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## Accuracy or Fairness: The Meaning of Habeas Corpus after *Boumediene v. Bush* and Its Implications on Alien Removal Orders

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# Accuracy or Fairness: The Meaning of Habeas Corpus after *Boumediene v. Bush* and Its Implications on Alien Removal Orders

## **Abstract**

Part One of this Comment will examine the developments of the writ of habeas corpus throughout the history of the United States, beginning with the importance the Founding Fathers placed on the writ. This section will also examine the recent changes in federal court review of alien removal orders, beginning with the 1996 legislation and continuing with the REAL ID Act, along with the federal courts' responses to those acts. Part Two will then examine the majority opinion in *Boumediene v. Bush*, addressing the meaning and purpose that Justice Kennedy attached to the writ of habeas corpus and the analytical approach he set forth to determine if a substitute is "adequate and effective." Part Three will then analyze whether the current system for review of alien removal orders comports with the guidelines set forth by Justice Kennedy in *Boumediene*. This section will draw comparisons between the Combatant Status Review Tribunals (CSRTs) that the Court examined in *Boumediene* and the immigration hearings concerning alien removal orders. This section will then contrast the level of review provided to courts of appeals when reviewing alien removal orders with the Court of Appeals for the District of Columbia's level of review over the CSRTs' decisions. Finally, this section will examine the courts of appeals' decisions since the passage of the REAL ID Act to determine whether the current system provides for adequate review in light of *Boumediene*. Part Four recommends the restoration of the right of aliens to seek habeas review of their removal orders due to the deficiencies in the earlier proceedings and the lack of "adequate and effective" review in the courts of appeals.

## **Keywords**

Habeas corpus, *Boumediene*, Alien removal

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ACCURACY OR FAIRNESS?:  
THE MEANING OF HABEAS CORPUS AFTER  
*BOUMEDIENE V. BUSH*  
AND ITS IMPLICATIONS ON  
ALIEN REMOVAL ORDERS

JENNIFER NORA KO\*

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## INTRODUCTION

“For 217 years, through boom and bust, insurgency, civil war, and terrorist attack, this Court . . . has carefully and prudentially administered the Writ of Habeas Corpus to secure the rights of the individual against overreaching by the executive.”<sup>1</sup> These words were written by Chief Judge Young of the United States District Court for the District of Massachusetts when he recommended that the Court of Appeals for the First Circuit reverse the removal order entered against Frank Enwonwu, due to the likelihood that he would be tortured upon return to his native Nigeria.<sup>2</sup> Despite this recommendation, the circuit court upheld the order to remove Enwonwu.<sup>3</sup> Due to legislative changes to the Immigration and Nationality Act (INA) in recent years, a considerable risk exists with the current scheme for judicial review of alien removal orders that individuals, such as Enwonwu, will be ordered removed to countries where they face a threat of torture, persecution, and other forms of mistreatment.<sup>4</sup> Most notably, the REAL ID Act of 2005 strips certain classes of aliens of the ability to seek habeas review.<sup>5</sup> Since the Act’s passage, federal courts have avoided finding that it violates the Suspension Clause of the Constitution.<sup>6</sup> Instead, courts have found the Act to provide an “adequate and effective” substitute for the writ of habeas corpus<sup>7</sup> and, therefore, have concluded that the Act is not in violation of the Suspension Clause.<sup>8</sup> These decisions have largely been based on the circuit courts’ own interpretations of the writ, since historically there has been little discussion of the writ by the Supreme Court.<sup>9</sup>

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

2. *Id.* at 85.

3. *Enwonwu v. Gonzales*, 232 F. App’x 11, 13 (1st Cir. 2007).

4. *See Enwonwu*, 376 F. Supp. 2d at 72 (finding that Enwonwu had sufficiently demonstrated that he would face a “danger of violent retribution” if he were to return to Nigeria).

5. *See infra* Part I.D (summarizing the provisions of the REAL ID Act).

6. *See infra* Part I.D (discussing courts’ responses to the passage of the REAL ID Act).

7. *See infra* note 79 and accompanying text (examining the circuit courts’ reasoning that the REAL ID Act provides a sufficient substitute for the writ and is therefore consistent with the Constitution).

8. *See infra* note 42 and accompanying text (noting the Supreme Court precedent permitting a suspension of the writ so long as a substitute is provided that meets certain standards).

9. *See infra* notes 39–41 and accompanying text (observing the limited Supreme Court jurisprudence concerning the writ, particularly in the context of executive detentions).

This elimination of habeas review has shaped the outcome of many aliens' experiences in our justice system, including Frank Enwonwu. Enwonwu, a native of Nigeria, was arrested in 1986 upon arrival in the United States after customs officials discovered that he was carrying heroin.<sup>10</sup> After agreeing to serve as a government informant for the Drug Enforcement Administration (DEA), Enwonwu received a suspended sentence.<sup>11</sup> He served as an informant for ten months,<sup>12</sup> after which he worked as a nurse assistant and a realtor.<sup>13</sup>

In response to the 1996 amendments to the INA that retroactively classified aliens convicted of certain felonies as removable to their country of origin,<sup>14</sup> Enwonwu was placed in removal proceedings.<sup>15</sup> The immigration judge (IJ), however, determined that it was "more likely than not" that Enwonwu would be tortured if he were sent back to Nigeria, given his role as an informant for the U.S. government.<sup>16</sup> Unbeknownst to Enwonwu,<sup>17</sup> the government appealed that determination to the Board of Immigration Appeals (BIA), who overturned the immigration judge's decision and ordered Enwonwu's removal in his absence.<sup>18</sup> Immigration and Naturalization Services (INS) arrested him in 2004,<sup>19</sup> and on March 17, 2005, Enwonwu filed a habeas petition with the district court.<sup>20</sup> Despite several days of evidentiary hearings and witness testimony,<sup>21</sup> the district court was forced to transfer the case to the court of appeals in response to the REAL ID Act,<sup>22</sup> enacted on May 11, 2005, which stripped the district

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10. *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 43–44 (D. Mass. 2005).

11. *Id.* at 47.

12. *See id.* at 47–49 (describing how Enwonwu provided the DEA with information concerning the drug trade in Nigeria and also served as a mole within the Nigerian community in the United States).

13. *Id.* at 49, 55.

14. *See infra* Part I.C (describing the changes made to the INA in the 1996 amendments, particularly concerning alien removal orders).

15. *Enwonwu*, 376 F. Supp. 2d at 49.

16. *See id.* at 54–55 (relying on expert testimony concerning the "interrelationship" in Nigeria between drug traffickers, the military, and the government and on testimony of the DEA agent who had worked with Enwonwu).

17. *See id.* at 55 (observing that Enwonwu never received the notice of appeal because it was not properly addressed and that his attorney, who claimed he had not received it either, never notified him of the appeal).

18. *Id.* at 56 (rejecting the argument that Enwonwu's cooperation with DEA would likely expose him to retribution in Nigeria, relying on the idea that a removal is not equivalent to torture condoned by a public official).

19. *Id.* at 55.

20. *See id.* at 56–57 (arguing that he was procedurally deprived of due process because of the lack of notice and substantively denied due process because a return to Nigeria would be a "government-created danger").

21. *Id.* at 56–58.

22. *Id.* at 81 (noting that the court was ready but unable to render a decision).

courts of jurisdiction over alien removal orders.<sup>23</sup> Nonetheless, in its order of transfer, the district court recommended that Enwonwu should be granted relief under the “state-created danger theory” because Enwonwu’s service as an informant, induced by the U.S. government, would likely lead to his torture upon return to Nigeria.<sup>24</sup> The court of appeals, however, held that Enwonwu’s claims concerning a state-created danger and the constitutionality of the REAL ID Act were not actionable and remanded the case back to the BIA for further consideration of Enwonwu’s Convention Against Torture (CAT) claim.<sup>25</sup> On remand, the BIA again ordered Enwonwu’s removal, finding him ineligible for CAT relief.<sup>26</sup> Enwonwu filed another petition for review in the court of appeals, but the court still upheld his removal order, finding that the BIA had engaged in a proper *de novo* review in reversing the IJ’s decision.<sup>27</sup> Frank Enwonwu now lives in a homeless shelter with his thirteen-year-old son and can be taken into custody and deported without any notice.<sup>28</sup> Unfortunately, Enwonwu’s story is not unique. Despite the clear need for more expansive review than what the circuit courts can currently provide, many individuals have been prohibited from seeking habeas review since the REAL ID Act’s

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23. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13, § 106, 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.).

24. See *Enwonwu*, 376 F. Supp. 2d at 74 (describing the government’s argument for Enwonwu’s removal as one that “shocks the conscience”).

25. See *Enwonwu v. Gonzales*, 438 F.3d 22, 29, 33, 35 (1st Cir. 2006) (remanding on Enwonwu’s CAT Claim after finding that, with regards to Enwonwu’s state-created danger claim, aliens do not have a substantive due process right to not be removed from the country, and that the REAL ID Act could not be unconstitutional on the facts presented because Enwonwu received the same level of review at the court of appeals that he would have received through habeas review).

26. *Enwonwu v. Gonzales*, 232 F. App’x 11, 13 (1st Cir. 2007).

27. *Id.* at 16.

28. See Denise Lavoie, *Drug Courier Helped in Sting, Feels Stung*, CHI. TRIB., Jan. 22, 2008, [http://archives.chicagotribune.com/2008/jan/22/news/chi-informant\\_22\\_jan22](http://archives.chicagotribune.com/2008/jan/22/news/chi-informant_22_jan22) (reporting that Enwonwu has had to spend five of the past eleven years in detention although he believed the United States would keep him safe when he agreed to be an informant); see also AMNESTY 133, AMNESTY INT’L, GROUP 133’S ELECTRONIC NEWSLETTER FOR MARCH 2008, [http://www.amnesty133.org/events/news/2008/news\\_3.txt](http://www.amnesty133.org/events/news/2008/news_3.txt) (noting the failed efforts to obtain relief for Enwonwu but hoping that, because Enwonwu has sole custody of his son, social services might block the deportation order).

passage.<sup>29</sup> The circuit courts continue to uphold the Act based on the limited jurisprudence available concerning the writ.<sup>30</sup>

All of this changed in 2008. In *Boumediene v. Bush*,<sup>31</sup> the Supreme Court provided the first extensive interpretation of the meaning and purpose of the Suspension Clause and the writ of habeas corpus.<sup>32</sup> The majority opinion also set forth an analytical approach for courts to undertake when determining whether a substitute for the writ is “adequate and effective.”<sup>33</sup> Based on this new framework, this Comment argues that the REAL ID Act fails to provide an “adequate and effective” substitute for the writ because the current level of review does not allow the courts of appeals to correct the deficiencies of earlier proceedings.

Part One of this Comment will examine the developments of the writ of habeas corpus throughout the history of the United States, beginning with the importance the Founding Fathers placed on the writ. This section will also examine the recent changes in federal court review of alien removal orders, beginning with the 1996 legislation and continuing with the REAL ID Act, along with the federal courts’ responses to those acts. Part Two will then examine the majority opinion in *Boumediene v. Bush*, addressing the meaning and purpose that Justice Kennedy attached to the writ of habeas corpus and the analytical approach he set forth to determine if a substitute is “adequate and effective.” Part Three will then analyze whether the current system for review of alien removal orders comports with the guidelines set forth by Justice Kennedy in *Boumediene*. This section will draw comparisons between the Combatant Status Review Tribunals (CSRTs) that the Court examined in *Boumediene* and the immigration hearings concerning alien removal orders. This section will then contrast the level of review provided to courts of appeals when reviewing alien removal orders with the Court of Appeals for the District of Columbia’s level of review over the CSRTs’ decisions. Finally, this section will examine

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29. *Ruiz-Almanzar v. Ridge*, 485 F.3d 193, 196 n. 7 (2d Cir. 2007) (explaining how district courts were required upon passage of the REAL ID Act to transfer pending habeas petitions for review of removal orders to the circuit courts).

30. *See infra* notes 39–41 and accompanying text (observing the limited Supreme Court jurisprudence concerning the writ, particularly in the context of executive detentions).

31. 128 S. Ct. 2229 (2008).

32. *See infra* Part II.B (describing the analytical approach set forth by the Court in *Boumediene* to determine the quality and sufficiency of a substitute for the writ); *infra* notes 38, 40–41, 140 and accompanying text (recounting the imprecise and vague treatment of the writ by federal appellate courts and the Supreme Court before *Boumediene*).

33. *Id.*

the courts of appeals' decisions since the passage of the REAL ID Act to determine whether the current system provides for adequate review in light of *Boumediene*. Part Four recommends the restoration of the right of aliens to seek habeas review of their removal orders due to the deficiencies in the earlier proceedings and the lack of "adequate and effective" review in the courts of appeals.

