

COMMENTS

DOES “KEEP OUT!” MEAN “STAY OUT!”?: THE IMMIGRATION AND NATIONALITY ACT’S EFFECT ON ACCESS TO FEDERAL COURTS FOR CONSTITUTIONAL ACTIONS

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I. INTRODUCTION

The unique and haphazard evolution of immigration law has contributed to its irregularities, idiosyncrasies, and chaos. Scholars have described it in ways that range from “a constitutional oddity”¹ to an area of law that “has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”²

This Comment will examine the impact that the Immigration and Nationality Act’s provision governing judicial review of orders of removal has on the success of constitutional claims in federal court such as *Bivens* claims. The provision governing judicial review of orders of removal, 8 U.S.C. § 1252(b)(9), makes judicial review of all questions of fact and law arising out of an action of removal available only in review of a final order.³ Effectively, § 1252(b)(9) acts as a “zipper clause,” forwarding all claims that have been administratively exhausted to the federal appellate courts.⁴ The provision was intended to resolve certain procedural and administrative redundancies presented in removal proceedings, such as aliens being able to

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¹ Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255.

² Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

³ 8 U.S.C. § 1252(b)(9) (2006) (“Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.”).

⁴ *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

file separate proceedings challenging the denial of a stay of deportation and challenging the deportation order itself.⁵ By consolidating review into one forum, Congress solved the problem of “successive filings and . . . backdoor challenges” to removal orders.⁶ The provision, where applicable, only requires exhaustion of administrative procedures and the consolidation of claims for judicial review.⁷ It is not intended to eliminate the right to review altogether.⁸ In practice, however, district and circuit courts have found interpreting the phrase “arising out of an action of removal” to be challenging.

This Comment will examine whether § 1252(b)(9) bars *Bivens* and similar constitutional claims in federal court. While the focus of the Comment will be on *Bivens* claims, the same discussion and analysis applies equally to other constitutional claims. Because most of these claims arise out of the same sets of facts and circumstances, though they may be wholly separate from the underlying removal proceeding, the issue of whether such claims are barred by § 1252(b)(9) is muddled.

Courts currently bar a variety of *Bivens* and constitutional claims for several reasons.⁹ However, the lack of uniformity in the determination of these cases does not address the reservations Congress had when it enacted § 1252(b)(9). In order to adhere to the intent of Congress in enacting the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and Real *ID* Act, courts may have to institute a uniform analytical method to the jurisdictional bar.

To quell backdoor challenges, successive filings, and redundant judicial findings, Congress has dictated that district courts should bar review of claims that are significantly, factually tied to removal proceedings so that they cannot be considered collateral to the underlying proceeding. While a great deal of scholarly work has focused on the effects of these limitations on the writ of habeas corpus and related proceedings, the main focus of this Comment is on examining the effects of the general consolidation provisions contained in the IIRIRA and § 1252(b)(9), and on providing a coherent methodology for analyzing the issue. The standard proposed for court use to assess

5 See *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 9 (1st Cir. 2007) (“In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings.”).

6 See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 270 (E.D.N.Y. 2006) (citing *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000), *aff’d on other grounds*, 585 F.3d 559 (2d Cir. 2009)).

7 See *id.* at 270 (quoting *INS v. St. Cyr*, 533 U.S. 289, 313 (2001)).

8 See *id.*

9 See *infra* Section VII.

whether claims are too factually tied to the underlying removal proceeding to continue in district court is a two-step process: first it examines whether the claims involve actions that arise out of an order of removal; and second, it examines whether immigration courts can provide the requested remedy. If the claims can be reviewed in immigration court, they “arise out” of circumstances involving an underlying order of removal and are therefore barred from review in district court. But if immigration courts cannot offer the requested remedy, these claims should not be barred from district court review.

Section II gives a brief overview of the administrative process individuals undergo when immigration court proceedings have been initiated. Section III offers an introduction to the Immigration and Nationality Act (INA), explaining Congress’s intent in enacting the 1996 amendments to the INA, which limited the jurisdiction of federal district courts hearing immigration-related claims. Section IV then provides a brief introduction to *Bivens* claims and cases in which courts have found an award of money damages appropriate. Then, Section V gives an explanation of the problems courts have had in interpreting the INA and its effect on an immigration plaintiff’s access to federal courts. Next, Section VI surveys cases applying § 1252(b)(9) generally, while Section VII offers an analysis of those cases that apply § 1252(b)(9) to *Bivens* or other constitutional claims. In Section VIII, the results of these cases are compared in order to create a map of the current jurisprudence regarding the jurisdictional bar of § 1252(b)(9). In Section IX, a solution to the tension exhibited in these cases is provided. Finally, in Section X, the new analysis is applied to the existing case law as an illustration of the proposed solution in practice.

II. THE ADMINISTRATIVE PROCESS

The Immigration and Nationality Act (INA) creates the Board of Immigration Appeals (BIA) and places the administrative procedure for judicial review of cases flowing out of the BIA under the umbrella of the Administrative Procedure Act (APA).¹⁰ However, courts have acknowledged that the APA “does not apply to the conduct of hearings explicitly governed by the INA.”¹¹ Therefore, the INA and APA,

¹⁰ Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1968 (2000) (explaining that the enactment of the INA “made the judicial review procedures of the Administrative Procedure Act of 1946 (APA) applicable to cases arising under the INA” (internal citations omitted)).

¹¹ *Baez-Fernandez v. INS*, 385 F. Supp. 2d 292, 295 (S.D.N.Y. 2005).

when read together, produce a framework whereby non-citizens who enter the process of adjudicating immigration claims first seek relief through the administrative process within the immigration courts, and, after exhausting their claims in the administrative courts, appeal their final judgments to the courts of appeals.

The first step for any non-citizen who is forcibly entered into the adjudication of immigration claims begins with the Executive Office for Immigration Review (EOIR).¹² The EOIR “is responsible for adjudicating immigration cases” through “immigration court proceedings, appellate reviews, and administrative hearings.”¹³ Most commonly, a non-citizen will appear before the EOIR in a removal hearing.¹⁴

Removal proceeding begin when the Department of Homeland Security (DHS) charges a non-citizen with an immigration law violation by serving the non-citizen with a Notice to Appear (NTA) before an immigration judge.¹⁵ The non-citizen appears for an individual hearing in which the immigration judge considers the merits of the case and issues an oral decision.¹⁶

Once the case is complete and the immigration judge issues a decision, either party may choose to appeal the decision to the BIA.¹⁷ If both parties choose not to appeal, the immigration judge’s decision is considered administratively final.¹⁸ This final order can be executed unless appealed to a federal court that grants the non-citizen a stay, but “the alien’s failure to exhaust administrative remedies may lead the court to deny relief.”¹⁹ “Filing an appeal with the BIA from an immigration judge’s removal decision results in an automatic stay of the execution of the removal order.”²⁰

All BIA appeals “now go directly to a single BIA member who must decide . . . whether the case merits full appellate review or summary affirmance *without an opinion*.”²¹ If the case merits full re-

12 Executive Office for Immigration Review, U.S. Dep’t of Justice, Responsibilities, <http://www.usdoj.gov/eoir/responsibilities.htm> (last visited Mar. 19, 2010).

13 Executive Office for Immigration Review, U.S. Dep’t of Justice, Responsibilities, <http://www.usdoj.gov/eoir/responsibilities.htm> (last visited Mar. 19, 2010).

14 Office of the Chief Immigration Judge, U.S. Dep’t of Justice, Immigration Court Practice Manual, http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last visited Mar. 19, 2010).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 Ilana E. Greenstein, *Board of Immigration Appeals and Federal Court Review of Deportation and Removal Decisions*, in 2 IMMIGRATION PRACTICE MANUAL § 20.2.1 (2004).

20 *Id.*

21 *Id.* § 20.3.2.

view, the BIA member refers the case to a three-member panel, which then conducts a full appellate review of the non-citizen's case.²²

As an alternative to BIA proceedings, the non-citizen may also use a motion to reopen "when required by case law or regulation—or when new evidence exists to strengthen the [alien's] case."²³ However, once an appeal is filed, "an immigration judge no longer has jurisdiction over the proceedings, and any motion to reopen filed with the BIA is treated as a motion requesting remand."²⁴

After a decision is issued by the BIA, which is final unless referred to the Attorney General for review, the non-citizen has the opportunity to appeal once more in federal court.²⁵ "The primary statutory basis for federal court review of an administratively final removal order is 8 U.S.C. § 1252"²⁶ Once a case reaches the court of appeals, the federal court "may consider only the administrative record on which the removal order is based, the pleadings, and the parties' briefs" in adjudicating the appeal.²⁷ "For other types of cases involving immigration issues" not related to removal proceedings, "the [APA] and the general grant of [federal question] jurisdiction . . . still apply," and such claims may be brought in federal district court.²⁸

III. A HISTORY OF THE INA

Judicial intervention in immigration administrative decisions is a fairly recent phenomenon. In fact, from 1882 to 1952, no statute authorizing a judicial role existed.²⁹ However, federal courts still informally exercised control in many cases, particularly in correcting immigration officials' interpretations of the law in the habeas corpus context.³⁰ However, the enactment of the INA (also referred to as the "Act") in 1952 added to the judiciary's traditionally held jurisdiction over habeas corpus review by requiring the adjudication of founda-

22 *Id.*

23 *Id.* § 20.2.2.

24 *Id.*

25 *Id.*

26 *Id.* § 20.3.1.

27 Daniel Kanstroom, *Immigration Litigation in Federal Court*, in 2 IMMIGRATION PRACTICE MANUAL § 20.5 (2004).

28 *Id.* § 20.5(E).

