

# The Limits of 8 U.S.C. § 1252(g): When Do Courts Have Jurisdiction to Entertain an Alien’s Claim for Damages Against the Government?

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## Introduction

On August 8, 2017, the Eighth Circuit held that it had no jurisdiction to adjudicate Jesus Eduardo Lopez Silva’s suit against the government for his wrongful removal from the United States.<sup>1</sup> Lopez Silva entered the United States lawfully as a permanent resident in 1992, but was convicted

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1. *Silva v. United States*, 866 F.3d 938, 938 (8th Cir. 2017).

of criminal offenses.<sup>2</sup> This prompted the government to initiate removal proceedings against him in 2012.<sup>3</sup> An immigration judge entered an order for his removal, which Lopez Silva timely appealed to the Board of Immigration Appeals (“BIA”).<sup>4</sup> The appeal should have automatically stayed the removal order per 8 C.F.R. § 1003.6(a). Nevertheless, Lopez Silva was removed to Mexico on July 17, 2013 while the appeal was still pending.<sup>5</sup> The government’s agents eventually realized their error, but Lopez Silva had to spend two months in Mexico before he was returned to the United States in September 2013.<sup>6</sup> An immigration judge ultimately granted Lopez Silva’s application to cancel the removal order, and he was allowed to legally remain in the United States.<sup>7</sup> Lopez Silva brought claims against the government under the Federal Tort Claim Act as well as *Bivens*.<sup>8</sup> However, the legal provisions under which he brought his claims turned out to be irrelevant. The court found that his removal fell within the scope of § 1252(g), a jurisdiction stripping statute which provides that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the [Secretary of the Department of Homeland Security] to commence proceedings, adjudicate cases, or execute removal orders against any alien.”<sup>9</sup>

*Silva* is the latest in the line of cases that deny aliens compensation on the basis of § 1252(g). The effect of § 1252(g) is that many aliens cannot recover damages even though the government has violated their constitutional rights. In many cases, they cannot even obtain judicial review of the removal decision. These results seem unfair to aliens who have suffered damages due to the government’s errors, and as such, proposals have been made to limit the scope of this provision.

Scholars and courts have pointed out that using § 1252(g) to bar suits for damages contradicts congressional intent.<sup>10</sup> This argument relies on a Supreme Court precedent, *Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), in which the Court seems to suggest that Congress enacted § 1252(g) to streamline the deportation process.<sup>11</sup> By depriving the courts of jurisdiction, Congress intended to prevent deportable aliens from pro-

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2. See *id.* at 939.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

9. The full text of 8 U.S.C. § 1252(g) (2005) reads: “Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”

10. See *infra* Parts I, II.

11. 525 U.S. 471, 482 (1999).

longing their presence in the US by seeking “separate rounds of judicial intervention.”<sup>12</sup> Since this is Congress’ goal in enacting § 1252(g), suits for damages are not barred because they seek compensation for a wrong that has already occurred, not to delay an upcoming deportation.

This argument is by no means meritless, but its opponents point out that the broad language of § 1252 does not suggest congressional intent to strip jurisdiction only in those cases where the alien seeks to delay a deportation. For example, in *Silva*, the Eighth Circuit contends that the Supreme Court in *AADC* did not say that § 1252 can only be applied to prevent “separate rounds of judicial intervention,” and § 1252 itself contains no such limitation.<sup>13</sup> If congressional intent cannot avail aliens who have suffered damages due to the government’s errors, another line of defense is available: to interpret § 1252 narrowly, so that their actions for damages fall outside its scope. For example, an alien may argue that his harm did not arise from the government’s decision to “commence proceedings, adjudicate cases, or execute removal orders.” This strategy has been met with success in some courts.<sup>14</sup>

The objective of this Note is to identify the scope of § 1252(g). It concurs with previous scholarship, which has stated that, based on legislative intent and controlling precedents, § 1252(g) only applies to instances where the government exercises discretionary authority. That is, when the government violates statutes or its own regulations, courts may entertain the alien’s claim for damages. However, as many courts reject this argument,<sup>15</sup> this Note further suggests that § 1252(g) should be interpreted narrowly so as to allow meritorious plaintiffs the possibility of recovering for the harm they suffered. This Note will also explore the international implications of America’s refusal to compensate victims. The rest of this Note is organized as follows:

This Note starts off with Section II, which explores the legislative intent of § 1252(g) and the Supreme Court’s interpretation of the provision. Section III explores the scope of § 1252(g) and the disagreement among courts regarding this section. Section IV explores the harm that results from a broad reading of § 1252(g). Section V argues for a narrow reading of § 1252(g). And lastly, Section VI serves as the conclusion.

## I. Legislative Intent as Interpreted by the Supreme Court

### A. Legislative History

8 U.S.C. § 1252(g) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IRINA”). Hearings leading to this enactment reflect Congress’ concern that under the law at

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12. *Id.* at 485.

13. *Silva*, 866 F.3d at 941.

14. See *infra* Part I.B.

15. See *infra* Part I.

the time, the government could not efficiently deport excludable aliens.<sup>16</sup> For example, the general counsel of the Immigration and Naturalization Service (“INS”) stated before a subcommittee, “The Administration is committed to ensuring that aliens in deportation proceedings are afforded appropriate due process; however, the availability of multiple layers of judicial review has frustrated the timely removal of deportable aliens.”<sup>17</sup> In fact, IRINA’s original section on judicial review was called, “Streamlining Judicial Review of Orders of Exclusion or Deportation.”<sup>18</sup> It was against this backdrop that the Supreme Court interpreted § 1252(g) in AADC.