## I. BACKGROUND

### A. *Historical Development of the Writ of Habeas Corpus*

The Founding Fathers placed considerable importance on the writ of habeas corpus when drafting the Suspension Clause of the Constitution,<sup>34</sup> which provides 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."<sup>35</sup> As evidence of its importance, the writ was one of the few individual rights set forth in the Constitution prior to the Bill of Rights.<sup>36</sup> Alexander Hamilton described the writ as a "bulwark" against arbitrary prosecutions and punishments.<sup>37</sup>

Despite the significance of the writ, courts have struggled in defining its exact scope and purpose.<sup>38</sup> Early on, the Supreme Court interpreted the writ as being in "the nature of a writ of error" with the

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34. See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 564–66 (2002) (noting that the Framers understood the "importance of habeas corpus as a security for physical liberty"). While there is not considerable information concerning the reason why the final version of the Clause was used over others, it is clear that the limitation on Congress's power to suspend the writ was uncontroversial. *Id.* at 566. In fact, three state delegations at the Constitutional Convention dissented from the final vote on the Clause because they did not feel that Congress should *ever* be able to suspend the writ. *Id.*; see also 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.04(2)(a) (Matthew Bender & Co. 2008) ("The right to habeas corpus is rooted in the U.S. Constitution's Suspension Clause. It has a pre-eminent role in our constitutional system; its scope, flexibility, and capacity to reach all manner of illegal detentions have been emphasized and jealously guarded.").

35. U.S. CONST. art. I, § 9, cl. 2.

36. Neuman, *supra* note 34, at 567.

37. THE FEDERALIST NO. 84, at 453 (Alexander Hamilton) (J.R. Pole ed., 2005) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*438 (1765)).

38. See Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1469 (1997) (finding that both the litigation and history of habeas corpus "suggest[s] that precision in defining the scope of [the writ] will be unattainable"); cf. Jill M. Pfenning, *Inadequate and Ineffective: Congress Suspends the Writ of Habeas Corpus for Noncitizens Challenging Removal Orders by Failing to Provide a Way to Introduce Evidence*, 31 VT. L. REV. 735, 741 (2007) (discussing the "debate" as to the scope of habeas review in the context of an alien challenging a removal order and finding that it was generally understood as a means of challenging the "legality of the detention").

purpose of examining the legality of the detention.<sup>39</sup> Later opinions by federal courts limited the scope of the writ to examining due process violations or “violation[s] of the Constitution or laws or treaties of the United States.”<sup>40</sup> Despite the frequency with which the federal courts have addressed the writ, any discussion of its scope and purpose has been limited.<sup>41</sup> The Supreme Court has made clear, however, that Congress can suspend the writ so long as it substitutes another form of review that is “neither inadequate nor ineffective to test the legality of a person’s detention.”<sup>42</sup> In addition, the limited discussion of the writ has largely dealt with its use in the context of state court convictions with little attention directed at habeas review of executive detentions.<sup>43</sup> While the focus on state court convictions is important, the primary historical purpose of the writ was to protect against unlawful executive detentions.<sup>44</sup>

### B. Importance of the Writ in Immigration Law

The writ of habeas corpus has “played a vital role” in immigration law as a means for aliens to challenge their removal orders.<sup>45</sup>

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39. See *Ex parte Watkins*, 28 U.S. (1 Pet.) 193, 202 (1830) (discussing the writ’s history in England).

40. 1 RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* 21 (4th ed. 2001) (citation omitted). Hertz and Liebman outline the various enumerations the Supreme Court gave to the writ, including language that would end up being used in the Fifth Amendment Due Process Clause. *Id.*

41. See *id.* at 6–9, 18–23 (explaining that, throughout the history of the writ in the United States, the Supreme Court has often used “one- or two-word labels,” such as a “civil remedy” and a “clearly appellate” process, which have sometimes been inconsistent and controversial when describing the scope of the writ, while also using “broad rhetoric” to describe the purpose of the writ, ranging from proclaiming the writ to be “in the nature of a writ of error, to examine the legality of the commitment” to a “remedy whose most basic traditions and purposes are to avoid a grievous wrong—holding a person in custody in violation of the Constitution” (citations omitted) (internal quotation marks omitted)).

42. *Swain v. Pressley*, 430 U.S. 372, 381 (1977); see *United States v. Hayman*, 342 U.S. 205, 223 (1952) (discussing the adequacy and effectiveness of an alternative to habeas corpus).

43. See Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1965 (2000) (critiquing the emphasis on state court convictions review, where “[t]he primary focus has been federalism, not separation of powers”).

44. See *id.* (explaining that the writ was meant to protect against both “executive detention without legal authority and executive detention in violation of legal restrictions”).

45. See 2 HERTZ & LIEBMAN, *supra* note 40, at 1769 (acknowledging the Supreme Court’s view that “[b]efore and after the enactment in 1875 of the first statute regulating immigration . . . federal habeas corpus jurisdiction was regularly invoked on behalf of noncitizens, particularly in the immigration context” (quoting *INS v. St. Cyr*, 533 U.S. 289, 305-06 (2001))). Moreover, “[u]ntil the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court.” *Id.*; see GORDON ET AL., *supra* note 34, § 104.04(2)(a) (“[H]abeas

Even prior to receiving statutory authority from Congress, federal courts consistently heard habeas petitions from aliens concerning both constitutional and non-constitutional claims.<sup>46</sup> In 1953, the Supreme Court in *Heikkila v. Barber*<sup>47</sup> recognized the constitutional right of aliens to petition the federal courts for review of immigration decisions.<sup>48</sup> However, the Court clarified that the scope of such review was limited to due process requirements, which is “very different from applying a statutory standard of review, [such as] deciding on ‘the whole record’ whether there is substantial evidence to support administrative findings of fact.”<sup>49</sup>

The 1961 amendments to the INA provided the next major development in review of alien removal orders by stipulating that the courts of appeals had “sole and exclusive” authority to review removal orders.<sup>50</sup> While review was typically limited to the courts of appeals, aliens had numerous assurances that they would receive adequate review.<sup>51</sup> Additionally, aliens subject to removal and simultaneously detained were still allowed to petition a district court for habeas review, rather than turning to the courts of appeals on direct review.<sup>52</sup> Habeas review was also available for “unusual cases,” where a removal

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corpus is the historic—and most fundamental—basis for judicial review of immigration orders.”). The 1996 legislation consolidated “exclusion” and “deportation” into one category entitled “removal”; for the purposes of this Comment, the term removal will be used. See Pfenning, *supra* note 38, at 743 (explaining the changes made in the 1996 legislation).

46. See GORDON ET AL., *supra* note 34, § 104.04(2)(b) (noting that despite the 1891 and 1917 Immigration Acts, which were intended to prohibit judicial review of aliens’ petitions, courts continued to hear such claims, indicating that the right to such review was constitutionally based); see also Neuman, *supra* note 43, at 1966 (observing that prior to congressional regulation of immigration, federal courts utilized the writ in examining the lawfulness of removing various groups of aliens, including enemy aliens and those aliens accused of committing a crime).

47. 345 U.S. 229 (1953).

48. *Id.* at 237; see also David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75, 79 (2006–07) (summarizing the Supreme Court’s holding that habeas review was the sole means of review for aliens because the Immigration Act of 1917 precluded any other form of review of immigration decisions).

49. *Heikkila*, 345 U.S. at 236.

50. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651-53 (repealed 1996); see also McConnell, *supra* note 48, at 80-81 (describing the judicial review scheme set up by the 1961 INA as “more closely resembling” the review found in the Administrative Procedure Act than habeas review, which was narrower in scope under the *Heikkila* decision).

51. See McConnell, *supra* note 48, at 81 (summarizing the provisions of the 1961 INA, including the ability of aliens to file for review up to ninety days after the final removal order was entered and the authority of the courts of appeals to review the administrative record, discretionary decisions, and factual determinations under varying levels of review).

52. See *id.* at 81-82, 82 n.37 (quoting the INA provision stating that “any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings” (citation omitted)).

order was necessitated by various circumstances, such as ineffective assistance of counsel.<sup>53</sup> Aliens were even allowed to file a second habeas petition in certain situations.<sup>54</sup> This system of judicial review remained in place until Congress took action in 1996.<sup>55</sup>

*C. 1996 Amendments to the INA and the Supreme Court's  
Response in INS v. St. Cyr*

Congress made drastic changes to the procedure for judicial review of alien removal orders in two different 1996 acts.<sup>56</sup> Initially, the Antiterrorism and Effective Death Penalty Act (AEDPA) repealed section 106(a)(10) of the INA, which had allowed habeas review for deportable aliens being detained.<sup>57</sup> AEDPA also added a provision to the INA, which prohibited *any* judicial review over deportations of aliens convicted of certain crimes.<sup>58</sup>

Within the same year, Congress again altered judicial review of removal orders in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>59</sup> which repealed all of section 106 of the INA and replaced it with section 242, part of which applied retroactively.<sup>60</sup> This new section provided that aliens only had thirty days to petition for review and that review of all removal orders would take place in the court of appeals in the circuit in which the IJ had

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53. See Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation Over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113, 117 (2006-07) (finding several situations where the circuit courts found habeas review available, including: ineffective assistance of counsel, an emergency stay of deportation while an appeal was pending, and abuse of discretion by the agency).

54. See *id.* (noting the availability of second habeas petitions when information became available that was not presented at the earlier proceeding or if earlier proceedings provided a remedy that was "inadequate or ineffective").

55. See Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 961 (1998) (explaining that the 104th Congress passed new legislation motivated by a frustration with what it perceived as "enforcement inefficiencies" with the INS).

56. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.); see also Neuman, *supra* note 55, at 961 (indicating that the 1996 acts would, "if taken literally, create unprecedented restrictions on the availability of habeas corpus to aliens being removed from the United States").

57. AEDPA § 401(e).

58. *Id.* § 401(a).

59. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

60. See GORDON ET AL., *supra* note 34, § 104.04(3)(a) (noting that section 242(g) of IIRIRA, which limited judicial review of certain immigration issues, was "expressly made to apply to 'past, pending or future exclusion, deportation, or removal proceedings under [the] Act'" (citation omitted)).

issued the removal order.<sup>61</sup> IIRIRA also further limited the scope of judicial review by providing that aliens convicted of serious criminal offenses would have no review of their removal order.<sup>62</sup>

Numerous issues immediately arose concerning the constitutionality of these provisions with regard to the Suspension Clause,<sup>63</sup> resulting in a surge of litigation.<sup>64</sup> The main issue that arose from this litigation centered on the availability of judicial review for those aliens convicted of criminal offenses.<sup>65</sup> While the Acts made clear that direct review to the courts of appeals was unavailable for aliens convicted of certain crimes, it was unclear whether Congress had intended to eliminate habeas review as well since there was no explicit reference to the writ.<sup>66</sup> In resolving that issue in *INS v. St. Cyr*,<sup>67</sup> the Supreme Court held that habeas review by the federal district courts was still available because Congress had not provided a “clear, unambiguous, and express statement of [its] intent” to repeal habeas review.<sup>68</sup> The Court in *St. Cyr*, however, did not undertake to examine the scope of habeas review in making its decision.<sup>69</sup> In response to the Supreme Court’s indication of what was required

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61. IIRIRA § 306(a)(2).

62. *Id.* § 309(c)(4)(G); see also McConnell, *supra* note 48, at 86-87 (explaining that prior to these acts, “aliens could file review petitions in the courts of appeals and detained aliens could challenge their deportation orders in habeas corpus proceedings”). The IIRIRA provision provided a similar list to the provisions in AEDPA of offenses that qualified as a serious criminal act, thus barring review. *Id.* at 87. The provision included such crimes as “aggravated felonies, controlled substance and firearms offenses, multiple crimes involving moral turpitude, and other miscellaneous offenses.” *Id.*

63. See generally Neuman, *supra* note 55, at 966-67 (describing the issues that arose in response to the 1996 acts, including the extent to which the bar to review of a deportation resulting from criminal conduct permitted the courts to review whether the conduct truly warranted deportation).

64. See McConnell, *supra* note 48, at 86, 88 (noting that despite Congress’s desire to “streamline and expedite” judicial review of aliens’ claims, considerable litigation arose in response to the 1996 acts).

65. See Neuman, *supra* note 43, at 1986-87 (observing that IIRIRA presented an issue as to whether the “rule [was] explicit enough to preclude habeas jurisdiction, . . . and potentially whether such preclusion [was] constitutional”).

66. See McConnell, *supra* note 48, at 87, 89 (reporting on the circuit court split that developed over whether habeas review was available to criminal aliens in light of AEDPA and IIRIRA). The Government maintained the position that habeas review was no longer available. See GORDON ET AL., *supra* note 34, § 104.04(3)(a) (noting that, because the 1996 acts did not “explicitly repeal[] or even address[] the traditional habeas corpus review provided by statute,” the Government argued it was repealed implicitly).

67. 533 U.S. 289 (2001).

68. See *id.* at 314 (finding that, if the Court were to rule otherwise, there would be no forum for review, which would raise Suspension Clause concerns and, therefore, the Court would read the acts to be constitutional).

