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## Finality and Judicial Review under the Immigration and Nationality Act: A Jurisprudential Review and Proposal for Reform

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## **FINALITY AND JUDICIAL REVIEW UNDER THE IMMIGRATION AND NATIONALITY ACT: A JURISPRUDENTIAL REVIEW AND PROPOSAL FOR REFORM**

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Jesi J. Carlson, Patrick J. Glen & Kohsei Ugumori\*

*Under the Immigration and Nationality Act (INA), aliens may petition for judicial review of an adverse decision of the Board of Immigration Appeals (Board) as long as that decision constitutes a “final order of removal.” Usually it is not difficult to ascertain when an alien should file her petition: the thirty-day statutory filing deadline begins to run when the Board issues a decision that affirms the immigration judge’s removal order in its entirety. In some cases, however, an alien seeks multiple forms of relief from removal in a single proceeding. When that occurs, some forms of relief might be granted, while others are denied or require a remand to the immigration judge for further proceedings. This hybrid “mixed” decision often leaves aliens and attorneys wondering when the removal order becomes final, and thus when they should file a petition for review. When the Board issues its decision? Or at the conclusion of the remanded proceedings? Which order constitutes the “final order of removal” for purposes of judicial review?*

*The implications are profound. If an alien misses the correct deadline, she may lose her ability to challenge the denial of relief from removal. Alternatively, if she files the petition too soon, the court may dismiss it as premature, which consumes time and resources for the alien, the courts, and the government alike. Unfortunately, neither the statute nor the decisions of the courts of appeals provides clear guidance on this question. Nonetheless, the Ninth Circuit has recently issued an important en banc decision on finality for purposes of judicial review that provides a useful starting point from which to clarify this convoluted area of law.*

*This Article is an attempt to bring clarity to the issue of finality for purposes of judicial review. Using the Ninth Circuit’s decision in *Abdisalan v. Holder*<sup>1</sup> as a frame of reference, the Article addresses how the INA and its implementing regulations contemplate “finality,” while also highlighting the conflicting manner in which the courts of appeals have thus far treated finality. This Article then proceeds to consider the Ninth Circuit’s en banc decision in *Abdisalan*, noting its importance in establishing a more or less uniform definition of finality within that circuit, while also exploring some concerns about the scope and limitations of that*

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1. 774 F.3d 517 (9th Cir. 2014) (en banc).

decision. Finally, to address broader inconsistencies amongst courts of appeals, this Article proposes two possibilities for reform: (1) a uniform definition of finality adopted across the courts of appeals; and (2) statutory reform that would define specifically and exhaustively what constitutes a final order of removal for purposes of judicial review.

## INTRODUCTION

On December 15, 2014, the U.S. Court of Appeals for the Ninth Circuit issued a unanimous en banc decision in *Abdisalan v. Holder*.<sup>2</sup> At issue in the case was whether a decision by the Board of Immigration Appeals (Board or BIA) upholding the denial of the alien's<sup>3</sup> application for asylum, but remanding for the completion of background checks regarding a grant of withholding of removal,<sup>4</sup> constituted a final order of removal for purposes of judicial review. Noting its conflicting precedent on this issue,<sup>5</sup> the court devised a bright-line rule to guide future litigants in seeking judicial review: "When the BIA remands to the [immigration judge] for any reason, no final order of removal exists until all administrative proceedings have concluded. Thus, when the BIA issues a mixed decision, no aspect of the BIA's decision is 'final' for the purpose of judicial review."<sup>6</sup>

Although the case implicates what appears to be a purely procedural question of administrative law—when does an agency order or decision possess sufficient finality to be subject to judicial review by a federal court of appeals—it in fact has very serious substantive dimensions. Since appellate review of Board decisions is dependent

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2. *Id.*

3. The INA defines the term "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2012). For lack of an adequate substitute for the term and to avoid confusion, see *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1695 n.1 (2013) (Alito, J., dissenting), the statutory term "alien" will be used in this Article.

4. An alien is entitled to withholding of removal if he or she establishes a clear probability of persecution on account of a protected ground in the relevant country of removal. *In re C-T-L*, 25 I. & N. Dec. 341, 343 (B.I.A. 2010); *see also* 8 U.S.C. § 1231(b)(3). Unlike asylum, withholding of removal is generally a mandatory—albeit limited—form of protection and cannot be denied in the exercise of discretion. *In re I-S- & C-S-*, 24 I. & N. Dec. 342, 434 (B.I.A. 2008) ("[A] grant of withholding of removal is not discretionary and does not afford the respondents any permanent right to remain in the United States.").

5. *See Abdisalan*, 774 F.3d at 520 ("When does an order of removal become 'final' for the purpose of seeking judicial review? Panels of our court have reached varying conclusions, creating unnecessary confusion as to the timeliness of petitions for review and our jurisdiction to entertain them. We reheard this matter en banc to clarify the issue of finality of the Board of Immigration Appeals' ('BIA') decisions.").

6. *Id.* at 526; *see id.* at 520 ("Today, we adopt a straightforward rule[.]").

on a “final order of removal,”<sup>7</sup> the question of when the relevant order has become final dictates when an alien may seek judicial review of the agency action. In circuits where the law is unsettled or in flux, as it was in the Ninth Circuit before to the en banc decision in *Abdisalan*, the question may control *whether* an alien is able to seek judicial review.

Under the Immigration and Nationality Act (INA), an alien must seek judicial review of the final order of removal within thirty days, and this filing deadline is “mandatory and jurisdictional.”<sup>8</sup> An alien who files her petition for review after a decision deemed non-final under relevant circuit law will have the petition dismissed for lack of jurisdiction. If she then fails to file a petition for review following entry of the actual final order, she will be barred from bringing an appeal if—as is often the case—the thirty-day filing deadline on the actual final agency order has run.

There are several distinct issues that contribute to this uncertainty and allow the serious consequence that aliens may be foreclosed from seeking judicial review. First, there are inter-circuit conflicts regarding the issue of finality and in what circumstances a Board decision may be deemed final for purposes of judicial review. This breeds confusion and means that a petition for review deemed timely in one circuit may be considered premature or untimely in a different circuit.

Second, there are intra-circuit conflicts in some courts of appeals regarding when certain types of Board decisions become final. These cases sometimes provide sufficient notice to aliens regarding when review must be sought, but more frequently they invoke only general considerations and provide no guarantee that a case arising from a slightly different procedural posture will be treated similarly.

Finally, undergirding both these difficulties is the opaque construction of “finality” in the INA and its implementing regulations. Nowhere is the relevant phrase “final order of removal” cleanly defined. Rather, terminology concerning finality is spread throughout both the statute and regulations, leaving ample room for courts to construct their own views on whether or when certain Board decisions become final for purposes of judicial review.

The end result of this confusion is the very real possibility that aliens will lose their opportunity to seek judicial review of the

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7. See 8 U.S.C. § 1252(a)(1).

8. See *id.* § 1252(b)(1) (“The petition for review must be filed not later than 30 days after the date of the final order of removal.”); *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007) (“The provision establishing the thirty day filing period is mandatory and jurisdictional[.]”) (citing *Stone v. INS*, 514 U.S. 386, 405 (1995)).

agency's disposition of their claims. Without certainty regarding when a petition for review should be filed, aliens may file too late or too early, and thereby risk the dismissal of their petition. This is unfair to the aliens, especially where the late filing is due to contradictory or confusing circuit court precedents on finality rather than any nonfeasance on the part of the alien or counsel. Furthermore, this uncertainty can remove a key backstop to the efficient and just operation of immigration law—judicial review by the appropriate court of appeals.

The purpose of this Article is to address this confusion and cut a path of clarity through statute, regulation, and precedent. To that end, there is a heavily doctrinal dimension to what follows. Part I reviews how the INA and the regulations address the issue of finality, as well as the implications of these scattered references to an alien's ability to seek judicial review. Part II then turns to the decisions of the Board and courts of appeals addressing finality under the INA's judicial review provision. This Part will highlight the divergent practice of the Board and courts of appeals in determining what constitutes a final, reviewable order of removal. Part III then focuses on the course of litigation in *Abdisalan* itself, including the conflict in Ninth Circuit law that prompted en banc consideration of the issue. The Ninth Circuit's decision provides clarity in determining finality for purposes of judicial review, but there are also shortcomings to its decision and further development of the law may be necessary.

This Article also offers normative direction through reform proposals. Part IV delves into these suggestions, which take two forms. The first form is court-driven: the courts of appeals should converge on a uniform definition of finality, informed by the *Abdisalan* decision's specific reading of the INA statute and its implementing regulations. This would eliminate both intra- and inter-circuit conflicts on finality and provide clear guidance to litigants regarding the timing and manner of judicial review. The second form is statutory: Congress should provide clear direction on what constitutes a final order of removal for purposes of judicial review. This second course is preferable because a clear statutory definition would eliminate the confusion that has emerged from the vague references to finality that currently riddle the INA and the regulations. But it is also the less likely possibility.

## I. FINALITY UNDER THE STATUTE AND REGULATIONS

“Finality” dictates whether or when an alien may seek judicial review of agency action under the relevant provisions of the INA. The agency conducts administrative removal proceedings to determine the removability of an alien and whether she is eligible for any form of discretionary relief from removal.<sup>9</sup> A removal proceeding begins with the filing of a Notice to Appear with the immigration court charging the alien with being subject to removal.<sup>10</sup> Hearings will then be scheduled before the immigration judge, where the alien will be able to contest or concede removability as charged, and pursue any forms of relief for which she may be eligible under the INA.<sup>11</sup> At the conclusion of the hearing(s), the immigration judge will issue a decision on removability and relief from removal.<sup>12</sup> Either party may then, within thirty days, file an administrative appeal with the Board of Immigration Appeals.<sup>13</sup> Once the Board has rendered a decision on the appeal, an alien, although not the government, may seek judicial review of that order in the appropriate federal court of appeals.<sup>14</sup>

The INA provides that the federal courts of appeals are the “sole and exclusive means for judicial review of an order of removal.”<sup>15</sup> But the courts of appeals’ jurisdiction to review such orders is limited to “final orders of removal” where review is sought within thirty days of the agency’s entry of that final order.<sup>16</sup> This thirty day filing

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9. See, e.g., 8 U.S.C. § 1229a(a)(1) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”). Removal proceedings are a unitary proceeding established in 1996, which take the place of the prior, discrete “exclusion” and “deportation” proceedings. See Patrick Glen, Judulang v. Holder and the Future of 212(c) Relief, 27 GEO. IMMIGR. L.J. 1, 4 (2012) (stating that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 “eliminated the distinction between ‘exclusion’ and ‘deportation’ proceedings, and replaced them with a single unified proceeding termed a ‘removal proceeding.’”).

10. See 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1003.14(a) (2015).

11. See generally 8 U.S.C. § 1229(a) (establishing procedures for the conduct of removal proceedings).

12. See, e.g., 8 C.F.R. § 1003.37.

13. See 8 C.F.R. §§ 1003.3(a)(1), 1003.38(a)–(b).

14. See 8 U.S.C. § 1252(b)(3)(A) (naming the Attorney General as respondent for petitions for review challenging Board action); see also John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO IMMIGR. L.J. 1, 39 n.203 (2005) (noting that although there is no express statutory prohibition on the filing of a petition for review, the statutory language strongly implies that only aggrieved aliens may petition for review of adverse Board decisions).

15. 8 U.S.C. § 1252(a)(5).

16. See 8 U.S.C. §§ 1252(a)(1), 1252(b)(1).

deadline is “mandatory and jurisdictional.”<sup>17</sup> Review of the final order in the courts of appeals has been held to encompass both findings of removability and the denials of relief from removal.<sup>18</sup>

Although the INA contains only oblique and scattered references to the finality requirement,<sup>19</sup> its provisions authorizing judicial review of orders of removal have universally been understood to contain a finality requirement for federal court jurisdiction.<sup>20</sup> This is not surprising, given the longstanding and strong presumption in administrative law “that judicial review will be available only when

17. See *Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (9th Cir. 2007); see also 8 U.S.C. § 1252(a)(5).

18. See *Foti v. INS*, 375 U.S. 217, 220–21, 232 (1963). In this context, “findings of removability” pertain to the order of removal itself, i.e., whether the alien is removable from the United States as specified in the charging document; by contrast, “denials of relief from removal” relate to the denial of any applications filed by a removable alien to cancel, avoid, or otherwise affect the consequences of a finding of removability. *Id.*

19. Section 242(a)(1) of the INA provides that “[j]udicial review of a final order of removal . . . is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347 of such title.” 8 U.S.C. § 1252(a)(1); see 8 U.S.C. §§ 1252(a)–(g) (providing, with limited exceptions, that a petition for review in the courts of appeals is the sole and exclusive means for judicial review of a final order of removal). In turn, chapter 158 of Title 28, which relates to judicial review of federal agency orders, more expressly alludes to the finality requirement. See, e.g., 28 U.S.C. § 2344; see also 28 U.S.C. §§ 2342, 2349 (stating that the courts of appeals have jurisdiction to review “final orders” of the relevant agencies and providing that the filing of a petition for review “does not itself stay or suspend the operation of the order of the agency”). In addition to the section authorizing judicial review, the INA refers to final orders of removal in other sections as well, using finality to describe a condition or serve as a reference point. See, e.g., 8 U.S.C. §§ 1182(a)(6)(F), 1182(d)(3)(B), 1227(d)(1), 1228(b)(4)(F), 1229a(b)(7), 1229a(c)(6)–(7), 1231(a)(1), 1253(a)(1). The implementing regulations similarly refer to final and finality throughout their provisions. See, e.g., 8 C.F.R. §§ 1.2, 210.4, 214.11(d)(9), 214.14(c)(1)(ii), 216.5(a)(2), 236.1(c)(1), 236.8(a)(4), 245a.12(b)(3), 245a.13(f), 245a.18(c)(1), 245.20(a)(1), (e), 274a.12(c)(18), 1001.1(p), 1003.23(b), 1208.18(b)(2), 1241.1, 1241.31.

20. See, e.g., *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (dismissing petition for review because “[t]he BIA’s granting of the motion to reopen means there is no longer a final decision to review”); *Gafurova v. Holder*, 448 F. App’x 139, 140 (2d Cir. 2011) (“[T]he BIA granted [the alien’s] motion to reopen and remanded her case to an immigration judge for further proceedings and entry of a new decision. Accordingly, there is no longer a final order of removal against her over which [the court] may exercise jurisdiction, and [the court] dismiss[es] the petition for review.”); *Satheeskumar v. U.S. Att’y Gen.*, 557 F. App’x 128, 130 n.2 (3d Cir. 2014) (“[The order of removal] was rendered non-final when the BIA granted [the alien’s] motion to reopen.”); *Sanchez-Naranjo v. Holder*, 510 F. App’x 759, 760 (10th Cir. 2013) (“[W]hen, as here, the BIA reopens a previously concluded removal proceeding and remands for a new decision by the IJ, the prerequisite for circuit court jurisdiction ceases to exist and any pending petition for review must be dismissed.”); *Suharti v. U.S. Att’y Gen.*, 349 F. App’x 443, 450 (11th Cir. 2009) (“Absent language explicitly upholding a final order of removal, the BIA’s *sua sponte* reopening of proceedings removes the finality of the removal order and [the court’s] jurisdiction to review it.”); see also *Castaneda-Castillo v. Holder*, 638 F.3d 354, 360 (1st Cir. 2011) (noting that the Board’s reopening of the case “would have meant that there would be no final agency determination for [the court] to review, and so [the court] would no longer have had jurisdiction over the case”).

agency action becomes final.”<sup>21</sup> Although some vagueness in the INA may not undermine the requirement of finality, such imprecision still affects the finality analysis so far as the provisions leave unspecified what “final” means. That is, the *requirement* that an agency order be final does not resolve *when* such an order becomes final. And, to the extent the INA’s judicial review provisions leave this critical detail undefined, such inadequacy ultimately has resulted in uncertainty as to when a petition for review may be filed,<sup>22</sup> and in some unfortunate cases, the loss of the alien’s opportunity for judicial review.<sup>23</sup>

To be sure, the INA defines “order of deportation” and specifies when such order becomes “final”: (1) an order of deportation is the agency’s order “concluding that the alien is deportable or ordering deportation”; and (2) such order becomes final upon the earlier of (a) the Board’s affirmance of the order or (b) the expiration of the time to appeal the order to the Board.<sup>24</sup> And, in many instances courts have looked to this definition in determining the finality *vel non* of an order of removal.<sup>25</sup> However, setting aside that an “order

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21. *Bell v. New Jersey*, 461 U.S. 773 (1983). In the administrative context, even if the relevant statute does not expressly require a “final order” for judicial review, the Supreme Court has stated that there is a “strong presumption . . . that judicial review will be available only when agency action becomes final.” *Id.*; *see Fed. Power Comm’n v. Metro. Edison Co.*, 304 U.S. 375, 383–85 (1938) (holding that the statute at issue did not authorize “review of every [agency] order” and that such a construction, “affording opportunity for constant delays in the course of the administrative proceeding . . . , would do violence to the manifest purpose of the provision [authorizing judicial review]”); *see also McKart v. United States*, 395 U.S. 185, 193–95 (1969) (referring to exhaustion principles to explain necessity of finality rule); CHARLES ALAN WRIGHT ET AL., 16 FEDERAL PRACTICE AND PROCEDURE § 3942 (3d ed. 2012) (discussing the requirement and reasons for finality in connection with federal court review of administrative decisions).

