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I. INTRODUCTION: "CONTIGUOUS TERRITORIES" AS A LEGAL FICTION AND CONFLATION WITH TRADITIONAL EXPEDITED REMOVAL UNDER INA § 235

The Immigration and Nationality Act ("INA") contains a little-known provision that permits the physical return of individuals who enter from "contiguous territories" (i.e., Mexico or Canada) pending their removal proceedings before a United States immigration judge.[1] The statute, interestingly, only applies to those who enter from those countries, and there is no requirement that the person actually be a citizen or national of either Mexico or Canada.[2] Furthermore, the provision is embedded within the "expedited removal" section, INA § 235, 8 U.S.C. § 1225; but importantly, the person subjected to the contiguous territories provision is not "deported" immediately but made to wait outside the U.S. during his judicial removal proceedings.[3] There is thus a "legal fiction" created by the statutory scheme whereby a person is "in" the U.S. for purposes of jurisdiction over his or her INA § 240, 8 U.S.C. §1229a, removal proceedings, while technically

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1. Immigration and Naturalization Act § 235(b)(2)(C), 8 U.S.C. § 1225(b)(2)(C) (2012) ("aliens arriving from a contiguous territory" (i.e., Mexico or Canada) over a "land border" can be returned to the contiguous country pending removal proceedings here in the United States).

2. *Id.*

3. *Id.*

and actually residing outside its territory.[4]

This article considers salient legal problems that this statutory provision implicates. Serious problems arise upon a close examination of the "contiguous territories" provision. There is a dearth of authority interpreting the statute's implementation which does not help matters. Moreover, it is also interesting that "contiguous territories" as a method for possible streamlining removal proceedings is situated within the statutory framework for "expedited removal" in INA § 235. Expedited removal, which enables certain classes of immigrants to be removed without the requirement or need for judicial oversight, previously has been limited by policy to those caught within 100 miles of the border to the U.S. and within fourteen days of their entry.[5] According to President Trump's Executive Order 13767, expedited removal will now be expanded to include its full statutory limits, i.e. to the entire United States and applied to those found to have entered within the past two years.[6]

Given the fact that the contiguous territories provision is found within the expedited removal section of the INA, there is every reason to believe that contiguous territories will be used in concert with, in lieu of, and as a back-up to expedited removal for those who may be encountered in the United States but who may not fall within the strict parameters required for traditional expedited removal.[7] This "alternative" method of (temporary) removal could readily be applied to those who have entered from contiguous territories. The sweep of

4. Legal fictions are ubiquitous in legal reasoning. A legal fiction has been defined as "[a]n assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates; specif., a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object." *Legal Fiction*, BLACK'S LAW DICTIONARY (10th ed. 2014). Unfortunately, legal fictions may result in unfairness or unwarranted assumptions and may be dangerous when believed. *See, e.g.*, Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 49 (2010).

5. In 2004, DHS published notice in the *Federal Register* to expand the application of expedited removal to noncitizens who are encountered within 100 miles of the border and who entered the U.S. without inspection less than 14 days before the time they are encountered. Designating Aliens for Expedited Removal, 69 C.F.R. § 48877–81 (2004); *see also* Nat'l Immigration Law Center, *DHS Announces Latest in Series of Expedited Removal Expansions*, 20 IMMIGRANTS' RIGHTS UPDATE 1 (Mar. 23, 2006).

6. *See* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (commenting specifically on "contiguous territories").

7. Under the INA, to be placed into expedited removal, an arriving alien must be inadmissible under 8 U.S.C. § 1182(a)(6)(C) (2006) (fraud or misrepresentation) or under 8 U.S.C. § 1182(a)(7) (2006) (no valid entry documents). 8 U.S.C. § 1225(b)(1)(A)(i) (2012). While an exception exists for those who can show credible fear of removal, the person placed into expedited removal would still have to pass a credible fear interview to be entitled to "asylum-only" proceedings before the immigration judge. 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

this provision poses the real danger of abuse, and, as argued herein, violates portions of the INA, domestic U.S. law, and U.S. international obligations, including duties owed to those seeking asylum or other humanitarian protections and especially duties owed to children encountered at or near the border. A host of scenarios present themselves where individuals could be immediately "returned" to the contiguous territories without clear instructions, or under a misimpression they have been actually deported and then barred from re-entry. Under these situations, the removal proceedings to which they are actually entitled would be rendered a mere nullity. They would be allegedly "awaiting" a proceeding outside the U.S. which could be completed without them were they not to show up for their hearing. If they for whatever reason do not appear on the appointed day for their hearing, an in absentia order of removal can be issued against them.[8]

The text of the President's executive order expanding expedited removal to the entire country and for those arriving aliens caught within two years from entry was operationalized in an implementing memorandum by then-Department of Homeland Security ("DHS") Secretary John Kelly.[9] In that memorandum, former Secretary Kelly noted that INA § 235(b)(2)(C) permits the return of "aliens to contiguous countries."[10] In so doing, the Secretary opined that the rationale for the return pending "the outcome of removal proceedings saves the Department's detention and adjudication resources for other priority aliens."[11] Importantly, the provision appears to be intended to be limited to those "aliens so apprehended who do not pose a risk of a subsequent illegal entry or attempted illegal entry. . . ."[12] The memorandum also specifically addresses operationalization of the contiguous territories provision with respect to unaccompanied alien children ("UACs"), noting that as to those children the requirements

8. Pursuant to Section 240(b)(5)(C) of the Immigration and Nationality Act, a person subject to an *in absentia* order has 180 days to attempt to reopen proceedings and rescind the order of removal. Such motion to reopen may be difficult to win since the burden is on the applicant to show "exceptional circumstances" for missing his or her hearing. Other options for reopening may also be available such as for lack of notice, changed country conditions, etc. 8 U.S.C. § 1229(a) (2012).