69. See *id.* at 301 n.13 (explaining that “[t]he fact that th[e] Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason” to find habeas review still available after the 1996 acts).

to effectuate a repeal of habeas review, Congress acted again in 2005 to make its intent to repeal habeas review perfectly clear.<sup>70</sup>

*D. The REAL ID Act Suspends Habeas Review of Alien Removal Orders*

In the REAL ID Act of 2005, Congress unambiguously eliminated habeas review of alien removal orders.<sup>71</sup> Congress admitted that the Act was a direct response to the Supreme Court's decision in *St. Cyr*.<sup>72</sup> Congress believed the decision had created "anomalies" in the judicial review scheme for alien removal orders<sup>73</sup> and was inconsistent with the purpose of the 1996 acts.<sup>74</sup>

In the cases that have arisen since the REAL ID Act, review of alien removal orders is only available in the courts of appeals and is limited to constitutional and legal claims.<sup>75</sup> In addition, the REAL ID Act maintains a thirty-day deadline for filing petitions for review,<sup>76</sup> limits courts of appeals' review to the administrative record,<sup>77</sup> and does not allow the courts to hear new evidence.<sup>78</sup> Despite the REAL ID Act's

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70. See McConnell, *supra* note 48, at 105 (explaining that the congressional repeal of habeas review of removal orders in the REAL ID Act was a direct response to the Supreme Court's decision in *St. Cyr* and other decisions in which the Court had not found congressional intent to be sufficiently explicit and unambiguous to justify a finding that habeas review was completely barred).

71. Pub. L. No. 109-13, § 106(a)(1)(B)(5), 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.); see McConnell, *supra* note 48, at 105 (suggesting that congressional intent to repeal habeas review could not have been clearer). Congress did attempt to ensure that there were no Suspension Clause concerns by adding a section stating that "[n]othing [in this Act] shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." REAL ID Act § 106(a)(1)(A)(iii).

72. H.R. REP. NO. 109-72, at 173 (2005) (Conf. Rep.), *reprinted in* 2005 U.S.C.C.A.N. 240.

73. See *id.* at 174 (arguing that *St. Cyr* gave criminal aliens more review than non-criminal aliens and created confusion as to which court should review immigration cases). Congress had been very critical of the system that resulted from the Supreme Court's decision in *St. Cyr*. See Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 136 n.11 (2006-07) (acknowledging Congress's concern that lawyers and courts would have difficulty litigating in such a system).

74. See *id.* at 172 (admitting that the purpose of the 1996 acts *was* to limit judicial review of alien removal orders, albeit in an effort to streamline the process).

75. *Id.* at 174 (noting that habeas review is not intended to address non-constitutional discretionary or factual issues).

76. See Morawetz, *supra* note 53, at 126 (contending that, while the thirty-day limit also existed with the 1996 acts, constitutional issues were avoided because the petition for review was only the primary, but not the sole, means of review).

77. See *id.* at 128 (noting that previously habeas review had served as a safety net for situations where factual issues needed to be addressed that were not included in the administrative record).

78. See Neuman, *supra* note 71, at 145 (maintaining that the adequacy of the review depends on the ability of the court to "make necessary inquiries"). Since the 1996 legislation, the courts of appeals are also not authorized to remand to the administrative agencies for more evidence gathering. See *id.* at 146.

limitations on review, courts of appeals have upheld the Act as constitutional by finding that it provides an “adequate and effective” substitute for the writ through direct review to the courts of appeals.<sup>79</sup>

*E. Executive Attempts to Limit Review at the Administrative Level*

As Congress attempted to limit review of alien removal orders, the executive branch instituted streamlining procedures at the BIA, an “administrative tribunal” of the Department of Justice (DOJ) that hears appeals from the immigration courts.<sup>80</sup> These measures were implemented to resolve the tremendous backlog of appeals.<sup>81</sup> Beginning in 1999, the DOJ instituted changes in the appeals procedure, one of which authorized the Chairman of the BIA to define categories of cases that could appropriately be heard by a single board member instead of the usual three-member panel.<sup>82</sup> The streamlining continued in 2002 when the Chairman added two more large categories to those appeals that could be decided by a single board member.<sup>83</sup> The Chairman continued adding categories until essentially all appeals concerning removal could be heard by a single board member; hearings by three-member panels have become the exception, not the rule.<sup>84</sup> These single board members are also authorized to affirm decisions made by an IJ without issuing an opinion.<sup>85</sup> The streamlining measures also limit the scope of the BIA’s review in examining factual findings of the IJs.<sup>86</sup> Additionally,

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79. See, e.g., *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 114 (2d Cir. 2008) (“[O]ther Circuits, with which [this court] now join[s], have determined that the provision of the REAL ID Act at issue here is not unconstitutional because ‘it provides, through review by a federal court of appeals, an adequate and effective remedy to test the legality of an alien’s detention.’” (citation omitted)). In this decision, the Second Circuit joined the Eighth, Ninth, and Eleventh Circuits in holding that the REAL ID Act was constitutional. See *id.* (citing *Mohammed v. Gonzales*, 477 F.3d 522, 526 (8th Cir. 2007); *Puri v. Gonzales*, 464 F.3d 1038, 1041 (9th Cir. 2006); *Alexandre v. Att’y Gen.*, 452 F.3d 1204, 1206 (11th Cir. 2006)).

80. See generally John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 17 n.16 (2006-07) (listing the various decisions that the BIA reviews in addition to alien removal orders).

81. See *id.* at 17-18, 18 n.18 (noting the increase in the 1990s of appeals of IJ decisions to the BIA with the total number of appeals before the BIA reaching almost 30,000 in 2000, compared to less than 3000 in 1984 (citation omitted)).

82. *Id.* at 18.

83. See *id.* at 19 (allowing single board members to hear appeals “involving claims for asylum, withholding, and CAT relief,” in addition to “cases involving claims for suspension of deportation or cancellation of removal”).

84. *Id.* at 19.

85. *Id.* at 18. Such decisions lacking a written opinion are called affirmances without opinions (“AWOs”). *Id.*

86. See *id.* at 19 (explaining that the BIA, which used to have de novo review over factual findings, must now defer to factual findings of the IJ “unless they are clearly erroneous,” and it can no longer engage in any fact finding itself).

the executive branch reduced the number of members on the BIA from twenty-three to eleven.<sup>87</sup>

While the aforementioned changes were implemented to reduce the BIA's backlog, these measures have led to a 970 percent increase in the number of appeals to the federal courts; any reduction in the backlog at the BIA has merely been transferred to the federal courts.<sup>88</sup> The resulting increase in appeals has turned the courts of appeals into a "major focal point for immigration litigation,"<sup>89</sup> despite the limited review available to aliens in these courts.<sup>90</sup> Regardless of the narrow scope of review at both the BIA and the courts of appeals, the courts of appeals have upheld the REAL ID Act's repeal of habeas review, finding the current level of review "adequate and effective."<sup>91</sup>

## II. *BOUMEDIENE V. BUSH* SETS FORTH THE SUPREME COURT'S APPROACH TO DETERMINING THE SCOPE OF THE WRIT OF HABEAS CORPUS

The Supreme Court expanded its explanation of the writ of habeas corpus in its 2008 decision *Boumediene v. Bush*.<sup>92</sup> The majority opinion by Justice Kennedy extended the writ of habeas corpus to the detainees at Guantanamo Bay.<sup>93</sup> More importantly, however, the

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87. *Id.* While the purpose of decreasing the number of members on the BIA was to encourage "cohesiveness and collegiality," *id.*, it seems "perverse" to do so when the BIA was facing such a tremendous backlog. Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 44 n.20 (2006-07). Benson also notes that the members removed from the BIA were those most likely to dissent or "write concurring opinions that suggested alternative legal analysis." *Id.* At the time this article went to print, the BIA has been authorized to increase its size to fifteen board members, although vacancies still exist. United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, <http://www.usdoj.gov/eoir/biainfo.htm> (last visited July 29, 2009).

88. See Benson, *supra* note 87, at 47 (describing the streamlining as having created an "explosion" of work in the federal courts). While it remains unclear what exactly motivated the increase in appeals to the circuit courts, whether it be a lack of faith in the BIA's procedure or some other factor, the link between those procedural changes and the surge in litigation in the courts of appeals is clear. *Id.*

89. See Palmer, *supra* note 80, at 35 (noting the indisputable link between the procedural changes at the BIA and the resulting surge in litigation in the courts of appeals).

90. See *supra* Parts I.C-D (describing the legislative changes to judicial review of alien removal orders).

91. See *supra* note 79 and accompanying text (acknowledging the circuit courts that have upheld the REAL ID Act).

92. 128 S. Ct. 2229 (2008).

93. *Id.* at 2262 (holding that "the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.").

Supreme Court enunciated what it had failed to explain in *St. Cyr*.<sup>94</sup> For the first time, the Supreme Court set forth its interpretation of the meaning and purpose of the writ of habeas corpus and the analysis to undertake in determining its scope.<sup>95</sup>

A. *Background and Summary of Boumediene v. Bush*

*Boumediene* involved a several-year struggle for the detainees at Guantanamo to secure the right to habeas review of their Combatant Status Review Tribunal (CSRT) hearings, which had determined that they were enemy combatants.<sup>96</sup> Though the Military Commissions Act of 2006 (MCA) eliminated habeas review of the CSRT hearings,<sup>97</sup> the Government argued that the Suspension Clause had not been violated because the Detainee Treatment Act (DTA) created a constitutionally sufficient substitute for the writ by allowing direct review by the Court of Appeals for the District of Columbia.<sup>98</sup> A majority of the Supreme Court disagreed and held that the MCA was an unconstitutional suspension of the writ because direct review was not a constitutionally sufficient substitute.<sup>99</sup>

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94. See *supra* note 66 and accompanying text (noting that the Court in *St. Cyr* did not attempt to define the scope of habeas review).

95. See *Boumediene*, 128 S. Ct. at 2262-74 (discussing whether Congress had provided an adequate substitute for the writ since it had removed habeas review in the Military Commissions Act (MCA)).

96. See *id.* at 2240-42 (outlining the procedural history of the case). See generally Carrie Newton Lyons et al., *International Legal Developments in Review: 2007, Public International Law, National Security: Supreme Court Again to Consider Guantanamo Detainees*, 42 INT'L LAW. 811, 812 (2008) (noting that Congress passed the Detainee Treatment Act of 2005 (DTA) in response to *Rasul v. Bush*, which extended habeas protections to aliens detained at Guantanamo Bay (citations omitted)). “[I]n June 2006, the Supreme Court responded again in *Hamdan v. Rumsfeld*, holding that the DTA did not strip federal courts of jurisdiction over pending habeas petitions from detainees.” *Id.* (citation omitted). “As a response, Congress and the executive branch passed the [MCA],” which explicitly stripped the federal courts of the authority to hear habeas claims. *Id.* (citation omitted).

97. Pub. L. No. 109-366, § 7, 120 Stat. 2635 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

98. See *Boumediene*, 128 S. Ct. at 2262. The DTA states that:

The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an [enemy combatant] . . . shall be limited to the consideration of: (i) whether the status determination of the [CSRT] . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C), 119 Stat. 2739 (codified as amended in scattered sections of 1, 5, 10, 15, 16, 28, 37, 41, 42, and 50 U.S.C.).

99. *Boumediene*, 128 S. Ct. at 2274.

B. *The Analytical Approach Established in Boumediene to Determine What Constitutes an “Adequate and Effective” Substitute for the Writ of Habeas Corpus*

Despite finding that a constitutionally sufficient substitute had not been provided, the majority in *Boumediene* did not set forth a clear test for determining when a substitute for the writ would be sufficient.<sup>100</sup> Instead, Justice Kennedy, writing for the majority, explained that the writ is an “adaptable remedy” whose exact scope will change depending on the circumstances.<sup>101</sup> Due to this adaptability, Kennedy proffered only two requirements that a substitute for the writ must provide: a “meaningful opportunity” for any detained person to “demonstrate that he is being held pursuant to ‘the erroneous application or interpretation of [the] law’”<sup>102</sup> and the ability of a reviewing court to order the release of the detained person.<sup>103</sup>

Beyond those requirements, the scope of habeas review depends on the nature of the earlier proceedings.<sup>104</sup> To illustrate this point, Justice Kennedy compared the writ in the context of review of executive detentions to its use in reviewing state court criminal convictions.<sup>105</sup> In examining the common law history of the writ, Kennedy noted that “pretrial and noncriminal detention[s]” appeared to receive the most extensive habeas review.<sup>106</sup> As Kennedy explained:

A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and

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100. See *id.* at 2279 (Roberts, C.J., dissenting) (criticizing the majority for “replac[ing] a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date”).

101. See *id.* at 2266-67 (majority opinion) (explaining why the majority opinion did not provide a “comprehensive summary of the requisites for an adequate substitute for habeas corpus”). This explanation of the writ as adaptable is consistent with prior Supreme Court decisions. See *Hensley v. Mun. Court*, 411 U.S. 345, 349-50 (1973). For instance, in *Jones v. Cunningham*, the Court stated that the writ “is not now and never has been a static, narrow, formalistic remedy.” 371 U.S. 236, 243 (1963). In *Harris v. Nelson*, the Court explained that, due to the nature of the writ, it must be “administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.” See 394 U.S. 286, 291 (1969) (describing that the purpose of the writ, in protecting against all illegal detention, requires it to be able “to cut through barriers of form and procedural mazes”).

102. *Boumediene*, 128 S. Ct. at 2266 (citation omitted).

103. *Id.* (noting, however, that the release of an individual does not have to be the “exclusive remedy[,]” nor is it always the most appropriate one).

104. *Id.* at 2268.

105. *Id.* at 2267-69.

