The Property Scope of Habeas Corpus Review in Civil Removal Proceedings

Andrea Lovell

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Immigration Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol73/iss2/8
THE PROPER SCOPE OF HABEAS CORPUS REVIEW IN CIVIL REMOVAL PROCEEDINGS

Andrea Lovell*

Abstract: The Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), two 1996 amendments to the Immigration and Nationality Act, eliminated direct judicial review in the federal courts of appeals of final removal orders for aliens convicted of certain enumerated crimes. The legislation also appears to limit the habeas corpus jurisdiction of the federal district courts. While most circuit courts agree that some degree of habeas corpus review of removal orders is constitutionally mandated, several have interpreted AEDPA and IIRIRA as limiting the scope of that review. This Comment argues that the scope of habeas corpus review in civil removal proceedings remains unchanged. Because AEDPA and IIRIRA did not explicitly and unambiguously eliminate habeas corpus review, courts should not interpret them as doing so. Furthermore, the Constitution requires that aliens have the opportunity to challenge removal proceedings in Article III courts. Finally, as a matter of policy, there are several critical removal-related decisions that should not be left exclusively to executive officials.

"Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land."1

The federal courts of appeals are divided over the precise scope of habeas corpus review available in removal2 proceedings involving aliens convicted of certain crimes in the United States. In 1996, Congress twice amended the Immigration and Nationality Act (INA),3 the statute that has governed immigration and nationality since 1952. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)4 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996...
not only eliminated direct judicial review of final removal orders in these cases, but also appeared to restrict habeas corpus review. The present scope of habeas review of removal orders is uncertain because the amended INA fails to address the independent grant of habeas corpus jurisdiction to federal district courts in 28 U.S.C. § 2241. There is general agreement among the courts that some degree of habeas corpus review of final removal orders is required by the Constitution. However, while some courts find subject matter jurisdiction over even nonconstitutional claims, others will no longer consider any claims that do not implicate "grave" constitutional questions where removal might result in a "fundamental miscarriage of justice." The proper scope of habeas corpus review in cases where aliens convicted of certain crimes face final orders of removal is the fundamental issue addressed by this Comment.

This Comment argues that AEDPA and IIRIRA should not be interpreted as narrowing the scope of habeas corpus review of civil removal proceedings. Rather, federal district courts should continue to review both constitutional and nonconstitutional claims in habeas corpus

---


6. 28 U.S.C. § 2241(a) (1994) states: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

7. See, e.g., Williams v. INS, 114 F.3d 82, 84 (5th Cir. 1997) (stating that at least habeas relief protected by Suspension Clause remains available); Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997) ("[H]abeas review remains available to appellee to raise substantial constitutional questions."); Vargas v. Reno, 966 F. Supp. 1537, 1542 (S.D. Cal. 1997) ("The Court finds that § 440 of the AEDPA does not preclude the Court from reviewing plaintiff's constitutional claims upon a petition for a writ of habeas corpus."); Duldulao v. Reno, 958 F. Supp. 476, 479 (D. Haw. 1997) ("Habeas corpus review under § 2241 is justified if an alien subject to an order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or a fundamental miscarriage of justice.") (citations omitted).


9. See, e.g., Thomas v. INS, 975 F. Supp. 840, 849 (W.D. La. 1997) (applying "miscarriage of justice" standard, but limiting review to issues collateral to order of removal); Duldulao, 958 F. Supp. at 479 ("Habeas corpus review under § 2241 is justified if an alien subject to an order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or a fundamental miscarriage of justice.") (citations omitted); In re Castellanos, 955 F. Supp. 96, 97 (W.D. Wash. 1997) ("The writ is available only to challenge a fundamental miscarriage of justice."); Mbiya v. INS, 930 F. Supp. 609, 612 (N.D. Ga. 1996) ("The Constitution requires only that the writ of habeas corpus extend to those situations in which the petitioner's deportation would result in a fundamental miscarriage of justice.").
Proper Scope of Habeas Corpus Review

proceedings pursuant to the jurisdiction conferred on them by 28 U.S.C. § 2241. Part I discusses congressional plenary power over immigration matters, the removal procedure itself, and the evolution of the use of habeas corpus petitions to challenge final orders of removal. Part II compares the various positions adopted by the circuit courts on the issue of the scope of habeas corpus review. Finally, Part III argues that as a matter of statutory construction, constitutional law, and policy, full review of all claims remains available in habeas corpus, despite the jurisdiction-stripping provisions of AEDPA and IIRIRA.

