

INDEX

Litigating Immigration Cases in Federal Court, 4th Edition

A

- AAO (Administrative Appeals Office)**
legalization appeals to, 569
- abuse of discretion standard**
habeas corpus review, 398–400
motion to reopen, 346
- ADAA (Anti-Drug Abuse Act of 1988)**
aggravated felony, history of term, 647
- adjudication**
administrative policy implemented through, 677n212
- adjustment of status**
advance parole and, 457
Chinese Student Protection Act, 133
consequences of failure to appear, 334
delay cases, 72–73
discretionary relief not previously applied for, 350–51
Duran-Gonzalez class members, 306–07
judicial review of expedited order of removal, 296–300, 306–07
motion to reopen for, 166–67, 353–54, 358
- Administrative Appeals Office (AAO)**
legalization appeals to, 569
- administrative notice of new facts**
due process concerns, 208
- Administrative Procedure Act (APA)**
generally, 76
Chevron deference rule and, 595
deportation or removal cases, APA not applicable to, 66–67
habeas proceedings not reviewed under, 389
judicial review, 473–529, 531
arbitrary and capricious standard, 502–03
BIA sua sponte decision to reopen removal proceedings, 491
consular denial of visa, 495–96
decisions made outside removal proceedings, 477–91
decisions made outside removal proceedings but renewed before IJ, 480–85
deferred inspection, right to counsel, 506
de novo standard of review, 501
discovery, 499–501
discretionary decisions. *See* Judicial review of discretionary decisions
due process, 513–21
- expedited removal proceedings, right to counsel, 506
extension of stay, 478
freedom of speech cases, 495–96
inspections at border, right to counsel, 505–06
labor certification and visa petitions, 493–94
legalization procedures, 486–88
mandamus for delay cases, 521–29
marriage fraud penalty, 478–79, 494–95
naming of proper defendants, 496–98
“pattern and practice” cases, 485–90
porting under AC21, 495
reinstatement of nonimmigrant status, 477–78
removal proceedings (INA §242) *vs.* other immigration decisions (28 USC §1331), 475–91
right to counsel, 503–06
scope of review, 501
standards of review, 501–03
standing, 492–96
substantial evidence standard, 501–02
termination of asylum status, 479–80
time for filing, 491–92
venue, 498–99
lawsuits brought under, 66–69
no stay of administrative decision pending administrative appeal, 69
regulatory exhaustion requirement, 68–69
required *vs.* permissive administrative appeals, 68–69
statutory exhaustion requirement, 67–68
standard of review, 573
substantial evidence standard, 110
- AEDPA (Antiterrorism and Effective Death Penalty Act of 1996)**
judicial review of criminal cases, 168
release standards, 431
- aggravated felony**
deportability for conviction, 647–49, 737–38
elimination of extreme hardship waiver, 653
judicial review of expedited order of removal, 292–93
- All Writs Act**
generally, 76
- ambiguity**
Chevron deference rule and, 598–602
determination of statutory ambiguity, 673n198
- amicus work**
fees awarded for, 806

Anti-Drug Abuse Act of 1988 (ADAA)
aggravated felony, history of term, 647

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)
judicial review of criminal cases, 168
release standards, 431

APA. *See* Administrative Procedure Act

appeals. *See also* Courts of appeals
BIA appeals and exhaustion of administrative remedies, 50–51
fair opportunity for administrative appeal, 207–08
FOIA requests, 697
notice of appeal rights, 207–08
required vs. permissive administrative appeals, 68–69
streamlined decisions review, 134–35
waiver of right to appeal, 61–63

“arbitrary and capricious” standard
APA provisions, 502–03
discretionary decisions, standard of review, 113–15

arriving aliens
habeas corpus proceedings, 278–79
judicial review of expedited order of removal, 280–92
due process challenge, 283–84
habeas corpus proceedings, 282–83
jurisdiction to review, 282–83
order of removal as unlawful, 284–92
lawful permanent residents as. *See* Lawful permanent residents as arriving aliens

asylum
appeals, streamlined review, 134
judicial review of expedited order of removal, 300
judicial review of orders of removal, asylum-only proceedings, 94–95
one-year time bar on applications, 177–79

Attorney General actions
judicial review of removal orders, 179–81

attorneys. *See* Effective assistance of counsel

attorneys’ fees
EAJA awards. *See* Equal Access to Justice Act
FOIA awards, 704–11

Auer deference
discussed, 627–29

B

Board of Immigration Appeals (BIA)
criticisms of, 1–2
failure to appeal to, under exhaustion of administrative remedies doctrine, 50–51
orders of removal. *See* Judicial review of orders of removal
streamlining regulations, review of violation of, 130–33

bond issues
judicial review. *See* Judicial review of custody and bond issues

border searches
generally, 234–38
fixed checkpoints, 235–36
“functional equivalent” of border, 234–35
right to counsel, 505
roving patrols, 236–38

Brand X deference
discussed, 619–27

Buckhannon standard
attorney’s fees, 782–84

burden of proof
lawful permanent residents as arriving aliens, 453–55
suppression of evidence, 267–68

C

CARRP (Controlled Application Review and Resolution Program)
delay cases, 521

“case or controversy” requirement
justiciability, 11–12

catalyst theory
attorney’s fees, 780–82

CAT (Convention Against Torture) relief
asylum-only proceedings, 94
judicial review of decisions denying deferral of removal, 171–72
reinstated order of removal, 303–04

causation
standing requirement, 14–15

central address filing system
IMMACT90 requirements, 332–33

change of address
IMMACT90 requirements to notify EOIR, 333

Cheney rule, 104–06

Chevron deference rule
generally, 593–619
administrative framework, 593–95
APA and, 595
Auer deference, 627–29
Brand X deference, 619–27
circuit court law, 609–10
citizenship issues, 606
congressional intent, 595–96
constitutional issues and, 106
distinguishing between “closed” and “open” statutes, 662n150
four-step inquiry, 596–97
naturalization issues, 605
retroactivity issues, 610–11
rule-making power
agency exercise of, 611–15

