⁴ These constitutional challenges included claims that petitioners had been denied procedural due process,⁴⁵ or that the immigration statutes violated petitioners’ right to free speech.⁴⁶

C. How AEDPA and IIRIRA Changed Judicial Review of Removal Orders

In 1996, through provisions in both the Antiterrorism and Effective Death Penalty Act (AEDPA)⁴⁷ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁴⁸ Congress sought to narrow the

41. See Neuman, *supra* note 29, at 1007 (citing various examples from the history of immigration law where the court was willing to reexamine the facts and competency of the evidence supporting exclusion or deportation on habeas review, such as in the Chinese exclusion cases between 1891 and 1917). Moreover, under 28 U.S.C. § 2241, the general habeas statute, petitioners have the right to present evidence orally, by deposition, or in some cases, by affidavit. 28 U.S.C. § 2246 (2000).

42. See Benson, *supra* note 1, at 1469 (“The litigation to date and the general history of habeas corpus review suggest that precision in defining the scope of habeas corpus will be unattainable.”) (internal citation omitted).

43. See Neuman, *supra* note 29, at 1020 (“The scope of [habeas] inquiry included interpretation of statutory grounds of exclusion and deportation, officials’ compliance with statutory procedures, and the subsequently recognized due process ‘some evidence’ test, as well as other constitutional issues.”) *Id.* (internal citation omitted). The requirement of “some evidence” to support deportation decisions was extended from its application in claims of citizenship to the deportation context. *Id.* at 1014.

44. See Benson, *supra* note 1, at 1469 (“Habeas corpus was clearly used to mount constitutional challenges to the substantive immigration laws and to the procedures used in implementing the statutes.”) *Id.* (internal citation omitted).

45. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 22, 32 (1982) (discussing a noncitizen’s procedural due process challenge to deprivation of a deportation hearing on habeas petition); *Yamataya v. Fisher*, 189 U.S. 86, 100, 102 (1903) (rejecting *Yamataya*’s due process challenge to deportation but concluding that deportees do retain some due process rights).

46. See, e.g., *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952) (denying petitioners habeas relief for the government’s alleged First Amendment violations in deporting petitioners because of their past membership in the Communist Party).

47. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28, and 42 U.S.C.).

48. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.).

judicial review available to noncitizens challenging removal orders. Both acts were in response to growing concerns about terrorism as well as perceived abuses of the judicial review system by noncitizens using it to delay deportation.⁴⁹ Congress wanted to make the removal process more efficient and provide fewer opportunities for appeal.

The Antiterrorism and Effective Death Penalty Act of 1996 was enacted to address terrorism concerns following the bombing of the Oklahoma City Federal Court Building in April of 1995.⁵⁰ While AEDPA included habeas corpus reform to limit the use of multiple habeas petitions to delay the enforcement of death penalty sentences,⁵¹ it also addressed terrorist and criminal noncitizen removal and expulsion.⁵² In § 401 and § 440 of AEDPA, Congress modified judicial review procedures for noncitizens challenging deportation orders. First, in § 401, Congress removed INA § 106(a)(10), which provided habeas review for any noncitizen held in custody pursuant to a deportation order.⁵³ Though this action did not necessarily preclude all habeas review, it repealed the express statutory grant of that review.⁵⁴ Second, in § 440(a) of AEDPA, Congress precluded direct review of deportation orders for criminal noncitizens in any court.⁵⁵ The specific language in AEDPA provided that “[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in [certain sections] shall not be subject to review by any court.”⁵⁶ For the first time, Congress statutorily precluded judicial review of deportation orders for an entire class of noncitizens, namely those who had committed certain enumerated crimes.⁵⁷

49. See *infra* notes 50–52 and accompanying text.

50. See Benson, *supra* note 1, at 1441 n.154 (asserting that the immigration portions of AEDPA were inspired in part by the fear that the Oklahoma City bombing was the work of foreign terrorists).

51. See AEDPA, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified as amended in scattered sections of 28 U.S.C.).

52. See *id.* §§ 401–43, 110 Stat. at 1258–81 (codified as amended in scattered sections of 8, 18 U.S.C.).

53. *Id.* § 401(e)(3), 110 Stat. at 1268 (codified as amended at 8 U.S.C. § 1105a (1994 & Supp. II 1997)). This habeas provision had been in place since 1961. See *supra* note 34 and accompanying text.

54. As discussed below in Part I.D., the Supreme Court later held in *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), that habeas jurisdiction had not been repealed for criminal noncitizens by the passage of AEDPA and IIRIRA.

55. § 440(a), 110 Stat. at 1276–77.

56. *Id.*

57. *Id.* § 440(d), 110 Stat. at 1277. Among the criminal offenses that qualified were “aggravated felonies,” an ever-growing list of offenses that made a noncitizen deportable. AEDPA modified the definition of “aggravated felony” to broaden its reach. See AEDPA § 440(e), 110 Stat. at 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43) (1994 & Supp. II)) (amending the definition of aggravated felony).

Later that session, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁵⁸ IIRIRA overhauled the procedures for judicial review of deportation and exclusion decisions.⁵⁹ This marked another attempt by Congress to streamline judicial review of immigration decisions in response to perceived abuses of the system by “illegal aliens” trying to delay expulsion from the U.S. through the court system.⁶⁰ IIRIRA extended the judicial review preclusion for criminal noncitizens to include both deportation and exclusion decisions, consolidating the two types of decisions into one “removal” category.⁶¹ The new language from IIRIRA read: “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of *removal* against an alien who is removable by reason of having committed a criminal offense covered in [certain sections].”⁶² IIRIRA also added two categories of removal decisions where direct review in the courts of appeals was expressly precluded: expedited removal orders upon entry⁶³ and discretionary decisions by the Attorney General.⁶⁴ Noncitizens are subject

58. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 28 and 42 U.S.C.).

59. This overhaul included a consolidation provision that provided noncitizens only one avenue for judicial review of any claim arising out of the removal proceedings. *See* IIRIRA § 306(a)(2), 110 Stat. at 3009-610 (codified as amended at 8 U.S.C. § 1252(b)(9) (2000)).

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

Id.

60. The legislative history illustrates Congress’s frustration with the inefficiency and inefficacy of removal procedures. *See* H.R. REP. NO. 104-469, pt. 1, at 107–08 (1996) (explaining that current removal procedures are “cumbersome and duplicative” and that IIRIRA provides a “streamlined appeal and removal process”).

61. *See generally* IIRIRA § 306, 110 Stat. at 3009-607 to 3009-612 (replacing “deportation” and “exclusion” with the new term “removal”); *see also* H.R. REP. NO. 104-879, at 108 (1997) (explaining how IIRIRA eliminated the distinction between “exclusion” and “deportation” proceedings because the distinction caused “needless litigation and procedural delay”). This change was significant because earlier precedent provided “deportable” noncitizens (who had already entered the U.S.) with more procedural due process protections than “excludable” noncitizens (who had not yet entered). *See* Benson, *supra* note 1, at 1441–42 n.157 (explaining the constitutional implications of combining “exclusion” and “deportation”).

62. IIRIRA § 306, 110 Stat. at 3009-607 to 3009-608 (codified as amended at 8 U.S.C. § 1252(a)(2)(C) (2000)) (emphasis added).

63. *See id.* § 306, 110 Stat. at 3009-607 (codified as amended at 8 U.S.C. § 1252(a)(2)(A) (2000)) (providing that no court shall have jurisdiction to review individual determinations made under 8 U.S.C. § 1225(b)(1) (2000), the expedited removal upon entry provisions).

64. *See id.* § 306, 110 Stat. at 3009-607 (codified as amended at 8 U.S.C. § 1252(a)(2)(B) (2000)) (providing that no court shall have jurisdiction to review any grant or denial of discretionary relief by the Attorney General (AG), except for granting relief under the asylum provisions). AEDPA and IIRIRA also significantly limited the AG’s ability to grant discretionary relief. For example,

to the expedited removal process upon entry when an immigration officer orders them removed for lack of proper documents or misrepresentation in seeking admission.⁶⁵ The discretionary decisions of the Attorney General include waiver of inadmissibility because of extreme hardship, cancellation of removal, voluntary departure, and adjustment of status.⁶⁶ Just like the judicial review preclusion enacted for criminal noncitizens by AEDPA, IIRIRA barred noncitizens removable through the expedited removal process or through discretionary decisions by the Attorney General from seeking direct review of their removal orders in any court.

D. The Question of Whether Habeas Jurisdiction Remained After AEDPA and IIRIRA

While AEDPA and IIRIRA significantly limited a noncitizen's access to direct judicial review in the courts of appeals, they left open the question of whether habeas review in district court was still available. AEDPA, as discussed above, had repealed the INA provision that expressly granted habeas review to noncitizens in custody pursuant to a deportation order, but in doing so had left the INA silent on the availability of habeas review in the district courts.⁶⁷ IIRIRA did not reinstate this habeas provision nor expressly preclude habeas review, and in this way it continued the INA's silence on habeas review of removal orders.⁶⁸ For noncitizens challenging removal orders, the availability of habeas review in district court was left in question by congressional silence in the INA.

More specifically, it was unclear whether the "no court shall have

§ 440(d) of AEDPA, by altering INA § 212(c), prohibited the AG from granting discretionary relief from deportation for criminal noncitizens. AEDPA § 440(d), 110 Stat. at 1277. Section 212(c) of the INA provided discretionary relief from deportation for noncitizens who, among other things, had been lawfully present for seven consecutive years. *See* INA, ch. 477, § 212(c), 66 Stat. 163, 187 (1952) (repealed 1996). IIRIRA repealed § 212(c) relief completely and replaced it with new cancellation of removal procedures that were not applicable to noncitizens convicted of an aggravated felony. *See* IIRIRA § 304(b), 110 Stat. at 3009-597 (repealing INA § 212(c)); *see also id.* § 304(a), 110 Stat. at 3009-594 (codified as amended at 8 U.S.C. § 1229b(a)) (creating cancellation of removal relief, which is only available to noncitizens not convicted of an aggravated felony).

65. 8 U.S.C. § 1225(b)(1) (2000) (providing procedures for expedited removal).

66. *See id.* § 1252(a)(2)(B) (stating that discretionary decisions for which judicial review is precluded include granting relief under § 1182(h) (waivers of inadmissibility), § 1182(i) (other waivers of removal), § 1229b (cancellation of removal), § 1229c (voluntary departure), and § 1255 (adjustment of status)).

67. 8 U.S.C. § 1105a(a)(9) (1964) (repealed 1996).

68. IIRIRA did preserve a limited habeas review for noncitizens challenging removal orders under the expedited removal provisions in INA § 235(b)(1), but that review was limited to determining whether: (a) the petitioner is an alien, (b) the petitioner was ordered removed, and (c) the petitioner can prove lawful admission by a preponderance of the evidence. IIRIRA § 306(a), 110 Stat. at 3009-610 (codified as amended at 8 U.S.C. § 1252(e)(2)).

jurisdiction to review” language as applied to criminal noncitizens, expedited removal, and discretionary decisions of the Attorney General precluded review through petitions for habeas corpus.⁶⁹ While some circuits held that this language did preclude all judicial review, including habeas review,⁷⁰ most circuits construed it to continue to allow habeas review absent an express congressional statement in INA § 242 to repeal habeas jurisdiction.⁷¹ The latter circuits were concerned that the repeal of habeas jurisdiction in such situations would present a constitutional issue and were eager to avoid that possibility absent a clear statement from Congress that it intended to repeal habeas jurisdiction.⁷² They reasoned that preclusion of habeas review in those categories of cases might present a congressional “suspension” of the writ of habeas corpus, forbidden by the Constitution “unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁷³ Courts were reluctant to read the statute in this way, preferring to avoid a potential Suspension Clause violation.⁷⁴

The Supreme Court resolved the issue in *I.N.S. v. St. Cyr* when the Court held that after AEDPA and IIRIRA, the federal courts retained jurisdiction over petitions for writ of habeas corpus filed by criminal noncitizens pursuant to 28 U.S.C. § 2241 to challenge removal orders.⁷⁵ Enrico St. Cyr was a Haitian citizen and lawful permanent resident of the

69. *Id.* at 3009-687.

70. *See, e.g.,* Max-George v. Reno, 205 F.3d 194, 198 (5th Cir. 2000), *vacated sub. nom.* Max-George v. Ashcroft, 533 U.S. 945 (2001), *remanded to* 277 F.3d 1373 (5th Cir. 2001) (holding that Congress meant to preclude all judicial review of criminal noncitizen’s removal orders, including federal habeas review, in enacting IIRIRA); Richardson v. Reno, 180 F.3d 1311, 1315 (11th Cir. 1999), *cert. denied*, 529 U.S. 1036 (2000) (same).