## B. The Supreme Court’s Interpretation of Legislative Intent

In AADC, the plaintiffs alleged that the government sought to deport them in violation of their First and Fifth Amendment rights.<sup>19</sup> The plaintiffs belonged to the Popular Front for the Liberation of Palestine, a group the government deemed to be a terrorist and communist organization.<sup>20</sup> Initially, the government charged the plaintiffs with advocating communism in contravention of the McCarran-Walter Act and routine status violations (such as overstaying a visa and failure to maintain student status).<sup>21</sup> When they challenged the constitutionality of the communism charge, the government dropped that charge but maintained the charge of routine status violations.<sup>22</sup> It also charged two of the plaintiffs under a different section of the McCarran-Walter Act, which authorized the deportation of members of organizations that advocate “the unlawful assaulting or killing of any [government] officer” and “the unlawful damage, injury or destruction of property.”<sup>23</sup> The INS regional counsel admitted at a press conference that the government changed the charges only for tactical reasons, and that it sought to deport the plaintiffs because of their affiliation with the Popular Front for the Liberation of Palestine.<sup>24</sup>

In holding that § 1252(g) deprives courts of jurisdiction over this case, the Supreme Court explained that this section is not a “zipper” clause that bars judicial review in all deportation cases.<sup>25</sup> Rather than barring all claims arising from deportation proceedings, “what § 1252(g) says is much narrower.” It applies

only to three discrete actions that the Attorney General may take: her “decision or action” to “commence proceedings, adjudicate cases, or execute removal

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16. See Sameer Ahmed, Comment, *INA Section 242(g): Immigration Agents, Immunity and Damages Suits*, 119 YALE L.J. 625, 627-28 (2009).

17. Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. On Immigration and Claims of the H. Comm. On the Judiciary, 104th Cong. 15 (1995) (statement of T. Alexander Aleinikoff, Gen. Counsel, Immigration and Naturalization Serv.).

18. See Ahmed, *supra* note 16, at 628.

19. *Reno*, 525 U.S. at 474.

20. *Id.* at 471.

21. *Id.* at 473.

22. *Id.*

23. *Id.* at 474.

24. *Id.* at 475.

25. *Id.* at 482.

orders.” There are of course many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.<sup>26</sup>

None of these decisions fit under the ambit of § 1252(g).<sup>27</sup> As the Court further pointed out,

It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. . . . We are aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation. . . .<sup>28</sup>

The Court then explained, “[t]here was good reason for Congress to focus special attention upon” these discrete acts.<sup>29</sup> Specifically, the government must be able to “defer action” against some aliens for “humanitarian reasons or simply for its own convenience” without fear of having to defend itself against plaintiffs who claim it violated equal protection.<sup>30</sup> To the plaintiffs’ contention that depriving courts of jurisdiction in their case would result in a “chilling effect” upon First Amendment rights, the Supreme Court responded that aliens like plaintiffs, who are “unlawfully in this country ha[ve] no constitutional right to assert selective enforcement as a defense against . . . deportation.”<sup>31</sup> Additionally,

The Executive should not have to disclose its “real” reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals—and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.<sup>32</sup>

Nevertheless, the Court left open “the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.”<sup>33</sup>

It is clear that cases like *Silva* do not at all implicate the policy concerns the Supreme Court discusses in *AADC*. In the vast majority of these types of cases, the plaintiffs do not seek to delay a removal.<sup>34</sup> Rather, they seek compensation for a wrongful deportation that has already occurred, excessive force committed against their person or instances of the government violating its own regulations.<sup>35</sup> And yet, a number of circuits have refused to allow district courts to adjudicate their claims, despite *AADC*’s

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26. *Id.* at 482 (emphasis in original).

27. *Id.*

28. *Id.*

29. *Id.* at 483.

30. *Id.* at 484.

31. *Id.* at 488.

32. *Id.* at 491.

33. *Id.*

34. See Ahmed, *supra* note 16, at 633.

35. *Id.*, at 634.

urging that § 1252(g) be interpreted narrowly.<sup>36</sup>

## II. The Circuit Split

### A. *Foster v. Townsley*

Most courts that refuse to exercise jurisdiction cite *Foster v. Townsley*, a case in which the plaintiff claimed to have been removed while his appeal to the BIA was pending.<sup>37</sup> Therein, a valid deportation order was entered against the plaintiff.<sup>38</sup> However, he submitted a motion to remand for reconsideration of new evidence.<sup>39</sup> He then petitioned a district court to order the BIA to rule on his motion, but his petition was denied.<sup>40</sup> The plaintiff was subsequently removed, even though 8 C.F.R. § 3.6 provides that a deportation order must not be executed while appeal is still pending.<sup>41</sup> The plaintiff claimed that the INS executed his removal in retaliation for his petition with the district court, and that during the removal process, five immigration officers used excessive force against him.<sup>42</sup> Specifically, some of them held his neck and pinned his head to the floor while others put their knees on his stomach.<sup>43</sup>

The district court found that § 1252(g) barred it from hearing the case, and the Fifth Circuit affirmed.<sup>44</sup> According to the Fifth Circuit, AADC “does not . . . explicitly state that [8 U.S.C. § 1252(g)] exclusively governs review of discretionary actions,” and 8 U.S.C. § 1252(g) itself “refers to ‘any cause or claim.’”<sup>45</sup> Therefore, “while it may be true that the officials executed the order despite the regulation’s requirement of an automatic stay of [the plaintiff’s] deportation . . . a plain reading of the statute demonstrates that Congress did not exclude non-discretionary decisions from this provision. . . .”<sup>46</sup> Thus, while ignoring 8 C.F.R. § 3.6 was not within the government’s discretion, this did not avail the plaintiff.<sup>47</sup> What matters is that the plaintiff’s claim arose from the Attorney General’s decision to execute a removal order.<sup>48</sup> As for what “arising from” means, the court stated simply that the plaintiff’s “claims of excessive force, denial of due process, denial of equal protection and retaliation are all *directly connected* to the execution of the deportation order.”<sup>49</sup> The court did not elaborate on the term “directly connected.”<sup>50</sup>

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36. See *infra* Part I.