106. See *id.* at 2267 (explaining that the more extensive habeas review was due to “little or no previous judicial review of the cause for detention”).

committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders . . . . In this context the need for habeas corpus is more urgent.<sup>107</sup>

In light of this difference in the scope of review, it was particularly important to the *Boumediene* majority that, even in the context of state court convictions, there were clear limits on the ability to circumscribe habeas review. For instance, in *Swain v. Pressley*<sup>108</sup> and *United States v. Hayman*,<sup>109</sup> the Court's leading cases concerning habeas substitutes for state court convictions, the majorities stressed that the substitutes were not "intended to circumscribe habeas review."<sup>110</sup> Additionally, in upholding the substitutes, the Court in both cases relied heavily on the existence of a savings clause in each statute that permitted habeas review if the substitute proved inadequate.<sup>111</sup>

The majority in *Boumediene* also established that a due process analysis does not end the inquiry into the constitutionality of the substitute.<sup>112</sup> As the Court noted, in the context of state court convictions, both *Swain* and *Hayman* established that the writ is relevant even when a person is detained after a criminal trial that was conducted in accordance with the Bill of Rights.<sup>113</sup> In explaining the need to go beyond a due process analysis, Kennedy described habeas review as a "collateral process" that is not "subordinat[e]" to the original proceeding.<sup>114</sup>

Beyond these general principles, the majority made clear that the sufficiency of any substitute for the writ will be determined on a

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107. *Id.* at 2269.

108. 430 U.S. 372 (1977).

109. 342 U.S. 205 (1952).

110. *See Boumediene*, 128 S. Ct. at 2264-66 (finding that the purpose and effect of the statutes involved in both cases was intended only to expedite post conviction review, not to "frustrate" it).

111. *Id.* at 2265-66.

112. *See id.* at 2270 (explaining that "[e]ven when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant"); *see also* Neuman, *supra* note 43, at 1965 (arguing that the "writ [is] not directed solely against detention that violates constitutional rights"). Professor Neuman supports the argument that the writ goes beyond a constitutional protection by pointing out that "the United States inherited habeas corpus from the English legal system, which had no separate category of constitutional error." *Id.*

113. *Boumediene*, 128 S. Ct. at 2270.

114. *See id.* ("Habeas corpus is a collateral process that exists . . . to 'cut through all forms and go to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved [sic] opens the inquiry whether they have been more than an empty shell.'" (quoting *Frank v. Magnum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting))).

case-by-case analysis.<sup>115</sup> The initial proceedings must first be examined in order to identify any potential issues or problems that arise based on both their structure and overall nature.<sup>116</sup> The analysis then turns to the reviewing court to determine whether the substitute provides adequate review given any deficiencies in the previous hearings.<sup>117</sup>

*C. Application of Boumediene's New Analytical Approach  
to the Detainees at Guantanamo*

After setting forth this approach to determining whether a substitute satisfies the Suspension Clause, the majority found that, in light of the proceedings and nature of the CSRTs,<sup>118</sup> the DTA did not provide an "adequate and effective" substitute.<sup>119</sup> In examining the CSRTs, the Court was especially concerned with the "considerable risk of error" in the factual findings, even when the parties fully adhered to proper procedures.<sup>120</sup> Considering that a mistake may lead to the detention of an innocent person for an indefinite period of time, the high risk of error provoked heightened concern for the constitutionality of the substitute.<sup>121</sup> Therefore, the Court held that, in order "to function as an effective and proper remedy," the reviewing court must be able to correct any factual errors.<sup>122</sup> This would include some ability "to assess the sufficiency of the Government's evidence against the detainee" and the ability to introduce and consider exculpatory evidence not admitted at the CSRT hearing.<sup>123</sup>

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115. *Id.* at 2266, 2270.

116. *See id.* at 2266-68 (describing the difference in the scope of review depending on whether the detention is based on a criminal conviction emanating from a court or an executive detention).

117. *See id.* at 2269-74 (determining whether the DTA provides adequate review in light of the circumstances at the CSRTs).

118. *Id.* at 2269 (noting numerous deficiencies including the detainee's difficulty in rebutting the Government's claim that he is an enemy combatant, the "limited means to find or present evidence," and the lack of counsel).

119. *Id.* at 2272-74 (finding that the court of appeals cannot order the detainee released even if it finds that detention is not justified). The court is only allowed to examine the standards and procedures of the military commission and cannot engage in any fact finding nor allow the detainee to present exculpatory evidence that was not available during the earlier proceedings. *Id.*

120. *Id.* at 2270.

121. *Id.* at 2270-71; *cf. id.* at 2279 (Souter, J., concurring) (criticizing the dissenting Justices for not appreciating the length of time the detainees had been at Guantanamo, which, for some, had already reached six years).

122. *Id.* at 2270 (majority opinion) (noting that habeas petitioners in federal courts traditionally have been able to submit additional evidence to the reviewing court, even in the state court conviction context).

123. *Id.*

It was, therefore, not difficult for the majority to find the DTA an inadequate substitute for the writ.<sup>124</sup> First, under the DTA, the court of appeals did not have the power to order the release of the detainee,<sup>125</sup> nor could it make the necessary factual findings.<sup>126</sup> Additionally, unlike the statutes in both *Swain* and *Hayman*,<sup>127</sup> neither the DTA nor the MCA contained a savings clause to permit habeas review should the “alternative process prove[] inadequate or ineffective.”<sup>128</sup> In further contrast to the statutes in *Swain* and *Hayman*, which were created to streamline judicial review,<sup>129</sup> the DTA and MCA were intended to limit judicial review of the detainee’s petitions.<sup>130</sup> Based on these characteristics of the judicial review scheme set up in the DTA, the Court found that the DTA did not provide an adequate substitute, and the MCA consequently was an unconstitutional suspension of the writ.<sup>131</sup>

*D. Chief Justice Roberts’s Dissent Arguing for a Due Process Analysis*

In his dissent, Chief Justice Roberts approached his analysis of the MCA from an opposing perspective, arguing that the Court cannot reach its conclusion without first determining whether the CSRTs comport with the Due Process Clause.<sup>132</sup> This approach, however, stems from a drastically different understanding of the writ.<sup>133</sup>

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124. *Id.* at 2274.

125. *Id.* at 2271.

126. *Id.* at 2271-74 (observing that the Court of Appeals was confined to reviewing the record from the CSRT and could not provide the detainees with an opportunity to introduce new exculpatory evidence). While the detainee could request a new CSRT hearing if exculpatory material became available after the initial hearing, the Court found this insufficient to allow new evidence introduced because the Deputy Secretary of Defense has complete discretion in granting a new hearing, and the detainee has no opportunity to challenge the denial of a new hearing. *Id.* at 2273.

127. *See supra* note 111 and accompanying text (observing that the statutes involved in both cases contained a savings clause that permitted habeas review if direct review proved inadequate or ineffective).

128. *Boumediene*, 128 S. Ct. at 2265-66.

129. *See supra* note 110 and accompanying text (describing how both statutes were intended to expedite judicial review).

130. *Boumediene*, 128 S. Ct. at 2265.

131. *See id.* at 2275-76 (explaining that the Court was only holding unconstitutional section 7 of the MCA, which barred habeas review for the detainees; the DTA and the CSRT process would still remain intact, and the only difference in the judicial review scheme would be the opportunity for the detainees to seek habeas review).

132. *See id.* at 2281 (Roberts, C.J., dissenting) (“Because the majority refuses to assess whether the CSRTs comport with the Constitution, it ends up razing a system of collateral review that it admits may in fact satisfy the Due Process Clause and be ‘structurally sound.’”).

133. *See generally* Neuman, *supra* note 43, at 1964-65 (explaining that judicial review in the context of executive detention can be examined from three overlapping perspectives: “the Article I prohibition against suspension of the writ of

Roberts found the writ to solely protect an individual's due process right to a fair hearing.<sup>134</sup> Under Chief Justice Roberts's narrow approach, the CSRTs comported with the rules by which they were bound<sup>135</sup> and provided the detainees a "constitutionally adequate opportunity to contest their detentions."<sup>136</sup> In contrast, the majority based its interpretation of the writ on the Suspension Clause and therefore found the scope of habeas review to be much broader.<sup>137</sup> The majority found that the purpose of the writ was not only to ensure fair procedures, but also to provide protections against detentions based on inaccurate determinations.<sup>138</sup> This approach is consistent with Supreme Court precedent, which has "consistently rejected interpretations of the [writ] that would suffocate [it] in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements."<sup>139</sup>

III. APPLYING *BOUMEDIENE*'S ANALYTICAL APPROACH TO DETERMINING  
THE CONSTITUTIONALITY OF A SUBSTITUTE FOR HABEAS REVIEW  
INDICATES THAT THE REAL ID ACT DOES NOT PROVIDE  
"ADEQUATE AND EFFECTIVE" REVIEW

Since *Boumediene* offers the Supreme Court's first extensive discussion of the Suspension Clause,<sup>140</sup> it necessarily encourages an

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habeas corpus, the vesting of judicial power in the federal courts under Article III, or the Fifth Amendment prohibition against deprivation of liberty without due process of law"). Professor Neuman, in support of the majority in *Boumediene*, argues that the Suspension Clause must drive the analysis of judicial review of executive detentions and that Article III and the Due Process Clause must be read in light of this prohibition against suspending the writ of habeas corpus. *Id.*

134. See *Boumediene*, 128 S. Ct. at 2279 (Roberts, C.J., dissenting) ("Habeas is most fundamentally a procedural right . . . . The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess."); see also Benson, *supra* note 87, at 60 (noting that due process, under current case law, may not require review of immigration hearings by an Article III court).

135. See *Boumediene*, 128 S. Ct. at 2287-89 (Roberts, C.J., dissenting) (noting the rights detainees possess at their CSRT hearings, including the right to examine witnesses and call witnesses of their own).

136. *Id.* at 2284.

137. *Id.* at 2244 (majority opinion).

138. See *id.* at 2266 ("We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation of relevant law.'" (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001))).

139. *Hensley v. Mun. Court*, 411 U.S. 345, 350 (1973).

140. See *Boumediene*, 128 S. Ct. at 2263 (explaining that "[o]ur case law does not contain extensive discussion of standards defining suspension of the writ or of circumstances under which suspension has occurred"); see also HERTZ & LIEBMAN, *supra* note 40, at 6-7 (noting that the extent of Supreme Court treatment of the writ was largely limited to "one- to two-word labels"). Justice Kennedy proffered an explanation for this absence of analysis of the writ as due to the fact that

examination of other forums where the writ has traditionally been employed to ensure that the right to habeas review is protected in accordance with the Court's understanding of the writ.<sup>141</sup> Considering the extensive legislative changes to judicial review of alien removal orders that have occurred in recent years,<sup>142</sup> the current system under the REAL ID Act should be reexamined using the analytical approach introduced by the Supreme Court in *Boumediene*.<sup>143</sup>

A. *Boumediene's Analytical Approach Should Be Applied to the REAL ID Act to Determine Its Constitutionality*

In light of the similar judicial review scheme that Congress established for both Guantanamo detentions and alien removal orders,<sup>144</sup> the analysis that the Court established in *Boumediene* should be applied to the REAL ID Act's judicial review scheme for alien removal orders. Even if differences exist between the two judicial review procedures, the analytical approach set forth in *Boumediene* is still appropriate because the Court indicated that its analysis was not limited to habeas review for Guantanamo detainees and should extend to other forms of executive detention.<sup>145</sup> First, the Court stressed that judicial review is "most pressing" in the context of executive detentions because, unlike state court convictions, such detentions are not the result of hearings before "disinterested" tribunals.<sup>146</sup> Additionally, even in the context of state court convictions, the Court indicated that it would still apply the analysis

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"Congress has taken [care] throughout our Nation's history to preserve the writ and its function. Indeed, most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims." *Boumediene*, 128 S. Ct. at 2263.

141. *Cf.* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

142. *See supra* Part I.C-D (describing the changes to judicial review of alien removal orders beginning with the 1996 amendments to the INA and culminating with the elimination of habeas review in the REAL ID Act of 2005).

143. *Cf.* Neuman, *supra* note 43, at 1965 (commenting that the "fundamental historical purpose" of the writ was to safeguard against unlawful executive detention, yet noting that the majority of scholarship concerning the writ in recent decades has been concerned with state court convictions).

144. *See supra* Parts I.D, II.A (observing that the DTA and MCA established that the only review available for the Guantanamo detainees would occur in the Court of Appeals for the District of Columbia, while the REAL ID Act provided that review of alien removal orders would reside with the relevant court of appeals).

145. *See Boumediene*, 128 S. Ct. at 2268-69 (discussing the need for more extensive review of all executive detentions, not merely those involved at Guantanamo).