I. BACKGROUND

A. Congressional Authority over Immigration Matters

1. Plenary Power

Perhaps more than any other area of the law, immigration is characterized by great judicial deference to the political branches of government. Congressional and executive “plenary power” over immigration matters was first recognized in the late nineteenth century. U.S. Supreme Court opinions during this period established a preference for committing immigration decisions to the political branches of government based on general notions of sovereignty. In *Chae Chan Ping v. United States*, also known as the Chinese Exclusion Case, the Court considered a Chinese alien’s constitutional challenge to a recently enacted statute that would bar his re-entry into the United States after a visit to China. Denying petitioner’s claim, Justice Field declared: “The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments.” Basing its decision on the need to preserve national security and independence, the Court clearly

14. *Id.* at 606–07.
established the right of the federal government to regulate immigration.\textsuperscript{15} The plenary power doctrine was expanded in 1892 to encompass not only substantive admission and exclusion standards, but also the procedures for enforcing those standards.\textsuperscript{16} Soon thereafter the doctrine was extended to deportation cases as well as exclusion cases.\textsuperscript{17}

2. \textit{Due Process Limitations on Plenary Power}

Although the plenary power doctrine remains essentially intact, it has been tempered by due process concerns in the deportation context.\textsuperscript{18} The U.S. Supreme Court established early in the twentieth century that aliens were entitled to procedural due process in deportation proceedings.\textsuperscript{19} Although full trials are not required in all immigration matters, the Court held that failure to provide an alien with notice and an opportunity to be heard when faced with deportation violated the Fifth Amendment.\textsuperscript{20} Modern due process analysis looks to the three-part \textit{Mathews v. Eldridge} test for determining due process requirements in a given context.\textsuperscript{21} In \textit{Landon v. Plasencia}, the U.S. Supreme Court held that this test was applicable in an immigration case.\textsuperscript{22} To determine whether an alien's due process rights have been violated, the court must consider: (1) the interests at stake for the individual; (2) the probability that a procedural error could lead to the wrongful deprivation of that interest; and (3) the interest of the government in using existing procedures.\textsuperscript{23} Although particular due process requirements are not always entirely clear under this test, it appears that in deportation cases a higher level of due process

---

\textsuperscript{15} \textit{Id.} at 603–04.

\textsuperscript{16} See Hiroshi Motomura, \textit{Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation}, 100 Yale L.J. 545, 552 (1990); see also Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (holding that judiciary could not review discretionary administrative determination of excludability).

\textsuperscript{17} See \textit{Fong Yue Ting} v. United States, 149 U.S. 698, 713 (1893).

\textsuperscript{18} See \textit{Note, supra} note 12, at 1857.

\textsuperscript{19} See \textit{Yamataya v. Fisher}, 189 U.S. 86 (1903).

\textsuperscript{20} \textit{Id.}


\textsuperscript{23} \textit{Id.}
is required than in most other immigration matters. Aliens facing deportation have a due process right to counsel at their own expense, and the government must make reasonable efforts to ensure the presence of its witnesses at deportation hearings for cross-examination. The question presented by AEDPA and IIRIRA is whether due process might also require independent review by Article III courts of adverse deportation-related decisions.

B. Overview of Immigration Proceedings

1. Statutory Grounds for Removal

Congress has extended its plenary power to define categories of aliens who may be excluded or deported from the United States. Deportability grounds apply not only to undocumented aliens, but also to aliens living legally in the United States. Only when aliens acquire U.S. citizenship do they become immune from deportation. The 1996 amendments to the INA now refer to both exclusion and deportation as "removal" proceedings. Despite this change, it should be noted that the grounds for inadmissibility and deportability remain distinct, and that aliens in deportation proceedings continue to benefit from greater constitutional protections than those facing exclusion. This Comment focuses on that aspect of removal formerly known as deportation.

