Mansour v. INS: Sixth Circuit Holds Judicial Review of Final Orders of Deportation Against Certain Criminal Aliens Available Solely Through Habeas Corpus Proceedings

In 1981, Ghassan Mansour (Mansour), a citizen of Iraq, entered the United States after inspection by the United States Immigration and Naturalization Service (INS), and was admitted as an immigrant.[1] Mr. Mansour, a resident of Oak Park, Michigan,[2] was subsequently convicted of conspiring to possess a controlled substance by a Michigan state court in 1988.[3] In 1991, the INS initiated deportation proceedings against Mansour based on his state court drug conviction, a crime which rendered him deportable under the Immigration and Nationality Act (INA) as an aggravated felon.[4] After conceding deportability, Mansour applied for, but was denied discretionary relief for long time permanent residents[5] by the Immigration Judge (IJ). On appeal, the Board of Immigration Appeals (BIA or Board) agreed with the IJ's order to deport Mansour.[6] Mansour appealed the Board's ruling directly to the United States Court of Appeals for the Sixth Circuit.[7] Following Mansour's appeal of the Board's ruling, but prior to the circuit court's ruling, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[8] Rejecting Mansour's Suspension Clause,[9] Fifth Amendment due process, and separation of powers arguments, the court *held* that Mansour's appeal must be dismissed for lack of subject matter jurisdiction since, with the exception of habeas corpus proceedings, the AEDPA precludes any opportunity for judicial review of final orders of

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1. *See* Mansour v. INS, 123 F.3d 423, 424 (6th Cir. 1997).
2. Ben L. Kaufman, *BENCHMARKS: Appeal Doesn't Derail Deportation, Court Rules That Iraqi Had Way To Fight Penalty*, CINCINNATI ENQUIRER, Nov. 23, 1997, at B4.
3. Mansour, 123 F.3d at 424.
4. *Id.* (citing the Immigration and Nationality Act § 241(a)(11), 8 U.S.C. § 1251(a)(2)(B) (Supp. 1997)) [hereinafter INA].
5. *Id.* (citing INA § 212(c), 8 U.S.C. § 1182(c) (1995)).
6. *See id.*
7. INA § 106(a) confers exclusive jurisdiction on the circuit courts to review a final order of deportation. 8 U.S.C. § 1105a(a) (1995).
8. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996) [hereinafter AEDPA]. President Clinton signed the AEDPA into law on the first anniversary of the Oklahoma City bombing.
9. The Suspension Clause of the United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

deportation[10] by certain specified classes of criminal aliens, of which Mansour was a member. *Mansour v. Immigration and Naturalization Service*, 123 F.3d 423 (6th Cir. 1997).

The INA has long provided for deportation of lawful permanent residents, nonimmigrants, and undocumented aliens who are convicted of major crimes, or who are found guilty of a certain series of multiple but less serious crimes committed while present in the United States.[11] Alien criminals can be removed from the United States for committing an "aggravated felony," which includes controlled substances violations,[12] certain firearms offenses,[13] and a constantly growing number of other less serious criminal offenses. Additionally, aliens convicted of certain crimes of moral turpitude are considered deportable.[14]

Prior to enactment of the AEDPA and the more recent Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[15] INA provisions allowed federal appeals courts to review most administrative deportation orders.[16] Thus, an unfavorable decision rendered by the IJ could be appealed by the alien to the BIA.[17] The BIA was and is entitled to review the hearing record de novo, and to "make its own findings and independently determine the legal sufficiency of the evidence."[18] The BIA's decision in a deportation proceeding could then be appealed directly to the court of appeals through a petition to review in the circuit where the Order to Show Cause was issued. Therefore, virtually all agency decisions or interpretations based on errors of law were reviewable by the federal courts.[19] Federal courts, however, were

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10. Technically, the term "deportation" has been eliminated from the lexicon of U.S. immigration law for aliens whose removal proceedings begin on or after April 1, 1997. Changes to the INA have merged both the former exclusion and deportation hearings into one unified procedure now termed "Removal Proceedings." *See* 8 U.S.C. § 1229 (1997).

11. *See* Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7341-7345, 102 Stat. 4181, 4469-71 (1988) (rendering aliens deportable under a new criminal classification in the INA entitled "aggravated felon"); Matter of Sanchez, 17 I.& N. Dec. 218 (BIA 1980) (holding alien deportable for crime involving moral turpitude within five years of entry where alien is sentenced to or serves one year in prison); Gonzalez-Sandoval v. INS, 910 F.2d 614 (9th Cir. 1990) (holding alien deportable for two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 71-74 (3d ed. 1992).

12. *See* 8 U.S.C. § 1251(a)(2)(B) (1995).

13. *See id.* § 1251(a)(2)(C).

14. *See id.* § 1251(a)(2)(A).

15. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

16. 8 U.S.C. § 1105a(a)(1)-(6) (1995).

17. *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 623 (5th ed. 1995).

18. *Id.* at 631 (citing Charlesworth v. INS, 966 F.2d 1323, 1325 (9th Cir. 1992)).

19. *See id.* at 632 (citing INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).

generally limited to a review of the agency's record and were not permitted to decide factual questions de novo.[20]

Prior to 1996, the INA clearly provided for collateral habeas corpus review of BIA judgments in federal court.[21] Alien detainees in deportation proceedings could obtain judicial review by habeas corpus if detained pursuant to the order of deportation.[22] The alien could then question whether detention by the government violated his or her right to liberty under the Fifth Amendment. However, in an effort to expedite removal of certain aliens, including those attempting to enter the United States illegally, Congress limited the ability of aliens to obtain judicial review in an Article III court if the alien was subject to a final order of exclusion.[23] Aliens under exclusion orders were limited exclusively to habeas corpus proceedings for federal court review.[24]

The prospect of success in a habeas corpus review of a deportation order was not as daunting before AEDPA as is the case under current immigration law. The scope of relief available in habeas review prior to AEDPA was relatively broad, as the writ of habeas corpus was at the time the only method of federal judicial review of deportation orders. Although the Supreme Court had held that deportation decisions were "nonreviewable to the fullest extent possible under the Constitution,"[25] courts continued to hear habeas petitions even on a variety of constitutional and nonconstitutional claims because of the belief that the Constitution required such latitude for relief through habeas corpus.[26]

Changes to the INA in 1996 drastically altered the effect and availability of these forms of relief from deportation for criminal aliens. Congress enacted the AEDPA, which provided that no federal court could review final orders of deportation for certain specified classes of criminal aliens. Congress enacted the immigration provisions of the AEDPA to achieve several objectives, including expediting removal of

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20. *See id.* at 632.

