Boston College Law Review

Volume 61
Issue 9 *Electronic Supplement*

Article 32

5-29-2020

Breaking Down the Wall Around Judicial Review in the Immigration Context: Examining Whether § 1252(g) Precludes Review of Noncitizen FTCA Claims for Wrongful Removal in Violation of a Court Order

Carmella R. O'Hanlon
Boston College Law School, carmella.ohanlon@bc.edu

BREAKING DOWN THE WALL AROUND JUDICIAL REVIEW IN THE IMMIGRATION CONTEXT: EXAMINING WHETHER § 1252(g) PRECLUDES REVIEW OF NONCITIZEN FTCA CLAIMS FOR WRONGFUL REMOVAL IN VIOLATION OF A COURT ORDER

Abstract: On August 9, 2018, the Ninth Circuit Court of Appeals in *Arce v. United States* held that a jurisdiction-stripping provision of the Immigration and Nationality Act does not preclude judicial review of damages claims brought by noncitizens. The Ninth Circuit's holding opened the door for noncitizens who were wrongfully removed from the United States in violation of a court order or automatic stay to pursue damages. In doing so, the Ninth Circuit departed from the Eighth Circuit Court of Appeals, which held that the Act precluded noncitizens' damages claims. This Comment argues that the Ninth Circuit's holding was correct because the ability of noncitizens to bring damages claims for their wrongful removal serves as a meaningful check on the power of immigration agencies to carry out immigration policy. Further, the ability of noncitizens to bring damages claims aligns with the policy goals of the Federal Tort Claims Act.

INTRODUCTION

Immigration courts in the United States lack the resources to efficiently manage the flood of cases that inundate the system .[1] One consequence of an

[1] *See* Denise Lu & Derek Watkins, *Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall*, N.Y. TIMES (Jan. 24, 2019), https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html [https://perma.cc/7HYG-PKFF] (explaining that the backlog of pending immigration cases has increased "by nearly fifty percent since [President] Trump took office in 2017"); *see also Immigration Court Backlog Tool*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/court_backlog/ [https://perma.cc/8N5U-LS3U] (tracking the total number of pending cases and wait time for resolution by nationality, state, court, and hearing location and noting that the active backlog has surpassed one million cases as of September 2019). Although a backlog of pending immigration cases is not a new issue, the crisis in the immigration courts has been largely exacerbated by the Trump administration's aggressive immigration policy agenda. Julia Preston & Andrew R. Calderon, *How Trump Broke the Immigration Courts*, POLITICO (July 16, 2019), https://www.politico.com/magazine/story/2019/07/16/trump-ice-raids-immigration-courts-arent-ready-227359 [https://perma.cc/68MR-XMLV]. The Trump administration's policy agenda is aimed at preventing an influx of immigrants into the country and rapidly removing any illegal immigrants already in the country. *Compare* Richard Gonzales, *Immigration Courts 'Operating in Crisis Mode,' Judges Say*, NPR, (Feb. 23, 2015, 4:21 AM), https://www.npr.org/2015/02/23/387825094/immigration-courts-operating-in-crisis-mode-judges-say [https://perma.cc/843Q-FS7T] (discussing how the Obama administration's policy of prioritizing the resolution of immigration cases involving unaccompanied minors delayed the

overburdened system is the increased likelihood of error.[2] In the context of immigration policy, the cost of error is particularly grim because of the possibility of removing individuals who have a legal right to remain in the country.[3] The cases of Mark Daniel Lyttle and Jesus Eduard Lopez Silva highlight the perils of errors in the execution of immigration policy.[4] Both cases involved the wrongful removal of an individual from the United States.[5] There was one major distinction, however—Lyttle was a U.S. citizen, whereas Silva was not.[6]

---

resolution of hundreds of thousands of other pending cases), *with* Preston, *supra* note 1 (detailing how the Trump administration's policies aimed at expediting and resolving the immigration case backlog actually intensified the problem).

[2] *See* Caitlin Dickerson, *An Afghan War Widower Is Caught up in a 'Chronic Problem': Wrongful Deportation*, N.Y. TIMES (Apr. 16, 2019) https://www.nytimes.com/2019/04/16/us/soldier-spouse-deported-phoenix.html [https://perma.cc/NWB5-YY9G] (describing wrongful deportation as a "chronic problem" in the United States and stating that "[t]here is a long history of wrongful deportations that span several administrations and they are only rarely reversed"); Beth Werlin, *The Human Cost of Fast-Track Deportation*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/opinion/politics/expedited-deportation-trump-immigration.html [https://perma.cc/Z557-GKX5] (describing how expedited removal policies increase the likelihood of removing individuals who are legally entitled to remain in the United States).

[3] *See* Esha Bhandari, *Yes, the U.S. Wrongfully Deports Its Own Citizens*, ACLU (Apr. 25, 2013, 11:45 a.m.), https://www.aclu.org/blog/speakeasy/yes-us-wrongfully-deports-its-own-citizens [https://perma.cc/G2JL-FZ6X] (explaining how Immigration and Customs Enforcement (ICE) agents have mistakenly detained and deported U.S. citizens); Werlin, *supra* note 2, (describing how the costs of wrongful removal are particularly acute for asylum seekers who could face serious harm or death if returned to their countries of origin); *see also* Tiziana Rinaldi, *When the Government Wrongly Deports People, Coming Back to the U.S. Is Almost Impossible*, PUB. RADIO INT'L (July 26, 2018, 10:30 AM) https://www.pri.org/stories/2018-07-26/when-government-wrongly-deports-people-coming-back-us-almost-impossible [https://perma.cc/P9E5-PU8X] (discussing the difficulties that individuals who were wrongfully removed from the United States face in attempting to return to the country due to long delays in proceedings and the inability to afford an attorney to navigate the appeals process).

[4] *See infra* notes 6–12 and accompany text (detailing the cases of Mark Daniel Lyttle and Jesus Eduard Lopez Silva).

[5] *See generally* Silva v. United States, 866 F.3d 938 (8th Cir. 2017) (involving the wrongful removal of a lawful permanent resident); Lyttle v. United States, 867 F. Supp. 2d 1256, 1266, 1302 (M.D. Ga. 2012) (involving the wrongful removal of a U.S. citizen).

[6] *Compare Lyttle*, 867 F. Supp. 2d at 1266, 1302 (holding that a U.S. citizen had successfully stated a claim for violation of the Federal Torts Claim Act (FTCA) due to harm suffered as a result of being wrongfully removed from the United States), *with Silva*, 866 F.3d at 939 (holding that a noncitizen's FTCA claim for wrongful removal from the United States was barred by a jurisdiction-stripping provision in the Immigration and Naturalization Act (INA)). The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) consolidated two previously distinct processes of exclusion and deportation into a new process referred to as removal. *See* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 705 n.2 (1997). Exclusion was the formal term for the process of denying a noncitizen entry into the United States. *Definition of Terms*, DEP'T. OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms#4 [https://perma.cc/Q9KC-HA52]. By contrast, deportation was the formal term for the expulsion of a noncitizen from the United States based on a finding that the noncitizen violated immigration laws. *Id.* Under the IIRIRA, removal encompassed both of these processes. *Id.* Thus, this Comment will use the term removal, except when directly quoting from sources of U.S. immigration law or other materials that predate the change in terminology. *See id.* Removal proceedings are initially conducted before administrative immigration court judges who

Lyttle, a U.S. citizen, was erroneously removed to Mexico with court approval after being arrested and misidentified as an undocumented illegal immigrant.[7] Lyttle recovered monetary damages from the federal government for the harm he suffered as a result of this error by filing suit pursuant to the Federal Tort Claims Act (FTCA).[8] Silva, a lawful permanent resident in the United States for over a decade, but a Mexican citizen, was also removed to Mexico.[9] Silva was sent to Mexico in spite of a court order expressly prohibiting his removal.[10] Silva also brought claims for monetary damages pursuant to the FTCA.[11] Unlike Lyttle, however, Silva was not merely denied relief but was precluded entirely from having his day in court because of a jurisdiction-stripping provision contained in the Immigration and Nationality Act (INA).[12]