22. “The petition for review must be filed not later than 30 days after the date of the final order of removal.” 8 U.S.C. § 1252(b)(1). This filing requirement is “indeed jurisdictional in nature,” *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 118 (2d Cir. 2008), and thus courts have “no authority to create equitable exceptions” to the thirty-day filing deadline, *Bowles v. Russell*, 551 U.S. 205, 214 (2007). *See Magtanong*, 494 F.3d at 1191 (“A mandatory and jurisdictional rule cannot be forfeited or waived, and courts lack the authority to create equitable exceptions to such a rule.” (internal citations omitted)).

23. *See, e.g., Batubara v. Holder*, 733 F.3d 1040, 1042–43 (10th Cir. 2013) (dismissing petition for review because the petitioner, who waited until administrative proceedings were completed, failed to file a timely petition for review of the Board’s order remanding the case to the immigration judge for further proceedings); *see also Abdisalan v. Holder*, 728 F.3d 1122 (9th Cir. 2013) (dismissing petition for review for the same reason), *reh’g en banc granted by* 750 F.3d 1098 (9th Cir. 2014), *and overturned by* 774 F.3d 517 (9th Cir. 2014) (en banc).

24. 8 U.S.C. § 1101(a)(47).

25. *See, e.g., Batubara*, 733 F.3d at 1042; *Almutairi v. Holder*, 722 F.3d 996, 1001 (7th Cir. 2013); *Junming Li v. Holder*, 656 F.3d 898, 901 (9th Cir. 2011), *overruled by Abdisalan v. Holder*, 774 F.3d 517, 517 (9th Cir. 2014) (en banc); *Giraldo v. Holder*, 654 F.3d 609, 613–14 (6th Cir. 2011); *Pinto v. Holder*, 648 F.3d 976, 979–80, 982–83 (9th Cir. 2011); *Viracacha v. Mukasey*, 518 F.3d 511, 513–14 (7th Cir. 2008); *Del Pilar v. U.S. Att’y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003); *see also Ocampo v. Holder*, 629 F.3d 923 (9th Cir. 2010) (“8 U.S.C.



of deportation” is not, as often assumed, coterminous with an “order of removal,”<sup>26</sup> the INA’s definition is limited in scope and fails to encompass the variety of final orders of removal that are subject to judicial review.

For example, although a reinstatement of a prior order of removal is a final order subject to judicial review,<sup>27</sup> such reinstatement orders are instituted and issued by the Department of Homeland Security and cannot be reviewed by the immigration judge or the Board.<sup>28</sup> A reinstatement order, therefore, is categorically beyond the contemplation of the INA’s definition of a final order of deportation.<sup>29</sup> The same can be said of a final administrative removal order, which also excludes the immigration judge and the Board from the process of issuing and entering the removal order.<sup>30</sup> Given

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§ 1101(a)(47) defines ‘order of deportation’ and when such orders become final. . . . [T]his definition also applies to an ‘order of removal.’”).

26. Indeed, the regulations define a final order of removal substantially differently than a final order of deportation. For one, an order of removal may become final upon the *expiration* of the voluntary departure period, while an order of deportation may become final upon *entry* of the order granting voluntary departure. Compare 8 C.F.R. § 1241.1 (defining a final order of removal to include, inter alia, an order upon which the period for voluntary departure has expired), with 8 C.F.R. § 1241.31 (defining a final order of deportation to include, inter alia, “an alternate order of deportation coupled with an order of voluntary departure”). And, although the courts have generally treated orders of removal and orders of deportation identically in the context of judicial review, the regulations make clear that different rules govern administrative proceedings depending on whether they are deportation proceedings or removal proceedings. Compare *Abmutairi*, 722 F.3d at 1001 (substituting “current terminology” to apply the INA’s definition of a final order of deportation to a final order of removal); *Junming Li*, 656 F.3d at 901 (“The terms ‘order of removal’ and ‘order of deportation’ are for . . . purposes [of judicial review] interchangeable.”); *Chupina v. Holder*, 570 F.3d 99, 104 (2d Cir. 2009) (“The term ‘order of deportation’ . . . is synonymous with the term ‘order of removal[.]’”), with 8 C.F.R. §§ 1003.26, 1240.40, 1240.55-58, 1240.65 (applying different rules for persons subject to an order of deportation or deportation proceedings than for persons subject to a removal order or removal proceedings); *In re Nolasco-Tofino*, 22 I. & N. Dec. 632, 635 (B.I.A. 1999) (“As a general matter, persons in deportation or exclusion proceedings that had begun before April 1, 1997, are not subject to the changes made by the IIRIRA.”) (internal citation omitted).

27. See, e.g., *Garcia v. Holder*, 756 F.3d 885, 890 (5th Cir. 2014) (“We have jurisdiction to review a final order of removal. The reinstatement of a prior removal order is a reviewable final order.”) (internal citation omitted); *Ixcot v. Holder*, 646 F.3d 1202, 1206 (9th Cir. 2011); *Lemos v. Holder*, 636 F.3d 365, 366 (7th Cir. 2011); *Avila v. U.S. Att’y Gen.*, 560 F.3d 1281, 1284 (11th Cir. 2009); *Lorenzo v. Mukasey*, 508 F.3d 1278, 1282 (10th Cir. 2007); see also *Dinnall v. Gonzales*, 421 F.3d 247, 251 n.6 (3d Cir. 2005) (“Because an order reinstating a prior removal order is ‘the functional equivalent of a final order of removal,’ we have jurisdiction to hear [the alien’s] petition.”) (internal citation omitted).

28. See 8 U.S.C. §§ 1228(b), 1231(a)(5); 8 C.F.R. §§ 238.1, 241.8.

29. Cf. 8 U.S.C. § 1101(a)(47); see also *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012) (concluding that the INA’s definition of a final order of deportation “does not dictate a clear answer” in determining whether the reinstatement order before the court constitutes a final order of removal).

30. Final administrative removal orders entered pursuant to section 238 of the INA, 8 U.S.C. § 1228, would fall outside the conditions of the INA’s definition because the order is

the limited reach of the INA's definition of a final order of deportation, then, administrative removal and reinstatement orders require a different analytical framework to explain their status as judicially reviewable final orders of removal. Similarly, although courts have interpreted the INA's definition of a final order of deportation to include denials of reopening and reconsideration,<sup>31</sup> the denial of a request to reopen or reconsider is not a conclusion of deportability or an order of deportation,<sup>32</sup> and such denial ordinarily would not raise an opportunity for an appeal to the Board.<sup>33</sup> Thus, it is not clear that the content or condition of finality described in the INA's definition applies to denials of reopening or reconsideration. Indeed, this lack of clarity may explain why courts have given a different reason for justifying their jurisdiction over denials of reopening and reconsideration—namely, that a grant of reopening

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entered and finally adjudicated by the Department of Homeland Security with no administrative review by the immigration judge or Board. *See* 8 C.F.R. § 238.1; *see also* 8 C.F.R. §§ 208.31(b)–(c), 208.31(g)(2) (providing for limited review of DHS's reasonable fear determination, but no review over entry of the order itself).

31. This appears to be based primarily on the judicial review provisions of the INA and historical practice than any analysis of the statute's definition of a final order of deportation. *See* *Kucana v. Holder*, 558 U.S. 233, 242 (2010) (“Federal-court review of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916[, and this] Court has ultimately reviewed reopening decisions on numerous occasions.”); *Stone v. INS*, 514 U.S. 386, 405–06 (1995) (“The alien, if he chooses, may . . . seek agency reconsideration of the order [of removal] and seek [judicial] review of the disposition upon reconsideration[.]” (citing former 8 U.S.C. § 1105a(a)(6) (1988), now codified at 8 U.S.C. § 1252(b)(6) (2012) (requiring consolidation of petitions for review proper with petitions for review of a denial of reopening or reconsideration))); *see also* *Sarmadi v. INS*, 121 F.3d 1319, 1321 (9th Cir. 1997) (“There is no explicit statutory basis for our jurisdiction to review the BIA's denial of motions to reconsider or to reopen deportation proceedings. Instead, we have assumed that jurisdiction over these orders is included in our jurisdiction over final orders of deportation.” (internal citation omitted)).

32. Both motions to reconsider and motions to reopen seek further review in a proceeding after an order of removal has already been entered. *In re J-J-*, 21 I. & N. Dec. 976, 997 n.1 (B.I.A. 1997) (“While a motion to reopen seeks a second review of a case by the Board based on new or previously unavailable evidence, a motion to reconsider questions the Board's decision for alleged errors in appraising the facts and the law.” (internal quotation marks omitted)). A motion to reconsider seeks further review of the Board's actual prior decision, *see* 8 C.F.R. § 1003.2(b)(1) (“A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the prior Board decision.”), while a motion to reopen seeks to “reopen” the order of removal by pointing to new facts or evidence that would establish eligibility for relief from removal, *see* 8 C.F.R. § 1003.2(c) (“A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material.”).

33. In cases where the individual subject to a removal order never sought an administrative appeal, jurisdiction remains with the immigration judge and thus any motions to reopen or reconsider must be filed with him or her. *See In re C-W-L-*, 24 I. & N. Dec. 346, 350 (B.I.A. 2007) (“[T]he regulations provide that to request further relief, a motion to reopen must be filed with the last body that issued an administratively final order of removal.” (citing 8 C.F.R. §§ 1003.2, 1003.23(b)(1))). The denial of reopening or reconsideration by the immigration judge may be appealed to the Board. *See* 8 C.F.R. §§ 1003.1(b), 1003.23, 1003.38.

or reconsideration has a direct and immediate effect on the underlying order of removal and, thus, such relief is “intimately associated” with, and its denial amounts to, a final order of removal.<sup>34</sup>

Although the INA lacks a statutory definition that fully describes the universe of final orders of removal subject to judicial review, the INA’s references to final orders throughout its various provisions inform the meaning of such orders. For example, the INA provides that the service of the petition for review of a final order of removal “does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.”<sup>35</sup> The INA also specifies that a petition for review of a final order of removal does not prevent the government from detaining the alien; does not require the government to defer execution of the removal order; and does not relieve certain aliens from complying with rules pertaining to those who have been ordered removed and are awaiting execution of the removal order.<sup>36</sup> And, more to the point, the INA refers to an “administratively final” order of removal as a prerequisite for the enforcement of removal orders.<sup>37</sup>

These INA provisions, consistent with general principles of administrative law,<sup>38</sup> suggest that a final order of removal is one that is executable against the alien, i.e., an order that can be enforced by the government.<sup>39</sup> But while an executable order of removal may be undoubtedly final,<sup>40</sup> there is nothing in the INA that would limit

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34. See *Cheng Fan Kwok v. INS*, 392 U.S. 206, 206, 216–17 (1968) (“Petitions to reopen, like motions for rehearing or reconsideration, are . . . intimately and immediately associated with the final orders they seek to challenge.”) (internal quotation marks omitted); *accord Sarmadi v. INS*, 121 F.3d 1319, 1322 (9th Cir. 1997) (discussing cases).

35. 8 U.S.C. § 1252(b)(3)(B).

36. *Id.* § 1252(b)(8); see *id.* § 1231(a)(1) (presupposing that an “administratively final” order of removal is subject to judicial review).

37. *Id.* § 1231(a)(1)(B) (directing the government to remove the subject within a ninety-day “removal period,” and providing that the removal period begins “on the latest of the . . . date the order of removal becomes administratively final[;] [i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order[;] [or] [i]f the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement”).

38. See generally *Bennett v. Spear*, 520 U.S. 154 (1997) (An agency decision is final if it makes (1) a definitive statement of its position (2) that determines the rights and obligations of the parties; or (3) from which legal consequences will flow).

39. For example, in *Giraldo v. Holder*, the government argued that, based on “the statutory and regulatory scheme governing adjudication, enforcement, and judicial review in immigration proceedings[,] . . . there is no ‘final order of removal’ until the Attorney General possesses the authority to execute it[.]” 654 F.3d 609, 613 (6th Cir. 2011) (describing the government’s reasoning).

40. In some cases, courts have considered the actual executability of removal—rather than the stated content of the order or government action—in determining the existence of a final order of removal. See, e.g., *Khouzam v. U.S. Att’y Gen.*, 549 F.3d 235 (3d Cir. 2008)

the definition of a final order of removal to executable orders.<sup>41</sup> Indeed, applying executability as the benchmark for determining finality would appear to create unexpected and incorrect results. For example, if finality were defined by executability, an alien who was granted asylum could not seek judicial review of the denial of his application for cancellation of removal or contest the charges of his removability. Similarly, defining finality with executability may raise problems in the context of voluntary departure. An alien who has been granted voluntary departure and wishes to seek judicial review of his denial of relief or protection from removal would not have an order of removal that can be executed by the government until the period of voluntary departure expires or terminates.<sup>42</sup> Contrary to established law, then, the alien would have to wait until the expiration of the voluntary departure period before filing a petition for review.<sup>43</sup>

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(holding that the government's termination of deferral of removal constituted a new order of removal because, in part, the action resulted in immediate and actual effects on the petitioner's removal status); *see also* *Anderson v. Holder*, 673 F.3d 1089 (9th Cir. 2012) (although the Board's order of removal was ultra vires, it was still a reviewable final order of removal because the government treated the order as such and executed it); *accord* *WRIGHT ET AL.*, *supra* note 21 (“[Judicial review] may be available . . . if an agency order is immediately enforceable, just as appeal is allowed from otherwise nonfinal district court orders that are subject to immediate enforcement.”).

41. Notably, in a provision relating to the Visa Waiver Program, the INA appears to contemplate the existence of both “a final executable order of removal” and a “final order of removal.” 8 U.S.C. § 1187(c)(2)(E) (providing that a country cannot be included in the program unless, *inter alia*, “[t]he government of the country accepts the repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued not later than three weeks after the issuance of the final order of removal.”); 8 C.F.R. § 212.7(q)(2)(i)(C). While “a final executable order of removal” and “a final order of removal” used in this context are likely coextensive and indistinguishable, such language may support an arguable basis to attribute different meaning to each phrase. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) (O'Connor, J., concurring) (“It is . . . a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute.”) (internal quotation marks omitted).

42. *Compare* 8 C.F.R. § 241.1 (provision relating to execution of removal orders providing that “[a]n order of removal becomes final in accordance with 8 CFR 1241.1”), *with* 8 C.F.R. § 1241.1(f) (“If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure,” the order of removal “shall become final . . . upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond.”).

43. The rules relating to voluntary departure have recently changed, *see* 8 C.F.R. § 1240.26(i) (2009) (providing for automatic termination of any grant of voluntary departure upon the filing of a petition for review, with limited exception), but this change does not directly address the tension between: (1) the established practice of treating the Board's dismissal of the appeal and reinstatement of voluntary departure as a final order of removal, *see Foti v. INS*, 375 U.S. 217, 219 n.1 (1963) (“The granting of voluntary departure relief does not result in the alien's not being subject to an outstanding final order of deportation.”); *see also* 8 C.F.R. §§ 1240.26(b)(1)(iv), 1240.26(c)(3)(iv) (“The automatic termination of a grant of voluntary departure and the effectiveness of the alternative order of removal shall not affect, in any way, the date that the order of the immigration judge or the Board became

Furthermore, because the INA's definition of a final order of deportation includes orders "concluding deportability" or "ordering deportation," the statutory definition appears to contemplate a broader category of orders beyond those that are executable.<sup>44</sup> In this way, the INA's definition of a final order of deportation not only is inadequate, as discussed above, but also contributes to the confusion. The definition could potentially be viewed as permitting a final agency order even when there are no firm consequences that flow from the order.<sup>45</sup> And so much as Congress has ostensibly provided a definition for finality in immigration cases,<sup>46</sup> that legislative

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administratively final."); *Dada v. Mukasey*, 554 U.S. 1, 10–11 (2008) (citing cases permitting the federal courts to stay the period of voluntary departure pending resolution of the petition for review); and (2) the regulation's marking the expiration of the voluntary departure period as the point of finality, see 8 C.F.R. § 1241.1 (providing that an order of removal becomes final upon, inter alia, expiration of the voluntary departure period); see also *Obale v. U.S. Att'y Gen.*, 453 F.3d 151, 160 n.9 (3d Cir. 2006) (" [I]f there is no final order of removal until 'overstay of any voluntary departure period,' then there is never a final order when the [petitioner] voluntarily departs in a timely fashion."). See generally *Ocampo v. Holder*, 629 F.3d 923, 927 (9th Cir. 2010) ("[W]e . . . agree with our sister circuits that the statutory definition of finality . . . controls and trumps the regulatory definition in 8 C.F.R. § 1241.1(f).").