21. 8 U.S.C. § 1105a(a)(10) (1995) (stating in INA § 106 that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings").

22. *See id.*

23. An "exclusion proceeding" was the prior term used for the judicial process by which a noncitizen who illegally "entered" the United States was removed. *See id.* § 1226.

24. *Id.* § 1105a(b).

25. Heikkila v. Barber, 345 U.S. 229, 234 (1953) (interpreting the Immigration Act of 1917).

26. *See* Note, *The Constitutional Requirement Of Judicial Review for Administrative Deportation Decisions*, 110 HARV. L. REV. 1850, 1862 (1997) (citing *Heikkila*, 345 U.S. at 236).

criminal aliens from the United States.[27] Thus, section 440(a) of the AEDPA amended section 106(a)(10) of the INA, and in its place substituted language barring judicial review of certain final orders of deportation:

> [A]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii) [aggravated felon], (B) [controlled substance violation], (C) [firearms or explosives charges], or (D) [sabotage, treason or sedition], or any offense covered by section 241(a)(2)(A)(ii) . . . for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.[28]

Additionally, the AEDPA repealed the grant of habeas review that was found in section 106 of the INA, though Congress did not strictly declare this repeal the end of any type of habeas review of final orders of deportation.[29] This repeal provision was controversial in that it seemingly eliminated even the possibility of habeas review of deportation orders against criminal aliens. Shortly thereafter, the state of the law was further complicated as the AEDPA was itself amended. On September 30, 1996, President Clinton signed into law the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[30] IIRIRA section 306(d) amended AEDPA Section 440(a) to apply its bar to judicial review to certain criminal offenses retroactively without regard to when the crime was committed.[31] IIRIRA also provides that no alien, whether deportable on criminal or noncriminal grounds, may appeal the denial of

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27. *See* H.R. REP. NO. 104-469(I), at 360 (1996), *available in* 1996 WL 168955 (legislative history demonstrating that amendments to judicial review provisions were enacted in order to provide a "streamlined appeal and removal process").

28. 8 U.S.C. § 1105a(a)(10) (1997) (as amended by AEDPA § 440(a)). Unamended, the AEDPA arguably did not completely divest the federal courts of appellate review: judicial review remained available to aliens who committed very minor offenses, and to certain aliens who had only been convicted of one crime of moral turpitude. *See, e.g.*, AEDPA § 440(a), 8 U.S.C. § 1251(a)(2)(A) (Supp. 1997).

29. AEDPA, *supra* note 8, § 401(e) (section entitled "Elimination of Custody Review by Habeas Corpus"), repealing INA § 106(a)(10).

30. Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

31. IIRIRA created new INA § 242(a)(2)(C), codified at 8 U.S.C. § 1252(a)(2)(C), which provides that:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) [crimes of moral turpitude] or 1227(a)(2)(A)(iii) [aggravated felony], (B) [most drug convictions], (C) [firearms offenses], or (D) [espionage and other offenses] of this title, or any offense covered by section 1227(a)(2)(A)(ii) [conviction for two or more crimes of moral turpitude] of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

discretionary relief, such as a section 212(c) waiver, cancellation of removal, or voluntary departure, placing that power solely within the discretion of the Attorney General.[32]

The court-stripping measures of the AEDPA can be understood only in light of the substantial deference shown by the federal courts to congressional authority to regulate aliens and immigration. The power of Congress to regulate the flow of aliens into the United States has been described by the courts as plenary.[33] Courts have justified this deference by indicating that the power to control the flow of aliens across our borders is an inherent and necessary exercise of national sovereignty.[34] Since then, federal courts have accepted the authority of Congress to limit Article III court review of removal orders against aliens.[35] However, no court has pointed to a specific provision in the Constitution that expressly grants Congress this seemingly limitless power to regulate aliens and immigration.[36] The grant of plenary power to Congress over immigration matters has been afforded far less deference when the exercise of that power interfered with substantive constitutional rights, including the right to seek habeas corpus.[37] Federal courts have maintained the power to grant writs of habeas corpus since enactment of the Judiciary Act of 1789, longer than the United States has actively exercised its right to

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32. *See* INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i).

33. *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (indicating that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens").

34. *See* Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953); *see also* Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (noting that in the exercise of its broad power over immigration and naturalization "Congress regularly makes rules that would be unacceptable if applied to citizens"); Galvan v. Press, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government."); The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 609 (1889) (holding that the power of exclusion of foreigners is an incident of sovereignty which belongs to the government of the United States as a part of the sovereign powers delegated by the Constitution).

35. *See* Hines v. Davidowitz, 312 U.S. 52 (1941) (Congress has the exclusive power to regulate aliens); Carlson v. Landon, 342 U.S. 524, 537 (1952) (indicating that Congress has the power to regulate exclusion, admission, and expulsion of aliens and, therefore, may grant this power exclusively to executive officers with "such opportunity for judicial review of their action as Congress may see fit to authorize or permit").

36. *See* Margaret Gaisford, Note, *Ideologically Excluded Aliens and Their Entitlement to Fundamental Procedural Rights*, 13 SUFFOLK TRANSNAT'L L.J. 229, 231-32 (1989). The Constitution does specifically grant Congress the power to "establish a uniform Rule of Naturalization . . . ." U.S. CONST. art I, § 8, cl. 4.

37. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 117 S. Ct. 1871, 1878 (1997) (refusing to apply statute retroactively where statute that created jurisdiction where none previously existed addressed substantive rights of the parties despite being phrased in "jurisdictional" terms); Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994).

control the flow of persons across its borders.[38] Since then, habeas corpus has become perhaps the most firmly established bastion of human rights enshrined by the Constitution.[39]

However, though it has enjoyed an honored position among rights specified in the Constitution, some opportunities for habeas review have been indirectly restricted via Congressional authority under the Exceptions Clause to control federal court subject matter jurisdiction.[40] The Exceptions Clause has been interpreted as conferring upon Congress broad authority[41] to restrict federal court appellate jurisdiction, whereby Congress may modify or completely eliminate judicial review of certain subject matters.[42]

AEDPA's court-stripping provision is not unique, as jurisdictional limitations or complete preemption have been imposed on Article III courts by Congress. The removal of appellate review of administrative agency action is not unprecedented, as it is specifically provided for in the Administrative Procedure Act (APA).[43] However, the APA confers a general cause of action upon those "adversely affected or aggrieved by agency action within the meaning of a relevant statute,"[44] and forbids any cause of action to the extent the relevant statute "preclude[s] judicial review."[45] Even though direct judicial review is subject to federal court jurisdiction as modified by Congress, when a jurisdictional statute substantially impinges on substantive rights, it is subject to due process and other constitutional challenges.[46]

An example of jurisdictional limits on the federal courts is *Ex Parte McCardle.*[47] There, the Supreme Court clarified Congress's authority over federal appellate jurisdiction in habeas corpus actions. A Mississippi newspaper editor was imprisoned for certain statements "founded upon

38. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

39. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1869); *see* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 143-47 (1952).

40. *See* U.S. CONST. art. III, § 2, cl. 2 (establishing that the appellate jurisdiction of federal circuit courts is subject to "such Exceptions" and "such Regulations as the Congress shall make").

41. *See* United States v. Sprague, 282 U.S. 716, 731-32 (1931) (The "normal and ordinary" meaning of "exceptions" and "regulations" justifies expansive congressional power in the regulation of aliens.).

42. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

43. 5 U.S.C. § 701 *et seq.* (1997).

44. *Id.* § 702.

45. *Id.* § 701(a)(1).

46. *See Hughes Aircraft*, 117 S. Ct. at 1878; *Landgraf*, 511 U.S. at 274.

47. 74 U.S. (7 Wall.) 506 (1868).

the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor."[48] These statements allegedly contravened free speech restrictions imposed on former Confederate states by the Reconstruction Act. McCardle's petition for habeas corpus to challenge the legality of his imprisonment was denied by the circuit court.[49] After certiorari was granted by the Supreme Court, but prior to a final ruling by the Court, Congress repealed the legislation that had given federal courts jurisdiction to hear the case.[50]

The Supreme Court responded by unanimously dismissing McCardle's appeal for want of jurisdiction. The *McCardle* Court noted that its appellate jurisdiction "is conferred 'with such exceptions and under such regulations as Congress shall make.'"[51] The Court announced the rule that has justified court-stripping of certain habeas corpus actions under the Constitution:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.
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> What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.[52]

The Supreme Court most recently revisited this issue in *Felker v. Turpin*,[53] which recently addressed a provision of the AEDPA that altered existing rules on second habeas corpus petitions.[54] In *Felker*, the petitioner argued that AEDPA modifications which limited the number of habeas corpus requests by prisoners constituted a suspension of writ habeas. The Felker Court held that the AEDPA did not repeal the Court's authority to entertain original habeas petitions filed pursuant to 28 U.S.C. § 2241.[55] The Court reasoned that repeals of

48. *Id.* at 508 (statement of the case).

49. *See id.*

50. *See* William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice*, 54 LA. L. REV. 1161, 1168 (1994). Chief Justice Rehnquist indicated that Congress repealed the habeas corpus provisions because there was concern that the Supreme Court would use McCardle's case to declare the Reconstruction Act unconstitutional. *Id.*

51. 74 U.S. (7 Wall.) at 512-13 (quoting U.S. CONST. art. III, § 2, cl. 2).

52. *Id.* at 514.

53. 116 S. Ct. 2333, *reh'g denied*, 117 S. Ct. 25 (1996).

54. Petitioner was required and failed to make the showing of "exceptional circumstances" that the statute mandated for review of a successive petition. *See id.* at 2341.

55. *See id.* at 2337-38.

habeas corpus jurisdiction by implication have been generally disfavored by the courts. Accordingly, the Supreme Court held that since the AEDPA did not specifically make mention of Section 2241, the AEDPA should not be interpreted to repeal that statute's habeas corpus review by implication.[56]

Few of the district courts in 1996 indicated whether habeas review remained available under the AEDPA, and if so, whether eliminating habeas review for criminal aliens would be constitutional.[57] In *Mbiya v. INS*,[58] one of the first major district court cases to deal squarely with the availability of judicial review under the AEDPA, the U.S. District Court for the Northern District of Georgia held that it had no power to directly review a final order of deportation against individuals covered by the AEDPA's court stripping provisions. Moreover, the court implied that judicial review by a district court would be required when an order of deportation "would result in a fundamental miscarriage of justice."[59] The court decided that Congress intended to permit Article III review for those covered by section 440(a) of the AEDPA only through habeas review. The court noted that where judicial review was precluded because of a criminal conviction aliens could seek a writ of habeas corpus, but that the scope of this habeas was limited to situations in which the alien petitioner could show that his deportation would "result in a fundamental miscarriage of justice."[60] The court characterized its limits on the type of habeas review, here at the constitutionally mandated minimum, as a means of "preserv[ing] the balance between the Suspension Clause and Congress' plenary authority to control immigration."[61]

Although the *Mbiya* court denied the criminal alien discretionary relief from deportation, the court indicated in passing that a total

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56. *See id.* at 2338-39.

