SUPREME COURT OF THE UNITED STATES

No. 97–1252

JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 24, 1999]

JUSTICE SCALIA delivered the opinion of the Court.*

Respondents sued petitioners for allegedly targeting them for deportation because of their affiliation with a politically unpopular group. While their suit was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546 (IIRIRA), which contains a provision restricting judicial review of the Attorney General's "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." 8 U. S. C. §1252(g) (1994 ed., Supp. III). The issue before us is whether, as petitioners contend, this provision deprives the federal courts of jurisdiction over respondents' suit.

I

The Immigration and Naturalization Service (INS), a division of the Department of Justice, instituted deportation proceedings in 1987 against Bashar Amer, Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, Naim Sharif, Khader Hamide, and Michel Shehadeh, all of whom belong to the Popular Front for the Liberation of

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*JUSTICE BREYER joins Parts I and II of this opinion.

Palestine (PFLP), a group that the Government characterizes as an international terrorist and communist organization. The INS charged all eight under the McCarran-Walter Act, which, though now repealed, provided at the time for the deportation of aliens who "advocate . . . world communism." See 8 U. S. C. §§1251(a)(6)(D), (G)(v), and (H) (1982 ed.). In addition, the INS charged the first six, who were only temporary residents, with routine status violations such as overstaying a visa and failure to maintain student status.[1] See 8 U. S. C. §§1251(a)(2) and (a)(9) (1988 ed.).

Almost immediately, the aliens filed suit in District Court, challenging the constitutionality of the anti-communism provisions of the McCarran-Walter Act and seeking declaratory and injunctive relief against the Attorney General, the INS, and various immigration officials in their personal and official capacities. The INS responded by dropping the advocacy-of-communism charges, but it retained the technical violation charges against the six temporary residents and charged Hamide and Shehadeh, who were permanent residents, under a different section of the McCarran-Walter Act, which authorized the deportation of aliens who were members of an organization advocating "the duty, necessity, or propriety of the unlawful assaulting or killing of any [government] officer or officers" and "the unlawful damage, injury, or destruction of property." See 8 U. S. C. §§1251(a)(6)(F)(ii)–(iii) (1982 ed.).[2] INS regional counsel William Odencrantz said

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[1]Respondents Barakat and Sharif were subsequently granted legalization and are no longer deportable based on the original status violations. Brief for Petitioners 11, n. 5.

[2]When the McCarran-Walter Act was repealed, a new "terrorist activity" provision was added by the Immigration Act of 1990. See 8 U. S. C. §1227(a)(4)(B) (1994 ed., Supp. III). The INS charged Hamide and Shehadeh under this, but it is unclear whether that was in addi-

at a press conference that the charges had been changed for tactical reasons but the INS was still seeking respondents' deportation because of their affiliation with the PFLP. See *American-Arab Anti-Discrimination Committee* v. *Reno*, 70 F. 3d 1045, 1053 (CA9 1995). Respondents amended their complaint to include an allegation that the INS was selectively enforcing immigration laws against them in violation of their First and Fifth Amendment rights.[3]

Since this suit seeking to prevent the initiation of deportation proceedings was filed– in 1987, during the administration of Attorney General Edwin Meese– it has made four trips through the District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit. The first two concerned jurisdictional issues not now before us. See *Hamide* v. *United States District Court*, No. 87–7249 (CA9, Feb. 24, 1988); *American-Arab Anti-Discrimination Committee* v. *Thornburgh*, 970 F. 2d 501 (CA9 1991). Then, in 1994, the District Court preliminarily enjoined deportation proceedings against the six temporary residents, holding that they were likely to prove that the INS did not enforce routine status requirements against immigrants who were not members of disfavored terrorist groups and that the possibility of deportation, combined with the chill to their First Amendment rights while the proceedings were pending, constituted irreparable injury. With regard to Hamide and Shehadeh's claims, however, the District Court granted summary judgment to the federal parties for reasons not pertinent here.

American-Arab Anti-Discrimination Committee v. *Reno*,

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tion to, or in substitution for, the old McCarran-Walter charges.

[3]The amended complaint was styled as an action for "damages and for declaratory and injunctive relief," but the only monetary relief specifically requested was "costs of suit and attorneys fees." App. 20, 51.