- delegation of, 603–11
- reasonableness of agency decision, 615–19
- state and federal criminal law, 606–09
- state law, 609
- statutory ambiguity, 598–602
- two-step inquiry, 596
- Chinese Exclusion Act of 1882**
 - congressional authority, 715
 - habeas proceedings, 391
 - impermissible retroactivity of, 641
- Chinese Student Protection Act**
 - Adjustment of status, 133
- circuit court law**
 - Chevron* deference rule, 609–10
- citizenship claims.** *See also* Judicial review of citizenship claims
 - Chevron* deference rule and, 606
 - colorable claim to citizenship, 460
 - exhaustion of administrative remedies, 59
 - judicial review of orders of removal, 122–26
- civil complaints**
 - generally, 745–55
 - EAJA claims, 773–76
 - FRCP rules governing (Rules 8–11), 748–49
 - preparation of, 747–55
 - items to be filed, 754
 - pleading standards, 751–53
 - service on parties, 754–55
 - when and where to file, 753
- civil proceedings**
 - civil complaints, 745–55. *See also* Civil complaints
 - exclusionary rule, 255–56
- Civil Rights Act of 1964, Title VII**
 - catalyst theory of award of attorney’s fees, 780–82
 - jurisdiction, 80
- claim-processing rules**
 - jurisdictional rules vs., 80–84
 - INA §242(d) as claim-processing rule, 47, 48–50
- claims to be presented**
 - determining when and where lawsuit can be filed, 3–5
- class actions**
 - legalization lawsuits, 488–90
 - mootness doctrine exception, 33–34
 - “pattern and practice” cases, 488–90
- collateral attacks**
 - acquittal in section 1326 prosecution, 385–87
 - “gross miscarriage of justice” standard, 376–84
 - prior order of removal, 375–87
 - reinstated order of removal
 - courts of appeals, 321–22
 - habeas corpus, 325
 - motion to reopen, 322–26
 - post-IIRIRA and REAL ID Act collateral attack, 320–21
 - traditional collateral attack, 316–20
- colorable claim to citizenship**
 - judicial review, 460
- complaints.** *See* Civil complaints
- congressional intent**
 - Chevron* deference rule, 595–96
 - “closed” and “open” statutes, 662
 - consular non-reviewability, 549–50
 - retroactivity issues, 634–37
- consent**
 - exclusionary rule, entry into home without, 261–62
 - search and seizure protections, 238–39
- Constitution, U.S.** *See also* specific Amendments
 - Article I, Section 2, 724
 - Article I, Section 8, 714
 - Article I, Section 9, clause 1, 714
 - Article I, Section 9, clause 2 (Suspension Clause), 6, 75, 139, 168, 316, 389
 - Article III, 11–19, 28–42
 - Article III, Section 1, 75
 - Article III, Section 2, 75
 - Article III, Section 2, clause 1, 6
 - Article VI, Section 6, 724
- constitutional issues**
 - Chevron* deference rule, 106
 - exhaustion of administrative remedies, 56–58
 - habeas corpus review, 393–94
 - international law, 739–42
- consular non-reviewability**
 - generally, 531–67
 - APA §702 and INA §279, 539–42
 - background, 531–33
 - “committed to agency discretion by law,” 551
 - early cases, 534–39
 - factual basis for consular officer’s decision, 565–67
 - failure to act, 562–63
 - failure to follow statute or regulations, 563–65
 - INA §104(a) semi-judicial review, 548–49
 - INA §106(b) and congressional intent, 549–50
 - Kerry v. Din*, 559–62
 - Kleindienst v. Mandel*, 542–43
 - naming proper defendant, 557–58
 - plenary power, 558–59
 - post-*Mandel* case law, 544–46
 - recent developments, 562–67
 - response to arguments for, 546–59
 - revocation of visa decisions, 562
 - standing, 552–59
 - noncitizens, 553–55
 - U.S. citizens and LPRs, 555–56
 - statutes precluding judicial review, 547–50
- continuance**
 - failure to grant continuance, 189–91
- Controlled Application Review and Resolution Program (CARRP)**
 - delay cases, 521