57. *See* Veliz v. Caplinger, No. CIV.A. 96-1508 (E.D. La. Feb.12, 1997), *available in* 1997 WL 61456, at *2 (stating that the privilege of habeas corpus is assured by constitutional mandate and by "generalized statutory directions"); Eltayeb v. Ingham, 950 F. Supp. 95, 99-100 (S.D.N.Y. 1997) (concluding that habeas review continues to be available in the district court); Powell v. Jennifer, 937 F. Supp. 1245, 1252-53 (E.D. Mich. 1996) (holding that habeas review continues to be available under 28 U.S.C. § 2241, but only if the alien's deportation would result in a "fundamental miscarriage of justice"); Dunkley v. Perryman, No. 96 C 3570 (N.D. Ill. Aug.9, 1996), *available in* 1996 WL 464191, at *3 (noting that AEDPA § 440(a) did not clearly eliminate the court's jurisdiction over the alien's habeas petition, but also questioning whether the habeas petition could be placed exclusively "within the exclusive jurisdiction of the federal courts of appeal").

58. 930 F. Supp. 609 (N.D. Ga. 1996).

59. *Id.* at 612.

60. *Id.*

61. *Id.*

elimination of all forms of judicial review of final orders of deportation,[62] including all opportunity of judicial review via habeas corpus, would render section 440(a) of the AEDPA unconstitutional.[63]

Aside from the court in the noted case, almost all other circuit courts have had an opportunity to review challenges to the judicial review-stripping provisions of the AEDPA on constitutional grounds, but most of those courts have avoided deciding such challenges.[64] The vast majority of the circuits, at least seven courts of appeals including the Sixth Circuit, have held that they no longer have subject matter jurisdiction to hear petitions to review final deportation orders entered against aliens convicted of certain criminal offenses.[65] However, a number of the circuit courts, in acknowledging that their jurisdiction over certain appeals by criminal aliens had been withdrawn by the AEDPA, emphasized that some means of seeking judicial relief remained available, without delineating the nature or scope of such relief.[66]

One group of jurisdictions, including the court in the noted case, holds that removal of direct Article III review of final deportation orders does not deny due process if the government agrees to permit habeas corpus review. In *Kolster v. INS*,[67] a case cited extensively by the court in the noted case, the First Circuit dismissed petitioner's challenge to the constitutionality of section 440(a) of the AEDPA. Kolster argued that the AEDPA was unconstitutional because it precluded all judicial review of the IJ's interpretation of INA judicial review provisions.[68] The court

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62. The court specifically noted that "final orders of deportation" include not only those determinations actually made at the hearing, but "all matters on which the validity of the final order is contingent." *Id.* at 611 (quoting INS v. Chadha, 462 U.S. 919, 938 (1983)).

63. *See id.* at 612.

64. *See* Robert D. Ahlgren, *Procedural Due Process in Exclusion/Deportation*, *in* 29TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE 78 (PLI Corp. L. & Practice Course Handbook Series No. 71, 1996).

65. *See, e.g.*, Boston-Bollers v. INS, 106 F.3d 352, 355 (11th Cir. 1997) (holding that section 440(a)(10) deprives court of jurisdiction over alien's petition); Hincapie-Nieto v. INS, 92 F.3d 27, 28 (2d Cir. 1996) ("We conclude that the AEDPA has repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain] drug offenses. . . ."); Qasguargis v. INS, 91 F.3d 788, 789-90 (6th Cir. 1996) (petition for review dismissed), *cert. denied*, 117 S. Ct. 1080 (1997); Mendez-Rosas v. INS, 87 F.3d 672, 673 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 694 (1997).

66. *See Hincapie-Nieto*, 92 F.3d at 30-31 (stating that "the Government acknowledges that at least some avenue of judicial relief remains available" and that the court would therefore "express no opinion on the nature of the remedy or the scope of review that remains available in any court").

67. 101 F.3d 785 (1st Cir. 1996).

68. Specifically, Kolster alleged that the IJ and INS incorrectly interpreted the "lawful unrelinquished residence" period that was required to seek an INA section 212(c) discretionary waiver. *Id.* at 790.

noted that the alien was a long-time permanent resident and had strong ties to the United States.[69] Thus, the court reasoned that a slavish reliance on the plenary power doctrine would violate the alien's Fifth Amendment due process rights.[70] The court also acknowledged Supreme Court precedent which recognizes the due process rights of permanent residents in deportation proceedings.[71] Accordingly, the court required additional briefing as to whether habeas corpus review survived the passage of the AEDPA.[72] The *Kolster* court then refused to rule on the constitutionality of the AEDPA after the INS attorney stipulated that any habeas review required by the Constitution remained available to criminal aliens in deportation proceedings. The First Circuit accordingly dismissed the appeal for lack of jurisdiction since an "avenue of judicial review" remained available to criminal aliens.[73] However, the court refused to delineate the scope of review available in habeas actions.

The Second Circuit has held that the AEDPA ends direct federal court review of deportation orders against criminal aliens, but preserves a modestly broad range of relief via habeas. In *Hincapie-Nieto v. INS*,[74] the Second Circuit held that the AEDPA removed its jurisdiction to review a denial of an INA § 212(c) waiver decided prior to the effective date of the AEDPA. Realizing the importance of the question presented, the court specifically requested government attorneys to brief the issue of whether the elimination of its jurisdiction to entertain Hincapie-Nieto's section 212(c) petition also precluded him from all habeas corpus remedies. In response, the Government argued that Hincapie-Nieto could not challenge his deportation order by petition for a writ of habeas corpus if not actually in INS custody.[75] Although the government argued the alien could challenge his detention if actually taken into custody,[76] the government's position seemed to be that the AEDPA completely removed any substantive appeal beyond the Board of Immigration Appeals. However,