37. 243 F.3d 210, 210 (5th Cir. 2001).

38. See *id.* at 211.

39. *Id.*

40. *Id.*

41. *Id.* at 211-12.

42. *Id.* at 212.

43. *Id.*

44. *Id.* at 211-12.

45. *Id.* at 214 (emphasis added).

46. *Id.*

47. See *id.*

48. *Id.* at 214.

49. *Id.* (emphasis added).

50. See *id.*

It is difficult to understand how the government's actions in this case could have "aris[en] from" the decision to execute a removal order. First of all, there was no valid removal order. Because 8 C.F.R. § 3.6 stayed the order entered against the plaintiff, that order was invalid.<sup>51</sup> While it is true that § 1252(g) does contain "any cause" and "any alien," (emphasis added), the argument based on the plain language of the statute cannot go so far as to allow the execution of an invalid removal order. One would suppose that if Congress had intended for invalid orders to be covered by this provision, it would have explicitly stated so. Certainly, § 1252(g) does not say 'no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision . . . to . . . execute removal orders, *including invalid orders.*' Congress did not use such language likely because its goal was to efficiently remove those with no right to be in this country, not to withdraw the protection afforded to authorized aliens.

It is further difficult to comprehend how excessive force was "directly connected" to the decision to execute the (invalid) removal order. Certainly, without the removal, no excessive force would have been applied, but the connection ends there.<sup>52</sup> The Fifth Circuit's claim that § 1252(g) covers events "directly connected" to the decision "to commence proceedings, adjudicate cases, or execute removal orders" seems meaningless. Here, "directly connected" is little different from "related," an interpretation that the court already disavowed in *Humphries v. Various Fed. USINS Employees*.<sup>53</sup>

## B. The Results of Adopting the Fifth Circuit's Approach

The Eighth, Ninth, and Eleventh Circuits follow a similar approach to § 1252(g) as the Fifth Circuit,<sup>54</sup> and this sometimes leads to absurd results. Below are some examples.

### 1. *Magallanes v. United States*<sup>55</sup>

In *Magallanes v. United States*, the Northern District of Atlanta refused to entertain a suit for damages pursuant to the Eleventh Circuit's decision in *Gupta v. McGahey*.<sup>56</sup> The plaintiff in *Magallanes* alleged that several U.S. Immigration and Customs Enforcement ("ICE") agents obtained entry to

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51. See *Silva*, 866 F.3d at 942 (Kelly, J., dissenting) (arguing that the government did not have an "enforceable removal order").

52. Several district courts have made a similar argument, as will be discussed below.

53. See 164 F.3d 936, 943 (5th Cir. 1999) ("As a general matter, 'arising from' does seem to describe a nexus somewhat more tight than the also frequently used phrase 'related to.'").

54. Compare *Silva*, 866 F.3d (8th Cir. 2017), with *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007) and *Gupta v. McGahey*, 709 F.3d 1062 (11th Cir. 2013).

55. 184 F. Supp. 3d 1372, 1378 (N.D. Ga. 2015).

56. *Id.* In *Gupta*, a foreign national brought an action, alleging that his civil rights were violated when ICE agents arrested him in connection with the initiation of removal proceedings. The Eleventh Circuit held that the district court lacked subject-matter jurisdiction because § 1252(g) precludes district courts from hearing any claim arising from a decision to execute removal orders. *Gupta*, 709 F.3d at 1062.

her home under the false pretext of looking for a fugitive.<sup>57</sup> Once inside, they arrested the plaintiff's husband and placed him in expedited removal, claiming he was convicted of an aggravated felony.<sup>58</sup> Plaintiff contends that the agents knew that no such conviction ever occurred, but proceeded with expedited removal anyway.<sup>59</sup>

The district court refused to exercise jurisdiction on the basis of § 1252(g), stating that the plaintiff's claim "directly challenges" the defendants' decision to remove her husband, whether that decision was "correct or not."<sup>60</sup> Thus, § 1252(g) prevented the plaintiff from recovering even though part of the wrong she suffered was purposefully inflicted. Needless to say, the court's interpretation would leave many aliens vulnerable to abuse and the government free to harass them without accountability.

## 2. *Khorrami v. Rolince*<sup>61</sup>

Similarly, in *Khorrami v. Rolince*, the Northern District of Illinois declined to adjudicate a Fourth Amendment claim on behalf of an alien who had been falsely accused of sharing an apartment with a 9/11 hijacker.<sup>62</sup> The plaintiff's account of the facts is as follows: the plaintiff was an Iranian-born British citizen who was married to a US citizen.<sup>63</sup> After the 9/11 attacks, he learned from acquaintances that the FBI was seeking information about him. He promptly reached out to the Chicago FBI office and volunteered to make himself available.<sup>64</sup> FBI agents then visited his home, and after speaking with him for several hours, they claimed he was not under suspicion.<sup>65</sup> However, later that day, FBI and INS agents arrested and then interrogated him for twelve hours.<sup>66</sup> They repeatedly ignored his pleas to be allowed to contact the British embassy.<sup>67</sup> Additionally, FBI and INA agents also subjected him to a polygraph test and threatened not to let him leave unless he consented to the use of the test results in court.<sup>68</sup> The agents subsequently handed him a "Notice to Appear," after which he was taken into INS custody, where he remained for three months.<sup>69</sup> While he was in custody, an agent "knocked him out of his chair and kicked him repeatedly" during an interrogation.<sup>70</sup> After this interrogation, the prison doctor treated him for bloody urine.<sup>71</sup> He was

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57. *Magallanes*, 184 F. Supp. 3d at 1373-74.

58. *See id.*

59. *Id.*

60. *Id.* at 1377.

61. 493 F. Supp. 2d 1061, 1061 (N.D. Ill. 2007).

