

EXPEDITED REMOVAL AND STATUTORY TIME LIMITS ON JUDICIAL REVIEW OF AGENCY RULES

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The controversial scheme of “expedited removal,” which gives low-level immigration officials the authority to deport people with little to no judicial review, came roaring back into the public consciousness in the wake of President Trump’s executive order temporarily suspending entry into the United States of individuals from certain Muslim-majority countries. Hugely controversial since its inception, challenges to the expedited removal statutory scheme are blocked by a sixty-day time limit to challenges to any regulations or procedures implementing the expedited removal provisions. Rather than address the constitutionality of the expedited removal system itself, this Note focuses on that sixty-day time limit. Congress frequently uses statutorily imposed time limits to curb judicial review of agency rules. But the validity of a statutory time limit on judicial review of agency rules cannot be evaluated independently of the scope of the judicial review that it restricts. When, as is the case with expedited removal, a statutory time limit forecloses the constitutional challenges of people whose claims could not have been raised during the prescribed time limit, that time limit poses serious constitutional concerns. In light of these concerns, this Note argues that courts should not read the expedited removal time-limit to bar constitutional challenges to the expedited removal system that could not have been raised within the prescribed time limit. Unfortunately, despite the disturbing constitutional implications of the expedited removal time limit, there are considerable doctrinal and jurisdictional challenges to convincing a court to exercise jurisdiction over such a challenge. The Note concludes by discussing some of these potential barriers and ways in which the planned future expansion of expedited removal might help to overcome some of these roadblocks.

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INTRODUCTION

The controversial scheme of “expedited removal”—which gives low-level immigration officials the authority to deport people with little to no judicial review¹—came roaring back into the public consciousness² in the wake of President Trump’s executive order temporarily suspending entry into the United States of individuals from certain Muslim-majority countries.³ In the chaos that ensued at international airports after the order went into effect, stories emerged like that of Sara Yarjani, an Iranian graduate student.⁴ Sara had flown to visit her parents in Austria.⁵ When she attempted to fly back to California, where she was studying, she spent twenty-three hours in deten-

¹ See 8 U.S.C. § 1225(b)(A)(i) (2012) (authorizing an immigration officer who determines that an alien arriving in the United States is inadmissible to “order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution”); see also William Branigin, *INS’s ‘Expedited Removal’ Attacked*, WASH. POST (Apr. 4, 1998), <https://www.washingtonpost.com/archive/politics/1998/04/04/inss-expedited-removal-attacked/eb8872ea-865b-4b5a-8625-308314d5ecb7/> (noting that the expedited removal process “allows immigration inspectors at ports of entry to issue summary deportation orders to foreigners who arrive without proper paperwork or to refer them to INS asylum officers if they indicate a fear of returning to their countries”).

² See Michael D. Shear & Ron Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES (Feb. 21, 2017), <https://nyti.ms/2m4lcIO> (describing the expansion of expedited removal under President Trump’s enforcement policies).

³ Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8977–78 (Feb. 1, 2017). The President rescinded this executive order and issued a new order on March 6, 2017, that was published in the Federal Register three days later. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). On September 24, 2017, President Trump rescinded the March executive order and implemented in its stead new permanent restrictions. See Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,161–71 (Sept. 27, 2017). The Supreme Court has now dismissed all cases challenging the temporary travel bans. See *Trump v. Hawaii*, No. 16-1540, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017) (vacating the judgment and remanding for dismissal as moot).

⁴ See Richard Pérez-Peña et al., *Migrants Were Told to Sign Away Right to Enter U.S., Lawyers Say*, N.Y. TIMES (Jan. 30, 2017), <https://nyti.ms/2jPDcBZ> (describing the experiences of individuals affected by expedited removal following President Trump’s now rescinded Executive Order).

⁵ *Id.*

tion as immigration officers debated how to comply with the order.⁶ Eventually an officer told her that she had to either “voluntarily” depart from the United States by signing a document cancelling her valid visa,⁷ or the officer could forcibly deport her and she could face a ban from the United States of one to five years, or longer.⁸ Another Iranian graduate student detained at John F. Kennedy International Airport was directed to sign a form she later found out was a “voluntary” withdrawal of her application to enter the United States.⁹ When she protested that she had only signed at his behest, the officer told her, “It’s better this way, ma’am. Otherwise I have to force you.”¹⁰

While stories of potential coercion were certainly distressing to many,¹¹ just as alarming may have been the idea that a relatively low-level customs official really did have the power to summarily deport and ban a person from entering the United States for up to five years, with little to no recourse to the courts or an attorney. Yet this has been the law since Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, which, in creating expedited removal, delegated to low-level immigration officers a power that had previously only been delegated to immigration judges: the power to deport.¹² Hugely controversial since its inception,¹³ challenges to the law have been blocked by a craftily-worded provision Congress also added: a sixty-day time limit to challenges to any regulations or procedures implementing the expedited removal provisions.¹⁴

⁶ *Id.*

⁷ *See id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.*

¹¹ In response to reports of coercion at Los Angeles International Airport, several members of Congress sent a letter to Customs & Border Patrol (CBP) demanding more information about how it was implementing the travel ban’s guidelines. *See* Letter from Fourteen U.S. Members of Cong. to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Patrol (Feb. 3, 2017), http://chu.house.gov/sites/chu.house.gov/files/documents/Letter_to_CBP_on_EO_implementation.pdf.

¹² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 302(b)(1)(A)(i), 110 Stat. 3009-546, 3009-580 (codified as amended at 8 U.S.C. § 1225(b)(1)(A)(i) (2012)) (“If an immigration officer determines that an alien . . . is inadmissible . . . the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 208 or a fear of persecution.”).

¹³ *See* Anthony DePalma, *New Rules at U.S. Borders Provoke Criticism*, N.Y. TIMES (Nov. 14, 1997), <http://www.nytimes.com/1997/11/14/us/new-rules-at-us-borders-provoke-criticism.html?mcubz=3> (describing heavy criticisms of the expedited removal scheme).

¹⁴ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 306(e)(3)(B) (“Any action [challenging the expedited removal provisions] . . . must be

Rather than address the constitutionality of the expedited removal system itself—which many have argued poses serious constitutional problems¹⁵—this Note focuses on the sixty-day time limit.¹⁶ Much has been written about Congress’s attempts to eliminate judicial review altogether in the immigration context,¹⁷ but relatively little has been written about provisions such as the sixty-day time limit, which restrict the availability of review rather than eliminate it entirely.¹⁸

Congress has long used statutorily imposed time limits to curb judicial review of agency rules.¹⁹ In many circumstances, pragmatic considerations militate towards their use.²⁰ But this Note argues that the use of such time limits in the context of expedited removal poses serious constitutional concerns. The validity of a statutory time limit on judicial review of agency rules cannot be evaluated independently of the scope of the judicial review that it restricts. When, as is the case with expedited removal, a statutory time limit forecloses the constitutional challenges of people whose claims could not have been raised during the prescribed time limit, then that time limit begins to look like the total preclusion of judicial review of constitutional claims—a practice that has long raised constitutional concerns for the Supreme Court.²¹ This characteristic makes the sixty-day expedited removal time limit drastically different from the types of statutorily imposed time limits on judicial review featured in other statutes and regulatory

filed no later than 60 days after the date the challenged section, regulation, directive, guideline or procedure . . . is first implemented.”). *See also infra* Part I.

¹⁵ *See generally* Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 219–42 (1999) (arguing that expedited removal is unconstitutional because of its due process violations); Ebba Gebisa, Comment, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 576–83 (same).

¹⁶ Admittedly, the two are intricately related. The validity of a time limit on judicial review cannot be evaluated independently of the scope of judicial review that it limits. *See generally infra* Parts II, III.

¹⁷ *See, e.g.*, Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) (discussing how 1996 immigration reform laws eliminate judicial review in many instances); Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1664 (2000) (describing jurisdiction-stripping provisions of the Immigration and Nationality Act).

¹⁸ *But see* Neuman, *supra* note 17, at 1676–80 (discussing briefly the implications of the expedited removal time limit).

¹⁹ *See infra* Section II.A.

²⁰ *See* Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 742 (1983) (describing judicial review as appropriate in situations where “Congress has made findings of the need for expedition, uniformity, and finality”).

²¹ *See infra* Section II.C (describing the Supreme Court’s use of the constitutional avoidance canon to uphold constitutional norms in such instances).

schemes,²² and arguably makes it unconstitutional. In light of these concerns, this Note argues that courts should not read the sixty-day provision as barring constitutional challenges to the expedited removal system that could not have been raised within the prescribed time limit.

Unfortunately, despite the disturbing constitutional implications of the expedited removal time limit, there are considerable doctrinal and jurisdictional challenges to convincing a court to hear a challenge to the time limit's constitutionality. Courts have sharply proscribed the scope of individual habeas review for people subject to expedited removal, preventing challenges to the statutory time limit and other regulations collaterally in the context of individualized enforcement proceedings.²³

What explains the reluctance? Two other *sui generis* aspects of immigration: the plenary power doctrine and the related entry fiction doctrine. The plenary power doctrine is the principle that the political branches' decisions regarding immigration are either unreviewable or subject to extraordinary deference.²⁴ The entry fiction doctrine is a legal fiction that allows courts and statutes to treat noncitizens seeking admission to the United States as technically not on American soil, and thus deprived of whatever constitutional rights may have accrued to them if they were actually within the territorial United States.²⁵ While courts have sometimes been willing to define the plenary power's constitutional limits,²⁶ they have been much less willing to do so in the context of the border, in part because of the entry fiction doctrine.²⁷ Because the constitutional rights of noncitizens detained at the border are at their lowest ebb, these courts argue that nonci-

²² See *infra* note 136 and accompanying text (listing other regulatory schemes with time limits on judicial review of agency rules).

²³ See *infra* Section III.A.

²⁴ See *infra* notes 110–15 and accompanying text; see also Benson, *supra* note 17, at 1412–13, 1413 n.6 (defining the plenary power doctrine).

²⁵ See Allison Wexler, Note, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-Zadvydas*, 25 CARDOZO L. REV. 2029, 2039 (2004) (defining the doctrine).

²⁶ The reaction of some courts to claims of nonreviewability of immigration actions by both Presidents Obama and Trump are recent examples of the courts' pushback against the plenary power doctrine. See *Washington v. Trump*, 847 F.3d 1151, 1161–64 (9th Cir. 2017) (dismissing government's nonreviewability claims); *Texas v. United States*, 809 F.3d 134, 165–67 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016) (dismissing argument that the government's granting of categorical prosecutorial discretion to certain undocumented immigrants was nonreviewable).

²⁷ See *infra* Section III.B (discussing the failure of post-*AILA* challenges to expedited removal).

tizens²⁸ subject to expedited removal have no due process rights that require the court to expand the narrowly defined scope of habeas review of expedited removal determinations.²⁹ Furthermore, the Supreme Court's construction of more recent cases like *Boumediene v. Bush*,³⁰ which jettison a formalist analysis of the extraterritorial application of constitutional rights for a more functional analysis, misread the purpose and intent of the expedited removal provisions. They also revive a strict reading of the entry fiction doctrine that the expedited removal provisions avoided.³¹ Nonetheless, these opinions remain good law, at least for the time being.

