

5-5-2022

## Finally, Some Clarity: Why Statutory Withholding Orders Are Not Final Orders of Removal Under the *Nasrallah v. Barr* Analysis

Victoria Montanio

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>

---

### Repository Citation

Victoria Montanio, *Finally, Some Clarity: Why Statutory Withholding Orders Are Not Final Orders of Removal Under the *Nasrallah v. Barr* Analysis*, 82 La. L. Rev. (2022)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol82/iss3/9>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# Finally, Some Clarity: Why Statutory Withholding Orders are not Final Orders of Removal Under the *Nasrallah v. Barr* Analysis

Victoria Montanio\*

## TABLE OF CONTENTS

Introduction .....	858
I. Removal Proceedings, Final Orders, Withholding of Removal, and the Circuit Split.....	863
A. General Removal Proceedings.....	864
B. The Statutory Definition of “Final Orders”.....	865
C. Final Orders of Removal and the Judiciary.....	865
D. Withholding of Removal.....	868
1. Statutory Withholding of Removal.....	868
2. CAT Withholding of Removal.....	869
E. The Circuit Split .....	870
II. <i>Nasrallah v. Barr</i> : Clarifying the Meaning of Final Orders of Removal .....	872
III. Statutory Withholding Orders Are Not Final Orders of Removal Under the Analysis in <i>Nasrallah v. Barr</i> .....	875
A. Effects of Applying the <i>Nasrallah</i> Reasoning to Statutory Withholding Orders.....	875
B. Statutory Withholding Is Similar to CAT Relief with Respect to the Aspects the Court Considered Important in <i>Nasrallah v. Barr</i> .....	878
C. The History of the Laws Governing Withholding of Removal Supports the Application of the <i>Nasrallah</i> Reasoning to Statutory Withholding Orders .....	879
D. The Administrative Regulations Governing CAT Relief and Statutory Withholding Support the Application of the <i>Nasrallah</i> Reasoning to Statutory Withholding Orders .....	882
E. Other Considerations that Support the Application of the <i>Nasrallah</i> Reasoning to Statutory Withholding Orders .....	884
F. The Attorney General Should Issue a Memorandum Adopting the <i>Nasrallah</i> Reasoning as Applicable to Statutory Withholding Orders .....	886

Conclusion.....	887
-----------------	-----

## INTRODUCTION

Nidal Khalid Nasrallah was a native and citizen of Lebanon, as well as a member of the Druze religion.<sup>1</sup> On a mountain in August 2005, he and a friend encountered members of Hezbollah, who shot guns in the air and ordered the two men to stop.<sup>2</sup> In Lebanon, Hezbollah is a Shiite political party and militant group known to kidnap, extort, and torture Christians, including the Druze.<sup>3</sup> Nasrallah claimed he and his friend jumped off a cliff to escape, which resulted in a severe back injury.<sup>4</sup> After a passerby took the men to the hospital, Nasrallah underwent two back surgeries within six months of each other.<sup>5</sup> In 2006, Nasrallah entered the United States as a 17-year-old on a tourist visa and became a lawful permanent resident the following year.<sup>6</sup> After his move to the United States, Hezbollah continued to harass, torture, and kill Druze in Lebanon.<sup>7</sup>

In September 2015, the United States government sought to remove Nasrallah to Lebanon after he was convicted for receiving stolen property.<sup>8</sup> During removal proceedings, Nasrallah applied for relief in the form of statutory withholding of removal<sup>9</sup> and relief under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).<sup>10</sup> The removal proceedings

---

Copyright 2022, by VICTORIA MONTANIO.

\* J.D./D.C.L. candidate 2022, Paul M. Hebert Law Center, Louisiana State University. Special thanks to professors Scott Sullivan and Darlene Goring for all their advice, feedback, and support.

1. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1688 (2020).

2. *Nasrallah v. U.S. Att’y Gen. (Nasrallah I)*, 762 F. App’x 638, 641 (11th Cir. 2019), *rev’d*, 140 S. Ct. 1683 (2020).

3. Joint Appendix at 31–32, 43, *Nasrallah II*, 140 S. Ct. 1683 (No. 18-1432).

4. *Nasrallah I*, 762 F. App’x at 641.

5. Joint Appendix, *supra* note 3, at 42.

6. *Nasrallah II*, 140 S. Ct. at 1688.

7. Joint Appendix, *supra* note 3, at 44.

8. *Id.* at 25–26.

9. Statutory withholding of removal prevents a noncitizen’s removal to a country where their “life or freedom would be threatened . . . because of the [noncitizen’s] race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A).

10. *Nasrallah v. U.S. Att’y Gen. (Nasrallah I)*, 762 F. App’x 638, 641 (11th Cir. 2019), *rev’d*, 140 S. Ct. 1683 (2020); *see* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10,

ended with an order concluding that Nasrallah was removable and denying his request for relief due to a deficient factual showing.<sup>11</sup>

Ordinarily, a court of appeals could provide judicial review of a challenge to the factual basis for a denial of relief resulting from removal proceedings.<sup>12</sup> However, no court has jurisdiction to review “any *final order of removal* against [a noncitizen] who is removable by reason of having committed a criminal offense,” including a “crime involving moral turpitude.”<sup>13</sup> Some confusion exists among the courts of appeals as to which rulings and orders are final orders of removal.<sup>14</sup> As a result of this

---

1984, S. TREATY DOC. NO. 100-20, p. 20, 1465 U.N.T.S. 112 (preventing the return of a person to a country where “there are substantial grounds for believing that he would be in danger of being subjected to torture”). Relief under the CAT, referred to as “CAT relief” in this Comment, consists of withholding of removal and deferral of removal. 8 C.F.R. § 1208.18(b)(1) (2020). Both withholding of removal and deferral of removal under the CAT temporarily prevent the noncitizen’s removal to a specific country due to a likelihood of torture. *Id.* §§ 1208.16(c), 1208.17(b). A noncitizen who applies for CAT relief and proves that they are more likely than not to be tortured in the country of proposed removal will be granted either withholding of removal or deferral of removal. *See id.* § 1208.16(c) (providing the eligibility requirements for protection under the CAT). Such a noncitizen is entitled to a withholding of removal under the CAT, unless they are subject to mandatory denial of withholding of removal. *Id.* § 1208.16(d)(1). An immigration judge only grants a deferral of removal under the CAT if the noncitizen applying for relief is entitled to protection under the CAT but is subject to mandatory denial of withholding of removal. *Id.* § 1208.17(a). It is important to note that the *Nasrallah* Court refers to CAT relief generally throughout the opinion, and the characteristics of CAT relief to which the Court refers for its analysis are applicable to both types of CAT relief. *Nasrallah II*, 140 S. Ct. 1683.

11. *Nasrallah I*, 762 F. App’x at 642.

12. *See* 8 U.S.C. § 1252(b)(9) (providing for judicial review “of all questions of law and fact” arising from removal proceedings).

13. *Id.* § 1252(a)(2)(C) (emphasis added). “Crime involving moral turpitude” is a term of art in the Immigration and Nationality Act, and whether a crime falls within this category is a determination for the immigration judge. *See id.* § 1227(a)(2)(A)(i).

14. *Compare* *Gourdet v. Holder*, 587 F.3d 1, 5 (1st Cir. 2009), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (stating that in a “criminal alien case,” the court may not review the administrative factual findings about CAT relief), *Ortiz-Franco v. Holder*, 782 F.3d 81, 88 (2d Cir. 2015), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (finding that the court only has jurisdiction to review a claim under the CAT as part of the review of a final order of removal and is thus limited to review of legal claims when the noncitizen falls under 8 U.S.C. § 1252(a)(2)(C)), *Pieschacon-Villegas v. Att’y Gen.*, 671 F.3d 303, 309–10 (3d

confusion, courts have refused judicial review to numerous noncitizens' factual challenges to administrative orders that may or may not have been final orders.<sup>15</sup>

In Nasrallah's case, however, the United States Eleventh Circuit Court of Appeals declined to review his factual challenges to the Board of Immigration Appeals' ("BIA") denial of CAT relief because of Nasrallah's 2011 criminal convictions for receiving stolen property.<sup>16</sup> The immigration judge and the BIA concluded Nasrallah was removable to Lebanon due to his conviction for a crime that was "particularly serious"<sup>17</sup>

---

Cir. 2011), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (stating that the court lacks jurisdiction to review factual challenges to the BIA's determination about a noncitizen's CAT relief when the noncitizen commits a crime involving moral turpitude), *Oxygene v. Lynch*, 813 F.3d 541, 545 (4th Cir. 2016), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (finding that 8 U.S.C. § 1252(a)(2)(C) eliminates judicial review of sufficiency of the evidence for CAT relief sought by an aggravated felon), *Escudero-Arciniega v. Holder*, 702 F.3d 781, 785 (5th Cir. 2012), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (finding the court lacks jurisdiction to review the BIA's factual determinations about CAT relief because the noncitizen was an aggravated felon), *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (same), *Lovan v. Holder*, 574 F.3d 990, 998 (8th Cir. 2009), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (same), *and Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 532 (11th Cir. 2013), *abrogated in part by Nasrallah II*, 140 S. Ct. 1683 (reviewing only legal and constitutional claims pertaining to statutory withholding of removal and CAT relief due to 8 U.S.C. § 1252(a)(2)(C)), *with Wanjiru v. Holder*, 705 F.3d 258, 264 (7th Cir. 2013) (stating that CAT relief is not a final order of removal within the meaning of 8 U.S.C. § 1252(a)(2)(C)), *and Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) (claiming that the court retains jurisdiction to review the facts underlying the denial of a CAT order, despite the noncitizen's conviction of a crime involving moral turpitude).