71. *See, e.g.,* Mahadeo v. Reno, 226 F.3d 3, 5 (1st Cir. 2000), *cert. denied*, Ashcroft v. Mahadeo, 533 U.S. 949 (2001) (holding that IIRIRA did not divest district courts of their traditional jurisdiction over habeas petitions of criminal noncitizens challenging deportation orders); Flores-Miramontes v. I.N.S., 212 F.3d 1133, 1134 (9th Cir. 2000) (same); Liang v. I.N.S., 206 F.3d 308, 323 (3d Cir. 2000), *cert. denied*, Rodriguez v. I.N.S., 533 U.S. 949 (2001) (same); Pak v. Reno, 196 F.3d 666, 673 (6th Cir. 1999) (same); Shah v. Reno, 184 F.3d 719, 724 (8th Cir. 1999) (same).

72. *See, e.g.,* Mahadeo, 226 F.3d at 10 (“[W]e are able to avoid these serious constitutional concerns because we conclude that IIRIRA’s permanent rules lack the clear statement of the congressional intent necessary to eliminate habeas review.”).

73. U.S. CONST. art. I, § 9, cl. 2.

74. *See, e.g.,* Mahadeo, 226 F.3d at 10 (“Our conclusion that IIRIRA does not repeal the availability of [28 U.S.C.] § 2241 relief in immigration cases also avoids the ‘serious, novel, and complex’ constitutional concerns raised by the elimination of aliens’ historic access to general federal habeas corpus jurisdiction when no other judicial review remains.”) (quoting *Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998)); *Liang*, 206 F.3d at 312 (“The imperative to avoid a constitutional crisis that might arise were the writ of habeas corpus effectively suspended or were there no viable means for judicial review of constitutional claims necessarily affects . . . the construction of the relevant statutory provisions.”).

75. *See* *I.N.S. v. St. Cyr*, 533 U.S. 289, 314 (2001) (“[W]e conclude that habeas jurisdiction under § 2241 was not repealed by AEDPA and IIRIRA.”).

United States who had pled guilty to a controlled substance violation in 1996 that made him removable under the INA.⁷⁶ At the time of his conviction, which was pre-AEDPA, St. Cyr would have been eligible for discretionary relief from deportation under INA § 212(c), a provision that allowed the Attorney General to grant waivers from deportation orders for lawful permanent residents based on certain criteria.⁷⁷ Since the INS did not commence removal proceedings against St. Cyr until after AEDPA and IIRIRA became effective, the Attorney General applied the 1996 amendments and found St. Cyr ineligible for § 212(c) discretionary relief because of his earlier criminal conviction.⁷⁸ St. Cyr filed a petition for writ of habeas corpus in district court, claiming that the restrictions on discretionary relief from deportation in AEDPA and IIRIRA should not apply to him since his guilty plea predated their enactment.⁷⁹ The issues before the Court were first, whether AEDPA and IIRIRA had repealed federal court jurisdiction over habeas petitions such as St. Cyr's, and second, whether St. Cyr was eligible for discretionary relief from deportation under § 212(c).⁸⁰ The Supreme Court held that federal courts retained jurisdiction under § 2241 to hear the legal issues raised in a habeas petition such as St. Cyr's, and that § 212(c) relief remained available to St. Cyr.⁸¹

The Court explained that for the government to prevail on its claim that AEDPA and IIRIRA stripped the federal courts of habeas jurisdiction for petitioners like St. Cyr, 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.”⁸² Citing its decisions in *Ex parte Yerger*⁸³ and *Felker v. Turpin*,⁸⁴ the Court stated that “[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction,” rather Congress must make a clear statutory directive to effect such a repeal.⁸⁵ In construing the specific “no court shall have jurisdiction to review” language in INA § 242, the Court noted there was no evidence of Congress's intent to preclude habeas review pursuant to 28 U.S.C. § 2241, emphasizing that

76. *Id.* at 293.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 292.

81. *Id.* at 297–98.

82. *Id.* at 298 (internal citation omitted).

83. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

84. *Felker v. Turpin*, 518 U.S. 651 (1996).

85. *St. Cyr*, 533 U.S. at 299.

there was no reference to § 2241 at all.⁸⁶ In the Court's view, this silence fell far short of a clear congressional directive to repeal habeas jurisdiction.⁸⁷

The Court found further support for its construction of INA § 242 in the avoidance canon, commenting that a construction that precluded review of St. Cyr's question of law would give rise to a constitutional question under the Suspension Clause.⁸⁸ To determine whether there would be a Suspension Clause issue, the Court considered whether St. Cyr would have another forum to address his question of law if habeas review was not available.⁸⁹ If there was no such forum, the Court reasoned, a serious Suspension Clause issue would be presented, because in effect Congress would have suspended the writ of habeas corpus for noncitizens like St. Cyr.⁹⁰ Since the statute at issue precluded direct review in the courts of appeals for criminal noncitizens, the Court concluded that there would be no forum where St. Cyr's legal question could be addressed.⁹¹ This concern, combined with the lack of clear congressional intent to preclude habeas review, led the Court to hold that AEDPA and IIRIRA did not repeal habeas jurisdiction under § 2241.⁹² The Court's decision left habeas review in the district courts available to criminal noncitizens challenging removal orders.⁹³

E. The REAL ID Act of 2005: Congress's Response to St. Cyr

Congress responded to the *St. Cyr* decision by enacting a number of amendments to the judicial review provisions of the INA in the REAL ID Act of 2005 (REAL ID).⁹⁴ Notably, in the section of the INA precluding

86. *Id.* at 312.

87. *Id.* at 312–13.

88. *Id.* at 300.

89. *Id.* at 314.

90. *Id.* at 305.

91. *Id.* at 314.

92. *Id.*

93. The federal circuits were split on whether habeas petitions in the district court were also available to non-criminal noncitizens after *St. Cyr*. Compare *Riley v. I.N.S.*, 310 F.3d 1253, 1256 (10th Cir. 2002) (agreeing with the Second and Third Circuits that the federal courts retain § 2241 habeas jurisdiction over petitions from criminal and non-criminal aliens), and *Liu v. I.N.S.*, 293 F.3d 36, 40 (2d Cir. 2002), *opinion amended and superseded by* 2003 WL 1872710 (S.D.N.Y.) (2003) (holding Congress preserved right to habeas review for both criminal and non-criminal aliens), and *Chmakov v. I.N.S.*, 266 F.3d 210, 215 (3d Cir. 2001) (holding Congress preserved right to habeas review for both criminal and non-criminal aliens), with *Lee v. Gonzales*, 410 F.3d 778, 785–86 (5th Cir. 2005) (affirming the district court's lack of jurisdiction over a habeas petition by a non-criminal noncitizen because he should have filed a petition for review in the court of appeals).

94. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (2005) (to be codified in

judicial review of certain removal decisions, the language was amended to also expressly preclude habeas review under 28 U.S.C. § 2241 or any other habeas statute.⁹⁵ These amendments were in direct response to the *St. Cyr* decision, which Congress felt produced the perverse result of affording criminal noncitizens review in two judicial forums, a habeas corpus petition in district court and an appeal of that decision in the court of appeals, while non-criminal noncitizens generally had access to review only in the courts of appeals.⁹⁶ REAL ID channeled habeas petitions like *St. Cyr*'s to the courts of appeals, now the only available forum for judicial review of removal orders for any noncitizen.⁹⁷ REAL ID also transformed such habeas petitions into "petitions for review," making them subject to the procedures provided in INA § 242.⁹⁸

In REAL ID, Congress for the first time statutorily precluded noncitizens from filing petitions for writ of habeas corpus to challenge removal orders. On its face, this preclusion would appear to be an unconstitutional suspension of the writ of habeas corpus, forbidden except in times of rebellion or invasion by Article I, § 9, clause 2 of the Constitution. However, Congress was aware that if it followed the Supreme Court's directive in *Swain v. Pressley*, it could substitute another remedy and avoid a Suspension Clause violation; in *Swain*, the Supreme Court held that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."⁹⁹ The Court in *Swain* found no Suspension Clause violation where a District of Columbia Code provision prohibited a prisoner from filing a habeas petition but provided alternate procedures for collateral review of convictions in the Superior Court of the District of Columbia.¹⁰⁰

various titles of the U.S.C.).

95. *See id.* § 106(a), 119 Stat. at 310–11 (to be codified at 8 U.S.C. § 1252) (providing that habeas review under 28 U.S.C. § 2241 or any other habeas statute is not available in judicial review of expedited removal decisions, removal of criminal noncitizens, and discretionary decisions by the Attorney General).

96. *See* H.R. REP. NO. 109-72 at 174 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 240, 299 (Conf. Rep.) ("Criminal aliens thus can obtain review in two judicial forums, whereas non-criminal aliens may generally seek review only in the courts of appeals. Not only is this result unfair and illogical, but it also wastes scarce judicial and executive resources."). As noted above, the circuits were split on whether non-criminal noncitizens had access to habeas review in the district courts after *St. Cyr*. *Supra* note 93.

97. *See* REAL ID Act of 2005 § 106(c), 119 Stat. at 311 (providing that any pending habeas petitions in the district court be transferred to the court of appeals for the circuit where a petition for review could have been filed).

98. *Id.*

99. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

100. *Id.* at 384.

In drafting the amendments enacted by REAL ID, Congress made sure to include a provision stating that nothing in INA § 242 limiting or precluding judicial review should be read to preclude review of “constitutional claims or questions of law.”¹⁰¹ Apparently, Congress intended this provision to permit judicial review in the courts of appeals over issues that were historically reviewable on habeas petitions, namely constitutional and statutory construction questions, to avoid a Suspension Clause issue.¹⁰² In Congress’s opinion, review of constitutional and statutory construction claims in the courts of appeals would provide an “adequate and effective substitute” for petitions for writ of habeas corpus filed in the district courts.¹⁰³

What Congress failed to recognize is that the procedures afforded in district court on a habeas petition differed dramatically from those in a court of appeals on a petition for review. Under the current legislation, noncitizens are prevented from submitting newly discovered evidence upon judicial review of their removal orders. Direct review in the court of appeals is limited to the administrative record below,¹⁰⁴ and the court may not remand to the agency to collect newly discovered evidence.¹⁰⁵ As a result, the courts of appeals will be bound by the administrative record to affirm the agency’s decision, unable to consider new probative evidence upon petitions for review.

II. PETITIONS FOR REVIEW IN THE COURTS OF APPEALS ARE NOT AN “ADEQUATE AND EFFECTIVE” SUBSTITUTE FOR HABEAS REVIEW IN THE DISTRICT COURTS

Congress attempted to follow the Supreme Court’s directive that it provide an adequate and effective substitute for habeas corpus when it repealed in REAL ID the right of noncitizens to petition for writ of habeas corpus. To determine whether Congress succeeded in providing an

101. REAL ID § 106(a)(1)(A)(iii), 119 Stat. at 310 (to be codified at 8 U.S.C. § 1252(a)(2)(D)).

102. See H.R. REP. NO. 109-72 at 175 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 300 (Conf. Rep.) (“The purpose of section 106(a)(1)(A)(iii) is to permit judicial review over those issues that were historically reviewable on habeas”); see also *id.* at 299 (“Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of criminal aliens’ removal orders, section 106 would give every alien one day in the court of appeals, satisfying constitutional concerns.”).

103. See *id.* at 299–300 (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)) (“The Supreme Court has held that in supplanting the writ of habeas corpus with an alternative scheme, Congress need only provide a scheme which is an ‘adequate and effective’ substitute for habeas corpus.”).

104. See 8 U.S.C. § 1252(b)(4)(A) (2000) (providing that the court of appeals shall decide the petition for review “only on the administrative record on which the order of removal is based”).

105. See *id.* § 1252(a)(1) (excepting Hobbs Act § 2347(c) from the INA, which would have allowed the court of appeals to remand to the agency to order the taking of additional evidence).

adequate and effective substitute in the courts of appeals requires a careful examination of how these two modes of review differ. This Part explains how the district courts considered new evidence on habeas petitions and demonstrates that, in contrast, the courts of appeals on petitions for review may not consider such new evidence. To show how this procedural difference will lead to unconstitutional results, Part II.C includes a discussion of noncitizens' claims for relief under the Convention Against Torture (CAT).¹⁰⁶ These claims provide an example of where the need to be able to present newly discovered evidence of changed country conditions upon judicial review is particularly acute. It is in these types of cases where Congress has in effect suspended the writ of habeas corpus in violation of the Constitution.

In *Swain v. Pressley*, the Supreme Court held that so long as Congress provided an "adequate and effective" substitute for the writ of habeas corpus to test the legality of a person's detention, there would be no violation of the Suspension Clause.¹⁰⁷ Although the Suspension Clause forbids Congress from suspending the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it,"¹⁰⁸ the message from *Swain* is that Congress may provide review that is functionally equivalent to the writ of habeas corpus without presenting a constitutional violation.¹⁰⁹ Congress had these guidelines in mind when it drafted the provisions governing judicial review of removal orders in REAL ID.¹¹⁰ After expressly withdrawing district court jurisdiction over petitions for writ of habeas corpus to challenge removal orders,¹¹¹ Congress added

106. In 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999). Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA) to give effect to CAT in 1998. Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822-23 (1998) (codified as a note to 8 U.S.C. § 1231).

