

In his petition, Wahab requests that we appoint him counsel. Lacking jurisdiction, we must deny his request. We do so, however, without prejudice because Section 106(a)(1)(B)(5) appears to raise constitutional concerns that our Court of Appeals may want to address. If the Court of Appeals shares our concern, Wahab definitely will need counsel to press the grave issues we merely highlight now.

Before May 11, 2005, an alien contesting removal could file one of two petitions: (1) a petition for review in a Court of Appeals or (2) a petition for a writ of habeas corpus in federal district court. See Chmakov v. Blackman, 266 F.3d 210, 213 (3d Cir. 2001). Section 106(a)(1)(B)(5)'s plain terms,¹ however, now foreclose aliens from proceeding under the second route, filing a habeas petition.

Under our Constitution's Suspension Clause, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. While Congress may divest federal courts of habeas jurisdiction without violating the Suspension Clause, it must at the very least substitute "a collateral remedy which is neither inadequate nor

1. To repeal habeas jurisdiction, Congress must clearly communicate its intent: "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal." Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299 (2001).

ineffective to test the legality of a person's detention." Swain v. Pressley, 430 U.S. 372, 381 (1977); see also Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 300-01 (2001) (suggesting that the Suspension Clause might be violated if habeas review were to be foreclosed in the immigration context).

When applied to all aliens fighting removal, one could find Section 106(a)(1)(B)(5) inadequate because it effectively bars these litigants from receiving an evidentiary hearing. Specifically, 28 U.S.C. § 2243 allowed aliens to proffer evidence at an evidentiary hearing, enabling the judge to make factual findings. Section 106(a)(1)(B)(5), however, requires aliens to file a petition for review, which, unlike habeas actions, restricts the court to "decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A) (emphasis added). In other words, Section 106(a)(1)(B)(5) deprives aliens of the ability to present evidence at a hearing.²

When applied to certain criminal aliens like Wahab, one could find Section 106(a)(1)(B)(5) even more inadequate. Read in conjunction with other Title 8 provisions, Section 106(a)(1)(B)(5) appears to foreclose certain alien criminals from receiving any judicial review of their removal orders. 8 U.S.C. § 1252(a)(2)(C) bars courts from entertaining an alien's petition

2. This could be problematic, for example, if an alien wanted to prove that he had ineffective counsel during removal proceedings by proffering evidence outside the administrative record.

for review if that alien committed any enumerated crime. See Liang v. Immigration & Naturalization Serv., 206 F.3d 308, 322 (3d Cir. 2000). Yet, Section 106(a)(1)(B)(5) appears on its face to restrict these alien criminals -- like all other aliens -- to one path, filing a petition for review in the Court of Appeals, the very procedure 8 U.S.C. § 1252(a)(2)(C) prohibits. Thus, reading Section 106(a)(1)(B)(5) and 8 U.S.C. § 1252(a)(2)(C) together appears to cut off certain criminal aliens from any channel of judicial review.³ See St. Cyr, 533 U.S. at 300 ("[S]ome 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" (quoting Heikkila v. Barber, 345 U.S. 229, 235 (1953))).

Wahab's petition demonstrates that this concern is by no means conjectural. The Board of Immigration Appeals emphasized that Wahab "was convicted of, among other things, making a false statement in an application for a United States passport." Pet.'s Ex. 3. While we do not know all the offenses Wahab committed, it is possible that one or more fall under 8 U.S.C. § 1252(a)(2)(C); consequently, Section 106(a)(1)(B)(5) could foreclose him from receiving any judicial review of his impending deportation.

Notwithstanding our concerns, we must honor Congress's

3. While relevant, Felker v. Turpin, 518 U.S. 651, 663-64 (1996) would appear to be distinguishable because it dealt with restrictions on the writ, rather than Congress's wholesale elimination of it for a certain class of people, i.e., aliens fighting a removal order.

3. The Clerk of Court shall CLOSE this matter statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.