---

operate under the purview of the Department of Justice within the executive branch. Caroline Holliday, Comment, *U.S. Citizens Detained and Deported? A Test of the Great Writ's Reach in Protecting Due Process Rights in Removal Proceedings*, 60 B.C. L. REV. E-SUPP. II-217, 220–21 (2019) https://lawdigitalcommons.bc.edu/bclr/vol60/iss9/16 [https://perma.cc/4NK7-M4QS]; *see also* John Gavin, Note, *Finally Freed or Infinitely Detained? The Need for a Clear Standard of Finality for Reinstated Orders of Removal*, 59 B.C. L. REV. 2437, 2445–51 (2018) (providing an in-depth overview of the removal proceeding process). Courts have referred to the process of removing someone from the United States erroneously as a "wrongful deportation;" however, this Comment will refer to that process as a "wrongful removal" except when directly quoting language from judicial opinions. *See* Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 152–53 (2010) (describing various categories of government action that constitute wrongful removal and noting that the list is not exhaustive because new actions that have not yet occurred can qualify).

[7] *Lyttle*, 867 F. Supp. 2d at 1277. *See generally* William Finnegan, *The Deportation Machine*, NEW YORKER (Apr. 29, 2013) https://www.newyorker.com/magazine/2013/04/29/the-deportation-machine [https://perma.cc/78C5-SCSK] (describing the *Lyttle* case and detailing the systemic failures in the U.S. immigration system that enabled this error to occur).

[8] *Lyttle*, 867 F. Supp. 2d at 1267; *see* Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against the Federal Government*, ACLU (Oct. 5, 2012, 12:15 AM) https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government?redirect=blog/immigrants-rights/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal [https://perma.cc/ZTJ8-C7ME] (reporting that Lyttle settled his FTCA claims with the federal government for $175,000 after being wrongly detained and deported by ICE despite being a U.S. citizen). The FTCA gives federal district courts exclusive jurisdiction over claims where the United States can be held liable for tort claims in the same manner and to the same extent as private individuals under similar circumstances. 28 U.S.C. §§ 2671–2680 (2018). A cognizable FTCA claim is one that is: (1) against the United States; (2) for money damages; (3) for injury or loss of property, or personal injury or death; (4) caused by the negligent or wrongful act or omission of any employee of the government; (5) while acting within the scope of his office or employment; (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. FDIC v. Meyer, 510 U.S. 471, 477 (1994) (quoting 28 U.S.C. § 1346(b)(1) (2018)).

[9] *Silva*, 866 F.3d at 939.

[10] *See id.* (noting that when Silva filed an appeal to challenge the decision to remove him to Mexico, the court issued an automatic stay barring his removal until the appeal was resolved).

[11] *Id.* at 939.

[12] *Id.*; *see infra* notes 57–78 and accompanying text (discussing the Eighth Circuit's holding in *Silva* that a jurisdiction-stripping provision of the INA precludes judicial review of FTCA claims arising from wrongful removal from the United States).

The fact that Lyttle recovered damages but Silva was barred was not due to the underlying merits of each case.[13] Rather, their different citizenship statuses solely determined the different results.[14] Although this may seem unfair, it is not entirely surprising.[15]

Political discourse in the United States has thrust immigration policy to the forefront of national debate and increasingly politicized the issue.[16] Although immigration policies and decisions often receive extreme scrutiny and criticism in the public sphere, they are largely insulated from judicial review.[17] In the immigration context, courts recognize that the power of the legislative and executive branch is plenary.[18] Thus, the judiciary affords Congress great deference in developing and implementing immigration policy.[19]

---

[13] *See Silva*, 866 F.3d at 942 (affirming the dismissal of Silva's FTCA claims for lack of subject matter jurisdiction pursuant to a jurisdiction-stripping provision in the INA); *Lyttle*, 867 F. Supp. 2d at 1301 (denying the government's motion to dismiss and allowing Lyttle's FTCA claim to proceed); *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1632 (2000) (noting that in the current U.S. immigration system, the availability of judicial review of a claim depends on the nationality of the litigant).

[14] *Legomsky*, *supra* note 13, at 1632.

[15] *See* Sameer Ahmed, *INA Section 242(G): Immigration Agents, Immunity, and Damages Suits*, 119 YALE L.J. 625, 626 (2009) (discussing how the federal government has repeatedly used the jurisdiction-stripping statutes of the INA to preclude courts from reviewing monetary damages claims made by noncitizens).

[16] *See* Peter Beinart, *Why America Is Fighting About Immigration*, THE ATLANTIC (Jan. 26, 2018), https://www.theatlantic.com/politics/archive/2018/01/politicians-immigration/551537/ [https://perma.cc/Y7NC-MGVW] (stating that immigration has become a central issue in American politics); *see also* Jeffery M. Jones, *New High in U.S. Say Immigration Most Important Problem*, GALLUP (June 21, 2019), https://news.gallup.com/poll/259103/new-high-say-immigration-important-problem.aspx [https://perma.cc/BYF6-Q9C8] (reporting that "twenty three percent of Americans name [immigration] as the most important problem facing the country," which is the highest number in the poll's history).

[17] *See* Legomsky, *supra* note 13, at 1615 (observing that immigration policy and judicial review have historically had an "oil-and-water relationship"); *see also* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 58–59 (2015) (noting that immigration law diverges significantly from the core principles present in other areas of the U.S legal system because it is largely shielded from judicial review). Judicial review is a core tenet of the U.S. legal system. *About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about [https://perma.cc/9UMW-SJKZ]. It is a process whereby the actions of the legislative and executive branches are subject to judicial scrutiny to ensure their actions are constitutional. *Id.*

[18] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power*, 100 YALE L.J. 545, 547 (1990) (explaining that the plenary power doctrine provides Congress and the executive branch with sweeping and largely exclusive authority to develop and implement immigration policy); s*ee also* Johnson, *supra* note 17, at 58 (explaining that the concept of plenary power as a means of insulating immigration decisions from judicial review emerged as a result of the Supreme Court's decision in *Chae Chan Ping v. United States*, 130 U.S. 581, 605 (1889)). *Chae Chan Ping* involved the Chinese exclusion laws that Congress passed in 1882 to prevent Chinese laborers from entering the United States. 130 U.S. at 589. The Supreme Court held that the federal government has the authority to exclude certain noncitizens from the country, and that this power is derived from concerns regarding national security, territorial sovereignty, and self-preservation. *Id.* at 605; Motomura, *supra*, at 551–52. The Supreme Court further held that if Congress determines that the exclusion of certain noncitizens from the United States is essential to the nation's peace and security, it has the absolute

Shielding immigration policy from judicial review raises numerous questions.[20] What recourse is available when immigration agencies act unlawfully?[21] What rights do noncitizens have to seek damages for harm they have suffered, and what power do courts have to hear such claims?[22] If the preclusion of judicial review in the context of immigration policy is absolute, do courts lack authority to enforce their rulings if the government fails to abide by them?[23] What checks exist, if any at all, on the political branches' powers over immigration matters?[24] The Ninth Circuit Court of Appeals addressed precisely these questions in 2018 in *Arce v. United States*.[25]

In *Arce*, Claudio Anaya Arce was deported to Mexico despite the issuance of a court order explicitly prohibiting his removal until the adjudication of his appeal.[26] Upon his court-mandated return to the United States, Arce, like Lyttle

---

authority to act, and courts should not interfere. *Chae Chan Ping*, 130 U.S. at 606; *see also* Fong Yue Ting v. United States, 149 U.S. 705, 707 (1893) (extending the plenary power doctrine to include the absolute right of the federal government to deport noncitizens).