107. *Swain v. Pressley*, 430 U.S. 372, 381 (1977). As discussed above, *Swain* involved a challenge to a District of Columbia Code provision that prohibited a federal district court from entertaining a petition for writ of habeas corpus where an applicant had not exhausted the new collateral remedy provision that provided similar review in District of Columbia Superior Court. The Supreme Court found no Suspension Clause violation because the new collateral remedy was "neither inadequate nor ineffective to test the legality of a person's detention." *Id.*

108. U.S. CONST. art. I, § 9, cl. 2.

109. *Swain*, 430 U.S. at 380. "Functionally equivalent" is this Article's language and not the Court's. In *Swain*, the government argued that the D.C. Code remedy was "exactly commensurate" with pre-existing habeas corpus relief. *Id.* (citing *Hill v. United States*, 368 U.S. 424, 427 (1962)). The *Swain* Court would not go so far as to say that the D.C. Code was "exactly commensurate" with existing habeas relief, adopting instead the "adequate and effective" substitute language. *Id.* at 381.

110. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106, 119 Stat. 302, 310-11 (2005) (to be codified at 8 U.S.C. § 1252).

111. *See id.* § 106(a) 119 Stat. at 310-11 (providing that a petition for review in the courts of

the following language to § 242 of the INA:

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.¹¹²

The conference committee report accompanying REAL ID explained that this subsection was meant to “permit judicial review over those issues that were historically reviewable on habeas” to ensure compliance with the Supreme Court’s holding in *Swain*.¹¹³

While the scope of reviewable issues enumerated by REAL ID may arguably be constitutionally permissible,¹¹⁴ petitions for review in the courts of appeals do not provide an “adequate and effective” substitute to habeas petitions in some cases because the courts of appeals are unable to consider new evidence in the way that district courts could in reviewing noncitizens’ habeas corpus petitions. This seemingly innocuous procedural difference does not just mean a different forum to review the same claims. Rather, it means that noncitizens who would have been entitled to present new evidence to the district court on habeas review are now foreclosed from that opportunity in the court of appeals. This rights stripping¹¹⁵ is particularly problematic in judicial review of claims for relief under

appeals is the exclusive means of review of a removal order and precluding all other types of judicial review including review pursuant to 28 U.S.C. § 2241 or any other habeas corpus provision).

112. *Id.* § 106(a)(1)(A)(iii), 119 Stat. at 310.

113. H.R. REP. NO. 109-72 at 175 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 300 (Conf. Rep.).

114. This issue in itself is the subject of enormous debate and is beyond the scope of this Article. There is considerable discourse as to what type of issues have been historically reviewable on habeas petitions challenging removal orders. See Neuman, *supra* note 29, at 990–94 (discussing the historical bases of the constitutionally required minimum inquiry of habeas petitions challenging executive detention pending deportation). Most scholars agree that “precision in defining the scope of habeas corpus will be unattainable.” Benson, *supra* note 1, at 1469. Thus, determining the constitutionally permissible scope of habeas review is equally elusive. See, e.g., Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1101–02 (1998) (arguing that the constitutionally necessary scope of habeas review must weigh the liberty interests of immigrants against the costs of judicial review).

115. Chief Judge William G. Young discussed the term “rights stripping” in *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 78–79 (D. Mass. 2005), discussed in the text below. He explained that it occurs because “Congress, by adjusting the jurisdiction of the lower federal courts, can effectively strip disfavored classes from full access to justice and thereby restrict, if not extinguish, cherished individual rights and liberties.” *Id.* Judge Young was defining rights stripping in the context of the REAL ID Act’s repeal of habeas jurisdiction in the district courts. *Id.*

CAT.¹¹⁶ In reviewing CAT claims, the inability to present new evidence—for example, evidence of changed conditions within a country—means that a noncitizen will not be able to meet the evidentiary burden to obtain potentially deserved relief from removal.

A. Procedures Afforded Noncitizens on Habeas Petitions in the District Courts

Before REAL ID, noncitizens were able to bring petitions for writ of habeas corpus in the district court to challenge their removal orders.¹¹⁷ Habeas petitions in district court were filed pursuant to 28 U.S.C. § 2241, the general habeas statute.¹¹⁸ In these petitions, noncitizens could present evidence to the district court through a variety of means.¹¹⁹ The case law illustrates how this right played out in the courts. By establishing that noncitizens had the right to present new evidence on habeas review, this section sets the stage for what procedures Congress must provide in the courts of appeals to meet the “adequate and effective” substitute standard articulated in *Swain*.

Under the general habeas statute, Congress gives the district courts significant fact-finding powers, including the ability to both review and take new evidence.¹²⁰ In the habeas petition itself, the applicant may allege the facts concerning his or her commitment or detention pursuant to 28 U.S.C. § 2242.¹²¹ There are no limitations in the plain language of § 2242 as to what facts the applicant may or may not allege.¹²² Section 2243 enables the court to hold a hearing on the petition where the applicant may deny any facts set forth by the government or allege any other material facts.¹²³ Other language in the same section states that “[t]he court shall

116. In 1994, the United States ratified the United Nations Convention Against Torture. *Supra* note 106. Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, 507). Congress passed the Foreign Affairs Reform and Restructuring Act (FARRA) of 1998 to give effect to CAT. Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822-23 (1998) (codified as a note to 8 U.S.C. § 1231).

117. *See* *I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001) (finding that district court jurisdiction under 28 U.S.C. § 2241 to review challenges to removal orders has been historically available to noncitizens).

118. *Id.*

119. *See* 28 U.S.C. § 2246-47 (2000) (allowing evidence to be taken upon petition for writ of habeas corpus orally, by deposition, by document, or by affidavit).

120. *Id.*

121. *Id.* § 2242 (“[The application] shall allege the facts concerning the applicant’s commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.”).

122. *Id.*

123. *Id.* § 2243 (“When the writ or order is returned a day shall be set for hearing The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege

summarily hear and determine the facts, and dispose of the matter as law and justice require.”¹²⁴ The statute gives the district court the power to find the facts, without limitation, on petitions for writs of habeas corpus.

Sections 2246 and 2247 also support this assertion by indicating what types of evidence are admissible. Section 2246 allows evidence to be taken orally, by deposition, or, in the judge’s discretion, by affidavit.¹²⁵ Section 2247 governs admission of documentary evidence such as transcripts of proceedings or oral testimony.¹²⁶ Congress would not have provided these guidelines if it did not want the district court to be able to find facts and review evidence on petitions filed pursuant to § 2241.

The following discussion shows several examples of how district courts exercised their fact-finding capabilities to review noncitizens’ removal orders pursuant to 28 U.S.C. § 2241. The courts conducted evidentiary hearings, allowed parties to submit new evidence, and reviewed facts potentially alleged for the first time in the habeas petition and supporting materials. Looking closely at these cases, it is clear that the district courts enjoyed broad discretion in considering new facts and evidence. This discretion to consider new evidence establishes the baseline for what Congress must provide if it chooses to repeal habeas review in district court for noncitizens challenging removal orders.

District courts reviewing removal orders hold evidentiary hearings pursuant to 28 U.S.C. § 2243.¹²⁷ In what is now a noted case discussing how REAL ID strips the district courts of habeas jurisdiction and the constitutional implications of that rights stripping, Judge Young, in the District of Massachusetts, conducted an extensive evidentiary hearing upon a noncitizen’s habeas petition.¹²⁸ Frank Enwonwu, a Nigerian citizen, filed a petition for writ of habeas corpus in the district court on March 17, 2005, asserting that the Board of Immigration Appeals (BIA) violated both his procedural and substantive due process rights.¹²⁹ Almost twenty years earlier, in 1986, Enwonwu tried to smuggle five ounces of heroin into the

any other material facts.”).

124. *Id.*

125. *Id.* § 2246 (“On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit.”).

126. *Id.* § 2247 (“On application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or on behalf of the same petitioner, shall be admissible in evidence.”).

127. *See id.* § 2243 (requiring the court to set a date for a hearing where the applicant may “deny any of the facts set forth in the return or allege any other material facts”).

128. *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 43 (D. Mass. 2005).

129. *Id.* at 56–57.

United States for a Nigerian military officer.¹³⁰ After agreeing to cooperate with the Drug Enforcement Administration (DEA) to help apprehend the Nigerian military drug traffickers, Enwonwu claimed the government promised that he would not be prosecuted and that he would be protected in exchange for his assistance.¹³¹ Enwonwu cooperated with both the DEA and the INS as an informant for many years, and the INS ultimately issued him a work authorization to stay in the United States and work as a taxi driver.¹³² Years later, after the passage of AEDPA and IIRIRA, the INS arrested Enwonwu and placed him in removal proceedings for his earlier drug offense.¹³³ The IJ found that Enwonwu was entitled to relief from removal under CAT because it was “more likely than not” that Enwonwu would be subjected to torture if returned to Nigeria.¹³⁴ Unbeknownst to Enwonwu, the BIA reversed the IJ’s decision upon the INS’s appeal.¹³⁵ In his habeas petition, Enwonwu claimed that the BIA had denied him procedural due process by failing to give him notice of the INS’s appeal of the IJ’s decision.¹³⁶ He also argued that the removal order violated his substantive due process rights, because returning him to Nigeria would subject him to a state-created danger.¹³⁷

In the face of such a long, complicated, and disputed record, Judge Young held a full evidentiary hearing.¹³⁸ He issued his findings of fact in the written opinion,¹³⁹ and these factual findings formed the basis of his recommendation that the case be remanded to the BIA for reconsideration of Enwonwu’s CAT claim, that the habeas petition be granted on substantive due process grounds as the government had exposed Enwonwu to a state-created danger, and that Enwonwu be released at once.¹⁴⁰

Because REAL ID became effective on May 11, 2005 and ordered the transfer of all pending habeas petitions to the courts of appeals,¹⁴¹ Judge Young was required to grant the government’s motion to transfer the case

130. *Id.* at 43.

131. *Id.* at 59.

132. *Id.* at 48.

133. *Id.* at 49.

134. *Id.* at 54; *see infra* Part II.C for a discussion of relief from removal under the Convention Against Torture.

135. *Id.* at 55–56.

136. *Id.* at 56.

137. *Id.* at 57. The state-created danger doctrine instructs that there is a constitutional right to protection for an individual where the state created the risk faced by that individual. *Id.* at 66–67 (citing *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989)).

138. *Id.* at 43.

139. *See id.* at 58–59 (explaining the court’s findings of fact).

140. *Id.* at 85.

141. *See supra* notes 94–98 and accompanying text (discussing the REAL ID Act’s effect on habeas review).

to the First Circuit Court of Appeals.¹⁴² He did so reluctantly, expounding at length upon the constitutional and practical importance of retaining habeas review of removal orders in the district courts.¹⁴³ In particular, he emphasized that petitioners like Enwonwu “are now without the benefit of the district courts’ experience in conducting searching evidentiary hearings and listening to their first-hand narratives.”¹⁴⁴ He went on to discuss the limitations of review in the courts of appeals, courts he characterized as “judicial bodies more accustomed to reviewing cold records for legal error than hearing testimony and evaluating evidence.”¹⁴⁵

A similar concern about the transfer of review of removal orders to the courts of appeals was echoed in *Wahab v. United States Attorney General*, where Judge Dalzell transferred a noncitizen’s habeas petition to the Third Circuit pursuant to REAL ID.¹⁴⁶ In discussing the pending transfer to the Third Circuit, Judge Dalzell invoked the Supreme Court’s requirement in *Swain* that a new collateral remedy for the writ of habeas corpus must be an “adequate and effective substitute.”¹⁴⁷ He wrote that petitions for review in the courts of appeals may be inadequate as a substitute for habeas review in the district courts because noncitizens would be barred from receiving an evidentiary hearing that they were previously entitled to under 28 U.S.C. § 2243.¹⁴⁸ He emphasized that REAL ID’s transfer of habeas petitions to the courts of appeals “deprives aliens of the ability to present evidence at a hearing.”¹⁴⁹

District courts sitting in habeas jurisdiction also allowed petitioners to submit new or additional evidence. In some cases, this evidence had significant bearing on the ultimate outcome of the case. In *Mohamed v. Tebrake*, a district court judge reviewed a noncitizen’s involuntary commitment order that was not considered by the agency.¹⁵⁰ The judge found that the IJ had erred in failing to hold a competency hearing,

142. *Enwonwu*, 376 F. Supp. 2d at 85.

143. *Id.* at 78–81.

144. *Id.* at 83. Though Judge Young did not address the issue, it is clear from the language of the INA that such evidentiary hearings are beyond the procedural scope of what is allowed in the courts of appeals.

145. *Id.* (internal quotation marks omitted).

146. *Wahab v. United States Att’y Gen.*, 373 F. Supp. 2d 524, 524–26 (E.D. Pa. 2005).

147. *Id.* at 525 (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

148. *See id.* (stating that § 2243 allowed noncitizens to present evidence at an evidentiary hearing and enabled judges to make factual findings).