69. *See id.*
70. *Id.* (citing Landon v. Plasencia, 459 U.S. 21, 32-33 (1982)).
71. *See id.*
72. *See id.*
73. *See id.* The court was satisfied that the statute was not unconstitutional since "the INS acknowledge[d] that some avenue for judicial review remains available to address *core constitutional and jurisdictional concerns*." *Id.* at 790-91 (emphasis added).
74. 92 F.3d 27 (2d Cir. 1996).
75. *Id.* at 30-31 (citing letter to the panel dated June 7, 1996 from Diogenes P. Kekatos, Assistant U.S. Attorney).
76. *Id.* at 31 (citing 8 U.S.C. § 1252(a)(1) (authorizing habeas corpus proceedings for review of detention pending determination of deportability); 8 U.S.C. § 1252(c) (authorizing habeas corpus proceedings for review of custody of alien subject to final order of deportation) as the sole remaining areas of federal court jurisdiction under the AEDPA).

as the INS attorney acknowledged that at least some avenue for judicial relief remained available, the court deferred to the apparent will of Congress by dismissing the appeal.[77]

Unlike the noted case, the district courts of the Second Circuit have interpreted judicial review provisions of AEDPA to permit a wide range of constitutional and equitable claims. In *Yesil v. Reno*,[78] the U.S. District Court for the Southern District of New York ordered the Board of Immigration Appeals to reconsider its decision not to grant an INA § 212(c) deportation waiver requested by a permanent resident living in New York. Judge Chin ruled that the judicial review language in the AEDPA did not repeal the right of aliens to challenge unlawful detention orders through habeas proceedings via the general habeas review in the Judiciary Act.[79] More importantly, the court questioned, without rejecting, the government's position that only substantial constitutional claims that involve a "fundamental defect that inherently results in a miscarriage of justice" are reviewable.[80] Since the court did find that deporting Yesil would result in a fundamental miscarriage of justice, it implied in dicta that judicial review of deportation orders under 28 USC § 2241, under a plain reading of that statute, should not be limited solely to "substantial constitutional claims."[81]

The Ninth Circuit rendered a decision considerably less flexible than the noted case, basing its ruling on dissimilar fact patterns. In *Duldulao v. INS*,[82] the alien was subject to deportation under an INA provision relating to firearms convictions.[83] Although Duldulao conceded his deportability at trial, he did so hoping to expedite his efforts to adjust his status to a lawful permanent resident under INA section 245.[84] Unfortunately for Mr. Duldulao, the IJ denied his application to adjust and ordered Duldulao deported.[85] In ruling on the government's motion to dismiss for lack of jurisdiction, the Ninth Circuit used sweeping language and interpreted the AEDPA's court-stripping provisions expansively.[86] The court then rejected Duldulao's constitutional challenge to AEDPA, holding that AEDPA section 440(a) was merely a jurisdictional statute as

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77. *See id.*
78. 958 F. Supp. 828 (S.D.N.Y. 1997).
79. *Id.* at 837 (interpreting 28 U.S.C. § 2241 (1995)).
80. *Id.*
81. *Id.* at 839.
82. 90 F.3d 396 (9th Cir. 1996).
83. INA § 241(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) (Supp. II 1997).
84. *Duldulao*, 90 F.3d at 397 (citing 8 U.S.C. § 1255 (1996)).
85. *See id.*
86. *See id.* at 398-99.

it only affects the forum to adjudicate the dispute, and not any rights or obligations of the alien.[87] The Ninth Circuit remarked that the power of pre-AEDPA federal courts to review final orders of deportation or exclusion existed "only because Congress has conferred it."[88] The *Duldulao* court also indicated that "[s]ince aliens have no constitutional right to judicial review of deportation orders, section 440(a) does not offend due process."[89]

While holding that the AEDPA removed the power of direct judicial review of final orders of deportation, the *Duldulao* court also ruled that habeas jurisdiction could be predicated on 28 U.S.C. § 2241. However, the court held, as has a number of other federal circuits, that this habeas review is limited to situations presenting a fundamental miscarriage of justice or grave constitutional errors. Similarly, the Third Circuit in *Salazar-Haro v. INS*,[90] held that the AEDPA "withdraws our jurisdiction to review the petition on the merits."[91] As did the Ninth Circuit, the court explicitly indicated that Congress may not preclude all forms of judicial review where "constitutional rights applicable to aliens may be at stake."[92]

The factual background of the noted case differs starkly from other rulings of the Sixth Circuit. In *Anwar v. INS*,[93] the alien, Jawaid Anwar, had been charged under then-existing law with being deportable for committing two crimes involving moral turpitude (CIMT) not arising out of a single scheme of criminal conduct.[94] The IJ found Mr. Anwar ineligible for asylum and withholding of deportation.[95] Anwar then asked for additional time to file his brief with the BIA, which the IJ denied because the request for extension came after the deadline had already passed. [96] The BIA affirmed this determination and ordered Anwar deported.[97] While Anwar's petition for review with the Fifth Circuit was pending, Congress passed the AEDPA. The *Anwar* court held that it retained jurisdiction over the appeal because the request for time extension was merely a due process challenge and not a direct challenge

87. *See id.* at 399.
88. *Id.* at 399-400.
89. *Id.* at 400.
90. 95 F.3d 309 (3d Cir. 1996).
91. *Id.* at 311.
92. *Id.*
93. 107 F.3d 339, *superceded*, 116 F.3d 140 (5th Cir. 1997).
94. INA § 241(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (Supp. II 1997).
95. *See Anwar*, 107 F.3d at 341.
96. *See id.* (citing 8 C.F.R. §§ 3.3(c), 242.8 (1997)).
97. *See id.* at 342.

to the IJ's or BIA's decision to deport him.[98] The court ruled that the presumption favoring an interpretation of statutes as to permit judicial review of administrative actions was not rebutted by "clear and convincing evidence" and, accordingly, jurisdiction remained with the circuit court.[99] Interestingly, the Fifth Circuit subsequently withdrew this opinion without deciding whether review of issues collateral to the actual decision to remove or deport an alien are also precluded from review by the circuit court.