[19] *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 14 (1984) (describing the notion that with respect to immigration law, judges should be "seen—if absolutely necessary—but not heard"). As a result of the plenary power, courts historically have afforded a high degree of deference to legislative and executive decision-making with respect to immigration policy development and implementation. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (recognizing that Congress has near complete control over the admission and expulsion of immigrants and this power is "largely immune" from judicial review); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (noting that immigration policy is "exclusively entrusted" to the political branches of government and thus beyond the scope of judicial review).

[20] *See* Legomsky, *supra* note 13, at 1632 (noting that the denial of judicial review in the immigration context is especially problematic given the vulnerability of immigrants due to their severe underrepresentation in the political process).

[21] *See id.* at 1631 (suggesting that the availability of judicial review in immigration cases is important because it serves as a deterrent for immigration agencies and ensures they act in accordance with the law).

[22] *Compare* Arce v. United States, 899 F.3d 796, 800 (9th Cir. 2018) (holding that 8 U.S.C. § 1252(g) (2018) of the INA does not deprive courts of jurisdiction to hear claims brought by a noncitizen for harm suffered as a result of the government's decision to remove them from the United States in violation of a court order to stay removal), *with Silva*, 866 F.3d at 939 (holding that § 1252(g) of the INA strips courts of jurisdiction to hear similar claims brought by noncitizens).

[23] *Arce*, 899 F.3d at 801; *see* Oral Argument, *Arce*, 899 F.3d 796 (No. 16-56706), 2018 WL 6599921 (inquiring whether a court would have the authority to initiate contempt proceedings against the federal government for violating a court order under a broad interpretation of the exclusive jurisdiction provision in the INA).

[24] *See* Sarah A. Moore, *Tearing Down the Fence Around Immigration Law: Examining the Lack of Judicial Review and the Impact of the REAL ID Act While Calling for a Broader Reading of Questions of Law to Encompass "Extreme Cruelty,"* 82 NOTRE DAME L. REV. 2037, 2063 (2007) (quoting Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005)) (suggesting that the lack of judicial review in the immigration context has led to adjudication of cases that fall below the "minimum standards of legal justice"); *see also* Legomsky, *supra* note 13, at 1617 (observing that under the current immigration system, "Congress has a virtual blank check to formulate the immigration policies it thinks best").

[25] *See generally Arce*, 899 F.3d. 796.

[26] *Id.* at 799.

and Silva, filed suit in the Ninth Circuit for damages under the FTCA for harm suffered as a result of his wrongful removal.[27] The federal government argued that the Ninth Circuit lacked the requisite authority to hear Arce's claims pursuant to the jurisdiction-stripping provision in the INA.[28] The statute, known as the exclusive jurisdiction provision, prohibits judicial review of claims that relate to decisions by the Department of Homeland Security (DHS).[29] Specifically, the provision applies to decisions to commence, adjudicate, or effectuate removal proceedings against noncitizens.[30] One year earlier, the Eighth Circuit Court of Appeals accepted this exact argument in *Silva*, which involved similar facts.[31] Deviating from its sister court's ruling, the Ninth Circuit held that Arce's claims were not precluded by the exclusive jurisdiction provision.[32]

Part I of this Comment discusses Congress's narrowing of the availability of judicial review in the immigration context under the INA and its various amendments.[33] Part I further explains how the Supreme Court has interpreted the exclusive jurisdiction provision and outlines the facts and the contrary holdings of the Eighth Circuit's decision in *Silva* and the Ninth Circuit's ruling in *Arce*.[34] Part II explores the policy implications of the Eighth Circuit's ruling in *Silva* and identifies problematic separation of powers issues that the case raises.[35] Lastly, Part III of this Comment argues that the Ninth Circuit's holding is a check on executive power because allowing noncitizens to recover damages serves as a meaningful deterrent to ensure immigration agencies act within the bounds of their legal authority.[36]

I. Congress Limits Judicial Review of Removal Proceedings

Although judicial review of executive and legislative action is a fundamental aspect of the U.S. legal system, this is not the case with respect to im-

---

[27] *Id.* at 798. After learning of Arce's removal from the United States, the Ninth Circuit issued an order requiring that the Department of Homeland Security (DHS) return Arce to the United States until his appeal was adjudicated. *Id.*

[28] *Id.* at 799.

[29] 8 U.S.C. § 1252(g) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

[30] *Id.*

[31] *Silva*, 866 F.3d at 940.

[32] *See Arce*, 899 F.3d at 801 (acknowledging the Eighth Circuit's acceptance of the government's arguments that the claims were precluded under § 1252(g), but disagreeing with the Eight Circuit for the reasons set forth in the opinion).

[33] *See infra* notes 37–50 and accompanying text.

[34] *See infra* notes 51–96 and accompanying text.

[35] *See infra* notes 97–122 and accompanying text.

[36] *See infra* notes 124–132 and accompanying text.

migration policy.[37] The plenary power doctrine, which established a norm of judicial deference, is a judge-made doctrine that limits judicial review of immigration policy.[38] Congress has also limited judicial review over immigration policy through positive statutory law.[39] In 1952, Congress passed the INA, which constitutes the core body of U.S. immigration law.[40] The INA has been amended several times since its enactment.[41] The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which Congress passed in 1996, further narrowed the availability of judicial review in the immigration context.[42] The IIRIRA codified the exclusive jurisdiction provision, which is at issue in this Comment.[43]

Section A of this Part explores the impact the exclusive jurisdiction provision has on the availability of judicial review of removal proceedings for noncitizens.[44] Section A further explains the Supreme Court's interpretation of the exclusive jurisdiction provision, in 1999, in *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), which narrowed the provision's scope.[45]

---

[37] *See supra* note 17 and accompanying text (discussing the absence of judicial review in the immigration context); Schuck, *supra* note 19, at 1 (noting that immigration law is a "maverick" in the American legal system because it is largely shielded from judicial review).

[38] *See supra* notes 18–19 and accompanying text (discussing the plenary power doctrine).

[39] Legomsky, *supra* note 13, at 1623.

[40] *See* 8 U.S.C. §§ 1101–1537 (2018) (codifying the INA). The U.S. Constitution vests Congress with the sole authority to establish uniform policies concerning immigration and naturalization. U.S. CONST. art. I, § 8, cl. 4.

[41] *See generally Public Laws Amending the INA*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-1.html [https://perma.cc/L6KK-MX28] (listing the various amendments to the INA since its passage in 1952).

[42] *See* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1975–76 (2000) (providing an overview of the impact of various immigration reform legislation on the availability of judicial review over immigration decisions). Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the REAL ID Act of 2005, which both also placed statutory restraints on the ability of the judiciary to review removal orders issued by the government against noncitizens. *See* Kanstroom, *supra* note 6, at 704–05 (describing the passage of the AEDPA and the IIRIRA as "the most fundamental statutory restructuring of immigration law in two hundred years" and noting that a central feature of both pieces of legislation is the severe curtailment of judicial review); *see also* Veena Reddy, *Judicial Review of Final Orders of Removal in the Wake of the Real ID Act*, 69 OHIO ST. L.J. 557, 570 (2008) (discussing the impact of the REAL ID Act on the ability of the judiciary to review removal orders). *But see* Patricia Flynn & Judith Patterson, *Five Years Later: Fifth Circuit Case Law Developments Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 53 BAYLOR L. REV. 557, 561 (2001) (acknowledging that the INA amendments can be viewed as "long overdue" changes to "simplify and streamline" removal procedures). The exclusive jurisdiction provision, which is at issue in this Comment, was passed under IIRIRA, and thus, this Comment's analysis is limited to the impact and significance of IIRIRA. *See* 8 U.S.C. § 1252(g).