29 Neuman, *supra* note 10, at 1967.

30 *Id.* Jurisdiction for such adjudications was primarily "founded on the general provision authorizing the grant of habeas corpus to persons in federal custody, the predecessor of the current 28 U.S.C. § 2241." *Id.*

tional issues concerning the authority of executive officials to detail non-citizens for deportation or exclusion.³¹

Since 1961, Congress amended the INA by placing “sole and exclusive” power to review deportation decisions in the courts of appeals.³² This was an attempt by Congress to cabin access to judicial review that the APA had created.³³ The 1961 amendments allowed exclusion orders to be reviewed by writ of habeas corpus in the district courts³⁴ but only allowed deportation orders to be reviewed in the courts of appeals under the Hobbs Act.³⁵ However, “[t]he 1961 Act contained no specific bars to judicial review for cases and issues properly exhausted administratively.”³⁶ The INA was “subsequently amended in 1990, 1991, and 1994” to provide separate procedures for judicial review of deportation and exclusion orders.³⁷

In 1996, “two separate pieces of legislation significantly changed judicial review of immigration decisions.”³⁸ The Antiterrorism and Effective Death Penalty Act (AEDPA), passed on April 24, 1996, limited judicial review “notably by eliminating it for most non-citizens

31 *Id.* at 1968. “In 1955, the Supreme Court held that declaratory and injunctive relief under the . . . [APA] were available to test deportation orders under the INA.” Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385, 395 (2000) (citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50–52 (1955)) (footnotes omitted). In 1956, the Court extended this reasoning to exclusion orders as well. *Id.* (citing *Brownell v. Shung*, 352 U.S. 180, 182–86 (1956)).

32 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, 80–81 & n.30 (2007) (“The fundamental purpose behind [placing exclusive review in the courts of appeals] . . . was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts.” (internal quotation marks omitted) (quoting *Foti v. INS*, 375 U.S. 217, 224 (1963)); see Immigration and Nationality Act of 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-52, *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009, 3009-612.

33 Motomura, *supra* note 31, at 395.

34 See § 5(a), 75 Stat. at 651–53 (amending the INA to allow a final exclusion order to be judicially reviewed through habeas corpus proceedings).

35 Motomura, *supra* note 31, at 395 (citing 28 U.S.C. §§ 2341–51 (1994)). The Hobbs Act governs review for several administrative agencies. *Id.*

36 McConnell, *supra* note 32, at 81.

37 *Id.* See *id.* at 81 n. 32 (“Administrative proceedings governing the admission and removal of aliens from the United States have historically been termed ‘exclusion’ or ‘deportation’ proceedings With the enactment of the IIRIRA, Congress replaced these differing forms of proceedings with a single form called removal proceedings. . . . A removal order results from administrative proceedings conducted under new section 240 of the INA.” (internal quotation marks omitted)). See also Immigration Act of 1990, Pub. L. No. 101-694, 104 Stat. 4978 (1990); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991); Immigration and Naturalization Technical Corrections Act, Pub. L. No. 103-416 (1994).

38 Motomura, *supra* note 31, at 396.

deportable because of criminal convictions.”³⁹ On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which repealed the judicial review scheme set forth in the INA of 1961 and replaced it with transitional and permanent rules to govern judicial review.⁴⁰ While it continued the substantive limits the AEDPA placed upon judicial review of proceedings, the IIRIRA also restructured judicial review in “fundamental ways.”⁴¹ Under the IIRIRA, the permanent judicial review rules codified in § 242 of the INA apply to removal proceedings initiated on or after April 1, 1997.⁴² These rules serve to channel all judicial review of final orders of removal by the Immigration and Naturalization Service (INS) to the courts of appeals.⁴³ The IIRIRA and § 242 in particular, placed many limits on the role of the judiciary in immigration cases.⁴⁴ In particular, Congress enacted § 242(b)(9), which serves to consolidate questions for judicial review, both as a matter of time and forum.⁴⁵

IV. AN INTRODUCTION TO *BIVENS* CLAIMS

A. *Bivens* and Its Progeny

In the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁴⁶ the Supreme Court first authorized individuals to bring

39 *Id.* at 397; *see also* Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 440(a), 110 Stat. 1214, 1276–77 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

40 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 306(a), 306(b), 309(c)(4), 110 Stat. 3009, 3009-607 to -12, 3009-26 to -27 (codified at 8 U.S.C. §§ 1101, 1231, 1252). IIRIRA § 306(b) repealed INA § 106 and created the new INA § 242, which governs judicial review. *Id.*

41 Motomura, *supra* note 31, at 397.

42 INA § 242, 8 U.S.C. § 1252 (Supp. III 1998); *see also* McConnell, *supra* note 32, at 84.

43 McConnell, *supra* note 32, at 84. The Act therefore ensures that judicial review will occur “under the Hobbs Act procedure that had applied to deportation orders under former § 106.” Motomura, *supra* note 31, at 397 (citing INA § 242(a)(1), 8 U.S.C. § 1252(a)(1) (Supp. III 1998)).

“The issue was not whether or when judicial review was available, but rather in which court. If a matter was included in a ‘final order,’ then § 106(a) applied, and judicial review was in the court of appeals. If a matter was not included in a ‘final order,’ then review was in the district court under the general federal question statute . . . and former INA § 279.”

Motomura, *supra* note 31, at 415.

44 *See* INA § 242(a)(2)(B)–(C), 8 U.S.C. § 1252 (a)(2)(B)–(C) (Supp. III 1998) (denying review to aliens deportable under crime-related grounds, and barring judicial review of integral categories of discretionary decisions and those that are specifically at the discretion of the Attorney General).

45 *See id.* § 1252(b)(9).

46 403 U.S. 388 (1971).

claims for damages against federal officials for constitutional violations even without express statutory authorization.⁴⁷ In this case, six agents of the Federal Bureau of Narcotics unlawfully entered the plaintiff's apartment and conducted a warrantless search and arrest for narcotics violations.⁴⁸ The Supreme Court held that the Fourth Amendment created a general right to file actions for damages in cases where federal officials violate constitutional or statutory legal rights.⁴⁹ The Court concluded that the plaintiff could recover monetary damages as long as there existed "no special factors counseling hesitation in the absence of affirmative action by Congress" and "no explicit congressional declarations[s] that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress."⁵⁰

The Court quickly signaled to the lower courts and potential plaintiffs that *Bivens* could be applied to other constitutional violations soon afterward, when it extended the right to damages to Fifth and Eighth Amendment violations.⁵¹ However, since *Carlson v. Green*,⁵² the Court has denied *Bivens* remedies to constitutional violations in a number of cases, focusing mainly on the two exceptions articulated in *Bivens*.⁵³

47 Christopher G. Froelich, *Closing the Equitable Loophole: Assessing the Supreme Court's Next Move Regarding the Availability of Equitable Relief for Military Plaintiffs*, 35 SETON HALL L. REV. 699, 714 (2005).

48 *Bivens*, 403 U.S. at 389.

49 *Id.* at 392.

50 *Id.* at 396–97. The Court noted several such factors "counseling hesitation," which include questions of federal fiscal policy and the imposition of "liability upon a congressional employee for actions contrary to no constitutional prohibition." *Id.* Since *Bivens*, the Court has considered a number of cases in which it has denied *Bivens* remedies to constitutional violations.

51 See, e.g., *Carlson v. Green*, 446 U.S. 14, 18–23 (1980) (extending *Bivens* to situations where there is no statute conferring the constitutional rights being violated and alternate remedies exist); *Davis v. Passman*, 442 U.S. 228, 245 (1979) (holding that damages are appropriate for violations of the Fifth Amendment because (1) it is a remedial scheme normally available in federal courts, (2) it would be judicially manageable without difficult questions about valuation or causation, and (3) there are no alternative forms of relief).

52 446 U.S. at 14.

53 See, e.g., *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (retreating from requiring adequate remedies by barring damages where other remedies, even when they are not federal or fully corrective in nature, are available); *Schweiker v. Chilicky*, 487 U.S. 412, 424–29 (1988) (holding that administrative schemes that award restitution but not expected damages function as a factor counseling hesitation of federal court intervention); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (holding that special factors counseling hesitation exist in situations where enlisted military personnel claim constitutional violations by superior officers); *Bush v. Lucas*, 462 U.S. 367, 388–90 (1983) (holding that since the government's comprehensive, remedial scheme protecting civil servants against arbitrary action by supervisors provides remedies for

B. *The Intersection of Bivens Claims and the INA*

A key question arises in the area of *Bivens* claims flowing out of the immigration context. Congress, in enacting the Immigration and Nationality Act, created a comprehensive scheme, including adjudication, to assist in the regulation of immigration.⁵⁴ Does the statutory scheme of the INA preclude federal courts from adjudicating *Bivens* claims arising out of the immigration context? Or is the INA scheme for judicial review insufficient for providing relief for some *Bivens* claims? Federal courts have grappled with these questions and have come to varying results, allowing some *Bivens* claims to be brought in federal district court, while dismissing others.

V. AN EXPLANATION OF THE PROBLEM

Two key questions arise out of the IIRIRA with regard to judicial review: (1) at what point does a federal court have jurisdiction to review an immigration-related decision by a government agency; and (2) in which court can a petitioner bring his or her claim? The answer to both of these questions hinges on the federal courts' understanding of 8 U.S.C. § 1252(b)(9).

Section 1252(b)(9) establishes exclusive appellate jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien."⁵⁵ The Supreme Court has described this provision as a "general jurisdictional limitation" and an "unmistakable 'zipper' clause,"⁵⁶ which channels all questions of law and fact arising from removal proceedings to the federal courts of appeals.⁵⁷ Because it encompasses "'all questions of law and fact' and extends to both 'constitutional and statutory' challenges," its expanse has been described by one court of appeals as "breathtaking."⁵⁸

these employees. a new judicial remedy for the same constitutional violations was not necessary).

⁵⁴ See *supra* Section II.

⁵⁵ 8 U.S.C. § 1252(b)(9).

⁵⁶ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999).

⁵⁷ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 270 (E.D.N.Y. 2006), *aff'd on other grounds*, 585 F.3d 559 (2d Cir. 2009).

⁵⁸ *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 9 (1st Cir. 2007) (internal quotation marks omitted). "As its text makes manifest, that proviso was designed to consolidate and channel review of *all* legal and factual questions that arise from the removal of an alien into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeals." *Id.* Therefore, a petitioner cannot avoid the jurisdictional channel by aggregating claims associated with removal, each one of which would be jurisdictionally barred if brought alone. *Id.* at 9–10.