146. *Id.* at 2269.

set forth in *Boumediene*.<sup>147</sup> The Court referenced leading cases involving judicial review of state court convictions as examples of appellate schemes that would provide constitutionally sufficient evaluation under the *Boumediene* analysis.<sup>148</sup> The implication that *Boumediene*'s approach applies to all forms of habeas review is also indicated by the nature of the analysis itself, which the Court described as an "adaptable remedy."<sup>149</sup>

Consequently, the judicial review scheme established in the REAL ID Act ought to be reviewed using the Court's analysis in *Boumediene* in order to determine the Act's constitutionality under the Suspension Clause. Under this approach, the hearings at the administrative level, both before an immigration judge and on appeal before the Board of Immigration Appeals, must be examined, as the Supreme Court examined the CSRTs in *Boumediene*,<sup>150</sup> in order to determine if any issues exist that create concern in the resulting removal order. The analysis should then turn to the reviewing court to determine whether it has the ability to correct the deficiencies from the earlier proceedings.<sup>151</sup> Therefore, as the Court in *Boumediene* examined the DTA's scope of review,<sup>152</sup> the analysis in the context of alien removal orders turns to the courts of appeals, which have exclusive jurisdiction to review IJ and BIA decisions under the REAL ID Act.<sup>153</sup> In conducting this analysis, numerous similarities appear between the review of alien removal orders and the detentions at Guantanamo.<sup>154</sup> These similarities necessitate the same conclusion with regard to the REAL ID Act that the Court reached in

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147. See *id.* at 2263-69 (applying a similar analysis as that applied to the DTA and MCA when explaining why the Court upheld the suspension of the writ in *Swain v. Pressley* and *United States v. Hayman* through examining the scope of the review and purpose of the statute (citations omitted)).

148. See *id.* at 2264-65 (explaining that the substitute review provided for in both *Swain* and *Hayman* did not intend to limit review, had a much broader jurisdictional grant than the DTA provided, and maintained a savings clause that permitted habeas review if the substitute proved "inadequate or ineffective").

149. See *id.* at 2267 (noting that the exact scope of the writ depends on the earlier proceedings and, therefore, will necessarily change depending on the circumstances).

150. See *supra* Part II.C (explaining the deficiencies in the CSRT hearings).

151. See *supra* note 117 and accompanying text (describing that the adequacy of the reviewing court must be examined in light of the circumstances of the earlier proceedings).

152. See *supra* Part II.C (maintaining that the jurisdictional grant to the court of appeals was insufficient to correct the deficiencies of the CSRTs).

153. See *supra* Part I.D (summarizing the judicial review scheme set up by the REAL ID Act).

154. See *infra* Parts III.B.1-2, III.C.1 (noting the similar deficiencies in the earlier proceedings of both systems and the inadequate level of review provided to the courts of appeals, which does not permit the reviewing court to correct the deficiencies of the earlier proceedings).

*Boumediene* in examining the DTA: the procedures provided for in the REAL ID Act do not provide a constitutionally sufficient substitute for the writ.<sup>155</sup>

*B. Analysis of Hearings at the Administrative Level Indicates the Need for Extensive Review in the Federal Courts*

Applying the standards set forth in *Boumediene*, the analysis begins with the initial proceedings before both an IJ and the BIA. These hearings present numerous issues similar to those of the CSRTs<sup>156</sup> and create reason to question resulting removal orders.<sup>157</sup> Both federal judges and commentators have criticized the immigration courts in recent years, not only for their procedures, but also for their determinations.<sup>158</sup> As one circuit court judge stated, “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”<sup>159</sup>

*1. Hearings before an immigration judge demonstrate deficiencies in removal orders*

Hearings before immigration judges present issues similar to those the Court found troublesome in *Boumediene*<sup>160</sup> and thus create concern about the accuracy of the resulting removal order.<sup>161</sup> This concern is only more urgent considering that the consequence of such errors—expulsion from this country and the possible threat of persecution, torture, and other mistreatment in one’s native

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155. See Pfennig, *supra* note 38, at 735-36 (finding that the substitution of direct review in the circuit courts in the REAL ID Act has not provided an “adequate and effective” substitute for the writ because aliens do not have a right to introduce new evidence in the courts of appeals); *cf.* Neuman, *supra* note 71, at 157 (arguing that the complete removal of habeas review where direct review to the courts of appeals does not afford an “adequate and effective” substitute for the writ poses serious problems for courts in upholding the Act).

156. See *supra* notes 117-18 and accompanying text (describing the “risk of error” present in the CSRTs determinations).

157. See, e.g., *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005) (noting that the “incomprehensible” opinion of an immigration judge resulted in the reviewing court’s inability to determine the IJ’s factual or legal determinations).

158. See generally Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (reporting on the various criticisms circuit court judges have lobbied on the immigration courts, in addition to the procedural changes that have occurred in recent years at the BIA).

159. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

160. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (noting the “considerable risk of error” in the CSRTs’ factual findings).

161. *Cf.* *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42, 85 (D. Mass. 2005) (disagreeing with the BIA’s removal order and recommending that the circuit court remand the case to the BIA, who had ordered Enwonwu’s removal, to reconsider all the evidence, and, if the BIA still reinstated the removal order, suggesting to the circuit court that his removal should be enjoined).

country<sup>162</sup>—is equally as serious as in *Boumediene*.<sup>163</sup> Admittedly, there are some issues present in the CSRTs not found in the hearings concerning alien removal orders.<sup>164</sup> However, the hearings on alien removal orders are more analogous to the CSRT hearings than detentions resulting from a state court proceeding.<sup>165</sup> Both the CSRTs and the immigration hearings are conducted within the executive branch. Additionally, in his opinion in *Boumediene*, Justice Kennedy expressed concern over various aspects of the CSRT hearings that limited a detainee's ability to contest the government's "assertion that he is an enemy combatant."<sup>166</sup> In hearings before IJs, an alien's ability to contest his or her removability is similarly hindered. First, as Kennedy criticized the CSRT hearings due to the lack of "assistance of counsel,"<sup>167</sup> aliens similarly do not have a right to counsel. Hearings concerning alien removal orders are conducted as civil hearings, and therefore, they do not provide a constitutional right to counsel,<sup>168</sup> whereas any individual detained due to a federal or state court criminal conviction would have the right to counsel.<sup>169</sup>

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162. See, e.g., *Elias v. Gonzales*, 212 F. App'x 441, 443 (6th Cir. 2007) (explaining that the petitioner, a member of the Chaldean Christian minority group in Iraq, was seeking withholding of his removal order based on his fear of being persecuted by the Ba'ath Party); *Fiadjoe v. Att'y Gen.*, 411 F.3d 135, 136–37 (3d Cir. 2005) (noting that the petitioner, a citizen of Ghana, was requesting withholding of removal after fleeing her home where her father had made her a slave, based on the practices of his cultural sect); *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187–88 (9th Cir. 2005) (describing that the petitioner, who was from an indigenous region in Guatemala, was seeking asylum after his family members were killed by guerrillas and he was arrested by soldiers, interrogated, and beaten for hours).

163. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (noting the risk that an innocent person could be detained for an indefinite period of time).

164. See, e.g., Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 540 n.442 (2007) (explaining that in the non-adversarial nature of CSRT hearings, because there is a presumption that the government's evidence is "accurate and genuine," the burden of proof on the government is only a "preponderance of the evidence," and the detainee has "no access to classified evidence").

165. See GORDON ET AL., *supra* note 34, § 104.04(2)(a) (noting the difference in habeas review for petitions involving immigration matters compared to that involving criminal convictions, in which an individual's detention has already been subjected to judicial review in either state or federal proceedings).

166. See *Boumediene*, 128 S. Ct. at 2238 (listing various aspects of the CSRT procedure that caused concern, including: the "limited means to find or present evidence to challenge the Government's case"; the lack of counsel and resulting inability to be "aware of the most critical allegations that the Government relied upon to order his detention"; and the difficulty posed to the detainee in questioning witnesses).

167. *Id.*

168. See Victoria Cook Capitaine, *Life in Prison Without a Trial: Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769, 771 n.12 (2001) (explaining that immigrants have no right to counsel or a jury trial in their proceedings).

169. See *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (establishing that all individuals facing a criminal prosecution have the right to counsel under the

Consequently, numerous aliens proceed pro se because they do not have the means to pay for counsel.<sup>170</sup> This creates additional issues, particularly regarding a judge's fact-finding,<sup>171</sup> similar to the problems the Court identified in *Boumediene*.<sup>172</sup>

Second, hearings before IJs have received increasing criticism in recent years, particularly from circuit court judges who review the records from these hearings.<sup>173</sup> Specifically, criticism has been directed at the treatment of those appearing before IJs.<sup>174</sup> In *Fiadjoe v. Attorney General*,<sup>175</sup> the circuit court described the IJ's tone as "hostile and at times . . . extraordinarily abusive" when he addressed the alien seeking asylum, several times reducing her to tears when questioning her about her father's sexual abuse.<sup>176</sup> While the court of appeals in *Fiadjoe* did find a basis to remand back to the BIA,<sup>177</sup> not all aliens are as fortunate.<sup>178</sup> Ms. Fiadjoe's experience before an IJ is hardly

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Sixth Amendment and, if they are unable to afford one, the State, through the Fourteenth Amendment, must appoint one).

170. See Noreen S. Ahmed-Ullah & Jon Yates, *Judges Fumble Asylum Cases: Refugee Was Sent Back to Sudan to Face Jail, Beatings*, CHI. TRIB., Sept. 24, 2006, at C1 (observing that many aliens cannot afford attorneys and subsequently do not know that they have a right to appeal to federal courts); see also Palmer, *supra* note 80, at 25 (noting the difficulty that detained aliens face in locating a lawyer, much less affording one).

171. See Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at A1 (maintaining that "[a] judge's fact-finding is much harder without a lawyer to speak for those facing deportation, who are not entitled to court-appointed counsel").

172. See *Boumediene*, 128 S. Ct. at 2270 (noting the "considerable risk of error" in the CSRTs' factual findings).

173. See, e.g., *Iao v. Gonzales*, 400 F.3d 530, 533-34 (7th Cir. 2005) (naming "disturbing features" that the circuit court had seen in the cases handled at the immigration court). This list included: a "lack of familiarity with relevant foreign cultures," an "exaggerated notion of the availability, especially in poor nations, of documentary evidence," "[i]nsensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages," "[i]nsensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from American [sic]," and "reluctance to make clean determinations of credibility." *Id.*

174. See Liptak, *supra* note 158, at A1 (quoting criticism from a judge on the Third Circuit that "[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ. seem more appropriate to a court television show than a federal court proceeding").

175. 411 F.3d 135 (3d Cir. 2005).

176. See *id.* at 154-55 (describing the "bullying nature" of the judge's questions concerning such sensitive subjects as sexual abuse and the murder of her fiancé by her father). Ms. Fiadjoe, a member of the Ewe tribe in Ghana, was raised by her father, a Trokosi priest, who enslaved his daughter when she was seven years old and sexually abused her for numerous years pursuant to Trokosi rituals. *Id.* at 139.

177. See *id.* at 163 (finding a lack of substantial evidence in the record to support the IJ's and BIA's holdings).

178. See, e.g., *Dong v. Ashcroft*, 139 F. App'x 325, 326 n.1, 327 (2d Cir. 2005) (acknowledging that the IJ and BIA decisions were not "model[s] of clarity," but still denying the petition for review); cf. *Fiadjoe*, 411 F.3d at 163, 169 (Smith, J., dissenting) (criticizing the majority for engaging in a de novo review, which is "not an approach we are permitted to take as an appellate court reviewing agency action," despite acknowledging Ms. Fiadjoe's "tragic story").

unique;<sup>179</sup> numerous reports in recent years have highlighted the extremely troubling treatment of aliens by IJs.<sup>180</sup> The extent of this criticism prompted Attorney General Gonzales to begin a review of all immigration courts.<sup>181</sup> In his memorandum to the IJs, the Attorney General noted the “reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration” and that the conduct of some judges “can aptly be described as intemperate or even abusive.”<sup>182</sup>

Lastly, there is concern over the quality of decisions issued by IJs.<sup>183</sup> In *Recinos de Leon v. Gonzales*,<sup>184</sup> the Court of Appeals for the Ninth Circuit reviewed a “literally incomprehensible opinion by an immigration judge.”<sup>185</sup> Due to the lack of any “intelligible structure,”

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179. See, e.g., *Wang v. Att’y Gen.*, 423 F.3d 260, 267 (3d Cir. 2005) (“Time and time again, [the Third Circuit has] cautioned immigration judges against making intemperate or humiliating remarks during immigration proceedings. Three times this year [the court has] had to admonish [IJs] who failed to treat the asylum applicants in their court with the appropriate respect and consideration.”); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003) (finding that the IJ abandoned her role as a neutral fact-finder when she “became aggressive and offered a stream of non-judicious and snide commentary” during the hearing and that her decision was “replete with sarcastic commentary and moral attacks”).

180. See, e.g., Bernstein, *supra* note 171, at A1 (describing one woman’s experience testifying before an IJ about being forcibly sterilized in China, to which the judge responded by “insist[ing] that she was lying, ridicul[ing] her story and, when she would not recant, den[y]ing her petition for asylum”); see also Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice: Complaints of Insensitive—Even Abusive—Conduct by Some U.S. Immigration Judges Have Prompted a Broad Federal Review*, L.A. TIMES, Feb. 12, 2006, at A18 (reporting criticism by one circuit judge concerning an IJ who “had failed to conduct herself as an impartial judge but rather as a prosecutor anxious to pick holes in the petitioner’s story” (internal quotation marks omitted)).