44. See, e.g., *Almutairi v. Holder*, 722 F.3d 996, 1001 (7th Cir. 2013) ("The INA defines an order of deportation as 'the order . . . concluding that the alien is deportable or ordering deportation.' Substituting current terminology, we see that the 'final' order might do no more than establish that the alien is removable; it need not go further and order immediate removal.") (internal citation omitted).

45. See, e.g., *id.* at 1001; see also *Lazo v. Gonzales*, 462 F.3d 53, 54 (2d Cir. 2006) (per curiam) ("[T]he statutory requirement of an order of removal is satisfied when [the immigration judge] either orders removal or concludes that an alien is removable.").

46. See *Forney v. Apfel*, 524 U.S. 266, 269–73 (1998) (emphasizing that the finality requirement is governed by the terms of the relevant statute); see also, e.g., *Pinto v. Holder*, 648 F.3d 976, 979 (9th Cir. 2011) ("Congress defined an 'order of deportation' as either an order of the [immigration judge] 'ordering deportation' or one merely 'concluding that the alien is deportable.'"); *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) ("[T]he statutory definition of an order of removal encompasses not only orders actually ordering removal but also orders in which an [immigration judge] merely determines that an alien is removable and issues a contingent order of removal." (citing *Obale*, 453 F.3d at 151)). A mere finding of removability would not, under the ordinary meaning of the term, be "final" because applications for relief or other matters may be unresolved. See *Abdisalan v. Holder*, 774 F.3d 517, 524 (9th Cir. 2014) (en banc) ("'Final' commonly means '[m]arking the last stage of a process; leaving nothing to be looked for or expected; ultimate.' In the legal context, the term 'final' refers to an order 'ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court's finding.'") (internal citations and ellipsis omitted). A finding of removability is usually the beginning, and not the end, of removal proceedings. See Sydenham Alexander, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 5 & n.19 (2006) ("In the vast majority of immigration court cases, however, noncitizens concede that they are removable and seek to prevail at the second legal stage by showing that the law entitles them to relief." (citing *Demore v. Kim*, 538 U.S. 510 (2003); Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 57,878, 54,880 (Aug. 26, 2002)); Laura L. Lichter, *Introduction to Practice Before the Executive Office [for] Immigration Review*, SN039 ALI-ABA 315, 321 (May 8–9, 2008) ("In many cases, removability is a forgone conclusion, with

specification may override judicial instinct to adopt a rule of finality that is consistent with the ordinary understanding of the concept.

In addition to the lack of statutory clarity on when an order of removal becomes final, the implementing regulations further complicate the matter by appearing to establish two tiers of finality. On the one hand, the regulations address adjudicatory finality and attempt to clarify when the order of removal is finally adjudicated.<sup>47</sup> On the other hand, the regulations also seem to identify executability of the removal order as a separate and different form of finality than adjudicatory finality.<sup>48</sup> Thus, for example, while the Board's dismissal of an appeal and reinstatement of voluntary departure may be a final adjudication that completes the administrative proceedings, the same order of removal may also be "non-final" for a different purpose until the period of voluntary departure expires and the order of removal can be executed. Furthermore, overlaying this additional complication is the relationship between statute and regulation vis-à-vis federal court jurisdiction: while regulations and their interpretations may affect federal court jurisdiction, it is unclear to what extent and under what circumstances federal courts will permit regulations—and thus the agency—to dictate Article III jurisdiction.<sup>49</sup>

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pleadings being entered as a quick 'admit and concede' in order to get on to the relevant applications for relief.").

47. See, e.g., 8 C.F.R. § 235.3(b)(7) (providing that an expedited order of removal "must be reviewed and approved by the appropriate [DHS] supervisor before the order is considered final"); *Id.* § 1003.1(d)(7) ("The Board may return a case to the [immigration judge] for such further action as may be appropriate, without entering a final decision on the merits of the case.").

48. See *id.* § 1241.1(f); see also *Obale*, 453 F.3d at 160 n.9 ("We note . . . that § 1241.1 may have been intended solely to specify when an order of removal may be executed, as opposed to when an order of removal is final for purposes of review."); accord 8 C.F.R. §§ 1240.26(b)(1)(iv), (c)(3)(iv) (providing that subsequent termination of voluntary departure does not affect the date of the final order of removal). *But cf.* 8 C.F.R. §§ 244.18(d), 1244.18 (providing that, in connection with temporary protected status, "[an] alien may be removed from the United States upon entry of a final order of deportation or exclusion."); 8 C.F.R. § 245.15(g) (filing of certain relief does not stay "execution" of a final order of exclusion, deportation, or removal); 8 C.F.R. 245a.13(f) (filing of certain relief stays the execution of any final order of exclusion, deportation, or removal); 8 C.F.R. § 1241.6(a) ("An alien under a final order of deportation or removal may seek a stay of deportation or removal from the Department of Homeland Security[.]"); 8 C.F.R. 1241.33 ("[O]nce an order of deportation becomes final, an alien shall be taken into custody and the order shall be executed.").

49. Compare *Foti v. INS*, 375 U.S. 217, 229–30 (1963) ("We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Courts of Appeals."); 8 C.F.R. § 1208.18(e) (prohibiting judicial review of claims for torture protection except in certain circumstances), with *Kucana v. Holder*, 558 U.S. 233, 233 (2010) (reversing decision by the court of appeals permitting regulation to effectively contract federal court jurisdiction); *Junming Li v. Holder*, 656 F.3d 898, 901–04 (9th Cir. 2011) (rejecting administrative finality as dictating finality for purposes of federal court jurisdiction), *overruled on other grounds by Abdusalan*, 774 F.3d at 517.

## II. FINALITY BEFORE THE BOARD AND COURTS OF APPEALS

As the preceding Part makes clear, the INA and its implementing regulations frequently refer to “finality” when describing an order of removal. But while these various provisions may help to inform the content of a final order of removal, they lack the substance, consistency, and clarity upon which to conclude a uniform definition of finality for purposes of judicial review. In most circumstances, this uncertainty is of little practical consequence because finality is clear—the Board will either enter a decision dismissing the alien’s administrative appeal or the alien will fail to appeal to the Board, rendering the immigration judge’s decision administratively final.<sup>50</sup> When the Board disposes of some issues but remands proceedings to the immigration judge, however, the issue of finality becomes more complicated.

This Part addresses how the Board and courts of appeals have construed finality in the context of so-called “mixed decisions” and other narrow circumstances where the delineation of “final” becomes less clear. Section A focuses on Board practice and how it construes its decision when certain forms of relief are denied, but a remand is necessary for either consideration of other forms of relief or for more administrative matters, such as the background checks that must be completed prior to the finalization of a grant of withholding of removal. Section B then turns to the courts of appeals and considers how they have interpreted “final order of removal” in several discrete circumstances, including remands for voluntary departure consideration, remands for background checks, and remands for further consideration of relief from removal.

### A. *Finality Before the Board*

When the Board dismisses an alien’s administrative appeal, and that dismissal encompasses all issues in the case, the agency decision is final and the alien then has thirty days from the date of the order in which to seek judicial review of the decision. But if the Board decides only certain aspects of the case and then remands to the immigration judge for further proceedings, such as the completion of background checks, the immigration judge reacquires jurisdiction over the proceedings and may consider any new evidence, unless the Board explicitly retains jurisdiction over the

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50. See 8 U.S.C. § 1101(a)(47)(B) (defining when an “order of deportation” becomes final); see also 8 C.F.R. §§ 1003.39 (“Finality of decisions”), 1241.1 (“Final order of removal”).

proceedings or otherwise limits the scope of its remand order.<sup>51</sup> In the specific case of a remand for background checks, for instance, the regulations require the agency to conduct background and security investigations when the grant of any form of relief or protection from removal would permit the alien to reside in the United States.<sup>52</sup> When it remands for such a purpose, the Board has held that its decision is not a final order of removal, even if it otherwise disposes of some of the alien's claims.<sup>53</sup>

More fundamentally, when the immigration judge regains jurisdiction, the Board has concluded that further hearings may be held to consider new factual or legal issues, in addition to the consideration explicitly mandated by the Board's remand order.<sup>54</sup> Both the government and the alien thus have the opportunity on remand to present new evidence that is "material, was not previously available, and could not have been discovered or presented at the former hearing."<sup>55</sup> The scope of remand is limited only by what the Board finally decided in its decision—remand is not "an opportunity for the parties to relitigate issues that were previously considered and decided,"<sup>56</sup> and the immigration judge is not free to reconsider the decision of the Board.<sup>57</sup>

When the immigration judge concludes the remanded proceedings and enters or finalizes the order of removal, that order becomes the final order if no administrative appeal is taken.<sup>58</sup> In such circumstances, the alien may file a petition for review from the immigration judge's decision in the court of appeals, and that petition will encompass all issues finally decided by the Board.<sup>59</sup> An

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51. See *Fernandes v. Holder*, 619 F.3d 1069, 1074 (9th Cir. 2010); *In re M-D*, 24 I. & N. Dec. 138, 141 (B.I.A. 2007); *In re Patel*, 16 I. & N. Dec. 600, 601 (B.I.A. 1978) (finding that where the Board remands to the immigration judge for further proceedings, "it divests itself of jurisdiction of that case unless jurisdiction is expressly retained").

52. See 8 C.F.R. § 1003.47.

53. See *In re E-L-H*, 23 I. & N. Dec. 814, 822 (B.I.A. 2005) (quoting 70 Fed. Reg. 4748 (Apr. 1, 2005)).

54. See *In re M-D*, 24 I. & N. Dec. at 141–42; *In re Alcantara-Perez*, 23 I. & N. Dec. 882, 883–84 (B.I.A. 2006).

55. *In re M-D*, 24 I. & N. Dec. at 141; *id.* at 142 n.3 (noting the time and number limitations regarding motions to reopen do not apply on remand, since there is no final order of removal); see 8 C.F.R. § 1003.47(h).

56. *In re Alcantara-Perez*, 23 I. & N. Dec. at 884.

57. *In re M-D*, 24 I. & N. Dec. at 141.

58. See 8 U.S.C. § 1101(a)(47)(B); see also *In re Alcantara-Perez*, 23 I. & N. Dec. at 883–84 (holding that "when a proceeding is remanded [to the immigration judge] for background checks," the immigration judge will enter an order and "[t]hat order then becomes the final administrative order in the case").

59. See *Chupina v. Holder*, 570 F.3d 99, 105 (2d Cir. 2009) ("in the event that no appeal is made to the BIA by either [the alien] or the government following the adjudication of [the alien's] pending applications, [the alien] may challenge the denial of his asylum application



alien may, however, also file an administrative appeal from the final order of the immigration judge. Aliens have occasionally filed petitions for review with the court of appeals from both the immigration judge's decision and the ultimate decision of the Board, or sometimes just the final decision of the Board. This highlights the confusion surrounding the issue of when timely judicial review should be sought in order to obtain review of all decisions made in the removal proceeding. On petition for review, whether from the immigration judge's or the Board's decision, the other requirements of 8 U.S.C. § 1252 (§ 1252) must be met, including the timely filing of the petition for review from the final order of removal and the alien's exhaustion of all administrative remedies available to her as of right.<sup>60</sup>

### *B. Finality in the Courts of Appeals*

The circuit courts are divided on whether and when certain orders become final for purposes of judicial review. These divisions exist both between and within the courts of appeals regarding similar claims, and across the broad range of issues where "mixed" Board decisions arise. This Section will examine three discrete classes of agency decisions and how the courts of appeals have answered the question of finality: (1) remands for further consideration of voluntary departure; (2) remands for the completion of required background checks; and (3) a catch-all "other" category including remands for substantive relief, reinstatement cases, and administrative removal cases. Finally, this Section will conclude by briefly reviewing how the courts of appeals have considered the issue of whether a premature petition for review may "ripen" into a petition for review once the agency has concluded all relevant administrative proceedings.

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within thirty days after the immigration judge's decision regarding his applications for withholding of removal and protection under the CAT becomes final"); *cf. Ortiz-Alfaro v. Holder*, 694 F.3d 955, 959 (9th Cir. 2012) (in the context of reinstatement of removal, noting the possibility that the alien could petition for review from immigration judge's credible fear determination).

60. See 8 U.S.C. §§ 1252(b)(1), 1252 (d)(1).

## 1. Voluntary Departure

Voluntary departure is a limited benefit that permits an eligible removable alien to depart from the United States without being “removed” and incurring all the legal disabilities that come with entry and execution of an order of removal.<sup>61</sup> Where the Board denies other relief from removal, such as asylum or adjustment of status, but remands for the purpose of either allowing an alien to pursue a request for voluntary departure or requiring the immigration judge to provide the proper advisals regarding a prior grant of voluntary departure, the courts of appeals have concluded that the Board decision is the final order from which a petition for review must be filed.

This conclusion has been based on several interrelated rationales: (1) the Board decision denying relief is an affirmance of the order of removal, and thus constitutes the final order as defined by the statute;<sup>62</sup> (2) a remand for voluntary departure cannot affect the removability of the alien—it will dictate only the manner of the alien’s departure from the United States, and thus has no bearing on the questions of removability or whether a final order of removal has been entered;<sup>63</sup> (3) there is no judicial review of the denial of voluntary departure, making the Board’s decision remanding proceedings the final *reviewable* agency order;<sup>64</sup> and (4) when the Board remands only for voluntary departure consideration, there is no longer any issue pending before the Board itself, and no reason for the alien to appeal from the immigration judge’s decision granting voluntary departure, making the Board’s decision the final “appealable” order of removal.<sup>65</sup>

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61. See *Dada v. Mukasey*, 554 U.S. 1, 8–12 (2008) (reviewing operation of the voluntary departure statute). Most importantly, voluntary departure allows an alien to avoid the five-year bar to admissibility that a formal order of removal entails. See 8 U.S.C. § 1182(a)(9)(A)(i) (“Any alien who has been ordered removed . . . at the end of proceedings under section 1229a . . . and who again seeks admission within 5 years of the date of such removal [ ] is inadmissible.”); see also *Dada*, 554 U.S. at 11 (“And, of great importance, by departing voluntarily the alien facilitates the possibility of readmission.”).

62. See *Batubara v. Holder*, 733 F.3d 1040, 1042 (10th Cir. 2013); *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011); *Alibasic v. Mukasey*, 547 F.3d 78, 83 (2d Cir. 2008); *Giraldo v. Holder*, 654 F.3d 609, 614 (6th Cir. 2011).

63. See *Batubara*, 733 F.3d at 1042–43.

64. See *Pinto*, 648 F.3d at 980; *Giraldo*, 654 F.3d at 614.

65. See *Hounmenou v. Holder*, 691 F.3d 967, 970 n.1 (8th Cir. 2012) (“[N]ow that the IJ has resolved the issue of voluntary departure and there has been no administrative appeal of its decision, the finality of the BIA’s removal order is no longer in question.”); *Giraldo*, 654 F.3d at 614 (“each issue presented to us has been the subject of a ‘final order of deportation.’” (quoting *Perkovic v. INS*, 33 F.3d 615, 618–19 (6th Cir. 1994))); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1362 (9th Cir. 1995) (“there was nothing pending before the Board and the petitioner had no reason or basis for appealing the Immigration Judge’s decision in his

There has been no real dissent from the view that the Board's decision constitutes the final reviewable order of removal when proceedings are remanded solely for consideration of voluntary departure. In adopting this view, however, the Seventh Circuit was more equivocal than other courts of appeals. It noted, rightly, that voluntary departure is in a real sense a substantive form of relief that entails clear benefits for the alien, undercutting the assertion that an order of removal is "final" even where an application for voluntary departure remains pending.<sup>66</sup> Yet it also noted, consistent with the observations of other courts of appeals, that the circuit courts lack jurisdiction to review the denial of voluntary departure, making the decision on such relief more "like an internal decision for the immigration authorities that at most has collateral consequences for the alien."<sup>67</sup> Since the court will not be permitted to review the decision regarding voluntary departure, the final reviewable order could be construed as excluding that determination.<sup>68</sup> The Seventh Circuit also opined that concepts of finality emanating from federal courts<sup>69</sup> perhaps do not carry over into immigration law, where the statute seems to only require a final order of removal, and the finality of that order may not be affected by the fact that a decision on voluntary departure remains outstanding.<sup>70</sup> Despite its equivocation, the Seventh Circuit fell in line with the unanimous views of the other courts of appeals—" [w]e are not inclined to create a circuit split on that point, given how close the question is."<sup>71</sup>

Despite the uniformity on the threshold question of whether the Board's decision is the final agency order of removal, some courts have nonetheless declined to exercise jurisdiction over a petition from the Board's decision for prudential reasons. The First Circuit led this development in *Hakim v. Holder*,<sup>72</sup> based on its reading of the voluntary departure regulation, which provides that a grant of voluntary departure (on or after January 20, 2009) automatically

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favor. He properly appealed the final order requiring his deportation."); *cf.* *Del Pilar v. U.S. Att'y Gen.*, 326 F.3d 1154, 1157 (11th Cir. 2003) ("As all of the issues presented to us were subject to a final order by the BIA and there is nothing remaining for Del Pilar to appeal as the only thing left for the IJ to determine if the country to which Del Pilar will be removed, we find that the BIA's order constitutes a final order of removal.").