However, courts are careful to ensure that this jurisdiction-limiting provision of the IIRIRA does not divest district courts entirely of jurisdiction to hear challenges to removal.⁵⁹ As the Supreme Court explained in *INS v. St. Cyr*, § 1252(b)(9) is intended “to consolidate judicial review of immigration proceedings into one action in the court of appeals, not to eliminate judicial review altogether.”⁶⁰ Congress enacted § 1252(b)(9) in response to “the problem of successive filings and additional back-door challenges to removal orders,” a problem created by holdings that allowed parties to initiate separate proceedings for a challenge to the denial of a stay of deportation in federal district court and a challenge to the underlying deportation order itself in immigration court.⁶¹ By consolidating review into one forum, Congress attempted to channel all removal-related challenges into one process.⁶²

Courts have, however, been careful to ensure that § 1252(b)(9)’s scope is not limitless.⁶³ They have not read the statute’s “arising from” limitation to “swallow all claims” that tangentially “touch upon, or [can] be traced to, the government’s efforts to remove an alien.”⁶⁴ If Congress had intended for the statute to reach so broadly, it could have used broader language.⁶⁵ Since it neglected to do so, Congress’ choice of phrase has been taken by courts to suggest that Congress did not intend § 1252(b)(9) to take “into its scope claims with only a remote or attenuated connection to the removal of an alien,”⁶⁶ or “claims that are independent of, or wholly collateral to, the removal process.”⁶⁷

⁵⁹ *Arar*, 414 F. Supp. 2d at 269.

⁶⁰ *INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (internal quotation marks omitted), *quoted in Arar*, 414 F. Supp. 2d at 270.

⁶¹ *Arar*, 414 F. Supp. 2d at 269–70 (citing *Calcano-Martinez v. INS*, 232 F.3d 328, 340 (2d Cir. 2000)); *see also Aguilar*, 510 F.3d at 9 (“In enacting section 1252(b)(9), Congress plainly intended to put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings.”); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1140–41 (9th Cir. 2000) (noting that before the enactment of § 1252(b)(9), motions to reopen were to be brought in the courts of appeals whereas challenges to denials of stays of deportation could be brought in federal district courts under the general federal question statute).

⁶² *See Arar*, 414 F. Supp. 2d at 269–70.

⁶³ *Aguilar*, 510 F.3d at 10.

⁶⁴ *Id.*

⁶⁵ *Motomura*, *supra* note 31, at 424; *see also Humphries v. Various Fed. Usins Employees*, 164 F.3d 936, 943 (1999) (holding that if Congress had intended for the provisions of the INA to be read more expansively, it could have used the term “related to,” which would have relaxed the requirements under which claims could be barred).

⁶⁶ *Aguilar*, 510 F.3d at 10.

⁶⁷ *Id.* at 11; *see also H.R. REP. NO. 109-72*, at 175 (2005) (Conf. Rep.) (“Moreover, section 106 would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders.”).

Federal courts have thus determined what Congress did not intend the term “arise from” to mean. However, courts have had a more difficult time assessing which claims “arise from” the underlying removal proceeding, and which claims are merely collateral to such proceedings. This inquiry has been particularly problematic in the adjudication of *Bivens* or other similar constitutional claims.

Bivens claims may arise in the immigration context “when the government physically and forcibly apprehends noncitizens as part of the process of removing them from the United States.”⁶⁸ May plaintiffs in these cases bring their *Bivens* claims to federal district court before a final order of removal has been issued in the immigration courts?⁶⁹ The answer to this question has important consequences for the non-citizen attempting to make this challenge in court.

Forcing plaintiffs to wait to receive a final order of removal before bringing their *Bivens* claims to court may require them to endure a long wait, even though their constitutional claims may be at the core of their case.⁷⁰ If plaintiffs wished to expedite the court’s hearing of their constitutional claims, they would be forced to rush the hearing of their administrative claims, often resulting in an unfavorable conclusion, and then to let the time to appeal run.⁷¹

Even if such plaintiffs took the chance of an unfavorable removal order so they could expedite their constitutional case, they may be further handicapped by the fact that the federal courts of appeals are not fact-finding bodies. Courts of appeals rely on the records created in the lower administrative body, including the proceedings in front of the immigration judge and BIA, to review claims. If plaintiffs are unable to establish the record necessary to argue their constitutional case in a court of appeals, they are unlikely to prevail in this federal court.⁷² Therefore, it is imperative that the delineation of federal court jurisdiction in these types of cases is both clear and fair.

⁶⁸ Motomura, *supra* note 31, at 431; *see, e.g.*, Lynch v. Cannatella, 810 F.2d 1363, 1366 (5th Cir. 1987) (“[D]etained and allegedly mistreated before being deported We hold that even excludable aliens are entitled to the protection of the due process clause [sic] while they are physically in the United States.”).

⁶⁹ In his 2000 article, Professor Motomura argues persuasively that § 1252(b)(9)’s jurisdictional limitation barring claims arising from a removal proceeding from being brought in federal district court does not apply to Federal Tort Claims Act or *Bivens* claims. Motomura, *supra* note 31, at 431. However, federal district and circuit courts have not read the statute as narrowly as Professor Motomura prescribes and have adjudicated such claims on a case-by-case basis, creating tensions between various courts’ holdings on the viability of plaintiffs’ *Bivens* claims in federal district courts.

⁷⁰ *Id.*

⁷¹ *Id.* at 388.

⁷² *See* Reno v. Am.-Arab Anti-Discrimination Comm. (AADC), 525 U.S. 471, 476 (1999) (“Since neither the Immigration Judge nor the Board of Immigration Appeals has authority to hear such claims . . . a challenge to a final order of deportation based upon

Since the enactment of the IIRIRA, federal district courts and courts of appeals have struggled to apply § 1252(b)(9) to claims of constitutional violations and have failed to produce a coherent analytical method. The next Section describes the jurisprudence of § 1252(b)(9).

VI. APPLYING § 1252(b)(9)

A. *A Tale of Beginnings: Reno v. American-Arab Anti-Discrimination Committee*

In 1999, the Supreme Court first dealt with § 1252 in *Reno v. American-Arab Anti-Discrimination Committee (AADC)*.⁷³ The respondents, non-citizens affiliated with the Popular Front for the Liberation of Palestine, sued the federal government for targeting them for deportation because of their membership in a politically unpopular group.⁷⁴ While their suit was pending, Congress passed the IIRIRA.⁷⁵ The government argued that the IIRIRA barred district court review of challenges to the deportation proceedings prior to the entry of a final order of deportation.⁷⁶ The Court, relying solely on § 1252(g), found that Congress had deprived federal courts of jurisdiction to review the Attorney General's discrete decisions to "commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."⁷⁷

For the purposes of analyzing the Court's jurisprudence on § 1252(b)(9), *AADC* is instructive in what it does not explicitly hold. Its exclusive focus on § 1252(g) left unresolved the larger question of whether § 1252(b)(9) is likewise made unavailable, absent a final removal order, ordinary judicial review in cases presenting constitutional issues but not strictly limited to removal proceedings (for example, habeas corpus petitions).⁷⁸

such a claim would arrive in the court of appeals without the factual development necessary for decision.").

⁷³ *Id.* at 471.

⁷⁴ *Id.* at 473–74.

⁷⁵ *Id.* at 475.

⁷⁶ *Id.*

⁷⁷ 8 U.S.C. § 1252(g), *cited in AADC*, 525 U.S. at 482.

⁷⁸ *AADC*, 525 U.S. at 489 n.10.

B. The First Foray into § 1252(b)(9): INS v. St. Cyr

Two years later, the Court applied its holdings in *AADC* to *INS v. St. Cyr*.⁷⁹ Though this case dealt primarily with respondent St. Cyr's habeas corpus application, it provides illuminating clues about the Court's initial treatment of the jurisdiction-limiting provisions of § 1252(b)(9) in the aftermath of *AADC*.

In *St. Cyr*, the respondent, a lawful, permanent United States resident, pleaded guilty to a criminal charge of selling a controlled substance in violation of state law, making him deportable.⁸⁰ St. Cyr's removal proceedings had commenced after AEDPA and IIRIRA had become effective.⁸¹ Among its many arguments, the INS claimed that the federal district court did not have subject-matter jurisdiction over St. Cyr's habeas petition because § 1252 consolidated all questions for judicial review to federal courts of appeals.⁸²

The Supreme Court noted that, though the purpose of § 1252(b)(9) was to consolidate judicial review of immigration proceedings in the courts of appeals, this provision did not bar habeas jurisdiction over any removal orders not subject to judicial review under § 1252(a)(1).⁸³ This included orders against non-citizens made removable for having committed criminal offenses.⁸⁴ Furthermore, the Court noted that the 1961 amendments channeled review of final orders to courts of appeals but unequivocally permitted district courts to continue to exercise jurisdiction over claims that fell outside a "final order."⁸⁵

Finally, the Court addressed the issue of alternative forums for relief. In particular, it noted that if it were possible for the question of law St. Cyr raised to be answered in another judicial forum, it may have been more inclined to accept the Government's reading of § 1252 as barring such claims for relief.⁸⁶ However, since St. Cyr lacked an alternative forum for his claim, the Court held that habeas jurisdiction under 28 U.S.C. § 2242 was not repealed by the jurisdiction-limiting provisions of the AEDPA and IIRIRA.⁸⁷

79 533 U.S. 289 (2001).

80 *Id.* at 293.

81 *Id.*

82 *Id.* at 309–12.

83 *Id.* at 313.

84 *Id.*

85 *Id.* at 313 n.37 (internal quotation marks omitted) (citing *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 485 (1999)).

86 *Id.* at 314.

87 *Id.*

While *St. Cyr* was the first case in which the Supreme Court tackled issues raised by § 1252(b)(9), the Court narrowly tied its analysis to the viability of a plaintiff's habeas petition and did not reach the issue of § 1252(b)(9)'s effects on other constitutional claims.