181. Memorandum from Alberto Gonzalez, Attorney General, to Immigration Judges (Jan. 9, 2006), available at <http://www.usdoj.gov/ag/readingroom/ag-010906.pdf> (noting his concern with the reports that had emerged concerning some immigration judges and explaining that the Deputy Attorney General and Associate Attorney General would be conducting a “comprehensive review” of the immigration courts and the BIA that would examine both the “quality of work as well as the manner in which it is performed”).

182. See *id.* (noting the importance of the IJs’ role since they are the “face of American justice” to the aliens appearing before them and that, while not all will be granted relief, they must “be treated with courtesy and respect”). As one court put it:

In a country built on the dreams and accomplishments of an immigrant population, a particularly severe wound is inflicted on the principle that anyone who appears in an American courtroom is treated with dignity and respect when an immigration matter is not conducted in accord with the best of our tradition of courtesy and fairness.

*Wang*, 423 F.3d at 268–69 (quoting *Iliev v. INS*, 127 F.3d 638 (7th Cir. 1997)).

183. See *Figueroa v. Mukasey*, 543 F.3d 487, 498 (9th Cir. 2008) (finding “that large parts of the opinion are incoherent”); *Salim v. Keisler*, 254 F. App’x 610, 610 (9th Cir. 2007) (observing that “several ambiguities” in the IJ’s decision “preclude proper review of [the] case”).

184. 400 F.3d 1185 (9th Cir. 2005).

185. *Id.* at 1187.

the court of appeals could not identify any factual or legal findings that the IJ had made.<sup>186</sup> There is also a failure to ensure consistency in the decisions made by different IJs, as evinced in the Miami immigration court, where one judge grants asylum three percent of the time, while another judge in the same court grants it seventy-five percent of the time.<sup>187</sup> The disparity between two judges in the same court who hear similar claims suggests that errors are occurring in the judges' decisions to order removal.<sup>188</sup>

These problems stem in part from the system itself, which has become increasingly overburdened in recent years and has a tremendous backlog of cases.<sup>189</sup> However, the source of these problems does not change the risk of error, which presents—as the Court similarly found in *Boumediene*<sup>190</sup>—serious consequences for those ordered removed: expulsion from the United States to another country where they could face persecution, torture, or other

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186. *See id.* at 1190 (providing numerous examples of the incomprehensibility of the IJ's decision, in addition to attaching the oral transcript of the IJ's decision to its own). For example, in one sentence, the IJ stated that he found the alien credible, only to state in the next sentence that the "credibility issue brings many doubts have arisen in that as to the actual happenings and that what will happen to him if he is to be returned." *Id.*

187. *See, e.g.,* Julia Preston, *Wide Disparities Found in Judging of Asylum Cases*, N.Y. TIMES, May 31, 2007, at A1 (describing the results of a study that found "vast differences in the handling of claims with generally comparable factual circumstances").

188. *See id.* (quoting immigration lawyers who find that an alien's likelihood of winning is based on luck and that there is a risk that the current system will not adequately provide a refuge for those aliens truly in need of one).

189. *See id.* (noting that "judges have difficult work, with huge dockets of cases that must be decided speedily on the basis of scant or subjective information"); *see also* Figueroa v. Mukasey, 543 F.3d 487, 498 (9th Cir. 2008) (suggesting that the incoherency of the IJ's decision may be "due to antiquated recording equipment, an exceptionally heavy caseload, or some other reason, [but regardless] the deficiencies in the IJ's opinion certainly have complicated [the court's] review"); Bernstein, *supra* note 171, at A7 (quoting a federal judge who could not "see how immigration judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances" which are only further exacerbated by the lack of counsel for those facing removal (internal quotation marks omitted)). Additionally, one recent study surveyed the immigration judges and found they faced a significant risk of secondary traumatic stress and burnout which could affect their decisions. Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 *Geo. Immigr. L.J.* 57, 58-59 (2008). Another recent study documented the numerous challenges that immigration courts face, including the politicization of the selection of immigration judges, the limited number of law clerks, issues with government attorneys, and the difficulties in ensuring accurate translations. *See* Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts* 8, 11, 16-18, 19-21 (2009), available at [http://www.asserlaw.com/articles/article\\_164.pdf](http://www.asserlaw.com/articles/article_164.pdf).

190. *See* 128 S. Ct. 2229, 2238 (2008) (noting the risk that an innocent person could be detained for an indefinite period of time).

mistreatment.<sup>191</sup> Despite the risk of error resulting in serious consequences for aliens inaccurately ordered removed, the administrative appeal to the BIA does not provide aliens with sufficient ability to address that risk.

2. *Procedures at the Board of Immigration Appeals do not correct the deficiencies of the earlier proceedings*

Instead of addressing the issues presented by the IJ hearings, the procedure and nature of appeals at the BIA further necessitate extensive judicial review in the federal courts.<sup>192</sup> The BIA has received similar criticism from the courts of appeals to that received by the IJs concerning the quality of its opinions.<sup>193</sup> As further evidence of the quality of BIA decisions, Judge Posner noted that his court overturned BIA decisions forty percent of the time.<sup>194</sup> More significant, however, are the streamlining procedures that have been implemented at the BIA in recent years.<sup>195</sup> Instead of ensuring that hearings at the administrative level provide adequate review of aliens' claims, especially in light of the increasing criticism of the IJs, these procedures were concerned only with eliminating the backlog of cases at the BIA.<sup>196</sup> This attempt to streamline has resulted in what many consider a failure of the BIA to adequately review IJ decisions because the majority of cases can be reviewed by a single judge without issuing an opinion.<sup>197</sup> As Judge Posner has noted, the BIA "often affirm[s] either with no opinion or with a very short,

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191. See *supra* note 162 and accompanying text (describing the types of situations aliens may return to if ordered removed to their native country).

192. See, e.g., Liptak, *supra* note 158, at A26 (describing the result of the streamlining processes as lacking any "meaningful" review).

193. See Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at A1 (quoting a federal judge who described a BIA decision as "nonsensical," "an example of sloppy adjudication," and "contraven[ing] considerable precedent"); see also *Kaur v. Mukasey*, 270 F. App'x 505, 507 (9th Cir. 2008) ("It is impossible to tell from the BIA's extremely cursory opinion in this case the legal and factual grounds for its decision.").

194. See *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (further remarking that the corresponding figure for civil cases during the same time period in which the United States was an appellee was eighteen percent).

195. See *supra* Part I.E (discussing the various streamlining procedures implemented by the Attorney General, including permitting single judges to review almost all removal orders instead of requiring the traditional three-judge panel, allowing judges to issue decisions without an accompanying opinion explaining their decisions, and, most importantly, limiting the scope of the BIA's review over factual findings made by IJs).

196. See *Palmer*, *supra* note 80, at 17-18 (noting that, beginning in 1999, the DOJ implemented various regulations to streamline the appeals process at the BIA in response to the increase in the BIA's backlog in the 1990s).

197. See *id.* (explaining that the streamlining created a real failure in reviewing cases from IJs, particularly in checking factual findings).

unhelpful, boilerplate opinion even when the immigration judge ha[s] committed manifest errors of fact and logic.”<sup>198</sup> Therefore, the courts of appeals, instead of the BIA, provide the “first meaningful review” over alien removal orders.<sup>199</sup> In fact, all that the streamlining procedures have produced is a shift, not elimination, of the backlog of cases from the BIA to the courts of appeals.<sup>200</sup>

Perhaps the most critical of the recent changes has been the curtailment of the BIA’s review over IJs’ factual findings.<sup>201</sup> Considering the criticism of the factual findings in the immigration courts,<sup>202</sup> the BIA’s inability to review such decisions severely hinders an alien’s ability to receive an accurate decision concerning his or her petition to halt removal proceedings.<sup>203</sup> Despite this elimination of substantive review at the BIA, several courts of appeals have upheld the streamlining, finding that it does not violate an alien’s due process rights.<sup>204</sup> Courts have acknowledged that aliens “have understandable concerns about the streamlining process, particularly in light of the congressional limitations of federal court review.”<sup>205</sup> Regardless of whether the process is constitutionally sufficient, *Boumediene* establishes that a due process analysis is never sufficient in determining the level of review required by the Suspension Clause.<sup>206</sup> The analysis of whether the BIA provides the necessary review cannot end by establishing that the streamlining

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198. Liptak, *supra* note 158, at A1 (internal quotation marks omitted).

199. *Id.* (quoting Judge Walker, the Chief Judge of the Court of Appeals for the Second Circuit).

200. See *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849 n.3 (9th Cir. 2003) (noting that “[a]lthough a stated goal of the new regulations is to eliminate the BIA’s backlog, [the 9th Circuit observes] that the practical result may be to shift the backlog directly to the courts of appeal”); Preston, *supra* note 187, at A14 (reporting the surge in appeals to the circuit courts since the streamlining procedures were implemented).

201. See *supra* note 86 and accompanying text (noting that the BIA must now defer to the factual findings of the immigration judges).

202. See *supra* Part III.B.1 (describing the various problems present in the immigration courts today).

203. Cf. Preston, *supra* note 187, at A14 (explaining that in a study of asylum cases from 1998 through 2005, “[a]sylum applicants . . . received favorable appeals decisions from the [BIA] in 43 percent of cases in 2001 . . .” but by 2005, after the changes had taken place, “asylum seekers . . . won their appeals in 13 percent of cases”).

204. See *Falcon Carriche*, 350 F.3d at 850 (stating that it joins the First, Fifth, Seventh, and Eleventh Circuits in its holding that the streamlining does not violate an alien’s due process). Courts of appeals have also ruled that they do not have jurisdiction to review the decision to streamline in a particular case because it would require reviewing the IJ’s decision on the merits, over which they clearly do not have jurisdiction. *Id.*

205. *Id.*

206. See *supra* notes 112-114 and accompanying text (noting that the inquiry into the sufficiency of judicial review cannot end with a due process analysis).

measures survive a due process test. Especially considering that the BIA's review over an IJ's factual findings has been limited and that the BIA cannot engage in its own fact finding, streamlining has hindered the ability of the BIA to correct any errors from the earlier hearing.<sup>207</sup> Therefore, despite this administrative appeal, the BIA does not alleviate the "risk of error," which was most crucial to the Court in *Boumediene* in finding the need for extensive judicial review.<sup>208</sup>

*C. The REAL ID Act Does Not Provide Sufficient Review of Alien Removal Orders Despite the Issues with the Earlier Proceedings*

Under the second step in the analytical approach set forth in *Boumediene*, which examines the reviewing court to determine if it can correct the deficiencies of the earlier proceedings,<sup>209</sup> the REAL ID Act fails to provide an "adequate and effective" substitute for the writ. In light of the significant risk of error present in both the CSRT hearings and those before IJs and the BIA,<sup>210</sup> the reviewing court under the REAL ID Act should be held to a standard similar to that which the Court required when examining the DTA and MCA's judicial review system.<sup>211</sup> *Boumediene* requires the reviewing court to have the means to correct the errors likely to occur in the factual findings of the CSRTs, including the ability to "assess the sufficiency of the Government's evidence" and to introduce new exculpatory evidence into the record.<sup>212</sup> Under this standard, the REAL ID Act also fails by not providing a means of judicial review to account for the failures of the previous proceedings.<sup>213</sup>

*1. The scope of review under the REAL ID Act is too limited to ensure the accuracy of removal orders*

Under the REAL ID Act, review by the courts of appeals is limited to examining the administrative records of the immigration hearings

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207. See *supra* Part I.E (providing an overview of the BIA and streamlining process and its effects).

208. See *supra* notes 120-123 and accompanying text (finding a need for extensive judicial review in light of the risk of error in the CSRTs).

209. See *supra* Part II.B (describing the analytical approach set forth by the Supreme Court in *Boumediene*).

210. See *supra* Part III.B.1-2 (examining the proceedings before both an IJ and the BIA and finding several deficiencies, particularly a risk of error in removal orders).

211. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008) (discussing the standard of review necessary for the writ to function as an appropriate remedy).

212. *Id.*

213. See *supra* Part I.D (discussing the effects of the Real ID Act, including changing the standard of review for habeas proceedings).

and considering constitutional issues or questions of law.<sup>214</sup> This is similar to the DTA's limited review, which Kennedy found insufficient based on the procedures at the CSRT hearings.<sup>215</sup> Therefore, just as the DTA's limited review failed to provide sufficient review of the CSRT hearings, the REAL ID Act has failed in numerous cases to provide adequate review when considering the problems existing at the administrative level.<sup>216</sup>

*a. The courts of appeals under the REAL ID Act have no ability to review the factual findings of the earlier proceedings*

In light of the similar risk of error in the earlier proceedings, the courts of appeals should have the ability to review the factual findings of the IJs and the BIA, in accordance with the Court's requirement in *Boumediene*.<sup>217</sup> However, in interpreting the REAL ID Act, the courts of appeals have made it clear that it is not their job to engage in fact-finding;<sup>218</sup> instead, they are generally deprived of jurisdiction when the petition for review concerns disputes over the correctness of an IJ's fact-finding.<sup>219</sup> In fact, one court stated that judicial review is not intended to ensure an accurate decision but rather to consider whether the BIA made an individualized determination.<sup>220</sup> This position conflicts with the Court's emphasis in *Boumediene* that judicial review should be focused on ensuring accuracy.<sup>221</sup> When considering the courts of appeals' interpretation of their

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214. See *supra* note 75 and accompanying text (noting that the courts of appeals no longer have jurisdiction to review factual findings).