62. *Id.*

63. *Id.* at 1064.

64. *Id.*

65. *Id.*

66. *Id.* at 1064.

67. *Id.* at 1064.

68. *Id.*

69. *Id.* at 1064-65.

70. *Id.* at 1065.

71. *Id.*



also later treated for suicidal tendencies and experienced chest pains.<sup>72</sup> Roughly three months after he was taken into custody, an FBI agent admitted that the plaintiff never shared an apartment with a 9/11 hijacker.<sup>73</sup> This contradicted a statement in an FBI affidavit submitted to the immigration court a month prior.<sup>74</sup> The agent explained that even though the FBI had information showing that this statement was incorrect at the time of the affidavit, it was mistakenly included because of the “fast-paced need to gather millions of pieces of information” and because the FBI was unable to centralize this information.<sup>75</sup> Two days after the agent made this admission, the plaintiff was released.<sup>76</sup> Nevertheless, two months after his release, he suffered a heart attack that he blamed on the mistreatment he suffered in detention.<sup>77</sup>

The plaintiff alleged that the agents violated his Fourth Amendment rights by subjecting him to illegal arrest and detention, and his Fifth Amendment rights by using excessive force.<sup>78</sup> The District Court for the Northern District of Illinois allowed the Fifth Amendment claim to go forward and divided the Fourth Amendment claim into two parts.<sup>79</sup> Events up until the plaintiff was handed the Notice to Appear were found to be within the court’s jurisdiction, whereas events thereafter were not.<sup>80</sup> The court reasoned that the service of the Notice to Appear marked the commencement of the removal proceeding.<sup>81</sup> Because the subsequent arrest and detention “directly” flowed from the decision to commence proceeding, they arose from this decision, and § 1252(g) barred the court from considering them.<sup>82</sup>

One has to wonder what the court would have done if the plaintiff had been detained for three years instead of three months. The plaintiff was only released after the FBI got around to correcting the inaccurate statement in the affidavit.<sup>83</sup> What if the FBI had neglected to do so until years later? Perhaps sensing a potential for injustice, the judge noted in his opinion,

I am not at all certain that this is the type of claim Congress sought to bar when it enacted § 1252(g). As one judge noted, section 1252(g) “was intended to help restore order to the administrative process by preventing multiple lawsuits over claims arising from action involving the removal of an alien— not to foreclose bona fide legal and constitutional questions unrelated to the removal order by barring all federal court review.”<sup>84</sup>

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 1064–73.

79. *Id.* at 1068–71.

80. *Id.* at 1068.

81. *Id.*

82. *Id.* at 1068 nn.3–4.

83. *Id.* at 1065.

84. *Id.* at 1068–69.

Nevertheless, the opinion continues, “The cardinal rule of statutory interpretation is that courts must first look to the language of the statute and assume that its plain meaning accurately expresses the legislative purpose.”<sup>85</sup>

### C. Limiting 8 U.S.C. § 1252(g)

Other courts have interpreted § 1252(g) much more narrowly than in the above cases and have allowed plaintiffs a way to obtain compensation. These courts did so by narrowing the meaning of the terms “commence proceedings, adjudicate cases, or execute removal orders” or “arising from.”

#### 1. Limiting “Commence Proceedings”

In *Diaz-Bernal v. Myers*, the District Court of Connecticut found it had jurisdiction by assigning a narrow meaning to the term “commence proceedings.”<sup>86</sup> In that case, the plaintiffs alleged that agents raided a number of homes in their neighborhood in New Haven to retaliate against the city for its immigration-friendly policies.<sup>87</sup> Without a search warrant, consent, or probable cause, the agents allegedly entered the plaintiffs’ homes and detained them before learning of their immigration status.<sup>88</sup> The plaintiffs further claimed that the agents failed to inform them of why they were detained, and even though their primary language was Spanish, the agents forced them to sign English forms with minimal to no translation.<sup>89</sup> The agents did so, the plaintiffs contend, to show immigrants that the city of New Haven was not safe.<sup>90</sup>

The district court held that it had jurisdiction over the case because the raid itself did not arise from a decision to commence removal proceedings.<sup>91</sup> That is, the defendants did not conduct the raid because they had decided to commence a proceeding against the plaintiffs.<sup>92</sup> Rather, they came to find someone against whom to commence a proceeding. The court further pointed out that entertaining the plaintiffs’ suit would not implicate the policy considerations for which section 1252(g) was enacted.<sup>93</sup> The plaintiffs only sought damages and did not seek to delay any proceeding.<sup>94</sup>

#### 2. Limiting “Arising From”

Other courts have achieved similar results by limiting the meaning of “arising from.” For example, the District Court of Kansas in *Mochama v.*

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85. *Id.* at 1069.

86. 758 F. Supp. 2d 106, 124 (D. Conn. 2010).

87. *Id.* at 114-15.

88. *Id.* at 113-14.

89. *Id.*

90. *Id.*

91. *Id.* at 122-24.

92. *Id.*

93. *Id.* at 125.

94. *Id.* at 124.