- Convention Against Torture.** *See* CAT (Convention Against Torture) relief
- convictions**
- guilty plea convictions, 649–50
 - retroactivity issues, 649–52
 - waiver under INA §212(c) and, 649–52
- costs, award of**
- EAJA. *See* Equal Access to Justice Act
 - FOIA attorneys' fees. *See* Freedom of Information Act
- courts of appeals**
- EAJA motions, 777–79
 - judicial review of criminal cases, 168–69
 - reinstated order of removal
 - collateral attack, 321–22
 - review of, 310–11
- credibility determinations**
- standard of review, 113
- criminal prosecutions**
- acquittal in section 1326 prosecution, 385–87
 - Chevron* deference rule and, 606–09
 - collateral attack of conviction, 377–78
 - exclusionary rule, 253–55
 - judicial review of, 167–76
 - police acting outside of statutory or regulatory authority, 255
- custody issues**
- detention. *See* Detention
 - judicial review. *See* Judicial review of custody and bond issues
- D**
- Davis, Kenneth**
- on exhaustion of administrative remedies, 43
- declaratory judgment actions**
- judicial review of citizenship claims, 577–78
 - jurisdictional considerations under Declaratory Judgment Act, 75
 - mootness, 32
- delay cases.** *See* Mandamus
- de novo review**
- citizenship claims, 576
 - constitutional issues, 106–09
 - criminal statutes, 607
 - motions to reopen, 346
 - naturalization cases, 71–72, 580, 583, 605
- deportation.** *See* Removal/deportation
- detention**
- indefinite detention, 443–45
 - lawful permanent residents as arriving aliens, 455–57
 - mandatory detention, pre-final order (INA §236(a) & INA §236(c)), 421–23, 432–33
- prolonged detention
 - lawful permanent residents as arriving aliens, 458–59
 - post-final order (INA §241(a)), 445–46
 - pre-final order (INA §236(a) & INA §236(c)), 423–30
 - release from, judicial review of orders of removal, 101
 - during withholding only proceedings, 440–43
- disclosure requests.** *See* Freedom of Information Act
- discretionary decisions**
- attorneys' fees under FOIA, 707–10
 - judicial review of, 142–67. *See also* Judicial review of discretionary decisions
 - motions to reopen, 346–53
 - standard of review, 113–15
- domestic violence against women**
- reinstated order of removal (INA §241(a)(5)), 304–05
 - suspension of deportation, 146–47
- due diligence**
- fraud, deception, or error, 368–69
- due process**
- acquittal in section 1326 prosecution, 385–87
 - administrative notice of new facts, 208
 - application to APA cases, 513–21
 - balancing test, 517–18
 - challenges to streamlining regulations, 129–30
 - consular non-reviewability, 559–62
 - discretionary benefits and, 516–17
 - effective assistance of counsel, 208–22
 - ineffective assistance as private wrong, 215–18
 - ineffective assistance in connection with discretionary relief, 218–22
 - exclusionary rule and, 232
 - fair hearing before IJ, 188–207
 - access to evidence, 194
 - failure to advise of eligibility for relief, 192–93
 - failure to allow witness to testify, 194–96
 - failure to change venue, 191–92
 - failure to grant continuance, 189–91
 - failure to provide explanation based on evidence in the record, 199–202
 - hearsay evidence, reliance on, 196–98
 - inadequate translation, 198–99
 - neutral judge, right to, 202–06
 - videoconferencing, 206–07
 - fair opportunity for administrative appeal, 207–08
 - judicial review of custody, 417–19
 - judicial review of discretionary decisions for violations of, 149–52
 - judicial review of expedited order of removal, 283–84
 - judicial review of reinstated order of removal, 325–26
 - liberty, protection of, 514–15
 - notice of appeal rights, 207–08
 - prejudice, 222–28

property, protection of, 515–16
remand, applicable law on, 228–29
removal proceedings, 183–229, 330
 fair opportunity to be heard, 187

E

- EAJA.** *See* Equal Access to Justice Act
- effective assistance of counsel**
 due process, 208–22
 ineffective assistance as private wrong, 215–18
 ineffective assistance in connection with discretionary relief, 218–22
 motion to reopen, 361–67
- Electronic Freedom of Information Amendments (EFOIA)**
 expedite requests, 698
- EOIR (Executive Office of Immigration Review)**
 IMMACT90 requirements to notify of change of, 333
- Equal Access to Justice Act (EAJA)**
 generally, 8, 771–812
 adequacy of documentation, 810–11
 amicus work, fees awarded for, 806
 amount of award, 792–810
 civil actions, 773–76
 compensable work, 800–06
 duplicative work, reduction for, 804
 EAJA fee application work, 806
 litigation activity, 802–05
 post-litigation work, 805
 pre-litigation work, 801
 remand, work related to, 806
 elements of fee award, 773–92
 enhanced fees, 793–99
 bad faith, 796–98
 counsel's possession of distinctive knowledge and skills, 794
 limited availability of qualified attorneys, 794–96
 needful for litigation, 795
 prevailing market rate, 798–800
 qualified counsel not available at statutory rate, 795
 expert witness fees, 808
 filing motion for fees, 811
 habeas cases, 773–74
 interest on attorney's fees, 809–10
 lack of substantial justification, 786–90
 local court rules, effect of, 808–09
 mandamus cases, 774–75
 naturalization cases, 775–76
 net worth of petitioning party, 779
 non-attorney work, 807
 no special circumstances, 790–92
 other expenses, 808

- payment of fees, 812
prevailing party, 779–84
 Buckhannon standard, 782–84
 catalyst theory, 780–82
purpose of, 772–73
remanded cases, 784–85
statutory rate adjusted for cost of living, 793
time for filing motion, 776–79
 courts of appeals cases, 777–79
district court cases, 777
- equitable tolling**
 motion to reopen, 361–70
- evidence in the record**
failure to provide explanation based on, 199–202
- exclusionary rule.** *See also* Motions to suppress
generally, 253–76
civil proceedings, 255–56
criminal prosecutions, 253–55
 Fifth Amendment violations, 254–55
 Fourth Amendment violations, 253–54
 police acting outside of statutory or regulatory authority, 255
 Fifth Amendment protections, 254–55, 264–65
immigration proceedings, 258–76
 action outside of statutory or regulatory authority, 265–67
 “egregious” violation, 258–64
entry into home without warrant or consent, 261–62
evidence of identity, 271–74
Fifth Amendment violations, 264–65
“fruit of the poisonous tree,” 268–71
racial profiling, 263
removal proceedings, statements made during, 275–76
shifting burden of proof, 267–68
widespread violations, 263–64
- purpose of, 231–32
standing to object, 253
- Executive Office of Immigration Review (EOIR)**
 IMMACT90 requirements to notify of change of, 333
- exhaustion of administrative remedies**
generally, 43–73
APA lawsuits, 66–69
 no stay of administrative decision pending administrative appeal, 69
regulatory exhaustion requirement, 68–69
required vs. permissive administrative appeals, 68–69
statutory exhaustion requirement, 67–68
appeal to BIA, 50–51
citizenship claims, 59
claim-processing rule (INA §242(d)), 47, 48–50
constitutional challenges, 45, 56–58