15. *See Nasrallah I*, 762 F. App'x at 644–45 (finding the court lacked jurisdiction to review factual challenges to a denial of relief under the CAT); *Gallimore v. Holder*, 715 F.3d 687, 690 (8th Cir. 2013) (finding that a noncitizen's factual dispute to a denial of CAT relief was beyond the court's jurisdiction).

16. *Nasrallah II*, 140 S. Ct. at 1688–89. Nasrallah pled guilty to two counts of receiving stolen property in 2011. *Nasrallah I*, 762 F. App'x at 640.

17. A "particularly serious crime" under the Immigration and Nationality Act is an aggravated felony, including receiving stolen property, for which the sentence is at least five years. However, the Attorney General may disregard the length of the sentence to determine a specific aggravated felony is a "particularly serious crime." Conviction of a particularly serious crime precludes a noncitizen from receiving a withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(B) (explaining the meaning of "particularly serious crime"); *id.* § 1101(a)(43)(G) (defining "aggravated felony"); *see also id.* § 1231(b)(3)(B)(ii) (providing

and “involv[ed] moral turpitude.”<sup>18</sup> Thus, the Eleventh Circuit classified denial of CAT relief as a final order of removal.<sup>19</sup>

The United State Supreme Court granted certiorari in *Nasrallah v. Barr* to address the circuit split on whether § 1252(a)(2)(C)’s preclusion of judicial review of factual challenges to final orders includes factual challenges to CAT orders.<sup>20</sup> The question before the Court was whether a court of appeals may review factual challenges to a CAT order in a case involving a noncitizen<sup>21</sup> who committed one of the crimes specified in § 1252(a)(2)(C).<sup>22</sup> The Court concluded that courts of appeals may review these challenges but must do so with deference to the administrative agency’s factual findings.<sup>23</sup>

The *Nasrallah* Court resolved the issue of whether CAT orders are final orders of removal but left unresolved the question of whether statutory withholding orders are final orders of removal.<sup>24</sup> The determination of whether a statutory withholding order is a final order of removal is particularly important for noncitizens convicted of one of the crimes enumerated in § 1252(a)(2)(C).<sup>25</sup> These noncitizens typically rely

---

conviction of a particularly serious crime as an exception to the mandatory nature of withholding of removal); 8 C.F.R. § 1208.16(d)(2) (2020) (applying the exceptions for withholding of removal to CAT withholding).

18. *Nasrallah I*, 762 F. App’x at 641–42.

19. See 8 U.S.C. § 1101(a)(47)(A) (defining order of deportation, also called an order of removal, as an administrative order “concluding that the [noncitizen] is deportable or ordering deportation”); see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(d)(2), 110 Stat. 3009-627 (codified as amended in scattered sections of 8 and 18 U.S.C.) (noting that any reference in the law to an order of removal also includes an order of deportation).

20. *Nasrallah II*, 140 S. Ct. at 1689; see cases cited *supra* note 14.

21. This Comment uses the term “noncitizen” as an equivalent of the statutory term “alien.” See 8 U.S.C. § 1101(a)(3) (defining alien as “any person not a citizen or national of the United States”).

22. *Nasrallah II*, 140 S. Ct. at 1688.

23. *Id.*

24. *Id.*

25. 8 U.S.C. § 1252(a)(2)(C) prohibits judicial review of any final order against a noncitizen who is removable due to the commission of or attempt or conspiracy to attempt a crime involving moral turpitude; the violation of a controlled substance law or regulation; the conviction of multiple offenses with an aggregate sentence of at least five years of confinement; involvement in prostitution or human trafficking; involvement in money laundering; conviction of an aggravated felony; the conviction for fire arms offenses; or the commission of offenses related to espionage and treason and sedition. See *id.* § 1182(a)(2); see also *id.* § 1227(a)(2)(A)(iii), (B), (C), (D).

on a presentation of facts to prove that they have a reasonable fear of persecution in a particular country.<sup>26</sup> Thus, if a statutory withholding order is a final order of removal, these noncitizens face removal from the United States—to countries with potentially dangerous conditions—without the ability to seek judicial review of their applications to withhold removal.<sup>27</sup> These noncitizens' situations are similar to *Nasrallah*'s, except that they do not have convictions for a “particularly serious” crime.<sup>28</sup>

To ensure these noncitizens' protection in situations where their life or freedom is at risk, the Supreme Court's reasoning for its holding in *Nasrallah* should apply by analogy to statutory withholding orders.<sup>29</sup> This analogous application of the Court's reasoning will allow the courts of appeals to exercise jurisdiction where most currently do not due to the Immigration and Nationality Act's (“INA”) strict provisions governing judicial review.<sup>30</sup> Therefore, applying the Court's reasoning in *Nasrallah* to statutory withholding orders will help further protect noncitizens from irreversible harm by allowing them to seek judicial review of factual challenges to denials of statutory withholding orders.<sup>31</sup>

Part I of this Comment will provide an overview of general removal proceedings, introduce the statutory definition of final orders of removal, explain the importance of final orders of removal to judicial review of challenges under the INA, and also explain withholding of removal.

---

26. See 8 C.F.R. § 1208.16(b)(1)–(3) (2020) (explaining the types of facts considered to determine likelihood of persecution). Persecution is a term used in determinations of asylum, but administrative officers and courts also use the term to describe the threat to life or liberty required for statutory withholding. See 8 U.S.C. § 1101(a)(42) (persecution in the definition of refugee); 8 C.F.R. § 1208.16(b)(1)(i) (2020) (past persecution can be evidence to future threat to life or freedom).

27. Both CAT relief and statutory withholding of removal require a sufficient factual showing to receive the relief from removal. See 8 C.F.R. § 1208.16(b)(1)–(3) (2020) (explaining the types of facts considered to determine likelihood of persecution); *id.* § 1208.16(c)(3) (listing the types of facts considered to determine likelihood of torture).

28. Conviction of a particularly serious crime bars the noncitizen from receiving a withholding of removal. See 8 U.S.C. § 1231(b)(3)(B)(ii) (providing conviction of a particularly serious crime as an exception to the mandatory nature of withholding of removal).

29. *Nasrallah II*, 140 S. Ct. at 1697 (Thomas, J., dissenting).

30. See 8 U.S.C. § 1252(a)(5) (providing for the exclusive means for judicial review of final orders of removal); *id.* § 1252(g) (excluding the judiciary's jurisdiction to hear claims under the INA, except as provided for within the INA).

31. A noncitizen's factual showing is central to establishing eligibility for statutory withholding of removal. See 8 C.F.R. § 1208.16(b)(1)–(3) (2020).

Additionally, Part I will briefly explain the circuit split that led to *Nasrallah*. Part II will discuss *Nasrallah v. Barr*, a case that seeks to clarify the meaning of “final order of removal” and its applicability to CAT orders. Part III will explore the legal rationale for analogizing the Court’s *Nasrallah* analysis to statutory withholding orders by comparing and contrasting CAT relief and statutory withholding and will conclude that statutory withholding orders are not final orders of removal.

#### I. REMOVAL PROCEEDINGS, FINAL ORDERS, WITHHOLDING OF REMOVAL, AND THE CIRCUIT SPLIT

The attorney general has authority over the laws relating to immigration and naturalization, including the INA.<sup>32</sup> However, the attorney general delegated his authority to determine removability to the Executive Office of Immigration Review (“EOIR”).<sup>33</sup> Due to this delegation of power, references to the attorney general throughout the INA may also include the EOIR and its offices.<sup>34</sup> Thus, the attorney general and immigration officers—such as immigration judges—can order the removal of any noncitizen in the United States who falls within one of the categories of removable noncitizens.<sup>35</sup>

---

32. 8 U.S.C. § 1103(g); *id.* §§ 1101–1537.

33. See 6 U.S.C. § 521 (establishing the EOIR); 8 U.S.C. § 1103(g) (attorney general’s control over the EOIR); *see also* 8 C.F.R. § 1003.0 (2020) (enumerating the offices that compose the EOIR, including all immigration courts and the Board of Immigration Appeals).

34. Compare 8 U.S.C. § 1231(b)(3)(A) (referring to the attorney general’s decision whether a noncitizen’s life or freedom would be threatened in a certain country), with 8 C.F.R. § 1208.16(b)(1)–(2) (2020) (referring to the asylum officer and the immigration judge as the officer who determines the likelihood of threat to the noncitizen’s life or freedom in a certain country).

35. The classes of deportable noncitizens include those who were inadmissible at the time of entry or at the time of adjustment of status; failed to maintain nonimmigrant status; violated a condition of entry; received termination of their conditional permanent residence; smuggled others into the United States; procured documentation by fraud; were convicted of a crime; falsified documents; failed to maintain their registration; engaged in activities that endangered the public; became a public charge; or unlawfully voted. 8 U.S.C. § 1227(a).