Zwetow took this approach.<sup>95</sup> The plaintiff in this case alleged that he was subjected to a brutal beating by government agents.<sup>96</sup> Specifically, one morning, when he was held at the detention center, government agents insisted that he sign certain paperwork that he did not quite understand.<sup>97</sup> At this point, the plaintiff's habeas corpus petition was pending and he was concerned that he was being tricked into signing something that could jeopardize his petition.<sup>98</sup> The agents did not inform the plaintiff that he was about to be deported, and they refused to let him speak to an attorney.<sup>99</sup> In an effort to make him fingerprint the form, the agents

pulled hard on Mochama's right arm, causing him to fall forward . . . punched Mochama in the stomach with his closed right fist. [An agent] then put his right arm around Mochama's neck from behind and squeezed, choking [the plaintiff] and pulling him backward. [An agent] then crouched with his right knee on the floor and slammed Mochama head first into the concrete floor.<sup>100</sup>

The entire incident was captured on camera. Plaintiff was also placed in solitary confinement.<sup>101</sup>

In agreeing to adjudicate the claim, the district court pointed out that excessive force and solitary confinement were not necessary components of a removal.<sup>102</sup> As such, section 1252(g) did not apply because these incidents did not arise from the decision to execute a removal order.<sup>103</sup> The court also pointed out that the establishment of a "but-for" causation relationship is not sufficient to satisfy the "arising from" requirement.<sup>104</sup> That is, while excessive force and solitary confinement would not have happened had the agents not decided to execute the removal order, this is not enough to trigger the application of section 1252(g).

In *El Bradawl v. Dep't of Homeland Sec.*, the District Court of Connecticut offers a similar reasoning.<sup>105</sup> In that case, the court agreed to adjudicate a prolonged detention claim. The court reasoned that if jurisdiction was excluded under section 1252(g), the government would be able to detain aliens indefinitely.<sup>106</sup> Thus, applying section 1252(g) would raise serious constitutional concerns.<sup>107</sup>

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95. No. CV 14-2121-KHV, 2017 WL 36363, 7-9 (D. Kan., 2017).

96. *Id.* at \*3.

97. *Id.* at \*2.

98. *Id.*

99. *Id.*

100. *Id.* at \*3.

101. *Id.*

102. *Id.* at \*8.

103. *Id.*

104. *Id.*

105. 579 F. Supp. 2d 249, 265-66 (D. Conn. 2008).

106. *Id.* at 269.

107. *Id.*

### III. The Harm of Reading 8 U.S.C. § 1252(g) Too Broadly

So far we have seen that various courts have adopted a broad reading of § 1252(g), finding that the government and its agents could escape liability for wrongful deportation, wrongful detention, and purposeful malicious prosecution.<sup>108</sup> Such a reading makes the following scenario possible: an agent has a dispute with an alien, falsely asserts that the alien has committed a deportable crime, detains him, possibly uses excessive force against him, wrongfully removes him from this country, and escapes responsibility. This scenario is troubling, but it hardly conveys all the harms that can befall an alien or the anomaly that a broad reading of § 1252(g) creates in the law. These issues will be addressed in this section.

#### A. Harm to the Alien

Even if the government follows all relevant laws and regulations, an alien is subjected to a most trying experience when he is targeted for removal proceedings. On the surface, this process appears to be a mere inconvenience for the alien. However, the reality is far more dreadful than one may suppose.

##### 1. *What Happens When the Attorney General Decides to “Commence Proceedings?”*

Hundreds of thousands of aliens are swept into custody each year.<sup>109</sup> An alien can be arrested upon mere suspicion that he “looks” like an undocumented person.<sup>110</sup> The Fourth Amendment offers him minimal protection, as evidence obtained illegally by the government is admissible in most cases.<sup>111</sup> “Put more graphically, immigration agents may well enter a home without a warrant and rifle through personal belongings for evidence.”<sup>112</sup> When arrested, an alien will not be read *Miranda* rights and may not be advised that he has the right to retain counsel at his own expense.<sup>113</sup> After his arrest, DHS has forty-eight hours to decide whether to retain custody over him.<sup>114</sup> That being said, DHS may detain a person for as long as is “reasonable” in extraordinary circumstances.<sup>115</sup> Additionally, regulations do not specify a remedy for when DHS breaks these rules.<sup>116</sup>

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108. See *supra* Part II.

109. See Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 *FORDHAM INT’L L.J.* 243, 252 (2013).

110. See Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 *STAN. J. CIV. RTS. & CIV. LIBERTIES* 195, 206-07 (2007).

111. See *id.*

112. *Id.*

113. *Id.*

114. Bridget Kessler, *In Jail, No Notice, No Hearing . . . No Problem? A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 *AM. U. INT’L L. REV.* 571, 586-87 (2009).

115. *Id.*

116. *Id.*

“Individuals who seek to remain in the United States generally remain in detention for three months or more, and it is not uncommon for individuals to stay in detention even longer, sometimes for more than a year.”<sup>117</sup> The appeal process may take several years.<sup>118</sup> Some detention centers are located in remote areas, impeding access to counsel and family visitation.<sup>119</sup> Conditions at a detention center are harsh and degrading. While technically, aliens are detained in administrative custody, there is no guarantee that the prison staff is aware of the difference between punitive and administrative custody.<sup>120</sup> In cases where families are held together, children may be threatened with separation from their parents.<sup>121</sup> In short, the potential for abuse is endless.

The number of people in detention has grown dramatically in past decades.<sup>122</sup> “In 2005, there were 238,000 immigration detainees each year, but that number increased by almost 200,000 in just five years to the 2011 figure of 429,000.”<sup>123</sup> Some detention centers are run by private companies who stand to make a profit at the expense of detainees.<sup>124</sup> There is no shortage of horror stories, including accounts in which detainees have died from the lack of medical care.<sup>125</sup> One detainee from Guinea died after undergoing emergency surgery for a skull fracture and multiple brain hemorrhages. He was “shackled and pinned to the floor of the medical unit as he moaned and vomited” and was then “left in a disciplinary cell for more than thirteen hours, despite repeated notations that he was unresponsive and intermittently foaming at the mouth.”<sup>126</sup> Others have died from untreated cancer or simple diseases that could have been resolved with antibiotics.<sup>127</sup> Some have committed suicide; others screamed in pain and were ignored.<sup>128</sup>

Not every detainee has been subjected to such horrific treatment, and as described above, some courts will in fact allow a claim of excessive force. However, an alien in custody is dangerously vulnerable to this type of abuse, and such vulnerability is not compensable if the *Khomarri* court was correct that detention “directly fl[ows]” from the decision to commence proceeding.<sup>129</sup>

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117. Gilman, *supra* note 109, at 256.