However, immigration advocates may have another bite at the apple. The Department of Homeland Security (DHS) has pledged to expand expedited removal.³² The expansion, if enforced pursuant to the Agency's maximum grant of statutory authority,³³ could subject any noncitizen who arrived in the United States within the past two years, and who cannot demonstrate their "admissibility"³⁴ to an immigration officer's satisfaction, to expedited removal.³⁵ For the moment, the details of this planned expansion remain unseen—DHS will publish the finalized expansion plan in the Federal Register.³⁶ But it is possible that the new class of people to whom expedited removal could apply would have stronger due process rights. If this is the case, it would allow those people to mount an effective challenge to the

²⁸ Or at least "some" noncitizens. See *infra* Section III.B (reviewing the distinctions between noncitizens seeking to enter the United States and noncitizens already physically present in the country).

²⁹ See *infra* Part III.

³⁰ 553 U.S. 723 (2008).

³¹ See *infra* Section III.B.

³² See Memorandum from John Kelly, Sec'y Dep't Homeland Sec., to Kevin McAleenan et al., Implementing the President's Border Security and Immigration Enforcement Improvements Policies, 5–7 (Feb. 20, 2017) [hereinafter Kelly Memorandum], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf (describing DHS Secretary's "sole and unreviewable" discretion to expand expedited removal).

³³ See 8 U.S.C. § 1225(b)(1)(A)(iii) (2012) (giving discretion to the Attorney General or DHS Secretary to apply expedited removal to any group of "aliens" that cannot demonstrate physical presence in the United States for the past two years); *infra* notes 120–21 (describing past expansion of expedited removal).

³⁴ "Admissibility" in the immigration context is a legal term of art that refers to the lawful entry of a noncitizen into the United States after inspection and authorization by an immigration officer. 8 U.S.C. § 1101(a)(13)(A).

³⁵ See Kelly Memorandum, *supra* note 32, at 3, 5–7.

³⁶ See *id.* at 7 ("To ensure the prompt removal of aliens apprehended soon after crossing the border illegally, the Department will publish in the *Federal Register* a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act . . .").

sixty-day time limit's validity, and thereby allow a court to hear the constitutional challenges to expedited removal that the sixty-day time limit has thus far prevented a court from considering in full.

This Note proceeds in three parts. Part I describes the expedited removal statutory scheme and the two crucial decisions that construed the sixty-day time limit to prevent any court from having any significant review of expedited removal generally or of the validity of the time limit specifically. Part II accomplishes three things. First, it briefly traces the history of statutory time limits on judicial review. Second, it uses the work of Paul Verkuil to evaluate when statutory time limits on judicial review of agency rules pose constitutional concerns. Third, it traces the Supreme Court caselaw on that same question and considers the viability of the Verkuil framework. Part III applies this framework to the context of expedited removal and concludes by discussing the doctrinal and jurisdictional barriers to successfully presenting a challenge to it in court.

I

UNDERSTANDING HOW *AILA I* AND *AILA II* FORECLOSED CHALLENGES TO EXPEDITED REMOVAL

The D.C. Circuit Court of Appeal's decision in *AILA II*³⁷ is crucial to understanding both how the expedited removal time limit works and why it is so different from other types of congressionally imposed time limits on judicial review of agency rules. To that end, this Part first describes the history of the expedited removal statutory scheme and then proceeds to the *AILA* case.

A. *History of Expedited Removal Provisions*

Anyone who arrives at a United States port of entry must undergo a primary inspection during which an immigration officer inspects the individual's documents and determines if the person is fit for entry.³⁸ If an immigration officer determines that a person's documents are insufficient in some way, the officer can then perform a secondary inspection of the person for a more thorough examination of their eligibility to enter.³⁹ For example, if an immigration officer

³⁷ Throughout this Note, two decisions are referred to as *AILA I* and *AILA II*. *AILA I* refers to the district court decision *AILA v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998), while *AILA II* refers to the D.C. Court of Appeals' affirmation of that decision in *AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000).

³⁸ See 8 C.F.R. § 235.1(f) (2017).

³⁹ See 8 C.F.R. § 235.2(b) (2017) (providing for further examination "if the examining immigration officer has reason to believe that the alien can overcome a finding of admissibility").

has reason to believe that a person with a valid tourist visa had actually come to the United States with the intent to immigrate—which requires a different kind of visa⁴⁰—that person may be subject to secondary inspection.⁴¹

Before IIRIRA, if an officer thought that a person was ineligible for entry, the officer would detain the person and place him or her in exclusion proceedings presided over by an immigration judge who determined whether the person was eligible to enter the country.⁴² People in exclusion hearings had a right to counsel (at their own expense), could examine witnesses, and received lists of free legal services organizations.⁴³ People could also challenge an adverse ruling by appealing to the Board of Immigration Appeals (BIA)⁴⁴ and eventually filing a petition for a writ of habeas corpus in federal court.⁴⁵

IIRIRA's expedited removal provisions dramatically upend this process. First, IIRIRA collapses the distinction between “exclusion” (the process by which a person's eligibility to *enter* was determined) and “deportation” proceedings⁴⁶—the process by which a person already physically present in the United States could be forced to leave—making each process a “removal” hearing.⁴⁷ IIRIRA also changes the immigration laws so that “admission,” rather than “entry” became the defining characteristic for whether someone is lawfully present in the United States.⁴⁸ Unlike entry,⁴⁹ to be “admitted” means more than just physical presence. It means that the noncitizen has

⁴⁰ Compare 8 U.S.C. § 1153 (describing different kinds of immigrant visas), with § 1184 (describing various nonimmigrant visas).

⁴¹ Cf. 8 U.S.C. § 1182(a)(6)(C) (describing the misrepresentation ground of inadmissibility, which would apply to a person who fraudulently claimed to be traveling to the United States under one visa but actually came to the United States with a different intent).

⁴² See 8 U.S.C. §§ 1225(b), 1226(a) (1994); see also *Landon v. Plasencia*, 459 U.S. 21, 25–28 (1982) (discussing how exclusion hearings worked).

⁴³ See 8 C.F.R. § 236.2(a) (1994).

⁴⁴ See *AILA I*, 18 F. Supp. 2d 38, 41 (D.D.C. 1998).

⁴⁵ See 8 U.S.C. §§ 1105a(b), 1226(b) (1994). The person could be detained pending the result of their exclusion hearing, thus allowing them the ability to file for habeas review.

⁴⁶ See *Landon*, 459 U.S. at 25–27 (describing the differences between “exclusion” and “deportation” proceedings).

⁴⁷ See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 587 (describing removal proceedings). Unlike expedited removal however, “regular” removal still occurs under the purview of an immigration judge and a person still has access to counsel at his or her own expense. See 8 U.S.C. § 1229a (2012).

⁴⁸ See 8 U.S.C. § 1101(a)(13)(A) (2012).

⁴⁹ Before IIRIRA, “entry” was defined as “any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise” with a qualified exception for lawful permanent residents. 8 U.S.C. § 1101(a)(13) (1994).

been inspected and authorized to enter the country by an immigration officer.⁵⁰ The expedited removal provisions thus authorize an immigration officer to order any person seeking admission deported without further hearing or review.⁵¹ Receipt of an expedited removal order also results in a five-year bar on entry to the United States for the person in expedited removal.⁵²

The provisions leave narrowly defined forms of relief—primarily the ability to claim asylum.⁵³ Judicial review of the expedited removal order itself is sharply proscribed. The only challenge a person can raise is to file a petition for a writ of habeas corpus, and the scope of review is limited to: 1) whether the person is an alien, 2) whether the person has been ordered removed, and 3) whether the petitioner can prove by a preponderance of the evidence that they are a lawful permanent resident (LPR), refugee, or that they were granted asylum.⁵⁴ The law also bans class action certification.⁵⁵ Respondents continue to be detained by immigration officials pending review of the expedited removal order.⁵⁶

Under a provision entitled “Challenges on validity of the system,”⁵⁷ IIRIRA further specifies that judicial review of the expedited removal statutory scheme and its implementing regulations can only be made in the United States District Court for the District of Columbia, and is limited to determinations of whether: 1) the expedited removal provisions, or any regulation issued to implement the section, is constitutional; and 2) any procedures violated the Immigration and Nationality Act (INA) or other laws.⁵⁸ These challenges, the law specifies, “must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure . . . is first implemented.”⁵⁹ The rules soon met their first challenge.

⁵⁰ See 8 U.S.C. § 1101(a)(13)(A) (2012).

⁵¹ See § 1225(b)(1)(A)(i).

⁵² See § 1182(a)(9)(A)(i).

⁵³ If at some point during the primary or secondary inspection, the interviewee expresses a credible fear of persecution, the person can be referred to an asylum officer who will then determine whether there is a credible fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(ii). If the asylum officer does not find there to be credible fear, the person will be removed without further hearing or review, unless the person requests a redetermination of the finding that they did not have a credible fear, presided over by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III).

⁵⁴ 8 U.S.C. § 1252(e)(2).

⁵⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(e)(1)(b), 110 Stat. 3009-546, 3009-610.

⁵⁶ See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (mandating detention of arriving aliens).

⁵⁷ 8 U.S.C. § 1252(e)(3).

⁵⁸ *Id.*

⁵⁹ 8 U.S.C. § 1252(e)(3)(B).

On March 6th, 1997, the Immigration and Naturalization Service (INS) published interim rules and regulations implementing the expedited removal provisions.⁶⁰ For immigration rights advocates, the regulations raised several due process concerns.⁶¹ For example, several commenters suggested that under the regulations, arriving noncitizens who claimed to be LPRs, or even U.S. citizens, could still be subject to the expedited removal system if an immigration officer thought their documents were false.⁶² Some commenters argued that those who claimed to be LPRs should have any removal proceedings occur before a judge as opposed to an immigration officer.⁶³ However, the INS refused to heed either suggestion.⁶⁴ Another major concern was lack of access to counsel during secondary inspection.⁶⁵ The INS regulations stated that no one subject to expedited removal in secondary inspection was entitled to legal representation unless they were under criminal investigation.⁶⁶ Commenters asked the INS to change its interpretation, but it refused.⁶⁷

B. AILA I and II

Five days before the interim rules were to become effective, the American Immigration Lawyers Association (AILA), filed a lawsuit in the District Court for the District of Columbia challenging their validity.⁶⁸ The complaint alleged that the interim rules violated the intent of IIRIRA, the Due Process Clause, the Equal Protection Clause, the First Amendment, and international law, and that the INS

⁶⁰ Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312 (Mar. 6, 1997).

⁶¹ *See id.* at 10,314–16 (replying to concerns raised by commenters who argued that certain classes of individuals should not be subject to expedited removal, that expedited removal should not be applied where there are suboptimal inspection conditions, and that aliens subject to expedited removal should receive a full hearing in front of a judge).

⁶² *See id.* at 10,314 (noting that “[s]everal commenters suggested that provisions of § 235.3(b)(5) were not sufficiently clear to provide adequate review of claims by returning lawful permanent residents, asylees, or refugees,” and noting that a lawful permanent resident could be ordered removed without an “opportunity through deferred inspection to present the required documents”).

⁶³ *See id.*

⁶⁴ *See id.* (“The statute is clear that the expedited removal provisions apply to all aliens inadmissible under . . . the Act, and that such aliens are not entitled to further hearing or review with specific limited exceptions.”).

⁶⁵ *See id.* at 10,319.

⁶⁶ *See id.*

⁶⁷ *Id.* (stating that because Congress did not amend the provision providing a right to counsel in removal proceedings before a judge to include proceedings before immigration officers, there was no entitlement to representation at secondary inspection).