C. Understanding the Issue of "Finality" for the Purposes of § 1252(b)(9)

Since the Court in *St. Cyr* specifically confined § 1252 to operating only on final orders of removal, courts of appeals have also been confronted with determining when an order becomes "final." In answering this question, they have had to explore the issue of exhaustion and have determined that an order becomes final when the immigration judge issues an order which the BIA then affirms, or the time to appeal expires.⁸⁸ Since *AADC* and *St. Cyr*, courts continue to deal with the multitude of claims that may arise out of removal proceedings, including the issue of finality, claims against illegal deportation,⁸⁹ and ineffective assistance of counsel,⁹⁰ and they have done so with little guidance. An area in which courts have had particular difficulty in determining whether the jurisdictional provisions of § 1252 apply is in the realm of *Bivens* actions arising from facts or circumstances surrounding a plaintiff's removal. The following section surveys existing case law in which plaintiffs' primary claims do not concern their removal, but constitutional claims. As will become evident, courts have not approached this class of cases using a uniform rubric, but have instead created distinctions between types of constitutional claims that are barred under varying rationales.

⁸⁸ See *Halabi v. Ashcroft*, 316 F.3d 807, 808 (8th Cir. 2003) (holding that federal courts do not have jurisdiction for claims where plaintiffs fail to exhaust their remedies in immigration court (citing *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140–41 & n.2 (9th Cir. 2002))); see also 8 U.S.C. § 1252(a)(1)(B)(i) ("[N]o court shall have jurisdiction to review any judgment regarding the granting of relief under section . . . 1229b . . . of this title . . .").

⁸⁹ See, e.g., *Kumarasamy v. Att'y Gen. of U.S.*, 453 F.3d 169, 172 (3d Cir. 2006) (holding that Kumarasamy's claim that his deportation was illegal because there was no order of removal was entirely separate from any claim for judicial review of an order of removal, and was therefore not barred by § 1252(b)(9)).

⁹⁰ See, e.g., *Afanwi v. Mukasey*, 526 F.3d 788, 795–96 (4th Cir. 2008) (holding that although the court did not have jurisdiction over Afanwi's claim of ineffective assistance of counsel, § 1252(b)(9) did not create a jurisdictional bar to allowing federal courts to consider this issue); *Singh v. Gonzales*, 499 F.3d 969, 972 (9th Cir. 2007) (holding that a claim of ineffective assistance of counsel in connection with post-administrative filings with the court of appeals falls outside the jurisdiction-limiting provisions of the REAL ID Act).

VII. APPLYING § 1252(b)(9) IN THE *BIVENS* CONTEXT

Courts applying § 1252(b)(9) to *Bivens* claims over the last ten years have been unable to articulate any “simple, one-size-fits-all”⁹¹ answers, though they have valiantly tried to analyze the issues with varying degrees of success. This section will provide an overview of cases, in order of their depth of § 1252(b)(9) analysis. The First Circuit in *Aguilar v. Immigration and Customs Enforcement* and the Eastern District of New York in *Arar v. Ashcroft* provide two examples of the more rigorous and detailed treatments the federal courts have offered.

A. *Aguilar v. Immigration and Customs Enforcement*

In *Aguilar*, federal officers conducted a raid targeting more than 300 rank-and-file employees of a Department of Defense contractor for civil immigration infractions.⁹² Immigrations and Customs Enforcement (ICE) then transferred a significant proportion of these detainees to detention and removal operation centers that were a considerable distance away.⁹³ The employee-detainees alleged that they: (1) were subject to arbitrary, prolonged, and indefinite detention; (2) were denied a prompt bond hearing prior to any transfer; (3) were denied access to counsel; and (4) suffered from loss of family integrity.⁹⁴

The First Circuit began its analysis with an exercise in statutory construction.⁹⁵ Noting Congress’s goal in consolidating and channeling questions arising from the removal process, the First Circuit held that the words “arising from” in § 1252(b)(9) should be read to exclude those claims that are “independent of, or wholly collateral to, the removal process.”⁹⁶ Therefore, the court found that § 1252(b)(9)

91 *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 6 (1st Cir. 2007).

92 *Id.*

93 *Id.*

94 *Id.* at 7.

95 *Id.* at 8.

96 *Id.* at 11. The First Circuit drew upon the long-recognized exception to the exhaustion requirement for claims that are collateral to administrative proceedings. *Id.* at 12; see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994) (stating courts have previously deemed claims collateral when requiring exhaustion would foreclose all meaningful judicial review). “[C]ourts have demonstrated a particular hostility toward requiring exhaustion when adequate relief could not feasibly be obtained through the prescribed administrative proceedings.” *Aguilar*, 510 F.3d at 12 (citing *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976)). This is particularly true when a party would be irreparably harmed by adherence to an exhaustion requirement. *Bowen v. City of New York*, 476 U.S. 467, 483 (1986).

carried an inherent exception for claims that are independent from removal orders that could be applied to the *Bivens* context.⁹⁷

The court found such an exception important because requiring the exhaustion of constitutional claims in administrative proceedings would “foreclose them from any meaningful judicial review.”⁹⁸ Since Congress’s intention was “to channel, rather than bar, judicial review,” the First Circuit held that courts must not read “arising from” as used in § 1252(b)(9) to encompass those claims⁹⁹ that cannot be raised efficaciously within the administrative proceedings of the INA.¹⁰⁰ The court found that such claims could not, by definition, be ones that arise from an alien’s removal.¹⁰¹

Having established these foundational precepts, the First Circuit went on to examine whether § 1252(b)(9) required the petitioners to exhaust their specific claims in the administrative framework.¹⁰² The court first examined petitioners’ conditions-of-confinement claims and dismissed them on procedural grounds because these claims were not raised in the lower court pleadings.¹⁰³ However, it is unclear whether the court would have found these claims barred by § 1252(b)(9) had they been raised on procedurally solid grounds.¹⁰⁴

The court reached the contrary conclusion with respect to petitioners’ right-to-counsel claims. Such claims, the Court held, were so intertwined with the removal process that allowing aliens to bring them directly to district court would result in the fragmented litigation Congress sought to avoid in enacting the INA amendments.¹⁰⁵ Moreover, the court acknowledged that petitioners could raise and seek redress for these claims before an immigration judge and the BIA before coming to the court of appeals.¹⁰⁶ Hence, the right-to-counsel claims “arise from” and are part-and-parcel of the removal proceeding,¹⁰⁷ and they are barred by § 1252(b)(9) from district court review.

Finally, the court considered petitioners’ due process claims “alleg[ing] violation[] of the Fifth Amendment right of parents to make

⁹⁷ *Aguilar*, 510 F.3d at 11; *see also* *Sissoko v. Rocha*, 440 F.3d 1145, 1156–57 n.18 (9th Cir. 2006) (finding that the jurisdiction-stripping provisions of 8 U.S.C. § 1252(g) do not foreclose a non-citizen’s claims for money damages under *Bivens*).

⁹⁸ *Aguilar*, 510 F.3d at 11.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 12.

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 13–14.

¹⁰⁶ *Id.* at 14.

¹⁰⁷ *Id.* at 13.

decisions as to the care, custody, and control of their children.”¹⁰⁸ Though these claims are somewhat connected to removal, the court found that: (1) the right to family integrity is only marginally related to removal; (2) the harm from continuing disruption may be irreparable; and (3) the issue is not one which the immigration court would ordinarily adjudicate.¹⁰⁹ Furthermore, since the issue of family integrity is generally “completely irrelevant” to the variety of issues that are likely to be litigated in removal proceedings, and the claims typically have no bearing on the aliens’ immigration status, § 1252(b)(9) does not bar such claims.¹¹⁰ The court also noted that the fact that petitioners have no other means by which to assert this right further argued in favor of jurisdiction.¹¹¹

B. *Arar v. Ashcroft*

In a 2009 *en banc* opinion, the Second Circuit in *Arar v. Ashcroft* adjudicated another set of constitutional claims arising from removal proceedings.¹¹² However, this court, unlike the First Circuit in *Agui-lar*, did not reach the question of whether the INA deprived the district court of subject-matter jurisdiction over Arar’s removal-related *Bivens* claims.¹¹³ Instead, it dismissed those claims as beyond the reach of *Bivens*, without addressing the “vexed question” of law arising from an analysis of the applicability of the INA’s jurisdiction-stripping provisions.¹¹⁴ Though the Second Circuit opted to avoid deciding whether the district court had subject-matter jurisdiction over Arar’s removal-related *Bivens* claims, the district court’s treatment of the issue provides useful insight into the manner in which courts currently analyze the jurisdictional bar.

Plaintiff Arar was a “native of Syria who immigrated to Canada with his family.”¹¹⁵ While in transit at JFK airport in New York, he was identified as the member of a known terrorist organization and was interrogated by officials, held in solitary confinement, and denied repeated requests to speak to his lawyer.¹¹⁶ Arar was later given an op-

108 *Id.* at 18–19.

109 *Id.* at 19.

110 *Id.*

111 *Id.*

112 *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (upholding district court and panel decisions dismissing defendant’s contention that mistreatment suffered while in U.S. custody provided a basis for a claim under the Fifth Amendment Due Process Clause), *aff’g on other grounds*, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006).

113 *Id.* at 571.

114 *Id.*

115 *Arar*, 414 F. Supp. 2d at 252.

116 *Id.* at 253.

portunity to return to Syria but refused, citing a fear of being tortured.¹¹⁷

The INS initiated removal proceedings, subsequently determined Arar was clearly part of al Qaeda and was therefore inadmissible to the United States, and ordered him to be sent to Syria.¹¹⁸ When Arar was handed over to the Syrians, United States officials had not informed the Canadian consulate of his removal.¹¹⁹ A Final Notice of Inadmissibility ordered Arar removed without further inquiry before an immigration judge.¹²⁰

Arar raised four claims for relief in the district court, two of which are relevant to the study of § 1252(b)(9): (1) that defendants violated his rights under the Fifth Amendment by knowingly subjecting him to torture in Syria; and (2) that he was denied access to counsel, the courts, and the consulate in violation of his Fifth Amendment rights.¹²¹

Reviewing the jurisdictional limitations imposed by the INA, the court noted that the amendments to the INA were designed “to create a streamlined procedure allowing for the effective administration of the immigration laws so that the removal of illegal aliens can proceed with as much alacrity as possible while maintaining a minimum of procedural due process.”¹²² Therefore, it held that the underlying question to be decided was whether Arar’s claims, at the core, challenged his removal.¹²³

The district court disagreed with the government’s attempts to redefine Arar’s action as “a simple challenge to circumstances ‘arising out of’” Arar’s removal.¹²⁴ The court noted that Arar’s claims did not concern why the government chose to send Arar to Syria or attack the bases of sending him there.¹²⁵ Instead, Arar’s claims concerned the legality of sending him to a country where they knew he would be tortured and arbitrarily detained.¹²⁶ Therefore, the district court found that Arar’s allegations are separate from, and collateral to, the underlying removal order under which he was deported.¹²⁷

117 *Id.*

118 *Id.*

119 *Id.* at 254.