66. *Almutairi v. Holder*, 722 F.3d 996, 1001 (7th Cir. 2013).

67. *Id.*

68. *Id.*

69. In district courts, "a case is not final until the district court has disposed not only of all theories of recovery, but also of all theories of relief." *Id.* (citing FED. R. CIV. P. 54(b)).

70. *Almutairi*, 722 F.3d at 1001.

71. *Id.*

72. 611 F.3d 73 (1st Cir. 2010).

terminates with the filing of a petition for review.<sup>73</sup> “The automatic termination provision of the current regulation assumes a chronological order, i.e., that the grant of voluntary departure *precedes* the filing of a petition for judicial review.”<sup>74</sup> If the court were to exercise jurisdiction over the petition for review prior to any decision on the application for voluntary departure, it “would be permitting [the alien] to circumvent the regulation by allowing him to seek both voluntary departure and judicial review, thus hindering judicial economy and denying the government the benefit of ‘a prompt and costless departure.’”<sup>75</sup> The court instead remanded the case to the agency, and noted that Hakim could then petition for review from the final agency decision regarding voluntary departure, and that the court would consider all his claims at that point.<sup>76</sup>

This position has subsequently been adopted in the Fourth and Sixth Circuits.<sup>77</sup> But it is not without its critics. As the Ninth Circuit noted in exercising jurisdiction in similar circumstances, there is a thirty-day deadline for petitioning for review of final orders, which “can begin well-before the grant of voluntary departure.”<sup>78</sup> The Ninth Circuit pointed out that “[t]he First Circuit did not explain how it could assert jurisdiction over Hakim’s petition for review on the merits if he was denied voluntary departure (or decided not to accept voluntary departure if it were granted) and sought to renew judicial review,” since the thirty-day statutory filing period would have likely expired.<sup>79</sup> The Seventh Circuit also noted fundamental problems with this conception of prudential jurisdiction: “[e]ither an order resolving everything except voluntary departure is final and ripe for a petition for review, or it is not.”<sup>80</sup>

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73. The regulation does not address petitions for review filed while the voluntary departure issue is pending before the immigration judge. See 8 C.F.R. § 1240.26(i) (discussing the effect of filing a petition for review after a grant of voluntary departure, but not addressing the situation where the petition for review precedes the decision on voluntary departure).

74. *Hakim*, 611 F.3d at 79.

75. *Id.* (quoting *Dada v. Mukasey*, 554 U.S. 1, 32–33(2008)).

76. *Id.*

77. See *Qingyun Li v. Holder*, 666 F.3d 147, 152 (4th Cir. 2011) (“An order in this case dismissing [the alien’s] petition without prejudice would be consistent with the regulation and *Dada*.”); *Giraldo*, 654 F.3d at 618 (“We likewise think it more prudent to decline to exercise jurisdiction at this time. If Petitioners are granted voluntary departure, they ‘can at that point decide whether to comply with the relevant departure provisions . . . or else to file a petition for judicial review’ of their application for withholding of removal.” (quoting *Hakim*, 611 F.3d at 79)).

78. *Pinto v. Holder*, 648 F.3d 976, 985 (9th Cir. 2011).

79. *Id.*

80. *Almutairi v. Holder*, 722 F.3d 996, 1000 (7th Cir. 2013).

The finality of the decision has jurisdictional significance, and such jurisdiction cannot be based solely on prudential grounds.<sup>81</sup> The better course, according to the Seventh Circuit, “is for the alien to file her petition for review within 30 days of the Board’s order resolving everything except voluntary departure, and then for [the court of appeals] to retain jurisdiction but to stay proceedings on the petition until voluntary departure has been resolved one way or the other.”<sup>82</sup> Declining jurisdiction on prudential grounds is problematic under the statutory language, because—as noted by the Seventh Circuit—there either is or is not a final, reviewable order of removal.<sup>83</sup> At the same time, however, declining jurisdiction does better effectuate the quid pro quo contemplated by the regulatory regime, whereby the government is saved the expense of further litigation in exchange for its agreement to allow the alien to depart voluntarily instead of under an order of removal.<sup>84</sup> Importantly for the alien, both approaches safeguard her right to judicial review and ensure that, regardless of the *when*, the alien will be able to present her claim to the court of appeals.

## 2. Background Checks

The Board may not enter an order granting relief or protection under the INA or its implementing regulations unless relevant background checks have been completed.<sup>85</sup> Where such checks have not been completed, or where previously completed checks have expired during the pendency of the alien’s administrative appeal, the Board will remand proceedings to the immigration judge so that the Department of Homeland Security can complete the relevant investigations and the final order of removal can be entered.<sup>86</sup>

The courts of appeals have divided over the reviewability of the Board’s decision to require a background check in such cases. Prior to the Ninth Circuit’s decision in *Abdisalan*, that court, along with the Third and Seventh Circuits, had concluded that the Board’s decision remanding proceedings was the final order from which the

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81. *Id.*

82. *Id.* at 1002.

83. *Id.* at 1000.

84. *See* *Hakim v. Holder*, 611 F.3d 73, 79 (1st Cir. 2010).

85. *See* 8 C.F.R. § 1003.1(d)(6)(i); *see also In re Alcantara-Perez*, 23 I. & N. Dec. 882, 883 (B.I.A. 2006).

86. *See* 8 C.F.R. § 1003.1(d)(6)(ii)(A); *see also* 8 C.F.R. § 1003.1(d)(6)(ii)(B) (permitting the Board to retain jurisdiction and hold the case in abeyance pending completion of the background checks).

alien had to file her petition for review. In *Junming Li v. Holder*, the Board upheld the immigration judge's denial of asylum but could not enter a final order upholding the grant of withholding of removal because the alien's background checks had expired during the pendency of the administrative appeal.<sup>87</sup> Rather, the Board remanded proceedings for the necessary completion of background checks regarding that grant of withholding of removal.<sup>88</sup> The Ninth Circuit held that the Board's decision upholding the denial of asylum was the final removal order for purposes of review, and justified this holding by reference to its extant precedent on voluntary departure remands: "there was nothing pending before the Board and the petitioner had no reason or basis for appealing the Immigration Judge's decision in his favor. He properly appealed the final order requiring his deportation."<sup>89</sup>

Likewise, the Third Circuit rested its holding in *Yusupov v. Attorney General of the United States* on the fact that the Board's decision represented the final determination of removability, and thus its remand for administrative matters did "not affect th[at] controlling removal determination."<sup>90</sup> The Seventh Circuit also reached this conclusion, reasoning that the remand for background checks does not displace the finding of removability, and that the normal rule in administrative law cases is that "the original decision on the only question open to judicial review is 'final.'"<sup>91</sup> In this context, that decision would be the Board's decision denying asylum, even if proceedings are remanded for background checks.

Although this conclusion was the majority view prior to *Abdisalan*, it was not uniform. The Third Circuit, in a decision issued the same day as *Yusupov*, concluded that the definition of a final order applies to the case as a whole, not to specific issues, meaning that finality was deemed to occur when the immigration judge disposed of the case on remand.<sup>92</sup> This being the case, the court accepted jurisdiction over a petition filed from an immigration judge's decision on remand, and construed that petition as encompassing the agency's decision on all issues raised during the administrative proceedings.<sup>93</sup> The Eighth Circuit had also concluded that the Board

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87. *Junming Li v. Holder*, 656 F.3d 898, 900 (9th Cir. 2011).

88. *Id.*; see 8 C.F.R. § 1003.1(d)(6).

89. *Junming Li*, 656 F.3d at 904 (internal quotation marks and citation omitted).

90. *Yusupov v. U.S. Att'y Gen.*, 518 F.3d 185, 196 (3d Cir. 2008).

91. *Viracacha v. Mukasey*, 518 F.3d 511, 513–14 (7th Cir. 2008) (citing *Forney v. Apfel*, 524 U.S. 266 (2008)).

92. *Vakker v. U.S. Att'y Gen.*, 519 F.3d 143, 147–48 (3d Cir. 2008).

93. *See id.*

decision remanding proceedings was not the appropriate final order of removal for purposes of judicial review, but it did not offer any analysis as to how it reached this conclusion.<sup>94</sup>

### 3. Other Decisions Implicating Finality

Although voluntary departure and background check remands dominate court of appeals consideration of the finality issue, these types of cases do not exhaust the range of cases where finality may be difficult to determine.

Reinstatement cases, for instance, present a variation on the concept of a mixed decision. Pursuant to the INA, the Attorney General may reinstate a prior order of removal against an alien who “has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal,” and that order is “not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.”<sup>95</sup> There is, however, a limited exception to the pursuit of protection for “reasonable fear” proceedings: “If an alien whose prior order of removal has been reinstated . . . expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture.”<sup>96</sup>

The courts of appeals that have addressed the issue have concluded that a reinstated order of removal is not final and reviewable if reasonable fear proceedings remain ongoing. In *Ortiz-Alfaro v. Holder*, the Ninth Circuit held “that where an alien pursues reasonable fear and withholding of removal proceedings following the reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete.”<sup>97</sup> The overarching consideration for the court was the fact that administrative proceedings remained ongoing.<sup>98</sup>

The Tenth Circuit recently rendered a similar holding: “When an alien pursues reasonable fear proceedings, the reinstated removal order is not final in the usual legal sense because it cannot be

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94. See *Goromou v. Holder*, 721 F.3d 569, 576 n.6 (8th Cir. 2013).

95. 8 U.S.C. § 1231(a)(5).

96. 8 C.F.R. § 241.8(e).

97. *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012).

98. See *id.* at 959–60.

executed until further agency proceedings are complete. . . . Thus, the rights, obligations, and legal consequences for the reinstated removal order are not fully determined until the reasonable fear and withholding of removal proceedings are complete.”<sup>99</sup> The Second Circuit also inclines towards this view, stating in dicta that once reasonable fear determinations have been completed, there are no longer any questions surrounding the finality of the reinstated order.<sup>100</sup>

The same result holds in the analogous situation of final administrative removal orders. The INA provides that aliens convicted of an aggravated felony may be subject to expedited removal without the benefit of a hearing before an immigration judge.<sup>101</sup> If the alien does not respond to the Notice of Intent to Remove or contest the charge of removability, an immigration officer issues a final administrative removal order.<sup>102</sup> Nonetheless, if the alien expresses the requisite fear of persecution or torture, then the alien’s case will be referred for a reasonable fear determination, which may entail proceedings before the immigration judge and the Board on that specific issue.<sup>103</sup> The Seventh Circuit has concluded that review of the final administrative removal order is not proper until the reasonable fear proceedings have run their course.<sup>104</sup> Although not holding so, the Tenth Circuit has also assumed for purposes of decision that a final administrative removal order is non-final when issued if the alien pursues reasonable fear proceedings.<sup>105</sup>

Finally, there are cases where the Board may deny one form of relief but remand consideration of other applications for relief and protection to the immigration judge. In these cases, where an application for a substantive benefit is the reason for a remand, the courts of appeals have generally concluded that the Board’s decision disposing of some forms of relief is not final for purposes of judicial review. In a case where the Board denied asylum but remanded for further consideration of the alien’s applications for withholding of removal and protection under the Convention Against Torture (CAT), the Second Circuit dismissed the petition for review from the Board’s decision. The court stated, “[H]aving remanded the case to the immigration judge for consideration of

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99. *Luna-Garcia v. Holder*, 777 F.3d 1182, 1185 (10th Cir. 2015).

100. *See Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010).

101. *See* 8 U.S.C. § 1228(b).

102. 8 C.F.R. § 238.1(d)(1) (2015).

103. *See id.* § 238.1(f)(3).

104. *Eke v. Mukasey*, 512 F.3d 372, 377–78 (7th Cir. 2008).

105. *See G.S. v. Holder*, 373 F. App’x 836, 841–43 (10th Cir. 2010).



applications which directly affect whether [the alien], who conceded removability, can in fact be removed to Guatemala, the BIA's decision cannot constitute a 'final order of removal.'"<sup>106</sup> The Ninth Circuit similarly concluded, in a case where the Board denied the applications for asylum and withholding of removal but remanded for consideration of the application for CAT protection, that the removal order was not final for purposes of judicial review until all claims had been decided by the agency.<sup>107</sup>

#### 4. Can a Premature Petition Ripen?

Given the divergent approaches of the courts of appeals on the issue of finality, a petition for review of agency action may sometimes not be filed from the appropriate agency decision. If a petition for review is late, the alien has lost his ability to seek judicial review because the filing deadline is mandatory and jurisdictional, and, thus, not susceptible to tolling or any other equitable exception.<sup>108</sup> If, on the other hand, the petition for review is *premature*, i.e., the lawyer for the alien has filed the petition prior to the agency's order obtaining the requisite degree of finality for review purposes, there is a possibility that a court of appeals will hold that it ripens upon the completion of all agency proceedings, negating any need to file a second, timely petition for review.

The Second Circuit has held that a "premature petition for review of a not-yet-final order of removal can become a reviewable final order upon the adjudication of remaining applications for relief and protection, provided that the Attorney General has not shown prejudice."<sup>109</sup> The Third Circuit is in accord with this view, holding in *Khan v. Attorney General of the United States* that "[s]o long as the Attorney General has not shown that he will suffer prejudice resulting from the premature filing of a petition for review, and we have yet to take action on the merits of the appeal, a premature petition for review can ripen once the BIA issues a final order on a motion to reopen."<sup>110</sup> And the Tenth Circuit, in the same case where it decided that a final administrative removal order is not

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106. *Chupina v. Holder*, 570 F.3d 99, 103 (2d Cir. 2009).

107. *Go v. Holder*, 640 F.3d 1047, 1051 (9th Cir. 2011).

108. *See supra* note 13 (discussing the statutory thirty-day filing deadline for petitions for review).

109. *Herrera-Molina v. Holder*, 597 F.3d 128, 132 (2d Cir. 2010); *see Lewis v. Gonzales*, 481 F.3d 125, 128–29 (2d Cir. 2007) (concluding that an untimely petition for review ripened after the Board reissued its prior decision, even though no timely petition was filed following reissue).

110. 691 F.3d 488, 494 (3d Cir. 2012).

reviewable when issued, nonetheless concluded that it could review the petition for review of that order because reasonable fear proceedings were concluded during the pendency of the alien's petition.<sup>111</sup>

Three other circuits—the Fifth, Sixth, and Ninth—have concluded that a premature petition for review cannot ripen into a properly filed petition. This is based largely on the premise that the INA provides jurisdiction to review only *final* orders of removal, and that finality is a jurisdictional prerequisite to review. Under the reasoning of the Fifth Circuit, “[b]ecause there was no final order of removal to review, we lacked jurisdiction at the time [the] petition was filed. The BIA’s later dismissal of [the administrative] appeal could not cure this jurisdictional defect.”<sup>112</sup> Likewise, the Ninth Circuit has construed a premature petition as constituting a “nullity because there is no final deportation order to review,” and the subsequent entry of a final order by the Board cannot “cure” this defect.<sup>113</sup>

### III. *ABDISALAN* v. *HOLDER*: FROM CONFUSION TO (A MEASURE OF) CLARITY IN THE NINTH CIRCUIT

On December 15, 2014, the Ninth Circuit held in its unanimous en banc opinion in *Abdisalan* that when the Board issues a decision that denies relief in part but remands other claims to an immigration judge for further proceedings, the agency decision is not a final reviewable order of removal and does not trigger the thirty-day window in which to file a petition for review.<sup>114</sup> The court’s holding creates an ostensible bright line rule regarding what constitutes a final order of removal for judicial review purposes. Nonetheless, despite announcing this rule, the court still set forth important caveats.

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111. See *G.S. v. Holder*, 373 F. App’x 836, 843 (10th Cir. 2010) (as the final administrative removal order was itself “final,” and there being no express prohibition against the ripening of a premature petition for review, “a petition for review filed after a FARO has issued but before an alien has completed the reasonable-fear process ripens upon completion of that process, provided the government has shown no prejudice arising from the timing of the petition”).

112. *Moreira v. Mukasey*, 509 F.3d 709, 713–14 (5th Cir. 2007); see *Jaber v. Gonzales*, 486 F.3d 223, 228–30 (6th Cir. 2007) (dismissing a case where review was sought from the immigration judge’s decision, but no petition for review was filed after the Board finally disposed of the case).

113. *Brion v. INS*, 51 F. App’x 732, 733 (9th Cir. 2002) (citing *Chu v. INS*, 875 F.2d 777, 780, 781 (9th Cir. 1989)).

114. *Abdisalan v. Holder*, 774 F.3d 517, 520 (9th Cir. 2014) (en banc).