⁶⁸ *AILA I*, 18 F. Supp. 2d 38, 41, 45 (D.D.C. 1998) (“The AILA complaint . . . was filed March 27, 1997, along with a motion . . . to prevent the Interim Regulations from taking effect on April 1, 1997.”).

itself failed to follow its own interim regulations.⁶⁹ After the rules went into effect, numerous individual plaintiffs who had been subject to the expedited removal procedures also sued, as did some other organizations.⁷⁰ Eventually, all the lawsuits were consolidated into one proceeding.⁷¹

The district court dismissed all of the claims.⁷² First, the court found that any individual plaintiffs who joined the lawsuit after May 31, 1997, which would have been sixty days since the regulations went into effect on April 1, were time-barred from bringing suit.⁷³ The sixty-day time limit, the court noted, was a jurisdictional, rather than traditional limitations period, and thus any amended complaint could not “relate back” to the original complaint that was timely filed.⁷⁴ This left two individual plaintiffs, who had been ordered summarily removed prior to May 31, 1997, and ten organizations, all of which either represented immigrants or did immigration advocacy work.⁷⁵

The two individual plaintiffs were both women from the Dominican Republic who had come to the United States with valid tourist visas.⁷⁶ They were detained without food or access to counsel, forced to sign forms that they did not understand, and ultimately ordered removed and thus subjected to the five-year ban.⁷⁷ The court rejected

⁶⁹ See *id.* at 41 (summarizing the plaintiffs’ claims).

⁷⁰ See *id.* at 44–45.

⁷¹ See *id.* at 41.

⁷² *Id.*

⁷³ See *id.* at 45 (“The vast majority of these individuals’ claims are barred because they did not arise within 60 days of the implementation of IIRIRA, i.e. prior to May 31, 1997.”). The *AILA* plaintiffs tried to argue that those plaintiffs should have been counted within the sixty days as the original *action* was filed within sixty days of implementation, but the Court chose to look at only the time when the complaint was amended to include the new plaintiffs, which was beyond the sixty days after implementation. See Opening Brief of Plaintiffs-Appellants at 11–13, *AILA II*, 199 F.3d 1352 (D.C. Cir. 2000) (No. 98-5463) [hereinafter *AILA* Opening Brief].

⁷⁴ *Id.* at 47 (“Where a statutory deadline is jurisdictional, however, no ‘relation-back’ under Rule 15(c) can occur.”).

⁷⁵ See *id.* at 44–45. The organizational plaintiffs were: the American Immigration Lawyers Association, Liberians United for Peace and Democracy, National Coalition for Haitian Rights, World Tamil Coordination Committee, Florida Immigrant Advocacy Center, Human Rights Project, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, New York Immigration Coalition, Northern California Coalition for Immigrant Rights, and the Dominican American National Foundation. *Id.* at 44 & nn.2–3.

⁷⁶ *Id.* at 45.

⁷⁷ See *id.* The expedited removal statutes are silent on the question of access to counsel in a proceeding before an immigration officer, as opposed to a proceeding before a judge. See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,319 (Mar. 6, 1997) (“Section 292 of [IIRIRA] provides that in any removal proceeding before an immigration judge, the person concerned shall have . . . represent[ation] by counsel Congress did not amend this section to include proceedings before an immigration

their statutory challenges (that the interim regulations violated IIRIRA by failing to provide them with interpretation assistance, or with food or water for extended periods of time) and their constitutional challenges (that the expedited removal procedures violated their equal protection and due process rights by denying them access to counsel, among other things).⁷⁸ The court noted that because the INS regulations as written required translation assistance, the plaintiffs' claims with regard to interpretation were a challenge to "unwritten policies or practices"⁷⁹—that is, the claim concerned the INS's *application* of its policies as opposed to the written policies themselves.⁸⁰ Because IIRIRA only gave the court explicit jurisdiction to review *written* policies or practices, the statute served to "immunize the unwritten actions of an agency from judicial review."⁸¹ Because the INS's failure to follow its own regulations concerning interpretive services constituted an unwritten policy, the court held that it did not have jurisdiction to hear the challenge.⁸²

Most consequentially, the court found that because the two individual plaintiffs were visa holders, they had no standing to challenge the expedited removal provisions that were solely applicable to refugees seeking asylum or status claimants.⁸³ This mattered because the type of challenges to the expedited removal provisions available varied depending on the status of the person subject to expedited removal.⁸⁴ Asylum seekers could have claims relating to the United States' potential violation of international refugee law that LPRs or undocumented people would not have.⁸⁵ By contrast, LPRs or undocumented immigrants might have standing to challenge the expedited removal procedures on due process grounds, which asylum seekers might not have.⁸⁶ But now all of the claims not relevant to the

officer."). The INS used this to justify its position that "an alien in primary or secondary inspection is not entitled to representation, except where the person has become the focus of a criminal investigation and has been taken into custody for that purpose." *See id.*

⁷⁸ *See AILA I*, 18 F. Supp. 2d 38, 52–61 (D.D.C. 1998) (describing and disposing of the plaintiffs' statutory and constitutional challenges).

⁷⁹ *Id.* at 58.

⁸⁰ *See id.* at 55.

⁸¹ *See id.* at 58.

⁸² *See id.* at 55, 58.

⁸³ *See id.* at 47.

⁸⁴ *See AILA* Opening Brief, *supra* note 73, at 11–13 (describing these differences with regard to the different initial lawsuits before they were consolidated).

⁸⁵ *See id.* at 15 (discussing the substantive rights of asylum seekers under the Refugee Act of 1980).

⁸⁶ *See infra* Section III.B (discussing how courts have used a territorial/extraterritorial distinction to withhold due process rights from initial entrants to the United States).

two Dominican visa holders were foreclosed without ever being raised.⁸⁷

The court also found that the organizations did not meet Article III standing requirements for all claims except their First Amendment claim.⁸⁸ The injuries alleged—that the organizations would have to divert resources to find other channels to communicate with refugees, and that expedited removal would deprive them of future clients and the opportunity to fulfill their missions—were too speculative and did not meet the causation or redressability requirements.⁸⁹ The lower court did find that the organizational plaintiffs met prudential standing requirements, since “such an action would probably not be brought in time if Congress intended that only aliens subject to [expedited] removal . . . be allowed to bring such an action.”⁹⁰ However, because the organizations did not meet Article III standing requirements, the court still could not hear any of their claims, except for the First Amendment challenge.⁹¹ The court also noted it was “troubled” by “the effects of Congress’s decision to immunize the unwritten actions of an agency from judicial review,” particularly in light of the unfettered discretion given to INS agents, and admonished the INS “in the strongest language possible,” to follow its own “regulations, policies, and procedures.”⁹²

The Court of Appeals affirmed the lower court’s holding.⁹³ But it also went further on one key issue. The lower court found that the organizations met the prudential consideration for third party standing under the “zone of interests” rule, which recognizes Congress’s ability to grant standing via statute.⁹⁴ Under the lower court’s

⁸⁷ See *AILA I*, 18 F. Supp. 2d 38, 47 (D.D.C. 1998).

⁸⁸ See *id.* at 49–52. The court ultimately dismissed the First Amendment claim as well, reasoning that the the organizations “d[id] not have a First Amendment right to government-provided access to aliens in removal proceedings.” *Id.* at 62.

⁸⁹ See *id.* at 49–50.

⁹⁰ *Id.* at 49.

⁹¹ See *id.* at 52.

⁹² *Id.* at 58.

⁹³ *AILA II*, 199 F.3d 1352 (D.C. Cir. 2000).

⁹⁴ *AILA I*, 18 F. Supp. 2d 38, 47–49 (D.D.C. 1998); see *AILA II*, 199 F.3d at 1358 (discussing the lower court’s holding). The lower court found that “[w]ithout either a clear indication of congressional intent or any obvious tie-breaking rule . . . this Court concludes that Congress intended to permit plaintiffs who could satisfy Article III standing requirements to bring an action under § 242(e)(3) Thus, the Court concludes that the organizational plaintiffs satisfy prudential standing requirements.” *AILA I*, 18 F. Supp. 2d at 49 (quoting *Fed’n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 903 (D.C. Cir. 1996)). Note that the lower court did not directly address the question of third-party standing, which the D.C. Circuit Court of Appeals then raised and considered on its own accord. See *id.*; see also *AILA II*, 199 F.3d at 1358 (“[W]e will consider third party standing *sua sponte* . . .”).

construction of the sixty-day limit, anyone subject to expedited removal after May 31, 1997 would have no means to challenge the validity of these provisions.⁹⁵ Presumably, this would mean that because noncitizens facing expedited removal had such a short period to bring a claim, they would need other parties to assert rights on their behalves.⁹⁶ But the D.C. Circuit declined to find that the organizations had third-party standing.⁹⁷ It was “a large stretch” to conclude that because of the sixty-day time limit, Congress intended to have organizations vindicate the rights of the noncitizens facing expedited removal.⁹⁸ “A sixty-day limit is commonplace for judicial review of agency action,” the court noted, and “[n]o one has ever thought that this time limit, in itself, amounted to a legislative repudiation of prudential standing.”⁹⁹ The court noted instead that it was clearly Congress’s intention to prevent organizations from having standing, noting the bar on granting injunctive relief and the bar on certifying class actions.¹⁰⁰

The court distinguished a prior D.C. Circuit case that had recognized third-party standing for unidentified depositors who did not know they were being deprived of property.¹⁰¹ In that case, the court had found that lack of awareness of a suit was enough of a hindrance to a party asserting its own rights.¹⁰² But the *AILA II* court found that noncitizens facing expedited removal faced “no [such] impediment” because the noncitizens were “quite aware of their [expedited] removal” and had a strong incentive to challenge it.¹⁰³ In response to the organizational plaintiffs’ argument that persons subject to expedited removal are forbidden from communicating with anyone while

⁹⁵ See *AILA I*, 18 F. Supp. 2d at 47 (holding that newly added plaintiffs who filed their claims after May 31, 1997 were time-barred); see also *AILA II*, 199 F.3d at 1363 (conceding that under the district court’s construction of the sixty-day time limit, aliens arriving after June 1, 1997 would be unable to bring any challenge at all).

⁹⁶ See *AILA I*, 18 F. Supp. 2d at 49 (concluding that in imposing the time limit, Congress realized that aliens subject to summary removal orders would be unlikely to file a lawsuit within sixty days); see also *AILA II*, 199 F.3d at 1358 (discussing the lower court’s holding).

⁹⁷ *AILA II*, 199 F.3d at 1364.

⁹⁸ *Id.* at 1358.

⁹⁹ *Id.*

¹⁰⁰ See *id.* at 1359 (noting that an alien may only bring a class action claim if they have been subjected to the summary procedures contained in 8 U.S.C. § 1225(b) or seek injunctive relief if the alien is subject to proceedings under 8 U.S.C. § 1252(f)(1)).

¹⁰¹ *Id.* at 1361–62. The case distinguished was *Lepelletier v. FDIC*, 164 F.3d 37 (D.C. Cir. 1999).

¹⁰² See *Lepelletier*, 164 F.3d at 43 (noting that a lack of awareness satisfies one of three prongs in determining whether an individual may assert a claim).