*A. General Removal Proceedings*

An immigration judge conducts proceedings to determine whether a noncitizen is removable.<sup>36</sup> These proceedings are the exclusive procedure for determining a noncitizen's removability.<sup>37</sup> Upon the government's commencement of a removal proceeding, the noncitizen has the initial burden of establishing either (1) that he is "clearly and beyond doubt" entitled to admission to the United States or (2) by clear and convincing evidence that the noncitizen's presence in the United States is lawful due to a prior admission.<sup>38</sup> If the noncitizen meets this initial burden, the burden shifts to the government to establish the noncitizen's removability by clear and convincing evidence.<sup>39</sup>

If the government satisfies its burden, the immigration judge will deem the noncitizen removable.<sup>40</sup> Once deemed removable, the noncitizen may apply for relief from removal by establishing that they satisfy the eligibility requirements provided in the INA and in Title 8 of the Code of Federal Regulations.<sup>41</sup> Available relief includes, among other things, asylum, withholding of removal, and CAT relief.<sup>42</sup> When reviewing testimony in support of a claim for relief, the immigration judge determines the credibility and persuasiveness of the testimony and refers to specific facts on the record to decide whether the noncitizen satisfied the burden of proof.<sup>43</sup> At the end of these proceedings, the immigration

---

36. See *id.* § 1101(b)(4) (defining an immigration judge as an administrative judge within the EOIR, appointed and supervised by the attorney general, and qualified to conduct specified proceedings, such as removal proceedings).

37. *Id.* § 1229a(a)(1), (3).

38. *Id.* § 1229a(c)(2).

39. *Id.* § 1229a(c)(3)(A).

40. *Id.* § 1229a(c)(1)(A).

41. *Id.* § 1229a(c)(4)(A).

42. See *id.* § 1158 (asylum); *id.* § 1231(b)(3)(A) (withholding of removal); 8 C.F.R. § 1208.16(b) (2020) (withholding of removal); *id.* § 1208.16(c) (CAT relief); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at 20 (CAT relief); see also 8 U.S.C. § 1231(c)(2)(A) (providing for a discretionary stay of removal); *id.* § 1182(h) (providing for discretionary waiver of inadmissibility); *id.* § 1182(i) (allowing waiver of inadmissibility that resulted from fraud or willful misrepresentation of material fact); *id.* § 1229b(a)–(b) (allowing cancellation of removal and adjustment of status); *id.* § 1229c (permitting departure from the United States in lieu of or prior to the completion of removal proceedings); *id.* § 1255 (providing for adjustment of a noncitizen's status to that of a lawful permanent resident).

43. 8 U.S.C. § 1229a(c)(4)(B); see also *id.* § 1229a(c)(4)(C) (explaining how the immigration judge determines credibility).

judge issues an order declaring a determination as to the noncitizen's removability.<sup>44</sup>

### *B. The Statutory Definition of "Final Orders"*

If the immigration judge's order concludes that the noncitizen is removable, then the disposition is an "order of removal."<sup>45</sup> In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act, which amended the INA to provide a definition of final orders.<sup>46</sup> This definition provides that an order from an administrative officer concluding that a noncitizen is deportable or ordering deportation is an "order of deportation," also referred to as an order of removal.<sup>47</sup> Further, this order becomes final upon either (1) the affirmation of the order by the BIA or (2) the expiration of the noncitizen's permitted period to seek the BIA's review of the order, whichever is earlier.<sup>48</sup> Once these orders become final, the noncitizen has the opportunity to seek judicial review of an unfavorable order if, and only if, they meet the procedural requirements enumerated in the INA.<sup>49</sup>

### *C. Final Orders of Removal and the Judiciary*

The INA provides the federal courts of appeals with limited jurisdiction to hear a noncitizen's cause or claim "arising from any action taken or proceeding brought to remove" the noncitizen from the United States.<sup>50</sup> Judicial review of orders of removal occurs in the court of appeals for the circuit in which the immigration judge held the removal

---

44. *Id.* § 1229a(c)(1)(A).

45. *Id.* § 1101(a)(47)(A).

46. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277.

47. *Id.*

48. 8 U.S.C. § 1101(a)(47)(B)(i)–(ii). The permitted period to seek the BIA's review is 30 days after the stating or mailing of the immigration judge's order. 8 C.F.R. § 1003.38(b) (2020).

49. 8 U.S.C. § 1252(b)(1)–(9) (requiring filing of the petition within 30 days of the final order of removal; filing petition in a court of appeals where venue lies; submission of the administrative proceeding records and typed briefs; service of the petition upon the opposing party; the petition's basis must be in the administrative record of the final order; and consolidation of any other questions of law or fact based on the relevant removal proceedings with the petition to review the final order).

50. *Id.* § 1252(b)(9).

proceedings.<sup>51</sup> The only circumstance in which a court of appeals may review a final order of removal is when the noncitizen has exhausted all administrative remedies available as of right—namely appealing the order to the BIA—and no other court has decided the validity of the order.<sup>52</sup> Filing a petition for review in accordance with these provisions is the “sole and exclusive means” for judicial review of an order of removal.<sup>53</sup>

During its review, the court of appeals bases its determination on the order of removal’s administrative record.<sup>54</sup> When relying on this record, “the administrative findings of fact are conclusive.”<sup>55</sup> Thus, the court of appeals must treat the administrative factual findings as true unless the evidence compels “any reasonable adjudicator . . . to conclude to the contrary.”<sup>56</sup> Should evidence compel such a conclusion, the court of appeals should reverse the administrative factual finding.<sup>57</sup>

Questions of law and fact arising from removal proceedings are only subject to judicial review when brought as part of a petition to review a final order of removal.<sup>58</sup> Thus, for example, a petitioner must include a question of statutory interpretation of the INA or a challenge to the administrative factual findings in a petition to review a final order of removal to receive judicial review.<sup>59</sup> Accordingly, the courts of appeals lack jurisdiction to review questions of law and fact not included in a petition to review a final order of removal.<sup>60</sup>

Certain administrative judgments, even when made during removal proceedings, however, are not within the jurisdiction of the courts of appeals.<sup>61</sup> For example, the courts lack jurisdiction to review the Attorney General’s decision to deny a noncitizen discretionary relief.<sup>62</sup>

---

51. *Id.* § 1252(b)(2).

52. *Id.* § 1252(d)(1)–(2).

53. *Id.* § 1252(a)(5).

54. *Id.* § 1252(b)(4)(A).

55. *Id.* § 1252(b)(4)(B).

56. *Id.*

57. *See* *INS v. Elias-Zacarias*, 502 U.S. 478, 481 n.1 (1992) (explaining the showing required to overturn an administrative factual finding).

58. 8 U.S.C. § 1252(b)(9).

59. *See id.* § 1252(g) (exclusive grant of jurisdiction).

60. *Id.* § 1252(b)(9).

61. *See id.* § 1252(a)(2).

62. *Id.* § 1252(a)(2)(B). Discretionary relief is relief from removal that the attorney general may, but need not, administer as he sees fit. The attorney general has the authority and discretion to grant or deny numerous types of relief under the INA. *See id.* § 1252(a)(2)(B)(i)–(ii); *see also id.* § 1182(h)–(i) (providing that the attorney general *may* waive certain provisions of the INA to allow admission to qualifying noncitizens); *id.* § 1229b (providing that the attorney general *may*

Nevertheless, courts have jurisdiction to review denials of asylum, even though asylum is a discretionary type of relief under the Attorney General's authority.<sup>63</sup> The bar on judicial review of discretionary relief does not affect statutory withholding or CAT relief.<sup>64</sup>

A final order of removal against a noncitizen whose removability is based on the commission of certain enumerated crimes is also not reviewable by a court of appeals.<sup>65</sup> The provisions limiting judicial review of final orders, however, do not preclude the review of constitutional claims or questions of law raised in an appropriately filed petition for review.<sup>66</sup> Therefore, when a noncitizen's removability results from the commission of an enumerated crime, the INA only precludes judicial review of *factual* challenges to final orders of removal.<sup>67</sup> Whether final orders include orders for withholding of removal is currently unclear.

---

cancel the removal of a noncitizen); *id.* § 1229c (providing that the attorney general *may* allow a noncitizen to voluntarily depart the United States in lieu of starting removal proceedings); *but see id.* § 1231(b)(3)(A) (stating that the attorney general *may not* remove a noncitizen to a country where their life or freedom would be threatened due to certain factors); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822 (implementing the CAT and stating the policy that the United States *shall not* involuntarily return a person to a country where they are likely to be tortured).

63. 8 U.S.C. § 1252(a)(2)(B)(ii); *see id.* § 1158(b)(1)(A) (provision for asylum).

64. Statutory withholding and CAT relief prevent a noncitizen's removal to a specific country. 8 C.F.R. § 1208.22 (2020). These forms of relief are mandatory in nature if the noncitizen makes a sufficient factual showing. *See* 8 U.S.C. § 1231(b)(3)(A) (stating that the attorney general *may not* remove a noncitizen to a country where their life or freedom would be threatened due to certain factors); Foreign Affairs Reform and Restructuring Act § 2242 (implementing the CAT and stating the policy that the United States *shall not* involuntarily return a person to a country where they are likely to be tortured).

65. 8 U.S.C. § 1252(a)(2)(C). The statute prohibits judicial review of any final order against a noncitizen who is removable due to the commission of or attempt or conspiracy to attempt a crime involving moral turpitude; the violation of a controlled substance law or regulation; the conviction of multiple offenses with an aggregate sentence of at least five years of confinement; involvement in prostitution or human trafficking; involvement in money laundering; the conviction of an aggravated felony; the conviction for fire arms offenses; or the commission of offenses related to espionage and treason and sedition. *See id.* § 1182(a)(2); *id.* § 1227(a)(2)(A)(iii), (B)–(D) (listing the above-mentioned bases of removal).

66. *Id.* § 1252(a)(2)(D).

67. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1688 (2020).