[43] 8 U.S.C. § 1252(g).

[44] *See infra* notes 47–50 and accompanying text.

[45] *See infra* notes 51–56 and accompanying text.

Sections B and C discuss *Silva* and *Arce*'s respective cases and provide overviews of the Eighth and Ninth Circuit's rationales for their contrary decisions.[46]

A. Congress Passed the Illegal Immigration Reform and Immigrant Responsibility Act that Further Expanded Restrictions on Judicial Review

In 1996, Congress passed the IIRIRA "to streamline removal proceedings and enhance enforcement of immigration laws."[47] The exclusive jurisdiction provision prohibits judicial review of claims brought by noncitizens related to the DHS's decision to commence proceedings, adjudicate cases, or execute removal orders.[48] The provision applies to claims arising from all past, present, or future proceedings related to the removal of noncitizens.[49] Shortly after the

---

[46] *See infra* notes 57–96 and accompanying text.

[47] Flynn & Patterson, *supra* note 42, at 560–61. Prior to the passage of the IIRIRA, 8 U.S.C. § 1105(a) (2018) governed judicial review of immigration matters under the INA. Reno v. Am.-Arab Anti-Discrimination Comm. (AADC), 525 U.S. 471, 475 (1999). In 1996, Congress repealed the earlier provision and implemented a much more restrictive judicial review procedure. *Id.* Despite the stated goals of streamlining removal proceedings and preventing undue delay, some members of Congress expressed discomfort about the idea of limiting judicial review of removal orders. *See* Ahmed, *supra* note 15, at 628–29 (quoting Congressman Jerrold Nadler's concern that the new provision would place Immigration and Naturalization Services (INS) decisions entirely outside of judicial review). Congressman Nadler stressed that it is a slippery slope to allow government agencies to act without any means of judicial questioning. *Id.*

[48] 8 U.S.C. § 1252(g). The INA defines any person that is not a citizen or national of the United States as an alien. § 1101(a)(3). Due to the dehumanizing nature of the term alien, however, this Comment will use the term "noncitizen" unless directly quoting language of applicable U.S. immigration law. *See* Elizabeth Rosenman, *This New Year, Let's Stop Using the Word 'Alien*,*'* THE HILL (Jan. 2, 2019) https://thehill.com/opinion/immigration/423570-this-new-year-lets-stop-using-the-word-alien [https://perma.cc/HWC9-J9E4] (discussing the offensive and dehumanizing connotations of the term alien in U.S. immigration discourse). Initially under the INA, Congress delegated its authority with respect to the implementation and execution of immigration policy to the Attorney General. 8 U.S.C. § 1103(a). The Attorney General further delegated their authority to the Commissioner of Immigration and Nationalization and the various employees and officers of the INS. *Id.* In the wake of the September 11, 2001, terrorist attacks, Congress established the DHS pursuant to the Homeland Security Act of 2002. 8 C.F.R. § 2.1 (2020). Congress abolished the INS and transferred the immigration enforcement powers of the Attorney General to the Secretary of the DHS (Secretary). 6 U.S.C. § 202(3) (2018). Thus, some cases and sources discussed in this Comment refer to the Attorney General as having enforcement power; however, all such references herein refer to the Secretary. *See, e.g.*, *Arce*, 899 F.3d at 799 n.4 (noting that for simplicity all references to the Attorney General in the opinion refer to the Secretary who currently has true enforcement authority pursuant to a congressional directive).

[49] *AADC*, 525 U.S. at 477. Under IIRIRA, Congress created two categories of rules governing availability of judicial review: transitional and permanent. *See* Neuman, *supra* note 42, at 1976 (explaining that transitional procedures applied to cases that were pending prior to the passage of the act, whereas permanent provisions applied to all cases initiated on or after the date the IIRIRA took effect). Section 1252(g) is unique in that it was the only "permanent" provision that was also applicable to pending cases. *Id.* at 1982.

IIRIRA took effect, there was disagreement over how broadly to interpret the exclusive jurisdiction provision.[50]

In 1999, in *AADC*, the Supreme Court clarified the purpose of the exclusive jurisdiction provision by holding that it should be read narrowly.[51] The Court held that the provision only applies to judicial review of noncitizens' claims challenging their removal in three distinct actions.[52] Specifically, the provision prohibits judicial review only when the claims are related to (1) the commencement of proceedings, (2) the adjudication of cases, or (3) the execution of removal orders by the Secretary of the DHS (Secretary).[53]

The issue of the exclusive jurisdiction provision's scope resurfaced in a circuit split between the Eighth and Ninth Circuit Courts of Appeals.[54] The question at issue was whether the statute prohibits noncitizens from bringing claims in search of damages for their wrongful removal.[55] More specifically, the courts considered whether the exclusive jurisdiction provision precludes federal

---

[50] *See* Neuman, *supra* note 42, at 1982–83 (discussing how initially § 1252(g) was interpreted broadly, which resulted in circuit splits over whether the provision precluded judicial review of habeas claims brought by noncitizens).

[51] *See AADC*, 525 U.S. at 482 (limiting § 1252(g) to preclude judicial review of claims brought by noncitizens relating only to "three discrete actions" taken by the Attorney General, namely, claims related to a decision or action to commence proceedings, adjudicate cases, or executive removal orders). *AADC* involved a suit brought by a group of noncitizens who challenged the government's decision to deport them by arguing that they were targeted because of their connections with a political group. *See id.* at 472–73 (noting that the petitioners in the case were members of the Popular Front for the Liberation of Palestine, which was characterized by the federal government as an international terrorist and communist organization). The district court granted the petitioners a preliminary injunction that halted the deportation proceedings brought against them. *Id.* at 471. The Supreme Court held that § 1252(g) barred the petitioner's claims because they arose from the decision of the Attorney General to commence removal proceedings against them. *Id.* at 487.

[52] *Id.* at 482.

[53] *Id.* at 482–83. The Court analogized the exclusive jurisdiction provision to the exercise of prosecutorial discretion in the criminal context. *See id.* at 489–90 (discussing various factors that make prosecutorial decision-making in the criminal context ill-suited to judicial review and noting that "[t]hese concerns are greatly magnified in the deportation context"). In the immigration context, prosecutorial discretion describes the ability of immigration agencies to decide whom to commence removal proceedings against. Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 42, 45, 48–49 (2013). It also gives immigration agencies the ability to extend relief from removal to certain noncitizens through mechanisms including asylum, cancellation of removal, or adjustment of status. *See id.* at 45 (summarizing the history of the use of prosecutorial discretion by immigration officials and noting that it is most often used to provide relief on humanitarian grounds).

[54] *Compare Arce*, 899 F.3d at 800 (holding that § 1252(g) of the INA does not deprive courts of jurisdiction to hear claims for harm suffered as a result of the government's decision to remove a noncitizen from the United States in violation of a court order to stay deportation), *with Silva*, 866 F.3d at 939 (holding that § 1252(g) of the INA strips courts of jurisdiction to hear claims brought by noncitizens seeking damages for harm suffered as a result of their removal from the United States in violation of a court order).