¹⁰³ *AILA II*, 199 F.3d at 1363.

they are detained, the court shrugged.¹⁰⁴ A person subject to expedited removal could simply bring suit after returning to his or her native country (assuming he or she was deported within the sixty-day time limit).¹⁰⁵ The immigration organizations filed lawsuits days before the regulations went into effect, and “thus knew well ahead of time what was coming.”¹⁰⁶ Any difficulties locating individuals that met the standing requirements were “either imposed by Congress or result[ed] from the normal burdens of litigation.”¹⁰⁷

The effect of the court’s findings would then preclude anyone who did not face expedited removal within the first sixty days of the regulations’ promulgation from challenging their validity. This, the court conceded, was “[t]rue enough. But this is precisely what Congress intended.”¹⁰⁸ The court did note that plaintiffs did not challenge the constitutionality of the sixty-day limit, and suggested that this was “perhaps in recognition of the longstanding principle that determining the conditions governing the admission of aliens is ‘so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’”¹⁰⁹

In this last comment, the D.C. Circuit Court of Appeals was referencing the plenary power doctrine. As explained *supra*, the plenary power doctrine is the principle that grants the political branches extraordinary deference when regulating immigration.¹¹⁰ One can trace the origins of the doctrine to the case *Chae Chan Ping*, which asserted broad authority to include and exclude noncitizens from American territory.¹¹¹ Since that case, the Court has repeatedly affirmed the broad deference owed to both the executive and the legislative branches with regard to their immigration decisions.¹¹² The plenary power doctrine continues to make immigration law an outlier vis-à-vis other areas of law, isolated not only from the process of con-

¹⁰⁴ See *id.* at 1362–63 (stating that Congress intended this result).

¹⁰⁵ *Id.* at 1363.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1363–64.

¹⁰⁸ *Id.* at 1363.

¹⁰⁹ *Id.* at 1356 n.5 (internal citations omitted). To be fair, the *AILA* plaintiffs did raise the validity of the time limit on appeal, but none of their arguments were framed as constitutional concerns. See *AILA* Opening Brief, *supra* note 73, at 48–50 (arguing that the time limit had been met, but not raising a constitutional argument).

¹¹⁰ See *supra* note 24 and accompanying text.

¹¹¹ *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.”).

¹¹² See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972) (noting that “the Court’s general reaffirmations of [the plenary power doctrine] have been legion” and listing several cases).

stitutional judicial review, but also from constitutional norms and principles applied elsewhere.¹¹³ On occasion, however, the Supreme Court has recognized that even this broad power has *some* constitutional limits. In *INS v. Chadha*, for example, the Court overruled Congress's use of the one-house legislative veto, finding that even though Congress did have plenary power over immigration decisions, it could not implement them via unconstitutional means.¹¹⁴ As *AILA II* indicates, however, in the context of expedited removal, the grip of the plenary power doctrine holds steady.¹¹⁵

The impact of *AILA II* was immediate and deep felt. In one fell swoop, issues affecting asylum seekers, LPRs, undocumented persons, and people who claimed U.S. citizenship were extinguished without ever having been raised. Other federal courts roundly rejected any future attempts to raise constitutional challenges to the expedited removal system, given their limited habeas review over individual deportation orders.¹¹⁶ Occasionally, the press would report stories of immigration officers mistakenly deporting U.S. citizens.¹¹⁷ In one case, the U.S. citizens sued the government, but it did not bring meaningful change to INS policies or practices.¹¹⁸ At most, some courts comment on the troubling due process implications of expedited removal, but insist that, by so clearly restricting the federal courts'

¹¹³ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 547 (describing this phenomenon).

¹¹⁴ *INS v. Chadha*, 462 U.S. 919, 956–59 (1983).

¹¹⁵ See *supra* notes 109–10 and accompanying text.

¹¹⁶ See *Shunaula v. Holder*, 732 F.3d 143, 147 (2d Cir. 2013) (finding the court barred on jurisdictional grounds from hearing collateral attack on expedited removal order); *Khan v. Holder*, 608 F.3d 325, 328–30 (7th Cir. 2010) (rejecting argument that court could review an expedited removal under special jurisdiction for substantial constitutional questions thus forming a “safety valve” that would “enable judicial correction of bizarre miscarriage of justice”); *Garcia de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1138–40 (9th Cir. 2008) (finding that the court is jurisdictionally barred from reviewing reinstatement of an expedited removal order or hearing habeas petition on the same matter); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1281 (10th Cir. 2007) (holding the court did not have statutorily authorized jurisdiction to hear the challenge to the deportation order).

¹¹⁷ See, e.g., Ian James, *Wrongly Deported, American Citizen Sues INS for \$8 Million*, *L.A. TIMES* (Sept. 3, 2000), <http://articles.latimes.com/2000/sep/03/news/mn-14714> (describing the case of Sharon McKnight, a U.S. citizen with intellectual disabilities who was mistakenly deported to Jamaica); see also Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 *VA. J. SOC. POL’Y & L.* 606, 659 (2011) (collecting several stories including that of Raymond, a U.S. citizen who had been kidnapped by his father and raised in Mexico, and was then denied entry and ordered removed when he escaped and attempted to return to the United States).

¹¹⁸ The case ended with an \$80,000 settlement for Ms. McKnight, but the rest of the terms of the settlement are not available to the public. See *McKnight v. Reno*, No. 1:01-cv-00127 (E.D.N.Y. Nov. 2, 2004) (Docket Entries 20–21).

jurisdiction on the matter, Congress tied their hands.¹¹⁹ As the courts rejected challenges to expedited removal, the INS, and later the Department of Homeland Security,¹²⁰ further expanded its reach.¹²¹ However, no case has successfully challenged the validity of these expansions, and no party raised the validity of the sixty-day time limit in these cases.¹²²

II

UNDERSTANDING THE “CONSTITUTIONAL REVIEW” MODEL FOR STATUTORY TIME LIMITS ON JUDICIAL REVIEW OF AGENCY RULES

There are many different types of time limits on judicial review of agency rules.¹²³ The kind relevant to this Note are provisions that impose time limits on judicial review of agency rules at both pre- and post-rule enforcement. This Part proceeds in three subparts. Part II.A briefly discusses the history of statutory time limits on judicial review

¹¹⁹ See, e.g., *infra* Part III; see also *Khan*, 608 F.3d at 329 (“To say that this procedure is fraught with risk of arbitrary, mistaken, or discriminatory behavior . . . is not, however, to say that courts are free to disregard jurisdictional limitations.”).

¹²⁰ In 2002, Congress created the Department of Homeland Security, which took over the then-defunct Immigration & Nationality Service’s duties. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2205 (codified at 6 U.S.C. § 291 (2012)).

¹²¹ IIRIRA gives the Attorney General (now the Secretary of Homeland Security) authority to subject to expedited removal any “alien . . . who has not been admitted or paroled into the United States.” 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012). From April 1997 to November 2002, only people arriving at ports of entry were subject to expedited removal. See *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,313 (Mar. 6, 1997). In 2002, the INS clarified that *all* arriving aliens could be subject to expedited removal, and expanded the applicability of the procedure to cover all non-Cuban noncitizens who arrived at sea and could prove that they had lived in the United States for at least two years. See *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68,924, 68,925–26 (Nov. 13, 2002). In 2004, the Department of Homeland Security further expanded expedited removal to cover any undocumented persons within one hundred miles of the United States border who could not prove that they had been physically present in the United States continuously for at least fourteen days prior to their encounter with an immigration officer. *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48,877, 48,880 (Aug. 11, 2004).

¹²² To the author’s knowledge, based on database searches and conversations with practitioners in the field, no INA § 242(e)(3) challenge was mounted to these two expansions, probably due to the standing problems discussed *infra* in Section III.A. One case did challenge DHS regulations as practiced at one immigration detention facility, but the case became moot when the government closed the facility, so the plaintiffs voluntarily dismissed their case. See *Plaintiffs’ Notice of Voluntary Dismissal*, M.S.P.C. v. Johnson, No. 1:14-cv-01437-ABJ (D.D.C. Jan. 30, 2015).

¹²³ See Frederick Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 DUKE L.J. 279 for a definitive discussion of the different types of statutory time limits on judicial review of agency rules.

of agency rules. Part II.B describes the framework developed by Paul Verkuil to analyze congressional limits on judicial review of agency rules. Part II.C examines how the Supreme Court uses Verkuil's framework and addresses the framework's workability.

A. *From Yakus to Abbott: A Brief History of Statutory Time Limits to Judicial Review of Agency Rules*

Statutory time limits on judicial review of agency rules have existed since at least the beginning of the modern administrative state, as evidenced by the statutory time limit at issue in the World War II case *Yakus v. United States*.¹²⁴ To combat wartime inflation, Congress created an Office of Price Administration to regulate commodity prices.¹²⁵ Anyone who sold commodities at prices beyond those specified by the Office could be prosecuted criminally.¹²⁶ If a person affected by a price regulation wanted to challenge the regulation, they had to file a challenge within sixty days of the effective date of the regulation.¹²⁷ Congress created a special federal court with exclusive jurisdiction over all such challenges.¹²⁸ In *Yakus*, the Supreme Court upheld the criminal prosecutions of two Massachusetts beef sellers who had failed to raise challenges to the validity of the price control regulations within the sixty-day time limit, and whose efforts to raise these challenges in their individual criminal proceedings had also been rejected by the lower courts.¹²⁹ In so doing, the Court declined to comment on whether challenges to the constitutionality of the procedures would be precluded in individual enforcement proceedings if the challenger could demonstrate that he had had *no* opportunity within the statutory scheme to bring the challenge at an earlier point.¹³⁰ The Court also explicitly acknowledged the wartime context as part of its consideration in upholding the time limit.¹³¹

¹²⁴ 321 U.S. 414 (1944).

¹²⁵ Emergency Price Control Act of 1942, Pub. L. No. 421, § 201, 56 Stat. 23, 29.

¹²⁶ § 205, 56 Stat. at 33.

¹²⁷ § 203(a), 56 Stat. at 31.

¹²⁸ The court was called the Emergency Court of Appeals. § 204(c), 56 Stat. at 32. The Supreme Court could review its decisions via petitions for certiorari. § 204(d), 56 Stat. at 32.

¹²⁹ 321 U.S. at 418–19, 444–48.

¹³⁰ *Id.* at 446–47 (noting that the Court has “no occasion to decide” whether one charged with criminal violation of the regulation “may defend on the ground that the regulation is unconstitutional on its face” because “petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so”).

¹³¹ *Id.* at 435 (“The sixty days’ period allowed for protest of the Administrator’s regulations cannot be said to be unreasonably short in view of the urgency and exigencies

Yakus is significant because statutory time limits such as the one at issue in the case were relatively rare until the watershed case *Abbott Laboratories v. Gardner*.¹³² At issue in *Abbott Laboratories* was whether pharmaceutical companies could request declaratory and injunctive relief challenging new prescription drug labeling regulations before the rules actually went into effect.¹³³ In affirming the ability of the companies to bring the pre-enforcement challenges, the Court upended previous doctrine that had limited the availability of pre-enforcement relief because of ripeness concerns.¹³⁴ *Abbott Laboratories* unleashed the floodgates,¹³⁵ and in the next decade Congress passed several new statutes that limited judicial review of agency rules to *only* the pre-enforcement stage, subject to certain limitations.¹³⁶ Today, the majority of statutory time limits on judicial review remain from this period.¹³⁷

B. Verkuil's Constitutional Review Model

Now we have a sense of where these statutory time limits came from, but how should we analyze them? In a 1983 article, Paul Verkuil recommended that two sets of distinctions should govern when statutory time limits on judicial review of agency rulemaking are permis-

of wartime price regulation.”). These last two aspects of *Yakus* will be important for reasons described *infra* in Section II.B.