#### D. Withholding of Removal

Withholding of removal is a form of relief for noncitizens facing removal from the United States.<sup>68</sup> To qualify for withholding, the noncitizen must make a showing to the immigration judge that the noncitizen has a reasonable fear of persecution or torture in the country of proposed removal.<sup>69</sup> This form of relief is available under both the INA and the CAT.<sup>70</sup> Withholding of removal under the INA is also known as statutory withholding of removal.<sup>71</sup>

##### 1. Statutory Withholding of Removal

A noncitizen is eligible for statutory withholding of removal if a threat to their life or freedom will likely occur in the country of proposed removal and this threat is due to the noncitizen's "race, religion, nationality, membership in a particular social group, or political opinion."<sup>72</sup> In an application for statutory withholding of removal, the noncitizen applicant bears the burden of proving that, more likely than not, a threat to their life or freedom exists in the country of proposed removal due to one of the statutorily enumerated reasons.<sup>73</sup> If credible, the noncitizen's testimony

---

68. See 8 C.F.R. § 1208.16(a) (2020) (providing the considerations for an application for withholding of removal).

69. *Id.* §§ 208.30(e)(5)(3), 1208.16(b)–(c). Persecution is a term used in determinations of asylum, but administrative officers and courts also use the term to describe the threat to life or liberty required for statutory withholding. See 8 U.S.C. § 1101(a)(42) (persecution in the definition of refugee); see also 8 C.F.R. § 1208.16(b)(1)(i) (2020) (past persecution can be evidence of future threat to life or freedom). Torture is the infliction of severe pain or suffering by or with the consent or acquiescence of a public official or some other person acting in an official capacity. *Id.* § 1208.18(a)(1).

70. See 8 U.S.C. § 1231(b)(3)(A) (providing for withholding of removal under the INA due to danger to life or freedom); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at 20 (providing for withholding of removal due to danger of torture); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822 (implementing the CAT); see also 8 C.F.R. § 1208.16(b)–(c) (2020) (establishing eligibility for withholding of removal under the INA and the CAT, respectively).

71. See, e.g., *Nasrallah II*, 140 S. Ct. at 1694 (referring to withholding of removal under the INA as statutory withholding).

72. 8 U.S.C. § 1231(b)(3)(A).

73. 8 C.F.R. § 1208.16(b) (2020). The basis of the feared persecution must be the noncitizen's race, religion, nationality, membership in a particular social

may suffice to sustain the burden without corroboration.<sup>74</sup> The immigration judge shall order the withholding of the proposed removal if the noncitizen sustains the burden and thus establishes eligibility for the withholding.<sup>75</sup>

## 2. CAT Withholding of Removal

Comparably, a noncitizen is eligible for withholding of removal under the CAT if the noncitizen reasonably believes there is a danger of torture if returned to the country of proposed removal.<sup>76</sup> Torture is “any act by which severe pain or suffering . . . is intentionally inflicted on a person for such purposes as” punishing, intimidating, discriminating, or obtaining information.<sup>77</sup> These acts amount to torture when “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>78</sup>

The CAT is an international convention to which the United States is a signatory.<sup>79</sup> Article 3 of the CAT provides for withholding of removal by forbidding signatories from forcibly sending a person to a country where they will likely suffer torture.<sup>80</sup> Congress implemented Article 3 into law through the Foreign Affairs Reform and Restructuring Act of 1998 (“FARRA”).<sup>81</sup> FARRA and its accompanying federal regulations provide guidance for obtaining CAT relief.<sup>82</sup>

---

group, or political opinion. *See* 8 U.S.C. § 1231(b)(3)(A) (listing the reasons for threat to life or freedom).

74. 8 C.F.R. § 1208.16(b) (2020). The immigration judge determines credibility based on the methodology explained at 8 U.S.C. § 1158(b)(1)(B)(ii)–(iii).

75. 8 C.F.R. § 1208.16(d)(1) (2020).

76. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at 20.

77. 8 C.F.R. § 1208.18(a)(1) (2020).

78. *Id.*

79. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at 20.

80. *Id.*

81. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822 (implementing the CAT and stating the policy that the United States *shall not* involuntarily return a person to a country where they are likely to be tortured).

82. *See* 8 C.F.R. § 1208.18 (2020) (implementing the CAT in the Code of Federal Regulations); *id.* § 1208.16(c) (providing the requirements for eligibility for CAT relief).

Under these regulations, the noncitizen applicant bears the burden of proof to establish that, more likely than not, they would be tortured if removed to the proposed country of removal.<sup>83</sup> As with statutory withholding, the noncitizen's testimony, if credible, may suffice to establish the burden of proof without corroboration.<sup>84</sup> If the noncitizen successfully establishes eligibility for CAT relief by sustaining the burden of proof, then the immigration judge shall order the withholding of the noncitizen's removal to the proposed country.<sup>85</sup>

Both types of withholding of removal are subject to the same mandatory exceptions.<sup>86</sup> First, if the noncitizen participated in Nazi persecution, genocide, or the commission of an act of torture or extrajudicial killing, then the noncitizen shall not receive withholding of removal.<sup>87</sup> Second, a noncitizen who, in some way, participated in the persecution of an individual on the basis of that individual's "race, religion, nationality, membership in a particular social group, or political opinion" shall not receive withholding of removal.<sup>88</sup> Third, a noncitizen convicted of a "particularly serious crime" shall receive a denial of a request for withholding of removal.<sup>89</sup> Finally, if the Attorney General reasonably believes that a noncitizen committed a serious nonpolitical crime before arriving in the United States or is a danger to the United States' security, then the noncitizen cannot receive withholding of removal.<sup>90</sup>

### *E. The Circuit Split*

When reviewing appeals by noncitizens with criminal convictions, the courts of appeals disagree about the scope of final orders of removal.<sup>91</sup> Whether the courts of appeals treat statutory withholding orders and CAT

---

83. 8 C.F.R. § 1208.16(c)(2) (2020).

84. *Id.*

85. *Id.* § 1208.16(d)(1).

86. *Id.* § 1208.16(d)(2); *see* 8 U.S.C. § 1231(b)(3)(B) (providing the mandatory exceptions for withholding of removal).

87. 8 U.S.C. §§ 1231(b)(3)(B), 1227(a)(4)(D).

88. *Id.* § 1231(b)(3)(B)(i).

89. *Id.* § 1231(b)(3)(B)(ii). For purposes of this statute, a "particularly serious crime" is an aggravated felony, or felonies, for which the noncitizen received an aggregate imprisonment term of at least five years. However, the attorney general may determine that such a noncitizen's conviction was for a "particularly serious crime" even if the length of the sentence is less than five years. *Id.* § 1231(b)(3)(B).

90. *Id.* § 1231(b)(3)(B)(iii)–(iv).

91. *See* cases cited *supra* note 14.

relief as final orders of removal affects the availability of judicial review to noncitizens with criminal convictions.<sup>92</sup> If statutory withholding orders and CAT relief are final orders of removal, then the bar on judicial review for criminal noncitizens applies to a review of factual challenges of these forms of relief.<sup>93</sup> The bar on judicial review applies in at least eight of the courts of appeals because these courts consider both statutory withholding orders and CAT relief to be final orders of removal.<sup>94</sup> On the contrary, the Seventh and Ninth circuits do not consider CAT relief to be a final order of removal.<sup>95</sup> Similarly, the Seventh Circuit's reasoning in *Wanjiru v. Holder* that an order is not final when it prevents the noncitizen's removal "for the time being" and "can be revisited if circumstances change" seems to indicate that the court does not consider statutory withholding orders to be final orders either.<sup>96</sup>

The tension between approaches to determining which orders are final orders of removal leaves noncitizens with criminal convictions uncertain about whether they can receive judicial review of their factual challenges to withholding orders.<sup>97</sup> Moreover, the lack of clarity among the courts of appeals could lead to the removal of these noncitizens to countries where they potentially face irreversible harm, after which there is no second chance to protect them.<sup>98</sup> To clarify this issue, at least with respect to CAT relief, the United States Supreme Court granted certiorari in *Nasrallah v. Barr*.<sup>99</sup>

---

92. See 8 U.S.C. § 1252(a)(2)(C)–(D) (precluding judicial review of factual challenges to final orders of removal when the noncitizen seeking review committed an enumerated crime).

93. See *id.*

94. See cases cited *supra* note 14.

95. See *Wanjiru v. Holder*, 705 F.3d 258, 264 (7th Cir. 2013) (stating that CAT relief is not a final order of removal within the meaning of 8 U.S.C. § 1252(a)(2)(C)); *Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) (claiming that the court retains jurisdiction to review the facts underlying the denial of a CAT order, despite the noncitizen's conviction of a crime involving moral turpitude).

96. *Wanjiru*, 705 F.3d at 264. An asylum officer may terminate a statutory withholding order once conditions in that country change and there is no longer a threat to the noncitizen's life or freedom. 8 C.F.R. § 1208.24(b)(1) (2020).

97. Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 418 (2020).

98. *Wanjiru*, 705 F.3d at 264.

99. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1689 (2020).