120 *Id.*

121 *Id.* at 257–58.

122 *Id.* at 268.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.* at 268–70.

Arar's situation was unusual, if not unique, because he did not have the opportunity to challenge his removal at a hearing at all.¹²⁸ In this case, Arar alleged that federal officials obstructed him from filing his claim that he was denied access to counsel.¹²⁹ The court noted that this deprivation did not leave Arar in a position similar to other deportees, who could wait to conclude their administrative proceedings before seeking review in a court of appeals.¹³⁰

Since Arar's claims did not challenge his deportation, but rather the legality of deportation to Syria where he would likely be tortured and because the administrative procedure would not remedy his lack of counsel claim. The district court found that his claims were separate from and collateral to his removal and not barred by § 1252(b)(9).¹³¹

C. Turkmen v. Ashcroft

In 2006, the Eastern District of New York also determined whether right-to-counsel claims were subject to the jurisdictional bars of § 1252(b)(9).¹³² In *Turkmen v. Ashcroft*, the plaintiffs were arrested and detained on immigration violations following the 9/11 attacks.¹³³ During the time of their detention, plaintiffs asserted that they were not issued their Notices to Appear (NTAs) in a timely fashion, they were denied bond on the basis of religion and ethnicity without assessing flight risk, they were subjected to a communications blackout that interfered with their access to counsel, and they were detained for longer than was necessary after receiving their final orders of removal.¹³⁴

128 *Id.* at 269.

129 *Id.*

130 *Id.* (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 479 (1999)).

131 Though the court held that Arar's claims were not barred by § 1252(b)(9), it still found it did not have proper jurisdiction to entertain his *Bivens* claims because of overriding factors counseling hesitation. *Id.* at 283. Since the district court felt that the task for balancing individual rights against such serious national security concerns was not one courts should undertake, it directed the Legislative and Executive branches to design a suitable remedy or enact explicit legislation directing judges to do so. *Id.*

132 *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663, at *25 (E.D.N.Y. June 14, 2006), *rev'd on alternate grounds*, 589 F.3d 542 (2d Cir. 2009). The Second Circuit affirmed in part and reversed in part the decision of the district court, but on grounds separate from the jurisdictional bar of § 1252(b)(9). *Turkmen*, 589 F.3d at 542. Since the Second Circuit's opinion does not concern the jurisdictional bar at issue here, the district court's decision remains instructive on this issue in this case.

133 *Turkmen*, 2006 WL 1662663, at *1.

134 *Id.* at *2.

The district court found that plaintiffs' challenges to the denial of bond were barred by § 1252(b)(9).¹³⁵ It first noted that the regulations governing the jurisdiction of the BIA specifically provide that "the Board may review appeals from [d]eterminations relating to bond."¹³⁶ That these challenges could have been reviewed by the BIA was instrumental in the court's finding that the plaintiffs could not bring them to district court.¹³⁷

Moreover, the court also found that the denial of bond was not an issue separate and apart from the underlying removal proceeding, but instead served to assure the plaintiffs' presence at later stages of the removal proceedings.¹³⁸ The court found this to be exactly the kind of claim Congress had in mind when it enacted § 1252(b)(9) to bar judicial review by the district court.¹³⁹

Plaintiffs also alleged that the communications blackout violated their rights to due process under the Fifth Amendment, including access to legal counsel.¹⁴⁰ The court acknowledged an alien's right to counsel in a proceeding before an immigration judge, but noted that a claim to this right could properly be presented to the BIA and then to the court of appeals.¹⁴¹

The court then turned to the question of whether the communications blackout arose out of a removal proceeding and was thus barred by § 1252(b)(9). It found that the phrase "action taken . . . to remove an alien" implied any action taken for the purpose of removing an alien, and it held that the purpose of the communications blackout was not to remove the plaintiffs, but instead to reduce the risk of further terrorist attacks.¹⁴² Therefore, the court found that the plaintiffs' communications blackout claim was not barred by § 1252(b)(9).¹⁴³

Similarly, plaintiffs' challenges to the Attorney General's delay in serving them with NTAs after detaining them were not barred by § 1252(b)(9).¹⁴⁴ In the sequence of events in immigration proceedings, the court noted that the service of the NTA marks the beginning of the process by which action is taken or proceedings are

135 *Id.* at * 25.

136 *Id.* at *25 (alteration in original) (internal quotation marks omitted) (quoting 8 C.F.R. § 1003.1(b)(7)).

137 *Id.* at *25.

138 *Id.* at *26 n.28.

139 *Id.* at *26.

140 *Id.*

141 *Id.*

142 *Id.* (omission in original) (internal quotation marks omitted).

143 *Id.*

144 *Id.*

brought against an alien and the purpose of detention is declared.¹⁴⁵ Therefore, the court found that a failure to bring proceedings is not within the scope of § 1252(b)(9), and plaintiffs' claims challenging the delay in serving them with NTAs should properly be heard in district court.¹⁴⁶

Finally, the court addressed plaintiffs' length-of-detention claims.¹⁴⁷ In its discussion of the implications of § 1252(b)(9), the court stated that, since challenges to the length of detention are not actions subject to review under § 1252(a)(1), § 1252(b)(9) does not apply.¹⁴⁸

D. *Turnbull v. United States*

A year later, in 2007, the district court in the Northern District of Ohio was asked to adjudicate a case in which the result turned on what constitutes an "order of removal," as described by § 1252(a)(1), that might make the § 1252(b)(9) jurisdictional bar applicable.¹⁴⁹ In *Turnbull v. United States*,¹⁵⁰ the plaintiff was a native and citizen of Jamaica who had served time for drug trafficking convictions.¹⁵¹ "[P]rior to his release from prison on his second conviction, the Immigration and Naturalization Service (INS) commenced deportation proceedings against [him]."¹⁵² After he exhausted his administrative appeals, the INS served a Warrant of Deportation.¹⁵³ Just before he was deported, he contacted his attorney, who then sought and was granted a stay in the district court.¹⁵⁴ However, though they were aware of the stay, ICE officers neglected to remove Turnbull from the plane.¹⁵⁵ The district court subsequently entered an order directing the United States "to immediately retrieve Turnbull from Jamaica."¹⁵⁶ Turnbull was returned to the United States thirty-two days after he

145 *Id.*

146 *Id.*

147 *Id.* at *27.

148 *Id.* at *27 n.30.

149 *Turnbull v. United States*, No. 1:06cv858, 2007 WL 2153279, at *5 (N.D. Ohio July 23, 2007).

150 *Id.*

151 *Id.* at *1.

152 *Id.*

153 *Id.*

154 *Id.* at *2 ("Before getting on the plane, plaintiff was allowed to place a telephone call to his mother, and she in turn contacted plaintiff's counsel." (internal citation omitted)).

155 *Id.*

156 *Id.*

had been deported. He filed suit, seeking damages against certain individual federal agents under *Bivens*.¹⁵⁷

The court rejected the government's argument that § 1252(b)(9) bars jurisdiction for reasons similar to those expressed by the *Turkmen* court.¹⁵⁸ Primarily, the court noted that Turnbull's claim was not a back-door attempt "to circumvent the administrative process set up to review orders of removal."¹⁵⁹ Rather, his suit was "specifically limited to an attack upon the decision to disregard the Magistrate Judge's stay order."¹⁶⁰ The claim did not implicate an order of removal under § 1252(a)(1), but instead was based upon the actions of several federal officers after a stay to such an order was entered.¹⁶¹ Therefore, the court found that § 1252(b)(9) did not bar Turnbull's claims from being brought in district court.¹⁶²

E. *Khorrani v. Rolince*

In the same year as *Turbull*, *Khorrani v. Rolince* was decided. The plaintiff, Dr. Khorrani, was an Iranian-born British citizen residing in the United States.¹⁶³ In the days following September 11, 2001, Dr. Khorrani was interrogated by the FBI with the use of threatening and abusive language and was denied permission to contact the British embassy and his family.¹⁶⁴ The immigration judge issued a final order finding Dr. Khorrani to be removable.¹⁶⁵ However, the judge also granted Dr. Khorrani's request for permanent residence status based on his marriage to a United States citizen.¹⁶⁶ As a result, though he was deemed removable, Dr. Khorrani was not deported.¹⁶⁷ Dr. Khorrani filed suit for *Bivens* violations arising from allegedly prolonged and abusive interrogation and denials of access to counsel.¹⁶⁸

In this case, the court did not analyze whether the claims were intertwined with the removal process. Instead, the court decided the

157 *Id.*

158 *Id.* at *6; *see also supra* Section VII.C.

159 *Turbull*, 2007 WL 2153279 at *6.

160 *Id.*

161 *Id.* at *5.

162 *Id.* at *6.

163 493 F. Supp. 2d 1061, 1064 (N.D. Ill. 2007), *aff'd on other grounds* 539 F.3d 782 (7th Cir. 2008). The government appealed the district court's decision in *Khorrani v. Rolince* on the issue of qualified immunity, and the Seventh Circuit did not address the question of § 1252(b)(9) jurisdiction. *Khorrani*, 539 F.3d at 782. Therefore, for purposes of the jurisdictional bar, the district court opinion controls.

164 *Khorrani*, 493 F. Supp. 2d at 1064.

165 *Id.* at 1065.

166 *Id.* at 1065–66.

167 *Id.* at 1066.