¹³² 387 U.S. 136 (1967).

¹³³ *Id.* at 139 (noting that the Third Circuit held that under the statutory scheme, “pre-enforcement review of [the] regulations was unauthorized and therefore beyond the jurisdiction of the District Court” and that accordingly “no ‘actual case or controversy’ existed,” and taking up these questions because of their “general importance” and the existence of a circuit split).

¹³⁴ *See id.* at 148–49 (discussing courts’ traditional reluctance to apply injunctive and declaratory judgment remedies “until an administrative decision has been formalized and its effects felt in a concrete way”).

¹³⁵ *See Davis, supra* note 123, at 280 (describing the influence of *Abbott*).

¹³⁶ *See, e.g.,* Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164 §§ 101(d), 106(a)(1), 91 Stat. 1290, 1295, 1306 (codified as amended at 30 U.S.C. §§ 811(d), 816 (2012)) (sixty-day limit with limited conditions for judicial review at enforcement); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 305(c)(3), 322(c)(1), 91 Stat. 686, 776, 784–85 (codified as amended at 42 U.S.C. §§ 7607(b)(1), 7622(c) (2012)) (sixty-day limit with limited conditions for judicial review at enforcement); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 509(b)(1), 86 Stat. 816, 892 (ninety-day time limit with exceptions for applications “based solely on grounds which arose after such ninetieth day”). For a full list of other such statutes and a discussion of the significance of *Abbott Laboratories* in generating such statutory schemes, see Davis, *supra* note 123, at 280 n.10, 285–90, app. (listing examples).

¹³⁷ *See* Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2213 (2011) (noting that most of the case law on statutory time limits is related to regulatory statutes that were already on the books in the early 1980s).

sible.¹³⁸ One set involves *time*: Can a challenge to the validity of a rule be raised pre-enforcement or only in enforcement proceedings?¹³⁹ The other set concerns the distinction between *procedural* and *substantive* challenges.¹⁴⁰ Using these distinctions, Verkuil developed two rules. First, procedural challenges to an agency's rulemaking should only be raised at pre-enforcement, while the statutory time limit remains in effect.¹⁴¹ Such a rule would ensure that rule process challenges would be heard before the evidence concerning the rulemaking became stale.¹⁴² Second, constitutional challenges to an agency's rulemaking should not be time-barred if made at the enforcement stage of a rule or in an as-applied challenge.¹⁴³ In developing this second guiding principle, Verkuil distinguished between judicial review and what he termed "constitutional review."¹⁴⁴ Generally, Congress's preferences regarding time limits should be accommodated, because statutory time limits ensure finality and protect administrative resources and reliance interests.¹⁴⁵ But if an agency rule raises a *constitutional* issue, then review should be required despite congressional restrictions.¹⁴⁶

Verkuil's conception of constitutional review stems from a concern the Supreme Court has long fretted about.¹⁴⁷ In some cases, a statutory time limit may foreclose the constitutional challenges of those who could not have raised their claims within the prescribed time limit, completely precluding judicial review of those constitutional claims.¹⁴⁸ The Supreme Court has repeatedly expressed its

¹³⁸ Verkuil, *supra* note 20.

¹³⁹ *See id.* at 763, 773–75.

¹⁴⁰ *See id.* at 763.

¹⁴¹ *Id.* at 762–63.

¹⁴² *Id.* at 763 ("Since process questions will never be more ripe than just after the rule is promulgated, they should be decided then.").

¹⁴³ *See id.* at 755–59. As Ronald Levin discusses, Verkuil makes a distinction between as-applied challenges to a rule and a challenge to the validity of a rule in an enforcement proceeding. Under the latter scenario, even if the validity of the rule is only raised in an enforcement proceeding, the court's finding could potentially apply to everyone similarly situated as the petitioner. *See* Levin, *supra* note 137, at 2232–33. *But see generally* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000) (arguing that the distinction between as-applied and facial challenges rests on mistaken assumptions, because there is no distinctive category of facial challenges).

¹⁴⁴ Verkuil, *supra* note 20, at 743–44.

¹⁴⁵ *Id.* at 762 (quoting Nat. Res. Def. Council v. Nuclear Regulatory Comm'n, 666 F.2d 595, 602 (D.C. Cir. 1981)).

¹⁴⁶ *Id.* at 743.

¹⁴⁷ *See infra* note 149 and accompanying text.

¹⁴⁸ Note, *Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples*, 49 N.Y.U. L. REV. 131, 141–42 (1974) (making this point).

doubts as to the constitutionality of jurisdiction stripping that would result in there being no forum appropriate to review a constitutional claim.¹⁴⁹

Arguably, the Court's desire to avoid explicitly addressing this question animated its decisions in this area of law, and Verkuil used decisions where the Court invoked the avoidance canon to support his framework.¹⁵⁰ He pointed to the express exception made in *Yakus*, in which the Court noted that it was avoiding the question of whether a constitutional challenge that could not have been raised within the prescribed time limit could be time-barred in an enforcement proceeding.¹⁵¹ He also pointed to *Johnson v. Robison*,¹⁵² a case where the Court held that a statutory time limit did not bar a conscientious objector from challenging a Veteran's Administration decision on constitutional grounds.¹⁵³ In his opinion for the Court, Justice Brennan wrote that to read the statutory time limit as foreclosing constitutional challenges raised serious constitutional concerns and thus required the Court to read the time limit differently.¹⁵⁴

While sometimes the Court has explicitly invoked the constitutional avoidance canon, other times it has framed the issue as a *statutory* rather than constitutional question, in order to avoid invoking the avoidance canon at all. In *Califano*, for example, the Court upheld the lower court's finding that the Social Security Act did not authorize

¹⁴⁹ The Court has mostly expressed this disapproval in pointed dicta. See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681, n.12 (1986)) (explaining that the Court uses a clear statement rule for congressional preclusion of judicial review of constitutional claims "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Bowen*, 476 U.S. at 681 n.12 (noting that the Court had avoided a "serious constitutional question" by declining to construe a provision of the Medicare Act as denying a judicial forum for constitutional claims); see also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 508 (1999) (Souter, J., dissenting) ("[C]omplete preclusion of judicial review of any kind for claims brought by aliens subject to proceedings for removal would raise the serious constitutional question whether Congress may block every remedy for enforcing a constitutional right.").

¹⁵⁰ See Verkuil, *supra* note 20, at 737–38 (citing cases and explaining that the Court often "assumes that Congress did not intend a preclusion of review provision to deny the Court the power of constitutional review" in order to "avoid a constitutional confrontation"). The avoidance canon is a canon of statutory interpretation in which statutes are construed so as to avoid any interpretation that is unconstitutional. See *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.").

¹⁵¹ Verkuil, *supra* note 20, at 750 ("[A] strict reading of *Yakus* suggests that even the constitutional component of judicial review can be eliminated, so long as the opportunity to raise constitutional issues at the preenforcement stage is adequate.").

¹⁵² 415 U.S. 361 (1974).

¹⁵³ See Verkuil, *supra* note 20, at 737–38.

¹⁵⁴ See *Robison*, 415 U.S. at 366–67.

judicial review of the Social Security Administration's final decisions absent a constitutional challenge.¹⁵⁵ In *Adamo*,¹⁵⁶ however, the Court tried a slightly different tack. A wrecking company had been indicted for violating an EPA emission standard.¹⁵⁷ The question was *Yakus*-like: Could the company now challenge the validity of the emission standard during its criminal proceeding when it had failed to challenge the emission standard during the required time limit?¹⁵⁸ Justice Rehnquist, writing for the Court, avoided the question by arguing that this was a question of statutory, rather than constitutional, interpretation—arguing that because the wrecking company's actions were not a violation of an EPA emission standard, but rather a “work practice,” they were not subject to the statutory time limit and other congressional restrictions on review.¹⁵⁹

To be sure, Verkuil concedes that Congress has “on occasion successfully limited the time frame or the forum within which constitutional issues can be raised.”¹⁶⁰ At least one federal court of appeals construed a statutory provision (not a time limit) as foreclosing both statutory and constitutional challenges made in the federal district courts, while noting that the parties had the option of having their issues heard in the Federal Circuit Court of Claims if they recast their equitable claims as claims for damages.¹⁶¹ Additionally, Verkuil himself noted the “draconian provision”¹⁶² found in the Trans-Alaska Pipeline Authorization Act,¹⁶³ which limited challenges to agency action regarding the Trans-Alaska Pipeline to sixty days following November 6, 1973 (the date implementing regulations went into effect) and limited constitutional and *ultra vires* challenges to sixty days after the challenged action took place.¹⁶⁴ The pipeline statutory time limit perhaps comes closer than any other congressional time limit to doing what the expedited removal time limit does. The Trans-

¹⁵⁵ See *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

¹⁵⁶ *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978).

¹⁵⁷ *Id.* at 277.

¹⁵⁸ See *id.* at 277–78.

¹⁵⁹ See *id.* at 279–87.

¹⁶⁰ Verkuil, *supra* note 20, at 750.

¹⁶¹ See *Am. Ass'n of Councils of Med. Staffs of Private Hosps., Inc. v. Califano*, 575 F.2d 1367, 1372–73 (5th Cir. 1978) (finding that certain provisions of the Medicare Act precluded seeking declaratory or injunctive relief with regards to constitutional claims, but that parties could seek relief if they could recast their claim into one for damages in the Court of Claims).

¹⁶² Verkuil, *supra* note 20, at 742.

¹⁶³ Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 201, 87 Stat. 576, 584 (codified at 43 U.S.C. § 1652 (2012)).

¹⁶⁴ 43 U.S.C. § 1652(d).

Alaska Pipeline completed construction in 1977,¹⁶⁵ and no court ever had to construe the provision's meaning.¹⁶⁶ Thus, one can understand this provision as justified only by the very specific circumstances that brought the Trans-Alaska Pipeline into being.¹⁶⁷ It also does little to change Verkuil's ultimate conclusion that statutory time limits on constitutional review of agency rules in an enforcement proceeding require "a heavy burden of justification."¹⁶⁸

C. *The Supreme Court Since Verkuil and the Viability of the Constitutional Review Model*

In an article evaluating Verkuil's model almost thirty years later, Ronald Levin found that most federal courts have basically adhered to the guiding principles that Verkuil devised.¹⁶⁹ This means that for *procedural* claims (i.e., claims that an agency adopted a rule without following correct rulemaking procedure), courts have generally adhered strictly to the statutory time limit.¹⁷⁰ But for *substantive* claims, the courts have been more flexible.¹⁷¹ In some cases, lower federal courts have strictly adhered to a statutory time limit,¹⁷² and in other cases courts have ignored it.¹⁷³ Most often however, and espe-

¹⁶⁵ Mary P. Aucoin, *An Engineering Marvel: Tapping into the History of the Trans-Alaska Pipeline*, PIPELINE & GAS J., June 1997, at 46, 53.

¹⁶⁶ See Verkuil, *supra* note 20, at 742 (noting that the provision was not challenged).

¹⁶⁷ For more information on the political and legislative history that led to the passage of the Trans-Alaska Pipeline, see Note, *supra* note 148, at 153–62.