24. See Daniel Kanstroom, Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get into Court?, 25 Harv. C.R.-C.L. L. Rev. 53, 73 (1990) ("Courts have declined to invoke procedural due process in exclusion hearings to the same degree as in deportation hearings.").


26. Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir. 1997) (holding that Board of Immigration Appeals abused its discretion by admitting hearsay statements because it failed to make reasonable efforts to present witness for cross-examination); see also Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988) (same).


29. Christopher L. Eisgruber, Birthright Citizenship and the Constitution, 72 N.Y.U. L. Rev. 54, 56 (1997) ("[A]liens can be deported, but citizens, if they can be expelled at all, must be exiled, which is likely to be a more difficult procedure for the nation to undertake.").


32. See generally Legomsky, supra note 30.
Particularly sweeping changes in this area took effect in 1996 with the enactment of two amendments to the INA. In April 1996, President Clinton signed into effect the Antiterrorism and Effective Death Penalty Act (AEDPA). In September, he signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) as well. Both were responses to mounting popular fears about potential criminal activity by aliens in the wake of the Oklahoma City, World Trade Center, and 1996 Atlanta Olympic Games bombings. To effectuate this goal, Congress both expanded the grounds for removal and streamlined the removal procedure.

In addition to expanding general grounds for removal and streamlining procedures, Congress created a special class of aliens: those convicted of certain enumerated crimes. These criminal aliens are not only removable, but are apparently no longer entitled to judicial review of the deportation decision. The enumerated crimes include certain firearms offenses, controlled substance violations, certain espionage and sabotage offenses, certain crimes involving moral turpitude, and

---

37. See Julie K. Rannik, The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver, 28 U. Miami Inter-Am. L. Rev. 123, 124 (1996) ("[AEDPA] ... expanded grounds of deportability to cover all drug offenses, including marijuana possession, and all crimes of moral turpitude . . . ").
38. Mary Reiko Osaka, New Limits Placed on Judicial Review of Administrative Orders Under the Immigration and Nationality Act, Haw. B.J., Sept. 1997, at 12, 12 ("[W]ith the enactment of . . . [IIRIRA], Congress has set new parameters for judicial review of matters arising under the INA in an effort to streamline and expedite the process.").
40. INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C); see also infra text accompanying note 98 (providing statutory language).
Proper Scope of Habeas Corpus Review

“aggravated felonies.” AEDPA and IIRIRA also vastly expanded the definition of the term “aggravated felony” in 1996. Whereas the original definition in 1988 included only murder, drug trafficking, and firearms or destructive device offenses, INA section 101(a)(43) now sets forth twenty-one classes of aggravated felonies. In many cases, the 1996 amendments have reduced the sentencing requirements used to determine whether a particular crime constitutes an “aggravated felony.” Furthermore, this new definition of the term “aggravated felony” provides for retroactivity to varying degrees. Therefore, an alien may be found to have an aggravated felony on her record even if the conviction was entered before the enactment of the statute.

2. Removal Procedure

The decision to pursue the removal of a given alien is left to the discretion of the Immigration and Naturalization Service (INS). Given the agency’s limited resources, the inevitable decisions to pursue some aliens and to ignore others function as a form of prosecutorial discretion. The actual removal process begins with a determination by the INS, acting on behalf of the Attorney General, that an alien is statutorily “inadmissible” or “deportable” pursuant to INA sections 212 or 237. Once the INS chooses to charge an alien with removability, the INS initiates an administrative hearing before an Immigration Judge (IJ) by filing a Notice to Appear (NTA) for removal proceedings. The INS must decide after filing the NTA whether the alien will be detained until the hearing or released on bond.