## II. *NASRALLAH V. BARR*: CLARIFYING THE MEANING OF FINAL ORDERS OF REMOVAL

In *Nasrallah v. Barr*, the United States Supreme Court attempted to resolve a circuit split among the courts of appeals by clarifying the scope of final orders of removal for the purpose of judicial review.<sup>100</sup> The scope of a final order of removal is particularly relevant in a case like *Nasrallah* that involves a noncitizen convicted of a crime specified in § 1252(a)(2)(C).<sup>101</sup> A conviction of one of these crimes precludes judicial review of factual challenges to final orders of removal.<sup>102</sup> Thus, if a CAT order is a final order, no court may review the factual challenges that a noncitizen, such as Nasrallah, brings regarding a denial of CAT relief.<sup>103</sup> Nasrallah had two convictions for receiving stolen property, and the government used these convictions to seek his removal under 8 U.S.C. § 1227(a)(2)(A)(i).<sup>104</sup> This provision renders removable any noncitizen with a conviction for a “crime of moral turpitude” for which the possible sentence may be a year or longer.<sup>105</sup>

After the immigration judge found Nasrallah removable, she granted him CAT relief to postpone his removal after finding it more likely than not that he would be tortured if returned to Lebanon.<sup>106</sup> The BIA overturned the immigration judge’s grant of CAT relief on appeal because of a deficient showing of a likelihood of torture.<sup>107</sup> When Nasrallah appealed the BIA’s finding of a deficient factual showing, the United States Eleventh Circuit Court of Appeals held that it lacked jurisdiction to review the factual challenge because of the restrictions in § 1252(a)(2)(C), namely that Nasrallah was convicted of a crime involving moral turpitude.<sup>108</sup>

---

100. *Id.*; see cases cited *supra* note 14.

101. See *Nasrallah II*, 140 S. Ct. at 1691 (determining that consolidating challenges into a single petition does not make a CAT order a final order of removal).

102. 8 U.S.C. § 1252(a)(2)(C).

103. *Nasrallah II*, 140 S. Ct. at 1690.

104. *Nasrallah v. U.S. Att’y Gen. (Nasrallah I)*, 762 F. App’x 638, 640 (11th Cir. 2019), *rev’d*, 140 S. Ct. 1683 (2020); see 8 U.S.C. § 1227(a)(2)(A)(i).

105. 8 U.S.C. § 1227(a)(2)(A)(i).

106. *Nasrallah I*, 762 F. App’x at 641–42. The immigration judge granted Nasrallah CAT relief in the form of a deferral of removal because his convictions of a particularly serious crime subjected him to a mandatory denial of withholding of removal.

107. *Id.*

108. *Nasrallah II*, 140 S. Ct. at 1688–89; see 8 U.S.C. § 1252(a)(2)(C) (precluding judicial review of factual challenges to a final order of removal when

The Supreme Court granted certiorari and held that CAT orders are not final orders of removal because they do not order removal nor do they conclude as to the noncitizen's removability.<sup>109</sup> Additionally, the Court held that CAT orders do not affect the validity of final orders of removal.<sup>110</sup> Thus, the bar on judicial review to factual challenges in § 1252(a)(2)(C) does not apply to CAT orders.<sup>111</sup> The Court focused on three points in making this determination. First, CAT orders do not conform to the definition of final orders of removal.<sup>112</sup> Second, CAT orders do not affect the validity of final orders of removal.<sup>113</sup> Third, Congress distinguished judicial review of final orders of removal from review of CAT orders.<sup>114</sup>

First, the Court looked to the definition of final orders of removal because § 1252(a)(2)(C) only precludes factual challenges to these final orders.<sup>115</sup> A final order of removal is an administrative order that declares a noncitizen removable or orders their removal.<sup>116</sup> An order granting CAT relief prevents the noncitizen's removal to the specified country of removal, but the noncitizen may be removed to another country where they are not likely to be tortured.<sup>117</sup> Thus, a CAT order is not the same as a final order of removal because it does not conclude that the noncitizen is removable or order them removed.<sup>118</sup>

Second, the Court then clarified that, for purposes of judicial review, final orders include not only the statutorily defined final orders but also all matters that affect the validity of those orders.<sup>119</sup> Thus, rulings and determinations that affect the validity of the final order merge into that order for considerations of judicial review.<sup>120</sup> CAT orders, on the contrary,

---

the noncitizen seeking appeal was convicted of a crime involving moral turpitude).

109. *Nasrallah II*, 140 S. Ct. at 1691.

110. *Id.*

111. *Id.* at 1694.

112. 8 U.S.C. § 1101(a)(47)(A).

113. *Nasrallah II*, 140 S. Ct. at 1691.

114. *Id.* at 1693.

115. *Id.* at 1691.

116. 8 U.S.C. § 1101(a)(47)(A).

117. *Nasrallah II*, 140 S. Ct. at 1691.

118. *Id.*; see 8 U.S.C. § 1101(a)(47)(A) (defining an order of removal).

119. *Nasrallah II*, 140 S. Ct. at 1691; see *I.N.S. v. Chadha*, 462 U.S. 919, 938–39 (1983) (holding that review of a final order of removal includes all matters affecting the validity of that final order).

120. *Nasrallah II*, 140 S. Ct. at 1691. Cancellation of removal is an example of such a determination. See 8 U.S.C. § 1229b (providing for cancellation of removal).

do not affect the final order's validity even though both orders are reviewed together in a single petition.<sup>121</sup> Therefore, CAT orders are not final orders of removal for purposes of judicial review under § 1252(a)(2)(C).<sup>122</sup>

Third, the Court analyzed Congress's choice to specifically bar judicial review of final orders of removal.<sup>123</sup> The Court found significance in the notion that Congress could have precluded judicial review of factual challenges to CAT orders just as it did for final orders of removal, but Congress chose to specifically bar factual challenges only to final orders of removal.<sup>124</sup> Further, Congress provided explicitly for review of final orders of removal in 8 U.S.C. § 1252(a)(1) but then separately provided for review of CAT orders in § 1252(a)(4).<sup>125</sup> The Court concluded that Congress had good reason to distinguish the two orders because, unlike the facts of the crime that rendered the noncitizen removable, the factual issues related to a CAT order are likely to be disputed and typically have not been litigated prior to the removal proceedings.<sup>126</sup> Thus, Congress's distinction provides an opportunity for deferential judicial review of potentially critical and likely-not-yet-litigated factual issues pertaining to the noncitizen's likelihood of being tortured.<sup>127</sup>

The Court concluded that courts of appeals may provide deferential review of factual challenges to CAT orders because these orders are not final orders of removal; therefore, the bar on factual challenges in § 1252(a)(2)(C) does not apply.<sup>128</sup> The Court left open the question of how its decision will affect factual challenges to statutory withholding orders because that issue was not part of the narrow question for which it granted certiorari.<sup>129</sup> As the dissent discussed, CAT relief and statutory withholding are similar in ways that are important under the majority's

---

121. *Nasrallah II*, 140 S. Ct. at 1691.

122. *Id.* at 1692.

123. *Id.*

124. *Id.*

125. The Court also pointed to 8 U.S.C. § 1252(b)(9), which is under the section of requirements for review of final orders and provides for judicial review of other questions of law or fact when brought together with a question about a final order of removal. *Id.* at 1691.

126. *Id.* at 1693.

127. *Id.*

128. *Id.* at 1694.

129. *Id.*

analysis, and these similarities support an argument for the application of the majority's rule to statutory withholding orders.<sup>130</sup>

### III. STATUTORY WITHHOLDING ORDERS ARE NOT FINAL ORDERS OF REMOVAL UNDER THE ANALYSIS IN *NASRALLAH V. BARR*

The Attorney General should issue a memorandum adopting the reasoning from *Nasrallah v. Barr* as applicable to statutory withholding orders. Applying the Supreme Court's reasoning, statutory withholding orders are not final orders of removal. Thus, the Court's reasoning allows the courts of appeals to review factual challenges to a statutory withholding order brought by a noncitizen convicted of a crime that would preclude judicial review of a final order of removal.<sup>131</sup> The application of the *Nasrallah* reasoning to statutory withholding orders provides noncitizens with a fair review of their appeals and prevents a separation-of-powers concern. Further support for this application of the Court's reasoning comes from the similarities between CAT relief and statutory withholding, the history of the laws governing withholding of removal, and the administrative regulations of withholding of removal, as well as other considerations.<sup>132</sup>

#### *A. Effects of Applying the Nasrallah Reasoning to Statutory Withholding Orders*

Allowing judicial review of factual challenges to denials of statutory withholding would benefit noncitizens applying for review because, due to large caseloads and deadline pressures, immigration judges and the BIA have an increased risk of making errors that would otherwise go unnoticed.<sup>133</sup> Human judgments are less accurate under time pressure, and

---

130. Justice Thomas applied the majority's reasoning to statutory withholding claims. He found that, under the majority's view, statutory withholding claims are not subject to § 1252(a)(2)(C) because they are "considered after the [noncitizen] has been deemed removable" and "also do not affect the validity of the underlying removal order." See *id.* at 1697 (Thomas, J., dissenting) (comparing CAT relief and statutory withholding).

131. 8 U.S.C. § 1252(a)(2)(C) forbids judicial review of factual challenges to final orders of removal if the noncitizen was convicted of an enumerated crime.

132. See generally *id.* § 1231(b)(3)(A) (providing for statutory withholding of removal); 8 C.F.R. § 1208.16 (2020) (providing administrative regulations for both types of withholding of removal).