9. *See* Memorandum from John Kelly, Sec., U.S. Dep't of Homeland Security, to Kevin McAleenan, Acting Commiss., U.S. Customs and Border Protection, et al. (Feb. 20, 2017) (available at https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

10. *Id.* at 7.

11. *Id.*

12. *Id.*

of 8 U.S.C. § 1232 must be followed.[13] Clearly, the provision is still to be applied to such children with the express proviso found in the memorandum that "the law and U.S. international treaty obligations" be followed and so long as the children pose "no risk of recidivism."[14]

A close reading of the memorandum of February 20, 2017 reveals a lot about how the contiguous territories provision is expected to be implemented. First, the provision is envisioned by the federal agency at issue,DHS, to be used on certain classes of undocumented immigrants and not others.[15] The imposition of the phrase "who do not pose a risk of a subsequent illegal entry or attempted illegal entry" tells us that the agency (at least from the point of view of the publicly available policy) does not apparently want to utilize the provision for individuals with a high risk of illegal re-entry. It begs the question how the agency is going to determine this issue. It also is problematic in that people may not be given any choice in the matter. When an individual is not given a preference, they may be forcibly returned to a contiguous territory where they could be subjected to persecution, crime, homelessness or, worse for some, expulsion back to their point of origin to face persecution there.

It is troubling that the implementing memorandum contains absolutely no discussion of safeguards in the neighboring country for those who are returned pending removal.[16] The lack of safeguards, such as adequate housing, protection, access to counsel, food or other procedural protections are missing. With respect to the nature of the removal proceedings which will be available to the returned person, there is mention of the Executive Office for Immigration Review consulting with U.S. Customs and Border Protection and Immigration and Customs Enforcement "to establish a functional, interoperable video teleconference system to ensure maximum capability to conduct video teleconference removal hearings for those aliens so returned to the contiguous country."[17] The inclusion of video equipment means that the future removal hearings do not have to be held in any established immigration court location, but could be held anywhere that video equipment is available. Such mobility implies that the hearings in such cases may be held at the border itself where presumably the returned immigrant's fate would be decided without

13. *Id.*
14. *Id.*
15. *Id.*
16. *See generally id.*
17. *Id.* at 7.

their ever having to be officially "re-entered" into the United States.

As noted by at least one commentator, the return of a person to the contiguous territory, e.g., Mexico, pending further proceedings leads to three logical possibilities: (1) the person is a citizen of Mexico, (2) the person is a citizen of some third country but has valid immigration status in Mexico; or (3) the person is a citizen of some third country but lacks valid immigration status in Mexico.[18] In the first and third cases, according to the blog, the returning of the person to Mexico under these circumstances would be "deeply problematic."[19] As will be discussed in a further section of this article, the provision if utilized in this deleterious way could violate U.S. treaty obligations, such as the 1987 U.N. Convention Against Torture (the U.S. is a state party), 1967 Protocols relating to the Status of Refugees (the U.S. is a state party), among other international instruments and norms, as well as portions of U.S. domestic law, most notably INA § 241(b)(3), relating to mandatory withholding of removal for those whose life or freedom would be threatened (enshrining the principle of non-refoulement).

A similar point also was made by the Harvard Immigration and Refugee Clinical Program, in a monograph discussing the impact of President Trump's executive orders on asylum seekers.[20] As explained in that paper, the principle of non-refoulement states that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, or membership of a particular social group or political opinion."[21] The Harvard Clinic noted that the implementation of the President's executive order, in section 7, is unclear and implementation would require cooperation from Mexico and Canada.[22] Furthermore, they note that in the event the U.S. sends "asylum seekers back to Mexico pending a formal removal proceeding, there is significant likelihood that Mexico would send those asylum seekers

18. David Isaacson, *Destroying the Case in order to Save It*, THE INSIGHTFUL IMMIGRATION BLOG (Feb. 28, 2017), http://blog.cyrusmehta.com/2017/02/destroying-the-case-in-order-to-save-it-why-returning-asylum-applicants-to-contiguous-territory-under-ina-§235b2c-would-often-violate-both-law-and-common-sense.html.

19. *Id.*

20. *See* Amy Volz, et al., *The Impact of President Trump's Executive Orders on Asylum Seekers*, HARV. IMMIGR. & REFUGEE CLINICAL PROGRAM (2017), https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf.

21. *Id.* at 6–7 (citing Art. 33 of the 1951 Refugee Convention).

22. *Id.* at 7.

back to their countries of origin."[23] The monograph then goes on to cite statistics showing an increase in deportations from Mexico, and especially to countries in the Central American northern triangle countries of El Salvador, Guatemala, and Honduras.[24] "Lawyers have noted multiple violations of due process for asylum seekers in Mexico; crime against migrants (including human trafficking, kidnapping, and rape) is widespread and largely goes unprosecuted.[25]

A final point to notice by way of introduction is that the contiguous territories provision contains no express time or geographical limitation found in the INA. Even the related expedited removal provisions for those found to have entered without inspection without valid entry documents or through fraud or misrepresentation are limited to those found within the U.S. within two years.[26] Since no limit exists on the contiguous territories provision, it is possible that DHS could return those found within the U.S. who are deemed to be "arriving aliens" even where a person has actually been in the country far longer than the two-year period. It is problematic furthermore because those who are caught within the U.S. and who entered from a contiguous territory (no matter when they entered) may now presumably be "returned" immediately to Mexico without seeing an immigration judge and without the possibility of any protection in the neighboring country, a place they may fear persecution, or where they have little or no connection and no way to support themselves while awaiting a future hearing which may be wholly inaccessible to them.