70 F. 3d 1045 (CA9 1995), a case that we shall call *"AADC I"* was the Ninth Circuit's first merits determination in this case, upholding the injunction as to the six and reversing the District Court with regard to Hamide and Shehadeh. The opinion rejected the Attorney General's argument that selective-enforcement claims are inappropriate in the immigration context, and her alternative argument that the special statutory-review provision of the Immigration and Nationality Act (INA), 8 U. S. C. §1105a, precluded review of such a claim until a deportation order issued. See 70 F. 3d, at 1056–1057. The Ninth Circuit remanded the case to the District Court, which entered an injunction in favor of Hamide and Shehadeh and denied the Attorney General's request that the existing injunction be dissolved in light of new evidence that all respondents participated in fundraising activities of the PFLP.

While the Attorney General's appeal of this last decision was pending, Congress passed IIRIRA which, *inter alia*, repealed the old judicial-review scheme set forth in §1105a and instituted a new (and significantly more restrictive) one in 8 U. S. C. §1252. The Attorney General filed motions in both the District Court and Court of Appeals, arguing that §1252(g) deprived them of jurisdiction over respondents' selective-enforcement claim. The District Court denied the motion, and the Attorney General's appeal from that denial was consolidated with the appeal already pending in the Ninth Circuit.

It is the judgment and opinion in that appeal which is before us here: *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F. 3d 1367 (CA9 1997), which we shall call *"AADC II."* It affirmed the existence of jurisdiction under §1252, see *id.*, at 1374, and reaching the merits of the injunctions, again affirmed the District Court, *id.*, at 1374–1376. The Attorney General's petition for rehearing en banc was denied over the dissent of three judges, 132 F. 3d 531 (CA9 1997). The Attorney General sought our

review, and we granted certiorari, 524 U. S. ___ (1998).

II

Before enactment of IIRIRA, judicial review of most administrative action under the INA was governed by 8 U. S. C. §1105a, a special statutory-review provision directing that "the sole and exclusive procedure for . . . the judicial review of all final orders of deportation" shall be that set forth in the Hobbs Act, 28 U. S. C. §2341 *et seq.*, which gives exclusive jurisdiction to the courts of appeals, see §2342. Much of the Court of Appeals' analysis in *AADC I* was devoted to the question whether this pre-IIRIRA provision applied to selective-enforcement claims. Since neither the Immigration Judge nor the Board of Immigration Appeals has authority to hear such claims (a point conceded by the Attorney General in *AADC I*, see 70 F. 3d, at 1055), a challenge to a final order of deportation based upon such a claim would arrive in the court of appeals without the factual development necessary for decision. The Attorney General argued unsuccessfully below that the Hobbs Act permits a court of appeals to remand the case to the agency, see 28 U. S. C. §2347(c) or transfer it to a district court, see §2347(b)(3) for further factfinding. The Ninth Circuit, believing these options unavailable, concluded that an original district-court action was respondents' only means of obtaining factual development and thus judicial review of their selective-enforcement claims. Relying on our decision in *Cheng Fan Kwok* v. *INS*, 392 U. S. 206 (1968), it held that the District Court could entertain the suit under either its general federal-question jurisdiction, see 28 U. S. C. §1331, or the general jurisdictional provision of the INA, see 8 U. S. C. §1329.[4]

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[4]This latter provision was subsequently amended by IIRIRA to make clear that it applies only to actions brought by the United States. See 8 U. S. C. §1329 (1994 ed., Supp. III).

Whether we must delve further into the details of this issue depends upon whether, after the enactment of IIRIRA, §1105a continues to apply to this case. On the surface of things, at least, it does not. Although the general rule set forth in §309(c)(1) of IIRIRA is that the revised procedures for removing aliens, including the judicial-review procedures of §1252, do not apply to aliens who were already in either exclusion or deportation proceedings on IIRIRA's effective date, see note following 8 U. S. C. §1101 (1994 ed., Supp. III),[5] §306(c)(1) of IIRIRA directs that a single provision, §1252(g), shall apply "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." See note following 8 U. S. C. §1252 (1994 ed., Supp. III). Section 1252(g) reads as follows:

> "(g) Exclusive Jurisdiction
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> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."