168 *See id.* at 1061.

applicability of § 1252(b)(9) by focusing primarily on the fact that “it only applies with respect to review of an order of removal.”¹⁶⁹ It found that though he was deemed removable, Dr. Khorrami’s grant of permanent residency functioned as an adjustment of status, not a removal order.¹⁷⁰ The fact that a formal removal order was not applicable takes it out of the realm of the applicability of § 1252(b)(9).¹⁷¹ Since a final removal order was not issued, § 1252(b)(9) provides no bar to bringing removal-related claims in district court.¹⁷²

F. The Outlier: Arias v. United States Immigrations and Customs Enforcement

In a move that diverged from the majority of federal court cases that had reviewed the applicability of the § 1252(b)(9) jurisdictional bar to *Bivens* actions, the district court for the District of Minnesota in 2008 held categorically that all *Bivens* claims arising out of circumstances surrounding immigration proceedings were barred from plea in federal district court by § 1252(b)(9).¹⁷³ In *Arias v. United States Immigrations and Customs Enforcement*, ICE agents implemented a civil immigration enforcement operation by forcibly entering homes illegally and conducting warrantless, non-consensual searches of the plaintiffs who were thought to have remained in the United States.¹⁷⁴ They subsequently arrested the plaintiffs.¹⁷⁵ Plaintiffs filed suit in federal district court under *Bivens*, alleging that the ICE agents had violated their Fourth and Fifth Amendment rights.¹⁷⁶

Relying on the First Circuit’s analysis in *Aguilar*, the district court held that the plaintiffs’ Fourth and Fifth Amendment claims were “common in removal proceedings and could directly impact . . . [their] immigration status.”¹⁷⁷ The court further noted that “allowing aliens to ignore the channeling provisions of § 1252(b)(9) and bring [these] claims directly in the district court” would fragment the removal process and interfere with the efficient administra-

169 *Id.* at 1066–1067.

170 *Id.* at 1067.

171 *Id.*

172 *Id.*

173 *See Arias v. U.S. Immigration and Customs Enforcement*, No. 07-1959, 2008 WL 1827604 (D. Minn. Apr. 23, 2008).

174 *Id.* at *3.

175 *Id.*

176 *Id.* at *4.

177 *Id.* at *6.

tion of immigration laws.¹⁷⁸ Therefore, the court held it lacked subject-matter jurisdiction to consider these *Bivens* claims.¹⁷⁹

VIII. LESSONS LEARNED FROM THE CASES: PUTTING TOGETHER § 1252(b)(9) AND *BIVENS*

Since *St. Cyr*, several federal district and circuit courts have attempted to analyze the applicability of the § 1252(b)(9) bar to various *Bivens* claims but, as the previous section shows, they have used differing rationales in adjudicating the same classes of claims. This Section attempts to reconcile the methodology used by these courts and draws inferences about what types of constitutional claims may be jurisdictionally barred under current standards.

All of the cases discussed agree on one central proposition: claims which are wholly independent of those issues arising from removal proceedings should not be barred from adjudication in federal district court.¹⁸⁰ The disagreement and confusion in the cases discussed seems to center on which claims “arise from”—and what tests should be used to determine whether a claim “arises from”—a removal proceeding.¹⁸¹

One of the more common types of constitutional claims that arise in contexts that would implicate immigration issues is the right to counsel, as exemplified in *Aguilar*, *Arar*, and *Turkmen*.¹⁸² Of these cases, only the district court in *Arar* recognized the independence of right-to-counsel claims from the underlying removal proceedings.¹⁸³ The courts in *Aguilar* and *Turkmen*, in dismissing these claims as being barred by § 1252(b)(9), noted that the chief reason that such claims should not be brought in federal district court is that they can be administratively addressed within the immigration courts, *i.e.*, that the BIA and immigration courts had jurisdiction to hear such claims,

178 *Id.* (alteration in original) (citing *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 13–14 (1st Cir. 2007)).

179 *Id.*

180 *E.g.*, *Aguilar*, 510 F.3d at 11; *see also supra* Section VII.

181 *Compare, e.g.*, *Khorrami v. Rolince* 493 F. Supp. 2d 1061, 1067 (N.D. Ill. 2007) (finding no § 1252(b)(9) jurisdictional bar on the grounds that no removal order had been issued), *aff'd on other grounds* 539 F.3d 782 (7th Cir. 2008), *with Arar v. Ashcroft*, 414 F. Supp. 2d 250, 283 (E.D.N.Y. 2006) (holding that claims challenging lack of counsel and the legality of removal to a country where torture was likely did not directly contest deportation, and therefore were not barred), *aff'd on other grounds*, 585 F.3d 559 (2d Cir. 2009).

182 *See Aguilar*, 510 F.3d at 7; *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663, at *1–*2 (E.D.N.Y. June 14, 2006), *rev'd on alternate grounds*, 589 F.3d 542 (2d Cir. 2009); *Arar*, 414 F. Supp. 2d at 257–58; *see also supra* Sections VII.A–C.

183 *Arar*, 414 F. Supp. 2d at 269; *see also supra* Section VII.B.

and that these claims were often brought to immigration court within the context of their removal proceedings.¹⁸⁴ In contrast, Judge Trager found in *Arar* that since Arar's right-to-counsel claim did not arise out of a challenge to his removal order, but instead out of a challenge to the legality of his rendition, these claims were not barred by § 1252(b)(9).¹⁸⁵

Another common category of constitutional claims concerns the length of detention. Both *Turkmen* and *Khorrami* examined slightly different claims and produced decisions that, while consistent in outcome, diverged in analysis. In *Turkmen*, the court analyzed claims protesting the government's delay in issuing the plaintiffs' NTAs, or protesting the time plaintiffs were held in detention, not from the standpoint of whether such claims are generated by the underlying removal proceeding but in terms of the purpose behind the government's actions.¹⁸⁶ The *Turkmen* court found that since the government's delay in issuing the NTAs and the resulting lengthy detention were not done in furtherance of their removal, these actions could not be considered to have "arisen from" the underlying removal proceeding.¹⁸⁷

In contrast, the court in *Khorrami* considered the issue far more narrowly, deciding simply that the plaintiff's claims objecting to the government's post-NTA detention and pre-NTA interrogation and arrest were not barred because no order of removal had been issued.¹⁸⁸ Since § 1252(b)(9) only applies to claims arising from orders of removal, that section of the INA was held inapplicable in this context.¹⁸⁹ Since the plaintiffs in *Turkmen* were only challenging their detention *after* a final order of removal had been issued, the court might have been able to use the same analysis as the *Khorrami* court in allowing the claims to go forward in district court.¹⁹⁰ Yet, the court chose to concentrate on the government's intent in detaining and delaying the issuance of the NTAs.¹⁹¹

The court in *Turnbull* used the same temporal analysis as the court in *Khorrami* to analyze whether the plaintiff's claims protesting his

184 *Aguilar*, 510 F.3d at 13–14; *Turkmen*, 2006 WL 1662663 at * 26; *see also supra* Sections VII.A, VII.C.

185 *Arar*, 414 F. Supp. 2d at 269; *see also supra* Section VII.B.

186 *Turkmen*, 2006 WL 1662663 at *26; *see also supra* Section VII.C.

187 *Turkmen*, 2006 WL 1662663 at *26; *see also supra* Section VII.C.

188 *Khorrami v. Rolince* 493 F. Supp. 2d 1061, 1067 (N.D. Ill. 2007); *see also supra* Section VII.C.

189 *Khorrami*, 493 F. Supp. 2d at 1067; *see supra* Section VII.E; *See also supra* Section 6.E.

190 *Turkmen*, 2006 WL 1662663 at *26–*27; *see also supra* Sections VII.C, VII.E.

191 *Turkmen*, 2006 WL 1662663 at *26–*27; *see also supra* Section 6.E.

deportation to Jamaica (notwithstanding the magistrate's stay order) were barred from consideration under § 1252(b)(9).¹⁹² Here, the court noted that, though an order of removal had been issued earlier in the case, the magistrate's order staying the removal served to override the order of removal, restoring the plaintiff to a pre-order-of-removal state.¹⁹³ Therefore, like the *Khorrami* court, this court found that § 1252(b)(9) did not apply.¹⁹⁴

The *Turkmen* court also analyzed two, separate claims that were not examined by any of the other courts in the earlier examples: (1) bond determination, and (2) communications blackouts.¹⁹⁵ While the court found that the bond determination claim was barred by § 1252(b)(9), it held that the claims against communications blackouts could be brought properly in federal district court, but it used different rubrics to support these conclusions.¹⁹⁶ In dismissing the bond determination claims, the court found that since the BIA could review appeals of issues arising from bond determination claims, such claims necessarily arose from the underlying order of removal and were therefore barred by § 1252(b)(9).¹⁹⁷

On the other hand, in accepting jurisdiction of the communications blackout claim, the same court looked to the *purpose* of the government's actions.¹⁹⁸ Because the government's motives in instituting the actions to which the plaintiffs were objecting were distinct and entirely separate from those associated with removal, the court found that these claims did not arise from orders of removal and could be considered in federal district court.¹⁹⁹

Similarly, the *Aguilar* court also relied on varying rationales for allowing the plaintiff's conditions-of-confinement and family integrity claims to continue through the district court.²⁰⁰ In the conditions-of-confinement analysis, the court relied on the same reasoning it had used in analyzing the right-to-counsel issue.²⁰¹ It first asked whether the conditions-of-confinement claims could be handled efficaciously

192 *Turnbull v. United States*, No. 1:06cv858, 2007 WL 2153279, at *5–*6 (N.D. Ohio July 23, 2007); *Khorrami*, 493 F. Supp. 2d at 1067; *see supra* Sections VII.D and VII.E.

193 *Turnbull*, 2007 WL 2153279 at *5–*6; *see also supra* Section VII.D.

194 *Turnbull*, 2007 WL 2153279 at *6; *Khorrami*, 493 F. Supp. 2d at 1067; *see also supra* Section VII.D.

195 *Turkmen*, 2006 WL 1662663 at *25–*26; *see also supra* Section VII.C.

196 *See Turkmen*, 2006 WL 1662663 at *25–*26; *see also supra* Section VII.C.

197 *Turkmen*, 2006 WL 1662663 at *25–*26; *see also supra* Section VII.C.

198 *Turkmen*, 2006 WL 1662663 at *26; *see also supra* Section VII.C.

199 *Turkmen*, 2006 WL 1662663 at *25–*26; *see also supra* Section VII.C.

200 *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 13, 19 (1st Cir. 2007); *see also supra* Section VII.A.