¹⁶⁸ Verkuil, *supra* note 20, at 750.

¹⁶⁹ Levin, *supra* note 137, at 2214–15 (noting that while the "constitutional review" category has not been widely adopted by courts, which tend to use functional and prudential considerations for determining which issues can be foreclosed, "the courts have, in applying the time limit statutes, tended to distinguish among legal, factual, and procedural issues as [Verkuil's] article and recommendation suggested").

¹⁷⁰ *Id.* at 2216.

¹⁷¹ See *id.* at 2220.

¹⁷² See, e.g., *United States v. Walsh*, 8 F.3d 659, 664–65 (9th Cir. 1993) (holding that the National Clean Air Act's sixty-day time limit forbade parties from raising the validity of regulations regarding asbestos removal despite the fact that the defendant had not been in the asbestos removal business when the regulations first came out, because "there were many asbestos removal companies in operation at the time of the promulgation . . . [who] had motive and opportunity to challenge the regulations" and that "[t]here is nothing to prevent Congress from providing a single national forum for the litigation of such standards").

¹⁷³ See, e.g., *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (declining to apply a six year statutory time limit to judicial review of a Bureau of Land Management decision to classify an area of land as a Wilderness Study Area (and thus exempt from ore-extraction activities), on the grounds that *ultra vires* and constitutional challenges will by their nature "require a more 'interested' person than generally will be found in the public at large"); *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 614 (7th Cir. 1987) (permitting review of application of a rule even though it exceeded the sixty-day time limit). *Wind River* is striking for the way it perfectly

cially when the Supreme Court is involved, courts avoid the question altogether.¹⁷⁴

For example, in *Environmental Defense v. Duke Energy Corp.*¹⁷⁵ the Court again avoided reaching the constitutionality of a statutory time-limit provision pertaining to challenges of certain EPA regulations.¹⁷⁶ More recently, in *Decker v. Northwest Environmental Defense Center*,¹⁷⁷ the Court held that another time-bar limit did not apply to a citizen suit seeking to enforce certain regulations promulgated by the EPA under the statute.¹⁷⁸ This was not an impermissible challenge to the validity of the regulation, the Court explained, because, the rule in question was ambiguous, and the suit was not a challenge to the rule itself, but instead only sought “to enforce [the regulation] under a proper interpretation.”¹⁷⁹ This thus placed the citizen suit under a different provision of the Act, which allows for challenges to be filed past the 120-day window.¹⁸⁰ Of course, the distinction between the validity of an agency rule and the validity of an agency’s *interpretation* of that rule seems razor-thin. But this approach allowed the Court to avoid more difficult constitutional questions.

The Court’s extensive invocation of the avoidance canon when it comes to time limits on judicial review of agency rules raises two important questions. First, what should one make of the Court’s frequent resort to the avoidance canon in this area of law? After all, as Justice Scalia once noted, there is a difference between declaring

adheres to Verkuil’s model. The case limited procedural claims to within the six-year statute of limitations, 946 F.2d at 715, for which the case has recently been criticized. See John Kendrick, Note, *(Un)Limiting Administrative Review: Wind River, Section 2401(a) and the Right to Challenge Federal Agencies*, 103 VA. L. REV. 157 (2017) (criticizing the *Wind River* holding).

¹⁷⁴ See Levin, *supra* note 137, at 2228 (“Avoidance techniques, including strained statutory construction as well as mere obscurity, have thus emerged as the strategy of choice.”).

¹⁷⁵ 549 U.S. 561 (2007).

¹⁷⁶ The Court found that the Fourth Circuit’s reading of the word “modification” as having the same meaning in two different regulatory schemes of the Clean Air Act—specifically, the New Source Performance Standards (NSPS) and the Prevention of Significant Deterioration (PSD)—to be incorrect. *Id.* at 576–81. It was an implicit concession that the PSD provisions were invalid as written, despite the fact that such a challenge to the validity of the PSD provisions, which had been promulgated in 1980, would have been time-barred in 2007. See *id.* at 581. But rather than directly address whether the time limit should apply, the Court reversed and remanded, noting only that it “ha[d] no occasion at this point to consider the significance of [the time limit] provisions ourselves.” *Id.* at 572–81.

¹⁷⁷ 568 U.S. 597 (2013).

¹⁷⁸ *Id.* at 608–09.

¹⁷⁹ *Id.* at 607–08.

¹⁸⁰ *Id.*

something unconstitutional and avoiding the question altogether.¹⁸¹ In other areas of law, there have been cases where the Court, after using the avoidance canon, has finally been forced to address a constitutional question, and has resolved it in Congress's favor.¹⁸² Second, given the reality that sometimes there are constitutional rights without readily available remedies,¹⁸³ why should courts be concerned if judicial review of some constitutional claims is foreclosed because other factors weigh in favor of time limits to review?

With respect to the first question, it is true that the constitutional avoidance canon is not supposed to be a way of resolving a constitutional question in and of itself. But using the constitutional avoidance canon is still constitutional decisionmaking.¹⁸⁴ In fact, the constitutional avoidance canon is often criticized for exactly this reason.¹⁸⁵ When the Court adopts strained statutory constructions to avoid constitutional questions, it is choosing to uphold constitutional norms over faithfulness to Congress's legislative intent.¹⁸⁶ This matters. Occasionally, the Court has construed a case that used the constitutional avoidance canon as having decided a constitutional question even when the case did not explicitly do so.¹⁸⁷ And, arguably, the fact

¹⁸¹ See *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (“The [constitutional avoidance] canon is not a method of adjudicating constitutional questions by other means.”).

¹⁸² See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960 (1997) (providing two First Amendment examples).

¹⁸³ See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 367 (1993) (“If there is no right to individually effective remedies in every constitutional case, how could there be a right to judicial review of all constitutional claims?”).

¹⁸⁴ See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2164 (2015) (“The Court generally defends the avoidance canon as a species of judicial restraint. But the only thing the avoidance canon ‘avoids’ is the invalidation of a statute. Recent history makes clear that the avoidance canon does *not* avoid a constitutional decision; it is, rather, a tool of constitutional decisionmaking.”); see also Eric S. Fish, *Constitutional Avoidance As Interpretation and As Remedy*, 114 MICH. L. REV. 1275 (2016) (arguing that Chief Justice Roberts’s use of the constitutional avoidance canon is actually a form of constitutional remedy).

¹⁸⁵ See e.g., Katyal & Schmidt, *supra* note 184 (critiquing the Supreme Court’s use of the avoidance canon in recent years as enabling the Court to adopt “dubious readings” of federal statutes and to articulate new constitutional norms).

¹⁸⁶ Cf. Fish, *supra* note 184, at 1279 (arguing that in addition to acting as a canon of construction that purports to help judges decipher statutory meaning, the constitutional avoidance canon should be separately used as a constitutional remedy that would “allow judges to actually change a statute’s meaning by creatively reinterpreting it to render it constitutionally valid”).

¹⁸⁷ For example, in *Kwong Hai Chew v. Colding*, the Court construed an immigration regulation as forbidding the Attorney General from authorizing the exclusion of a lawful permanent resident from the country without a hearing so as not to raise the constitutional question of whether the Attorney General had violated the lawful permanent resident’s constitutional right to due process. 344 U.S. 590, 598–99, 602–03 (1953) (noting that the

that the Court is engaging in constitutional decisionmaking when it invokes the avoidance canon still matters even if the Court ultimately dismisses the constitutional challenge when pressed to confront it in a particular case. For example, it might well be true that the Court's reluctance to face the constitutionality of time limits to judicial review squarely makes it difficult to argue that a time limit that forecloses all constitutional challenges after a certain point—regardless of whether future affected parties could have brought their claims within the permissible time period—is *inherently* unconstitutional. But there is more than enough case law to suggest that courts should proceed with caution when reading a time limit provision to do so.¹⁸⁸

The second question—why should courts be concerned if opportunities for judicial review are foreclosed—is trickier and brings up larger questions about the role of courts. Even if there are some constitutional rights that remain underenforced,¹⁸⁹ this should not mean that courts should refrain from protecting those rights as much as they are able. The foundational case on the supremacy of judicial review, *Marbury v. Madison*, seems to insist that there be a right to review, even if no remedy is ultimately available.¹⁹⁰ For this question, there can be no hard and fast rule, but perhaps, as Richard Fallon suggests,¹⁹¹ a way to approach the issue would be to balance the interests of involved parties, in an approach similar to that of the *Mathews*

Court did “not reach the . . . constitutional status” of the regulation as “if it were interpreted as denying to petitioner all opportunity for a hearing” nor the question of the Attorney General’s authority “to order the deportation of petitioner after giving him reasonable notice of the charges against him and allowing him a hearing sufficient to meet the requirements of procedural due process”). The Court in a later case construed *Kwong Hai Chew* as having held that a returning resident alien “is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him” See *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963) (citation omitted). While the Court in *Kwong Hai Chew* in fact observed that the petitioner was entitled to a “fair opportunity to be heard” prior to expulsion as a matter of procedural due process, the Court did not flesh out the requirements of procedural due process. See 344 U.S. at 598 (mentioning only that, “for example, [the petitioner] is entitled to a fair chance to prove mistaken identity”).

¹⁸⁸ See *supra* notes 148–50 and accompanying text.

¹⁸⁹ For examples of underenforced constitutional rights or norms, see generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

¹⁹⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested right.”).

¹⁹¹ See Fallon, *supra* note 183, at 366–72 (describing a possible way to address the issue of when justiciable rights without remedies should be permissible).

test¹⁹² for procedural due process. According to Fallon, when determining whether total preclusion of constitutional claims is appropriate, courts should balance the government's interest in efficiency with the strength of the affected party's interest.¹⁹³ So for example, courts should favor judicial review of constitutional claims when fundamental interests that lie at the heart of the Due Process Clause, such as the right to liberty or property, are at stake.¹⁹⁴ And specifically in the context of statutory time limits that result in total preclusion of judicial review of constitutional claims, courts should favor liberal readings of those time-limit provisions when there are strong reasons to think that another similarly situated party would not have been able to vindicate the present plaintiffs' concerns effectively within the prescribed time limit.

Arguably, this is what the lower federal courts already do. In *United States v. Walsh*, for example, in upholding a statutory time limit, the Ninth Circuit in part relied on the fact that there were other entities (in that case asbestos companies) who could have raised the relevant challenges within the time limit.¹⁹⁵ In the context of an agency regulatory scheme that will affect several powerful entities that will have the ability to pose effective challenges within the prescribed time limit, it makes sense for a court to be less concerned about the future preclusion of constitutional claims of similarly situated parties. But when circumstances are different, courts should be much more loath to find preclusion of constitutional challenges permissible. And indeed, they are. In *Wind River*, another Ninth Circuit case, the court declined to read a statutory time limit on challenges to agency action as foreclosing constitutional and *ultra vires* challenges because the court felt that constitutional challenges would, by their nature, "require a more 'interested' person than generally will be found in the public at large."¹⁹⁶ Unfortunately, as Part III discusses in more detail, there are considerable barriers to courts adopting this approach in the context of expedited removal.

¹⁹² See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring courts to balance the governmental interest, private interests, and the risk of error when determining whether a government procedure complies with procedural due process).

¹⁹³ See Fallon, *supra* note 183, at 370–72.

¹⁹⁴ See, e.g., *United States v. Salerno*, 481 U.S. 739, 750 (1987) ("On the other side of the scale, of course, is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.").