The Seventh Circuit has departed from the other federal circuits, including the Sixth Circuit in the noted case, by holding that judicial review of deportation orders for criminal aliens already in deportation proceedings before the AEDPA's passage may still be available under certain limited circumstances. In *Reyes-Hernandez v. INS*,[100] the alien had conceded deportability under the INA at a time when the Act permitted waiver of deportation for long-time lawful permanent residents.[101] Reyes-Hernandez conceded deportability in order to expedite a claim for discretionary relief under section 212(c), even though he might have brought a meritorious defense to deportation. At the time deportability was conceded, judicial review in an Article III court was still available. When the AEDPA was signed into law, it retroactively ended the right of Reyes-Hernandez to a section 212(c) waiver.[102]

The *Reyes-Hernandez* court held that the AEDPA did not divest it of jurisdiction over an appeal where deportability was stipulated by the alien and where the alien might have done so in reliance on the availability of discretionary relief and judicial review.[103] The Seventh Circuit therefore ruled that, under these circumstances, an alien who had conceded that he was deportable due to his conviction of certain crimes would probably have contested deportability had he known that, under the AEDPA, conceding deportability on that ground would render him ineligible for discretionary relief from deportation and preclude judicial review of the INS decision.[104] Concerned with fairness to the alien, the court found that the decision not to mount a defense to deportability in order to seek discretionary relief could "mousetrap" the alien, leaving him or her with

98. *See id.*

99. *Id.*

100. 89 F.3d 490 (7th Cir. 1996).

101. INA § 212(c), 8 U.S.C. § 1182(c) (1995).

102. *See Reyez-Hernandez*, 89 F.3d at 492.

103. *See id.* at 492-93.

104. *See id.* The court made it clear that the aliens must actually have "a colorable defense to deportation" to seek judicial review. *Id.* at 493.

no opportunity for judicial review.[105] The court stated that it was "unlikely that Congress intended to 'mousetrap' aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability."[106] Moreover, the court rejected the INS' argument that judicial review of BIA determinations is duplicative or a waste of time.[107]

In contrast to the noted case, rulings of the Seventh Circuit, involving those in removal proceedings after the effective date of the AEDPA, have also come close to precluding all habeas review for criminal aliens. Yet, ironically, decisions rendered in the Seventh Circuit likely provide the greatest opportunity for full review of the aliens' claims for relief in the federal court system. In *Yang v. INS*,[108] the court found that IIRIRA § 306 together with AEDPA § 440(a) abolished not only direct judicial review, but also judicial review under 28 U.S.C. § 2241.[109] The court held that only the right to habeas review in the Constitution remained intact.[110]

However, the court's interpretation of direct review of the AEDPA seems, at first blush, to contradict the legislative intent and plain meaning of the statute. The Seventh Circuit held that the language of AEDPA permits judicial review of the merits in a deportation case, as the "court may (indeed, must) determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason of a criminal offense listed in the statute."[111] The court in *Yang* read the AEDPA as permitting review if the Attorney General finds an alien deportable by reason of having committed a listed crime. Essentially, the court was arguing that it had jurisdiction in order to determine if it had jurisdiction under the AEDPA.[112] The court reasoned that it should review the merits of whether an alien was validly deportable by reason of having committed one of the enumerated criminal offenses because the judicial review provision in the AEDPA depended on "particular fact[s] or [a] legal conclusion."[113] Review would be precluded in the case of an alien who is

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105. *See id.* at 492.
106. *Id.*
107. Chief Judge Richard Posner voiced the opinion in dictum, stating that the Seventh Circuit had "on a nontrivial number of occasions vacated the Board's denial of section 212(c) relief and remanded for further proceedings." *Id.* at 492.
108. 109 F.3d 1185 (7th Cir. 1997).
109. *See id.* at 1195-96.
110. *See id.* at 1195.
111. *Id.* at 1192.
112. *See id.*
113. *Id.*

actually deportable (and not simply because the INS finds that the alien is deportable) on the grounds set forth in the AEDPA.

In the noted case, the Sixth Circuit was asked to decide what residue of judicial review for criminal aliens survived the passage of AEDPA. The case was one of first impression in the Sixth Circuit because no other panel in the circuit had ruled on whether precluding Article III judicial review of final orders of deportation was constitutional.[114] The court began by quickly reiterating the Sixth Circuit's ruling that the AEDPA applied to pending cases on the date it was enacted.[115] Next, the court foreshadowed its ruling by citing Sixth Circuit precedent holding section 440(a) of AEDPA to be merely a jurisdictional statute, a statute which does not affect substantive rights.[116] After a cursory review of section 440(a) of the AEDPA, the court held that Mansour was subject to the law's court removal provisions.[117] This determination was supported by the fact that Mansour had conceded deportability for the predicate offenses listed in the AEDPA which preclude Article III court review.[118]

Finally, the Sixth Circuit was squarely presented with the question of what residue of judicial review of deportation orders survived the passage of the AEDPA. The court characterized the issue as the "fundamental question whether the Constitution requires independent judicial review of a deportation order where a question of law is raised, or whether Congress can limit review to the Board of Immigration Appeals."[119] The court was accordingly asked to declare section 440(a) unconstitutional on Suspension Clause, due process, and separation of powers grounds.[120]

The court began its analysis by acknowledging the significance of the plenary power doctrine in immigration law.[121] Then the Sixth Circuit panel followed the law of the First Circuit and held that the plenary power

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114. Mansour v. INS, 123 F.3d 423, 425 (6th Cir. 1997).

115. *See id.* at 424.

116. *Id.* at 424-25 (citing Figueroa-Rubio v. INS, 108 F.3d 110 (6th Cir. 1997)).

117. *See id.* at 425.

118. Mansour conceded deportability before the IJ, but alleged that he was eligible for a Section 212(c) waiver. The INS objected to Mansour's request for a waiver on a purely factual basis: the Service alleged that Mansour was statutorily ineligible because he had served at least five years in prison for the aggravated felony drug conviction. Mansour maintained that he had served one day less than five years and, therefore, was not ineligible. The IJ and BIA both agreed that Mansour had served at least five years and was thus ineligible for a discretionary waiver. *See id.* at 424.

119. *Id.* at 426. The court found that this right to some form of appeal remained because, at oral argument, the INS conceded that some form of judicial review of a deportation order still remained available under the AEDPA. *Id.*

120. *See id.* at 425.