Darby and final administrative decisions, 66–67, 69
deportation or removal cases, APA not applicable
to, 66–67
FOIA litigation, 700–01
futility, 58–59
issue exhaustion, 52–56
judicial review of custody, 463
legalization and LIFE Act cases, 70–71
mandamus in delay cases, 72–73
manifest injustice, 59–60
motion to reopen or reconsider, 60–61, 327
naturalization decisions, 71–72
as prudential requirement, 43–46
release from custody decisions, 64–65
removal orders, 47–63
as statutory requirement, 46–47
waiver of requirement, 43–46
waiver of right to appeal, 61–63

exigent circumstances
search and seizure, 239–40

expedited order of removal
judicial review. *See* Judicial review of expedited order of removal

mechanisms, 141
right to counsel, 506

expert witness fees
EAJA and, 808

extreme cruelty
suspension of deportation, 146–47

extreme hardship
retroactivity issues (INA §212(h) & INA §212(i)), 653–55
suspension of deportation, 147

F

fairness
in applying new regulations retroactively, 669–70

FBI name check
naturalization cases, 580–82

Federal Claims Collection Act
payment of EAJA fees, 812

Federal Migrant and Seasonal Agricultural Worker Protection Act
damages in private action, 605

Federal Rules of Civil Procedure (FRCP)
civil complaints, rules governing (Rules 8–11), 748–49
Rule 11(a), 80

fees. *See* Equal Access to Justice Act

Fifth Amendment protections
due process, 330
exclusionary rule, 254–55
immigration proceedings, 264–65
interrogations, 248–50

final order of removal
assessing when order is final, 85–95

findings of fact
habeas corpus review, 397–98
judicial review of discretionary decisions, 157–59
standard of review, 110–13

fingerprints
suppression of evidence of identity, 272–74

***Fleuti* “brief, casual, and innocent” rule**
retroactivity issues, 658–59

FOIA. *See* Freedom of Information Act

Form I-212
Application for Permission to Reapply for Admission into the United States After Deportation or Removal, 305n157

Form I-546
Order to Appear for Deferred Inspection, 506

Form I-862
Notice to Appear, 506

Form I-871
Notice of Intent to Reinstate, 302

Form N-400
Application for Naturalization, 585–86

Fourth Amendment protections
exclusionary rule, 253–54. *See also* Exclusionary rule
search and seizure, 232–48. *See also* Search and seizure protections

fraud, deception, or error
collateral attacks, 376n10
due diligence exercised, 368–69
motion to reopen, 361–68

FRCP (Federal Rules of Civil Procedure)
civil complaints, rules governing (Rules 8–11), 748–49
Rule 11(a), 80

Freedom of Information Act (FOIA)
generally, 679–711
administrative appeal, 697
agency determination, 696–97
attorney-client privilege, 687
attorneys’ fees, 704–11
amount of award, 710
commercial benefit to plaintiff, 708–09
discretionary considerations, 707–10
eligibility, 705–07
nature of plaintiff’s interest, 709
other recoverable costs, 710–11
public benefit, 708
reasonableness of withholding documents, 709–10
“substantially prevailed” requirement, 707
time for filing motion, 705
attorney work-product privilege, 686–87
deliberative-process privilege, 683–86
district court jurisdiction, 699–700
exemptions, 679–92

exhaustion of administrative remedies, 700–01
 expedited processing, 697–99
 inadequate justification for withholding documents, 703
 inadequate search for documents, 702–03
 law enforcement documents, exemption, 689–91
 list of exempted material, 692–93
 litigation privileges, exemption, 683–87
 litigation process, 699–711
 mootness, 701–02
 overview, 8
 privacy concerns, exemption, 688–89
 procedures, 694–99
 production of documents, 697, 703–04
 relief, 702–11
 response time, 696
 segregable portions of record, 691–92
 standing, 701–02
 statutory exemption, 681–83
 Vaughan index, 692–93
“fruit of the poisonous tree”
 immigration proceedings, 268–71
futility
 issue exhaustion and, 58–59

G

gap-filling rules
 prospective rule-making proceedings, 662–63
Ginsburg, Ruth Bader
 on judicial review under APA, 496
“gross miscarriage of justice” standard
 generally, 376–79
 collateral attack on prior order of removal, 379–84
guilty plea convictions
 waiver under INA §212(c) and, 649–50

H

habeas corpus. *See also* REAL ID Act of 2005
 arriving aliens, 278–79
 judicial review of expedited order of removal, 282–83
 collateral attack on reinstated order of removal, 325
 constitutional provision, 6, 75, 139
 EAJA fees, 773–74
 judicial review, 168, 389–416
 abuse of discretion, 398–400
 application of law to facts, 396–97
 constitutional claims, 393–94
 development of record for, 408–11
 elimination of, 400–03
 findings of fact, 397–98
 historical background, 391–92

naming of proper respondent, 414–15
 petition not filed within 30 days of BIA decision, 405–08
post-IIRAIRA, 392–93
 removal orders after REAL ID Act, 403–13
 scope of review, 392–400
 statutory and regulatory claims, 395–96
 stay of removal, 414
 time for filing, 413–14
 ultra vires or non-existent order of removal, 411–13
 venue, 416
jurisdiction, 7
petitions
 generally, 745
 preparation, 755–58
 preparation of petition, 755–58
 items to include, 757–58
 service of petition, 758
 when and where to file, 757
 statutory provisions, 76
hearsay evidence
 reliance on, 196–98
human rights
 international law violations against U.S., 713