¹⁹⁵ See *supra* note 172 (describing case).

¹⁹⁶ *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991).

III

APPLYING “CONSTITUTIONAL REVIEW” TO THE EXPEDITED REMOVAL TIME LIMIT

From Part II we now have some guiding principles: If a statutory time limit forecloses the constitutional challenges of people who would not have had standing to bring their challenges within the prescribed time limit, courts should read the time-limit provision liberally so as to avoid having to determine the validity of foreclosing judicial review of constitutional claims. So how do these principles fare when applied to expedited removal? Not very well. This Part begins by applying Verkuil’s model of constitutional review to the statutory time limit on expedited removal. It next discusses how courts have used the entry fiction doctrine to prevent parties from bringing constitutional challenges to the expedited removal time limit. It concludes by considering how the planned expansion of expedited removal might provide a new opportunity to raise an effective challenge.

A. *Constitutional Review of the Expedited Removal Time Limit*

In *AILA II*, the D.C. Circuit Court noted that the sixty-day expedited removal time limit at issue was a provision similar to those of many other agencies.¹⁹⁷ But this is only partially correct. By itself the sixty-day time limit may seem like any other agency’s statutory time limit, but when evaluated in light of the restrictions on judicial review that accompany it, it looks very little like statutory time limits in other agency contexts. Virtually no other congressional statute restricts judicial review of constitutional challenges so severely.¹⁹⁸ Even other provisions in the Immigration and Nationality Act, for example, leave a safety valve for constitutional questions.¹⁹⁹ Not so, however, for expedited removal. The following example explains the implications of this difference.

Imagine that a lawful permanent resident (LPR) with intellectual disabilities, Mariana, is detained today at an airport and unable to demonstrate to an immigration officer’s satisfaction that she is a valid green-card holder. The officer and officer’s supervisor sign her deportation order after detaining her, and only then is she allowed to con-

¹⁹⁷ See *AILA II*, 199 F.3d 1352, 1358 (D.C. Cir. 2000) (noting that “[a] sixty-day time limit is commonplace for judicial review of agency action” and citing examples).

¹⁹⁸ As discussed, the one possible exception, the time limit provision in the Trans-Alaska Pipeline Authorization Act, has never had its validity contested in court. See *supra* notes 163–67 and accompanying text.

¹⁹⁹ For example, 8 U.S.C. § 1252(a)(2)(D) states that “nothing in [this judicial review provision] . . . shall be construed as precluding review of constitutional claims or questions of law”

tact family, who quickly hire a lawyer who files an individual habeas petition. Under the model of constitutional review outlined in Part II, Mariana should be able to challenge not only the immigration officer's erroneous finding that she was not a valid green-card holder, but also the constitutionality of the provisions as applied to her and similarly situated plaintiffs. She might want to argue that the failure to provide her access to counsel during her secondary inspection violated her due process rights or that, as a person claiming to be an LPR, she should not have been subject to expedited removal at all. But under the current state of the law neither of these claims would ever see the light of day.

As you may recall from Part I, IIRIRA limits the scope of individual habeas review available to persons subject to expedited removal. The scope of review is limited to just three questions: 1) whether the person ordered removed is an alien; 2) whether the person was actually ordered removed; and 3) whether the petitioner could prove by a preponderance of the evidence that they were actually a lawfully admitted noncitizen.²⁰⁰ Under a strict reading of this statute, a court would not have jurisdiction to hear Mariana's constitutional claims. The only thing that Mariana could contest is the immigration officer's finding that she is not actually an LPR. Here is where the sixty-day time limit lands an additional blow. Even if a court found that it *did* have jurisdiction to consider Mariana's constitutional claims within the scope of an individual habeas proceeding, the claims articulated above are actually about the constitutional validity of the expedited removal procedures and regulations, and thus time-barred by the sixty-day time limit. Thus both of Mariana's claims, neither of which have ever been raised or litigated by a court²⁰¹ would be foreclosed.²⁰²

In a non-immigration context, this situation would be unlikely to stand. The plaintiff here would obviously not have had standing to bring her claims in 1997, which was before she was subject to expe-

²⁰⁰ 8 U.S.C. § 1252(e)(2).

²⁰¹ Recall from *AILA II* that only claims regarding valid visa holders, who are distinct from green-card holders, were raised. *See supra* Section I.B.

²⁰² The reason for this is that the individual plaintiffs with standing to bring claims for asylum seekers, LPRs, and others had been subject to expedited removal *after* the sixty-day time limit. *See supra* notes 57–59 and accompanying text. A professor who was an associate with a law firm that assisted in the *AILA* litigation informed the Author that the organizations that brought the litigation had been (understandably) unable to locate plaintiffs falling within these particular subclasses within the sixty days, which is why they had to use plaintiffs whose claims were time-barred according to the judge's construction of the statute. Conversation with Adam B. Cox, Robert A. Kindler Professor of Law, N.Y. Univ. Sch. of Law, in New York, N.Y. (Mar. 10, 2017).

dited removal and thus before she had a cognizable injury. And unlike the asbestos companies in *United States v. Walsh*,²⁰³ she would have had no reason to assume that a similarly situated plaintiff would vindicate her constitutional rights. If the purpose of a statutory time limit on judicial review of agency rules is to give regulated entities one opportunity to contest a rule's validity, then it needs to be a *real opportunity* to contest the Agency's rules or regulations, not one in which claims that were never raised in the first instance are foreclosed for all time.

Despite these arguments, courts have been loath to expand the scope of review in individual habeas proceedings to permit such collateral attacks. On the rare occasions where a habeas petitioner will attempt to raise a claim that *could* be construed as a challenge to the validity of the expedited removal system, courts have been quick to raise the sixty-day time limit.²⁰⁴ This is particularly striking in light of other immigration cases like *INS v. St. Cyr*²⁰⁵ and *Zadvydas v. Davis*,²⁰⁶ where the Supreme Court read constitutional protections into certain statutory provisions in order to avoid constitutional concerns. In the case of *Zadvydas*, this meant reading a provision that forbid indefinite detention of noncitizens with final deportation orders so as not to raise the question of whether indefinite detention of noncitizens violated the Due Process Clause.²⁰⁷ In the case of *St. Cyr*, the Court read a provision that purported to preclude any judicial review of the immigration agency's discretionary decisions as still permitting the filing of statutory habeas corpus petitions in federal court in order to avoid the question of whether Congress had violated the Suspension Clause.²⁰⁸ In response to *St. Cyr*, Congress passed the REAL ID Act of 2005, which included a provision that explicitly pre-

²⁰³ See *supra* notes 172, 195 and accompanying text (noting that the *Walsh* court justified its decision on the basis that there were other asbestos companies who could have brought challenges within the time limit).

²⁰⁴ See, e.g., *Shunaula v. Holder*, 732 F.3d 143, 147 (2d. Cir. 2013) (noting that even if petitioner's complaint could be viewed as systemic, it was a challenge that could only be brought in the District Court of Columbia under 8 U.S.C. § 1252(e)(3)); *Vaupel v. Ortiz*, 244 F. App'x 892, 895–96 (10th Cir. 2007) (noting that petitioners' claims that the procedures violated his due process rights could not be raised in that circuit court and were also time-barred).

²⁰⁵ 533 U.S. 289 (2001).

²⁰⁶ 533 U.S. 678 (2001).

²⁰⁷ See *id.* at 690 (“A statute permitting indefinite detention of an alien would raise a serious constitutional problem.”).

²⁰⁸ See *St. Cyr*, 533 U.S. at 300 (noting that “[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions,” and that the Suspension Clause requires “some judicial intervention in deportation cases”) (internal citations omitted).

served questions of law and constitutional claims for judicial review.²⁰⁹ But courts were quick to clarify that the new provision did *not* apply to judicial review of expedited removal orders.²¹⁰ So what gives? What exactly about expedited removal makes it so much more difficult to argue for additional constitutional safeguards? Understanding the answer requires quickly parsing through two related but distinct concepts: the entry fiction doctrine and the extraterritorial application of constitutional rights.

B. The Entry Fiction Doctrine and the Extraterritorial Application of Constitutional Rights

Part I discusses how the entry fiction doctrine is a corollary of the plenary power doctrine²¹¹ that allows courts to treat noncitizens who are seeking “admission”²¹² to the country as if they were not in the territorial United States. The distinction has tremendous importance because the extraterritorial application of constitutional rights to noncitizens has always been somewhat unclear.²¹³ This is particularly the case with due process rights. On the question of the extent to which a noncitizen at the border has due process rights, the Supreme Court has usually, with one notable exception,²¹⁴ adhered to a for-

²⁰⁹ REAL ID Act of 2005, Pub. L. No. 109–13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310.

²¹⁰ See, e.g., *Garcia de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1138 (9th Cir. 2008).

²¹¹ As explained *supra* text accompanying note 24, the plenary power doctrine is the principle that the political branches’ decisions regarding immigration are either unreviewable or subject to extraordinary deference.

²¹² See *supra* notes 48–50 and accompanying text (defining admission).

²¹³ And indeed, it can vary for different purposes. For example, the entry fiction doctrine is generally not used for the purpose of bringing Fourth Amendment challenges. See, e.g., *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 623–24 (5th Cir. 2006) (refusing to apply the entry fiction doctrine in a case involving application of Fourth Amendment rights to an unauthorized immigrant beaten up by a CBP agent within the territorial United States).

²¹⁴ In 1982, the Supreme Court appeared to soften its stance in *Landon v. Plasencia*. 459 U.S. 21 (1982). In *Landon*, a lawful permanent resident who had previously lived in the United States was placed in exclusion hearings (this was before expedited removal was implemented in 1996) upon her return to the U.S. for her role in alleged human smuggling. *Id.* at 23. The Court found that, as a returning permanent resident, she had “weighty” due process interests and remanded for consideration of whether she was denied due process in her exclusion hearing. *Id.* at 34–37. This case arguably weakened the strict entry analysis the Court had employed in other cases because now the Court was looking at other factors besides physical presence in the United States when determining how much process was due. See *id.* at 32–33; see also David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 191, 214–15 (1983) (arguing that established community ties “ought to count in deciding what process is due” and citing *Landon* as an example of the Court adopting similar logic to that of his proposal). *Zadvydas*, however, decided in 2001, seemed to move the Court back to a strict territorial analysis. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (holding that

malist territorial framework. Under this framework, a noncitizen at the border has no due process rights, and thus any deficiencies in the process that determines whether a noncitizen may enter the country are not legally cognizable injuries.²¹⁵ The Court famously summed up this view as “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”²¹⁶

In construing the expedited removal provisions, the courts have overwhelmingly embraced the strict territorial/extraterritorial distinction.²¹⁷ Under this logic, because noncitizens subject to expedited removal are seeking “admission,” and are not actually on U.S. soil, they do not have any due process rights.²¹⁸ If a person does not have due process rights, then the procedure authorized by Congress, in this case, the limited habeas provision of INA § 242(e)(3), is sufficient due process.²¹⁹ This finding continues to pose a frustrating roadblock to meaningful constitutional challenges to the expedited removal scheme as a whole and to the statutory time limit specifically.