149. *Id.*

150. *Mohamed v. Tebrake*, 371 F. Supp. 2d 1043, 1048 (D. Minn. 2005). *See also* Thomas Hutchins, *Mohamed v. Tebrake: A Case Study on the Mentally Ill in Removal Proceedings, and an Example of How REAL ID Violates the Suspension Clause*, 82 INTERP. REL. 1297, 1297 n.6 (Aug. 15, 2005) (explaining that Judge Doty considered the involuntary commitment order that established Mohamed was mentally ill, a document put into evidence for Judge Doty’s de novo review of the case).

requested that the BIA vacate the removal order, and remanded to the IJ for a de novo hearing.¹⁵¹ Mohamed's habeas petition alleged that he was denied due process when the IJ failed to hold a competency hearing in spite of evidence presented suggesting such a hearing was necessary.¹⁵²

In *Le v. Greene*, a district court judge allowed both the noncitizen habeas petitioner and the government to submit letters to support their arguments.¹⁵³ This evidence, not submitted to the agency below, strengthened the noncitizen's case for relief from removal.¹⁵⁴ Dan Quoc Le, who had been found removable to Vietnam based on a robbery conviction, asked if he could submit letters from family and documentation of an employment offer to support his request for release.¹⁵⁵ The government likewise offered to submit materials to support its argument that Le was a danger to the community.¹⁵⁶ The additional submissions from both parties totaled several hundred pages, which the judge carefully reviewed before making his decision.¹⁵⁷ The judge decided to grant the petition because the government failed to show that Le was a risk to the community, and Le succeeded in showing strong family ties in Colorado.¹⁵⁸ It is clear from the opinion that the letters Le submitted from his family had a significant bearing on the judge's decision to grant the petition.¹⁵⁹

In other cases, judges reviewed the facts as taken from the petition and accompanying materials, rather than exclusively from the administrative record.¹⁶⁰ At the least, these cases show that noncitizens had the opportunity to allege facts, possibly for the first time in the habeas petition, consistent with the dictates of 28 U.S.C. § 2242. At the most, they exemplify the district court's ability to review facts and evidence from

151. *Mohamed*, 371 F. Supp. 2d at 1048–49. The government moved to transfer the case to the Eighth Circuit pursuant to the REAL ID Act. A month later in June, 2005, Judge Doty granted the motion in an order without opinion. See Hutchins, *supra* note 150, at 1298.

152. *Mohamed*, 371 F. Supp. 2d at 1045. Mohamed had been adjudged incompetent to stand trial in his criminal case. *Id.*

153. *Le v. Greene*, 84 F. Supp. 2d 1168, 1171 (D. Colo. 2000).

154. *Id.* at 1175.

155. *Id.* at 1171.

156. *Id.*

157. *Id.*

158. *Id.* at 1175.

159. See *id.* (“[T]he evidence presented shows Le enjoys strong family ties here in Denver that militate against any [finding of flight risk]. Under these circumstances, Le must be released.”).

160. See, e.g., *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 425 (M.D. Pa. 2004) (citing all facts to the habeas petition and accompanying exhibits, and crediting petitioner's claim that he is Palestinian, as alleged in the petition); *Bamba v. Elwood*, 252 F. Supp. 2d 195, 196 (E.D. Pa. 2003) (stating that the facts are taken from the exhibits attached to the petition and from the public record); *Diaz v. McElroy*, 134 F. Supp. 2d 315, 320 (S.D.N.Y. 2001) (citing all facts to the petition and accompanying exhibits and reviewing evidence of medical condition not in the administrative record).

outside the administrative record compiled by the agency below.

Both the statutes and the case law make clear that noncitizens were afforded the opportunity to present new evidence, either through a hearing or by submitting documents, upon petitions for writ of habeas corpus challenging removal orders in the district courts before the passage of REAL ID. The existence and exercise of this right are supported by both the dictates of the general habeas statute and district court precedent. As discussed below, the courts of appeals do not allow for the submission of new evidence upon petitions for review. By repealing a noncitizen's access to habeas review in the district courts, Congress has prevented noncitizens from presenting any new evidence upon judicial review of the agency's decision to remove them.

B. Procedures Afforded Noncitizens on Petitions for Review in the Courts of Appeals

Under *Swain v. Pressley*, if Congress rescinds access to the writ of habeas corpus, it must provide an "adequate and effective" substitute.¹⁶¹ The preceding section established that noncitizens had the right, before REAL ID, to submit new evidence upon habeas petitions in district court. An adequate substitute, then, must include a similar right to submit new evidence. This section will show that in petitions for review in the courts of appeals, Congress has deprived the courts of the ability to consider new evidence by forcing them to decide the petition only upon the administrative record and by taking away their ability to remand to the agency to collect new evidence. Congress has simultaneously taken away habeas review and prohibited the courts of appeals from reviewing any new evidence upon petitions for review.

Looking first at the statutes involved, it is clear that Congress does not want the courts of appeals to review, or order the taking of, new evidence upon petitions for review of removal orders. The INA provides: "Judicial review of a final order of removal . . . is governed only by chapter 158 of Title 28 [the Hobbs Act], except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title."¹⁶² On petitions for review of removal orders, the courts of appeals must look to both the Hobbs Act, excluding § 2347(c), and the procedures provided in INA § 242(b). The main thrust of the Hobbs Act is that petitions are to be heard exclusively in

161. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

162. 8 U.S.C. § 1252(a)(1) (2000).

the courts of appeals.¹⁶³ Significantly, Congress excluded from the INA the section of the Hobbs Act that would allow the courts of appeals to order the taking of additional evidence in the agency.¹⁶⁴ Congress took this power away from the courts of appeals in amendments to INA § 242 enacted by IIRIRA in 1996.¹⁶⁵ The courts' inability to review new evidence is reinforced by INA § 242(b), which requires the courts to decide petitions "only on the administrative record on which the order of removal is based."¹⁶⁶ The same section instructs that the facts found at the administrative level are conclusive "unless any reasonable adjudicator would be compelled to conclude to the contrary."¹⁶⁷ The plain language of the INA dictates that a court of appeals may not go outside the administrative record in reviewing the removal order and must view the facts with great deference to the agency's findings.¹⁶⁸ A noncitizen has no opportunity to present to the court of appeals new evidence that may have been discovered in the intervening time between the agency's decision and the petition for review.

The case law shows how these restrictions prevent the courts of appeals from engaging, on habeas petitions, in the sort of review in which district courts engaged. The circuits have consistently interpreted INA § 242(b)¹⁶⁹ to preclude them from considering new evidence upon petitions

163. *See id.* (providing exclusive jurisdiction in the court of appeals).

164. *See* 28 U.S.C. § 2347(c) (2000) (allowing the court to order the agency to take additional evidence under certain conditions).

165. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306(a), 110 Stat. 3009-546, 3009-607 (1996) (codified as amended at 8 U.S.C. § 1252(a)(1) (2000)); *see also infra* Part III.D (discussing cases where, pre-IIRIRA, courts of appeals remanded to the agency pursuant to § 2347(c) for the taking of new evidence). At least one circuit court judge has noticed the absence of § 2347(c) and the limitations that it puts on the courts of appeals in the face of new evidence. *See* *Jasem v. U.S. Att'y Gen.*, 157 F. App'x 153, 159 (11th Cir. 2005) (noting that before IIRIRA, the court could remand immigration cases to the BIA or the IJ to consider new evidence pursuant to 28 U.S.C. § 2347(c), and concluding that now there is no means for the court to "find, or consider, facts not raised in the administrative forum.").

166. 8 U.S.C. § 1252(b)(4)(A) (2000). This limitation does not apply to nationality claims, where, if the court of appeals finds a genuine issue of material fact regarding the claim, it must transfer the petition to a district court for a new hearing. *Id.* § 1252(b)(5)(B).

167. *Id.* § 1252(b)(4)(B).

168. The level of deference given to the agency's findings of fact on habeas review in district court is an open question and is beyond the scope of this Article. *See* Neuman, *supra* note 29, at 986-87 (discussing the ambiguities around what fact-finding authority the courts had in habeas practice historically). It is clear that district courts were able to consider new evidence on habeas review. *See supra* Part II.A. In contrast, in the courts of appeals upon petitions for review, the statute requires the court to treat the administrative findings of fact with great deference and does not allow for the submission of new evidence. *See* *Enwonwu v. Chertoff*, 376 F.Supp. 2d 42, 83 (D. Mass. 2005) (discussing the limitations placed upon courts of appeals regarding petitions for review).

169. *See* 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based.").

for review, despite the sometimes difficult consequences that preclusion may engender.¹⁷⁰ The inability to consider new evidence forces the courts of appeals to summarily affirm the agency's decision, whereas if the new evidence had been considered, the noncitizen might have been able to meet the required evidentiary burden for relief. In *Gebremaria v. Ashcroft*, the Eighth Circuit affirmed the IJ's decision to deny asylum and refused to grant a motion to supplement the record.¹⁷¹ Gebremaria sought review of the BIA's denial of her motion to reopen her case, arguing that because of her HIV-positive status, she would die if removed to Ethiopia.¹⁷² She also alleged that her husband had disappeared in Ethiopia, and her family thought he had been killed.¹⁷³ To support the claim of her husband's disappearance, she asked the court to review a new affidavit submitted by a family member.¹⁷⁴ The court refused to consider non-record evidence submitted for the first time on appeal and went on to find her ineligible for asylum based on a lack of evidence.¹⁷⁵ This case shows how the inability to consider any new evidence forces the courts of appeals to be bound by the administrative record to affirm the agency's denial of relief.

The courts have also recognized that being limited to the administrative record can produce unfortunate results, as it can force them to affirm the decision below despite considerations of equity or practicality. In *Yadegar-Sargis v. I.N.S.*, the Seventh Circuit refused to consider facts presented by Yadegar-Sargis's counsel at oral argument that were not part of the administrative record.¹⁷⁶ Yadegar-Sargis challenged the BIA's denial of her application for asylum because of religious persecution as an Armenian Christian in Iran.¹⁷⁷ While the court was bound by the record to affirm the BIA's denial of asylum, it was sympathetic to her plight as a seventy-one-

170. See, e.g., *Najjar v. Ashcroft*, 257 F.3d 1262, 1278 (11th Cir. 2001) (construing INA § 242(b) and stating that "we cannot engage in fact-finding on appeal, nor may we weigh evidence that was not previously considered below").

171. *Gebremaria v. Ashcroft*, 378 F.3d 734, 740 (8th Cir. 2004).

172. *Id.* at 736. A noncitizen may make a motion to reopen the removal proceedings at the agency level based on the existence of material facts that were not available at the time of the removal hearing. The motion must state the new material facts and provide supporting evidence. 8 C.F.R. § 1003.2(c) (2006).

173. *Gebremaria*, 378 F.3d at 736.

174. *Id.*

175. *Id.* at 740.

176. *Yadegar-Sargis v. I.N.S.*, 297 F.3d 596, 598–99 n.1 (7th Cir. 2002).

During oral argument before this court, counsel for Ms. Sargis recounted additional facts that, upon study of the administrative record, we find not to have been part of the administrative record. . . . [W]e are bound by the administrative record and cannot consider matters not before the IJ or the BIA.

Id.

177. *Id.* at 598–99.

year-old woman with apparently no close relatives living in Iran when it stated:

Although we are bound by the record to sustain the Board's determination that Ms. Sargis will not be subject to persecution on the basis of her religion or social group, the practical reality is that, given her age and her attempt to remain in the United States, she cannot expect a warm welcome or a very easy life. . . . [T]he INS must bear significant responsibility for the situation. To the extent that there exist further steps that may permit this applicant to avoid these difficulties, it is, we respectfully suggest, the responsibility of immigration officials to give them very serious consideration.¹⁷⁸

The INA forcefully binds the courts of appeals to the administrative record and requires them to render decisions only upon that record. While the district courts regularly engaged in evidentiary hearings and allowed noncitizens to submit new evidence upon petitions for writ of habeas corpus, the courts of appeals have not allowed and do not allow for such evidentiary review. The difference between the two methods of review is stark: on the one hand, habeas petitions in the district courts allowed for a fresh look at the detention and removal order, whereas petitions for review in the courts of appeals allow only for a second deferential look at the same record that was before the agency, without any possibility of updating the record to account for newly discovered evidence. Such a limited review in the courts of appeals does not suffice as an "adequate and effective substitute" for habeas review in situations where newly discovered evidence could have significant bearing upon the question of whether the noncitizen is eligible for relief from removal.

C. Claims for Relief Under the Convention Against Torture

The inadequacy of petitions for review in the courts of appeals as a substitute for habeas petitions in the district courts comes into sharp focus where relief has been denied under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁷⁹ Because the standard for relief from removal under CAT is solely reliant upon the sufficiency of the evidence related to torture,¹⁸⁰ the inability of the

178. *Id.* at 606.

179. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988) 1465 U.N.T.S. 113 [hereinafter CAT].

180. *Id.* at 114.

courts of appeals to admit new evidence turns the reviewing court into a rubberstamping one. The court's hands are similarly tied when it comes to bringing the administrative record up to date when country conditions have changed since the BIA's decision to deny relief.¹⁸¹ The result is that noncitizens whose evidence would have been reviewed in the district courts on habeas petitions will be foreclosed from the opportunity to have that evidence heard in the courts of appeals.