118. Kanstroom, *supra* note 110, at 207.

119. Gilman, *supra* note 109, at 249.

120. Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 162 (2008).

121. See *id.* at 163.

122. Gilman, *supra* note 109, at 255.

123. *Id.*

124. See generally Anshu Budhrani, *Regardless of My Status, I Am A Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781 (2012).

125. See *id.* at 781-84.

126. *Id.* at 781.

127. *Id.* at 782.

128. *Id.* at 781-82.

129. See *supra* Part I.

## 2. The Hearing and Subsequent Deportation

If an immigration judge determines that an alien is deportable, that alien has the option of appealing to the BIA. The BIA may then spend ten minutes reviewing his case and summarily dismiss it.<sup>130</sup> Between 2002 and 2004, the BIA ruled against the alien in such appeals between 94% and 98% of the time.<sup>131</sup> Should the BIA reject the appeal, the alien can appeal to a Circuit Court of Appeals. Such a court may not be able to adjudicate the issue because it lacks jurisdiction over certain discretionary matters.<sup>132</sup> However, if the court has jurisdiction, the reversal rate is quite high (40% in some circuits).<sup>133</sup>

A significant number of reversals involve already deported aliens.<sup>134</sup> An appeal to a Circuit Court does not automatically stay the deportation order.<sup>135</sup> In fact, even though an appeal to the BIA automatically stays the deportation order, the government may erroneously decide to deport the alien anyway.<sup>136</sup> This severely prejudices the alien because, as the government has argued, once an alien is deported, he can only be readmitted if he satisfies the standard for "arriving aliens."<sup>137</sup> For example, possessing less than 30 grams of marijuana is not a deportable crime.<sup>138</sup> However, it is a crime that would bar an arriving alien from entering the United States.<sup>139</sup> The government has informed a number of wrongfully deported aliens that they may not return on similar grounds.<sup>140</sup> However, some courts have declared this practice illegal.<sup>141</sup>

Additionally, not everyone who is deported has the financial resources to return to the United States. This problem is especially dangerous for those who fled to the United States in the first place because of perilous conditions at home. Some were victims of political or religious persecution; others came from war torn countries. Because immigration law mandates deportation of all aliens convicted of an "aggravated felony," even refugees can be removed if an immigration judge determines that they committed such a crime.<sup>142</sup> It is not at all clear, however, what constitutes an aggravated felony. For example, would possession of less than 30 grams of marijuana constitute an aggravated felony?<sup>143</sup>

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130. Kanstroom, *supra* note 110, at 207.

131. Richard Frankel, *Illegal Emigration: The Continuing Life of Invalid Deportation Orders*, 65 SMU L. REV. 503, 524 (2012).

132. Kanstroom, *supra* note 110, at 207-08.

133. Frankel, *supra* note 131, at 525.

134. *See id.* at 526-27.

135. *Id.* at 506.

136. *Id.*

137. *Id.*

138. *Id.* at 507

139. *Id.*

140. *Id.* at 507.

141. *Id.* at 532.

142. Adam Collicelli, *Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada*, 32 B.C. INT'L & COMP. L. REV. 115, 117-19 (2009).

143. *See Frankel, supra* note 131, at 515, 526 n.126.

If the immigration judge makes an erroneous determination, the consequences for the alien are particularly unfair. This is true even if the alien did not come to America as a refugee, as not every country welcomes repatriated citizens with open arms. For example, in El Salvador, newspapers raised the concern that America was sending “criminals” back to their country and the police implemented a program to monitor deportees.<sup>144</sup> However, statistics do not support the notion that most deportees are dangerous. For example, in 2005, 64.6% of removals for criminal convictions were based on non-violent offenses.<sup>145</sup> Another country where deportees face cold reception is Haiti.<sup>146</sup> In 2000, “the Haitian government . . . impose[d] mandatory, indefinite detention on all criminal deportees arriving from the United States.”<sup>147</sup> According to one deportee, who the United States later allowed to return, he was held in a cell that was so crowded that prisoners slept sitting.<sup>148</sup> Prisoners did not have a restroom and were forced to use plastic bags in lieu of a toilet.<sup>149</sup> The only source of light was a small ventilation hole in the wall.<sup>150</sup> If it rained during the day, swarms of mosquitos attacked prisoners at night.<sup>151</sup> Prisoners were also beaten and denied medical attention.<sup>152</sup>

Even when a deportee does not suffer from systematic mistreatment perpetrated by the government of his country, he may still fall victim to vigilante violence.<sup>153</sup> This is the case in Honduras and El Salvador.<sup>154</sup> In these countries, a deportee may be killed by vigilante squads within days of his arrival.<sup>155</sup>

Even if all of the above were not true, a person’s departure from the United States is still a hardship upon other members of his family who remain in this country.<sup>156</sup>

## B. An Expansive Interpretation of 8 U.S.C. § 1252(g) Creates an Anomaly in the Law

An expansive interpretation of § 1252(g) would create a paradoxical result in the law whereby an alien who has never been to the United States may recover in American courts for a harm committed against him by another individual who also has never been to the United States; but, an alien who was wrongfully deported by U.S. government agents has nowhere to turn to for compensation.

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144. See Kanstroom, *supra* note 110, at 219.

145. Collicelli, *supra* note 142, at 118.

146. See Kanstroom, *supra* note 110, at 220-21.

147. *Id.*

148. *Id.* at 221.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 219.

154. *Id.*

155. *Id.*

156. *Id.* at 216.