I

IACHR (Inter-American Commission on Human Rights)
 claims against U.S., 713
 proceedings, 735–37
ICCPR (International Covenant on Civil and Political Rights)
 history, 722
ICESCR (International Covenant on Economic, Social and Cultural Rights)
 history, 722
identity evidence
 exclusion of, 271–74
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA)
 aggravated felony, history of term, 648
 class actions, 488–90
 expedited removal, 280–81
 extreme hardship under INA §212(h) & INA §212(i), 653–55
 judicial review of criminal cases, 168
 jurisdiction-stripping provisions, 139–81. *See also* Jurisdiction-stripping provisions
 reinstated order of removal, 301–10
 release from custody, 431–32
 retroactivity issues, 647–61
 standard of review, 112
 waiver under INA §212(c), 649–61
 when and where to file, 5

IMMACT90. *See* Immigration Act of 1990
Immigration Act of 1917
deportation orders, challenges to, 391–92
Immigration Act of 1990 (IMMACT90)
in absentia order of removal, 332–42
aggravated felony, history of term, 648
bonding, 431
naturalization applications, 588–89
Immigration and Nationality Act (INA)
authority, 715
“channeling” provisions, 76–77
court process, 141
preclusion provisions, 77–79
immigration judges
criticisms of, 1–2
fair hearing before. *See* Due process
neutral judge, right to, 202–06
immigration proceedings
exclusionary rule, 258–76. *See also* Exclusionary rule
Fifth Amendment protections, 264–65
Immigration Reform and Control Act of 1986 (IRCA)
legalization programs, 569
INA. *See* Immigration and Nationality Act
in absentia order of removal
judicial review, 330–46
exceptional circumstances, 339–42
failure of respondent to appear, 334
IMMACT90, 332–42
no notice, 337–39
pre-IMMACT90, 331–32
service by regular mail, 342–45
ineffective assistance of counsel. *See* Effective assistance of counsel
“injury in fact”
standing requirement, 13–14
Inter-American Commission on Human Rights (IACHR)
claims against U.S., 713
proceedings, 735–37
interest on attorney’s fees
EAJA provisions, 809–10
International Bill of Human Rights
history, 722
International Covenant on Civil and Political Rights (ICCPR)
history, 722
International Covenant on Economic, Social and Cultural Rights (ICESCR)
history, 722
international law
generally, 713–44
constitutional interpretation, 739–42
customary international law, 732–35

facilitating consideration, 742–44
federal power over immigration, 714–23
foundational U.S. cases, 714–19
human rights developments, 719–23
“law of nations,” 732–35
limits on federal power over immigration, 723
litigation, 735–38
Nuremberg Tribunal, 720–21
overview, 7
state sovereignty, 719–20
statutory interpretation, 739–42
“supreme Law of the Land,” 724–35
treaties, 724–31
use in domestic courts, 739–44

interrogations

Fifth Amendment protections, 248–50
“mere questioning,” 241

IRCA (Immigration Reform and Control Act of 1986)

legalization programs, 569

issue exhaustion

generally, 52–56
citizenship claims, 59
constitutional claims and challenges to regulations, 56–58
futility, 58–59
manifest injustice, 59–60

J**Jessup, Philip**

on international law, 720

judicial review

APA application to, 473–529. *See also* Administrative Procedure Act
limitations on, 76–79
motion to reopen or reconsider, 327–73
preclusion provisions, 77–79
ripeness doctrine, 38–40

judicial review of citizenship claims

generally, 575–80
declaratory judgment actions, 577–78
removal proceedings, 579–80

judicial review of criminal cases

generally, 167–76
types of criminal offenses, 167–68

judicial review of custody and bond issues

generally, 417–72
“channeling” provisions, 76
colorable claim to citizenship, 460
constitutional framework, 420–60
due process considerations, 417–19
individuals applying for admission, 446–47
jurisdictional considerations, 460–72
exhaustion of administrative remedies, 463

“in custody” requirement, 461–62
 limitation on judicial review, 463–66
 naming of proper respondent, 466–70
 relief available, 471–72
 venue, 470–71
 LPRs as arriving aliens, 447–57
 burden of proof, 453–55
 detention status, 455–57
 grounds of removal, 448–53
 prolonged detention, 458–59
 travel on advance parole, 457
 post-final order (INA §241(a)), 438–46
 detention during withholding only proceedings, 440–43
 indefinite detention, 443–45
 prolonged detention, 445–46
 pre-final order (INA §236(a) & INA §236(c)), 420–38
 conditional parole, 437–38
 mandatory detention, 421–23, 432–33
 prolonged detention, 423–30
 “when released” issue, 431–37
 statutory framework, 417–19

judicial review of discretionary decisions
 generally, 142–67, 507–13
 APA §701(a)(2), “committed to agency discretion by law,” 507–08
 application of legal concepts to facts, 154–57
 characteristics of discretionary decision, 146–49
 due process violations, 149–52
 findings of fact, 157–59
 INA §242(b)(9) and order of removal, 512–13
 INA §242(g) eliminating judicial review of removal proceedings, 510–12
 legalization and LIFE Act cases, 569–73
 REAL ID Act and, 508–10
 reviewable aspects of, 149–67
 specifying decision as discretionary, 143–45
 statutory eligibility, 152–54
 unlawful exercise of discretion, 159–67

judicial review of expedited order of removal
 generally, 277–326
 aggravated felony, 292–93
 arriving aliens, 280–92
 due process challenge, 283–84
 habeas corpus proceedings, 282–83
 jurisdiction to review, 282–83
 order of removal as unlawful, 284–92
 “channeling” provisions, 76
 reinstated order of removal, 300–26
 categories of individuals not subject to reinstatement, 302–03
 challenge to validity of prior order, 314–26
 constitutional and legal claims, 316
 court of appeals, review in, 310–11
 courts of appeals, collateral attack in, 321–22