133. Brief for Former Executive Office of Immigration Review Judges as Amici Curiae Supporting Petitioner at 18–22, *Nasrallah II*, 140 S. Ct. 1683 (No. 18-1432).

both the immigration judges and the BIA face daunting case quotas and deadlines.<sup>134</sup> As of 2018, immigration judges must complete 700 cases per year to receive a satisfactory performance review, which gives judges an average of two and a half hours to complete each case.<sup>135</sup> The BIA generally cannot have cases pending for more than 335 days after the filing of the notice of appeal because EOIR policy for efficiency in case handling prohibits pendency beyond this timeframe.<sup>136</sup> Consequently, a heightened risk of errors going unnoticed—and thus, uncorrected—exists.<sup>137</sup> Therefore, the attorney general should adopt the application of the *Nasrallah* reasoning to statutory withholding orders to ensure noncitizens receive fair and reasonable factual determinations before their removal to a country where they might suffer irreversible harm.<sup>138</sup>

Additionally, allowing judicial review of factual challenges avoids a separation-of-powers concern by preventing the executive branch—via the immigration judges and the BIA—from having unreviewable authority to decide factual issues pertaining to withholding of removal.<sup>139</sup> Unlike the facts surrounding the criminal conviction that renders a noncitizen

---

134. Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure Studies and Findings*, in *TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING* 26, 35–36 (Ola Svenson & A. John Maule eds., 1993); see Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, WALL ST. J. (Apr. 2, 2018), <https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158> [<https://perma.cc/HSU8-R59V>]; OFF. OF DIR., EXEC. OFF. OF IMMIGR. REV., OOD PM NO. 20-01, CASE PROCESSING AT THE BOARD OF IMMIGRATION APPEALS (2019), <https://www.justice.gov/eoir/page/file/1206316/download> [<https://perma.cc/KZ2P-QCSB>].

135. Email from James McHenry, Dir. of Exec. Off. of Immigr. Rev., to EOIR Judges (Mar. 30, 2018), in *EOIR Issues Guidance Implementing Immigration Judge Performance Metrics*, AM. IMMGR. LAWS. ASSOC. (Mar. 30, 2018), <https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics> [<https://perma.cc/8B YX-CGV5>]; see Colleen Long, *Immigration Judges Say New Quotas Undermine Independence*, A.P. NEWS (Sept. 21, 2018), <https://apnews.com/article/d8008f7a66a54562b612bd74156f2bed> [<https://perma.cc/L7RB-LGMF>] (averaging the amount of time allotted to immigration judges per case under their quota of 700 cases per year).

136. OFF. OF DIR., EXEC. OFF. OF IMMIGR. REV., *supra* note 134.

137. Brief for Former Executive Office of Immigration Review Judges as Amici Curiae Supporting Petitioner, *supra* note 133, at 21.

138. See Margulies, *supra* note 97, at 418 (discussing the importance of protecting noncitizens from suffering foreseeable, irreversible harm).

139. Brief for Former Executive Office of Immigration Review Judges as Amici Curiae Supporting Petitioner, *supra* note 133, at 17–18.

removable, the factual components of statutory withholding orders usually are not litigated prior to the removal proceedings.<sup>140</sup> These facts are important in determining whether the noncitizen's life or freedom would be threatened due to "race, religion, nationality, membership in a particular social group, or political opinion."<sup>141</sup> In *Nasrallah*, the Court found this consideration, when applied to a CAT order, weighed in favor of allowing judicial review of factual challenges.<sup>142</sup>

Allowing judicial review of factual challenges to statutory withholding orders seems to contradict the INA's limited grant of authority to the courts.<sup>143</sup> Nevertheless, a strong presumption exists that Congress intended an opportunity for the judiciary to review administrative decisions.<sup>144</sup> Congress provided for the exclusive means of judicial review of all questions arising from removal proceedings in the INA, but it also specifically excluded certain decisions from judicial review.<sup>145</sup> Whether Congress intended to include statutory withholding orders within this exclusion is unclear because the exclusion applies to final orders of removal, but statutory withholding orders do not seem to fit within the definition of final orders.<sup>146</sup> Thus, the Attorney General should read this ambiguity to allow judicial review of these executive

---

140. See 8 C.F.R. § 1208.9 (2020) (outlining the procedure for an interview with an asylum officer, including the introduction of evidence); *id.* § 1208.12 (allowing the asylum officer to rely on other information, aside from the noncitizen's evidence, to determine the credibility of a fear of persecution or torture); *id.* § 1208.16(b)(1)–(3) (describing the means of evaluating evidence supporting a claim for withholding of removal).

141. See sources cited *supra* note 140.

142. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1693 (2020).

143. See 8 U.S.C. § 1252(a)(5) (providing for the exclusive means of judicial review of final orders of removal); *id.* § 1252(b)(9) (requiring the consolidation of other challenges arising from removal proceedings into the petition to review a final order of removal).

144. *Smith v. Berryhill*, 139 S. Ct. 1765, 1776–77 (2019) (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986)).

145. 8 U.S.C. § 1252(b)(9) (providing the exclusive means of judicial review); *id.* § 1252(a)(2)(C) (excluding final orders of removal against criminal noncitizens from judicial review).

146. *Id.* § 1252(a)(2)(C); see *id.* § 1101(a)(47) (defining final orders of removal as a final order that concludes a noncitizen is removable or orders their removal); see also *id.* § 1231(b)(3)(A) (providing for statutory withholding of removal by stating that a noncitizen may not be removed to a country where there exists a threat to their life or freedom due to race, religion, nationality, membership in a particular social group, or political opinion).

determinations.<sup>147</sup> The preservation of federal court jurisdiction over statutory withholding orders finds support not only in this presumption but also in the similarities between statutory withholding orders and CAT relief.<sup>148</sup>

*B. Statutory Withholding Is Similar to CAT Relief with Respect to the Aspects the Court Considered Important in Nasrallah v. Barr*

Like CAT relief, statutory withholding seeks to prevent removal after an immigration judge deems the noncitizen removable and does not affect the validity of a final order of removal.<sup>149</sup> The *Nasrallah* Court considered these characteristics important in its determination that CAT relief is not a final order.<sup>150</sup> Both statutory withholding and CAT relief have humanitarian purposes meant to prevent a noncitizen's removal to a certain country.<sup>151</sup> CAT relief protects a noncitizen from removal to a country in which it is more likely than not that they will suffer torture.<sup>152</sup> Similarly, statutory withholding prevents a noncitizen's removal to a country where their life or freedom would be threatened due to "race, religion, nationality, membership in a particular social group, or political opinion."<sup>153</sup> Thus, the purpose of both statutory withholding and CAT relief is to prevent removal after the noncitizen is deemed removable, not to determine removability or order removal.<sup>154</sup>

Additionally, statutory withholding and CAT relief have similar effects on removability.<sup>155</sup> Though both types of relief prevent a noncitizen's removal to a specific country, neither one necessarily

---

147. See *Kucana v. Holder*, 558 U.S. 233, 251 (2010) (quoting *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995)) (utilizing the principle of statutory construction that generally subjects executive determinations to judicial review to interpret an ambiguous provision of the INA).

148. See generally 8 C.F.R. § 1208.16 (2020) (providing guidelines for the application of both statutory withholding and CAT relief).

149. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1697 (2020) (Thomas, J., dissenting).

150. *Id.* at 1691 (majority opinion).

151. See 8 U.S.C. § 1231(b)(3)(A); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-822.

152. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at 20; see also 8 C.F.R. § 1208.16(c) (2020).

153. 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(b) (2020).

154. *Nasrallah II*, 140 S. Ct. at 1697 (Thomas, J., dissenting) (citing to *Kouambo v. Barr*, 943 F.3d 205, 210 (4th Cir. 2019)).

155. See 8 C.F.R. § 1208.16(b), (c)(1), (f) (2020).

prevents removal in general.<sup>156</sup> A noncitizen granted either a statutory withholding order or a CAT order may be removed “to a third country other than the one to which removal has been withheld or deferred.”<sup>157</sup> Therefore, like CAT relief, statutory withholding does not affect “the validity of a final order of removal.”<sup>158</sup> Accordingly, statutory withholding of removal must fall within the Court’s reasoning in *Nasrallah*.<sup>159</sup>

*C. The History of the Laws Governing Withholding of Removal Supports the Application of the Nasrallah Reasoning to Statutory Withholding Orders*

The history of the laws governing withholding of removal shows that both CAT relief and statutory withholding are based on the United States’ obligations under international law to protect people from situations where they would suffer irreversible harm.<sup>160</sup> Courts should avoid interpreting laws in a way that presumes Congress precluded judicial review when the availability of such review ensures the United States’ compliance with its international obligations.<sup>161</sup> Thus, preserving judicial review by applying the *Nasrallah* reasoning to statutory withholding orders is consistent with the United States’ international law obligations.

In 1951, the United Nations Convention Pertaining to the Status of Refugees (“the 1951 Convention”) provided protection to refugees<sup>162</sup> by prohibiting signatories from returning refugees to a country where their life or freedom would be in danger due to “race, religion, nationality, membership in a particular social group or political opinion.”<sup>163</sup> Though

---

156. See *id.* § 1208.16(f) (providing that withholding of removal shall not prevent the noncitizen’s removal “to a third country other than the country to which removal has been withheld or deferred”).

157. *Id.*

158. *Nasrallah II*, 140 S. Ct. at 1697 (Thomas, J., dissenting).

159. *Id.*

160. See Margulies, *supra* note 97 (discussing the importance of protecting noncitizens from suffering foreseeable, irreversible harm).

161. *Wanjiru v. Holder*, 705 F.3d 258, 265 (2013) (citing to *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

162. See 8 U.S.C. § 1101(a)(42)(A) (defining refugee as any person outside their country of nationality who is unable or unwilling to return because of persecution or a well-founded fear of persecution based on “race, religion, nationality, membership in a particular social group, or political opinion”).