[55] *See* Ahmed, *supra* note 15, at 626 (discussing the split amongst the circuit courts regarding whether § 1252(g) prevents noncitizens from bringing damages claims).

courts from hearing claims brought by noncitizens under the FTCA for wrongful removal from the United States in violation of a court order or automatic stay.[56]

B. The Eighth Circuit Held That § 1252(g) Precluded Judicial Review of FTCA Claims for Wrongful Removal

In 2017, in *Silva*, the Eighth Circuit Court of Appeals held that the exclusive jurisdiction provision precluded federal courts from hearing noncitizen FTCA claims for wrongful removal.[57] In April of 2012, the federal government initiated removal proceedings against Jesus Eduard Lopez Silva as a result of his conviction for two crimes in Minnesota.[58] Although an immigration judge ordered that Silva be removed to Mexico, Silva filed a timely appeal challenging the immigration judge's determination.[59] The appeal triggered the issuance of an automatic stay, which prohibited federal agents from executing Silva's removal until the adjudication of his appeal.[60]

Irrespective of the stay, the government deported Silva to Mexico in July of 2013.[61] Realizing their error, however, federal agents returned Silva to the United States in September of 2013.[62] Upon his reentry into the country, Silva brought suit against the United States government in the U.S. District Court for the District of Minnesota pursuant to the FTCA.[63] Silva sought compensation for harms that arose from his wrongful removal from the country.[64] The district court dismissed Silva's claims for lack of subject matter jurisdiction pursuant

---

[56] *See generally* Jason B. Binimow, Annotation, *Effect of 8 U.S.C.A. § 1252(g) upon Jurisdiction to Hear Federal Tort Claims Act Claims of Noncitizen Wrongfully Removed in Violation of Court Order or Automatic Stay*, 37 A.L.R. Fed. 3d Art. 4 (2018) (discussing how various courts have addressed the issue of whether noncitizens have standing under § 1252(g) to bring damages suits under the FTCA for their wrongful removal from the United States in violation of a court order or automatic stay). In the immigration context, a stay is a decision issued by an immigration judge that temporarily prevents the removal of a noncitizen from the United States. *Fact Sheet: BIA Emergency Stay Requests*, U.S. DEP'T. OF JUST. EXECUTIVE OFF. FOR IMMIGR. REV. (Mar. 2018), https://www.justice.gov/eoir/page/file/1043831/download [https://perma.cc/4PBW-WQEV]. Stays can be discretionary or automatic. *Id.* An automatic stay is issued when a noncitizen files an appeal of an immigration judge's decision to remove them. *Id.*

[57] *Silva*, 866 F.3d at 939.

[58] *Id.* Silva was a Mexican citizen and he had been a lawful permanent resident of the United States since 1992. *Id.*

[59] *Id.*

[60] *Id.*; *see also* 8 C.F.R. § 1003.6 ("[T]he decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal . . . nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.").

[61] *Silva*, 866 F.3d at 939.

[62] *Id.* After Silva's return to the United States, an immigration judge granted his application for the cancelation of his removal, and Silva was able to remain lawfully in the country. *Id.*

[63] *Id.*

[64] *Id.*

to the exclusive jurisdiction provision of the INA.[65] The district court accepted the government's position that the exclusive jurisdiction provision barred Silva's suit because his claims arose from the decision to execute his removal.[66] Silva appealed the district court's decision to the Eighth Circuit.[67]

In *Silva*, the Eighth Circuit ultimately affirmed the district court's determination and held that the exclusive jurisdiction provision prohibited the court from hearing Silva's FTCA claims.[68] In his appeal, Silva presented two primary arguments as to why his claims were not precluded.[69] First, Silva argued that his claims did not arise from the decision by the Secretary to effectuate his removal, but instead they arose from the government's violation of the order to stay the execution of his removal.[70] The Eighth Circuit rejected this characterization and held that Silva's claims were precluded because the violation of the stay was connected to the decision to execute his removal.[71] Thus, in determining whether federal courts have jurisdiction over a noncitizen's FTCA claims, the court held it was irrelevant that the execution of the removal order occurred in violation of a court order.[72]

---

[65] *Id.* Federal courts are courts of limited jurisdiction, and therefore they can only adjudicate cases that fall within the scope of their authority. Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1378–79 (2014). If a federal court determines that a particular claim is beyond the scope of their authority, they are required to dismiss the claim without reaching the underlying merits of the case. *Id.* at 1391.

[66] *Silva*, 866 F.3d. at 940.

[67] *Id.* at 939.

[68] *Id.*

[69] *Id.* at 940–41.

[70] *Id.* at 940.

[71] *Id.* The court held that the exclusive jurisdiction provision precluded Silva's claims by adopting the rule established by the Fifth Circuit in *Humphries v. Various Federal U.S. INS Employees*, 164 F.3d 936, 943 (5th Cir. 1999), that a claim that is "connected directly and immediately" to a decision to effectuate a removal order arises from that decision. *Silva*, 866 F.3d at 940.

[72] *Silva*, 866 F.3d at 940. The Eighth Circuit adopted this reasoning from prior rulings by the Fifth and Eleventh Circuit Courts of Appeals on whether § 1252(g) precluded noncitizens from bringing claims for monetary damages. *See* Gupta v. McGahey, 709 F.3d 1062, 1065 (11th Cir. 2013) (holding that a noncitizen's *Bivens* claims for monetary damages arose from the decision to commence removal proceedings and thus were precluded under § 1252(g)); Foster v. Townsley, 243 F.3d 210, 214–15 (5th Cir. 2001) (holding that a noncitizen's *Bivens* claims are directly connected to the decision to execute a deportation order, and thus under § 1252(g) the district court lacked jurisdiction to hear the claims); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1999) (holding that the violation of an individual's Fourth Amendment rights by federal officers confers standing for civil action in federal court). *Foster* and *Gupta* involved plaintiffs bringing only *Bivens* actions for monetary damages and not claims under the FTCA, and therefore, they are not discussed at length in this Comment. *See* Ahmed, *supra* note 15, at 626 n.6 (distinguishing a *Bivens* action from claims brought pursuant to the FTCA). *See generally Gupta*, 709 F.3d 1062 (dismissing claimant's Bivens action for lack of subject matter jurisdiction pursuant to § 1252(g)); *Foster*, 243 F.3d 210 (same).

Second, Silva argued that the exclusive jurisdiction provision only applied to discretionary decisions of the Secretary.[73] Silva asserted that the issuance of the automatic stay, however, deprived the Secretary and his agents of the discretion to make the decision to execute his removal.[74] The Eighth Circuit deemed this argument unpersuasive.[75] The court noted that the Supreme Court's decision in *AADC* never explicitly stated that the statute applied only to discretionary decisions.[76] Furthermore, the Eighth Circuit noted the statutory silence on the distinction between discretionary and nondiscretionary decisions acts as evidence that such a distinction is irrelevant.[77] For these reasons, the Eighth Circuit affirmed the district court's determination that the exclusive jurisdiction provision prohibited federal courts from exercising jurisdiction over Silva's FTCA claim.[78]

C. The Ninth Circuit Came to the Opposite Conclusion That § 1252(g) Did Not Preclude Judicial Review of FTCA Claims for Wrongful Removal

In 2018, in *Arce*, the Ninth Circuit split with the Eighth Circuit, holding that federal courts are not prohibited from hearing noncitizen FTCA claims relating to their wrongful removal from the United States.[79] Claudio Anaya Arce, a Mexican citizen, was deported to Mexico in direct violation of a temporary stay of removal issued by the Ninth Circuit.[80] Upon his return to the

---

[73] *Silva*, 866 F.3d at 940. Silva asserted that the Supreme Court's holding in *AADC* that § 1252(g) should be narrowly construed means that the scope of the statute is limited to discretionary decisions of the Secretary. *Id.*; *see* 8 U.S.C. § 1252(g); 525 U.S. at 482 (suggesting that the decisions by the Secretary to commence, adjudicate, or execute removal proceedings against a noncitizen are normally at the Secretary's own discretion).

[74] *Silva*, 866 F.3d at 940. The success of Silva's argument depended on the Eighth Circuit making the assumption that the automatic stay deprived the Secretary and its agents of the authority to decide to execute the removal order—thus, making the determination to execute his removal nondiscretionary and, therefore, outside the scope of § 1252(g). *See id.*

[75] *Id.*

[76] *Id.* at 940–41.