In certain circumstances, the law empowers federal courts to entertain lawsuits where all parties are foreigners if the defendant's alleged conduct is particularly egregious. For example, under the Torture Victim Protection Act of 1991 ("TVPA"), an alien may bring suit against "an individual who, under actual or apparent authority, or color of law, of any foreign nation," subjected him to torture.<sup>157</sup> A suit brought under this statute falls within the jurisdiction of federal courts because it poses a federal question, even if the alleged conduct took place on foreign soil.<sup>158</sup> For example, the Second Circuit has upheld a jury verdict and award of punitive damages against a Bangladeshi defendant who caused the plaintiff, also a citizen of Bangladesh, to be held and tortured by the Bangladeshi government in order to deprive him of his business interests.<sup>159</sup> The plaintiff was blindfolded, handcuffed, and electric shocks were applied to his thighs and arms.<sup>160</sup>

The Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is another statute that allows foreigners to sue other foreigners in American courts. The statute provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>161</sup> While the text of the statute is plain and simply stated, a complaint brought under the ATS must meet a set of stringent requirements. Specifically, the complaint must satisfy three main requirements: (1) the conduct alleged violates the law of nations, (2) such conduct sufficiently touches and concerns the United States to overcome the presumption against the extraterritorial application of the statute, and (3) the mode and theory of liability are cognizable under international law.<sup>162</sup>

Regarding the first requirement, violation of the law of nations, the Supreme Court has explained that "the ATS is a jurisdictional statute creating no new causes of action"; however, Congress intended for federal common law to "provide a cause of action for [a] modest number of international law violations."<sup>163</sup> The Court further stated that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."<sup>164</sup> That is, the violations covered by the statute are those that run afoul of "specific and universally accepted rules that the nations of the world treat as binding in their dealings with one another."<sup>165</sup> Here, "*in their dealings with one another*" is a crucial component. While the alleged conduct has to be universally prohibited to fall

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157. 28 U.S.C. § 1350 note 2(a).

158. See *Doe v. Drummond Co.*, 782 F.3d 576, 601-02 (11th Cir. 2015).

159. See *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 45-46 (2d Cir. 2014).

160. *Id.* at 46.

161. 28 U.S.C. § 1350.

162. See *Mastafa v. Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014).

163. *Sosa*, 542 U.S. at 712, 724 (2004).

164. *Id.* at 732.

165. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115 (2d Cir. 2012).



within the ATS, this is not sufficient in and of itself. For example, the murder of one private party by another private party is universally illegal, but would not be actionable under the ATS.<sup>166</sup> Rather, to be actionable under the ATS, a conduct must violate “rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.”<sup>167</sup> This requirement is met when the alleged conduct is so odious that it renders the actor “*hostis humani generis*, an enemy of all mankind.”<sup>168</sup> Therefore, genocide, war crimes, and crimes against humanity may be asserted as causes of action under the ATS.<sup>169</sup>

The “touch and concern” requirement stems from a general presumption that American statutes do not govern conduct that occurs overseas.<sup>170</sup> This presumption must be overcome in order for the TVPA and the ATS to apply extraterritorially. In the case of the TVPA, the presumption is rebutted by the statute itself, which explicitly holds liable individuals who acted “under actual or apparent authority, or color of law, of any foreign nation.”<sup>171</sup> The ATS, on the other hand, contains no express language authorizing extraterritorial application.<sup>172</sup> As such, it governs extraterritorial conduct only if such conduct touches and concerns the United States with sufficient force to displace the presumption against extraterritoriality.<sup>173</sup> This requirement exists because an overly broad application of the ATS would sow international discord.<sup>174</sup> An example of conduct that sufficiently touches and concerns the United States can be found in *Licci by Licci*, where the Second Circuit held that a Lebanese bank accused of wiring U.S. dollars to a terrorist organization could be sued under the ATS.<sup>175</sup> The Lebanese bank completed the wiring through a New York bank.<sup>176</sup> This was enough to displace the presumption against extraterritoriality.<sup>177</sup>

As for mode and theory of liability, the Second Circuit has suggested that certain types of conspiracy are not cognizable under international law and, therefore, are not cognizable under the ATS.<sup>178</sup> However, plaintiffs who cannot satisfy the requirements for conspiracy may be able to plead aiding and abetting.<sup>179</sup> For example, an individual who contracted with a

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166. See *Mastafa*, 770 F.3d at 180.

167. *Id.* (citing *IIT v. Vencap, Ltd.*, 819 F.2d 1001, 1015 (2d Cir. 1975)).

168. *Kiobel*, 621 F.3d at 175.

169. See *id.* at 115.

170. See *Licci by Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 213-14 (2d Cir. 2016).

171. 28 U.S.C. § 1350 note 2(a) (emphasis added).

172. See 28 U.S.C. § 1350.

173. See *Chowdhury*, 746 F.3d at 49-50; *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2013).

174. *Kiobel*, 569 U.S. at 115-16.

175. *Licci by Licci*, 834 F.3d at 213-14.

176. See *id.*

177. *Id.*

178. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 252-55 (2d Cir. 2009).

179. See *Mastafa*, 770 F.3d at 181.

regime to build a road that is used to facilitate war crimes could potentially be held liable under the ATS.<sup>180</sup> However, the ATS only applies if this individual did so with the purpose of aiding war crimes.<sup>181</sup> If he built the road with the *knowledge* that it would be used to facilitate war crimes, but facilitating war crimes was not his *purpose*, he cannot be held liable under the ATS.<sup>182</sup>

Despite these stringent criteria, both the TVPA and the ATS have helped foreign victims obtain compensation from foreign offenders in American courts.<sup>183</sup> And yet, an immigrant in the United States who suffers from the same type of harm at the hand of United States government agents would not be able to recover in US courts under a broad reading of § 1252(g). For example, the wrong allegedly inflicted upon the plaintiff's husband in *Magallanes* could have taken place in an entirely different context. What if the ICE agents who falsely claimed that the husband had committed a felony had done so with the purpose of deporting him to a country where he would be subjected to genocide? What if the agents received kickbacks from the regime perpetrating the genocide? In that case, the agents would be aiding and abetting genocide, and their conduct would definitely touch and concern the United States because it would take place in this country. An expansive reading of § 1252(g) would strip courts of jurisdiction in this case too because the statute says, "notwithstanding any other provision of law (statutory or nonstatutory)."