1. Background on CAT

The United States signed onto CAT in 1994¹⁸² and incorporated it into federal law through the Foreign Affairs Reform and Restructuring Act (FARRA) in 1998.¹⁸³ Article 3 of CAT provides that: "No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."¹⁸⁴ FARRA incorporated this mandate into federal law by providing:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.¹⁸⁵

The implementing regulations for immigration law purposes created two forms of relief from removal pursuant to CAT: withholding of removal¹⁸⁶ and deferral of removal.¹⁸⁷ Both types of relief only prevent the

181. *See Berishaj v. Ashcroft*, 378 F.3d 314, 317 (3d Cir. 2004) (lamenting the disturbing trend of requiring courts to base their review on outdated country conditions). *See also infra* Part II.C.3.

182. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (explaining that "[o]bligations under the Convention Against Torture have been in effect for the United States since November 20, 1994").

183. Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822-23 (1998) (codified as a note to 8 U.S.C. § 1231).

184. CAT, *supra* note 179, at 114.

185. FARRA, Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-761, 2681-822 (1998) (codified as a note to 8 U.S.C. § 1231).

186. 8 C.F.R. § 208.16 (2006). Withholding of removal allows a noncitizen to stay in the United States and annually apply for employment authorization. *See id.* § 208.22 (providing that a noncitizen who is granted withholding of removal may not be removed to the country determined by the IJ). Once granted withholding of removal, the noncitizen may apply for employment authorization. *Id.* § 208.7.

187. *Id.* § 208.17. Deferral of removal delays removal until deferral is terminated but does not

government from removing the noncitizen to the country where he or she would be subjected to torture; a noncitizen granted relief under CAT can still be removed to a third country.¹⁸⁸

For either form of CAT relief, the applicant must prove that it is “more likely than not” that he or she would be tortured if removed to the proposed removal country.¹⁸⁹ To meet this burden of proof, the applicant can submit evidence of past torture, evidence of human rights violations within the country of removal, and other relevant information about conditions in the country of removal.¹⁹⁰ An applicant can also present his or her own testimony, which, if credible, may be enough to sustain the burden of proof without any additional evidence.¹⁹¹

If the applicant is able to show that it is “more likely than not” that he or she will be tortured if removed to the country of removal, then relief is mandatory.¹⁹² This has significance for judicial review in the federal courts because it means that relief under CAT is not discretionary relief. If it was considered discretionary relief, then the IJ’s or BIA’s decision to grant or deny such relief would not be reviewable in the courts of appeals because INA § 242(a)(2)(B) prohibits judicial review of discretionary decisions.¹⁹³ Denial of relief under CAT, therefore, is reviewable upon a petition for review in the courts of appeals.

In such a petition for review, the court of appeals will review the decision by the BIA or IJ to deny a CAT claim by considering whether there is “substantial evidence” to support the decision.¹⁹⁴ One circuit is

guarantee release from detention. *Id.* § 208.17(b). The primary difference for eligibility purposes is that withholding of removal is not available to noncitizens who are removable based on certain criminal convictions. *See id.* § 208.16(c)(4) (explaining the eligibility difference between withholding and deferral of removal under CAT); *see also id.* § 208.16(d)(2)–(3) (explaining that certain criminal noncitizens will be denied withholding of removal under CAT because of their previous convictions). Criminal noncitizens are only eligible for deferral of removal under CAT. *Id.* § 208.16(c)(4).

188. *Id.* § 208.16(f) (“Nothing in this section or § 208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.”).

189. *Id.* § 208.16(c)(2); *id.* § 208.17(a).

190. *Id.* § 208.16(c)(3). The government will also review evidence that the applicant could be removed to a part of the country where he or she would not likely be tortured in determining whether the applicant meets the “more likely than not” standard. *Id.*

191. *Id.* § 208.16(c)(2).

192. *See id.* § 208.16(c)(4) (“If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture.”); *see also id.* § 208.16(d)(1) (“[A]n application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant’s eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.”).

193. *See* 8 U.S.C. § 1252(a)(2)(B) (2000) (explaining that “no court shall have jurisdiction to review” denials of discretionary relief to noncitizens challenging removal orders).

194. Most circuits apply the “substantial evidence” test to review denials of CAT relief. *E.g.*,

even willing to review whether the BIA properly applied the CAT “more likely than not” standard to the given facts in a case.¹⁹⁵ Although the substantial evidence standard is deferential to the determinations of the BIA or IJ, the court of appeals will still look at whether the evidence in the record supports the denial of relief.¹⁹⁶ The court must also consider the whole record on review.¹⁹⁷

However, as discussed in the preceding section, noncitizens may not introduce any new evidence upon a petition for review, so the “whole record” is confined to the administrative record developed below.¹⁹⁸ Particularly for CAT claims, evidence of changed country conditions subsequent to the IJ or BIA decision may be instrumental in determining whether a noncitizen is entitled to relief from removal.¹⁹⁹ Whereas such evidence would have been considered on habeas review in the district court, such evidence is expressly barred from consideration in the courts of appeals by INA § 242(b).²⁰⁰ Noncitizens asking the court to take notice of changed country conditions that have a direct impact on whether it is “more likely than not” that they will be tortured if removed have no way to introduce such evidence upon judicial review, since REAL ID now prohibits noncitizens from filing a habeas petition in district court. For judicial review of a CAT claim, noncitizens are stuck with a petition for

Chen v. U.S. Dep’t of Justice, 434 F.3d 144, 156 (2d Cir. 2006) (applying the substantial evidence standard to review denial of withholding of removal under CAT); Chacon-Botero v. U.S. Att’y Gen., 427 F.3d 954, 957 n.4 (11th Cir. 2005) (concluding denial of CAT relief supported by substantial evidence); Salkeld v. Gonzales, 420 F.3d 804, 809 (8th Cir. 2005) (reviewing a withholding of removal claim under the substantial evidence standard). While there is some debate about how CAT claims should be reviewed, if at all, that issue is beyond the scope of this Article. *See, e.g.*, Hamid v. Gonzales, 417 F.3d 642, 647 (7th Cir. 2005) (explaining that the court was unwilling to apply the “substantial evidence” test to a criminal noncitizen’s claim that the IJ erred in denying CAT relief because such a claim is not a “question of law” for purposes of jurisdiction).

195. *See* Kamara v. Att’y Gen., 420 F.3d 202, 213–15 (3d Cir. 2005) (finding that the BIA erred in its application of the CAT standard and that Kamara may be entitled to relief if the standard was applied properly); *accord* Ramadan v. Gonzales, 427 F.3d 1218, 1222–23 (9th Cir. 2005) (considering evidence to determine whether Ramadan met the “more likely than not” standard for CAT relief).

196. *See, e.g.*, Roy v. Ashcroft, 389 F.3d 132, 138 (5th Cir. 2004) (internal citation omitted). “The substantial evidence standard requires only that the BIA’s conclusion be based upon the evidence presented and be substantially reasonable. The BIA will be reversed only when the evidence is so compelling that no reasonable fact finder could fail to find the petitioner statutorily eligible for relief.” *Id.*

197. *See, e.g.*, D-Muhumed v. U.S. Att’y Gen., 388 F.3d 814, 817–18 (11th Cir. 2004) (quoting Najjar v. Ashcroft, 257 F.3d 1262, 1283–84 (11th Cir. 2001)) (explaining that under the substantial evidence test, “this court ‘must affirm the BIA’s decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole’”) (internal citation omitted).

198. 8 U.S.C. § 1254(b)(4)(A); *see also supra* Part II.B.

199. *See* Berishaj v. Ashcroft, 378 F.3d 314, 317 (3d Cir. 2004) (noting that courts are prohibited from reviewing changed country conditions). *See also infra* Part II.C.3.

200. 8 U.S.C. § 1254(b)(4) (2000).

review in the courts of appeals—courts that cannot review their newly discovered evidence.

2. District Courts Allowed Noncitizens to Submit New Evidence in Reviewing CAT Claims on Habeas Petitions

As discussed in Part II.A, before the passage of REAL ID in 2005,²⁰¹ district courts hearing habeas petitions challenging removal orders allowed noncitizens to present new evidence.²⁰² In general, district courts found that they had jurisdiction under 28 U.S.C. § 2241 over noncitizens' petitions raising CAT claims.²⁰³ For CAT claims, the ability to introduce new evidence on habeas review held particular significance since the decision to grant or deny relief under CAT is solely based on evidence presented to meet the “more likely than not” standard.²⁰⁴

In cases where the record was complicated and disputed, district courts exercised their right to hold evidentiary hearings to gather evidence regarding CAT claims. In *Enwonwu v. Chertoff*, discussed above,²⁰⁵ Judge Young in the District of Massachusetts conducted an extensive evidentiary hearing when considering Enwonwu's challenge to his removal order. One of Enwonwu's claims was that he would be subjected to torture if removed to Nigeria. This claim was the basis for the IJ's original grant of deferral of removal for Enwonwu, which was later reversed by the BIA.²⁰⁶ In the district court's findings of fact based on the evidentiary hearings, the court credited Enwonwu's testimony about the dangerousness of the Nigerian

201. Pub. L. No. 109-13, div. B, 119 Stat. 302 (2005) (codified in scattered titles of the U.S.C.).

202. *Supra* Part II.A.

203. See *Cadet v. Bulger*, 377 F.3d 1173, 1182–83 (11th Cir. 2004) (holding that federal courts retain jurisdiction to hear habeas petitions challenging removal orders based on CAT); *Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (holding that federal courts retain jurisdiction to hear habeas petitions challenging removal orders based on CAT); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 221 (3d Cir. 2003), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 1074, *as recognized in* *Kamara v. Att'y Gen.*, 420 F.3d 202 (3d Cir. 2005) (holding that federal courts retain jurisdiction to hear habeas petitions challenging removal orders based on CAT); *Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003) (holding that federal courts retain jurisdiction to hear habeas petitions challenging removal orders based on CAT); *Wang v. Ashcroft*, 320 F.3d 130, 142 (2d Cir. 2003) (holding that federal courts retain jurisdiction to hear habeas petitions challenging removal orders based on CAT). Although the district courts recognized that the scope of their review was limited, *Cadet*, 377 F.3d at 1184, they considered whether there was substantial evidence to support the denial of the CAT claim, *Singh*, 351 F.3d at 442, and whether the BIA had properly applied the law to the facts of the case, *Ogbudimkpa*, 342 F.3d at 222; *Wang*, 320 F.3d at 143.

204. See 8 C.F.R. § 208.16(c)(4) (articulating the “more likely than not” standard for CAT review).

205. *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 57; *see discussion supra* Part II.A.

206. *Enwonwu*, 376 F. Supp. 2d at 54–55.

drug traffickers that he would face if removed to Nigeria.²⁰⁷ Although Judge Young was forced to transfer Enwonwu's habeas petition to the First Circuit pursuant to REAL ID, he recommended that the First Circuit remand the CAT claim to the BIA for consideration based on his review of the relevant evidence.²⁰⁸

Noncitizens also presented evidence in district court of current country conditions to support their claims for relief under CAT. For CAT claims in particular, the ability to present evidence of current country conditions can be instrumental in showing that a noncitizen is "more likely than not" to be subjected to torture in the country of removal. In an Eleventh Circuit case heard in the Southern District of Florida, a district court judge apparently reviewed new evidence concerning prison conditions in Haiti that was not part of the administrative record.²⁰⁹ Jean Neckson Cadet appealed the district court's denial of his habeas petition, which alleged that removing him to Haiti violated CAT. He had argued to the district court that removal to Haiti would subject him to imprisonment and that Haiti's poor prison conditions amounted to torture under CAT.²¹⁰ On appeal, the Eleventh Circuit noted that the district court had reviewed new evidence that Cadet presented, in particular a 2001 State Department Country Report on Haiti and certain depositions attached to his habeas petition.²¹¹ While the government had objected to Cadet's new evidence, the district court did not strike the evidence and "made fact findings of its own."²¹² The Eleventh Circuit addressed this issue by coyly stating that "although we discuss Cadet's new evidence, nothing in this opinion should be construed as ruling on whether a district court in a § 2241 case is restricted to the administrative record or may consider new and previously unavailable evidence. Instead, we reserve this issue for another day."²¹³

Other decisions allude to the district court's ability to consider new evidence upon habeas petitions presenting CAT claims. For example, the Eighth Circuit, in *Raffington v. Cangemi*, affirmed the district court's denial of Raffington's CAT claim, reasoning that "as Congress has granted the agency exclusive authority to implement the CAT, and as Raffington failed to present any newly discovered evidence to the district court, habeas relief

207. *Id.* at 59.

208. *Id.* at 85. The First Circuit ultimately followed Judge Young's recommendation and remanded the CAT claim to the BIA for reconsideration, concluding that the BIA opinion was "insufficiently reasoned as a matter of law." *Enwonwu v. Gonzales*, 438 F.3d 22, 35 (1st Cir. 2006).

209. *Cadet v. Bulger*, 377 F.3d 1173, 1176 (11th Cir. 2004).

210. *Id.* at 1178.