This provision seemingly governs here, depriving the federal courts of jurisdiction "[e]xcept as provided in this

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[5] Section 309(c)(1) provides:

"(c) Transition for Aliens in Proceedings

"(1) General Rule that New Rules Do Not Apply.– Subject to the succeeding provisions of this subsection [§309(a) carves out §306(c) as an exception], in the case of an alien who is in exclusion or deportation proceedings before the title III–A effective date–

"(A) the amendments made by this subtitle shall not apply, and

"(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." 110 Stat. 3009–625.

section." But whether it is as straightforward as that depends upon the scope of the quoted text. Here, and in the courts below, both petitioners and respondents have treated §1252(g) as covering all or nearly all deportation claims. The Attorney General has characterized it as "a channeling provision, requiring aliens to bring all deportation-related claims in the context of a petition for review of a final order of deportation filed in the court of appeals." Supplemental Brief for Appellants in No. 96–55929 (CA9), p. 2. Respondents have described it as applying to "most of what INS does." Corrected Supplemental Brief for Appellees in No. 96–55929 (CA9), p. 7. This broad understanding of §1252(g), combined with IIRIRA's effective-date provisions, creates an interpretive anomaly. If the jurisdiction-excluding provision of §1252(g) eliminates other sources of jurisdiction in *all* deportation-related cases, and if the phrase in §1252(g) "[e]xcept as provided in this section" incorporates (as one would suppose) all the other jurisdiction-related provisions of §1252, then §309(c)(1) would be rendered a virtual nullity. To say that there is no jurisdiction in pending INS cases "except as" §1252 provides jurisdiction is simply to say that §1252's jurisdictional limitations apply to pending cases as well as future cases– which seems hardly what §309(c)(1) is about. If, on the other hand, the phrase "[e]xcept as provided in this section" were (somehow) interpreted *not* to incorporate the other jurisdictional provisions of §1252– if §1252(g) stood alone, so to speak– judicial review would be foreclosed for all deportation claims in all pending deportation cases, even after entry of a final order.

The Attorney General would have us avoid the horns of this dilemma by interpreting §1252(g)'s phrase "[e]xcept as provided in this section" to mean "except as provided in §1105a." Because §1105a authorizes review of only final orders, respondents must, she says, wait until their administrative proceedings come to a close and then seek re-

view in a court of appeals. (For reasons mentioned above, the Attorney General of course rejects the Ninth Circuit's position in *AADC I* that application of §1105a would leave respondents without a judicial forum because evidence of selective prosecution cannot be introduced into the administrative record.) The obvious difficulty with the Attorney General's interpretation is that it is impossible to understand how the qualifier in §1252(g), "[e]xcept as provided in *this* section" (emphasis added), can possibly mean "except as provided in §1105a." And indeed the Attorney General makes no attempt to explain how this can be, except to observe that what she calls a "literal application" of the statute "would create an anomalous result." Brief for Petitioners 30, n. 15.

Respondents note this deficiency, but offer an equally implausible means of avoiding the dilemma. Section 309(c)(3) allows the Attorney General to terminate pending deportation proceedings and reinitiate them under §1252.[6] They argue that §1252(g) applies only to those pending cases in which the Attorney General has made that election. That way, they claim, the phrase "[e]xcept as provided in this section" can, without producing an anomalous result, be allowed to refer (as it says) to all the rest of §1252. But this approach collides head-on with §306(c)'s prescription that §1252(g) shall apply "*without limitation* to claims arising from *all* past, pending, or future exclusion, deportation, or removal proceedings." See note following 8 U. S. C. §1252 (1994 ed., Supp. III) (emphasis added). (Respondents argue in the alternative, of course, that if the Attorney General is right and §1105a does apply, *AADC I* is correct that their claims will be

[6] It is unclear why the Attorney General has not exercised this option in this case. Respondents have taken the position that the District Court's injunction prevents her from doing so. Brief for Respondents 41, n. 38.

effectively unreviewable upon entry of a final order. For this reason, and because they say that habeas review, if still available after IIRIRA,[7] will come too late to remedy this First Amendment injury, respondents contend that we must construe §1252(g) not to bar *constitutional* claims.)

The Ninth Circuit, for its part, accepted the parties' broad reading of §1252(g) and concluded, reasonably enough, that on that reading Congress could not have meant §1252(g) to stand alone:

> "Divorced from all other jurisdictional provisions of IIRIRA, subsection (g) would have a more sweeping impact on cases filed before the statute's enactment than after that date. Without incorporating any exceptions, the provision appears to cut off federal jurisdiction over all deportation decisions. We do not think that Congress intended such an absurd result." 119 F. 3d, at 1372.