The purpose of this Part is to explore the *Abdisalan* proceedings and assess the importance of the opinion for other circuits grappling with the issue of finality. Section A reviews the background of the case and culminates in an overview of the panel's decision, which sought to reconcile the competing views of finality that prior panels of the Ninth Circuit had offered. Section B then turns to the en banc proceedings—the petition for rehearing and the government's response, as well as the jurisprudential confusion that justified recourse to en banc proceedings in the case. Section C then addresses the en banc decision itself, a unanimous decision concluding, consistent with the position of the parties, that the Board decision remanding proceedings is not a final, reviewable order of removal. Finally, Section D considers the import of *Abdisalan* as well as its shortcomings. Despite the path to clarity offered by the decision, uncertainty about the concept of finality has not been entirely eradicated.

#### A. Background and the Ninth Circuit's Panel Decision

Sama Abdiaziz Abdisalan is a native and citizen of Somalia who submitted an application for asylum and related protection to the Department of Homeland Security.<sup>115</sup> She claimed that in Somalia she was forced to undergo female genital mutilation and also was kidnapped and raped by members of a rival clan.<sup>116</sup> In removal proceedings, an immigration judge denied Abdisalan's asylum application as time-barred,<sup>117</sup> but granted withholding of removal.<sup>118</sup>

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115. *Id.*

116. *Id.*

117. Asylum is discretionary relief from removal available to an alien primarily on the basis of future persecution in the alien's home country. Asylum may be granted to eligible applicants by the Secretary of Homeland Security, who generally delegates such decisions to the discretion of asylum officers at U.S. Citizenship and Immigration Services or by the Attorney General, who generally leaves such decisions to the discretion of immigration judges. An alien is eligible for asylum if he is unable or unwilling to return to his country of nationality (or country of last habitual residence) because of past persecution or a "well-founded fear" of future persecution "on account of [his or her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42); see also *id.* § 1158(b). Withholding of removal is protection against removal for an alien who faces a "clear probability" of future persecution in the country to which he has been ordered deported because of his "race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1231(b)(3)(A); see *INS v. Stevic*, 467 U.S. 407, 414–29 (1984) (holding that the clear-probability standard applies to applications for withholding of removal under section 1231). Withholding of removal requires an alien to show a greater likelihood of future persecution than is required for asylum. If an alien qualifies for withholding of removal, it is mandatory and cannot be denied as a matter of discretion. 8 U.S.C. § 1231(b)(3)(A) (noting

In 2008, the Board dismissed Abdisalan's appeal of the asylum denial and remanded proceedings to the immigration judge to complete the background checks for withholding.<sup>119</sup> Abdisalan did not seek judicial review of the 2008 decision.<sup>120</sup>

The immigration judge granted Abdisalan withholding of removal in 2009 upon satisfactory completion of her background checks.<sup>121</sup> Abdisalan filed an administrative appeal with the Board, again challenging the rejection of her asylum application.<sup>122</sup> The Board, construing the appeal as an untimely motion to reconsider its 2008 decision, dismissed the appeal in 2010.<sup>123</sup> The immigration judge remanded the case for background checks again because the previously completed checks had expired during the administrative appeals process.<sup>124</sup> Abdisalan filed a petition for review with the Ninth Circuit within thirty days of the Board's 2010 decision.<sup>125</sup>

Upon completion of the background checks, the immigration judge again entered an order granting Abdisalan withholding of removal in 2011.<sup>126</sup> A timely petition for review of that decision was filed and the two petitions were consolidated for review. At that time, Abdisalan advanced two arguments: (1) that the court had jurisdiction to review whether her application was timely; and (2) since no negative credibility finding was made, and both she and her witness testified that she entered the United States within one year of filing her application, the testimony was enough to meet the "clear and convincing" standard for the one-year deadline. The government did not contest the court of appeals' jurisdiction to review the petitions on timeliness grounds. Rather, the government took the position that the case should be remanded to the Board to address the Ninth Circuit's observation in *Singh v. Holder* that the agency "has provided neither definition nor structure to the contours of [the clear and convincing evidence] standard with respect to the one-year filing bar."<sup>127</sup>

After oral argument, the panel requested supplemental briefing on the issue of whether it had jurisdiction to review the petitions at

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that the Attorney General "may not remove an alien" who establishes eligibility for withholding of removal); see *Stevic*, 467 U.S. at 421 n.15 (noting mandatory language of statute).

118. *Abdisalan*, 774 F.3d at 521.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Singh v. Holder*, 649 F.3d 1161, 1168 (9th Cir. 2011) (en banc).

all. In the supplemental briefing, the government agreed with Abdisalan that under Board precedent she appropriately petitioned for review from the immigration judge's 2011 order.<sup>128</sup> The government nonetheless acknowledged that under certain Ninth Circuit precedent, such a petition would be deemed untimely and thus outside the court's jurisdiction.<sup>129</sup>

A divided three-judge panel issued a published decision in September 2013, dismissing the petitions for review.<sup>130</sup> The panel majority held that insofar as Abdisalan's asylum claim was concerned, the agency decision became final upon the Board's 2008 dismissal of the administrative appeal.<sup>131</sup> Because Abdisalan failed to timely petition for review of this decision, the court concluded that it lacked jurisdiction to review her asylum challenge, which was the only issue she raised in her briefs.<sup>132</sup> The panel construed its decision as dictated by circuit precedent and otherwise consistent with the Board's own approach to finality.<sup>133</sup> On the panel's reading of those precedents, the denial of relief was final in 2008, notwithstanding the further remand to the immigration judge, and any petition for review needed to be filed within thirty days of that decision.<sup>134</sup> Counsel did not file the petitions until 2010 and 2011, however, far outside the statutory deadline.

Judge Watford dissented.<sup>135</sup> Based on his reading of the statute, regulations, and relevant precedent, he agreed with the position advanced by both Abdisalan and the government, and would have held that there was no final reviewable order of removal until the immigration judge's 2011 order.<sup>136</sup> In his view, it was only then when the proceedings were final. Because Abdisalan timely filed a petition for review of that decision, Judge Watford concluded that the court of appeals had jurisdiction to review the merits of the agency's denial of Abdisalan's asylum claim.<sup>137</sup>

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128. See *In re M-D*, 24 I. & N. Dec. 138, 141–42, 142 n.3 (B.I.A. 2007) (concluding that when a Board remands a case for completion of background checks, the immigration judge reacquires jurisdiction over the proceedings and may consider any new evidence, unless the Board explicitly retains jurisdiction or otherwise limits the scope).

129. See *Junming Li v. Holder*, 656 F.3d 898, 904 (9th Cir. 2011) (holding that where the Board denies relief and remands for background checks required for alternative relief, it has jurisdiction to consider an appeal of the final order denying relief, i.e., the Board's decision, not the final order of the immigration judge).

130. *Abdisalan v. Holder*, 728 F.3d 1122 (9th Cir. 2013).

131. *Id.* at 1125–26.

132. *Id.*

133. *Id.* at 1126–30.

134. *Id.*

135. *Id.* at 1130–34.

136. *Id.* at 1134.

137. *Id.*

*B. En Banc Rehearing*

Abdisalan sought en banc rehearing. Consistent with the position advocated by the government, Abdisalan contended that the final order of removal was the immigration judge's 2011 decision concluding proceedings, not the 2008 Board decision dismissing her asylum claim. Abdisalan asserted that the panel's decision deepened an intra-circuit split and was contrary to the agency's own statement of when an order becomes final, while undermining principles of judicial economy and certainty.

The government agreed with Abdisalan that the court should rehear her case en banc. Specifically, the government argued that the panel's decision deepened an intra-circuit conflict regarding when aliens should seek judicial review of mixed Board decisions.<sup>138</sup> The government also asserted that the panel's approach was inconsistent with the Board's own approach to the finality of agency decisions, as set forth in *Matter of M-D*.<sup>139</sup> The government noted that the case was particularly important because the thirty-day filing deadline for petitions for review is mandatory and jurisdictional.<sup>140</sup> Thus, both parties agreed that it was important for the court to clarify *when* aliens should petition for review in these and similar circumstances. More specifically, the government agreed with Abdisalan that the rule should be that a removal order is final and

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138. Prior to the court's opinion in *Abdisalan*, the Ninth Circuit's authority on this issue was in conflict. The panel's decision in *Abdisalan* was consistent with the Ninth Circuit's decision in *Junming Li*, where the court held that "where the [Board] denies relief and remands pursuant to 8 C.F.R. § 1003.1(d)(6) for background checks required for alternative relief, [it has] jurisdiction to consider an appeal of the final order denying relief," i.e., the Board's decision, not the final order of the immigration judge. *Junming Li*, 656 F.3d at 904. This approach, accepting jurisdiction over the Board's denial of relief or protection despite a contemporaneous remand of proceedings to the immigration judge, is also consistent with Ninth Circuit precedent holding that a Board decision denying relief or protection but remanding for consideration of voluntary departure is a final, reviewable order of removal. *See* *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011). However, those decisions were in tension with other Ninth Circuit decisions. For example, in *Go v. Holder*, the Board denied asylum and withholding of removal, but remanded for further proceedings regarding the alien's eligibility for protection under the CAT. 640 F.3d at 1047, 1051–52 (9th Cir. 2011). The alien did not file a petition for review until after the final decision by the agency on his CAT claim, but the court construed that petition as encompassing all final decisions made by the agency during the course of proceedings, not just the final denial of the CAT claim. *Id.* The court's approach in *Go* was consistent with the position of both Abdisalan and the government, as it recognized that it was prudent to await the agency's resolution of all pending matters before entertaining judicial review.

139. *See In re M-D*, 24 I. & N. Dec. 138, 141–42 & n.3 (B.I.A. 2007).

140. *See, e.g., Magtanong v. Gonzales*, 494 F.3d 1190, 1191 (7th Cir. 2007).

reviewable *only* when *all* proceedings have been completed, regardless of whether the order has been issued by the Board or the immigration judge.

The Ninth Circuit agreed to rehear the case<sup>141</sup> and it was argued before an en banc panel in June 2014.<sup>142</sup> The disposition of the case turned on whether Abdisalan's evidence met the "clear and convincing" evidence standard that she had timely filed her asylum application, but the parties agreed on the need for a uniform finality rule.

### C. The Ninth Circuit's En Banc Decision

On December 15, 2014, the Ninth Circuit issued a unanimous en banc decision in *Abdisalan*.<sup>143</sup> The Ninth Circuit "adopt[ed] a straightforward rule: when the Board of Immigration Appeals issues a decision that denies some claims but remands any other claims for relief to an immigration judge [ ] for further proceedings (a 'mixed' decision), the BIA decision is not a final order of removal with regard to any of the claims, and it does not trigger the thirty-day window in which to file a petition for review."<sup>144</sup> Rather, an alien should only seek judicial review at the conclusion of the proceedings, after either the immigration judge has issued a decision and the time for filing an administrative appeal has passed, or the Board has issued a final decision after appeal from the immigration judge's decision.<sup>145</sup> Any petition for review filed prior to the conclusion of the proceedings would be premature and the court would not have jurisdiction due to the lack of a final order of removal.<sup>146</sup>

In rendering a decision on these points, the court recognized that the "point at which a removal order becomes final is critical for the purposes of timely petitioning for judicial review."<sup>147</sup> It acknowledged that the stakes for Abdisalan and other aliens like her are high. If the Board's 2008 decision was a final order of removal with regard to her asylum claim, then she would have lost her opportunity to challenge the agency's denial of that claim when she failed to file a petition for review of the 2008 decision.<sup>148</sup> But if the

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141. *Abdisalan v. Holder*, 750 F.3d 1098 (9th Cir. 2014).

142. *Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2014) (en banc).

143. *Id.* at 526.

144. *Id.* at 520.

145. *Id.* at 526–27.

146. *Id.*

147. *Id.* at 521 (quoting *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012)).

148. *Id.* at 523.

Board's 2008 decision was not a final order of removal, then the court would have jurisdiction to review her asylum claim as part of her subsequent petitions for review.<sup>149</sup>

The court was concerned about the injustice that could arise because of the inconsistency in its jurisprudence on this issue. It correctly pointed out that in a majority of immigration cases, the concept of finality is clear—aliens generally must file a petition for review within thirty days of the Board's decision.<sup>150</sup> But the court recognized that “finality is less obvious when the Board affirms the denial of relief on some of an alien's claims but remands to the immigration judge for further proceedings on others in a ‘mixed’ decision.”<sup>151</sup> The most important question facing the court was whether in the mixed decision context, the Board decision constitutes a “final order of removal” with regard to the claims denied.<sup>152</sup> The court answered that question in the negative, thereby settling the circuit conflict on the issue and providing attorneys and aliens with a clear path forward as to when to file a petition for review.<sup>153</sup>

The court relied in part on the statutory text in arriving at its conclusion as to how it should treat “mixed” or “bifurcated” Board decisions. It adopted what it described as a straightforward reading of the statutory text to indicate that an order of removal cannot become final for any purpose when it depends on the resolution of further issues by the immigration judge on remand. First, in defining finality for purposes of judicial review, the court began with its jurisdictional statute, 8 U.S.C. § 1252, which states that the court has jurisdiction to review “a final order of removal.”<sup>154</sup> The court relied on the definition of “order of removal” as set forth in 8 U.S.C. § 1101(a)(47)(A), where Congress defined an order of removal as “the order” of the immigration judge “concluding that the alien is deportable or ordering deportation.”<sup>155</sup> “The order” then becomes “final upon the earlier of—(i) a determination by the Board [ ] affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board.”<sup>156</sup>

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149. *Id.*

150. *Id.* at 521.

151. *Id.* at 522.

152. *Id.*

153. *Id.* at 520, 526.

154. *Id.* at 523.

155. *Id.* (quoting 8 U.S.C. § 1101(a)(47)(A) (2012)).

156. 8 U.S.C. § 1101(a)(47)(B).



Second, the court cited to the INA's repeated reference to "*the*" order<sup>157</sup> and concluded that those references suggest that Congress contemplated that an alien's removal proceedings would typically culminate in one final order of removal.<sup>158</sup> Thus, given the fact that there is only one final order of removal—as is true in the absence of a motion to reopen or reconsider, the court found it difficult to conceive of how the order could become final at multiple points in time.<sup>159</sup> In highlighting this point, the court relied on the plain meaning of the word "final," and its common definition, as well as Congress's use of the familiar term to conclude that Congress could not have intended for an order of removal to become final while remanded proceedings remained ongoing.<sup>160</sup>

In particular, the court stated that the disjunctive reference to "the order" in the statute, *i.e.*, "concluding that the alien is deportable *or* ordering deportation" could suggest that two different kinds of orders are in fact covered; an alien could be deportable but not ordered deported, particularly if the alien is entitled to some form of relief from deportation.<sup>161</sup> Because of this ambiguity, the court turned to the agency regulations and interpretations for further clarification on the issue.

In doing so, the court decided that the agency's regulations and the Board's interpretations of those regulations bolstered its view that a mixed decision is not "final" with regard to any of the alien's claims.<sup>162</sup> In the absence of a motion to reopen or reconsider, the court was convinced that there is only one final order of removal per alien, and that order does not become final until background checks or other remanded proceedings are complete.<sup>163</sup> The court

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157. *Abdisalan*, 774 F.3d at 523.

158. *Id.* at 523–24 (citing *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013) (interpreting the statutory term "the" to mean "singular")); *In re Cardelucci*, 285 F.3d 1231, 1234 (9th Cir. 2002) (observing that the "definite article 'the' particularizes the subject which it precedes and is [a] word of limitation as opposed to [the] indefinite or generalizing force 'a' or 'an'") (quoting BLACK'S LAW DICTIONARY 1477 (6th ed. 1990)); *cf.* *Stone v. INS*, 514 U.S. 386, 393–95 (1995) (holding that an amendment to the INA in 1990 abrogated the default presumption that "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved," but that it did so only in the specific context of motions to reopen and reconsider).

159. *Abdisalan*, 774 F.3d at 524.

160. *Id.*

161. *Id.* (citing 8 U.S.C. § 1101(a)(47)(A) (2012) (indicating that the INA thus does not completely foreclose the possibility that a mixed Board decision could constitute a final order of removal with regard to the claims denied)).

162. *Id.* at 525–26.