211. *Id.* at 1184 n.10.

212. *Id.* at 1185 n.11.

213. *Id.*

should not be available.”²¹⁴ This statement by the Eighth Circuit strongly suggests that such “newly discovered evidence” would be admissible, and even necessary, to prevail on a habeas petition raising a CAT claim.

3. Courts of Appeals Do Not Allow Noncitizens to Submit New Evidence of Changed Country Conditions on Petitions for Review

Since the passage of REAL ID in 2005, noncitizens no longer have the option to file a petition for writ of habeas corpus in district court to review the denial of relief under CAT.²¹⁵ The exclusive means for judicial review is in the courts of appeals, where noncitizens are not allowed to present new evidence. Circuit court cases cite INA § 242(b), which requires the court of appeals to decide the petition for review only on the administrative record, to support the conclusion that the court may not consider new evidence in reviewing CAT claims.²¹⁶

The issue often surfaces when a noncitizen asks a court of appeals to take judicial notice²¹⁷ of changed country conditions that affect the noncitizen’s eligibility for relief under CAT.²¹⁸ In future cases, the court’s inability to consider evidence of changed country conditions will force the court to affirm the agency’s denial of relief because the court is limited to an administrative record that may no longer reflect current conditions in the removal country. In fact, one study has looked at the average delay between when a petition for review is filed in the courts of appeals and when the matter is terminated.²¹⁹ It found that in the Second Circuit and Ninth Circuit, where most petitions for review are filed, the average delay was around eighteen months and twelve months, respectively.²²⁰ This kind

214. *Raffington v. Cangemi*, 399 F.3d 900, 903 (8th Cir. 2005).

215. See REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(A)(iii), 119 Stat. 302, 310–11 (to be codified at 8 U.S.C. § 1252(a)(5)) (providing petitions for review as the exclusive means of review of removal orders, notwithstanding 28 U.S.C. § 2241 or any other habeas corpus provision).

216. See 8 U.S.C. § 1252(b)(4)(A) (2000) (“[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based”); see also discussion *supra* Part II.B.

217. See FED. R. EVID. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). Whether this rule applies to federal appellate courts is beyond the scope of this Article.

218. See, e.g., *Berishaj v. Ashcroft*, 378 F.3d 314, 328–31 (3d Cir. 2004) (discussing the problem posed by the court’s inability to admit new evidence of changed country conditions in the face of a stale administrative record).

219. See *Palmer et al.*, *supra* note 27, at 81–82 (calculating data from 1994 to 2004). Since a petition for review must be filed in the court of appeals within thirty days of the final removal order, 8 U.S.C. § 1252(b)(1) (2000), the filing date corresponds closely to the date of the agency decision.

220. *Id.* at 82.

of delay, and the potential that intervening events may not be introduced in the courts of appeals, cannot be squared with Congress's claim that petitions for review provide an "adequate and effective" substitute for habeas review.²²¹

The courts of appeals have generally refused to take judicial notice of changed country conditions. In *Jasem v. United States Attorney General*, the Eleventh Circuit cited INA § 242(b) to support its conclusion that the court could not take judicial notice of changed country conditions in Iraq.²²² *Jasem* asserted that if he were removed to Iraq, he would be subjected to torture because of his Shiite faith.²²³ Although the BIA took "administrative notice" of the fall of Saddam Hussein's regime to affirm the IJ's decision to deny relief under CAT,²²⁴ the Eleventh Circuit was unwilling to take judicial notice of continued instability and human rights abuses in Iraq that would have supported a finding of CAT eligibility.²²⁵ Instead, the court affirmed the BIA's decision that *Jasem* was not eligible for CAT relief.²²⁶

The Third Circuit has lamented the fact that the courts of appeals are often forced to decide petitions for review upon stale administrative records, which are sometimes many years old and no longer reflect current removal country conditions.²²⁷ It has called upon the BIA to adopt policies to prevent the courts of appeals from having to review "administrative records so out-of-date as to verge on meaningless."²²⁸ In *Berishaj v. Ashcroft*, the Third Circuit reviewed the BIA's decision to deny *Berishaj* asylum and relief under CAT, relying on an administrative record that was

221. See *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (articulating the standard to be met when Congress wishes to provide a substitute for habeas review); see also discussion *supra* Part II.B.

222. *Jasem v. U.S. Att'y Gen.*, 157 F. App'x 153, 159 (11th Cir. 2005).

223. *Id.* at 155.

224. *Id.* at 158. "Administrative notice," also referred to as "official notice," is the administrative proceedings analogue to "judicial notice" in court proceedings. It is addressed in section 556(e) of the Administrative Procedure Act, which states "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. § 556(e) (2000).

225. *Jasem*, 157 F. App'x at 165 ("[W]e conclude that we are foreclosed under the IIRIRA from either remanding *Jasem's* case to the IJ or the BIA, or considering new evidence of changed country conditions.").

226. *Id.*

227. *E.g.*, *Kamara v. U.S. Att'y Gen.*, 420 F.3d 202, 219 (3d Cir. 2005) (expressing concern that, despite policy updates, the court was again "faced with an administrative record which appears woefully outdated"); *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 87 (3d Cir. 2004) ("[W]e expressed our concerns about being forced to use stale administrative records to decide petitions seeking to avoid deportation to countries of origin where asylum applicants might be persecuted."); *Berishaj v. Ashcroft*, 378 F.3d 314, 317 (3d Cir. 2004) (commenting on the "disturbing trend" of "administrative records [that] are grossly out-of-date").

228. *Berishaj*, 378 F.3d at 331.

already three years old.²²⁹ Lek Berishaj, an ethnic Albanian, claimed that he would be subjected to persecution and torture if removed to Montenegro.²³⁰ Although the court ultimately affirmed the BIA's denial of both forms of relief, it wrote a lengthy discussion about the problems posed by stale administrative records:

Considering the rapid, frequent political changes in countries from which asylum and CAT applicants usually come, and the potentially dire consequences of sending such an applicant back to his country of origin to face possible persecution or torture on the basis of such a stale report, we call on Congress, the Department of Justice, the Department of Homeland Security, and the BIA to improve the structure and operation of the system, so that all may have the confidence that the ultimate disposition of a removal case bears a meaningful connection to the merits of the petitioner's claim(s) in light of contemporary world affairs.²³¹

While the court recognized that the Seventh Circuit has remedied this problem by taking judicial notice of changed country conditions on petitions for review, it stated that this approach "not only carries with it the potential for wholesale relitigation of many immigration-law claims, but the Courts of Appeals are ill-equipped to receive supplementary evidence."²³² Instead, the court posed other possible solutions to address the problem of stale administrative records that would not violate the well-established principle that the courts of appeals may not consider new evidence upon petitions for review.²³³

Under the current legislative scheme in INA § 242, there is no way for

229. The court commented that "[t]his case is a good example of how much can change in the time between the creation of the administrative record before the IJ and the judgment of this Court," citing the fall of Slobodan Milosevic and the reorganization of what was formerly Yugoslavia. *Id.* at 329.

230. *Id.* at 316, 323.

231. *Id.* at 317.

232. *Id.* at 330. The Seventh Circuit has afforded itself the ability to take judicial notice of changed country conditions. *See Pelinkovic v. Ashcroft*, 366 F.3d 532, 540 (7th Cir. 2004) ("[W]e take judicial notice that the Montenegro to which the Pelinkovics will return is much different from the one they left in 1992."). The Sixth Circuit has conflicting opinions on this issue. *Compare Namu v. Gonzales*, 401 F.3d 453, 455 (6th Cir. 2005) ("[B]ecause we take judicial notice of the changed circumstances in Iraq, we remand to the BIA for further proceedings."), *with Jebraail v. Ashcroft*, 119 F. App'x 759, 764 (6th Cir. 2005) ("This court cannot supplement the administrative record. . . . [and] cannot take judicial notice of changed country conditions."). Whether the practice of taking judicial notice of changed country conditions violates INA § 242(b)(4)(A) is beyond the scope of this Article.

233. *See Berishaj*, 378 F.3d at 330–32 (posing congressional action to allow remand to the BIA, greater use of motions to reopen, and BIA procedural reform as possible solutions to the problem of a stale administrative record).

noncitizens challenging removal orders to introduce new evidence of changed country conditions upon petitions for review in the courts of appeals. As suggested by the Third Circuit, there have been and will continue to be many situations where, in volatile removal countries, conditions have changed significantly between the time the IJ makes its decision and the court of appeals reviews that decision. There must be a way to make petitions for review in the courts of appeals more functionally equivalent to habeas review in the district courts,²³⁴ by allowing for the introduction of new evidence upon judicial review in these types of cases.

III. PROPOSED SOLUTIONS

The result of REAL ID's repeal of habeas review of removal orders is that there will be cases where petitions for review in the courts of appeals will not provide the "adequate and effective" substitute required by the Supreme Court in *Swain v. Pressley*.²³⁵ Although Congress attempted to provide a collateral remedy that would be functionally equivalent to habeas review in the district courts to avoid a Suspension Clause violation,²³⁶ Congress failed to consider how transferring all judicial review to the courts of appeals would change the procedural rights afforded. Because noncitizens now have no way to introduce new evidence upon judicial review where they did have such an opportunity in the district courts on habeas review before REAL ID, judicial review in the courts of appeals is not an "adequate and effective" substitute. This is particularly true in cases of CAT claims, as discussed in Part II.C, where the court's inability to consider evidence of changed country conditions forces the court to rubberstamp agency decisions upon judicial review.

Critics might argue that solutions to this problem are already in place. First, a noncitizen can make a motion to reopen the proceedings with the BIA in light of newly discovered evidence. Second, the Office of Immigration Litigation (OIL) has apparently developed new procedures in response to the Third Circuit's concerns expressed in *Berishaj* whereby the OIL can remand cases to the agency to update a stale record.²³⁷ For the reasons explained below, however, these options are not viable solutions to the inadequacy and ineffectiveness of the substitute remedy for habeas in

234. See *supra* notes 103 and 109.

235. *Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.").

236. See *supra* notes 103–06 and accompanying text.

237. The OIL represents the government in cases before the IJ and the BIA, and defends the BIA's decisions in the federal courts. *Ambartsoumian*, 388 F.3d at 95 n.6 app.

the courts of appeals.

If a noncitizen wants to introduce new evidence of changed country conditions, he or she may file a motion to reopen with the BIA pursuant to 8 C.F.R. § 1003.2. This, however, is not an effective way to remedy the problem of being unable to introduce evidence of changed country conditions for the following reasons. First, a noncitizen must file the motion within ninety days of the final administrative decision.²³⁸ If the noncitizen has new evidence of changed country conditions after the ninety-day time limit has tolled, he or she is barred from filing a motion to reopen.²³⁹ Second, the BIA's decision to grant the motion to reopen is discretionary.²⁴⁰ In other words, even if the noncitizen meets the burden of showing that the evidence is "material and was not available and could not have been discovered or presented at the former hearing," the BIA can still deny the motion to reopen.²⁴¹ Subject to these restrictions, the motion to reopen does not present a viable avenue for relief, nor one that would be an adequate substitute to the right to submit new evidence of changed country conditions on a habeas petition in district court.

The Department of Justice (DOJ) posed a different solution to the problem of a stale administrative record, as expressed by the Third Circuit in *Berishaj*.²⁴² It explained that the OIL could seek a remand to the agency in situations where the administrative record had become outdated.²⁴³ According to the Attorney General, when a case is assigned to an OIL attorney, he or she "should consider whether the age and quality of the record counsels in favor of a remand."²⁴⁴ The OIL may consider certain factors in making this determination,²⁴⁵ but ultimately the Director of OIL

238. 8 C.F.R. § 1003.2(c)(2) (2006).

239. *Id.* There are some exceptions to the ninety-day limit for motions to reopen based on new evidence to support claims for asylum. *See id.* § 1003.2(c)(3)(ii) (explaining that the time limit does not apply for asylum applications). This exception does not apply to CAT claims, where the need to present new evidence may be acute, as discussed above in Part IIC.

240. *Id.* § 1003.2(a). "The decision to grant or deny a motion to reopen . . . is within the discretion of the Board The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief." *Id.*

241. *Id.* § 1003.2(c)(1).

242. The DOJ discussed new procedures that would be implemented by the OIL in a supplemental memorandum to the court in *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 87–88 (3d Cir. 2004). The text of the procedures, excerpted from the memorandum, is set forth in an appendix to the opinion. *Id.* at 94 app. The Third Circuit had expressed its concerns in *Berishaj* where it called upon the government to remedy the problem of stale administrative records upon judicial review. *Berishaj v. Ashcroft*, 378 F.3d 314, 328–31 (3rd Cir. 2004).

243. *Ambartsoumian*, 388 F.3d at 94.