It recognized, however, the existence of the other horn of the dilemma ("that retroactive application of the entire amended version of 8 U. S. C. §1252 would threaten to render meaningless section 306(c) of IIRIRA," *ibid.*), and resolved the difficulty to its satisfaction by concluding that "at least *some* of the other provisions of section 1252" must

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[7] There is disagreement on this point in the Courts of Appeals. Compare *Hose* v. *INS*, 141 F. 3d 932, 935 (CA9) (habeas not available), withdrawn and reh'g en banc granted, 161 F. 3d 1225 (1998), *Richardson* v. *Reno*, 162 F. 3d 1338 (CA11 1998) (same), and *Yang* v. *INS*, 109 F. 3d 1185, 1195 (CA7 1997) (same), with *Goncalves* v. *Reno*, 144 F. 3d 110, 122 (CA1 1998) (habeas available), and *Henderson* v. *INS*, 157 F. 3d 106, 117–122 (CA2 1998) (same). See also *Magana-Pizano* v. *INS*, 152 F. 3d 1213, 1220 (CA9 1998) (elimination of habeas unconstitutional); *Ramallo* v. *Reno*, 114 F. 3d 1210, 1214 (CADC 1997) (§1252(g) removes statutory habeas but leaves "constitutional" habeas intact).

be included in subsection (g) "when it applies to pending cases." *Ibid.* (emphasis added). One of those provisions, it thought, must be subsection (f), entitled "Limit on Injunctive Relief," which reads as follows:

> "Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated."

The Ninth Circuit found in this an affirmative grant of jurisdiction that covered the present case. The Attorney General argued that any such grant of jurisdiction would be limited (and rendered inapplicable to this case) by §1252(b)(9), which provides:

> "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section."

The Ninth Circuit replied that, even if §1252(b)(9) were one of those provisions incorporated into the transitional application of §1252(g), it could not preclude this suit for the same reason *AADC I* had held that §1105a could not do so– namely, the Court of Appeals' lack of access to factual findings regarding selective enforcement.

Even respondents scarcely try to defend the Ninth Circuit's reading of §1252(f) as a jurisdictional grant. By its plain terms, and even by its title, that provision is nothing

more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§1221–1231, but specifies that this ban does not extend to individual cases. To find in this an affirmative grant of jurisdiction is to go beyond what the language will bear.

We think the seeming anomaly that prompted the parties' strained readings of §1252(g)– and that at least accompanied the Court of Appeals' strained reading– is a mirage. The parties' interpretive acrobatics flow from the belief that §306(c)(1) cannot be read to envision a straightforward application of the "[e]xcept as provided in this section" portion of §1252(g), since that would produce in *all* pending INS cases jurisdictional restrictions identical to those that were contained in IIRIRA anyway. That belief, however, rests on the unexamined assumption that §1252(g) covers the universe of deportation claims– that it is a sort of "zipper" clause that says "no judicial review in deportation cases unless this section provides judicial review." In fact, what §1252(g) says is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her "decision or action" to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." (Emphasis added.) There are of course many other decisions or actions that may be part of the deportation process– such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order.

It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting. We

are aware of no other instance in the United States Code in which language such as this has been used to impose a general jurisdictional limitation; and that those who enacted IIRIRA were familiar with the normal manner of imposing such a limitation is demonstrated by the text of §1252(b)(9), which stands in stark contrast to §1252(g).

It could be argued, perhaps, that §1252(g) is redundant if it channels judicial review of only *some* decisions and actions, since §1252(b)(9) channels judicial review of *all* of them anyway. But that is not so, since only §1252(g), and *not* §1252(b)(9) (except to the extent it is incorporated within §1252(g)), applies to what § 309(c)(1) calls "transitional cases," that is, cases pending on the effective date of IIRIRA. That alone justifies its existence. It performs the function of categorically excluding from non-final-order judicial review– even as to transitional cases otherwise governed by §1105a rather than the unmistakable "zipper" clause of §1252(b)(9)– certain specified decisions and actions of the INS. In addition, even after all the transitional cases have passed through the system, §1252(g) as we interpret it serves the continuing function of making it clear that those specified decisions and actions, which (as we shall discuss in detail below) some courts had held *not* to be included within the non-final-order review prohibition of §1105a, *are* covered by the "zipper" clause of §1252(b)(9). It is rather the Court of Appeals' and the parties' interpretation which renders §1252(g) entirely redundant, adding to one "zipper" clause that does not apply to transitional cases, another one of equal scope that *does* apply to transitional cases. That makes it entirely inexplicable why the transitional provisions of §306(c) refer to §1252(g) instead of §1252(b)(9)– and why §1252(g) exists at all.