II. POSSIBLE LEGAL CHALLENGES IN UNITED STATES FEDERAL COURTS

A. Habeas Corpus and the Real ID Act of 2005 – limits imposed on habeas by the INA

Petitioning for a writ of habeas corpus presents one way to seek to remedy the use or abuse of the contiguous territories provision. Necessarily, any immigrant's options for relief in this regard are going to be severely limited by several factors. First, the person may be no

23. *Id.*

24. *Id.* at 8.

25. *Id.* (citing *Mexico Now Detains More Central American Migrants than the United States*, WASHINGTON OFFICE ON LATIN AMERICA (June 11, 2015), https://www.wola.org/2015/06/mexico-now-detains-more-central-american-migrants-than-the-united-states/).

26. Immigration and Nationality Act § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii) (2012).

longer present in the U.S. Second, she may lack access to counsel, and especially counsel who are able to navigate federal court procedures required to seek to enjoin the Department of Homeland Security from "returning" an arriving alien to a contiguous territory under the INA. Furthermore, there are various sections of the INA which limit jurisdiction in federal district court, following the Real ID Act of 2005.[27] INA § 242 [8 U.S.C. § 1252] has provisions which restrict courts from even hearing actions to challenge expedited removal proceedings, more generally. In the words of the statute, "no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [8 U.S.C. § 1225(b)(1)] . . . ."[28] Because the contiguous territories provision is in 8 U.S.C. § 1225(b)(2)(C) and ***not*** 1225(b)(1), then the restriction on judicial review (at least with respect to this limiting statutory provision) should not be used as a valid reason to restrict judicial review over a contiguous territories claim.[29]

As the Real ID Act of 2005 made clear, federal district courts no longer have jurisdiction over challenges to final orders of removal.[30] Instead, pursuant to 8 U.S.C. § 1225(a), petitioners must exhaust their administrative remedies before the immigration judge ("IJ") and Board of Immigration Appeals ("BIA") and then bring a challenge in the form of a petition for review to a final order exclusively in the circuit court of appeals. Unfortunately, this jurisdiction-stripping provision often means that petitioners will have to await a remedy to their constitutional challenges until the appropriate circuit court of appeals reviews their case. Many times, however, a "victory" at the circuit court level may be an illusory one where the petitioner has already been deported and cannot be found or is unable to return to the U.S.[31]

The jurisdiction-stripping provision, in 8 U.S.C. § 1252, does not

27. The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005), imposed limits on habeas jurisdiction in federal court, making petitions for review in the circuit courts of appeals the exclusive means of challenging a final order of removal. *See* 8 U.S.C. § 1252(a), discussed more in depth *infra* Part II (B).

28. 8 U.S.C. § 1252(a)(2)(A)(i) (2012).

29. Even in cases involving expedited removal orders, petitioners are still entitled to judicial review over three issues: (1) whether the petition is an alien; (2) was ordered removed; (3) whether the petitioner can prove by a preponderance of evidence that he or she is "lawfully admitted for permanent residence," admitted as a refugee," or granted asylum. 8 U.S.C. § 1252(e)(2)(A–C) (2012).

30. 8 U.S.C. § 1252(a)(5) (2012).

31. *See* Geoffrey A. Hoffman, et al., *Immigration Appellate Litigation Post-Deportation: A Humanitarian Conundrum,* 5 HOUSTON L. REV.-E.: OFF THE RECORD 143 (2015).

foreclose all habeas cases since they still can be brought to challenge the conditions of, and the reasons for, a person's confinement if in violation of law. If a person is being held "in custody" by the federal government in violation of a federal statute or the United States Constitution, then habeas may permit a federal district court to remedy the violation.[32] The argument will turn on whether a federal court will exercise jurisdiction over a person who has been "returned" (or about to be returned) to a contiguous territory. One issue will be whether that person is still "in custody" for purposes of habeas jurisdiction. Given how expansively the definition of "in custody" has been interpreted, there should be no question that such an immigrant is "in custody" for purposes of a valid habeas claim.[33] Another issue may be the appropriate venue in cases where an immigrant is returned and no longer in the United States. Given the flexibility of the venue rules under 8 U.S.C. § 1291 this also should not present a significant obstacle to federal court jurisdiction.[34]

Even though federal courts do have jurisdiction over such cases, the government may argue that another section of the judicial review statute should be held to prevent any federal court review whatsoever. Under INA § 242(g), 8 U.S.C. § 1252(g), the government in federal court may attempt to obtain a dismissal based on lack of jurisdiction under the jurisdiction-stripping provision in INA § 242(g). In the words of this limitation on judicial review, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."[35] In that provision, the key terms "commence proceedings" "adjudicate cases" and "execute removal proceedings" have been narrowly construed so that the applicability of § 242(g) to foreclose review is not always applicable.[36] In addition, the

32. *See Judicial Review Provision of the Real ID Act*, LEGAL ACTION CTR. – AM. IMMIGR. COUNCIL (June 7, 2005), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/realid6705.pdf.

33. *See* Rumsfeld v. Padilla, 542 U.S. 426, 437 (2004) ("[O]ur understanding of custody has broadened to include restraints short of physical confinement"); *see also Introduction to Habeas Corpus*, LEGAL ACTION CTR. – AM. IMMIGR. COUNCIL (June 2008), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf.

34. *See* 28 U.S.C. § 1391(e) (2006) (providing for venue in case in which defendant is officer or employee of federal government).

35. 8 U.S.C. § 1252(g) (2012).

36. According to one commentator, "[o]n its face, section 242(g) appears broad, as to abolish judicial review of practically every claim of a noncitizen challenging aspects of his detention or removal not specifically authorized under the INA. However, IIRIRA's legislative

use of a "return" to contiguous territories while removal proceedings are pending does not obviously fall within any one of these three categories. Therefore, a federal district court should not be persuaded to dismiss a challenge on this basis.