In 2008, the landmark Supreme Court case *Boumediene v. Bush*²²⁰ appeared to offer some hope. In *Boumediene*, the Court found for the first time in modern history that a provision of a congressional statute, Section 7 of the Military Commissions Act, violated the Suspension Clause.²²¹ In response to a prior Supreme Court ruling, Congress had passed an act eliminating judicial review of habeas petitions of Guantánamo detainees, opting to use military

noncitizens with final removal orders nonetheless had due process rights that prevented them from remaining in indefinite detention because they were within the physical territory of the United States); see also Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 407 (2002) (describing *Zadvydas* as a reaffirmation of territorial analysis).

²¹⁵ See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543–44 (1950) (finding that noncitizens subject to exclusion orders had no due process rights with which to challenge the order); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214–15 (1953) (same).

²¹⁶ *Knauff*, 338 U.S. at 544.

²¹⁷ See, e.g., *Khan v. Holder*, 608 F.3d 325, 329–30 (7th Cir. 2010) (stating that “[t]he Khans . . . were at the point of initial entry where their constitutional rights were at their lowest ebb”); *Garcia de Rincon v. Dep’t of Homeland Sec.*, 539 F.3d 1133, 1141 (9th Cir. 2008).

²¹⁸ See *Garcia de Rincon*, 539 F.3d at 1141.

²¹⁹ See, e.g., *Castro v. Dep’t of Homeland Sec.*, 835 F.3d 422, 444–49 (3d Cir. 2016), cert. denied, 137 S. Ct. 1581 (2017) (finding that Congress had not violated the Suspension Clause in not providing for review of constitutional claims in context of individual habeas proceedings).

²²⁰ 553 U.S. 723 (2008).

²²¹ The Suspension Clause requires Congress to not suspend the writ of habeas corpus except in times the public safety requires it or if there has been a rebellion. U.S. CONST. art. I, § 9, cl. 2.

commissions instead.²²² A statute may modify the scope of habeas review without violating the Suspension Clause so long as the habeas substitute is “neither inadequate nor ineffective to test the legality of a person’s detention.”²²³ The Court found that the Suspension Clause applied to detainees at Guantánamo Bay, and thus that Congress’s alternative procedures were an inadequate substitute for habeas corpus and in violation of the Suspension Clause.²²⁴ In so doing, the Court brought a new functional analysis to when the habeas right, a closely related but conceptually distinct corollary of due process,²²⁵ could run extraterritorially. The Court balanced three factors:

- (1) the citizenship and status of the detainee and the adequacy of the process through which [the determination to detain the person] was made;
- (2) the nature of the sites where apprehension and then detention took place;
- and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.²²⁶

In the Court’s analysis, while citizenship put a thumb on the scale towards finding that the right to petition for habeas review did run, it was not necessary as all of the detainees at Guantánamo were noncitizens and not on U.S. territory.²²⁷

Federal courts scholars and immigration rights advocates immediately grasped the potential significance of applying *Boumediene* to expedited removal.²²⁸ If the Suspension Clause ran to noncitizens detained at the border, then advocates might be able to make the case that the individual habeas review provided for in INA § 242(e)(3) was an inadequate substitute for constitutional habeas corpus. This would then require a court to read INA § 242(e)(3) as providing room for constitutional challenges so that it would avoid having to decide whether the individual habeas review provision violated the Constitution.

²²² *Boumediene*, 553 U.S. at 736.

²²³ *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

²²⁴ *Boumediene*, 553 U.S. at 771, 792.

²²⁵ See, e.g., Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 V.A. L. REV. 1361, 1416 (2010) (arguing that when the writ of habeas corpus is suspended under the Suspension Clause, basic procedural due process protections must still survive).

²²⁶ *Boumediene*, 553 U.S. at 766.

²²⁷ See *id.* at 766–71.

²²⁸ See, e.g., Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 571–78 (2010) (discussing the effect of *Boumediene* on the constitutionality of expedited removal); Jennifer Norako, Comment, *Accuracy or Fairness?: The Meaning of Habeas Corpus After Boumediene v. Bush and Its Implications on Alien Removal Orders*, 58 AM. U. L. REV. 1611, 1647–50 (2009) (making similar recommendations to reform the REAL ID Act and its restrictions on the availability of habeas review for noncitizens).

Unfortunately, virtually every court that has considered the question of whether the expedited removal provisions as written violate the Suspension Clause post-*Boumediene* has rejected this argument.²²⁹ The most recent rejection came from the Third Circuit in the case *Castro v. Department of Homeland Security*.²³⁰ Twenty-eight women and their children, all Central Americans who alleged that they were fleeing either gang violence or domestic violence, were detained at the border within hours of crossing unlawfully.²³¹ In each of their cases, an asylum officer failed to find that the petitioner had a credible fear of persecution, an immigration judge affirmed the asylum officer's findings,²³² and all were placed in expedited removal proceedings.²³³ The women sued, arguing that the immigration judges and asylum officers had violated their due process rights with regard to their credible fear determinations.²³⁴ The women argued that the federal court had jurisdiction to hear their claims because the limited scope of INA § 242(e)(3) was an inadequate substitute for the habeas right and an unlawful violation of the Suspension Clause.²³⁵ The Third Circuit rejected this argument, applying *Boumediene* and finding that the Suspension Clause did not run to the petitioners because they were seeking initial admission to the United States, and thus had no constitutional rights at all.²³⁶

In coming to its conclusion, the *Castro* court relied heavily on both the plenary power and entry fiction doctrines. The Court noted that, at least with regard to noncitizens seeking initial entry at the border, the plenary power doctrine was in full effect.²³⁷ It then affirmed the entry fiction doctrine to conclude that because the asylum seekers were arrested “within hours of surreptitiously entering the United States,” they should be treated as people seeking initial admission to the U.S.²³⁸ In other words, despite the physical presence

²²⁹ See, e.g., *Dugdale v. U.S. Customs & Border Prot.*, 88 F. Supp. 3d 1, 8 (D.D.C. 2015) (rejecting the Suspension Clause argument against the petitioner and noting that “courts after *Boumediene* uniformly have held that they lack jurisdiction over constitutional challenges to that system”).

²³⁰ 835 F.3d 422 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017).

²³¹ *Id.* at 427–28.

²³² As discussed in Part I, noncitizens who express a credible fear of persecution can have that determination (and *only* that determination) reviewed by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012).

²³³ *Castro*, 835 F.3d at 428.

²³⁴ *Id.*

²³⁵ *Id.* at 444.

²³⁶ *Id.* at 445.

²³⁷ *Id.* at 443 (“[T]he [Supreme] Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country.”).

²³⁸ *Id.* at 445–46.

of the asylum seekers on American soil, they had no constitutional rights.²³⁹

In making this decision, however, the *Castro* court relied on a distinction that the expedited removal provisions purposefully eliminated. As you may recall from Part I, pre-IIRIRA, exclusion hearings concerned noncitizens seeking to “enter” the United States, while deportation hearings concerned noncitizens who were already physically present in the country. IIRIRA collapsed these distinctions, and Congress granted DHS the authority to subject to expedited removal people who have already “entered” and are thus physically present in the United States, but who had not been subject to formal inspection, or “admitted” in immigration law parlance.²⁴⁰ The Supreme Court has held that basic due process rights, which would include the right to invoke the Suspension Clause, run to all people who are indisputably in the territorial United States.²⁴¹

Yet expedited removal could potentially apply to people within the territorial United States too.²⁴² Thus *Castro*’s invocation of the entry fiction doctrine seems particularly odd given that Congress did not care about the territorial/extraterritorial distinction when it created expedited removal in the first place.²⁴³ Arguably, the *Castro* court itself acknowledged this strangeness. The opinion took pains to note that the asylum seekers had never been to the United States before, were detained less than four miles away from the border, and most had only been in the country for one hour before they were arrested by immigration officers.²⁴⁴ By emphasizing these details, the *Castro* court seemed to intimate that its calculus might have been different if the asylum seekers had had pre-existing ties to the United States, had spent a longer period of time in the United States prior to their apprehension, or had been arrested farther away from the border.

This is where the Department of Homeland Security’s planned expansion of expedited removal becomes significant. At the moment,

²³⁹ See *id.* at 445, 448–49.

²⁴⁰ See 8 U.S.C. § 1225(b)(1)(A)(iii) (2012).

²⁴¹ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); Redish & McNamara, *supra* note 225, at 1367 (describing how the writ of habeas corpus serves as “the primary mechanism for the enforcement of the Fifth Amendment due process guarantee against extra-judicial coercive action by the executive”).

²⁴² See *supra* note 121 (describing past expansions of expedited removal).

²⁴³ Professor Neuman also makes this point. See Neuman, *supra* note 17, at 1673–79 (describing how the expedited removal statutory scheme elided distinction between admission and entry).

²⁴⁴ *Castro*, 835 F.3d at 427.

expedited removal procedures can only be initiated within a hundred miles of the border²⁴⁵ (which is what allows the territorial/extraterritorial distinction, however dubious, to remain in place). But if expedited removal expands to the interior, the strict territorial/extraterritorial distinction falls on its face. Noncitizens with extensive ties to the United States could find themselves in expedited removal proceedings. Such an expansion could have two new effects. First, it would provide stronger constitutional footing for noncitizens to raise constitutional claims in their individual habeas proceedings.²⁴⁶ An expansion of expedited removal to the interior would force the courts to decide whether the INA § 242(e)(3) proceeding is truly an adequate substitute for constitutional habeas corpus for noncitizens who are indisputably within the territorial United States, and who may have extensive preexisting ties to the country. Second, it could at last give advocates the opportunity to contest the constitutionality of the statutory time limit, and argue for its invalidity as applied to people who would not have been eligible to bring their claims within the original sixty-day period.

CONCLUSION

As the administrative state has grown, so has Congress's desire to control the forum and form of challenges to agency actions that delay or infringe on the ability of agencies to implement their statutory mandates. One device Congress has used to accomplish this goal has been statutory time limits on judicial review of agency rules. As the scholar Paul Verkuil advocated, courts have generally tolerated such time limits when they foreclose *procedural* challenges after a certain time period. When substantive, and in particular *constitutional* challenges are at play, however, courts have generally been reluctant to adopt strict readings of the statutory time limit. And, at least in the case of the Supreme Court, courts will go to extraordinary lengths to avoid addressing directly the question of the validity of statutory time limits that foreclose constitutional challenges to agency rules.

²⁴⁵ See *supra* note 121 and accompanying text.

²⁴⁶ Some scholars have long advocated for a graduated application of due process rights for noncitizens that depends on the degree of the person's preexisting ties with the United States. See, e.g., David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v Davis*, 2001 SUP. CT. REV. 47, 48 (making this argument); see also Rick Hills, *Focusing on Temporary Visas as Protected "Liberty Interests" in the Challenges to Trump's Immigration EO*, PRAWFSBLAWG (Feb. 5, 2017, 3:34 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2017/02/focusing-on-temporary-visas-as-protected-liberty-interests-in-challenges-to-trumps-immigration-eo.html#more> (also making this argument).

Under this framework, courts should not read the expedited removal statutory time limit as barring challenges to the expedited removal regulations that could not have been raised within the time limit. But the plenary power doctrine and the entry fiction doctrine continue to wield their awful weight, blocking most attempts to persuade courts to hear challenges to the sixty-day provision. Recent plans to expand expedited removal into the interior present a new opportunity to realign immigration law with the constitutional norms and principles that guide other areas of law. By applying the analysis from the literature on statutory time limits on judicial review of agency rules to the context of the statutory time limits on expedited removal, this Note hopes to make a modest contribution to eliminating an unjust regime.