#### IV. 8 U.S.C. § 1252(g) Should be Read Narrowly

Courts should interpret § 1252(g) narrowly to avoid manifest injustice. Additionally, Congress passed § 1252(g) to accomplish a very specific purpose—namely, to allow the Attorney General to exercise discretion.<sup>184</sup> Why, then, do some courts interpret § 1252(g) broadly?

A familiar argument is that the plain language of § 1252(g) necessitates a broad reading. Section 1252(g) itself does not make any distinction between discretionary decisions and non-discretionary decisions. Regarding congressional intent, laws are not written just to resolve problems in front of legislators. They may be adopted for future purposes as well. This is the line of reasoning adopted by the Eighth Circuit in *Silva*:

[The Supreme Court's] reference to discretionary decisions did not say that § 1252(g) applies *only* to discretionary decisions, notwithstanding plain language that includes no such limitation. "Congress often passes statutes that sweep more broadly than the main problem they were designed to address." *Gonzales v. Oregon*, 546 U.S. 243, 288, 126 S. Ct. 904, 163 L.Ed.2d 748 (2006). The terms of the statute, not the principal concerns of the enacting

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180. See *Presbyterian Church of Sudan*, 582 F.3d at 258.

181. *Id.*

182. *Id.*

183. *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008); *Chowdhury*, 746 F.3d at 55.

184. See *supra* Part I.

legislators, must govern. *Id.*<sup>185</sup>

And yet, if the “terms of the statute” must govern, they still must be interpreted in a rational manner. For example, if the “decision to commence proceedings” were taken literally, aliens would not be able to obtain compensation even when the government decided to knowingly commence groundless proceedings against them.<sup>186</sup> What if the government were to detain an alien indefinitely? Wouldn’t that detention arise from the decision to “commence proceedings”? Would it be correct to conclude that in that case, the courts would not have the power to issue a writ of *habeas corpus*? Here, the Supreme Court itself tells us that such a conclusion would not be correct.<sup>187</sup> Thus, § 1252(g) should be interpreted narrowly, against the backdrop of congressional intent.

Additionally, the interpretation of § 1252(g) in *Silva*, *Foster*, and *Magallanes* appears to be contrary to *AADC*. In *AADC*, the Supreme Court does not just explain Congress’s goals. It also contrasts the “decision or action” to “commence proceedings, adjudicate cases or execute removal orders” with “*other* decisions or actions that may be part of the deportation process—such as the decisions to open investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.”<sup>188</sup> Under the logic of *Silva*, *Foster*, and *Magallanes*, however, no difference exists between these types of decisions, or more precisely, the difference is meaningless. While it is true that the decision to surveil a suspected violator is not the same as the decision to commence a proceeding, the former is “directly related” to the latter and therefore arises from it. As such, the jurisdictional bar exists just the same. In *Foster*, for example, the decision to use excessive force was “directly related” to the decision to execute a removal order.<sup>189</sup> How is the relationship between these two decisions any closer than the relationship between the decision to commence proceedings and the decision to surveil the violator? Thus, *Foster*’s interpretation of § 1252(g) obliterates the Supreme Court’s effort to delineate the scope of this provision.

One must also not forget that in *AADC*, the Supreme Court responds to the plaintiffs’ warning of the “chilling effect” on constitutional rights by pointing out that, at least in cases with similar fact patterns to *AADC*, “an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.”<sup>190</sup> In many of the cases noted above, the alien was not in this country unlawfully. As such, the court’s decision in each of these cases is cause for constitutional concern. As the *El Bradawl* court points out, the Supreme Court stated in

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185. *Silva*, 866 F.3d at 941.

186. *Cf. Magallanes*, 184 F. Supp. 3d at 1373–74 in Part I *supra*.

187. See *El Bradawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 267–68 (D. Conn. 2008) (citing *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)).

188. *Reno*, 525 U.S. at 483 (emphasis added).

189. See *supra* Part I.

190. *Reno*, 525 U.S. at 488.

*Clark v. Martinez* that when deciding “which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”<sup>191</sup> This is another reason why § 1252(g) should be interpreted narrowly.

Finally, the Supreme Court in *AADC* leaves open “the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome.”<sup>192</sup> The Supreme Court made this statement in its discussion of selective enforcement claims. But if the scope of § 1252(g) can be narrowed even when the Attorney General is exercising prosecutorial discretion, which, according to the Court, was an essential part of congressional intent in passing the IRINA,<sup>193</sup> it can be narrowed in other contexts as well. Why, then, should § 1252(g) not have been interpreted more narrowly in *Magallanes*? Surely, when the government intentionally inflicts a wrong, the situation is sufficiently outrageous to trigger a narrower reading of the provision.

## Conclusion

In conclusion, a broad interpretation of § 1252(g) is inadvisable. Not only is such an interpretation inconsistent with legislative history and the Supreme Court’s decision in *AADC*, it also leaves aliens without recourse when they are wrongfully targeted or mistreated by government agents and therefore, brings about absurd results. Section 1252(g) should be interpreted to apply only to instances where the government exercises discretionary authority. It should not shield the government from liability when the government violates its own rules. At the very least, this provision should not strip courts of jurisdiction when the wrong inflicted was purposeful rather than due to an oversight or misunderstanding of the law.

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191. *El Bradawi*, 579 F. Supp. 2d at 267-68 (quoting *Clark*, 543 U.S. at 380-81).

192. *Reno*, 525 U.S. at 491.

193. See *supra* Part I.