163. United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 606 U.N.T.S. 268; Evangeline G. Abriel, *The Effect of Criminal Conduct upon Refugee and Asylum Status*, 3 SW. J.L. & TRADE AMS. 359, 361 (1996); see 8 U.S.C. § 1101(a)(42) (defining refugee).



the United States was not a signatory of the 1951 Convention, Congress incorporated a similar provision into the INA of 1952.<sup>164</sup> Unlike the mandatory nature of the 1951 Convention's protection, the Attorney General had the authority to withhold removal at his own discretion.<sup>165</sup> In 1968, the United States signed the 1967 United Nations Protocol Relating to the Status of Refugees ("the Protocol"), which bound signatories to honor the 1951 Convention.<sup>166</sup> Consequently, Congress amended the INA to eliminate the discretionary nature of withholding<sup>167</sup> and adopted the 1951 Convention's requirement that the potential persecution be based on the noncitizen's "race, religion, nationality, membership in a particular social group or political opinion."<sup>168</sup>

Additionally, the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of which the United States was a signatory, forbade signatories from returning persons to a country where they likely faced torture.<sup>169</sup> Then, the 1996 amendment to the INA enacted the current language of the statute, which provides that the Attorney General *may not* remove a noncitizen to a country where their "life or freedom would be threatened."<sup>170</sup> Finally, the United States implemented CAT Article 3, which provides for withholding of removal, with the Foreign Affairs Reform and Restructuring Act

---

164. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 ("The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason").

165. Compare United Nations Convention Relating to the Status of Refugees, *supra* note 165, 19 U.S.T. at 6259, 606 U.N.T.S. at 268 ("No Contracting State shall expel or return . . . a refugee in any manner whatsoever" to a place where their life or freedom would be threatened), with Immigration and Nationality Act § 243(h) ("The Attorney General is authorized to withhold deportation").

166. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S. 267; Abriel, *supra* note 163.

167. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 107 (stating that the attorney general *shall not* deport a noncitizen to a country where they might be subject to persecution).

168. Compare *id.*, with United Nations Convention Relating to the Status of Refugees, *supra* note 165, 19 U.S.T. at 6259, 606 U.N.T.S. at 268.

169. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 10, at 20.

170. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-602.

(“FARRA”) in 1998.<sup>171</sup> FARRA and its accompanying federal regulations provide guidance for obtaining CAT relief.<sup>172</sup>

As shown by the history detailed above, Congress took progressive steps to bring United States immigration law into compliance with the country’s international obligations.<sup>173</sup> Under the CAT and the 1951 Convention, the United States has an obligation to protect noncitizens from countries where they face torture or persecution.<sup>174</sup> Because of this obligation, a noncitizen should have the opportunity to receive judicial review of factual claims about the likelihood of torture or persecution before the government removes the noncitizen to a potentially dangerous country.<sup>175</sup>

If a noncitizen is subject to persecution or torture after informing the United States government of the likelihood that such harm would result and the government made no attempt to prevent the harm, then the United States failed to perform its international obligation to protect people from such harm.<sup>176</sup> By allowing noncitizens to seek judicial review of factual challenges to statutory withholding orders, like *Nasrallah* allows for CAT orders, the United States would provide an extra layer of protection to noncitizens and would comply with its international obligations.<sup>177</sup> In *Nasrallah*, the Supreme Court noted that the importance of these factual claims seemed to show Congress’s intent to allow judicial review of a CAT order’s factual components.<sup>178</sup> A noncitizen’s factual claims are just as important to establishing eligibility for statutory withholding as they are

---

171. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681–822.

172. See 8 C.F.R. § 1208.18 (2020) (implementing the CAT in the Code of Federal Regulations); *id.* § 1208.16(c) (providing the requirements for eligibility for CAT relief).

173. See Bobbie Marie Guerra, Comment, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act’s Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY’S L.J. 941, 966 (1997) (claiming that Congress’s amendments to the INA fulfilled the United States’ international obligations).

174. *Id.*

175. See *id.* at 968–69.

176. See *id.*

177. *Id.* at 976 (claiming that foreclosing judicial review of statutory withholding orders is “inconsistent with international agreements concerning refugee rights”).

178. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1693 (2020).

for CAT relief.<sup>179</sup> Thus, the *Nasrallah* Court's interpretation of the availability of judicial review for CAT orders should be instructive in the interpretation of the same issue for statutory withholding orders.<sup>180</sup>

*D. The Administrative Regulations Governing CAT Relief and Statutory Withholding Support the Application of the Nasrallah Reasoning to Statutory Withholding Orders*

A direct comparison of the administrative regulations for CAT relief and statutory withholding further supports the application of the *Nasrallah* reasoning to statutory withholding orders.<sup>181</sup> The Code of Federal Regulations provides guidelines for both statutory withholding and CAT relief in the same section.<sup>182</sup> Statutory withholding requires the noncitizen applicants to establish that their life or freedom would be threatened in the country of proposed removal.<sup>183</sup> The noncitizen's burden of proof is one of "more likely than not."<sup>184</sup> Similarly, under the regulations for CAT relief, the noncitizen applicants must establish that, more likely than not, they would suffer torture in the country of proposed removal.<sup>185</sup> For both types of relief, the noncitizen's testimony, if credible, may be sufficient, without corroboration, to sustain the burden of proof.<sup>186</sup> The application of the same burden of proof for statutory withholding and CAT relief supports the argument that courts should analyze both under a similar analytical framework.

For statutory withholding, the noncitizens must prove that a past threat to their life or freedom occurred, which leads to a presumption of a future threat to life or freedom; or they must prove that there exists some future threat to their life or freedom in the country of proposed removal.<sup>187</sup> To

---

179. "The burden of proof is on the applicant for withholding of removal under [the INA] to establish that his or her life or freedom would be threatened. . . ." 8 C.F.R. § 1208.16(b) (2020).

180. Guerra, *supra* note 173, at 969.

181. See generally 8 C.F.R. § 1208.16 (2020).

182. See *id.*

183. *Id.* § 1208.16(b).

184. *Id.* § 1208.16(b)(1)–(2).

185. *Id.* § 1208.16(c)(2). Torture is "any act by which severe pain or suffering . . . is intentionally inflicted on a person" for purposes like obtaining information, intimidating or coercing someone, or discriminating. These acts amount to torture when a public official or other person acting in an official capacity inflicts, instigates, or consents or acquiesces to the infliction of the pain or suffering. *Id.* § 1208.18(a)(1).

186. *Id.* § 1208.16(b), (c)(2).

187. *Id.* § 1208.16(b)(1)–(2).

show a likelihood of future torture for CAT relief, the noncitizens may produce evidence of past torture experienced, evidence of gross human rights violations in the country of removal, and other relevant information about the conditions in the country of removal.<sup>188</sup> Because both statutory withholding and CAT relief require the same general factual showings of past threat or harm and future danger, both should utilize a similar analysis.

The threat to life or freedom required for statutory withholding must be due to the noncitizen's "race, religion, nationality, membership in a particular social group, or political opinion."<sup>189</sup> Contrarily, the torture inflicted or likely to be inflicted for CAT relief does not have to be based on any protected grounds.<sup>190</sup> Further distinguishing the two types of relief is the fact that statutory withholding, unlike CAT relief, does not require any action or acquiescence by a public official.<sup>191</sup> Additionally, CAT relief requires more than a showing of persecution; proving torture imposes a higher bar on what the noncitizen must show.<sup>192</sup> Though the factual requirements to prove a likelihood of torture are different than those to prove a likelihood of persecution, a factual showing of torture under the CAT can also satisfy the requirements of persecution necessary for statutory withholding if the actions were done for one of the requisite reasons.<sup>193</sup> Despite the differences in the specific factual requirements for statutory withholding and CAT relief, the factual issues are critical to receiving both types of relief from removal and usually have yet to be litigated.<sup>194</sup> The *Nasrallah* Court found that the importance of these unlitigated facts weighed in favor of allowing judicial review of factual challenges to CAT orders.<sup>195</sup> Because these facts are equally important when seeking statutory withholding, the *Nasrallah* reasoning should also apply to statutory withholding orders.

Further support for similar treatment of CAT orders and statutory withholding orders appears in 8 C.F.R. § 1208.16(d)(2), which provides

---

188. *Id.* § 1208.16(c)(3).

189. 8 U.S.C. § 1231(b)(3)(A); *see* 8 C.F.R. § 1208.16(b) (2020).

190. *See* 8 C.F.R. § 1208.16(c) (2020) (explaining the required factual showing to receive CAT relief).

191. *See id.* § 1208.18(a)(1) (defining torture).

192. *Efe v. Ashcroft*, 293 F.3d 899, 906 (5th Cir. 2002).

193. *Id.* These reasons are the noncitizen's "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

194. *See* 8 C.F.R. § 1208.16(b)–(c) (2020) (explaining the factual showings necessary for eligibility for statutory withholding and CAT relief).

195. *Nasrallah v. Barr (Nasrallah II)*, 140 S. Ct. 1683, 1693 (2020).

that applications for both types of withholding are subject to the same mandatory denials.<sup>196</sup> The fact that the reasons for mandatory denial of an application for withholding apply to both types of withholding is significant. The original CAT did not provide exceptions to the requirement of withholding a noncitizen's removal.<sup>197</sup> However, when the EOIR incorporated the CAT into the Code of Federal Regulations, it added exceptions to the mandatory withholding of removal under the CAT, and it provided that these exceptions would be the same as those for statutory withholding of removal.<sup>198</sup>

Also, § 1208.16(f) stipulates that neither type of withholding prevents the noncitizen's removal to a third country.<sup>199</sup> These parallels support the view that analyses of both types of withholding should utilize a similar analytical framework because both require similar factual showings and must account for the same exceptions.<sup>200</sup> The similarities between the two types of withholding prove to be more significant than their distinctions for the purpose of an analysis under *Nasrallah*.