163. *Id.* at 524 (citing *Mejia-Hernandez v. Holder*, 633 F.3d 818, 822 (9th Cir. 2011) (applying *Skidmore* deference to the Board's interpretation "proportional to its thoroughness, reasoning consistency, and ability to persuade"))).

recognized that as a general matter Executive Office for Immigration Review (EOIR) regulations permit the Board to “return a case to . . . an immigration judge for such further action as may be appropriate, *without entering a final decision* on the merits of the case.”<sup>164</sup>

The court further elucidated its holding by analyzing the agency regulations and Board decisions governing background checks. By regulation, the Board may not grant certain forms of relief, including withholding of removal, until background checks have been completed.<sup>165</sup> If background checks must be completed or updated, the Board may remand to the immigration judge with instructions to carry out the checks.<sup>166</sup> Thereafter, the immigration judge will enter an order granting or denying the immigration relief sought.<sup>167</sup> “Similarly, EOIR’s interim rule governing background checks states that when required checks have not been completed, ‘the Board will not be able to issue a final decision granting any application for relief . . . because the record is not yet complete.’”<sup>168</sup>

Looking at the agency precedent concerning background checks, the court relied on two published Board decisions, both of which indicated that an order remanding a case for background checks is not a final decision: *Matter of Alcantara-Perez* and *Matter of M-D*.<sup>169</sup> In *Alcantara-Perez*, the Board held that because an order remanding the case for background checks is “not a final decision,” new information that comes to light on remand permits the immigration judge to “examine the case in a different light,” including by holding new hearings.<sup>170</sup> The Board explained that where the background checks fail to turn up new evidence, “the Immigration Judge will enter an order granting relief,” and “[t]hat order then becomes *the* final administrative order in the case.”<sup>171</sup>

In *Matter of M-D*, the Board explained that when a case is remanded to an immigration judge for the appropriate background checks pursuant to 8 C.F.R. § 1003.47(h), the immigration judge

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164. *Id.* at 524–25 (quoting 8 C.F.R. § 1003.1(d)(7) (2015)).

165. 8 C.F.R. § 1003.1(d)(6)(i).

166. 8 C.F.R. § 1003.1(d)(6)(ii)(A).

167. *Id.*

168. *Abdisalan*, 774 F.3d at 525 (quoting Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4748 (Jan. 31, 2005)).

169. *Id.* at 525–26 (citing *In re M-D*, 24 I. & N. Dec. 138, 140 (B.I.A. 2007); *In re Alcantara-Perez*, 23 I. & N. Dec. 882, 884–885 (B.I.A. 2006)).

170. *In re Alcantara-Perez*, 23 I. & N. Dec. at 884.

171. *Id.* at 884–85.

“reacquires jurisdiction over the proceedings . . . [but] may not reconsider the decision of the Board.”<sup>172</sup> But if the background checks reveal new evidence potentially affecting relief, the immigration judge must consider such evidence before entering an order. The court indicated that these agency interpretations shed further light on what the text of the statute already implies: that in a case like *Abdisalan*’s, there is only one final order of removal, and when the Board remands to the immigration judge, that order is not “final” until administrative proceedings have concluded.<sup>173</sup>

The court pointed out that in a related context, the Supreme Court has long interpreted the term “final agency action” in the Administrative Procedure Act to require that an agency’s action “mark the ‘consummation’ of the agency’s decisionmaking process.”<sup>174</sup> In other words, the action “must not be of a merely tentative or interlocutory nature.”<sup>175</sup> Finally, the court acknowledged the importance of maintaining judicial efficiency, which weighs in favor of reviewing a single final order of removal, as opposed to employing a piecemeal approach.<sup>176</sup>

Beyond the court’s relatively straightforward holding, there are two exceptions set forth in its opinion. First, the court noted that its holding meant that a number of currently pending petitions for review would be deemed premature and thus presumptively outside the court’s jurisdiction, and that the time for filing a proper and timely petition for review from the remanded proceedings in those cases may well have passed.<sup>177</sup> In order to not “punish these petitioners for [the Ninth Circuit’s] own doctrinal inconsistency,” the court held “that any pending petitions rendered premature by today’s decision shall be treated as automatically ripening into timely petitions upon the completion of remanded proceedings, regardless of whether those proceedings have already concluded.”<sup>178</sup>

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172. *In re M-D*, 24 I. & N. Dec. at 141.

173. *Abdisalan*, 774 F.3d at 525.

174. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948))).

175. *Id.* at 525 (citing *Bennett v. Spear*, 520 U.S. at 178); see *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012) (holding that an agency order was final in part because its conclusions “were not subject to further agency review”).

176. *Id.* at 525 (citing *Office of Workers’ Comp. Programs v. Brodka*, 643 F.2d 159, 161 (3d Cir. 1981) (noting that declining to exercise jurisdiction over agency remand orders “furthers the interests of administrative economy and judicial efficiency embodied in the policy against piecemeal appeals”); *Nat’l Steel & Shipbuilding Co. v. Dir., Office of Workers’ Comp. Programs*, 626 F.2d 106, 107–08 (9th Cir. 1980) (holding that an agency order involving a remand is not a reviewable “final order,” and reasoning that this rule “furthers the same policies as the finality rule embodied in 28 U.S.C. § 1291”).

177. *Id.* at 526–27.

178. *Id.*

However, this holding is limited in that “extends only to petitioners whose petitions for review were filed with [the] Court before [December 15, 2014].”<sup>179</sup> The court explicitly declined to take a position on the current circuit split regarding treatment of premature petitions generally.<sup>180</sup>

Second, despite the seemingly absolute nature of the court’s holding—which stated that “[w]hen the BIA remands to the [immigration judge] for *any* reason, no final order of removal exists until all administrative proceedings have concluded”<sup>181</sup>—the court declined to revisit its case law regarding remands where the Board denies all claims of relief but remands for further consideration of voluntary departure.<sup>182</sup> Specifically, the court opined that “[u]nder the facts of this case, we need not revisit our rule that the BIA’s decision is a final order of removal when it remands for consideration of voluntary departure but denies all other forms of relief.”<sup>183</sup> This distinction is hard to reconcile with *Abdisalan*’s holding, which is that a remand “for *any* reason” renders the Board decision non-final for purposes of judicial review. Although some may interpret this language as an exception to the Court’s broad holding regarding finality, it can also be argued that any exception would be swallowed by the rule the court adopted.

In light of its holding regarding finality, the court ultimately held that it had jurisdiction to consider *Abdisalan*’s challenge to the Board’s determination that her asylum application was time-barred, but remanded the case for the agency to address in the first instance whether an asylum applicant’s credible and uncontradicted testimony regarding her date of entry meets the statutory “clear and convincing evidence” standard for timeliness.<sup>184</sup>

#### *D. Jurisprudential and Policy-Based Takeaways from Abdisalan*

Perhaps in some respects, it is difficult to imagine why the “straightforward” rule announced in *Abdisalan* was not adopted earlier by the Ninth Circuit court and, more broadly, is not already well established in other circuits. Far from breaking new ground, *Abdisalan* accords with the Supreme Court’s articulation (as early as

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179. *Id.*

180. *Id.*

181. *Id.* at 526.

182. *Id.* at 526 n.8 (emphasis added) (citing *Pinto v. Holder*, 648 F.3d 976, 980 (9th Cir. 2011); *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1361–62 (9th Cir. 1995)).

183. *Id.*

184. *Id.* at 527–28.

1963) that all decisions made “during and incident to” the immigration proceedings are part of the final order of deportation.<sup>185</sup> In explaining this “rather clear” understanding of what encompasses a final agency order in the immigration context, the court specifically provided examples of pending matters—such as relief and protection from deportation, as well as the privilege of voluntary departure—that would require final administrative resolution before a federal appeals court may review the order of deportation.<sup>186</sup> And, indeed, the Board’s precedent and relevant regulations are consistent with this understanding of finality, and both foresee and account for situations where the Board may issue a non-final mixed decision.<sup>187</sup> For example, the regulations specify when the Board cannot enter a final order and also provide for the Board’s remand authority to the immigration judge without having to enter a final order.<sup>188</sup> Similarly, as discussed above, the Board has charted a path for litigants on remand to the immigration judge, clarifying where jurisdiction lies, under what circumstances litigants may raise new claims, and when a final order of removal is issued.<sup>189</sup> Importantly, in light of these established procedures, the *Abdisalan* rule—which essentially applies the Supreme Court’s original understanding of finality in the immigration context—avoids premature judicial intrusion into the agency’s decision-making process. Additionally, by permitting the agency to decide the issues and potentially resolve the case in favor of the alien on remand or beyond (thus making judicial review unnecessary and a moot point), the rule also serves judicial efficiency.<sup>190</sup>

Furthermore, the *Abdisalan* rule protects against the alien’s inadvertent loss of opportunity for judicial review as a result of his or

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185. *Foti v. INS*, 375 U.S. 217, 229 (1963).

186. *Id.* at 229–30. The courts of appeals have not found *Foti* to compel a conclusive resolution on the question of finality. *See, e.g.,* *Giraldo v. Holder*, 654 F.3d 609, 615–16 (6th Cir. 2011) (stating that it was not bound by *Foti*’s “dictum,” which, in any event, no longer appeared persuasive in view of subsequent amendments to the INA’s jurisdictional provisions).

187. *See, e.g., In re M-D-*, 24 I. & N. Dec. 138, 140–42 (B.I.A. 2007) (explaining that a partial remand to the immigration judge for resolution of specific issues would not result in a final decision); *see also* 8 C.F.R. § 1003.1(d)(7) (2015) (providing that the Board may remand a case to the immigration judge without entering a final decision).

188. 8 C.F.R. §§ 1003.1(d)(6)–(7).

189. *See, e.g., In re M-D-*, 24 I. & N. Dec. at 140–42; *In re Alcantara-Perez*, 23 I. & N. Dec. 882, 883 (B.I.A. 2006).

190. The general policy reasons behind the finality requirement often converge with the reasons for requiring exhaustion. *See* WRIGHT ET AL., *supra* note 21, § 3942. Thus, while one does not equal the other, the justifications for exhaustion, *e.g.*, concepts such as judicial efficiency and administrative primacy often explain or elucidate the purpose of the finality requirement. *Id.* Notably, some have suggested that finality and the ripeness doctrine completely overlap and that the former may be substituted by the latter. *Id.*

her misunderstanding of finality. If the alien files a premature petition for review, presumably the government's motion to dismiss the case for lack of jurisdiction and the subsequent court order doing so would provide her with notice about the unresolved matters before the agency and indicate at which point the case would be final for purposes of judicial review. Thus, the *Abdisalan* rule not only brings certainty to when an order of removal becomes final, but the application of the rule necessarily functions as a fail-safe in those rare instances where an alien may have misapprehended when her order of removal becomes final. That is, while the possibility of human error resulting in an untimely petition for review cannot be completely eradicated, *no misunderstanding about finality* should prevent an alien from obtaining judicial review of an order of removal.

Notwithstanding the desirability of the *Abdisalan* rule as a matter of law and policy, the court's decision announcing the rule is problematic in two ways. First, as described in Part III(C), *supra*, the court's footnote that it was not revisiting its voluntary departure cases is questionable and potentially dims the certainty of the bright-line rule. It would seem that the bright-line rule necessarily resolves the voluntary departure scenario noted by the court, and thus, (1) the note about voluntary departure is superfluous dicta; or (2) the court's contradicting statements raise serious questions about the true meaning of the rule. Assuming the latter for the moment, one way to reconcile the apparent inconsistency is to qualify the bright-line rule with the condition that it does not apply where a case is remanded for resolution of an issue that does not "affect" the result of removal.<sup>191</sup> For example, the rule may not apply when the pending matter is for voluntary departure—a form of relief that some courts have described as an internal administrative matter not affecting the removal decision.<sup>192</sup> But this interpretation would undo the efficacy of the *Abdisalan* rule, as it is debatable

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191. Indeed, at one point in its discussion about finality, the court observes that "the agency's adjudication of an alien's claims can hardly be considered fully consummated while background checks or other remanded proceedings *which have the potential to affect the disposition* are still in progress." *Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014) (emphasis added).

192. In discussing finality in the immigration context, courts have often distinguished between pending matters that are substantive and procedural. *See, e.g., Chupina v. Holder*, 570 F.3d 99, 103 (2d Cir. 2009) ("[H]aving remanded the case to the immigration judge for consideration of applications which directly affect whether Chupina, who conceded removability, can in fact be removed to Guatemala, the BIA's decision cannot constitute a 'final order of removal.'"); *Yusupov v. U.S. Att'y Gen.*, 518 F.3d 185, 196 n.19 (3d Cir. 2008) (noting that a remand for background checks would not constitute a final order of removal if such checks "could have affected his eligibility for withholding of removal"); *see also* *Batubara*

whether voluntary departure or other potential matters are substantive or procedural.<sup>193</sup> Moreover, under this approach, finality would be determined by considering the nature of the pending matter rather than the fact that such proceedings remain ongoing, thus relegating the *Abdisalan* “rule” to a starting proposition rather than a dispositive principle of finality. Consequently, reconciling the two statements in this way would inject uncertainty in the *application* of the bright-line rule and undermine the purpose of the court’s decision to bring clarity to its finality jurisprudence.<sup>194</sup>

Second, aside from the caveat problem, the decision also suffers from its lack of clarity as to the scope of its holding. The court’s decision appears limited to removal orders entered at the conclusion of proceedings under 8 U.S.C. § 1229a (section 240) of the INA.<sup>195</sup> The court does not explain or suggest the rule’s applicability to, for example, reinstatement and administrative removal orders (neither of which are issued by an immigration judge nor reviewed the Board). Similarly, the court does not attempt to address motions to reopen or reconsider, and how orders denying such relief fit in the context of the *Abdisalan* rule.<sup>196</sup> Indeed, by focusing on the text of the INA’s definition of a final order of deportation,<sup>197</sup> the court’s decision is vulnerable to being limited in

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v. Holder, 733 F.3d 1040, 1042 (10th Cir. 2013) (distinguishing between whether the pending matter affects the removal decision or merely “the manner of her exit” (citing *Almutairi v. Holder*, 722 F.3d 996, 1001 (7th Cir. 2013))).

193. See, e.g., *Yusupov*, 518 F.3d at 196 n.19 (noting that remand for background checks may, depending on the circumstances, constitute the type of remand that may affect actual removability); see also *Junming Li v. Holder*, 656 F.3d 898, 902–03 (9th Cir. 2011) (discussing finality of order of removal where background checks are pending); see generally *Almutairi*, 722 F.3d at 1001 (expressing ambivalence about whether voluntary departure is substantive or an internal administrative decision).

194. On January 14, 2016, the Ninth Circuit decided *Rizo v. Lynch*, 810 F.3d 688, 691–92 (9th Cir. 2016), holding that the Board’s order remanding for matters relating to voluntary departure constituted a final order of removal. On January 20, 2016, a different panel of the Ninth Circuit ordered the parties in *Singh v. Lynch*, No. 12-74163 (9th Cir.), to submit supplemental briefs “addressing whether this case should initially be heard en banc” and directed the parties to “discuss this court’s opinion in *Rizo v. Lynch*.”

195. Under 8 U.S.C. section 1229a (section 240 of the INA), aliens are provided a relatively formal proceeding to determine their removability and, if applicable, their eligibility for any relief or protection from removal. 8 U.S.C. § 1299a (2015). Section 1229a specifies, in part, the form or proceeding, burdens of proof, and the various rules relating to entering, reconsidering, and reopening a removal order. *Id.*

196. Of course, these matters were not before the court. Still, in view of the court’s apparent attempt to bring order to its finality jurisprudence by announcing a “straightforward” rule, the court had in *Abdisalan* a compelling purpose and fair opportunity to explain more fully the doctrinal underpinnings of finality in the immigration context. *Abdisalan*, 774 F.3d at 520.

197. *Id.* at 523–28.

application to the ordinary cases of removal that undergo adjudication by an immigration judge and review by the Board. And, if the *Abdisalan* decision is so restricted, the efficacy of the bright-line rule is further undermined, as its simplicity and universal reach are the factors that ensure the optimal balance between fairness and efficiency for purposes of judicial review of final orders of removal.

#### IV. TOWARDS A UNIFORM APPROACH TO JUDICIAL REVIEW OF FINAL ORDERS OF REMOVAL: PROPOSALS FOR REFORM

The Ninth Circuit's decision in *Abdisalan* may have marked a turning point in bringing order and fairness to the finality rule in the immigration context. However, the opinion is internally inconsistent and sows some uncertainty about finality in cases involving voluntary departure. Additionally, the opinion does not seek to settle finality issues for all types of removal orders. Still, the result and principal rule announced in the case is supported by substantial authority and appears aligned with the optimal interpretation of finality; it minimizes uncertainty in litigation, protects the litigant's opportunity for judicial review, preserves the agency's primacy in resolving issues assigned to it for adjudication, and promotes judicial efficiency.

A measure of uniformity has thus been brought to the Ninth Circuit, but that same uniformity is lacking across the courts of appeals that exercise jurisdiction in immigration cases. The purpose of this Part is to propose the universalization of a strong version of the Ninth Circuit's rule as announced in *Abdisalan*. Section A argues for uniformity through interpretation—for the courts of appeals to coalesce in their interpretations of finality around a rule that finality exists only when administrative proceedings have concluded. This rule is based on a compelling interpretation of the statute and regulations, and is supported by strong policy-based considerations. Section B then addresses the possibility that uniformity could likewise be established through statute, with the relevant reform eradicating the uncertainty and ambiguity that have given rise to the conflict in the courts of appeals over when an order becomes final for purposes of judicial review.

##### *A. Interpretive Uniformity*

A universal rule that an order of removal is not final until all administrative proceedings have completed—as applicable to all



types of removal orders and without any qualification for certain remands, voluntary departure, or otherwise—is adequately grounded in the INA, regulations, and administrative precedent. Such a universal rule would also preserve a fair opportunity for aliens to seek judicial review of final orders of removal. The following framework in support of this universal rule assumes, as have the courts, that the INA’s definition of a final order of deportation is applicable in determining the existence of a final order of removal for purposes of judicial review. Accordingly, the terms “removal” and “deportation” are used interchangeably in this Section.