50. See Note, supra note 12, at 1853.
At the individual removal hearing before the IJ, the alien and the INS have the opportunity to present evidence and to cross-examine witnesses.\textsuperscript{55} The alien will generally testify and be asked to plead to the allegations if he or she has not already plead.\textsuperscript{56} The burden of proof is initially on the alien to demonstrate lawful residence in the United States.\textsuperscript{57} The burden then shifts to the INS to prove deportability grounds.\textsuperscript{58} At the conclusion of the administrative hearing, the IJ must decide whether to issue an order of removal or to grant relief from removal.\textsuperscript{59} An adverse decision by the IJ can be appealed to the Board of Immigration Appeals by either party.\textsuperscript{60}

3. Procedural Differences Between Removal Hearings and Criminal Trials

Although many of the same liberty interests may be at stake, removable aliens are not afforded the same constitutional protections as criminal defendants. Perhaps the most critical difference is that criminal defendants receive judicial review in an Article III court, whereas removable aliens receive only administrative review by an executive agency.\textsuperscript{61} There are also several procedural differences between removal proceedings and criminal trials. For example, although an alien facing removal is entitled to be represented by counsel, the alien is fully responsible for the cost of such representation.\textsuperscript{62} Realistically, many aliens in removal proceedings do not have the resources to obtain private counsel.\textsuperscript{63} Consequently, as many as ninety percent of all detained aliens are unrepresented at their hearings.\textsuperscript{64} Furthermore, although the alien is provided with an interpreter if necessary, only the alien's own testimony

\begin{itemize}
\item \textsuperscript{55} INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B) (Supp. II 1996).
\item \textsuperscript{56} 8 C.F.R. § 242.16(b) (1997).
\item \textsuperscript{57} INA § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B).
\item \textsuperscript{58} INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).
\item \textsuperscript{59} INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A).
\item \textsuperscript{60} 8 C.F.R. § 242.21(a) (1997).
\item \textsuperscript{61} See Legomsky, \textit{supra} note 30, at 540.
\item \textsuperscript{62} INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A).
\item \textsuperscript{64} \textit{Id.} at 1664.
\end{itemize}
and the questions put to the alien are interpreted. Thus, the alien may be unable to understand discussions between counsel or between the IJ and counsel.

Other rules governing the proceedings also differ. The formal rules of evidence do not apply in removal hearings. Hearsay evidence is admissible in removal proceedings, and the "exclusionary rule" generally does not apply. Additionally, the ex post facto prohibition is inapplicable, so laws may be applied retroactively to removable aliens. Although administrative hearings have always been dramatically different from criminal proceedings, the potentially harsh effects of the system were mitigated by the possibility of appellate review by an Article III court prior to 1996.

C. Habeas Corpus Review of Immigration Decisions

1. Pre-1952 Habeas Corpus Review

Prior to 1952, petitions for writs of habeas corpus were the primary means by which aliens could seek judicial review of deportation orders. During this time, most cases were governed by the 1891 and 1917 Immigration Acts, which precluded judicial review "except insofar as it was required by the Constitution." Despite this jurisdictional limit, courts continued to entertain a broad range of claims in habeas corpus. These included not only constitutional claims, but also nonconstitutional claims involving statutory interpretation and abuse of discretion. In cases where petitioners' habeas petitions were ultimately denied,

72. Id. at 235.
73. See infra Part III.B.1.
courts consistently reached their decisions on the merits of a given alien’s claims rather than on jurisdictional grounds.⁷⁴

In cases governed by the 1891 and 1917 statutes, courts routinely reviewed nonconstitutional claims involving the executive branch’s interpretations of immigration statutes.⁷⁵ For example, in Delgadillo v. Carmichael, the U.S. Supreme Court rejected the executive’s interpretation of the term “entry” in an immigration statute.⁷⁶ In that case the alien had resided in the United States for almost twenty years before embarking on an intercoastal voyage as a crew member on an American merchant ship. Delgadillo’s ship was torpedoed, and he was taken to Cuba for a week.⁷⁷ Two years after returning to the United States, he was convicted of second-degree robbery and ordered deported under a statute providing that an alien sentenced to more than one year in prison within five years after “entry” into the United States shall be taken into custody and deported.⁷⁸ On review, the U.S. Supreme Court granted the alien a writ of habeas corpus because it would be irrational to find that the alien effected another “entry” after his unforeseeable detour to Cuba.⁷⁹

Courts during this time also consistently reviewed the legality of deportation and exclusion orders and denials of discretionary relief.⁸⁰

---

⁷⁴. See, e.g., United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72, 78 (1957) (holding that Attorney General applied correct legal standard in determining whether statutory prerequisites for discretionary relief had been met); Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) (holding that determination that alien was deportable for practicing prostitution was based on sufficient evidence and not unconstitutional because alien had fair hearing); Uyemura v. Carr, 99 F.2d 729, 732 (9th Cir. 1938) (“We have carefully examined the record and it fails to show that the proceedings were unfair, or were conducted in an improper manner, or that there was any abuse of discretion or any denial of appellant’s right to due process of law.”).