215. *Boumediene*, 128 S. Ct. at 2238.

216. See *supra* Part III.B.1-2 (summarizing the issues that have arisen in recent years concerning hearings before IJs and the BIA for alien removal orders).

217. *Boumediene*, 128 S. Ct. at 2270.

218. See, e.g., *Puri v. Gonzales*, 464 F.3d 1038, 1042 (9th Cir. 2006) (noting that it is the agency's responsibility to make factual findings and the court's job to review the administrative record).

219. See *id.* (finding that the courts of appeals only have jurisdiction over "questions of law," and the REAL ID Act provides an adequate substitute to the writ by allowing review in the courts of appeals because the Suspension Clause does not require an evidentiary hearing before an Article III court). This unequivocal statement that the Suspension Clause does not require evidentiary hearings is rebutted in *Boumediene*, where the Court held that evidentiary hearings will be required in certain circumstances. See 128 S. Ct. at 2270 (maintaining that the court reviewing CSRT determinations "must have the authority to admit and consider relevant exculpatory evidence" (emphasis added)).

220. *Kamara v. Att'y Gen.*, 420 F.3d 202, 211 (3d Cir. 2005). This due process approach to determining the scope of habeas review was rejected by the majority in *Boumediene*. See 128 S. Ct. at 2270 ("Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry.").

221. See *id.* at 2273 (objecting to the DTA, which it found to "disadvantage[] the detainee by limiting the scope of collateral review to a record that may not be accurate").

jurisdiction under the REAL ID Act, judicial review of alien removal orders is not sufficiently extensive to correct factual errors made in the earlier proceedings.<sup>222</sup>

The inability of the courts of appeals to sufficiently review factual findings is also evident when considering the level of judicial review the district courts possessed prior to the REAL ID Act.<sup>223</sup> The story of Frank Enwonwu typifies this difference in review.<sup>224</sup> While the case was before the district court, four days of evidentiary hearings were held and the judge used factual findings from those hearings in his advisory opinion recommending that Enwonwu not be removed.<sup>225</sup> However, the circuit court disregarded those findings and remanded the case back to the BIA.<sup>226</sup> The BIA, however, was unable to consider the district court's factual findings and again ordered Enwonwu's removal.<sup>227</sup>

*Mohamed v. Gonzales*<sup>228</sup> also began as a habeas petition to a district court, but was transferred to the court of appeals upon passage of the REAL ID Act.<sup>229</sup> The district court still issued an advisory opinion,<sup>230</sup> in which it disagreed with the BIA decision affirming the removal order.<sup>231</sup> The district court objected to the failure to provide the petitioner with a competency hearing prior to the original hearing, where the alien proceeded pro se, despite clear evidence of his incompetency.<sup>232</sup> The court of appeals, however, affirmed the BIA's decision.<sup>233</sup> Despite the alien's argument that the dismissal was unconstitutional, the court of appeals held that the REAL ID Act did

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222. See, e.g., *Enwonwu v. Gonzales*, 232 F. App'x 11, 16 (1st Cir. 2007) (engaging only in a limited review of the BIA's reinstatement of Enwonwu's removal order by finding that the BIA's review of the facts was "reasonable").

223. See *supra* Part I.B-C (summarizing the availability of judicial review prior to the REAL ID Act).

224. See *supra* notes 10–28 and accompanying text (describing the story of Frank Enwonwu as he tried to seek judicial review over his state-created danger claim after serving as a government informant).

225. See *Enwonwu v. Gonzales*, 438 F.3d 22, 27 (1st Cir. 2006) (taking testimony not only from Enwonwu, but also from DEA agents who had worked with Enwonwu when he served as an informant for the government).

226. See *id.* at 35 (finding that there was no basis for the "state-created danger" claim).

227. See *Enwonwu*, 232 F. App'x at 15 (noting the inability of the BIA to consider the district court's factual findings because its review is limited to the administrative record of the hearing before the IJ).

228. 477 F.3d 522 (8th Cir. 2007).

229. *Id.* at 524.

230. *Mohamed v. TeBrake*, 371 F. Supp. 2d 1043 (D. Minn. 2005).

231. See *id.* at 1047 (finding that the IJ abused his discretion).

232. *Id.* at 1048–49.

233. See *Mohamed*, 477 F.3d at 528 (holding that the court lacked jurisdiction because there was no constitutional claim or question of law).

not violate the Suspension Clause.<sup>234</sup> These examples demonstrate the failure of the REAL ID Act to provide the level of judicial review required by the Court in *Boumediene* due to the risk of error from the earlier proceedings.<sup>235</sup>

*b. Petitioners are unable to present new exculpatory evidence to the courts of appeals*

In addition to their inability to review factual findings, the reviewing courts under the REAL ID Act cannot introduce exculpatory evidence that was not presented at the initial hearing,<sup>236</sup> which further limits their ability to correct the deficiencies of the earlier proceedings.<sup>237</sup> *Boumediene* criticized the DTA for failing to permit the introduction of exculpatory evidence, which the Court found “constitutionally required” in light of the earlier proceedings.<sup>238</sup> In the context of alien removal orders, considering that many involve asylum claims based on a fear of persecution in their native country, the need to evaluate the current situation in that country is imperative to correctly determining a petitioner’s qualification for relief.<sup>239</sup> Therefore, limiting review to a potentially outdated administrative record cannot afford sufficient consideration of the alien’s claim.<sup>240</sup>

While an alien can request that the BIA reopen the case based on newly available information, the decision to grant such a motion for

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234. See *id.* at 525 (finding that the Suspension Clause was not violated because an “adequate and effective” substitute for the writ was provided by the court, whose jurisdictional grant over constitutional claims and questions of law was as broad as a habeas petition).

235. See *supra* Part III.B.1-2 (describing the deficiencies of the earlier proceedings).

236. See Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the REAL ID Act*, 69 OHIO ST. L.J. 557, 582 (2008) (noting the inability of circuit courts to consider changed circumstances in the country where an alien is claiming persecution); see also *id.* at 566 (noting the lack of “pre-trial discovery of evidence” in immigration hearings that is atypical of the “American model of civil adjudication”).

237. See *id.* at 579-80 (describing the criticisms of immigration judges for “making mistakes in reviewing evidence proffered by a petitioner,” but noting the inability of circuit courts to review such mistakes).

238. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2272 (2008) (“[W]e see no way to construe the statute to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings.”).

239. See Reddy, *supra* note 236, at 582 (maintaining that a petitioner’s qualification for relief from removal may have changed since the BIA issued its decision but prior to review by a court of appeals).

240. See Pfenning, *supra* note 38, at 735-36 (arguing that the REAL ID Act unconstitutionally suspends the writ by not providing an “adequate and effective” substitute because the courts of appeals cannot admit new evidence); cf. *Boumediene*, 128 S. Ct. at 2273 (criticizing the DTA for disadvantaging the “detainee by limiting the scope of collateral review to a record that may not be accurate or complete”).

reconsideration is discretionary and unappealable, providing no assurance that the information will be introduced.<sup>241</sup> Additionally, as one circuit court has admitted, the ability to request reconsideration cannot be enough to satisfy the Suspension Clause because it does not provide *judicial* review.<sup>242</sup> The detainees in *Boumediene* also had the opportunity to request a second CSRT in light of new evidence;<sup>243</sup> Kennedy, however, found this an “insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus,” particularly considering that the decision to grant a new CSRT is discretionary and unchallengeable by the detainee.<sup>244</sup> Therefore, the ability to request reconsideration of a removal order cannot cure the inability of the reviewing court to introduce new evidence.<sup>245</sup>

Despite this inability to review factual findings or admit new evidence, the courts of appeals have unanimously found that the REAL ID Act does not violate the Suspension Clause because the courts have jurisdiction to review constitutional claims and questions of law.<sup>246</sup> The courts have found such review sufficient, despite interpreting “questions of law” narrowly.<sup>247</sup> While consideration of such issues is necessary, *Boumediene* requires that judicial review extend further to allow consideration of factual issues when there is a serious risk of error in the initial determination,<sup>248</sup> as exists with alien removal orders.<sup>249</sup>

## 2. *Strict time limits place further limits on review by the courts of appeals*

In addition to limiting the scope of review, the REAL ID Act maintains a very stringent thirty-day time limit for the filing of

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241. Cf. Kirk L. Peterson, “Final” Orders of Deportation, Motions to Reopen and Reconsider, and Tolling Under the Judicial Review Provisions of the Immigration and Nationality Act, 79 IOWA L. REV. 439, 443 (1994) (noting that the only means to review such determinations is under an “abuse of discretion” standard).

242. *Kolkevich v. Att’y Gen.*, 501 F.3d 323, 333 (3d Cir. 2007).

243. *Boumediene*, 128 S. Ct. at 2273.

244. *Id.*

245. *Id.*

246. See, e.g., *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 114 (2d Cir. 2008) (finding that Congress had provided an “adequate and effective” substitute for the writ in the REAL ID Act by allowing review by the courts of appeals). In this decision, the Second Circuit joined the Eighth, Ninth, and Eleventh Circuits in finding that the Suspension Clause was not violated. *Id.*

247. See, e.g., *Chen v. U.S. Dep’t of Justice*, 471 F.3d 315, 324–25 (2d Cir. 2006) (clarifying that “questions of law” is not meant to encompass all legal questions).

248. See *supra* notes 121–123 and accompanying text (describing the deficiencies in the CSRT hearings that required extensive judicial review).

249. See *supra* Parts III.B.1–2 (illustrating the issues with the hearings before both IJs and the BIA).

petitions for review in the courts of appeals.<sup>250</sup> While this time limit existed prior to the REAL ID Act, an alien had the ability to file for a writ of habeas corpus if the time limit was not met.<sup>251</sup> Aliens face numerous hurdles in filing such petitions,<sup>252</sup> notably the possibility that aliens will not receive notice of the BIA's removal order in a timely manner,<sup>253</sup> as in Mr. Enwonwu's case.<sup>254</sup> Considering these issues, the REAL ID Act's time limit raises serious concerns that an alien will be precluded from *any* review.<sup>255</sup>

This preclusion of review was evident with certain aliens who had been ordered removed but who had not yet filed a habeas petition upon passage of the REAL ID Act.<sup>256</sup> When petitioners had a habeas petition pending in a district court upon passage of the Act, the courts of appeals granted review, even if the transfer from the district court occurred more than thirty days after the removal order was entered.<sup>257</sup> However, those aliens who had yet to file a habeas petition were only given thirty days after the passage of the Act to file a petition for review in the relevant court of appeals.<sup>258</sup> In one such case, because the alien did not file a petition within thirty days, the court of appeals denied his motion.<sup>259</sup> He was, therefore, provided no

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250. See Morawetz, *supra* note 53, at 126 (noting that the REAL ID Act maintained the time limit from the 1996 legislation). See generally Neuman, *supra* note 71, at 142 (explaining the development of time limits for seeking review of removal orders, a "recent development" that did not exist in any capacity prior to 1961 and gradually has been reduced to its current thirty-day limit).

251. Cf. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (holding that habeas review was still available).

252. See Morawetz, *supra* note 53, at 126 (noting possible issues that could arise, including: failure to receive a BIA decision, difficulties in filing while in detention, or failure to file due to ineffective assistance of counsel).

253. *Id.*

254. See *supra* note 17 and accompanying text (describing how Enwonwu never received notice that the dismissal of his removal order was being appealed).

255. See Morawetz, *supra* note 53, at 127 (explaining that how the courts choose to interpret the date that the time limit begins to run will have implications for the availability of judicial review).

256. See, e.g., *Kolkevich v. Att'y Gen.*, 501 F.3d 323, 336 (3d Cir. 2007) (discussing the issues posed by this situation upon passage of the REAL ID Act).

257. See *id.* (noting that habeas petitions that were currently pending in the district courts upon passage of the REAL ID Act could be transferred to the appropriate court of appeals).