### 1. Finding Uniformity in the INA’s Definitions of Removal

The INA defines an order of removal in two parts: (1) an order of the immigration judge or administrative officer that (2) either concludes deportability or orders deportation.<sup>198</sup> As to the first part regarding the existence of an “order,” the INA directs immigration judges to decide cases and, as appropriate, order removal at the conclusion of proceedings.<sup>199</sup> Thus, an order entered by an immigration judge necessarily disposes of the entire case. This understanding is echoed by the regulation defining the “order of the immigration judge” as one that “direct[s] the respondent’s removal from the United States, or the termination of the proceedings, or *other such disposition of the case.*”<sup>200</sup> As the Board has observed, the “regulations contemplate that an Immigration Judge will enter an order that leads to a final conclusion of the removal proceedings.”<sup>201</sup> Thus, whatever “order” an immigration judge or administrative officer enters, the statute and regulations contemplate that such order disposes of the entire case.<sup>202</sup>

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198. 8 U.S.C. § 1101(a)(47)(A) (2012).

199. See 8 U.S.C. §§ 1229a(a)–(c).

200. 8 C.F.R. § 1240.12 (2015).

201. *In re I-S- & C-S*, 24 I. & N. Dec. 432, 433 (B.I.A. 2008) (“[S]ince the regulations require entry of an order that will result in the conclusion of proceedings, a grant of voluntary departure without an alternate order of deportation is improper because it leaves the proceedings unresolved and incomplete” (citing *In re Chamizo*, 13 I. & N. Dec. 435 (B.I.A. 1969); 8 U.S.C. § 1101(a)(47)(A)).

202. Indeed, the Board ordinarily does not consider interlocutory appeals from non-final orders of an immigration judge. See *In re Avetisyan*, 25 I. & N. Dec. 688, 688–89 (B.I.A. 2012). Thus, the condition of finality contained in the statute—*i.e.*, that the order becomes final upon the Board’s affirmance of the Immigration Judge’s order or the time to appeal the order to the Board expires—would generally not apply unless the underlying order disposes of the entire case. See *In re Jean*, 23 I. & N. Dec. 373, 379 (Op. Att’y Gen. 2002) (“[I]t would be unreasonable to construe [the regulation] to require litigants to file notices of appeal with the BIA from non-final decisions in order to preserve their objections to such rulings.”).

As for the second part of the INA's definition of an order of removal, the order must either conclude deportability or order deportation.<sup>203</sup> This part of the definition has caused some confusion, leading courts to suggest that a mere finding of deportability—and thus something less than a full disposition of the case—could constitute an order of removal.<sup>204</sup> But once the “order” is understood as an action disposing of the entire case, this second part of the definition is more naturally read to qualify what types of *such complete dispositions* fall within the category of an order of removal. That is, the definition should be understood to mean that the INA considers an order of removal to be an order that (1) disposes of the case; and (2) either orders deportation or, without ordering deportation, results in a finding of deportability.<sup>205</sup> Importantly, this interpretation would account for the dispositions of cases that do not result in an order of removal. For example, an immigration judge's termination of proceedings,<sup>206</sup> while a decision that disposes of the case, would not constitute an order of removal. Thus, the second part of the INA's definition would serve as a limit on the types of dispositive orders that constitute an “order of removal” to account for the obvious fact that not all dispositions of the case result in an order of removal.

Next, once there is an “order of removal,” the INA provides for two alternate conditions upon which such order becomes “final.” First, the order becomes final when the Board affirms it.<sup>207</sup> Second,

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203. See 8 U.S.C. § 1101(a)(47)(A).

204. See, e.g., *Almutairi v. Holder*, 722 F.3d 996, 1001 (7th Cir. 2013) (stating that the INA's definition of a final order of deportation may be met by “no more than [a finding] that the alien is removable” and “need not go further and order immediate removal.”); see also *Pinto v. Holder*, 648 F.3d 976, 979 (9th Cir. 2011); *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006); *Obale v. U.S. Att'y Gen.*, 453 F.3d 151, 160 n.9 (3d Cir. 2006).

205. A grant of voluntary departure does not, by definition, order removal; rather, an “alternate” order of removal is entered at the time of the grant of voluntary departure. See 8 C.F.R. § 1240.26(d). The alternate order of removal is not effective until certain conditions are met. See 8 C.F.R. § 1240.26. Thus, a final order of removal that includes a grant of voluntary departure may more accurately be described as an order “concluding deportability” rather than an order “ordering deportation.” See 8 U.S.C. § 1101(a)(47)(A). This interpretation is consistent with the time for filing a petition for review beginning to run upon entry of a final order of removal granting voluntary departure—and not upon entry of the alternate order of removal if, at a later time, the applicant fails to comply with voluntary departure. See generally 8 C.F.R. § 1240.26(b)(1)(iv), (c)(3)(iv) (providing that the date the alternate order of removal becomes effective “shall not impact, in any way, the date that the order of the immigration judge or the Board became administratively final”). Furthermore, hypothetically, a person who is granted asylum or other relief—but who seeks to challenge the charged and sustained grounds of his removability—would also have an order of removal that does not “order” deportation but rather only concludes deportability.

206. 8 C.F.R. § 1240.12 (indicating that termination of proceedings is one possible resolution of removal proceedings).

207. See 8 U.S.C. § 1101(a)(47)(B).

and alternatively, the order becomes final when the time to appeal the order to the Board expires.<sup>208</sup> Thus, finality could be easily determined by pointing to the Board's affirmance or the expiration of the time to appeal the immigration judge's decision. Furthermore, even where the Board upholds part of the removal order and remands for any reason, *e.g.*, voluntary departure, background checks, designation of country of removal, or other applications for relief, the analysis can remain uncomplicated. If the Board remands to the immigration judge for an outstanding matter, then there would be no "order" that disposes of the entire case. And without an order that disposes of the entire case, the conditions of finality could not attach under the INA's definition of a final order of removal. Only after the immigration judge resolves the outstanding matter and thus disposes of the entire case would the conditions of finality attach—*i.e.*, the alien may, at that later time, appeal to the Board or wait for the expiration of the time to appeal (or waive appeal) if such appeal is unnecessary under the circumstances.<sup>209</sup>

This framework resolves many of the finality issues that arise in immigration cases in the courts of appeals. And, because the framework would result in the adoption of the universal rule, this approach is necessarily fortified by the legal authority and desirable policy objectives associated with that rule.<sup>210</sup>

But what about immigration cases that involve reopening, reconsideration, reinstatement, and administrative removal? Admittedly, these additional forms of final orders of removal require a different approach. Nevertheless, the statute, regulations, and judicial and administrative precedents permit adopting the universal rule here

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208. *See id.*

209. As explained by the Second Circuit, a petition for review of administratively exhausted matters may be filed immediately upon the entry of a final order of removal without requiring an appeal to the Board. *See Chupina v. Holder*, 570 F.3d 99, 105 (2d Cir. 2009). For example, if the Board upholds the denial of asylum but remands to the immigration judge for torture protection, and, upon remand torture protection is denied (or granted) and the person does not seek review of that determination, a petition for review may be filed upon entry of the immigration judge's decision for review of the asylum application. *See id.* Alternatively, the person may file an appeal with the Board (either out of unnecessary caution or to challenge the denial of torture protection), and seek review of the asylum application upon entry of the Board's final order. *See id.*

210. *See supra* Part III; *see also* 8 U.S.C. §§ 1241, 1252 (2012) (suggesting that final orders of removal described in the judicial review provision of the INA are such orders that are awaiting execution after completion of administrative proceedings); *Foti v. INS*, 375 U.S. 217, 227–31 (1963) (construing the predecessor statute to the INA's current judicial review provision, and concluding that a "final order of deportation" not only includes the administrative finding of deportation but also "all determinations made during and incident to the administrative proceeding").

as well: an order entered in each of these circumstances is not final if there are any pending administrative proceedings relating to the removal order.

## 2. Judicial Review of Reopening and Reconsideration

Perhaps the easiest of the additional forms of removal to explain are reopening and reconsideration. Although the denial of reopening and reconsideration does not appear to fall within the INA's definition of a final order of removal, the INA's provision authorizing judicial review specifically contemplates such denials as matters that are subject to judicial review (if the litigant seeks it).<sup>211</sup> This understanding is consistent with historical practice—as recognized by the Supreme Court—which permitted judicial review of reopening and reconsideration primarily because the grant of such relief would necessarily and immediately affect the underlying removal order.<sup>212</sup> Thus, given the long-standing practice and concomitant support in the INA, there appears to be no doubt that the denial of reopening or reconsideration is a “final order of removal” under the INA's judicial review provisions. And, notably, so far as the universal rule considers the existence of any pending administrative matters relating to the underlying order of removal, denials of reopening or reconsideration of a final order of removal are,<sup>213</sup> by their nature, lacking in any possibility of unfinished administrative proceedings relating to removal.<sup>214</sup>

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211. See 8 U.S.C. § 1252(b)(6) (“When a petitioner seeks [judicial] review of [a final order of removal], any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.”).

212. See *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (noting the “longstanding exercise of judicial review of administrative rulings on reopening motions”); *Sarmadi v. INS*, 121 F.3d 1319, 1322 (9th Cir. 1997) (“Over thirty years ago, the Supreme Court in a one sentence decision reversed our conclusion that we lacked jurisdiction to review the BIA's denial of a motion to reopen. Since that time we have assumed that our jurisdiction to review ‘final orders of deportation’ includes jurisdiction over motions to reconsider or to reopen deportation proceedings.” (citing *Giova v. Rosenberg*, 379 U.S. 18 (1964)); see also *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216–17 (1968) (distinguishing denial of reopening from denial of a stay of removal, stating that denials of reopening—which the Court can review—“like motions for rehearing or reconsideration, are . . . intimately and immediately associated with the final orders they seek to challenge.”).

213. Of course, any denial of reopening or reconsideration will not do. The denial must be in connection with reopening or reconsideration of an order of removal. An order denying reopening of a visa-petition case, for example, would not constitute an order of removal. That is, it is not merely the denial of reopening and reconsideration that make them orders of removal; rather, it is their relationship to the underlying order that makes their denial a final order of removal.

214. Tangentially, if an immigration judge denies reopening or reconsideration of a final order of removal, the movant must appeal to the Board and exhaust administrative remedies

### 3. Judicial Review of Certain Expedited Removal Orders: Reinstatement Orders and Administrative Removal Orders

In contrast, reinstatement orders and administrative removal require more analysis to conclude the same point. These expedited orders of removal are issued by the Department of Homeland Security with no possibility of review by an immigration judge or the Board. Although an immigration judge and the Board may become involved in the case through collateral proceedings relating to protection from removal,<sup>215</sup> the regulations bar any review of the underlying reinstatement or administrative order of removal by the immigration judge or Board.<sup>216</sup> Thus, the INA's definition appears entirely inapplicable to reinstatement and administrative removal orders because the Board cannot affirm the underlying order of removal and there is necessarily no period of time that would expire for an appeal to the Board.<sup>217</sup> Moreover, unlike reopening and reconsideration, there is not a similarly well-established imprimatur of the Supreme Court regarding judicial review of reinstatement or administrative orders of removal.<sup>218</sup>

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before that denial may be reviewed in the appropriate court of appeals. *See* 8 U.S.C. § 1252(d)(1).

215. As discussed in Part II.B.3, *supra*, if the person subject to reinstatement or administrative removal expresses a fear of persecution or torture, he is referred to an asylum officer for a reasonable fear interview after entry of the reinstatement order or administrative removal order. *See* 8 C.F.R. §§ 208.31(a)-(b), 241.8(e) (2015). If the asylum officer determines that the person has a reasonable fear, the case is referred to the immigration court for withholding-only proceedings—which may or may not proceed to the Board depending on whether protection is denied and the person seeks administrative review of the denial. *See* 8 C.F.R. § 208.31(e). If, on the other hand, the asylum officer makes a no-reasonable-fear determination, administrative review may be sought in the immigration court. *See* 8 C.F.R. § 208.31(g). If the immigration court affirms the asylum officer's decision, then there are no additional administrative proceedings available; however, if the immigration court disagrees with the asylum officer, withholding-only proceedings commence and the case may or may not, as described above, proceed to the Board based on whether protection is denied and the person seeks administrative review of the denial. *See* 8 C.F.R. § 208.31(g).

216. *See* 8 C.F.R. § 208.31(e), (g)(2) (providing for review and consideration of “only” the applicant's request for withholding of removal).

217. *See* 8 U.S.C. § 1101(a)(47)(B) (2015).

218. *Cf.* *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (noting the “longstanding exercise of judicial review of administrative rulings on reopening motions”). That said, many lower courts have exercised jurisdiction over reinstatement and administrative removal orders—albeit without much analysis, if any, about how such orders constitute an “order of removal” as contemplated in the INA's judicial review provisions. *See, e.g.*, *Valdiviez-Hernandez v. Holder*, 739 F.3d 184, 188 (5th Cir. 2013) (administrative removal); *Guo Xing Song v. U.S. Att'y Gen.*, 516 F. App'x 894, 897 (11th Cir. 2013); *G.S. v. Holder*, 373 F. App'x 836 (10th Cir. 2010); *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281 (11th Cir. 2009); *Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008); *Romero-Fereyros v. U.S. Att'y Gen.*, 221 F. App'x 160, 163–64 (3d Cir. 2007);

It may be said that these expedited forms of removal are not the types of orders that are subject to judicial review and that the issue of finality is beside the point.<sup>219</sup> But while the INA may suggest such a construction, the courts, government, and litigants have never seriously taken such a position.<sup>220</sup> Rather, the courts and litigating parties have focused on when and how these expedited forms of removal are subject to judicial review because, at bottom, it appears evident that entry of an order resulting in an individual's removal from this country constitutes an "order of removal."<sup>221</sup> Because entry of a reinstatement or administrative removal order changes the legal relationship between the government and the individual litigant,<sup>222</sup> such orders clearly constitute "orders of removal" subject to judicial review.<sup>223</sup>

Thus, once courts accept that a reinstatement order or administrative removal order is an "order of removal" as contemplated under the INA's judicial review provisions, the next question is when such order becomes final. Here again, there are adequate sources of law that support the adoption of the universal rule: a reinstatement or administrative removal order will be final for purposes of judicial review when, if invoked, the collateral proceedings relating to protection from removal have been finally adjudicated and completed by the immigration judge or the Board.

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*Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 297 (5th Cir. 2002).

219. Although courts have equated reinstatement with an order of removal or assumed that an administrative removal order qualifies as an "order of removal," they have not attempted to explain the statutory basis for drawing such a comparison or the relevance (or inapplicability) of the INA's definition of an order of deportation. *See, e.g., Valdiviez-Hernandez*, 739 F.3d at 188 (assuming that an administrative removal order is an order of removal without reference to the INA's definition of an order of deportation); *Arevalo*, 344 F.3d at 9 (stating that reinstatement is the "functional equivalent" of an order of removal without analysis). The void in analysis is not surprising, given that the litigating parties do not contest jurisdiction in these cases. *See, e.g., Eke*, 512 F.3d at 376; *Avila*, 560 F.3d at 1285.

220. *Eke*, 512 F.3d at 377–78 (agreeing with both parties that the court has jurisdiction to review a final administrative removal order); *Avila*, 560 F.3d at 1284 (agreeing with both parties that the court has jurisdiction to review a final reinstatement order).

221. *See Avila*, 560 F.3d at 1284.

222. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (stating that a final agency action "alter[s] the legal regime" under which the agency operates, resulting in "direct and appreciable legal consequences").

223. And, generally, the Supreme Court has recognized a "presumption favoring interpretations of statutes to allow judicial review of administrative action." *Kucana*, 558 U.S. at 237 (quoting *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43 (1993)). This "strong presumption" is well-settled in the immigration context, and "[i]t therefore takes 'clear and convincing evidence' to dislodge the presumption." *Id.* at 251–52. Thus, the lack of clear statutory authority to review reinstatement and administrative removal orders would appear to be a reason to support—rather than undermine—federal court jurisdiction over such orders.