Under INA § 242, 8 U.S.C. § 1252, there is a further way to challenge a return to a contiguous territory while removal proceedings are pending. Although challenges to individual cases where expedited removal has been ordered are severely circumscribed by the INA, there is a category of cases specifically allowed for in the INA relating to judicial review over "challenges to the validity of the system." Section 242(e)(3) of the INA, 8 U.S.C. § 1225(e)(3), specifically allows for review of determinations under "§ 1225(b)" – note it is not limited to (b)(1) but applies to all subsections including contiguous territories determinations – and "its implementation."[37] Such cases are brought in the U.S. District Court for the District of Columbia.[38] The deadline for bringing such an action is expressly set forth in the statute: "Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure.…"[39]

B. Circuit Court Petition for Review as exclusive means of challenging a final order of removal under INA § 242(a)(5); 8 U.S.C. § 1252(a)(5)

Given that federal courts of appeals are now the exclusive means of addressing challenges to final orders of removal, as we have seen, a contiguous territories challenge in federal district court must be framed carefully in such a way that the petitioner is not challenging the underlying removal proceeding or a final order of removal. Courts have found jurisdiction in a variety of habeas cases even where the removal proceedings are still ongoing and prior to the issuance of a final order of removal.[40] Moreover, a person who has been or is about to be "returned" to a contiguous territory will have a variety of Constitutional and/or statutory claims, *see infra* Part II(D) and (E),

history demonstrates that Congress never intended for section 242(g) to strip federal court jurisdiction over damages actions brought by noncitizens against immigration officials." Sameer Ahmed, *INA Section 242(g): Immigration Agents, Immunity, and Damage Suits*, 119 YALE L.J. 625, 627 (2009).

37. 8 U.S.C. § 1252(e)(3)(A) (2012).

38. *Id.*

39. 8 U.S.C. § 1252(e)(3)(B) (2012).

40. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK, 1652–59 (15th ed. 2016) (discussing cases); *see also* Jennings v. Rodriguez, No. 15–1204 (S. Ct. Feb. 27, 2018).

because they will be severely hampered in their ability to fully litigate their case in a removal proceeding. Issues will arise impacting access to counsel, evidence, or witnesses, as well as the safety and well-being of a petitioner who is residing in a foreign country without housing, employment, or the ability to feed themselves or their children.

A contiguous territories challenge has rarely if ever been made, either as a part of a final order review (i.e., petition for review) in the circuit courts or as a habeas proceeding in the district courts.[41] The only discussion of contiguous territories in any case – reported or unreported—was in an unpublished BIA case. *In Matter of Nuzaira Mahfuz aka Nuzaira Mahfuz Rahman*, 2011 WL 1373407 (BIA Mar. 28, 2011), the respondent had been placed into removal proceedings but then returned to Canada at the land border in Niagara Falls, New York.[42] The respondent failed to appear for the removal hearing and was ordered removed in absentia. In that case, respondent relied upon *Matter of Sanchez*, 21 I&N Dec. 590 (BIA 1996) for the proposition that there are no time limits on her motion to reopen in exclusion proceedings.[43] However, the BIA distinguished *Sanchez* as that case dealt with exclusion proceedings, not removal proceedings, and the exception for time limits for motions to reopen in that context was not applicable for those in present-day removal.

Importantly, as confirmed in the John Kelly memorandum dated February 20, 2017, discussed *supra*, those who are subjected to contiguous territories return will be placed in INA § 240 removal proceedings, just like Ms. Mahfuz.[44] The Board has thus already shown its unwillingness to consider a challenge by someone who has been returned to the contiguous territory from which they have come. Although the procedural history is not very well developed in *Matter of Mahfuz*, it is apparent that the respondent in that case was

41. The research has uncovered only one case, discussed *infra*, In re: Nuzaira Mahfuz a.k.a. Nuzaira Rahman, No. A076-492-135, 2011 WL 1373407 (BIA Mar. 28, 2011) (involving a return to Canada).

42. *Id.*

43. The modes of removal of a person from the U.S. used to be divided into two separate types of proceedings: "exclusion" and "deportation" proceedings. Now, the unitary system is "removal" and generally speaking there are no longer "exclusion" proceedings in the immigration court, with rare exceptions. *See Deportation*, U.S. CITIZENSHIP AND IMMIGR. SERV., https://www.uscis.gov/tools/glossary/deportation (last visited Apr. 20, 2018) (explaining that "[p]rior to April 1997 deportation and exclusion were separate removal procedures. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 consolidated these procedures. After April 1, 1997, aliens in and admitted to the United States may be subject to removal based on deportability. Now called Removal, this function is managed by U.S. Immigration and Customs Enforcement.").

44. *See In re: Nuzaira Mahfuz*, *supra* note 41.

complaining about her departure from the U.S. under the INA § 235(b)(2)(C) process. The decision does not reveal what her arguments were for missing her court date or whether it was because of lack of notice or some other issue such as "exceptional circumstances."[45] Assuming she did have actual notice of the hearing date, the respondent could have successfully reopened her case in the event she had shown some "exceptional circumstance" within 180 days of issuance of the order as required to prevail on a motion to reopen in absentia.[46] According to the Board, she missed the deadline and the Board refused to reopen her case. One interpretation of this decision is that the Board (at least in an unpublished decision as a result of a motion to reconsider) will not view return to a contiguous country in and of itself as an "exceptional circumstance."