244. *Id.*

245. The government's memorandum cited the following factors: "(1) whether there have been pertinent, intervening events in the country of removal; and (2) whether the issues on review are 'time

has discretion in whether to seek a remand to have the record updated.²⁴⁶ Although these new OIL procedures have yet to play out fully in the courts, it is obvious that they are no real fix for the problem. First, the decision to seek a remand is left in the hands of an attorney for the government who is overburdened with cases and presumably motivated to have them adjudicated as quickly as possible. The decision to remand would certainly entail delay,²⁴⁷ and the OIL is an interested party that would not make the decision to remand based only on interests of justice. Second, the decision to seek remand is within the discretion of the OIL and thus unreviewable.²⁴⁸ Any noncitizen wishing to challenge the OIL's decision not to seek a remand based on a stale record would have no recourse under the INA. And finally, there is no published authority for these internal procedures, and thus no public mandate for the OIL to follow.²⁴⁹

Thus, faced with a judicial review scheme that impermissibly suspends the writ of habeas corpus in violation of the Constitution for failing to provide an "adequate and effective" substitute for habeas review, this Article poses four possible solutions, discussed in turn below. First, Congress could reinstate the district court's habeas jurisdiction as it existed before the enactment of REAL ID in 2005. Second, Congress could amend INA § 242 to allow the courts of appeals to review new evidence submitted upon petitions for review of removal orders. Third, the courts of appeals could follow the lead of the Seventh Circuit and take judicial notice of new evidence upon petitions for review. And fourth, Congress could reinstate the provision of the Hobbs Act now excepted by INA § 242 that allows the courts of appeals to remand to the agency to order the taking of additional evidence where necessary. The proposed solutions are discussed with two questions in mind. First, does the solution repair the constitutional

sensitive' in that changes in conditions over time may affect the resolution of the issues." *Id.*

246. *Id.* In *Ambartsoumian*, the government chose not to seek such a remand, even though the most recent State Department Country Report in the record was from 1998, six years before the case was argued in the Third Circuit. *Id.* at 88. Although the court asked for comment from the parties on the adequacy of the administrative record based on concerns about stale records voiced in *Berishaj*, the parties agreed that the record was sufficient. *Id.* at 87–88.

247. The government stated in its memorandum that "such remands would add delay to the adjudication of some aliens' claims." *Id.* at 95 app.

248. See 8 U.S.C. §1252(a)(2)(B) (precluding judicial review of discretionary decisions by the immigration authorities).

249. At the time this Article was written, these OIL procedures had not been published in the Federal Register. According to the *Immigration Litigation Bulletin*, a DOJ internal publication, apparently OIL attorneys were issued internal memoranda from the Director of OIL on September 14, 2004, and November 10, 2005, instructing them on procedures for requesting a remand in cases of stale administrative records. *OIL Guidance on Remand of Immigration Cases*, IMMIGR. LAW BULL. (Office of Immigr. Litig., Wash., D.C.), Nov. 30, 2005, at 7, available at <http://www.usdoj.gov/civil/oil/9news11.pdf>.

infirmity of the current judicial review scheme? Second, is the solution practical? The assessments of practicality consider whether the solutions will result in more consistency in review, whether they will add to the burdens on the federal courts, and whether they are viable solutions given the current political climate.

A. Reinstate the Availability of Habeas Review in the District Courts

The most obvious solution to the Suspension Clause violation is to restore habeas review in the district courts as it existed before the enactment of REAL ID in 2005. As discussed in Part I.B, habeas review was historically available as a means of reviewing the legality of executive detention.²⁵⁰ Moreover, from 1961 to 1996, the INA expressly granted habeas review to noncitizens held in custody pursuant to a deportation order.²⁵¹ The statutory reinstatement of habeas jurisdiction in the district courts would solve the constitutional problem created by its repeal in 2005.

However, this solution is not practical for a number of reasons. First, it is highly unlikely that Congress would be willing to reinstate habeas review in the district courts. As is clear from the legislative history accompanying REAL ID, Congress unequivocally repealed habeas jurisdiction in the district courts to streamline and clarify the process for judicial review of removal orders.²⁵² Second, reinstating habeas would undermine Congress's attempt to create uniform procedures and consistent treatment for judicial review of removal orders. One only has to look at the last ten years of federal case law reviewing removal orders to see how much confusion there was in the courts.²⁵³ A system of judicial review of removal orders that is inconsistent and unpredictable does not benefit anyone. Third, this solution would add to the burden on the federal courts because it would again open two avenues for judicial review of removal decisions. Although reinstating habeas review in the district courts would remedy the constitutional infirmity of INA § 242, it is not a practical solution.

B. Amend the INA to Allow Noncitizens to Introduce New Evidence upon Petitions for Review in the Courts of Appeals

Another possible solution would be to enable the courts of appeals to

250. See Neuman, *supra* note 29 (discussing habeas corpus, executive detention, and the removal of aliens).

251. See *supra* notes 36–37 and accompanying text.

252. H.R. REP. NO. 109-72, at 174 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 299 (Conf. Rep.); see also discussion *supra* Part I.E.

253. See discussion *supra* Part I.

consider new evidence submitted upon a petition for review, much in the same way that the district courts considered new evidence submitted upon habeas petitions.²⁵⁴ INA § 242 would have to be amended to strike the provision stating that the court of appeals shall decide the petition only on the administrative record,²⁵⁵ and Congress would need to add language affirmatively granting the courts of appeals the power to review new evidence submitted upon petitions for review.

The first question is whether this would cure the constitutional infirmity of the current INA § 242. The thesis of this Article is that review in the courts of appeals is not, in specific cases, an adequate and effective substitute to district court habeas review, primarily because of the inability to submit new evidence in the courts of appeals. Following that line of reasoning, this modification would make petitions for review an adequate and effective substitute to habeas review because it would allow noncitizens to submit new evidence in the same way that they did on habeas petitions in district court. While there is an argument that the courts of appeals are ill-suited to receive such evidence, this argument would probably not tip the scale toward a constitutional violation.²⁵⁶ If Congress enabled the courts of appeals to review such evidence, petitions for review would meet the “adequate and effective” standard.

This solution, however, is not practical. First, this kind of change would be inconsistent with the long history of administrative law that requires judicial review of administrative action to be limited to the administrative record.²⁵⁷ It would fundamentally undermine the well-established role of the courts of appeals as appellate courts traditionally not suited for fact-finding. As Judge Young stated in *Enwonwu v. Chertoff*, the courts of appeals are “judicial bodies more accustomed to reviewing cold records for legal error than hearing testimony and evaluating evidence.”²⁵⁸

254. See discussion *supra* Part II.A (explaining that district courts held evidentiary hearings and accepted the submission of new evidence on review of habeas petitions).

255. This provision can be found at INA § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A) (2000).

256. The “adequate and effective” substitute standard is not a high bar to meet and could be met through review in the courts of appeals with some modifications to the current system. Because the Supreme Court declined to require the “exactly commensurate” standard in its decision in *Swain*, the substitute remedy, for constitutional purposes, need not be identical to habeas review. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

257. See *Berishaj v. Ashcroft*, 378 F.3d 314, 330 (3d Cir. 2004) (stating that taking judicial notice of changed country conditions in the courts of appeals “might go a long way toward solving the problem we face, but with all respect we are unable to square this practice with the clear command . . . that courts reviewing the determination of an administrative agency must approve or reject the agency’s action purely on the basis of the reasons offered by, and the record compiled before, the agency itself”) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

258. *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 83 (D. Mass. 2005) (internal quotation marks omitted).

Other judges have similarly stated that the courts of appeals are not an appropriate forum for reviewing new evidence, and that this task is better suited to the immigration courts.²⁵⁹ Finally, while it would not increase the burden on the federal courts since review would still be consolidated in the courts of appeals, it is not a politically viable solution because it would be too disruptive to the current federal court system.

C. Encourage the Courts of Appeals to More Widely Take Judicial Notice of Changed Country Conditions and Other Pertinent Evidence

The Seventh Circuit has made a practice of taking judicial notice of changed country conditions in petitions for review of removal orders.²⁶⁰ This is another possible solution, and one that would not require Congress to amend the INA. Courts of appeals could more liberally take judicial notice of changed country conditions and other pertinent evidence to bring the administrative record up to date when it has become stale.

This solution would cure the constitutional infirmity of INA § 242 in some situations, but would not in other circumstances. If a noncitizen wanted to introduce a State Department Country Report on the removal country that showed that he or she would be more likely than not to be tortured because of current political upheaval and mass human rights abuses, then a court of appeals taking judicial notice of that report would provide an adequate and effective substitute to habeas review. In that kind of situation, the courts of appeals would in effect be admitting new evidence upon petitions for review, just as the district courts did on habeas review. However, taking judicial notice alone could exclude certain probative evidence. For example, what if the newly discovered evidence came in the form of an affidavit from someone in the removal country or a letter from a family member? It is questionable whether the court would be able to take judicial notice of such evidence since it would not meet the standard under the Federal Rules of Evidence of being “generally known” and “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”²⁶¹ Where a district court would have been able to review evidence such as an affidavit or letter, the court of appeals probably could not review it pursuant to judicial notice.

Additionally, this solution would not be practical. As the Third Circuit

259. See *Berishaj*, 378 F.3d at 330 (“[T]he Courts of Appeals are ill-equipped to receive supplementary evidence.”); see also *Najjar v. Ashcroft*, 257 F.3d 1262, 1278 (11th Cir. 2001) (stating that immigration courts are more well-suited to fact-finding than reviewing courts).

260. See *supra* note 232.

261. FED. R. EVID. 201(b).

aply concluded, such a practice would undermine the longstanding rule that the courts of appeals are limited to the administrative record below.²⁶² There is also no guarantee, without a statutory mandate, that all the circuits would be willing to take judicial notice of such facts. This would inevitably lead to more inconsistency in the review afforded, which would in turn lead to unpredictability. Although it would not add to the burden on the federal courts, it would not be politically viable and would most likely result in a congressional amendment to end the practice. This solution, then, does not ensure constitutionality, nor is it practical.

D. Reinstate § 2347(c) of the Hobbs Act in the INA to Allow the Courts of Appeals to Order the Taking of Additional Evidence

Before 1996, the courts of appeals were permitted, under the Hobbs Act as incorporated into the INA, to order the taking of additional evidence upon remand to the BIA pursuant to 28 U.S.C. § 2347(c).²⁶³ If a court of appeals were faced with a case where it was clear that the taking of additional evidence was warranted, the court could, in its discretion, remand the case to the agency to gather such evidence.²⁶⁴ The court's power to remand was limited to situations where: "(1) the additional evidence is material; and (2) there were reasonable grounds for failure to adduce the evidence before the agency."²⁶⁵ Congress repealed this power to remand in the amendments enacted to INA § 242 by IIRIRA in 1996.²⁶⁶ Another possible solution, then, would be to reinstate § 2347(c) in INA § 242 to allow the courts of appeals to remand to the agency for the taking of additional evidence where necessary. Congress would need to strike the clause in INA § 242 that currently excepts the applicability of § 2347(c) to petitions for review in the courts of appeals.²⁶⁷

The first question is whether this provides an "adequate and effective" substitute for habeas review in the district courts. Upon first blush, it would appear to solve the problem because it would allow noncitizens to present new evidence upon petitions for review. This would provide a much more

262. *Berishaj*, 378 F.3d at 330.

263. *See supra* Part II.B.

264. *Najjar v. Ashcroft*, 257 F.3d 1262, 1278–79 (11th Cir. 2001).

265. 28 U.S.C. § 2347(c) (2000).

266. IIRIRA, Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009-546, 3009-607 (1996) (codified as amended at 8 U.S.C. § 1252(a)(1)) (forbidding the court from taking additional evidence under § 2347(c) of the Hobbs Act).

267. *See* INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (2000) ("Judicial review of a final order of removal . . . is governed only by chapter 158 of Title 28 . . . except that the court may not order the taking of additional evidence under section 2347(c) of such title."). This solution would strike the final "except" clause from this provision.

adequate and effective substitute than what is currently in place, without changing the rule that the courts of appeals are limited to the administrative record upon petitions for review. However, while this amendment would allow noncitizens to submit new evidence, that evidence would be submitted to the BIA rather than to a federal district court. Unlike habeas review where the district court provided a set of fresh eyes to look at the case, here the new evidence would be adduced by the BIA, presumably the body who denied relief from removal to the noncitizen in the first place. While this would certainly be a concern, the difference between evidence submitted to the agency versus evidence submitted to the federal courts would probably not rise to a level of constitutional significance.²⁶⁸

Additionally, this solution would be a step toward rectifying situations like the ones discussed in Part II.C, where changed country conditions warrant the admission of current evidence regarding CAT claims.²⁶⁹ This procedural device would provide a type of review more functionally equivalent to what was available on habeas review in the district court; a noncitizen who would have had the opportunity to introduce evidence of changed country conditions on habeas review would now have the opportunity to argue for the need to adduce new evidence before the agency. For example, in the *Berishaj* case discussed above,²⁷⁰ where the Third Circuit was frustrated with its inability to update a three-year-old administrative record, under this solution the court could remand the case to the BIA to update that record if the proffered evidence met the standard under § 2347(c). While this is not a perfect solution and does not provide a remedy “exactly commensurate” with habeas review in district court, it would probably be sufficient to meet the *Swain* standard.²⁷¹

Finally, reinstating § 2347(c) of the Hobbs Act into the INA may be

268. This statement is not intended to diminish the potentially problematic implications of requiring the agency to adduce the new evidence. However, there are some safeguards in place. After the agency adduced the evidence it could change its original disposition. See 28 U.S.C. § 2347(c) (2000) (“The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.”). If the agency did not change its original disposition, then the noncitizen would still have recourse in the court of appeals, where the court would be able to consider the newly admitted evidence because it would be part of the administrative record.