201 *See Aguilar*, 510 F.3d at 13; *see also supra* Section VII.A.

in the administrative context.²⁰² Here, however, the answer was different: the conditions-of-confinement claim could *not* have been properly addressed in immigration court and, absent an appropriate administrative forum, could not be barred by § 1252(b)(9).²⁰³

In analyzing the family integrity claims, however, the *Aguilar* court relied on vastly different reasoning to determine that these claims could not be barred either.²⁰⁴ The court found that the family integrity claims had only a “tenuous” link to the plaintiff’s removal and for *that* reason were not covered by § 1252(b)(9).²⁰⁵ The court made only passing mention of the standard it had used in analyzing the conditions-of-confinement and right-to-counsel claims.²⁰⁶

Finally, in a move that diverged from all of the previous case law, the court in *Arias* held, categorically, that *all* unreasonable search and seizure claims were barred from being brought in federal district court because such “claims [were] common in removal proceedings and could directly impact the plaintiff’s immigration status.”²⁰⁷ The court, however, did not adequately explain its meaning or illustrate the extent of the “impact” it perceived, and its decision seems diametrically opposed to all of the other cases examined above.²⁰⁸

Ironically, the 1996 amendments to the INA complicated the judicial scheme in an attempt to consolidate and simplify judicial review of aliens in removal proceedings. The Supreme Court has provided little assistance in bringing clarity to this area of the law, leaving the courts of appeals and district courts to muddle through the statute’s text and legislative history in cases covering a wide expanse of constitutional law. The result has been a jurisprudence of confusion, with courts stating results but failing to provide an underlying theory. As the cases surveyed show, each constitutional claim is analyzed in a vacuum, with courts making ad hoc judgments about whether that particular claim “arises from” an underlying order of removal. Even within a particular case, a district court presented with multiple constitutional claims sometimes uses different tests and rationales in deciding whether § 1252(b)(9) is a bar. This inconsistency has engendered more confusion in other courts as they look to one another for

202 See *Aguilar*, 510 F.3d at 13; see also *supra* Section VII.A.

203 See *Aguilar*, 510 F.3d at 13; see also *supra* Section VII.A.

204 See *Aguilar*, 510 F.3d at 19; see also *supra* Section VII.A.

205 *Aguilar*, 510 F.3d at 19.

206 *Id.*

207 *Arias v. U.S. Immigration and Customs Enforcement*, No. 07-1959, 2008 WL 1827604 at *6 (D. Minn. Apr. 23, 2008) (holding, unlike every other case, that all *Bivens* claims are categorically barred by § 1252(b)(9)).

208 *Id.*; see also *supra* Section VII.F.

guidance. The result is a collage of high-level theories about what the statute means and how Congress intended for it to be applied, but no consistent underlying theory of how it should be applied in cases involving constitutional claims.

IX. PROPOSED SOLUTION

A. Legal Scholarship

Legal scholarship in this area is likewise lacking in guidance. While a great deal of work has concentrated on the implications of the recent amendments to the INA on habeas corpus jurisdiction in federal court,²⁰⁹ few scholars have examined how § 1252(b)(9) should be interpreted within the context of constitutional claims such as *Bivens* claims. Most notably, Professor Motomura offered an interpretation of § 1252(b)(9) that focused on a narrow reading of the provision.²¹⁰ In support, he analogized the way the courts read phrases similar to “arising from” in other contexts and found that courts applying the federal question jurisdiction language of “arising under,” appellate jurisdiction language of “final decision,” and supplemental jurisdiction language of “case or controversy” all apply them narrowly.²¹¹ In drawing these parallels, Motomura persuasively argues that the phrase “arising from” in the context of § 1252(b)(9) should also be interpreted narrowly.²¹²

In attempting to illustrate the possible application of the “significant and independent” analysis to determine the interaction between the claims plaintiffs present and the underlying order of removal, Motomura suggested using the *Cohen v. Beneficial Industrial Loan Corp.* collateral order analysis.²¹³ Unfortunately, the *Cohen* analysis often in-

209 See, e.g., David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of the REAL ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75 (2007); Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2007); Peter Bibring, *Jurisdictional Issues in Post-Removal Habeas Challenges to Orders of Removal*, 17 GEO. IMMIGR. L.J. 135 (2002); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000); Matthew J. Droskoski, *Criminal Aliens Get Pinched: Sandoval v. Reno, AEDPA’s and IIRIRA’s Effect on Habeas Corpus Jurisdiction*, 45 VILL. L. REV. 711 (2000).

210 See generally Motomura, *supra* note 31 (arguing § 1252(b)(9) jurisdiction bars do not apply to the Federal Tort Claims Act or *Bivens* claims).

211 *Id.* at 417–23.

212 *Id.* at 414.

213 *Id.* at 426; see also *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (allowing for interlocutory appeals for a “small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate con-

volves case-by-case considerations that do not lend themselves to uniformity. Furthermore, Motomura's test does not flesh out in detail the method that courts should use to analyze whether these claims are separate and important, essentially presenting the same problem as the jurisdictional bar issue in immigration claims for which Motomura offers the *Cohen* analysis as a solution. Hence, the *Cohen* analysis cannot provide courts with much extra guidance in analyzing the issues involved in the immigration cases—it merely presents a restatement of the problem in an analogous context.

Specifically, Motomura argues that the Federal Tort Claims Act and *Bivens* cases categorically do not “arise from” removal proceedings.²¹⁴ He contends that although these cases often contain claims that “relate to” removal proceedings, they do not “arise from” such proceedings.²¹⁵ Therefore, they should categorically be treated as “significant and independent matters” for purposes of applying the jurisdictional bar of § 1252(b)(9).²¹⁶ Unfortunately, as was demonstrated in earlier sections, courts applying § 1252(b)(9) since Motomura's articulation of the appropriate scope of the rule have found that there are some constitutional claims that are barred by § 1252(b)(9) and others that are not.²¹⁷ Therefore, Motomura's analysis, whatever its normative appeal, does not satisfactorily describe or explain the choices courts have actually made.

Courts seem to be applying differing analyses to this question without an underlying theory, and scholars have been relatively reticent in providing a theory of their own. But certain patterns and goals have emerged from adjudicated cases that lend themselves to fashioning a theory for analysis that can be applied going forward, without severely damaging the precedential value of these cases.

sideration be deferred until the whole case is adjudicated”). Since *Cohen*, the Supreme Court has distilled these requirements and applies them to those district court decisions: (1) that are conclusive, (2) that resolve important questions completely separate from the merits, and (3) that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866-868 (1994). Professor Motomura suggests using the same method of analysis as the second of the three requirements, the separate and important requirement, in the context of § 1252(b)(9) defenses as well.

214 Motomura, *supra* note 31, at 431.

215 *Id.*

216 *Id.*

217 *See supra* Section VII (discussing many courts' bar of right-to-counsel claims and their mixed approaches to length-of-detention claims).

B. A Different Approach

As a threshold matter, courts should first determine, in terms of timing, whether § 1252(b)(9) applies at all in deciding if constitutional claims should be barred from district court. Section 1252(b)(9) requires that the claim arise from a final order of removal.²¹⁸ The cases decided when read together with the statute seem to have created a window during which § 1252(b)(9) is applicable in deciding such claims. The court in *Turkmen* found that pre-NTA interrogation and arrest claims do not arise from an order of removal because the removal process starts with the NTA.²¹⁹ Any action taken before an NTA is issued is not part of a removal proceeding.²²⁰ Therefore, any action taken before an NTA is issued is not barred by § 1252(b)(9). As such, *Turkmen* described when the removal process begins.²²¹ The court in *Turnbull*, on the other hand, helped clarify when the timeframe for possible consolidation ends. The *Turnbull* court found that a stay to removal restarts the removal process.²²² Therefore, it can be inferred that the grant of a removal order and expiration of the time to appeal is the end of the timeframe—any action that a plaintiff wants to challenge that takes place after a removal order has been entered is outside the requisite timeframe. Taken together, *Turkmen* and *Turnbull* show that only those actions that take place after an NTA is issued and before a final order of removal has been entered can possibly be barred by § 1252(b)(9). Any actions taken outside of this window are categorically not barred and can be brought in federal district court under the general federal jurisdiction statute.

After a court has answered this question, and if it determines that the action the plaintiff is challenging falls within the requisite time period, the court can then reach the merits of the government's § 1252(b)(9) defense. In undertaking this analysis, the court must first decide whether the claim is one that is independent of the removal process.

The district court in *Arar* noted that immigration court proceedings and BIA appeals are specialized, administrative functions that deal with a discrete set of judicial issues: removal and deportation of

218 See INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (Supp. III 1998).

219 *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663, at *26 (E.D.N.Y. June 14, 2006), *rev'd on alternate grounds*, 589 F.3d 542 (2d Cir. 2009).

220 See *id.*

221 See *id.*

222 *Turnbull v. United States*, No. 1:06cv858, 2007 WL 2153279, at *5 (N.D. Ohio July 23, 2007); see also *supra* Section VII.D.

non-citizens.²²³ As such, the jurisdiction of immigration courts is specialized, limited, and clear. Immigration judges only hear cases that involve the Department of Homeland Security's investigation and prosecution of a non-citizen's presence in the United States.²²⁴ The only issues an immigration judge can decide are those that arise while the immigration courts administratively regulate issues of deportation or removal.²²⁵ This certainly does not mean that the only issues that are of interest to immigration judges are decisions to remove an alien. However, immigration judges have decided issues that are not linked to the substance of the court's decision to remove an alien when these issues concern the process by which a court makes its removal decision. Examples of issues in which such concerns are implicated are in the areas of bond determinations, detention, and the right to counsel.²²⁶ Indeed, claims of improper bond determination, detention, and access to counsel come about only as a result of procedural shortcomings during the removal process. They do not address any substantive claims, which are usually the bases of a court's decision to remove. Therefore, immigration courts rely on substantive issues to make their removal decisions and have jurisdiction over only those procedural claims that come about as a result of the removal determinations. Immigration courts do not have jurisdiction over procedural claims that do not come about as a result of removal decisions, nor do they have jurisdiction over non-removal substantive claims.

Since the immigration courts have jurisdiction only over claims that involve substantive issues regarding removal or procedural issues arising out of the process of removal, these claims are clearly "inextricably linked" to the removal process and thus well within *St. Cyr's* definition of the scope of § 1252(b)(9).²²⁷ Hence, all claims that can be brought to immigration court *must* be brought there (and not to a federal district court), and, by virtue of § 1252(b)(9), those claims are subject to review only in the courts of appeals.