C. Limited Authority of the Immigration Judges and Board of Immigration Appeals to provide redress

There is unfortunately a dearth of legal precedents to help guide litigants who wish to challenge the contiguous territories provision. However, one thing we do know is that the IJs and the BIA do not have authority (generally speaking) to address Constitutional questions because they do not represent Article III courts.[47] For example, as the leading sourcebook for immigration law reports, "the BIA generally will not rule on the constitutionality of the statute/regulations that it administers."[48] This inability of the immigration courts and the Board to address Constitutional questions does have a loophole. Although the Board may not find a statute unconstitutional in the first place, that does not mean that it may apply a statute found unconstitutional by federal courts.[49] Likewise, the Board is permitted to construe statutes to avoid Constitutional problems.[50] Additionally, where the Board can effectuate a remedy of a Constitutional violation, for example ineffective assistance or other violation of due process under the Fifth Amendment, it can and does do so by remanding the case back to the

45. *See supra* note 8 (discussing 180 day rule and exceptional circumstances for reopening of in absentia order).

46. *Id.*; 8 U.S.C. § 1229a(b)(5)(C) (2012) (reopening may be granted if "exceptional circumstances" are shown within 180 days of an *in absentia* order).

47. Immigration judges and the BIA are not, in point of fact, Article I courts either, but instead employees of the Department of Justice (DOJ). *See About the Office*, THE U.S DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office (last visited on Apr. 20, 2018).

48. KURZBAN, *supra* note 40, at 1584 (citing *Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), among other cases).

49. *Id.*

50. *Id.*

immigration judge.[51]

The doctrine which prevents administrative bodies from adjudicating the Constitutionality of the INA, the Board's own governing statute, has real ramifications for a contiguous territories challenge. What it means is that the IJ and the Board will not be able to find INA § 235(b)(2)(C) unconstitutional as applied to those respondents who are arguing that the implementation of this provision somehow hindered or even disabled the defenses in their removal case. This fact should be emphasized to a federal district judge in the habeas context. It will mean that the district court cannot require a petitioner in federal court to exhaust their administrative remedies by attempting to bring this issue up with the IJ or the BIA in the first instance.[52] An exception to the exhaustion doctrine would clearly be applicable: futility.[53] It would be futile for a litigant to raise the issue with the IJ and the Board where both are unable to adjudicate the question of the INA § 235(b)(2)(C)'s constitutionality. Given the inability of the IJ and the BIA to address these issues, we now turn to possible Constitutional claims that may be raised in a potential federal court action.

D. Procedural and Substantive Due Process Claims; other constitutional claims

The most salient challenge to the contiguous territories provision will be under the Fifth Amendment's due process clause and implicate either procedural and/or substantive due process. Due process is guaranteed to respondents in INA § 240 removal proceedings.[54] Importantly, the procedural due process guarantee of a full and fair hearing in removal proceedings has been well-spelled out in prior cases.[55] A respondent is permitted access to counsel of her choosing but not paid for by the government, as well as evidence used against her, the ability to call witnesses and reserve appeal.[56] In the old case, *United States ex rel. Mezei*, the Supreme Court had held that an immigrant at the border is entitled to no procedural due process rights

51. *See Seeking Remedies for Ineffective Assistance of Counsel in Immigration Cases*, AM. IMMIGR. COUNSEL (Jan. 19, 2016), https://www.americanimmigrationcouncil.org/research/seeking-remedies-ineffective-assistance-counsel-immigration-cases (discussing remedies for ineffective assistance claims).

52. *See* KURZBAN, *supra* note 40, at 1662–63, 1707–25 (discussing exhaustion).

53. *Id.* at 1722 (discussing futility doctrine and citing cases).

54. Reno v. Flores, 507 U.S. 292, 306 (1993).

55. *See* KURZBAN, *supra* note 40, at 391–99.

56. *See* 8 U.S.C. § 1229a(b)(4) (2012) (listing rights of respondents in removal proceedings).

beyond what the statute provides for and where he is denied entry.[57] However, *Mezei* does not apply to respondents in INA § 240 proceedings. In any event the court itself in *Mezei*, even where it denied procedural due process to the immigrant in exclusion proceedings, nevertheless confirmed the availability of habeas corpus to challenge the validity of his exclusion from the United States.[58]

Not just procedural but substantive due process may also be implicated by the contiguous territories provision. Substantive due process doctrine protects those whose fundamental rights are violated by governmental conduct. The basis for substantive due process is in the Fifth and Fourteenth Amendments and prohibits the government from depriving any person of "life, liberty, or property, without due process of law."[59] Respondents who are subjected to the return provision by the federal government could potentially make out a claim under substantive due process. Perhaps the strongest such case would be where the litigant could show for example that their asylum claim was based on past persecution or fear of future persecution from Mexico (or a third country) and they would not be able to avail themselves of the protection of Mexico or the third country while awaiting removal proceedings in the U.S.

Another potential Constitutional claim will involve equal protection. Under the Fourteenth Amendment, no state may treat persons who are similarly situated unequally under the law.[60] With respect to the federal government, the Fifth Amendment prohibits the federal government likewise from engaging in discrimination where it would be so unjustifiable that it violates due process.[61] A litigant in federal court could also make an equal protection claim against the federal government's implementation of the contiguous territories provision. A class of persons, those arriving aliens subjected to INA § 235(b)(2)(C), are being returned or threatened to be returned where others "similarly situated" are in the exact same circumstances (arriving from Mexico or Canada) but are not returned. The protected class awaits their hearing date in a United States detention facility. The discriminatory nature of the contiguous territories provision may be evidenced by the February 20, 2017 implementing memorandum from DHS. In that memo, as discussed, *supra*, those who will be "returned" must be found to be at a low risk for illegal re-entry. This sets up an

57. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 215 (1953).
58. *Id.* at 213.
59. U.S. CONST. amend. V.
60. U.S. CONST. amend. XIV, § 1.
61. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

unfair dichotomy where, on the one hand, those who are seen as least culpable are subjected to return, while those who may (allegedly) be more culpable are taken out of the contiguous territories provision. Those persons are provided with the ability to stay in the U.S. while awaiting their removal proceedings.