[77] *Id.* at 940. The Eighth Circuit noted that even if the intent of the legislature was to limit § 1252(g) to discretionary decisions, the fact that the statute does not explicitly make that distinction controls. *See id.* at 941 ("Congress often passes statutes that sweep more broadly than the main problem they were designed to address." (quoting Gonzales v. Oregon, 546 U.S. 243, 288 (2006))).

[78] *Id.* at 942.

[79] *Arce*, 899 F.3d at 801.

[80] *Id.* at 798–99. U.S. Customs and Border Patrol officers apprehended and detained Arce in Adelanto, California where he expressed fear of harm if removed from the country. *Id.* at 798. An asylum officer determined that Arce did not successfully establish a reasonable fear of persecution or torture, which is required to grant asylum. *Id.* An immigration judge affirmed the asylum officer's finding and returned the case to the DHS to effectuate removal. *Id.* at 798–99. Arce's lawyer filed an emergency petition for review and a motion for stay of removal to the Ninth Circuit. *Id.* at 799. Upon the filing of the motion, the Ninth Circuit issued a temporary stay on the removal order at 11:25 AM. *Id.* That same day, Arce's attorney faxed a copy of the notice of the stay to the assigned deportation officer and attempted numerous calls. *Id.* Despite the attempts to enforce the issuance of the automatic stay, at 2:15 PM the federal government deported Arce to Mexico. *Id.*

United States, pursuant to a court order, Arce brought suit against the United States under the FTCA in the U.S. District Court for the Central District of California.[81] The district court dismissed Arce's complaint for lack of subject matter jurisdiction because his claims were precluded by the exclusive jurisdiction provision of the INA.[82]

On appeal, the Ninth Circuit reversed the district court's dismissal of Arce's complaint.[83] In doing so, the Ninth Circuit rejected the government's argument that the FTCA claims fell within the exclusion because they arose from the Secretary's decision to execute the removal order.[84] The court determined that the government's interpretation of the provision was too broad.[85] The Ninth Circuit determined that the exclusive jurisdiction provision did not apply because Arce was not challenging the validity of the removal order.[86] Rather, the basis of Arce's claim was that the Secretary did not have the authority to execute his removal from the United States given the stay of removal issued by the court.[87] Therefore, the court held that Arce's claims did not arise from the Secretary's decision to execute his removal, but rather from the violation of the court's order.[88] Therefore, Arce's claim was outside the scope of the exclusive jurisdiction provision.[89] The Ninth Circuit determined that its holding was in accordance with the Supreme Court's instruction in *AADC* to construe the statute narrowly.[90] Further, the Ninth Circuit's holding also followed

---

[81] *Id.* Prior to bringing this action in federal district court, and in accordance with the requirements set forth in the FTCA, Arce first filed an administrative claim with the DHS, which it denied. *Id.*; *see also* 28 U.S.C. § 2675(a) (2018) (instructing that a claimant must first exhaust all administrative remedies and receive a final denial of his or her claim before seeking relief in federal court). Arce brought claims of false arrest and imprisonment, intentional infliction of emotion distress, and negligence. *Arce*, 899 F.3d at 799.

[82] *Arce*, 899 F.3d at 799.

[83] *Id.*

[84] *Id.* at 799–800. The government contended that the DHS's violation of the court's stay of removal was irrelevant because § 1252(g) applies "to *any* action taken in connection with a removal order." *Id.* at 799.

[85] *Id.* at 799–800.

[86] *Id.* at 800.

[87] *Id.* The Ninth Circuit noted that were it not for the issuance of the stay of removal and the subsequent violation of it by the DHS, Arce would not have had a viable FTCA claim. *Id.* But for the violation of the automatic stay, the DHS would have had complete discretion with respect to when it carried out Arce's removal from the United States, and § 1252(g) would have precluded judicial review of that decision. *Id.*

[88] *Id.*

[89] *Id.* The Ninth Circuit noted that the issuance of the stay of removal "temporarily suspended" the Secretary's authority to execute the removal order against Arce. *Id.* (quoting Nken v. Holder, 566 U.S. 418, 428–29 (2009)).

[90] *See id.* (noting that in deciding *AADC*, the Supreme Court did not interpret § 1252(g) to "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General" (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018))). The Ninth Circuit noted that in *AADC* the Supreme Court held that § 1252(g) did not stop federal courts from reviewing claims relating to the "multitude of other decisions or actions that may be part of the deportation process." *See id.*

its own precedent to limit the exclusive jurisdiction provision to discretionary decisions.[91]

Lastly, the Ninth Circuit took issue with the government's interpretation of the exclusive jurisdiction provision because the court reasoned that such a broad reading of the statute would effectively impede the ability of the judiciary to enforce its own rulings.[92] Further, such an expansive reading of the statute raised important separation of powers issues.[93] The executive branch, through its administrative agencies, and the legislative branch, through positive statutory law, are insulating immigration decisions from the purview of federal courts.[94] By denying the judiciary meaningful participation in the immigration context, Congress is impeding federal courts' vested rights under Article III to be the final arbiters of federal law.[95] Therefore, the Ninth Circuit declined to dismiss Arce's case for lack of jurisdiction because his claims were beyond the

---

(quoting *AADC*, 525 U.S. at 482) (listing examples of other decisions that would be beyond the reach of § 1252(g)). Thus, the court determined that a court order staying removal similarly lies beyond the jurisdictional reach of § 1252(g). *Id.*

[91] *Id.* The Ninth Circuit noted that, in accordance with its precedent, it refused to apply a broad reading of § 1252(g). *Id.* at 800; *see also* United States v. Hovespian, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (holding that § 1252(g) should be interpreted narrowly); Barahona-Gomez v. Reno, 236 F.3d 1115, 1118–19, 1121 (9th Cir. 2001) (interpreting the Supreme Court's decision in *AADC* as limiting § 1252(g)'s scope to barring suits challenging discretionary decisions by the Secretary to initiate proceedings, adjudicate cases, and execute removal orders). Because the Ninth Circuit determined that DHS violated its mandatory duty to act in accordance with a court order staying removal, its actions were subject to judicial review and Arce's claims could proceed. *Arce*, 899 F.3d. at 800–01.

[92] *Arce*, 899 F.3d at 801. At oral argument, the government conceded that under its interpretation of the statute, courts would lack jurisdiction to sanction the DHS for intentionally deporting a subpoenaed witness while under court order not to do so. *Id.*; *see also* Oral Argument, *supra* note 23 (noting that the government's broad interpretation of § 1252(g) would violate the inherent power of the judiciary to initiate contempt proceedings if they relate to decisions by immigration officers to deport noncitizens); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2960 (3d ed. 2020) (noting that courts have an inherent power to punish contempt and that such power is essential to maintaining the authority and legitimacy of the courts and ensuring that justice is administered).

[93] *See* Neuman, *supra* note 42, at 1969–70 (highlighting the importance of judicial review of administrative decisions). An independent judiciary is central to the principle of the separation of powers amongst the three branches of government. *Id.* Therefore, judicial review of administrative decisions is a necessary check on the powers of the executive and legislative branches. *See id.* at 1969 ("[T]he assignment of adjudicatory functions to executive officers and nonindependent tribunals raises concerns about separation of powers, fairness to litigants, and the rule of law."); *see also* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 938 (1988) (highlighting the importance of having an impartial judiciary determine the limits of the law and enforce those limits with respect to the actions of the political branches).

[94] Moore, *supra* note 24, at 2037–38.