Duran-Gonzales class members, 306–07
 habeas proceedings, collateral attack in, 325
 IIRAIRA amendments, 301–10
 motion to reopen, collateral attack in, 322–26
 post-IIRAIRA and REAL ID Act collateral attack, 320–21
 retroactive application of INA §241(a)(5), 307–10
 review of order, 313–14
 time for filing petition for review, 311–13
 traditional collateral attack, 316–20
 validity of regulations, 310
 VAWA benefits, 304–05
 venue, 313
 withholding of removal and CAT protection, 303–04
 withholding only decision, review of, 313
 Visa Waiver Program, 293–300
 adjustment of status, 296–300, 306–07
 asylum, 300
 challenges to removal, 294–95
 statutory and regulatory framework, 293–94
 where to file, 295–96

judicial review of legalization and LIFE Act cases
 generally, 569–73
 “channeling” provisions, 76
 citizenship claims. *See* Judicial review of citizenship claims
 decisions issued after final order of removal already in place, 572–73
 discretionary denials, 571–72
 habeas review, 573
 naturalization cases. *See* Judicial review of naturalization cases
 overview, 7
 review under INA §106 before October 1, 1996, 570–71

judicial review of naturalization cases
 generally, 580–91
 “channeling” provisions, 76
 de novo review by district court, 583
 FBI name check, 580–82
 jurisdiction of district court, 584
 overview, 7
 pendency of removal proceedings, 585–91
 petition to review, 746, 759
 scope of review, 583–85
 time for filing, 580–81

judicial review of orders of removal
 generally, 85–137
 “channeling” provisions, 76
 citizenship claims review, 122–26
 in habeas proceedings, 389–416
 INA §242 considerations, 85–122
 asylum-only proceedings, 94–95
 BIA granting motion to reopen or motion to reconsider, 88–89

BIA granting voluntary departure, 89–90
 BIA issuing order of removal, 87–88
 BIA issuing order terminating proceedings, 87
 BIA issuing remand to immigration judge, 90–93
 decision on remand from BIA, 93–94
 final order of removal required, 85–95
 release from detention, 101
 scope of review, 101–06
 standard of review, 106–22. *See also* Standard of review
 stay of removal, 97–100
 stay of voluntary departure period, 100–01
 time for filing, 95–97
 withholding-only proceedings, 94–95
 overview, 7
 streamlined decisions review, 126–37
 appeals, 134–35
 BIA violation of streamlining regulations, 130–33
 due process challenges, 129–30
 jurisdiction, 128–29
 “pattern and practice” cases, 135–37

jurisdiction
 generally, 75–84
 Article I, Section 9, clause 2, 75, 79
 Article III, Section 1, 75
 Article III, Section 2, 75
 constitutional framework, 75
 FOIA litigation, 699–700
 judicial review of custody, 461–72
 exhaustion of administrative remedies, 463
 “in custody” requirement, 461–62
 limitation on judicial review, 463–66
 naming of proper respondent, 466–70
 relief available, 471–72
 venue, 470–71
 judicial review of expedited order of removal, 282–83
 judicial review of naturalization cases, 584
 jurisdictional rules *vs.* claim-processing rules, 80–84
 of lower federal courts, 6
 preclusion provisions, 77–79
 statutory framework, 75–76
 streamlined decisions review, 128–29

jurisdiction-stripping provisions
 generally, 139–81
 asylum applications, one-year time bar for, 177–79
 judicial review of criminal cases, 167–76
 judicial review of denial of voluntary departure, 176–77
 judicial review of discretionary decisions, 142–67. *See also* Judicial review of discretionary decisions
 prosecutorial and enforcement decisions, 179–81

justiciability
 generally, 11–42
 mootness, 28–36
 ripeness, 37–42
 standing, 12–28

L**lawful permanent residents as arriving aliens**

judicial review of custody, 447–57
 burden of proof, 453–55
 detention status, 455–57
 grounds of removal, 448–53
 prolonged detention, 458–59
 travel on advance parole, 457

legalization and LIFE Act cases

exhaustion of administrative remedies, 70–71
 judicial review of. *See* Judicial review of legalization and LIFE Act cases

local court rules

EAJA and, 808–09

Lozada requirements

motion to reopen, 362–63

LPRs. *See* Lawful permanent residents as arriving aliens

M**mandamus**

delay cases, 72–73, 521–29
 agency’s duty to perform act, 525–26
 delay not discretionary, 522–24
 elements necessary for mandamus, 525–28
 mootness, 528–29
 no adequate alternative remedy, 528
 right to relief requested, 526–28
 EAJA fees, 774–75
 overview of Mandamus Act, 76
 petition for writ
 generally, 746, 758–59
 filing and serving, 758–59
 preparation of, 758

manifest injustice

issue exhaustion and, 59–60
marriage fraud penalty, 478–79, 494–95

Marshall, John

on treaties, 726–27

Mathews v. Eldridge test, 517–18**mootness**

FOIA litigation, 701–02
 justiciability, 28–36
 mandamus in delay cases, 528–29

motions to reopen or reconsider

in absentia order of removal, 330–46. *See also* In absentia order of removal
 benefits outside removal proceedings, 353–54
 discretionary decisions, 346–53
 discretionary denial of, 166–67, 350
 discretionary relief not previously applied for, 350–51
 discretionary relief previously applied for, 351–53

due diligence exercised, 368–69
 equitable tolling, 361–70
 exhaustion of administrative remedies, 60–61, 327
 fraud, deception, or error, 361–68
 ineffective assistance of counsel, 361–67
 judicial review, 327–73
 non-in absentia motion to reopen, 346–50
 post-departure motions, 354–58
 prejudice, 370
 preserving voluntary departure, 358–60
 reinstated order of removal, collateral attack, 322–26
 removal orders, 88–89
 stay of removal pending, 328–30
 sua sponte, 370–73

motions to suppress
 generally, 231–76
 exclusionary rule, 231–32, 253–76. *See also* Exclusionary rule
 interrogations, 248–50
 search and seizure protections. *See* Search and seizure protections