The INA presupposes the availability of judicial review over determinations relating to CAT protection—and by extension withholding of removal under the statute—as part of a final order of removal. Under the INA, “any cause or claim under [the CAT,] except as provided [elsewhere in the INA],” is subject to judicial review through a petition for review of a final order of removal.<sup>224</sup> Similarly, the Foreign Affairs and Restructuring Act of 1998 (FARRA), which requires the Executive Branch to implement the CAT, provides that “no court shall have jurisdiction to review . . . any other determination made with respect to the application of the policy set forth in subsection (a), *except as part of the review of a final order of removal [pursuant to the INA].*”<sup>225</sup> Thus, there is an inherent expectation in the law that protection claims are reviewed as part of the final order of removal. And, it stands to reason that the agency cannot, by regulation, circumvent the statutory purpose and shield CAT denials from judicial review by separating the CAT determination from the final order of removal.<sup>226</sup>

Furthermore, similar to cases involving reopening and reconsideration of a final order of removal, the grant of protection from removal has a direct and immediate effect on the order of removal—i.e., the grant of protection affects the parameters for execution of the removal order and, as a practical matter, extinguishes the immediate possibility of actual removal.<sup>227</sup> In this way the conclusion of the collateral proceedings is intimately associated with the expedited order of removal, much like how reopening or reconsideration has a similar potential to affect the underlying order of removal. Of course, a grant of protection from removal would not constitute a reopening or reconsideration of a reinstatement order or administrative removal order; however, the ultimate

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224. 8 U.S.C. § 1252(a)(4) (2012).

225. Foreign Affairs and Restructuring Act of 1998, H.R. 1757, 105th Cong. § 1242(d) (1998).

226. *See Kucana*, 558 U.S. at 252 (rejecting construction of statute that would permit the agency to have “a free hand to shelter its own decisions . . . by issuing a regulation” that would invoke the jurisdiction-stripping condition of the statute at issue).

227. The grant of withholding of removal only prohibits removal to the applicant’s specified country—i.e., removal may otherwise be effected to an alternative country to which there is not a likelihood of persecution or torture. *See In re I-S- & C-S*, 24 I. & N. Dec. at 433–34 (B.I.A. 2008). Because a successful applicant for protection from removal generally claims fear of returning to their country of citizenship or last place of habitual residence, *see* 8 U.S.C. §§ 1101(a)(42), 1231(b)(3) (2012); *Paul v. Gonzales*, 444 F.3d 148, 155 (2d Cir. 2006) (discussing relationship between asylum and withholding of removal under the INA). The Department of Homeland Security must search for a statutorily acceptable alternative country for removal before executing the order, *see* 8 U.S.C. § 1231(b)(1)–(2); *see also Urgen v. Holder*, 768 F.3d 269, 273–74, 274 n.2 (2d Cir. 2014).

end of the expedited removal order—i.e., the conditions and likelihood of its execution—is undoubtedly left uncertain and unresolved until the collateral proceedings have been fully completed.

Moreover, a contrary interpretation may result in adopting a scheme that is inconsistent with the INA. First, as one court has suggested, treating the protection issue apart from the final order of removal may deprive the individual litigant entirely of obtaining judicial review of the collateral proceedings.<sup>228</sup> Specifically, any petition for review filed from the completed collateral proceedings would most likely be untimely because, by then, more than thirty days would have elapsed since the entry of the final reinstatement or administrative removal order.<sup>229</sup> Such a result would be contrary to the statutes prescribing judicial review of any cause or claims associated with CAT protection, as well as raise constitutional concerns about the availability of judicial review over protection issues.<sup>230</sup>

Second, even if the denial of protection could be construed as somehow separate from the order of removal, such treatment would raise further problems. At the outset, it would appear that jurisdiction would no longer be proper in the court of appeals if the agency action is not construed as part of the “order of removal.” Rather, jurisdiction would be proper in the district court.<sup>231</sup> And, if that were the case, then an individual subject to *expedited* proceedings and who invokes the collateral proceedings may forestall execution of the removal order until completion of review before the district court *and* the courts of appeals. Thus, this approach would result in permitting an additional tier of judicial review—and a potential for substantial delay until execution of the removal order—in the cases that Congress specifically designated for expedited treatment.<sup>232</sup>

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228. See *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 958 (9th Cir. 2012).

229. See *id.*

230. See *id.*; see also 8 U.S.C. 1252(a)(4) (2012); H.R. 1757, § 1242(d).

231. See 8 John S. Richbourg, *The Interplay Between INA 242 and Section 1331*, in 8 BUS. & COMMERCIAL LITIG. IN FED. COURTS § 93:4 (3d ed. 2014) (district court jurisdiction over agency actions that are not “orders of removal” is proper).

232. Relatedly, the REAL ID Act was enacted, in part, to correct the anomalous situation permitting criminal convicts to obtain more judicial review (and thus also effectively delay removal) than non-criminal persons. See H.R. REP. NO. 109-72, at 174 (2005) (Conf. Rep), as reprinted in 2005 U.S.C.C.A.N. 240, 299 (stating that under then-current law, “[c]riminal aliens . . . can obtain review in two judicial forums, whereas non-criminal aliens may generally seek review only in the courts of appeals. Not only is this result unfair and illogical, but it also wastes scarce judicial and executive resources.”).



Of course, requiring the resolution of the collateral proceedings to direct the question of finality might raise other issues and problems. Although the universal rule is generally desirable for the reasons already discussed, the application of the rule in the expedited context allows for some obvious inefficiencies and uncertainties. For example, the lack of a finite period for invoking the collateral proceedings means that, theoretically, the alien may deprive the court of jurisdiction at any time and potentially at her convenience.<sup>233</sup> Moreover, the lack of clear rules for invoking the collateral proceedings raises concerns about process and, as well, the judiciary's role—if any—in reviewing the integrity of that process.<sup>234</sup> Nonetheless, the legal and policy arguments for applying the universal rule in the expedited removal context outweigh these concerns, which are relatively minor and unlikely to be a major (or even likely) cause for delay or missed opportunity for judicial review.<sup>235</sup>

In sum, the various sources of law support the adoption of the universal rule. Adopting the framework discussed above would result in the following general guidelines for finality in the context of orders of removal: First, an order of removal may take the following alternative forms: (1) an order that meets the definition of an “order of deportation” under the INA; (2) the denial of any relief that is intimately and immediately associated with the underlying order of removal; or (3) any order for which the purpose is to confer on the executing officer the authority to remove an individual. Second, an order of removal is not final until all administrative proceedings have completed in connection with that order or underlying removal order. This latter condition is uncomplicated in the ordinary removal case and necessarily fulfilled in cases involving

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233. The regulations do not specify a deadline or finite period within which a person must express a fear of persecution or torture. *See* 8 C.F.R. § 208.31(a) (2015) (providing that a person may express the requisite fear “in the course of the administrative removal or reinstatement process”). It would appear permissible for a person to express a fear of persecution or torture at any time until the execution of the removal order is completed. *See* 8 C.F.R. §§ 208.31(a), 241.8(e) (2015). It is possible, then, for the person to express the requisite fear and invoke the collateral proceedings—and thus deprive the court of appeals of jurisdiction—well into the consideration of the petition for review of the reinstatement or administrative removal order.

234. The regulations do not specify how or to whom to express the requisite fear. *See* 8 C.F.R. §§ 208.31, 241.8(e). It is also unclear if there are any levels of review to ensure against erroneous deprivation of the collateral protection proceedings. *See id.*

235. While the specifics of invoking the collateral protection proceedings are wanting in the regulation, such deficiency would not result in a missed opportunity for judicial review. Moreover, because reinstatement and administrative removal are expedited processes—and the accompanying collateral proceedings are likewise expeditiously completed, *see* 8 C.F.R. §§ 208.31, 241.8(e)—the amount of delay, if any, would not likely be substantial.

the denial of reopening or reconsideration of a final order of removal; however, in cases involving expedited removal orders with the possibility of collateral protection proceedings, Article III jurisdiction is relatively—but not unbearably—fluid.

### *B. The Possibility of Legislative Reform*

Congress itself could also step in and resolve any lingering ambiguity over what constitutes a final order of removal for purposes of judicial review by enacting a specific definition to govern finality in that context. In line with the decision in *Abdisalan*, and the existing statutory definition of a “final order of deportation,” the new definition should encompass both a final determination of removability and the agency’s denial of all forms of relief requested by the alien. In other words, the statutory definition should enact into the INA a concept of finality whereby a petition for review would not be jurisdictionally proper so long as any aspect of the removal proceedings remains ongoing before the agency.

The most natural place for this new definition would be section 1252 of Title 8, which is titled, “Judicial review of orders of removal.”<sup>236</sup> Subsection (a) lays out general concerns regarding the applicability of judicial review, including the requirement that such review is only available regarding a “final order of removal.”<sup>237</sup> Subsection (b), “Requirements of review of orders of removal,” includes provisions pertaining to the filing deadline for petitions for review, venue, the scope and standard of review, and a consolidation provision for instances where multiples petitions for review are filed.<sup>238</sup> It is in this section, as a “requirement” for judicial review, that a specific definition of finality would be best placed. The new definition of finality would immediately follow the jurisdictional filing deadline, which provides that an alien has thirty days within which to file her petition for review following “the date of the final order of removal.”<sup>239</sup> The definition fits most naturally here as a new subpart (2) because it immediately addresses the issue of finality raised by the jurisdictional limitation of subpart (1).

We propose the following language:

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236. 8 U.S.C. § 1252 (2012).

237. 8 U.S.C. § 1252(a)(1).

238. 8 U.S.C. §§ 1252(b)(1), (2), (4), (9).

239. 8 U.S.C. § 1252(b)(1).

## (2) Finality

(A) An order of removal entered under 8 U.S.C. §§ 1228, 1229a, and 1231(a)(5), is not final for purposes of judicial review unless (i) removability has been finally determined and (ii) all applications for relief and protection and other administrative matters, including but not limited to asylum, withholding of removal, cancellation of removal, adjustment of status, voluntary departure, background checks, and designation of country of removal, have been resolved by the Board, an immigration judge, or other immigration official charged with resolving such application or matter.

(B) The filing of any applications for relief or protection from removal following entry of the final order of removal shall not affect the finality of such order.

(C) An order denying reopening or reconsideration becomes a final order of removal upon entry of the order by the Board or, if denied by the immigration judge, when such order becomes final pursuant to regulation.

This definition seems to encompass a conception of finality whereby judicial review would be premature until all agency proceedings are completed. Under clause (i) of subsection (A), “removability” must be finally decided, meaning that the agency must have concluded that the alien is removable from the United States as a necessary prerequisite to judicial review. This is consistent with the courts of appeals’ fairly uniform conclusion that such a determination is, at the least, a component of what constitutes a final order of removal; for most it is currently a sufficient condition for judicial review, whereas for others it is a necessary but not sufficient condition.

Clause (ii) of subsection (A) pertains to the final decision on all applications for relief and protection under the INA, as well as resolution of any outstanding administrative matters directly related to the order of removal. It is this clause that would be the operative one for purposes of establishing uniformity consistent with the general thrust of the Ninth Circuit’s decision in *Abdisalan* and other decisions that have assumed a *lack* of finality where the possibility of some relief from removal remains outstanding. Under this clause, for instance, any remand by the Board for further proceedings regarding an application for relief would render the agency decision non-final for purposes of review. The proposed language makes clear that this would be so in *all* cases, including those where the remand is for further consideration of voluntary departure. The

proposed language's reference to administrative removal and reinstatement, however, also ensures that this definition encompasses reasonable fear proceedings, consistent with decisions that have concluded that judicial review of orders under these provisions is premature so long as these collateral proceedings remain ongoing.<sup>240</sup>

The proposed language thus enacts a universal rule that is fairly easy to apply in practice: finality, for purposes of judicial review, does not exist so long as any determination of removability or application for relief remains to be decided by the agency.

It is less clear, however, how this definition might fit within the existing statutory and regulatory framework of "finality." For instance, would this definition supersede the definition in 8 U.S.C. § 1101(a)(47), or coexist with it as a more specialized definition of finality for the narrow purposes of judicial review? It is likely that both definitions could remain. There is little legislative history on the addition of section 1101(a)(47), so it is not clear what that provision was meant to address. As Part I of this Article made clear, section 1101(a)(47) does not address all the issues of finality that arise under the INA, and so it cannot be read as an exhaustive exposition of "finality." The two provisions could fit together quite simply if section 1101(a)(47) is meant only to address when the determination of removability itself becomes final. To that end, the definition of section 1101(a)(47) would inform whether clause (i) of the proposed definition has been met—i.e., whether a final determination of removability has been entered.

As Part I also noted, there are potentially competing conceptions of finality under the INA and its regulations. Rather than streamline one conception of finality to fit all circumstances, perhaps it makes sense to have a specialized definition of finality to govern judicial review under section 1252, while adhering to the section 1101(a)(47) definition for purposes of "administrative" finality. This distinction might contemplate a sufficient degree of finality for purposes of detention, for instance, even where the more exact and specific definition of finality for purposes of judicial review has not been met.<sup>241</sup>

Nor is there any issue regarding the timing of judicial review and from which decision an alien would be able to petition for review.

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240. See, e.g., *Luna-Garcia v. Holder*, 777 F.3d 1182, 1185–86 (10th Cir. 2015) (so holding in the context of reinstatement); *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 959–60 (9th Cir. 2012); *Eke v. Mukasey*, 512 F.3d 372, 377–78 (7th Cir. 2008) (so holding in the context of administrative removal).

241. See, e.g., 8 U.S.C. § 1231(a)(1)(B)(i) (2012) (referring to an order that is "administratively final").

In contemplating the completion of all proceedings as the touchstone for judicial review of a removal order, this definition necessarily presupposes that judicial review could be sought from a decision of the immigration judge. Section 1252(b)(1) governs the timing of judicial review—thirty days following *entry* of the final order of removal, and the regulations otherwise define when that occurs: upon (1) the Board’s disposition of an administrative appeal, or (2) the expiration of the time to file such an appeal from the decision of the immigration judge.<sup>242</sup> As the courts of appeals have already concluded, however, an alien may file a petition for review following the immigration judge’s decision on remand without having to pursue further administrative proceedings before the Board.<sup>243</sup> In such cases the other jurisdictional prerequisites must be met, including the exhaustion of administrative remedies concerning the issues the alien seeks to raise in her petition for review.<sup>244</sup> But there is no serious impediment to an alien’s pursuit of judicial review following the Board’s remand: it can be had either directly from the immigration judge’s decision on remand, or, if necessary, following a second appeal to the Board.

Of course, there would be issues to address in adding the definition proposed by this Article, but none of the concerns would be insurmountable. And, in the end, the addition of a specific definition of finality to govern judicial review would have the benefit of clarity and ease of application. No longer would the timing of judicial review depend on the interpretation of somewhat esoteric language by a panel of the court of appeals. Aliens would have clear notice of when a petition for review should be filed, and thereby would have a safeguard against the erroneous filing of such petitions and the potential loss of judicial review that could entail.

This statutory reform seems unlikely, for reasons divorced from its wisdom or practicability. The proposed language could be added quite simply, and would not have to await the ever-delayed comprehensive immigration reform that has been discussed for the better part of a decade. Realistically, however, “finality for purposes of judicial review under the INA” is not likely to be the type of issue to

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242. 8 C.F.R. § 1003.39 (2015).

243. See, e.g., *Chupina v. Holder*, 570 F.3d 99, 105 (2d Cir. 2009) (“[I]n the event that no appeal is made to the BIA by either Chupina or the government following the adjudication of Chupina’s pending applications, Chupina may challenge the denial of his asylum application within thirty days after the immigration judge’s decision regarding his applications for withholding of removal and protection under the CAT becomes final.”); cf. *Ortiz-Alfaro*, 694 F.3d at 959 (in the context of reinstatement of removal, noting the possibility that the alien could petition for review from immigration judge’s credible fear determination).

244. See 8 U.S.C. § 1252(d)(1) (“A court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right.”).

figure prominently on the legislative agenda of any member of Congress, and thus the possibility of such a provision being enacted *outside* broader immigration reform seems slight.

#### CONCLUSION

The issue of finality is ripe for reconsideration. The Ninth Circuit's unanimous en banc decision in *Abdisalan* provides a working template for how the issue should be approached, as well as explaining why a uniform interpretation of finality is so important. To depart from the present state of conflict and confusion amongst and within the circuits, the courts of appeals should seek a uniform interpretation of what constitutes a final order of removal for purposes of judicial review. This definition, countenancing judicial review only when all administrative proceedings have been finally completed, is the better interpretation of the existing statutory and regulatory language. Equally importantly, it is also the fairest and most efficient rule. A bright-line rule dictating when judicial review should be sought ensures that aliens are on clear notice of when they must file their petition for review, thus guarding against a missed filing deadline. It also safeguards the resources of the federal judiciary, ensuring that judicial review is engaged only when the agency has finally decided all issues and there are no remaining determinations that might undercut the exercise of jurisdiction.

Congress could, as well, step in and resolve the problem by enacting a clear definition of what constitutes a final order of removal for purposes of judicial review. Considering the current legislative malaise, however, this option seems far less likely than the courts of appeals themselves resolving the issue under the existing statutory and regulatory framework.

Regardless of whether, how, or by whom reform might be enacted, there will be a further period of uncertainty in the various courts of appeals regarding the issue of finality. Thus, as always, aliens and their counsel must be vigilant in ensuring that any petition for review is filed from the appropriate decision of the agency. The timing of judicial review may, for now, remain something of a guessing game in many of the circuits. Nonetheless, the recommendations of this Article provide a simple, fair, and efficient manner for banishing this lingering uncertainty, while adhering to the text of the statute.