There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of "commenc-

[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"– which represent the initiation or prosecution of various stages in the deportation process. At each stage the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as "deferred action") of exercising that discretion for humanitarian reasons or simply for its own convenience.[8] As one treatise describes it:

> "To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that, for the humanitarian reasons described below, no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated." 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure §72.03[2][h] (1998).

See also *Johns* v. *Department of Justice*, 653 F. 2d 884,

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[8] Prior to 1997, deferred-action decisions were governed by internal INS guidelines which considered, *inter alia*, such factors as the likelihood of ultimately removing the alien, the presence of sympathetic factors that could adversely affect future cases or generate bad publicity for the INS, and whether the alien had violated a provision that had been given high enforcement priority. See 16 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure §242.1 (1998). These were apparently rescinded on June 27, 1997, but there is no indication that the INS has ceased making this sort of determination on a case-by-case basis. See *ibid*.

890–892 (CA5 1981). Since no generous act goes unpunished, however, the INS's exercise of this discretion opened the door to litigation in instances where the INS chose *not* to exercise it.

> "[I]n each such instance, the determination to withhold or terminate deportation is confined to administrative discretion. . . . Efforts to challenge the refusal to exercise such discretion on behalf of specific aliens sometimes have been favorably considered by the courts, upon contentions that there was selective prosecution in violation of equal protection or due process, such as improper reliance on political considerations, on racial, religious, or nationality discriminations, on arbitrary or unconstitutional criteria, or on other grounds constituting abuse of discretion." Gordon, Mailman, & Yale-Loehr, *supra*, §72.03[2][a] (footnotes omitted).

Such litigation was possible because courts read §1105a's prescription that the Hobbs Act shall be "the sole and exclusive procedure for the judicial review of all final orders of deportation" to be inapplicable to various decisions and actions leading up to or consequent upon final orders of deportation, and relied on other jurisdictional statutes to permit review. See, *e.g.*, *Cheng Fan Kwok* v. *INS*, 392 U. S. 206 (1968) (review of refusal to stay deportation); *Ramallo* v. *Reno*, Civ. No. 95–01851 (D.D.C., July 23, 1996) (review of execution of removal order), described in and rev'd on other grounds, 114 F. 3d 1210 (CADC 1997); *AADC I*, 70 F. 3d 1045 (CA9 1995) (review of commencement of deportation proceedings); *Lennon* v. *INS*, 527 F. 2d 187, 195 (CA2 1975) (same, dicta). Section 1252(g) seems clearly designed to give some measure of protection to "no deferred action" decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate

rounds of judicial intervention outside the streamlined process that Congress has designed.[9]

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[9]This history explains why JUSTICE SOUTER ought not find it "hard to imagine that Congress meant to bar aliens already in proceedings . . . from challenging the commencement of proceedings against them, but to permit the same aliens to challenge, say, the decision of the Attorney General to open an investigation of them or to issue a show cause order." *Post*, at 6. It was the acts covered by §1252(g) that had prompted challenges to the Attorney General's exercise of prosecutorial discretion. We know of no case involving a challenge to "the decision . . . to open an investigation"– perhaps because such decisions are rarely made public. And we know of no case challenging "the decision . . . to issue a show cause order" (though that might well be considered a mere specification of the decision to "commence proceedings" which some cases do challenge and which §1252(g) covers). Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion. It does not tax the imagination to understand why it focuses upon the stages of administration where those attempts have occurred.

But in any event, any challenge to imagination posed by reading §1252(g) as written would be small price to pay for escaping the overwhelming difficulties of JUSTICE SOUTER's theory. He makes no effort to explain why his broad, catchall reading of §1252(g) does not render it redundant of §1252(b)(9). And his throw-in-the-towel approach to §306(c)(1), which reads it out of the statute because he finds it difficult to explain, see *post*, at 9, not only strains the imagination but ruptures the faculty of reason. We do not think our interpretation "parses [§1252(g)] too finely," *post*, at 5; but if it did, we would think that modest fault preferable to the exercise of such a novel power of nullification.