²²³ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 280 (E.D.N.Y. 2006) ("[T]he INA deals overwhelmingly with the admission, exclusion and removal of aliens—almost all of whom seek to remain within this country until their claims are fairly resolved."). *See supra* Section VII.B.

²²⁴ Executive Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals, <http://www.justice.gov/eoir/biainfo.htm> (last visited Mar. 19, 2010).

²²⁵ Executive Office for Immigration Review, U.S. Dep't of Justice, *General Overview of Jurisdiction of the Courts*, IMMIGRATION JUDGE BENCHBOOK, http://www.justice.gov/eoir/vll/benchbook/resources/criminal/1_jurisdiction.htm (last visited Mar. 19, 2010).

²²⁶ *See supra* Section VII.

²²⁷ *See INS v. St. Cyr*, 533 U.S. 289, 313–14 (2001); *see also supra* Section VI.B.

What about claims (such as *Bivens* claims) that *cannot* be brought in immigration court, but involve circumstances surrounding removal proceedings and in that attenuated sense “arise from” removal orders? Are they, too, barred by § 1252(b)(9)? If the immigration courts do not have the ability to offer the remedy being sought by that particular claim, it cannot have arisen from a removal proceeding and is thus not barred by § 1252(b)(9).

The converse is true as well: if a claim cannot be brought in immigration court, it does not deal substantively or procedurally with removal. Hence, if a court finds that a claim cannot be brought in the immigration court, it is not procedurally or substantively tied to removal proceedings, does not “arise from” the underlying order of removal, and is thus not barred by § 1252(b)(9). This conclusion is particularly important because it ensures that individuals have the ability to sue for constitutional grievances: if individuals were unable to bring claims in both immigration and district courts, they will have no opportunity to seek redress for these wrongs at all.

Tying all of these components together, courts must ask two questions before deciding whether a constitutional claim is barred by § 1252(b)(9): (1) did the claim arise from actions taken after an NTA was issued, but before a final order of removal; and (2) can the claim be brought in immigration court? If the answer to both of these questions is yes, then § 1252(b)(9) bars the claim from being considered in district court. If the answer to either one of these questions is no, then § 1252(b)(9) does not bar such claims from being considered in federal district court.

The virtues of this analysis are embodied in certainty and uniformity. The current lack of standardization in the manner in which federal courts apply the jurisdictional bar inevitably leads to both false positive and false negative results. In the case of false positives (for example, *Arias*),²²⁸ claims that should continue in federal district court have been dismissed for lack of jurisdiction, thereby eliminating the plaintiff’s ability to obtain relief for the alleged violations. On the other hand, some claims, like the right-to-counsel claims in *Arar*,²²⁹ that should be dismissed because of the plaintiff’s ability to properly seek relief in the administrative context could continue in federal district court, clogging the dockets and frustrating the intent of Congress by performing end-runs around the goal of consolida-

228 See *Arias v. U.S. Immigration and Customs Enforcement*, No. 07-1959, 2008 WL 1827604, at *6 (D. Minn. Apr. 23, 2008).

229 See *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 269 (E.D.N.Y. 2006), *aff’d on other grounds*, 585 F.3d 559 (2d Cir. 2009).

tion. Both outcomes weaken the fabric of the judiciary with poor results.

The solution proposed here will help judges decrease the number of false positives and negatives and allow plaintiffs a clear sense of which courts are most appropriate for filing their claims of constitutional violations. While there are many possible solutions that might increase uniformity—indeed, bright-line rules, such as the one proposed by the *Arias* court,²³⁰ are arguably more effective in creating clear standards—the virtue of the solution proposed here is that it ensures plaintiffs have a venue in which they may bring their claims, without being dismissed for want of jurisdiction.

Of foremost importance is that plaintiffs who have been wronged should be able to obtain recovery, particularly for violations of fundamental rights that arise out of the Constitution. Allowing such plaintiffs a defined venue for bringing such claims ensures that their constitutional rights are protected.

The solution proposed here also ensures that the adjudicatory process is streamlined: those courts that have the most expertise in the administrative context (immigration courts) hear those cases involving their area of expertise. All other claims are heard and adjudicated, but by courts of general subject-matter jurisdiction. This streamlined procedure produces the most efficient mechanism for allowing plaintiffs to recover for constitutional grievances.

In order to illustrate how this analytical structure might function in federal district courts, it is beneficial to apply this analysis to the cases already discussed. While most of the outcomes will remain the same, when examined in the aggregate this new analytical structure will achieve better comity.

X. TEACHING OLD CASES NEW ANALYSES

A. *Claims for Monetary Relief*

Claims for monetary relief, like *Bivens* claims, are a class of cases that are categorically not barred by § 1252(b)(9). Since immigration courts cannot award damages, claims that seek monetary relief can-

²³⁰ See *Arias*, 2008 WL 1827604, at *6 (holding § 1252 bars all Fourth and Fifth Amendment claims because they are “common in removal proceedings and could directly impact . . . immigration status”); see also *supra* Section VII.F.

not be brought there.²³¹ Such claims therefore fail the second prong of the analysis, since plaintiffs cannot obtain relief for these claims in immigration court. Therefore, such claims must be brought in federal district court.

In *Arar*, since Arar's claims did not seek an adjustment of removal, but only monetary damages under *Bivens*, which an immigration court cannot award, his claims cannot effectively be brought there.²³² Therefore, the district courts cannot be divested of their jurisdiction to hear his case, and § 1252(b)(9) should not bar Arar's *Bivens* claims from being heard in federal district court. Similarly, district courts should not bar Turnbull's, Khorrami's, and Arias' claims either, as they, too, were seeking monetary relief.²³³

B. Right-to-Counsel Claims

Since right-to-counsel claims arising out of actions taken after an NTA is issued, but before a final order of removal, can be brought in immigration court, these claims should be barred by § 1252(b)(9). Both the *Aguilar* and *Turkmen* courts used this precise rationale in determining that these claims should be barred, though they did not formally go through the first temporal step of the analysis.²³⁴

C. Length-of-Detention and NTA-Related Claims

Using the proposed analysis, claims that protest the length of detention between the filing of an NTA and final order of removal should be barred by § 1252(b)(9) since these claims can be brought in immigration court. However, if a plaintiff files suit citing unreasonable pre-NTA detention or delay, as the plaintiffs did in *Turkmen*, this claim must fall outside the scope of § 1252(b)(9).²³⁵

²³¹ Executive Office for Immigration Review, U.S. Dep't of Justice, *General Overview of Jurisdiction of the Courts*, IMMIGRATION JUDGE BENCHBOOK, http://www.justice.gov/eoir/vll/benchbook/resources/criminal/1_jurisdiction.htm (last visited Mar. 19, 2010).

²³² See *Arar*, 414 F. Supp. 2d at 258.

²³³ See *Arias*, 2008 WL 1827604, at *4; *Turnbull v. United States*, No. 1:06cv858, 2007 WL 2153279, at *1 (N.D. Ohio July 23, 2007); *Khorrami v. Rolince* 493 F. Supp. 2d 1061, 1064 (N.D. Ill. 2007).

²³⁴ See *Aguilar v. U.S. Immigration and Customs Enforcement*, 510 F.3d 1, 13–14 (1st Cir. 2007); *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663, at *26 (E.D.N.Y. June 14, 2006), *rev'd on alternate grounds*, 589 F.3d 542 (2d Cir. 2009).

²³⁵ See *Turkmen*, 2006 WL 1662663, at *26.

D. Bond Determination and Communication Blackouts

Under the new analysis, since the BIA may review appeals of issues arising from bond determination, the immigration courts can, and therefore should, have jurisdiction over these claims. This was, in fact, the rationale offered by the *Turkmen* court.²³⁶ However, the opposite is true for the communications blackout claims. Since these claims are usually not of the kind that are adjudicated by immigration courts, such claims should not be barred by § 1252(b)(9). In *Turkmen*, the reasons for allowing these claims to go forward were two-fold: (1) the communications blackout occurred before an NTA was issued, and thus fell outside the scope of § 1252(b)(9); and (2) even if a communications blackout had taken place after the issuance of an NTA, this claim would still not be barred by § 1252(b)(9) because it is not the type of claim over which immigration judges have jurisdiction.²³⁷

E. Conditions of Confinement and Family Integrity

Turning to the First Circuit's consideration of Aguilar's conditions-of-confinement claims, the analysis here closely follows the analysis of the court in that case. Since these claims cannot be raised effectively in immigration courts, these claims should not be barred from consideration in federal district court.²³⁸ In *Aguilar*, the First Circuit uses a similar rubric to achieve the same result. However, its treatment of the family integrity claims is much different: the court cites the tenuous link that the family integrity claims had with the final order of removal to find that these claims were not barred.²³⁹ Using the new analysis, however, it is clear that family integrity issues are, in general, not the business of immigration courts. Since immigration courts do not adjudicate claims of family integrity, these claims should not be barred by § 1252(b)(9).

X. CONCLUSION

There has been a great deal of tension between different circuits in deciding how and when to apply § 1252(b)(9). While many of the outcomes can be reconciled, the manner in which courts reach these outcomes varies widely from court to court, offering other courts and

²³⁶ See *id.* at *25–*26.

²³⁷ See *id.*

²³⁸ See *Aguilar*, 510 F.3d at 12–13.

²³⁹ See *id.* at 19.

potential plaintiffs little guidance in determining whether certain claims should be barred from being brought in federal district court. The solution proposed here, suggesting that federal courts use a two-step process that first examines whether the plaintiff's claim involves actions that arise out of an order of removal, and then examines whether such a claim can be effectively reviewed in immigration court, offers courts and individuals a clear guide to determine this question. This solution offers an optimal combination of judicial efficiency in barring claims that should properly be brought in the administrative setting (as dictated by Congressional intent when it passed the IIRIRA), while offering every plaintiff alleging a constitutional wrong the opportunity to have his or her case adjudicated in court. For these reasons, courts should adopt the solution proposed and implement a fair and uniform method for determining whether certain constitutional and *Bivens* claims are barred from district court by 8 U.S.C. § 1252(b)(9).