*E. Other Considerations that Support the Application of the Nasrallah Reasoning to Statutory Withholding Orders*

Some courts utilize distinct analyses for CAT relief and statutory withholding.<sup>201</sup> After *Nasrallah*, the Eighth Circuit in *Sharif v. Barr* still applied 8 U.S.C. § 1252(a)(2)(C) to withholding of removal in order to claim the court lacked jurisdiction to review factual findings.<sup>202</sup> Additionally, the Tenth Circuit in *Malik v. Barr* did not apply the *Nasrallah* Court's reasoning to review the BIA's determination on

---

196. 8 C.F.R. § 1208.16(d)(2) (2020). One of the reasons for a mandatory denial of withholding of removal is the conviction of a particularly serious crime. See 8 U.S.C. § 1231(b)(3)(B) (listing the exceptions to withholding of removal).

197. Guerra, *supra* note 173, at 983.

198. See 8 C.F.R. § 1208.16(d)(2) (2020) (providing for mandatory denial of withholding of removal). A noncitizen subject to a mandatory denial of withholding, like *Nasrallah*, can still receiving CAT relief in the form of deferral of removal if they are eligible for CAT protection. *Id.* § 1208.17(a).

199. *Id.* § 1208.16(f).

200. See generally *id.* § 1208.1(a)(1) (providing that the regulations in this subpart apply to asylum and both types of withholding); *id.* § 1208.2(c) (referring to withholding generally); *id.* § 1208.24 (explaining termination of withholding of removal, without specifying which type).

201. See, e.g., *Sharif v. Barr*, 965 F.3d 612, 619 (8th Cir. 2020); *Malik v. Barr*, 822 F. App'x 763, 765 (10th Cir. 2020).

202. *Sharif*, 965 F.3d at 619.

statutory withholding of removal but did so for the BIA's CAT decision.<sup>203</sup> On the contrary, other courts apply the same or similar reasoning to both statutory withholding and CAT relief.<sup>204</sup> Some courts acknowledge that a noncitizen's claims for both statutory withholding and CAT relief can rely on the same alleged facts and that these claims are treated similarly.<sup>205</sup> Additionally, at least one court claims that the bar against review of factual challenges in 8 U.S.C. § 1252(a)(2)(C) does not apply to statutory withholding of removal or CAT relief.<sup>206</sup> The differing approaches to these issues indicate that *Nasrallah* did not clarify the meaning of "final order of removal" as the Court intended. A memorandum by the Attorney General adopting the *Nasrallah* reasoning as applicable to both CAT relief and statutory withholding will provide the clarity *Nasrallah* did not and will lead to more consistency among the lower courts.

An additional basis for applying the *Nasrallah* reasoning to statutory withholding orders exists in the treatment of withholding-only proceedings.<sup>207</sup> In contrast to the varying judicial approaches to the review of statutory withholding orders and CAT relief, withholding-only proceedings have the same process and requirements regardless of which type of relief the noncitizen seeks.<sup>208</sup> These proceedings can address a noncitizen's eligibility for either or both CAT relief and statutory withholding.<sup>209</sup> While in withholding-only proceedings, detained noncitizens can bring a habeas corpus suit against the government to determine which detainment guidelines apply to them.<sup>210</sup> In these cases,

---

203. *Malik*, 822 F. App'x at 765.

204. *See* *Issaq v. Holder*, 617 F.3d 962, 969 (7th Cir. 2010) (noting that petitions for withholding of removal and for CAT relief are treated similarly); *Budhathoki v. Holder*, 442 F. App'x 939, 942 (5th Cir. 2011) (recognizing that asylum and CAT claims can be based on the same facts and theory); *Hongyok v. Gonzales*, 492 F.3d 547, 551 (5th Cir. 2007) (finding that, though the analyses of eligibility for statutory withholding and CAT relief are independent, a failure to demonstrate eligibility for statutory withholding is sufficient to support a ruling of ineligibility for CAT relief).

205. *See* cases cited *supra* note 204.

206. *Bromfield v. Mukasey*, 543 F.3d 1071, 1075 (9th Cir. 2008).

207. Withholding-only proceedings occur when a noncitizen expresses fear of returning to the country of removal after already receiving an order of removal. Because these proceedings are separate from removal proceedings, they are distinct from the proceedings addressed throughout this Comment, which decided the issues of removal and withholding in one proceeding.

208. 8 C.F.R. § 1208.31(c) (2020).

209. *Id.* § 1208.31.

210. *See* *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016); *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017); *Guerrero-Sanchez v. Warden York Cnty.*

the noncitizens tend to claim that the order from the pending withholding-only proceeding affects the validity of their final order of removal, while the government normally argues that withholding-only proceedings are not final orders of removal and do not affect these final orders.<sup>211</sup>

During withholding-only proceedings, the government tends to utilize a similar analysis as the one adopted by the *Nasrallah* majority to support its argument.<sup>212</sup> In fact, the government's brief for *Pham v. Guzman Chavez* referenced the Court's ruling in *Nasrallah* to support the argument that withholding-only proceedings—and therefore, statutory withholding and CAT relief—do not affect a final order of removal.<sup>213</sup> The government typically urges courts to treat these withholding-only proceedings as separate from final orders of removal.<sup>214</sup> Thus, the government's treatment of withholding-only proceedings also supports applying the *Nasrallah* reasoning to conclude that statutory withholding orders are not final orders of removal.

*F. The Attorney General Should Issue a Memorandum Adopting the Nasrallah Reasoning as Applicable to Statutory Withholding Orders*

Despite the differences between CAT relief and statutory withholding, the basic considerations are similar.<sup>215</sup> Eligibility for both types of relief from removal requires a determination of the likelihood of future harm.<sup>216</sup> Additionally, neither type of relief prevents the removal of noncitizens to a third country where they do not face harm.<sup>217</sup> To remedy the courts'

---

Prison, 905 F.3d 208, 213–19 (3d Cir. 2018); *Martinez v. LaRose*, 968 F.3d 555, 559 (6th Cir. 2020).

211. The parties take these stances on the classification of withholding-only proceedings to support their arguments about which detention rules apply to the noncitizen. *See* cases cited *supra* note 210; *see also* 8 U.S.C. § 1231(a)(2) (providing for detention of a noncitizen who is subjected to a final order of removal); *id.* § 1226(a) (providing for detention of a noncitizen not yet ordered removed from the United States).

212. *See* cases cited *supra* note 210; *see generally* 8 C.F.R. § 1208.31 (2020) (withholding-only proceedings cover only a determination of the noncitizen's eligibility for withholding of removal).

213. Brief for the Petitioners at 4, 16, *Albence v. Guzman Chavez*, 141 S. Ct. 107 (2020) (No. 19-897).

214. *See* cases cited *supra* note 210; *see generally* 8 C.F.R. § 1208.31 (2020) (withholding-only proceedings cover only a determination of the noncitizen's eligibility for withholding of removal).

215. *See* discussion *supra* Section I.D.

216. 8 C.F.R. § 1208.16(b), (c)(2) (2020).

217. *Id.* § 1208.16(f).

different approaches to review of factual challenges to statutory withholding of removal and to CAT relief when the noncitizen falls under 8 U.S.C. § 1252(a)(2)(C), the Attorney General should issue a memorandum adopting the *Nasrallah* rule as well as its reasoning as applicable to statutory withholding of removal.<sup>218</sup> Because the Attorney General has significant authority over immigration matters, his interpretations of immigration statutes are entitled to substantial deference.<sup>219</sup> The Supreme Court cannot address whether statutory withholding orders are final orders of removal for purposes of judicial review until an applicable case occurs, and even then, the Court might choose not to grant certiorari or not to address the issue.<sup>220</sup> Therefore, a memorandum by the Attorney General is the fastest route to ensure the application of *Nasrallah* to statutory withholding orders and to give noncitizens a path to this relief.

#### CONCLUSION

The Supreme Court's reasoning for finding that CAT relief is not a final order of removal for purposes of judicial review should apply by analogy to statutory withholding orders. These withholding orders are similar to CAT relief in that they neither determine a noncitizen's removability nor prevent removal to a country where there is less likelihood of persecution or torture.<sup>221</sup> Further, without this solution, courts will continue to consider statutory withholding orders to be final orders of removal. Consequently, noncitizens with criminal convictions that fall under the jurisdictional bar in § 1252(a)(2)(C) will be unable to seek judicial review of factual challenges to statutory withholding orders, unlike noncitizens in similar situations who seek CAT relief. Thus, the

---

218. See 8 U.S.C. § 1103(a)(1) (establishing that the attorney general's determinations and rulings with respect to questions of law under the INA are controlling).

219. *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215 (5th Cir. 2003); *Amanfi v. Ashcroft*, 328 F.3d 719, 721 (3d Cir. 2003); see 8 U.S.C. § 1103(a)(1) (charging the attorney general with administration and enforcement of the INA); see also *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (noting that the judiciary takes into account the executive branch's greater expertise in immigration law).

220. See *Nasrallah v. Barr* (*Nasrallah II*), 140 S. Ct. 1683, 1694 (2020) (declining to address how the decision affects statutory withholding orders because that was not the specific question before the Court).

221. See *Nasrallah II*, 140 S. Ct. at 1690–91 (holding that a final order of removal is an administrative order that orders a noncitizen's deportation or concludes as to their deportability and that a "final order of removal" includes all decisions that affect the validity of the final order).



application of the *Nasrallah* reasoning to statutory withholding orders would afford these noncitizens an opportunity to receive judicial review of potentially erroneous administrative factual findings about their claims for withholding, regardless of whether the claim is under the INA or the CAT.