JUSTICE STEVENS, like JUSTICE SOUTER, rejects §1252(g)'s explicit limitation to specific steps in the deportation process. He then invokes the conflict with §306(c)(1) that this expansive interpretation creates as justification for concluding that, when §1252(g) uses the word "section," it "can't mean what it says," *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 511 (1989) (internal quotation marks omitted)– empowering him to declare a "scrivenor's error" and to change the word "section" to "Act." JUSTICE STEVENS' approach, like JUSTICE SOUTER's, renders §1252(g) redundant of §1252(b)(9). That problem *is* solved by our more conventional solution: reading *both* "commence proceedings, adjudicate cases, or execute removal orders" *and* "section" to mean precisely what

Of course *many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts– indeed, that can fairly be said to be the theme of the legislation. See, *e.g.*, 8 U. S. C. §1252(a)(2)(A) (limiting review of any claim arising from the inspection of aliens arriving in the United States); §1252(a)(2)(B) (barring review of denials of discretionary relief authorized by various statutory provisions); §1252(a)(2)(C) (barring review of final removal orders against criminal aliens); §1252(b)(4)(D) (limiting review of asylum determinations for resident aliens). It is entirely understandable, however, why Congress would want only the discretion-protecting provision of §1252(g) applied even to pending cases: because that provision is specifically directed at the deconstruction, fragmentation, and hence prolongation of removal proceedings.

Our narrow reading of §1252(g) makes sense of the statutory scheme as a whole, for it resolves the supposed tension between §306(c)(1) and §309(c)(1). In cases to which §1252(g) applies, the rest of §1252 is incorporated through the "[e]xcept as provided in this section" clause. This incorporation does not swallow §309(c)(1)'s general rule that §§1252(a)–(f) do not apply to pending cases, for §1252(g) applies to only a limited subset of deportation claims. Yet it is also faithful to §306(c)(1)'s command that §1252(g) be applied "without limitation" (*i.e.*, including the "[e]xcept as provided" clause) to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings."

Respondents' challenge to the Attorney General's decision to "commence proceedings" against them falls squarely within §1252(g)– indeed, as we have discussed, the language seems to have been crafted with such a challenge precisely in mind– and nothing elsewhere in §1252 provides for jurisdiction. Cf. §1252(a)(1)(review of final

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they say.

orders); §1252(e)(2) (limited habeas review for excluded aliens); §1252 (e)(3)(A) (limited review of statutes and regulations pertaining to the exclusion of aliens). As we concluded earlier, §1252(f) plainly serves as a limit on injunctive relief rather than a jurisdictional grant.

III

Finally, we must address respondents' contention that, since the lack of prior factual development for their claim will render the §1252(a)(1) exception to §1252(g) unavailing; since habeas relief will also be unavailable; and since even if one or both were available they would come too late to prevent the "chilling effect" upon their First Amendment rights; the doctrine of constitutional doubt requires us to interpret §1252(g) in such fashion as to permit immediate review of their selective-enforcement claims. We do not believe that the doctrine of constitutional doubt has any application here. As a general matter– and assuredly in the context of claims such as those put forward in the present case– an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.[10]

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[10] Instead of resolving this constitutional question, JUSTICE GINSBURG chooses to resolve the constitutional question whether Congress can exclude the courts from remedying an alleged First Amendment violation with immediate effects, pending the completion of administrative proceedings. It is not clear to us that this is easier to answer than the question we address– as is evident from the fact that in resolving it JUSTICE GINSBURG relies almost exclusively on cases dealing with the quite different question of federal-court intervention in state proceedings. (Even in that area, most of the cases she cites where we did not intervene involved no claim of present injury from the state action– and none involved what we have here: an admission by the Government that the alleged First Amendment activity was the basis for selecting the individuals for adverse action. Cf. *Dombrowski* v. *Pfister*, 380 U. S. 479, 487–488, n. 4 (1965).) The one case not involving federal-state relations in fact *overrode* a congressional requirement for completion of

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administrative proceedings– even though, unlike here, no immediate harm was apparent. See *Oestereich* v. *Selective Serv. System Local Bd. No. 11*, 393 U. S. 233 (1968). JUSTICE GINSBURG counts the case as one for *her* side on the basis of nothing more substantial than the Court's characterization of the agency action at issue as "blatantly lawless," *id.*, at 238. See *post*, at 3.