E. Administrative Procedure Act / Declaratory Judgment/ Mandamus and other forms of federal court actions including federal question jurisdiction under 28 U.S.C. § 1331

In addition to and as a part of the habeas petition, there may be asserted other claims in the context of a challenge to the contiguous territories provision. Habeas is available pursuant to 28 U.S.C. § 2241 and, as mentioned, extends to a prisoner who is "in custody under or by color of the authority of the United States" and in violation of "the Constitution or laws or treaties of the United States."[62] In conjunction with this statute, petitioners will want to invoke the Declaratory Judgment Act, 28 U.S.C. § 2201, which provides in pertinent part that "any court of the United States . . . may declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought." The statute also provides, "Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." While declaratory judgment does not provide independent jurisdiction, it can and should be used to request that the federal district court declare the contiguous territories statute unconstitutional either as applied or on its face.[63]

The Administrative Procedure Act ("APA") also does not provide independent jurisdiction, but nevertheless can be used in conjunction with a habeas claim.[64] In the context of a challenge to the contiguous territories provision, the APA can be utilized because it redresses the suffering "of a legal wrong due to agency action or adversely affected by agency action."[65] According to the APA, the reviewing court may compel agency action that is "unlawfully withheld or unreasonably delayed."[66] Also, the APA addresses agency action which is "arbitrary,

62. 28 U.S.C. § 2241 (2006).

63. *See* 28 U.S.C. § 2201 (2012); *see also* 28 U.S.C. § 2202 (2010) (providing that further necessary and proper relief may be granted based on a declaratory judgment).

64. Ove Gustavsson Contracting Co. v. Floete, 278 F.2d 912, 914 (2d Cir.), cert. denied, 364 U.S. 894 (1960); *see also* Alfred L. Scanlan, *Judicial Review under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 514 (1948).

65. 5 U.S.C. § 702 (2011).

66. 5 U.S.C. § 706(1) (2012).

capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" "without observance of procedure required by law;" or "unsupported by substantial evidence."[67]

Finally, the federal question jurisdictional statute, 28 U.S.C. § 1331, must also be invoked because the utilization of INA § 235(b)(2)(C) to return persons to contiguous territories does present a federal question regarding the constitutionality of a federal statute. Federal question jurisdiction allows a federal court to hear a case where the plaintiff has alleged a violation of the Constitution, a federal law, or a treaty to which the United States is a party.[68] As will be discussed in Part III, *infra*, there are several possible international legal instruments, as well as domestic laws, which could be implicated and can also serve to support federal question jurisdiction.[69] The plaintiff will allege that the return provision of § 235(b)(2)(C) conflicts with the safeguards provided for in the INA and associated regulations which protect respondents in removal proceedings. These include for example the right to counsel of their choosing not paid for by the government, the right to present evidence, cross-examine witnesses, and present their case in a full and fair hearing consistent with due process of law.[70] The plaintiff may also allege, as will be discussed, that other parts of the INA, and/or other federal laws, may be violated by the forcible returning of arriving aliens to contiguous territories.

III. OTHER ISSUES IMPACTING IMMIGRANTS SUBJECTED TO THE CONTIGUOUS TERRITORIES PROVISION IN INA § 235

A. International legal Authority

Having now discussed considerations relating to the jurisdictional and procedural aspects of bringing a claim to challenge returns to contiguous territories, we now turn to potential substantive legal

67. 5 U.S.C. § 706(2) (2012).

68. 28 U.S.C. § 1331 (2006).

69. Not all international treaties are self-executing. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1025 (2d ed. 2000). If not self-executing, they would need to have domestic implementing legislation to provide a cause of action in U.S. federal district courts or a cause of action could be asserted more generally under the Federal Tort Claims Act. 28 U.S.C. §§ 2671–80 (1946).

70. *See* 8 U.S.C. § 1229a(b)(4) (2012) ("Aliens rights in proceedings"); *see also* 8 C.F.R. §1240.10(a)(1) (2005) ("In a removal proceeding, the immigration judge shall . . . [a]dvise the respondent of his or her right to representation at no expense to the government, by counsel of his or her choice.").

authorities which can be harnessed to support such a challenge. Since the contiguous territories provision necessarily involves another country, i.e. Mexico or Canada, the first place to look would be to international legal authorities that protect migrants and to which the United States is a party or has some significant interest. International treaties, as apparent from 28 U.S.C. § 1331, have the force of law and may provide the basis for federal court jurisdiction if self-executing or where implementing domestic legislation exists.[71] Furthermore, under the Charming Betsy principle of interpretation, domestic statutes must be interpreted in such a way that they do not conflict with international law.[72]

The international treaties potentially implicated include the 1987 U.N. Convention Against Torture ("CAT")[73] (U.S. is a state party), as well as the 1967 Protocols relating to the Status of Refugees[74] (U.S. is a state party). Other possible authorities to be aware of and explore would be the 1991 International Convention on the Rights of All Migrant Workers[75] (ratified by Mexico, but unfortunately, not by the U.S.); the 1969 International Convention on the Elimination of All Forms of Racial Discrimination[76] (U.S. does not accept competence under Art. 14) and the 1976 International Covenant on Civil and Political Rights[77] ("ICCPR", ratified by U.S. but with a number of reservations); the U.N. Charter;[78] the Universal Declaration of the rights of Man;[79] and the 2002 Optional Protocol to the Convention on the Rights of the Child[80] (U.S. is a state party). Moreover, there exist various local repatriation agreements executed by both U.S. and Mexican government officials, which attempt to ensure the protection

71. *See supra* note 69 and accompanying text.

72. Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804).

73. G.A. Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

74. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 Stat. 6223, 606 U.N.T.S. 267.

75. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003).

76. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD].

77. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (the provisions of Art. 41 (Human Rights Committee) entered into force Mar. 28, 1979) [hereinafter ICCPR].

78. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993.

79. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

80. G.A. Res. 54/263 A, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (May 25, 2000).

of Mexican citizens being returned to Mexico.[81]

First and foremost, returning those who are not Mexican nationals and who do not have any valid immigration status in Mexico would be most problematic. Such returns would arguably violate CAT and the 1967 Protocols relating to the Status of Refugees for those returnees who are seeking asylum or other humanitarian types of relief in the U.S. Article 3 of the CAT prohibits the United States from returning, extraditing or refouling a person to any state, "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[82] The Committee Against Torture, which oversees implementation of the CAT, has determined that the danger must be assessed not just for the initial receiving state, but also with regard to any other states to which the person may be subsequently "expelled, returned or extradited."[83] CAT is implemented in the U.S. by federal regulation and is a mandatory form of relief for immigrants who can prove that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal."[84] Mexico is also a state party to the Convention.[85]

In addition, the 1967 Protocols implement Article 33 of the 1951 Convention, which enshrines the principle of non-refoulement. This is a principle of international law that prevents a country in which a person is seeking asylum from returning them to a country they would be in danger of persecution on the basis of "race, religion, nationality, membership of a particular social group or political opinion."[86] This international legal principle to which the United States is bound is included also within our domestic law, specifically INA § 241(b)(3). That section provides that with certain exceptions, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership

81. The United States Department of Homeland Security website references nine (9) local bilateral agreements, and provides links to each agreement. *See Updated U.S.-Mexico Local Repatriation Arrangements*, U.S. Dep't of Homeland Security, https://www.dhs.gov/publication/updated-us-mexico-local-repatriation-arrangements (last visited Apr. 24, 2018).

82. G.A. Res. 39/46, *supra* note 73, at Art. 3.

83. *Id.*

84. 8 C.F.R. § 208.16(c)(2) (2002).

85. *See Status of Ratification: Interactive Dashboard*, UNHCR (Jan. 24, 2018), http://indicators.ohchr.org/ (providing a list of countries who have ratified).

86. Protocol relating to the Status of Refugees, *supra* note 74.

in a particular social group, or political opinion."[87]

The 2002 Optional Protocol to the Convention on the Rights of the Child also may provide some basis for international legal authority where juveniles are returned or threatened to be returned to a contiguous territory.[88] This is because the U.S. is a party, and Article 6 provides that "[e]ach State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction."[89] To the extent that children who are returned are subject to trafficking, prostitution, slavery and other forms of abuse or persecution, the 2002 Optional Protocol would be violated. If the United States has no safeguards in the contiguous country to which children are being returned, the 2002 Optional Protocol may provide an additional argument supporting relief in federal court.

The International Covenant on Civil and Political Rights ("ICCPR"), of which the U.S. is a party, could also provide legal authority, with the important caveat that the U.S. has made many reservations in terms of the applicability of the covenant's provisions.[90] With respect to Article 6(1), for example, the ICCPR provides that "Every human being has the inherent right to life. This right shall be protected by law.[91] No one shall be arbitrarily deprived of his life."[92] Article 7 also protects against "the subjection to torture or to cruel, inhuman, or degrading treatment." [93] Article 12(1) provides that "Everyone lawfully within the territory of a State, within that territory, have the right to liberty of movement and freedom to choose his residence."[94] An asylum seeker may be able to rely on Article 12(1) to assert liberty of movement and argue they should not be forcibly returned to a contiguous country pending removal proceedings. Article 13 provides that an alien lawfully in a territory may be expelled only "in pursuance of a decision reached in accordance with law." [95]

B. Potential Conflicts with other domestic U.S. statutory

87. Immigration and Nationality Act § 241(b)(3), 8 U.S.C. 1231(b)(3).
88. G.A. Res. 54/263 A, *supra* note 80.
89. *Id.*
90. *See* ICCPR, *supra* note 77.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

provisions

The Immigration and Nationality Act protects respondents in removal proceedings.[96] Clearly, the use of returns under INA § 235(b)(2)(C) could violate those provisions where respondents are foreclosed from access to evidence, witnesses, counsel or other resources here in the United States. As discussed, the portions of the INA which protect asylum seekers and those who fear persecution, *see* INA § 208; 241(b)(3), 8 U.S.C. § 1158; 8 U.S.C. § 1231(b)(3), and the associated regulations, also would be violated by the use of the contiguous territories provision against those who fear return to their home countries based on persecution and torture. Even if the asylum claim does not originate from Mexico, but from a third country, there is considerable danger of a person being deported by the Mexican authorities without due process, as recognized in the Harvard Clinical Program study, mentioned *supra*.[97]

Additionally, the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") protects unaccompanied alien children, and would be violated if juveniles are returned under INA § 235(b)(2)(C) without regard to the TVPRA's protections.[98] Then-Secretary Kelly, it is important to note, specifically mentioned in the DHS implementing memorandum that the return provisions under INA § 235(b)(2)(C) must be implemented "to the extent otherwise consistent with the law and U.S. international treaty obligations."[99] Moreover, pursuant to the "*Flores* Settlement," *see Flores v. Reno*, Case No. CV 85-4544-RJK (C.D. CA 1997), children who are in detention in the United States must be held in the "least restrictive setting."[100] *Flores* also requires that that juveniles be released from custody "without unnecessary delay" to a parent, legal guardian, or adult relative.[101] Clearly, therefore, by implementing the return the provision in a way that prevents children from being released to adult relatives or other appropriate care providers here in the U.S. would violate *Flores v. Reno*.