[95] *Id.*; *see* U.S. CONST. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (holding that when the Constitution and the law conflict it is "the very essence of judicial duty" to determine which applies).

scope of the exclusive jurisdiction provision, given the DHS's violation of the court order temporarily prohibiting Arce's removal from the United States.[96]

II. UNDERSTANDING THE CIRCUIT SPLIT: WHETHER § 1252(G) PRECLUDES SUITS BROUGHT BY NONCITIZENS FOR MONETARY DAMAGES UNDER THE FTCA

At the core of the discrepancy between the rulings of the Eighth and Ninth Circuit Courts of Appeals is the scope of the exclusive jurisdiction provision.[97] Specifically, the circuits disagreed over whether the provision was intended to preclude noncitizens from bringing suits for monetary damages against the federal government related to the noncitizens' wrongful removal from the United States.[98] The Eighth Circuit, in reaching its conclusion, based its holding on the fact that statutory silence on the issue enables them to interpret the statute to preclude such claims.[99] In contrast, the Ninth Circuit relied on its interpretation of the Supreme Court's ruling in 1999, in *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*).[100] In its precedent, the Ninth Circuit has interpreted *AADC* to limit the exclusive jurisdiction provision to acts of discretion.[101] Thus, the Ninth Circuit held that noncitizen FTCA claims for court order violations are beyond the statute's scope.[102]

Section A of this Part examines whether by passing the IIRIRA Congress intended for the exclusive jurisdiction provision to preclude noncitizen claims for monetary damages.[103] Section A also discusses the various issues that arise because of the Eighth Circuit's determination that preclusion is permitted.[104]

---

[96] *Arce*, 899 F.3d at 801.

[97] *See generally* Arce v. United States, 899 F.3d 796, 800 (9th Cir. 2018); Silva v. United States, 866 F.3d 938, 940 (8th Cir. 2017).

[98] *See* Ahmed, *supra* note 15, at 627 (exploring two possible interpretations of the statutory silence on the issue of whether § 1252(g) prohibits noncitizens from bringing FTCA claims for monetary damages against immigration officials).

[99] *Silva*, 866 F.3d at 940; *see supra* note 77 and accompanying text (discussing the implications of statutory silence on their interpretation of § 1252(g)).

[100] *Arce*, 899 F.3d at 800; Reno v. AADC, 525 U.S. 471, 482; *see also supra* note 91 and accompanying text (discussing how the Supreme Court's ruling in AADC influenced the Ninth Circuit's interpretation of § 1252(g)).

[101] *Arce*, 899 F.3d at 801. In dicta, however, the Ninth Circuit suggested that even if it were not bound by its precedent to limit 8 U.S.C. § 1252 (g) (2018) to discretionary decisions, it would still have come to the same conclusion in *Arce* based on "common sense." *Id.* at 800–01. The Ninth Circuit reasoned that there was no evidence that Congress intended for the statute to preclude review of any claim that relates tangentially to deportation proceedings. *Id.* at 801. The Ninth Circuit also noted that when interpreting ambiguity in jurisdiction-stripping statutes it adhered to the general rule of adopting the narrower interpretation of ambiguous statutory language and presuming in favor of judicial review where possible. *Id.*

[102] *Id.* at 801.

[103] *See infra* notes 106–107 and accompanying text.

[104] *See infra* notes 108–113 and accompanying text.

Section B of this Part discusses whether the Supreme Court's ruling in *AADC* limited the exclusive jurisdiction provision to discretionary decisions as a way to resolve the statutory ambiguity.[105]

A. Looking to Legislative Intent of the IIRIRA to Resolve the Ambiguity from Statutory Silence

The preclusion of damages claims brought by noncitizens against immigration officials was neither intended nor contemplated by Congress when it passed the IIRIRA in 1996.[106] Rather, the legislative history suggests that the jurisdiction-stripping provisions were intended to support the act's goals of making it easier to remove deportable noncitizens—not to insulate the execution of immigration policy entirely from the judiciary.[107] Yet, in 2017, the Eighth Circuit in *Silva v. United States* determined that irrespective of legislative intent, statutory silence coupled with the broad language of the exclusive jurisdiction provision precludes noncitizens from bringing FTCA claims related to their wrongful removal from the United States.[108] Such a determination, however, raises additional questions that make this interpretation seem untenable.[109]

Absent explicit congressional instruction stating that IIRIRA precludes noncitizens from bringing claims under the FTCA, there are two additional options for interpreting legislative intent.[110] First, in passing the IRRIRA, Congress repealed the FTCA with respect to immigration cases.[111] Second, if the FTCA was not repealed, then the Eighth Circuit's reading of the exclusive jurisdiction provision suggests that immigration officials are uniquely exempted from liability under the FTCA although all other federal officials are liable

---

[105] *See infra* notes 114–122 and accompanying text.

[106] *See* Ahmed, *supra* note 15, at 627–28 (noting that the legislative history of § 1252(g) demonstrates that Congress did not intend for the exclusive jurisdiction provision to prohibit federal courts from having jurisdiction over monetary damages brought by noncitizens); *see also* Flynn & Patterson, *supra* note 42, at 561 (discussing the substantive effects of the passage of the IIRIRA on immigration law in accordance with its stated purpose to "streamline the removal process").

[107] *See* Ahmed, *supra* note 15, at 628–29 (detailing excerpts from congressional testimony and Senate reports demonstrating that the purpose of the jurisdiction-stripping provisions of § 1252(g) was to further the goals of the Act to eliminate undue delay in the removal process). The section of IIRIRA that was dedicated to judicial review provisions was originally entitled "Streamlining Judicial Review of Orders of Exclusion or Deportation." *Id.* at 628.

[108] *Id.* at 629. The Eighth Circuit adopted the government's argument in *Silva.* 866 F.3d at 940–41.

[109] *See* Ahmed, *supra* note 15, at 629–30 (outlining several reasons why statutory silence on the issue of whether FTCA claims are precluded under § 1252(g) of the INA does not suggest that such claims are in fact precluded).

[110] *Id.* at 630, 635.

[111] *Id.* at 630. Counsel for Arce raised and dispelled this issue regarding repeal of the FTCA by Congress at oral argument before the Ninth Circuit. *See* Oral Argument, *supra* note 23 (noting that U.S. jurisprudence regarding implicit statutory repeal indicates that such findings are heavily disfavored, and that for one act to repeal another, Congress must explicitly state their intention).

for their actions.[112] Some argue that such an interpretation, however, would clearly violate the venerable maxim that "no man is above the law."[113]

B. Whether AADC Resolves the Statutory Ambiguity by Limiting § 1252(g) to Preclude Judicial Review of Only Discretionary Decisions

One way to reconcile the statutory silence and the perceived ambiguity regarding whether the exclusive jurisdiction provision precludes FTCA claims related to wrongful removal of noncitizens is to look to the Supreme Court's holding in *AADC*.[114] The Ninth Circuit, in 2018, in *Arce v. United States* looked to the holding of *AADC* and came to the opposite conclusion of the Eighth Circuit.[115] In *AADC*, the Supreme Court held that the exclusive jurisdiction provision should be narrowly construed.[116] The Court in *AADC* held that the exclusive jurisdiction provision of IIRIRA applies only to three "discrete" actions taken by an immigration official.[117] Specifically, the Court held that judicial review was precluded only when the review was related to a decision or action to commence proceedings, adjudicate cases, or executive removal orders.[118] The Court made clear that the language of the exclusive jurisdiction provision does not apply to all claims arising out of removal proceedings.[119]

---

[112] *See* Ahmed, *supra* note 15, at 635 (noting that to accept the proposition that § 1252(g) precludes recovery for FTCA claims would create "unwarranted and unprecedented exception[s]" for immigration officials because they would be the only government officials immune from liability under the FTCA).