Nor is it clear that the constitutional question JUSTICE GINSBURG addresses has narrower application and effect than the one we resolve. Our holding generally deprives deportable aliens of the defense of selective prosecution. Hers allows all citizens and resident aliens to be deprived of constitutional rights (at least where the deprivation is not "blatantly lawless") pending the completion of agency proceedings.

Finally, JUSTICE GINSBURG acknowledges that her constitutional conclusion might be different if "a court of appeals reviewing final orders of removal against respondents could not consider their selective enforcement claims." *Post*, at 4. But she never establishes that a court of appeals *can* consider their selective enforcement claims, though she expresses "confiden[ce]" (despite the Ninth Circuit's holding to the contrary) that that would be the outcome. *Post*, at 5, n. 2. How well-founded that confidence is may be assessed by considering the first and most substantial option upon which it is based, namely, "the Attorney General's position that the reviewing court of appeals may transfer a case to a district court . . . and counsel's assurance at oral argument that petitioners will adhere to that position . . . ." *Post*, at 5. What petitioners primarily rely upon for this concession is the provision of the Hobbs Act that authorizes remand to the agency or transfer to a district court "[w]hen the agency has not held a hearing." 28 U. S. C. §2347(b). It is not at all clear that this should be interpreted to mean "when the agency's hearing has not addressed the particular point at issue"– especially since that situation is specifically covered by §2347(c) (providing for remand in such circumstances), which the new amendments explicitly render inapplicable to deportation cases, see 8 U. S. C. §1252(a)(1) (1994 ed., Supp. III). Petitioners' position is cast further in doubt by the fact that the Hobbs Act remedy for failure to hold a hearing "required by law" is not the transfer which petitioners assert, but *remand*, see 28 U. S. C. §2347(b)(1). Of course petitioners' promise not to quibble over this transfer point is of no value, since the point goes to jurisdiction and must be raised by the District Court *sua sponte*. It is quite possible, therefore, that what JUSTICE GINSBURG's approach would ultimately accomplish in this litigation is requiring us to address *both* the constitutional issue she now addresses *and* (upon termination of the administrative proceedings) the constitutional issue we now

Even in the criminal-law field, a selective prosecution claim is a *rara avis*. Because such claims invade a special province of the Executive– its prosecutorial discretion– we have emphasized that the standard for proving them is particularly demanding, requiring a criminal defendant to introduce "clear evidence" displacing the presumption that a prosecutor has acted lawfully. *United States* v. *Armstrong*, 517 U. S. 456, 463–465 (1996). We have said:

> "This broad discretion [afforded the Executive] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All of these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute." *Wayte* v. *United States*, 470 U. S. 598, 607–608 (1985).

These concerns are greatly magnified in the deportation context. Regarding, for example, the potential for delay: Whereas in criminal proceedings the consequence of delay is merely to postpone the criminal's receipt of his just deserts, in deportation proceedings the consequence is to

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resolve. We think it preferable to resolve only the one (and we think narrower) issue at once.

permit and prolong a continuing violation of United States law. Postponing justifiable deportation (in the hope that the alien's status will change– by, for example, marriage to an American citizen– or simply with the object of extending the alien's unlawful stay) is often the principal object of resistance to a deportation proceeding, and the additional obstacle of selective-enforcement suits could leave the INS hard pressed to enforce routine status requirements. And as for "chill[ing] law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry": What will be involved in deportation cases is not merely the disclosure of normal domestic law-enforcement priorities and techniques, but often the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products and techniques. The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat– or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals– and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy. Moreover, the consideration on the other side of the ledger in deportation cases– the interest of the target in avoiding "selective" treatment– is less compelling than in criminal prosecutions. While the consequences of deportation may assuredly be grave, they are not imposed as a punishment, see *Carlson* v. *Landon*, 342 U. S. 524, 537 (1952). In many cases (for six of the eight aliens here) deportation is sought simply because the time of permitted residence in this country has expired, or the activity for which residence was permitted has been completed. Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in

all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.

To resolve the present controversy, we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome. Whether or not there be such exceptions, the general rule certainly applies here. When an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity.

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Because 8 U. S. C. §1252(g) deprives the federal courts of jurisdiction over respondents' claims, we vacate the judgment of the Ninth Circuit and remand with instructions for it to vacate the judgment of the District Court.

It is so ordered.