258. See *id.* (holding that the REAL ID Act allowed "the transfer from a district court to a court of appeals not only of those habeas petitions that were pending in the district court at the time [the Act] became law, but also those that could have been brought in a district court prior to [the Act's] enactment"). The court went on to note that the time limit "should not be interpreted as applying to those aliens who received final orders of removal prior to the enactment of [the Act], but who did not file a petition for review directly in a court of appeals until after the enactment of [the Act]." *Id.*

259. *Id.* at 337 (dismissing the petition for review because the filing of it was well past the thirty-day limit that started when the REAL ID Act was enacted).

judicial review of his administrative hearing, regardless of his right to such review in a federal district court prior to the Act.<sup>260</sup> The court argued that he was put on notice as soon as the Act was passed,<sup>261</sup> but considering he had no counsel, such notice is insufficient.<sup>262</sup> Some circuits have taken an even harsher approach by not even providing thirty days from the Act's passage to petition for review for those aliens who had yet to file a habeas petition prior to the Act.<sup>263</sup>

Concerns also develop with this stringent time limit when the failure to comply is due to ineffective assistance of counsel.<sup>264</sup> In one case, an alien ordered removed filed a motion with the BIA to reopen his case because his previous counsel had failed to file an appellate brief with the BIA and his time limit subsequently ran out.<sup>265</sup> The BIA denied the motion to reopen and the alien subsequently appealed to the court of appeals, arguing the REAL ID Act did not provide an "adequate and effective" substitute for the writ due to its time limit.<sup>266</sup> While the court acknowledged that the time limit was considerably shorter than the one-year time limit under AEDPA,<sup>267</sup> it upheld the REAL ID Act and found that it did not have jurisdiction to review the BIA's decision on the alien's ineffective assistance of counsel claim.<sup>268</sup>

While it is reasonable to impose some time limit on the ability to seek review in the federal courts, any time limit must be examined to ensure that it does not effectively preclude an individual's right to "adequate and effective" judicial review.<sup>269</sup> The continuing reduction in the time limit for seeking review of alien removal orders has reached the point where the ability to seek review could, in some circumstances, become an "illusion."<sup>270</sup> While this specific issue did

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260. *Id.*

261. *Id.* at 337 n.9.

262. *Cf.* Morawetz, *supra* note 53, at 127-28 (describing the ability of the court to issue removal orders *in absentia* so long as notice has been sent out, yet stressing that this procedure can present the "most frightening exercise of government power" because there is no way to ensure that the alien received notice, and he or she will consequently have no way to contest removal).

263. *See* Peguero-Cruz v. Gonzales, 500 F.3d 358, 361 (1st Cir. 2007) (refusing to commence the thirty-day time line from the date of the Act's passage and finding that the petition was untimely since it was not filed within thirty days of the BIA's decision).

264. *See* Morawetz, *supra* note 53, at 126 (presenting the possibility that counsel may fail to file a timely appeal).

265. Ruiz-Martinez v. Mukasey, 516 F.3d 102, 107 (2d Cir. 2008).

266. *Id.* at 108.

267. *Id.* at 115.

268. *Id.* at 117.

269. *Cf.* Boumediene v. Bush, 128 S. Ct. 2229, 2266 (2008) (requiring a substitute for the writ to provide a "meaningful opportunity to demonstrate" the "erroneous application or interpretation" of the law which resulted in a detention).

270. Neuman, *supra* note 71, at 142.

not arise in *Boumediene*, the analytical framework developed in the case indicates that the REAL ID Act does not provide an “adequate and effective” substitute for the writ due to the preclusive nature of the thirty-day time limit.<sup>271</sup>

Any court reviewing removal orders must have an extensive scope of review due to the risk of error in the administrative hearings.<sup>272</sup> However, the REAL ID Act, particularly as interpreted by the circuit courts, cannot be upheld as a sufficient substitute for the writ under *Boumediene*’s analysis in light of the circuit courts’ limited scope of review and the stringent time limit on seeking review.

#### IV. RECOMMENDATIONS IN LIGHT OF THE CURRENT INADEQUATE REVIEW OF ALIEN REMOVAL ORDERS AVAILABLE UNDER THE REAL ID ACT

Because the REAL ID Act has not created an “adequate and effective” substitute for the writ based on *Boumediene*’s test, the Act violates the Suspension Clause by stripping aliens of the right to seek habeas review and not providing a constitutionally sufficient substitute. Congress and the courts, therefore, should reexamine the current judicial review scheme in order to provide the level of review required by the Constitution.

##### A. *A Saving Construction of the REAL ID Act Cannot Alleviate the Insufficient Review*

While the courts of appeals could attempt to use a saving construction of the REAL ID Act either to allow habeas review or to expand the scope of review currently employed by the courts of appeals, neither approach will alleviate the Suspension Clause concerns.

First, based on both the language of the REAL ID Act and its legislative history, it appears impossible to interpret the Act in a way that would permit habeas review, as the Court in *St. Cyr* was able to do.<sup>273</sup> The Court in *St. Cyr* made clear that in order to find a repeal of habeas review, Congress would have to provide a “clear, unambiguous, and express statement” of that intent,<sup>274</sup> which

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271. See *supra* notes 121-123 and accompanying text (summarizing the Court’s findings in *Boumediene* concerning the deficiencies in the CSRTs, which the Court held required extensive judicial review).

272. Cf. *Boumediene*, 128 S. Ct. at 2270 (concluding that even when all parties to a proceeding act in good faith there is still a *considerable* risk of error in fact-finding).

273. See *INS v. St. Cyr*, 533 U.S. 289, 315 (2001) (finding that Congress did not explicitly dictate its intent to repeal habeas review).

274. *Id.*

Congress has done in the REAL ID Act. The language of the Act establishes that review in the courts of appeals will be the “sole and exclusive means for judicial review of an order of removal.”<sup>275</sup> Congress also clarified its intent to eliminate habeas review through its Conference Report for the Act.<sup>276</sup> Therefore, any attempt by the courts to read the Act as allowing habeas review would be contrary to congressional intent.

Additionally, any attempt by the courts to read broadly the scope of review granted in the Act would still not satisfy the Suspension Clause under the Court’s analysis in *Boumediene*. Under the *Boumediene* analysis, it was essential for the court reviewing the CSRTs to have the ability to correct the deficiencies of the earlier proceedings, particularly any errors in fact-finding.<sup>277</sup> Because there is a similar concern regarding the accuracy of alien removal orders,<sup>278</sup> any extension in the scope of the circuit courts’ review would not address that concern due to the courts of appeals’ inability to consider new evidence and make factual findings.<sup>279</sup>

*B. Habeas Review Should Be Restored to Provide a Safeguard  
When Direct Review Proves Inadequate or Ineffective*

Since it is not possible to construe the REAL ID Act in a manner that would comport with the Suspension Clause, Congress must restore some form of habeas review or the courts should find the Act in violation of the Suspension Clause. As mentioned in *Boumediene*, Congress could satisfy the Suspension Clause by inserting a savings clause that would permit habeas review in the district courts if the

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275. Pub. L. No. 109-13, § 106(a)(1)(B), 119 Stat. 231 (2005) (codified as amended in scattered sections of 8 U.S.C.).

276. See H.R. REP. NO. 109-72, at 173-74 (2005) (Conf. Rep.), reprinted in 2005 U.S.C.C.A.N. 240, 298-99 (noting, first, that the intent of the 1996 acts was to eliminate habeas review, which the Court disregarded in its *St. Cyr* decision; second, that the system created by the *St. Cyr* decision has created anomalies and confusion; and third, section 106 of the REAL ID Act solves the problems created in *St. Cyr* because it eliminates the bifurcated system of review in both the district courts and courts of appeals by only permitting review in the circuit courts).

277. See *supra* Part II.B-C (observing that “adequate and effective” review must include the ability to correct the deficiencies of the earlier proceedings, which the DTA did not permit because the court of appeals could not make factual findings).

278. See *supra* Part III.B.1-2 (describing the deficiencies of the hearings before IJs and the BIA).

279. See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2007-08 (1992) (commenting that an essential aspect of review under a petition for habeas corpus is the ability of the district courts to “hear evidence themselves,” whereas the courts of appeals or the Supreme Court hearing claims on direct appeal must remand to either the administrative courts or the state courts for additional evidence to be gathered).

review in the courts of appeals proved inadequate or ineffective.<sup>280</sup> This approach would largely restore judicial review of alien removal orders to the system established by the 1961 amendments to the INA, which existed until 1996.<sup>281</sup> Under the 1961 system, while the courts of appeals would have primary jurisdiction to review removal orders, habeas review would be preserved for unusual cases where direct review proved inadequate or ineffective.<sup>282</sup> In this way, direct review could still be used for those cases where the circuit courts have adequate jurisdiction to correct any deficiencies from the earlier proceedings.<sup>283</sup> A savings clause would, however, preserve the right to judicial review for those individuals for whom direct review is not sufficient.<sup>284</sup>

If direct review is preserved as the primary means of judicial review, Congress would need to alter the time limit on filing for review in the courts of appeals. In the 1961 amendments, most aliens had ninety days to file for review,<sup>285</sup> compared to the thirty days allowed under the REAL ID Act.<sup>286</sup> Such a stringent time limit can preclude *all* review<sup>287</sup> and, therefore, cannot satisfy *Boumediene's* test for “adequate and effective” review when habeas review is limited to unusual circumstances.

While it might appear difficult to create an “adequate and effective” substitute for the writ after *Boumediene*, this limited ability to suspend the writ would be consistent with the history of the writ in

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280. See *supra* notes 110-111 and accompanying text (noting that even in the state court conviction context, both statutes maintained a savings clause to permit habeas review).

281. See *supra* notes 50-55 and accompanying text (explaining the previous system of review, which provided for primary jurisdiction to reside with the courts of appeals but permitted habeas review in unusual circumstances or when an alien was subject to removal and simultaneously detained).

282. See Morawetz, *supra* note 53, at 117 (describing habeas review as a “backstop”).

283. See *supra* note 177 and accompanying text (discussing the *Fiadjoé* case, in which the circuit court had sufficient jurisdiction to address the deficiencies from the earlier proceedings).

284. See, e.g., *Enwonwu v. Gonzales*, 232 F. App'x 11, 12-13 (1st Cir. 2007) (revealing the failings of direct review and exemplifying a situation in which judicial review is necessary to correct the BIA's erroneous conclusion).

285. See *supra* note 48 and accompanying text (describing the provisions of the 1961 INA).

286. See *supra* note 76 and accompanying text (acknowledging the time limits imposed by the REAL ID Act, which maintained those previously established in the 1996 acts).

287. See *supra* note 270 and accompanying text (explaining that the reduction in the time allowed to petition for review can be reduced to the point where judicial review is an “illusion”).

the United States.<sup>288</sup> As the Court in *Boumediene* stressed, the writ of habeas corpus has not been suspended often in this country's history, indicating the "care Congress has taken . . . to preserve the writ and its function."<sup>289</sup> The drafters of the Suspension Clause also considered the writ to have a "pre-eminent role" in the United States' constitutional system,<sup>290</sup> and only permitted its suspension in two limited circumstances.<sup>291</sup> The Supreme Court has acknowledged the ability of Congress to suspend the writ so long as an "adequate and effective" substitute is provided.<sup>292</sup> *Boumediene* makes clear for the first time the stringent nature of the test for determining an "adequate and effective" substitute, ensuring that the suspension of the "Great Writ" will not occur with any frequency.<sup>293</sup>

#### CONCLUSION

For the first time, *Boumediene v. Bush* established a test for determining whether a substitute for the writ of habeas corpus is "adequate and effective" for the purpose of upholding the Suspension Clause. In order to establish the constitutionality of a substitute, earlier proceedings must first be examined for any deficiencies that create cause for concern in the resulting determination. Upon determining the existence of any deficiencies, the reviewing court's authority must then be examined to determine if it can properly address the deficiencies from the earlier proceedings.

Applying this test to the current system of review for alien removal orders, the elimination of the right to habeas review under the REAL ID Act violates the Suspension Clause. When considering the procedures both at the immigration courts and the BIA, in addition to the issues concerning the conduct of those cases, there is cause for concern regarding the accuracy of the removal orders, as the Court similarly found in *Boumediene* with the CSRTs. In light of this concern, the courts of appeals' permitted level of review over the IJs

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288. See *supra* Part I.A (noting the importance placed on the writ throughout the history of the United States).

289. *Boumediene v. Bush*, 128 S. Ct. 2229, 2263 (2008) (finding that most legislative acts concerning the writ have actually expanded its scope rather than suspended it).

290. GORDON ET AL., *supra* note 34, § 104.04(2)(a).

291. See U.S. CONST. art. I, § 9, cl. 2 (permitting the writ to be suspended in the event of a "[r]ebellion or [i]nvasion").

292. *E.g.* *Swain v. Pressley*, 430 U.S. 372, 381 (1977); *United States v. Hayman*, 342 U.S. 205, 223 (1952).

293. See BLACK'S LAW DICTIONARY 728 (8th ed. 2004) (noting that the writ of habeas corpus is also called the "Great Writ").

and BIA's decisions does not provide sufficiently extensive review, particularly due to the limited jurisdictional grant and the stringent time limit for filing for review. Because the courts of appeals would be unable to conduct evidentiary hearings and make factual findings, it is unlikely that even the broadest possible grant to the courts of appeals would satisfy the Suspension Clause. Instead, the surest way of providing constitutionally adequate review would be to restore aliens' right to seek habeas review in the federal district courts. While direct review to the courts of appeal can be maintained as the primary means of judicial review for removal orders, habeas review must be reinstated as a safeguard for those unique cases, such as Frank Enwonwu's, for whom direct review proves inadequate and ineffective.

*Boumediene* has refocused the use of the writ to providing protections that go beyond assurances of fair procedure, as the legislative changes in recent years concerning alien removal orders have erred in doing. The writ must be administered in a way that will reach and correct injustices that have occurred. Stories such as Frank Enwonwu's demonstrate the grave risks presented when Congress and the courts fail to apply the writ to its fullest capacity. The implications of *Boumediene* do not end here, however, but rather reach to all uses of the writ. The impact on alien removal orders is, unfortunately, but one example of the curtailment of habeas protections in recent years.