[113] *See* Humphries v. Various Fed. U.S. INS Emps., 164 F.3d 936, 951 (5th Cir. 1999) (Dennis, J., concurring in part and dissenting in part) (rejecting the majority's determination that § 1252(g) precludes noncitizens from bringing *Bivens* claims seeking monetary damages). In his opinion, Judge James L. Dennis argued that under the majority's holding, a federal immigration official would have a jurisdictional defense to a *Bivens* claim, whereas any other federal officer would not:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

Id. (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).

[114] *AADC*, 525 U.S. at 482 (instructing that § 1252(g) should be read narrowly and applied to only three distinct actions taken by the Secretary).

[115] *Arce*, 899 F.3d at 800–01. The Ninth Circuit directly addressed the Eighth Circuit's reasoning and noted that even if it were not bound by its precedent it still would have come to the same conclusion based on a variety of factors, including the Supreme Court's ruling in *AADC*. *See supra* note 101 and accompanying text (discussing other factors beyond stare decisis that persuaded the Ninth Circuit to adopt a narrower reading of § 1252(g)).

[116] *AADC*, 525 U.S. at 482.

[117] *Id.*

[118] *Id.*

[119] *See id.* ("It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.").

Therefore, the Ninth Circuit in *Arce* interpreted the exclusive jurisdiction provision to apply only to discretionary decisions of immigration officials.[120] In the immigration context, the ability of agencies to determine whether immigration laws should be enforced against a particular noncitizen is discretionary.[121] Under the Ninth Circuit's interpretation, the decision of immigration officials to deport a noncitizen when there is a court order or automatic stay prohibiting their removal was not within the scope of the exclusive jurisdiction provision because the agency lacked the discretion to remove them.[122] Thus, as interpreted by the Ninth Circuit, the Supreme Court's ruling in *AADC* provided guidance on the scope of the exclusive jurisdiction provision with respect to noncitizen FTCA claims for wrongful removal.[123]

III. The Ninth Circuit in *Arce* Correctly Allowed Noncitizen Wrongful Removal Claims to Proceed Under the FTCA

The Ninth Circuit's holding in 2018, in *Arce v. United States*, that the exclusive jurisdiction provision does not preclude federal courts from reviewing a noncitizen's FTCA claim, arising from their removal from the United States in violation of a court order, is more persuasive than the Eighth Circuit's conclusion on three grounds.[124]

First, the Ninth Circuit correctly interpreted the provision to insulate only discretionary actions taken by the Secretary of the DHS from judicial review.[125] Limiting the provision to discretionary actions follows the Supreme Court's interpretation that the provision's function is similar to shielding prosecutorial discretion from judicial review in the criminal context.[126]

Second, the Eighth Circuit's determination in 2017, in *Silva v. United States*, that the exclusive jurisdiction provision applies to both discretionary and nondiscretionary decisions raises important separation of power issues.[127] Both the Eighth Circuit's holding in *Silva* and the argument put forth by the government in *Arce* would effectively impede federal courts from enforcing

---

[120] *Arce*, 899 F.3d at 800; *see* Ahmed, *supra* note 15, at 631–32; Wadhia, *supra* note 53, at 64–65.

[121] Wadhia, *supra* note 53, at 41–42.

[122] *Arce*, 899 F.3d at 800; *see* Ahmed, *supra* note 15, at 632 ("Courts have made it clear that government officials do not have discretion to violate the law or the Constitution.").

[123] *Arce*, 899 F.3d at 800.

[124] *See* Arce v. United States, 899 F.3d 796, 800–01 (9th Cir. 2018) (acknowledging the contrary holding in the Eighth Circuit).

[125] *See id.* (construing § 1252(g) narrowly).

[126] *See supra* note 53 and accompanying text (discussing the role of prosecutorial discretion in the immigration context); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018) (affirming that the Court's determination in *AADC* that § 1252(g) should be read narrowly); Reno v. AADC, 525 U.S. 471, 475 n.9 (1999) (recognizing that the purpose of § 1252(g) is to prevent the imposition of judicial review or control on the exercise of prosecutorial discretion).

[127] *See supra* note 93 and accompanying text (discussing the importance of judicial review for enforcing and maintaining principles of separation of powers).

their own orders.[128] The more expansive view taken by the Eighth Circuit in *Silva* of the provision's scope is problematic because it would leave noncitizens with no avenue for recourse to reign in immigration agencies when they are acting beyond the constitutional scope of their powers.[129] Judicial review is a bedrock principle of the American legal system, and the Eighth Circuit's holding in *Silva* diminishes the vested rights of the judiciary under Article III of the U.S. Constitution because it is the duty of the judiciary to interpret and determine the law.[130]

Lastly, the Ninth Circuit's holding will act as a deterrent by discouraging immigration agencies from exceeding their congressional mandate.[131] The prospect of FTCA liability for improper actions will provide a meaningful check on immigration agencies.[132] Given the increasing politicization of immigration policy, along with noncitizens' lack of representation in the political process, judicial review is even more important because noncitizens are particularly vulnerable members of our society.[133]

CONCLUSION

Allowing noncitizens who were wrongfully removed from the United States to bring FTCA claims to recover damages for the subsequent harm of deportation is a meaningful deterrent to administrative agencies for acting in violation of a court order. Although neither party in *Arce v. United States* nor *Silva v. United States* requested certiorari, it is likely that this issue will recur. Given the continued increase in immigration activity under the Trump admin-

---

[128] *See Arce*, 899 F.3d at 801 (rejecting a broad interpretation of § 1252(g) because it would inhibit the ability of the court to enforce its own orders); Silva v. United States, 866 F.3d 938, 940 (8th Cir. 2017) (holding that federal courts do not have jurisdiction to hear damages claims arising from the decision to remove a noncitizen from the United States even if that removal violated a court order).

[129] *See Arce*, 899 F.3d at 801 ("There is no support for the government's claim that Congress intended to prohibit federal courts from enforcing *any* court order so long as it is related to or in connection with an immigration proceeding.").

[130] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (noting the centrality of judicial review in ensuring a meaningful check on the power of the legislative and executive branches); Humphries v. Various Fed. U.S. INS Emps., 164 F.3d 936, 943 (5th Cir. 1999) (Dennis, J., dissenting) (noting the importance of judicial review in ensuring that government officers act within the bounds of their constitutional authority); *see also supra* note 93 and accompanying text (same).

[131] *See* Oral Argument, *supra* note 23 (noting that the availability of monetary damages is a crucial tool for ensuring that the government can be held accountable when it exceeds the scope of its powers).

[132] *See* Legomsky, *supra* note 13, at 1631 (noting that the availability of judicial review will incentivize administrative adjudicators to ensure that they have "defensible reason[s]" for their conclusions).

[133] *See id.* (noting the heightened importance of judicial review in the immigration context); Dickerson, *supra* note 2 (noting that often those who are wrongfully deported lack resources and an attorney, and, consequently, they are deported and no one is aware of the injustice that occurred).

istration, and the inability of immigration courts to handle the influx of cases, there is a greater likelihood that noncitizens could face wrongful removal. The holding in *Silva* raises significant policy concerns with respect to the ability of the judiciary to enforce its own rulings. In addition, there are separation of powers issues raised by the prospect of the executive branch violating judicial orders with impunity. Therefore, the Supreme Court should clarify its interpretation of the exclusive jurisdiction provision and affirm the Ninth Circuit's interpretation that limits the scope of § 1252(g) to discretionary decisions of the Secretary of the DHS.

CARMELLA R. O'HANLON

Preferred citation: Carmella R. O'Hanlon, Comment, *Breaking Down the Wall Around Judicial Review in the Immigration Context: Examining Whether § 1252(g) Precludes Review of Noncitizen FTCA Claims for Wrongful Removal in Violation of a Court Order*, 61 B.C. L. Rev. E. Supp. II.-339 (2020), http://lawdigitalcommons.bc.edu/bclr/vol61/iss9/32/.