N

naming of proper parties
 APA judicial review, 496–98
 consular non-reviewability, 557–58
 habeas review, 414–15
 judicial review of custody, 466–70

naturalization cases
Chevron deference rule and, 605
 EAJA fees, 775–76
 exhaustion of administrative remedies, 71–72
 judicial review of. *See* Judicial review of naturalization cases
 petition to review, 746, 759

notice
 administrative notice of new facts, 208
 of appeal rights, 207–08

notice and comment cases
 retroactivity issues, 667

Notice to Appear (NTA)
 removal proceedings initiated by, 506, 585

O

Open Government Act of 2007
 attorneys' fees under FOIA, 704–05

P

"pattern and practice" cases
 FOIA litigation, 701–02
 streamlined decisions review, 135–37

petition for habeas corpus. *See* Habeas corpus

pleading standards
 civil complaints, 751–53

precedent decisions
 retroactive application of, 661–64, 670–77
 rules for judicial discretion from, 160–62

prejudice
 due process concerns, 222–28
 motion to reopen, 370

privacy concerns
 border searches, 238
 FOIA exemption, 688–89
 "Terry" stops, 242–43

probable cause
 search and seizure, 246–48

prolonged detention
 judicial review of custody
 post-final order (INA §241(a)), 445–46
 pre-final order (INA §236(a) & INA §236(c)), 423–30
 LPRs as arriving aliens, 458–59

prudential requirements
 exhaustion of administrative remedies, 43–46
 issue exhaustion, 52

R

racial profiling
 exclusionary rule in immigration proceedings, 263

REAL ID Act of 2005
 habeas corpus review, 125, 173, 280, 403–13, 573
 judicial review of discretionary claims, 154
 judicial review of orders of removal, 169
 overview, 7, 79
 standard of review, 112

reinstated order of removal
 generally, 300–26
 categories of individuals not subject to reinstatement, 302–03
 challenge to validity of prior order, 314–26
 constitutional and legal claims, 316
 courts of appeals, collateral attack in, 321–22
 courts of appeals, review in, 310–11
Duran-Gonzales class members, 306–07
 habeas proceedings, collateral attack in, 325
 IIRAIRA amendments, 301–10
 motion to reopen, collateral attack in, 322–26
 post-IIRAIRA and REAL ID Act collateral attack, 320–21
 retroactive application of INA §241(a)(5), 307–10, 655–58
 review of order, 313–14
 time for filing petition for review, 311–13
 traditional collateral attack, 316–20
 validity of regulations, 310

- VAWA benefits, 304–05
- venue, 313
- withholding of removal and CAT protection, 303–04
- withholding only decision, review of, 313
- release from custody decisions**
 - exhaustion of administrative remedies, 64–65
- release from detention**
 - judicial review of orders of removal, 101
- reliance**
 - retroactivity issues, 641–46
- remands**
 - applicable law on, 228–29
 - compensable work related to and EAJA fees, 806
 - decision on remand from BIA, 93–94
 - EAJA fees, 784–85
 - judicial review of orders of removal, 90–93
- removal/deportation**
 - aggravated felony convictions, 647–49
 - APA not applicable, 66–67
 - due process. *See* Due process
 - exclusionary rule, statements made during removal proceedings, 275–76
 - ex parte pressure to favor, 1–2
 - extreme hardship for suspension of deportation, 147
 - judicial review of citizenship claims, 579–80
 - judicial review of orders. *See* Judicial review of orders of removal
 - LPRs as arriving aliens, grounds of removal, 448–53
 - reentry, acquittal in §1326 prosecution, 385–87
 - suspension of deportation
 - consequences of failure to appear, 334
 - repeal of, 652–53
 - VAWA benefits, 304–05
- removal orders**
 - collateral attacks. *See* Collateral attacks
 - exhaustion of administrative remedies, 47–63
 - judicial review. *See* Judicial review of orders of removal
 - petition for review
 - generally, 746, 759–69
 - filing of certified record of proceedings, 767–68
 - items to file, 767
 - preparing, 759–62
 - scheduling order, 767
 - service of, 767
 - stay of removal, request for, 762–65
 - stay of voluntary departure, request for, 765
 - time for filing, 765–66
 - where to file, 766
 - reinstated orders. *See* Reinstated order of removal
- reopening. *See* Motions to reopen or reconsider**
- retroactivity issues**
 - generally, 631–77
 - Chevron* deference rule, 610–11
 - congressional intent, 634–37
- extreme hardship under INA §212(h) & INA §212(i), 653–55
- Fleuti* “brief, casual, and innocent” rule (elimination of INA §101(a)(13)), 658–59
- fraud, discretionary waiver under INA §212(i), 654–55
- new regulations, 664–70
 - application of, 661–64
 - fairness in applying retroactively, 669–70
 - intent to apply retroactively, 668–69
 - precedent decisions, application of, 661–64, 670–77
 - reinstated order of removal (INA §241(a)(5)), 307–10, 655–58
- reliance, 641–43
 - conduct showing, 644–46
 - repeal of suspension of deportation, 652–53
 - statutory framework, 632–33
 - stop-time rule, 659–61
 - substantive vs. interpretive regulations, 664–68
 - sufficient condition for “retroactive effect,” 637–41
- waiver under INA §212(c), 649–52
 - convictions after trial, 650–52
 - guilty plea convictions, 649–50
- right to counsel. *See also* Effective assistance of counsel**
 - APA provisions, 503–06
 - deferred inspection, 506
 - expedited removal proceedings, 506
 - inspections at border, 505–06
- ripeness doctrine**
 - generally, 37–42
 - fitness for judicial review, 38–40
 - hardship to parties, 40–41
 - removal proceedings, review of, 484–85
- rule-making power. *See* Chevron deference rule**