269. This method would be a significant improvement over the OIL procedures discussed in the *Ambartsoumian* case, where the OIL could request a remand for certain petitions with stale administrative records. See *supra* notes 228–36 and accompanying text. At least here, noncitizens would have the benefit of an impartial federal court of appeals deciding whether a remand was warranted, rather than legal counsel for the opposing party.

270. See *supra* notes 214–20 and accompanying text. *Berishaj v. Ashcroft*, 378 F.3d 314, 328–31 (3rd Cir. 2004).

271. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

the best solution because it is the most practical. There is already a proven track record of cases where the courts of appeals, before IIRIRA, did in fact employ this procedure as a means of adducing new evidence upon petitions for review.²⁷² In *Becerra-Jimenez v. I.N.S.*, the Tenth Circuit remanded to the agency pursuant to § 2347(c) to admit certain newly discovered evidence that supported Becerra-Jimenez's case for relief from removal.²⁷³ Becerra-Jimenez was ordered deported to Mexico for illegally reentering the U.S. after he was previously deported for criminal convictions. Upon his petition for review in the Tenth Circuit, Becerra-Jimenez moved pursuant to § 2347(c) to admit new evidence that included the expungement of his earlier convictions, his father obtaining U.S. citizenship, and his own fathering of another U.S. citizen child.²⁷⁴ The court found that Becerra-Jimenez's motion met the standard under § 2347(c):

Becerra's motion to remand clearly falls within the parameters of § 2347(c). The additional evidence of expungement of two prior convictions, his father obtaining citizenship, and his fathering of another United States citizen child, appears to be material, and was not available during his hearing. Under these circumstances, we hold that Becerra's case should be remanded to the BIA in accordance with § 2347(c).²⁷⁵

Although the government argued that an attempt to introduce new evidence can only be pursued through a motion to reopen with the BIA, the court concluded that the motion to reopen procedures did not preempt the use of the motion to remand pursuant to § 2347(c).²⁷⁶

Similarly, in *Feleke v. I.N.S.*, the Eighth Circuit remanded a case pursuant to § 2347(c) where the noncitizen had new evidence to support his asylum claim.²⁷⁷ Feleke was ordered deported to Ethiopia despite his claim that he would be persecuted there for his membership in a political opposition group. In response to his motion to adduce additional evidence

272. See *Feleke v. I.N.S.*, 118 F.3d 594, 599 (8th Cir. 1997) (remanding pursuant to § 2347(c) to consider new evidence); *Osaghae v. I.N.S.*, 942 F.2d 1160, 1164 (7th Cir. 1991) (same); *Bernal-Garcia v. I.N.S.*, 852 F.2d 144, 147 (5th Cir. 1988) (same); *Becerra-Jimenez v. I.N.S.*, 829 F.2d 996, 1002 (10th Cir. 1987) (same); *Dolores v. I.N.S.*, 772 F.2d 223, 226–27 (6th Cir. 1985) (declining to remand based on the circumstances of the case but recognizing that § 2347(c) does authorize such a remand).

273. *Becerra-Jimenez*, 829 F.2d at 1002.

274. *Id.* at 1001. Becerra-Jimenez already had four children, all U.S. citizens.

275. *Id.*

276. *Id.*

277. *Feleke*, 118 F.3d at 599. Although this case was decided after IIRIRA, it was submitted to the court of appeals on February 13, 1997, almost two months before the relevant provisions of IIRIRA became effective on April 1, 1997.

pursuant to § 2347(c), the court stated: “Although we are not to take evidence, we may remand to the Board to consider newly discovered evidence and to create an adequate record.”²⁷⁸ Pursuant to this authority, the court found that Feleke met the standard under § 2347(c) by proffering evidence, including news articles documenting persecution and violence by the current government; an Amnesty International Report on Ethiopia; and a letter from an Ethiopian administrator of the opposition group stating that Feleke would likely be persecuted if he returned to Ethiopia.²⁷⁹ The Eighth Circuit reasoned that the “evidence of changing conditions in Ethiopia is relevant to Feleke’s asylum claim” and that “consideration of this evidence is crucial to the development of an adequate record.”²⁸⁰

The power to remand pursuant to § 2347(c) also gave the courts of appeals the ability to remand for humanitarian as well as legal reasons. In *Bernal-Garcia v. I.N.S.*, the Fifth Circuit remanded the case to the agency, even though it was more of a close call as to whether the standard under § 2347(c) had been met.²⁸¹ To support Bernal-Garcia’s request for political asylum, he wished to introduce into evidence a letter from his brother in El Salvador documenting recent incidences of violence against their family by Salvadoran soldiers.²⁸² The letter stated that the soldiers told Bernal-Garcia’s brother that Bernal-Garcia was on a wanted list as a unionist.²⁸³ Apparently the soldiers destroyed Bernal-Garcia’s family’s home and then went to another home, where they killed two unionists.²⁸⁴ While the court recognized that the letter was material evidence, it was less convinced of the reasonableness of Bernal-Garcia’s failure to produce the letter before the agency.²⁸⁵ Ultimately the court made the decision to remand and explained:

In determining whether to remand for consideration of additional evidence, we are mindful that the granting of asylum is not only a legal act; it is a humanitarian one as well. Since the ultimate decision regarding Bernal’s deportation may well decide his life or death, we apply [§ 2347(c)]’s principles to this case and

278. *Id.*

279. *Id.* This list of evidence is significant because it includes a letter from an Ethiopian administrator that would not have necessarily been admissible through judicial notice. The ability to remand via § 2347(c) avoids the limitations on evidence that taking judicial notice could present.

280. *Id.*

281. *Bernal-Garcia v. I.N.S.*, 852 F.2d 144, 147 (5th Cir. 1988).

282. *Id.* at 146. Again this letter is a piece of evidence that would not necessarily be admissible through judicial notice.

283. *Id.*

284. *Id.*

285. *Id.* at 146.

remand for a reconsideration of Bernal's claims in light of his brother's letter.²⁸⁶

Section 2347(c) gave the courts of appeals the discretion to order a remand to adduce additional material evidence in certain circumstances. These cases form an historical basis for the section's reintroduction and provide guidelines for its exercise.

This solution is also practical because it does not undermine federal court practice in the way that allowing the courts of appeals to gather their own evidence would.²⁸⁷ It allows for the introduction of new evidence upon judicial review without forcing the courts of appeals to gather the evidence themselves. In this way, it maintains one consistent avenue for judicial review of removal orders for noncitizens but does not close the door on the possibility of introducing new evidence.

This solution would also not add to the burden on the federal courts. As stated above, Congress removed this provision of the Hobbs Act from the INA in IIRIRA's amendments in 1996.²⁸⁸ In reviewing the legislative history accompanying that amendment, it is not entirely clear why Congress took this power from the courts of appeals. Although the legislative history speaks in very broad terms about streamlining judicial review and appeals,²⁸⁹ there is no evidence cited that the ability to remand pursuant to § 2347(c) added significantly to delay in removing noncitizens. In fact, the Joint Explanatory Statement of the Committee of Conference on IIRIRA, in its exhaustive catalogue of all of IIRIRA's amendments to the INA, did not even mention the repeal of § 2347(c).²⁹⁰ It seems, then, that Congress

286. *Id.*

287. Some courts, however, have suggested that this procedure amounts to the courts of appeals commanding the BIA to reopen proceedings in an impermissible way, particularly since a noncitizen has the opportunity to make a motion to reopen on his or her own volition. *See, e.g., Ramirez-Gonzalez v. I.N.S.*, 695 F.2d 1208, 1213–14 (9th Cir. 1983) (“[W]e will not compel the BIA to reopen Mr. Ramirez’s hearing on the basis of the new evidence he wishes to present [pursuant to § 2347(c)]. He must follow the INS regulations and file a motion to reopen with the BIA.”). This Article does not address this minor concern. However, as discussed above, the motion to reopen is not a viable solution to the Suspension Clause problem. *See supra* notes 238–41 and accompanying text.

288. IIRIRA, Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009-546, 3009-607 (1996) (codified as amended at 8 U.S.C. § 1252(a)(1)) (forbidding the court from taking additional evidence under § 2347(c) of the Hobbs Act).

289. *See* H.R. REP. NO. 104-879, at 108 (1997) (“[T]he process for appeals was streamlined and the scope of judicial review narrowed.”); *see also* H.R. REP. NO. 104-469, pt. 1, at 107–08 (1996) (“[IIRIRA] streamlines rules and procedures for removing illegal aliens For illegal aliens already present in the U.S., there will be a single form of removal proceeding, with a streamlined appeal and removal process.”).

290. *See* H.R. CONF. REP. NO. 104-828, at 219 (1996) (Conf. Rep.) (“Section 242(a) provides that a final order of removal, other than an order of removal under section 235(b)(1), is governed by chapter 158 of title 28 [Hobbs Act]. This is consistent with current section 106(a).”).

could not greatly protest its reinstatement since it did not provide any specific explanation for its removal.

Since this type of remand would only be necessary in a minority of cases, it would not significantly add to the burden on the courts or cause delay in the appeals process. Section 2347(c) itself provides the standard for the limited exercise of this kind of remand: (1) the evidence must be material, and (2) there must be reasonable grounds for failure to adduce the evidence before the agency.²⁹¹ There is no indication in the pre-IIRIRA case law applying § 2347(c), nor in the legislative history of IIRIRA, that this power was abused or overused by the courts of appeals.

This solution not only meets the constitutional minimum required by *Swain* but is also the most practical solution and the one most likely to be considered by Congress because it is the least disruptive to the current system in place. Because it would only be applied in a minority of cases where new evidence is material and there were reasonable grounds for why it was not introduced in the agency proceedings below, there is little chance that it will delay the review process or further burden the federal courts. In the minority of cases where the courts of appeals find remand is warranted under § 2347(c), the section's reinstatement would ensure that there would be no Suspension Clause violation caused by applying INA § 242.

CONCLUSION

The Suspension Clause of the Constitution states that: "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."²⁹² This constitutional right has been available historically to all persons held in United States custody, regardless of citizenship.²⁹³ For decades, noncitizens have used petitions for the writ of habeas corpus to challenge their detention pursuant to the government's decision to deport them.²⁹⁴ REAL ID changed this landscape dramatically, expressly withdrawing habeas jurisdiction from the district courts and replacing it with petitions for review in the courts of appeals.²⁹⁵ Upon first glance, the legislation does not appear to present a Suspension Clause violation, since the

291. 28 U.S.C. § 2347(c) (2000).

292. U.S. CONST. art. I, § 9, cl. 2.

293. *I.N.S. v. St. Cyr*, 533 U.S. 289, 301–02 (2001) ("In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.").

294. Neuman, *supra* note 29, at 992.

295. Pub. L. No. 109-13, div. C, 119 Stat. 302 (2005) (codified as amended in various titles of the U.S.C.).

Supreme Court has held that Congress may substitute a collateral remedy for the writ of habeas corpus.²⁹⁶ Where such a remedy is an “adequate and effective” substitute to test the legality of a person’s detention, there is no suspension of the writ of habeas corpus.²⁹⁷ Congress carefully drafted REAL ID’s provisions to avoid suspending the writ, intentionally providing a scope of review similar to what it considered historically available on habeas review: constitutional questions and questions of law.²⁹⁸

However, Congress failed to consider the consequences of transferring that similar scope of review from a trial court to an appellate court. Where noncitizens were allowed to present new evidence to make the case for relief from removal at the district court on habeas petitions, they are foreclosed from presenting such evidence upon petitions for review in the courts of appeals. This foreclosure will limit the ability of the courts of appeals to truly engage in meaningful judicial review of agency decisions to remove noncitizens. Particularly in cases where noncitizens seek relief from removal under the Convention Against Torture, it is not hard to imagine a situation like that in Iraq or Montenegro, where country conditions are changing faster than the courts of appeals can address noncitizens’ petitions.

There must be a way for noncitizens’ claims for relief from removal to be supported by newly discovered evidence where necessary. Only this will cure the potential Suspension Clause violation that Congress created through REAL ID’s amendments to the INA. The most viable solution is to allow the courts of appeals to remand cases to the BIA to collect new evidence needed for the court to make a decision regarding relief. This would cure the constitutional infirmity of REAL ID’s amendments because it would mean that petitions for review in the courts of appeals would be a more adequate and effective substitute to habeas review in cases where newly discovered evidence would have a significant bearing on whether to grant relief. Until Congress acts to remedy the situation, there will be a suspension, in violation of the Constitution, of the writ of habeas corpus for noncitizens challenging removal orders.

296. *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

297. *Id.*

298. *See supra* notes 98–100 and accompanying text.