121. *See id.*

doctrine was never an adequate constitutional foundation to remove all judicial review of administrative proceedings.[122] The court avoided the monumental constitutional issue raised by Mansour and ultimately concluded that since some "judicial involvement" in the form of habeas corpus review remained available to criminal aliens, eliminating direct Article III judicial review was constitutional.[123] However, the Sixth Circuit mirrored most of the other circuits and declined to decide the scope of the remaining habeas review. The court mentioned in passing that the parties disagreed as to whether habeas review might extend from errors of law, or only from "grave constitutional errors."[124] Consistent with the policy of avoiding constitutional issues as a basis for decision-making, the Sixth Circuit court held that it lacked subject matter jurisdiction over the case and dismissed it.[125]

The Sixth Circuit's ruling gives the criminal alien seeking judicial review little room for celebration. Even though the ruling preserves the opportunity for habeas proceedings, it places increased procedural burdens on the alien fighting deportation. First, few immigration attorneys are familiar with federal court proceedings based solely on habeas, as the last time habeas was the sole vehicle for judicial review of a deportation order was over fifty years ago.[126] Second, by permitting only post-deprivation remedies to unconstitutional laws, behavior or other violations of due process, the AEDPA, as interpreted in the noted case, is not merely changing federal court jurisdiction to review certain types of cases. Instead, the statute is affecting substantive rights, such as the right not to return to a nation where the alien may be subject to persecution. Indeed, some sentiments in the circuit courts, whether in dictum or in concurring opinions, cast doubt on the argument accepted by the majority of the circuits (and the noted case) that the end of judicial review does not affect substantive rights, but merely determines the legal forum in which certain criminal aliens are entitled to bring an appeal. At least one court reviewing the AEDPA has acknowledged the substantive effect of procedural immigration rules.[127] There, Ninth Circuit Judge Kozinski echoed his concern, relying on the facts of the case to show the

122. *See id.* at 426.

123. *Id.* at 426.

124. *Id.* at 426 n.3. The court noted that it would leave the resolution of the scope of habeas relief "for a case in which it is squarely presented." *Id.*

125. *See id.*

126. *See* Brian K. Bates, *Déjà Revu: Judicial Review of Deportation Orders*, *in* 20TH ANNUAL CONFERENCE ON IMMIGRATION AND NATIONALITY LAW 10 (Univ. of Texas School of Law Continuing Legal Education, 1996).

127. *See* Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996).

"importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression and, quite possibly, life and death."[128]

Certainly, AEDPA is a watershed in U.S. immigration law, changing the rules under which criminal aliens and those illegally in the United States may be removed. However, the decision of Congress to vest virtually all final authority to remove aliens from this country solely in an administrative setting has serious implications for due process and international human rights.[129] Additionally, many commentators have argued that restrictive judicial review provisions of the AEDPA and IIRIRA are contrary to the American tradition of welcoming immigrants with open arms.[130]

The United States is not alone in its efforts to speed up the deportation process by restricting appellate court review for certain criminal aliens.[131] For example, Canada has incorporated into the Canadian Charter of Rights and Freedoms provisions that, although providing judicial review of deportation orders against permanent residents,[132] do not permit those considered a security threat to appeal an order of deportation.[133] However, by restricting judicial review for criminal aliens, the United States may be running afoul of international norms of human rights. One such international agreement, the United Nations Body of Principals for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles), provides protections for persons imprisoned for reasons other than convictions for

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128. *Id.* at 432 (Kozinski, J., concurring). The court found that the asylum applicant, a Cuban who left his country because of his political opinions, would face severe punishment for illegally departing Cuba. The court indicated that the Immigration Judge expressly found that Rodriguez left because of his political opinions, that he faced a clear probability of prosecution by the Cuban government, and that he would face "harsh, if not fatal" punishment if he returned to Cuba. *Id.* at 431.

129. Though he ultimately signed the AEDPA into law, President Clinton indicated his concern about "a number of ill-advised changes to our immigration laws having nothing to do with fighting terrorism." President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 721 (Apr. 24, 1996).

130. *See* Anthony Lewis, *Abroad at Home; Grinding Into Dust*, N.Y. TIMES, March 17, 1997, at A15.

131. *See* Sue Cant, *Ruddoch Defends Change to Refugee Appeal Changes*, AAP NEWSFEED, Oct. 17, 1997 (reviewing criticism of Melborne, Australia Federal Immigration Minister Philip Ruddock's proposal to deny refugees the right to appeal to the courts following a decision of the Australian Refugee Review Tribunal).

132. Immigration Act, R.S.C. ch. I-2 (1998) (Can.). Section 70(1)(a) of the Act permits the reviewing court to address issues of fact or law, while section 70(1)(b) permits review of a denial on compassionate grounds (i.e., "having regard to all the circumstances of the case" the permanent resident alien should not be deported). *Id.*

133. *See id.*

nonpolitical crimes.[134] Under the UN Body of Principles, detained or imprisoned persons must be "subject to the effective control of, a judicial or other authority."[135] It can be argued that "judicial authority" has been defined under the UN Body of Principles in such a way as to enjoin officers of administrative agencies, such as the IJ and members of the BIA, from making final decisions as to deportation.[136]

The noted case's interpretation of AEDPA's judicial review provisions, as expanded by IIRIRA, poses troubling questions for United States commitments under international law. First, the Sixth Circuit's ruling in the noted case essentially vests final review of deportation or removal orders, with the exception of perhaps some noncriminal asylum applicants, in an administrative board. Moreover, an administrative board may not have the expertise, experience, and political will to effectively address *nonrefoulment* issues raised by criminal aliens.[137] The BIA is not always successful in effectively analyzing and adjudicating new, difficult, or unique claims for relief from aliens in removal or deportation proceedings.[138] More importantly, by limiting the alien to habeas proceedings in federal court, the Sixth Circuit has essentially given authority to the Attorney General alone to make the ultimate determination of whether to deport an alien with a criminal background.[139] BIA Board Members are not independent of the authority ordering removal of criminal aliens, as Board Members are not only

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134. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Annex, Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988).