S

- search and seizure protections**
 - generally, 232–48
 - border searches, 234–38
 - fixed checkpoints, 235–36
 - “functional equivalent” of border, 234–35
 - roving patrols, 236–38
 - consent, knowing and voluntary, 238–39
 - exceptions to warrant requirement, 233–46, 251–52
 - exclusionary rule. *See* Exclusionary rule
 - exigent circumstances, 239–40
 - “mere questioning,” 241
 - probable cause, 246–48
 - site inspections, 252–53
 - “stop and frisk,” reasonable suspicion for, 243
 - “Terry” stops, 241–46
 - INA §287 and its regulations, 251

service of process

deportation proceedings, 332–37
show cause orders, 331–32

show cause orders

service of, 331–32

site inspections

search and seizure protections, 252–53

***St. Cyr* review**

mixed questions of fact and law, 155
REAL ID Act and, 142, 280
statutory eligibility for discretionary relief, 152
Suspension Clause and, 279

standard of review

generally, 106–22
APA standard for legalization, 573
application of law to undisputed facts, 109–10
constitutional issues, *de novo* review, 106–09
credibility determinations, 113
discretionary decisions, 113–15
failure to provide reasoned explanation, 115–22
findings of fact, 110–13
substantial evidence standard, 110–13

standing requirement

associational standing, 26–28
causation, 14–15
exclusionary rule, 253
FOIA litigation, 701–02
“generalized grievance,” 21
“injury in fact,” 13–14
“irreducible constitutional minimum,” 13–19
justiciability, 12–28
organizational standing, 23–26
prudential standing, 19–23
redressability, 15
third party rights, 21–22
“zone of interest,” 22–23

State Department

visa denials, 495–96

stay of administrative decision

pending administrative appeal, when required, 69

stay of removal

habeas corpus review, 414
judicial review of orders of removal, 97–100, 762–65

stay of voluntary departure period

judicial review of orders of removal, 100–01, 765

“stop and frisk”

reasonable suspicion for, 243

stop-time rule

retroactivity issues, 659–61

streamlined decisions review

generally, 126–37
appeals, 134–35
BIA violation of streamlining regulations, 130–33
due process challenges, 129–30
jurisdiction, 128–29

sua sponte

motion to reopen, 370–73

substantial evidence standard

APA provisions, 501–02
review of fact-findings, 110–13

suppression. *See* Motions to suppress**suspension of deportation**

consequences of failure to appear, 334
repeal of, 652–53

T**terminating proceedings**

judicial review of orders of removal, 87

“Terry” stops

criminal prosecutions, 241–46
INA §287 and its regulations, 251

timeliness

EAJA motions, 776–79
FOIA motions for attorneys’ fees, 705
habeas corpus review petition not filed within 30 days of BIA decision, 405–08
habeas petition, time for filing for review, 413–14
judicial review of naturalization cases, 580–81
judicial review of orders of removal, 95–97
judicial review under APA, 491
petition for review of orders of removal, 311–13

Title VII of the Civil Rights Act of 1964

catalyst theory of award of attorney’s fees, 780–82
jurisdiction, 80

trafficking of humans

T-visa applications, 306

translation

inadequate translation, 198–99

travel on advance parole

lawful permanent residents as arriving aliens, 457

treaties

generally, 724–31

U**ultra vires**

habeas corpus review, 411–13

United Nations

international human rights law, 721–22

Universal Declaration on Human Rights

history, 721–22

V**de Vattel, Emerich**

on sovereign right to exclude aliens, 716, 718

VAWA. *See* Violence Against Women Act

venue

APA, 498–99

failure to change venue, 191–92

habeas corpus review, 416

judicial review of custody, 470–71

judicial review of order of removal, 313

victims of crime

T-visa applications, 306

U-visa applications, 306

VAWA benefits, 304–05

videoconferencing

due process concerns, 206–07

Violence Against Women Act (VAWA)

reinstated order of removal (INA §241(a)(5)), 304–05

suspension of deportation, 146–47

Visa Waiver Program

expedited removal orders, 141, 277

judicial review of expedited order of removal, 293–300

adjustment of status, 296–300, 306–07

asylum, 300

challenges to removal, 294–95

statutory and regulatory framework, 293–94

where to file, 295–96

voluntary departure

consequences of failure to appear, 334

judicial review of denial, 176–77

judicial review of orders of removal, 89–90

preserving, 358–60

stay request in petition for review of removal order, 765

W

waiver

of exhaustion of administrative remedies, 43–46

of right to appeal, 61–63

visa program. *See* Visa Waiver Program

war crimes

Nuremberg Tribunal, 720–21

warrants. *See also* Search and seizure protections

entry into home without warrant or consent, 261–62

exceptions to warrant requirement, 233–46, 251–52

withholding of removal

detention during withholding only proceedings, 440–43

judicial review of orders of removal, withholding-only proceedings, 94–95, 313

reinstated order of removal, 303–04

witnesses

failure to allow witness to testify, 194–96

women, VAWA protections

reinstated order of removal (INA §241(a)(5)), 304–05

suspension of deportation, 146–47