Finally, INA § 235(b)(2) contiguous territories provision violates potentially all parts of the INA which provide relief from removal and

96. *See supra* notes 56, 70 and accompanying text (discussing Immigration and Nationality Act § 240, 8 U.S.C. § 1229a(b)(4) (2012)).

97. *See* Volz, et al., *supra* note 20.

98. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter TCPRA 2008].

99. Memorandum from John Kelly, *supra* note 9.

100. TVPRA 2008, *supra* note 98.

101. Flores v. Reno, Case No. CV 85-4544-RJK (C.D. Cal. 1997).

benefits to immigrants, such as the Violence Against Women Act ("VAWA"), cancellation of removal, adjustment of status, and other forms of relief.[102] If a person is no longer here within the United States but is warehoused in another country, then all other parts of the INA which enable immigrants to apply for and be granted relief are frustrated. Under the canons of statutory interpretation, all provisions of a statute are to be read consistently, if possible, and interpretations which render other statutory sections surplusage or a mere nullity are to be avoided.[103] To interpret the INA to allow for any arriving alien who arrived from a contiguous territory to be "returned" without regard to the procedural safeguards and relief available in the INA would lead to absurd results and undermine the intent of Congress when it passed the Act as a whole.[104]

C. Further options available to Mexico or other countries seeking redress

Thus far, this article has not considered options that an individual country may have when facing migrants who are being returned to their territory. The situation is exacerbated by the fact that there simply may be a lack of knowledge of what exactly is transpiring on the ground. Mexican or Canadian authorities may not be advised specifically about "returns" and neither the INA nor the implementing guidance to date has any provisions for advising other nations, with the exception of local bilateral agreements, mentioned *supra*.[105] It also presupposes that the governments of the contiguous territories would perceive the returns as their problem or an issue that they could or would want to have redressed. The situation is compounded further by the complex relationships between governments at or near the border. Countries

102. Violence Against Women Act of 1994, 42 U.S.C. § 13701; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

103. *See* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); INS v. Cardoza–Fonseca, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

104. Congressional intent in the context of immigration laws is not limited to just immigration enforcement, but also encompasses family unity, the granting of benefits, protection of those seeking asylum, as well as crime victims and others. *See* KURZBAN, *supra* note 40, at 3–33 (discussing history of immigration laws).

105. *See Updated U.S.-Mexico Local Repatriation Arrangements*, *supra* note 81.

invariably work together in various capacities at the border: in law enforcement, to combat drug trafficking, illegal arms sales, in resolving matters of trade and other commercial matters. To make matters more uncertain, the future of the North American Free Trade Agreement ("NAFTA") is unclear.

If migrants' rights are violated in Mexico, the government of Mexico could file a petition with the Inter-American Commission on Human Rights. Part of the Commission's duties include issuing member states with recommendations that if adopted could further the cause of protection of migrants' rights. Moreover, the Commission could request that a state take "precautionary measures" such as the suspension of INA § 235(b)(2)(C) returns in the case of the United States. The Commission also could refer a case to the Inter-American Court of Human Rights, but importantly the U.S. would first have to accede to its jurisdiction since it has not accepted blanket authority. The Commission also could ask the Inter-American Court of Human Rights for an advisory opinion.

Other remedies may be available dependent upon the procedures in place in each international legal instrument. Several human rights treaties have provisions allowing for a State Party to complain to a relevant body, the Human Rights Committee, about alleged violations of the treaty by another State Party.[106] In the case of the United States, it has issued numerous reservations with respect to the ICCPR, for example, but still is bound by the treaty as a State Party.[107] In the reservations, it is worth noting, the United States "declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the Covenant."[108] Because the ICCPR is part of international law and has been ratified, it is the supreme law of the land, and applies to all government entities and agents including all state and local governments in the United States.[109] On other fronts, the United States

106. *See Human Rights Bodies – Complaints Procedures*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate (last visited Apr. 20, 2018).

107. *See U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, U. OF MINN. (Apr. 2, 1992), http://hrlibrary.umn.edu/usdocs/civilres.html.

108. *Id.*

109. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr (last visited Apr. 20, 2018).

under President Trump's administration recently withdrew from talks on the Global Compact for Migration.[110] In addition, the United States has never ratified or signed onto the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[111]

IV. CONCLUSION

A little-known provision of the INA, the contiguous territories provision, is now poised to be implemented by the United States Department of Homeland Security in a more expansive way. This change has the power to alter the face of immigration enforcement. It could be used to return anyone, under the expanded understanding of expedited removal, found within the U.S. within two years of entry no matter where they may be encountered in the United States.[112] If a person entered the U.S. from Mexico or Canada there is now a real potential danger of her being returned to that contiguous territory without any judicial oversight. The possibility for abuse of this important provision cannot be overstated. This article has laid the groundwork for thinking about how a litigant would go about making a claim in federal court with a habeas petition and on other grounds to challenge such a return. This represents a new area of litigation, which the federal courts will have to grapple with as a matter of first impression. The stakes could not be higher where immigrants' due process rights are implicated and, in certain cases, where their very lives and well-being will be at risk if returned to a contiguous country pending removal proceedings in the United States.

110. Rick Gladstone, *U.S. Quits Migration Pact, Saying It Infringes on Sovereignty*, N.Y. TIMES (Dec. 3, 2017), https://www.nytimes.com/2017/12/03/world/americas/united-nations-migration-pact.html.

111. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *supra* note 75.

112. It is also possible to interpret the Immigration and Nationality Act § 235(b)(2)(C) as not requiring any particular temporal or geographic limitation, since the two-year period is imposed within INA § 235(b)(1) and not (b)(2)(C), as has been discussed, *supra* Part I.