135. *Id.*

136. The words "judicial or other authority" are defined in the UN Body of Principles as "a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence." *Id.* at 299.

137. Article 3(1) of the UN Convention Against Torture provides expressly that "[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, June 26, 1987, art. 3(1), S. TREATY DOC. NO. 100-20, at 20 (1988), 1465 U.N.T.S. 85.

138. Although the BIA has authority to designate noteworthy decisions for publication and treatment as precedent under 8 C.F.R. § 3.1(g), it is not clear how often the BIA will choose to exercise that power in the post-AEDPA environment. One recent BIA use of this power was to recognize that female genital mutilation can constitute "persecution" within the meaning of the INA even where the persecutor's intent was entirely benevolent. *See In re* Fauziya Kasinga, Int. Dec. 3278 (BIA 1996) (en banc) (designated as precedent by the BIA).

139. The Executive Office for Immigration Review (EOIR) includes the immigration court and judges, and the Board of Immigration Appeals (BIA). Even though the EOIR was "separated" from the direct control of the INS in 1983 to help promote independent decisionmaking, the IJ's and BIA Board Members continue to serve under the ultimate authority of the Attorney General. *See* 8 C.F.R. pts. 1, 3, 100 (1983).

appointed by the Attorney General, but unlike federal judges, they do not enjoy either salary protection or life tenure on good behavior.[140] The Attorney General has in fact exercised her authority to overrule and vacate decisions of the BIA on a number of occasions.[141]

Moreover, prior to 1996, aliens were likely to seek judicial review primarily in strong cases, or to litigate serious constitutional challenges to the law. First, many asylum seekers did not seek judicial review of their cases prior to the AEDPA because their attorneys advised aliens to seek judicial review only if the case appeared fairly strong, particularly when the alien was being represented on a pro bono basis.[142] Moreover, immigration attorneys were wary of creating bad precedents if they lost their cases at the circuit court level.[143] Ironically, the major legislative aim of the AEDPA court-stripping provisions, the desire of many in Congress to expedite the deportation of criminal aliens, may not significantly assist in speeding deportation of criminal aliens, particularly in the case of those who later file legitimate asylum claims. Accordingly, a number of proposals in the late 1980's and early 1990's to change judicial review provisions of our immigration laws, as accomplished in the AEDPA and IIRIRA, were rejected as being unwarranted.[144]

One approach to speeding removal of criminal aliens proposed prior to AEDPA's enactment was to expedite deportations by eliminating the BIA and retaining judicial review.[145] This approach has been roughly adopted in the asylum context in Canada.[146] European Community procedural rules seem to indicate that an authority independent of the one

140. The Attorney General appoints Board Members, who serve without fixed terms. *See* 8 C.F.R. § 3.1 (1997).

141. *See In re* Soriano, Int. Dec. 3289 (BIA 1996; A.G. Slip Op. 1997). The Attorney General reversed the BIA holding that AEDPA section 440(d) did not preclude an opportunity for a section 212(c) discretionary waiver of waiver applications pending at time of AEDPA's enactment. *Id.* The BIA reasoned that retroactivity "would attach a new legal consequence" to settled events. *Id.*

142. *See* David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1325 (1990).

143. *See id.*

144. *See id.* The author argued that if evidence later showed that judicial review was causing undue delay in a "far higher percentage of cases," then reform would have to be considered at that point. *Id.* Among the statutory changes proposed by Mr. Martin would be to either speedily identify a class of applications adjudged "manifestly unfounded" and strictly limiting judicial review for that class; or, "more ambitiously," limit the scope of judicial review in virtually all asylum cases to a summary proceeding that is highly deferential to the administrative outcome, but permit the alien some opportunity for judicial correction of gross error or abuse. *Id.*

145. *See id.* at 1355.

146. Canada approved legislation in 1988 which established a new asylum adjudication system, eliminating the centralized administrative review by a body equivalent to the BIA. *See* Immigration Act, R.S.C., ch. 35, §§ 46.02, 48.02, 69.1(10), 71.1(10) (1988) (Can.).

making the decision to deport is necessary under its treaty obligations, giving credibility to proposals to limit review by the BIA rather than by federal courts.[147] The rules require a European Community member State to allow citizens of other EC States to obtain review of deportation orders where no national authority independent of the administrative agency ordering deportation will allow for a merits review of the deportation order.[148] While not specifically granting a right to judicial review of deportation decisions, the Directive specifically indicates that the "competent authority" which reviews a deportation order on the merits must be, unlike the Attorney General, "independent of the administrative authority making the decision [to deport]."[149]

The Supreme Court rulings on administrative law imply that deportation or removal orders are a far different species than typical administrative agency decisions because of the severity and finality of removal from this country for certain aliens.[150] The Supreme Court has indicated[151] that challenges to determinations made by administrative agencies affecting "fundamental rights" would best be finally made in a judicial rather than an administrative hearing.[152] Judicial competence to review the use of prejudicial or erroneous legal standards by the Immigration Judge also would favor judicial review of final orders of deportation or removal.

Certainly, while the Sixth Circuit opinion in the noted case may be applauded for specifically protecting the right to habeas review under the Constitution from the reach of the AEDPA, it diminishes the due process rights of those aliens with meritorious claims who wish to directly challenge rulings based on erroneous facts, misapplied law, or other factors relevant to the decision to deport a criminal alien.

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147. *See* Council Directive 64/221, art. 9(1), 1963-1964 O.J. SPEC. E.D. 117.

148. *See id.*

149. Joined Cases 115-116/81, Adoui and Cornuaille v. Belgian State, 1982 E.C.R. 1665, 1666-67, 3 C.M.L.R. 631, 632-33 (1982).

150. *See* Stone v. INS, 514 U.S. 386, 398 (1995).

151. *See* Crowell v. Benson, 285 U.S. 22 (1932).

152. *See id.* at 61. The court viewed lifetime tenure and salary protection guaranteed in Art. III, § 1 of the Constitution as a major part of this judicial expertise and competence. *Id.*