⁷⁷. Id. at 389.

⁷⁸. Id. at 390.

⁷⁹. Id. at 390–91.

⁸⁰. See Brief of Amici Curiae Law Professors at 24, Mojica (citing United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) (finding adequate allegation of failure to exercise discretion in accordance with regulations)); see also Gonzalez-Martinez v. Landon, 203 F.2d 196 (9th Cir. 1953); United States ex rel. de Sousa v. Day, 22 F.2d 472 (2d Cir. 1927); United States ex rel. Berman v. Curran, 13 F.2d 96 (3d Cir. 1926).
Review of discretionary decisions was particularly important because, as several courts noted, "discretionary waivers serve to reconcile the rigid categories of the immigration laws with the claims of compassion in individual cases." In *Mastrapasqua v. Shaughnessy*, the Second Circuit overturned a denial of discretionary suspension of deportation because the relevant statute was applied arbitrarily. In that case, an Italian alien who was held in INS custody was present in the United States solely because of World War II. The court held that the Attorney General's decision to refuse to consider pre-examination or suspension of deportation for all aliens present due to the war was capricious and irrational. Accordingly, the court ordered the alien's release.


In 1952, Congress enacted the Immigration and Nationality Act (INA) that is currently in effect. The INA gave aliens the right to challenge a deportation order in an action for declaratory relief pursuant to the Administrative Procedure Act (APA), as well as in a habeas corpus proceeding. However, amendments to the INA soon eliminated APA declaratory actions for aliens. During this period, habeas corpus remained an important means for securing judicial review.


In 1961, Congress amended the INA, providing that petitions for direct review by the courts of appeal "shall be the sole and exclusive

---

83. *Id.* at 1002.
84. *Id.* at 1003.
85. *Id.*
88. *Id.* A full discussion of the APA is beyond the scope of this Comment.
89. *See id.*
procedure for the judicial review of all final orders of deportation." Nevertheless, Congress expressly preserved the habeas corpus jurisdiction of federal district courts. INA section 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." Legislative history indicates that habeas corpus was expressly preserved in the INA to avoid constitutional challenges. In fact, the Congressional Record states: "Nothing contained in the bill is, or can be, designed to prevent an alien from obtaining review [of a deportation order] by habeas corpus." Although most courts during this time did not look beyond the INA to find habeas corpus jurisdiction, those that did found jurisdiction under both INA section 106(a)(10) and 28 U.S.C. § 2241, the general grant of habeas corpus jurisdiction to federal courts. INA section 106(a)(10) remained in effect until 1996.

4. The 1996 Amendments and Habeas Corpus Review

In 1996, AEDPA and IIRIRA dramatically limited judicial review for aliens convicted of the enumerated crimes. First, AEDPA not only struck the habeas corpus provision in the INA, but also replaced it with the following language: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in [certain specified sections] . . . shall not be subject to review by any court." IIRIRA further revised the INA by completely repealing section 106 and replacing it with INA section 242, which provides that:

---

92. 87 Cong. Rec. H12,177 (1961) (statement of Rep. Walter) ("[W]e were very much concerned over the possibility of writing an unconstitutional statute by depriving even an alien the right to a writ of habeas corpus.").
94. Mojica, 970 F. Supp. at 162; see also Sotelo Mondragon v. Ilchert, 653 F.2d 1254, 1255 (9th Cir. 1980) (finding jurisdiction to review deportation order under INA § 106(a)(10) and 28 U.S.C. § 2241).
95. See supra Part I.B.1.
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 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).\textsuperscript{98}

This elimination of judicial review appears to have left many deportation decisions entirely to the discretion of officials in the executive branch.

II. CURRENT INTERPRETATIONS OF THE SCOPE OF HABEAS CORPUS REVIEW

The courts that have interpreted the jurisdictional effects of the 1996 amendments to the INA agree that Congress may not constitutionally close all avenues of judicial review.\textsuperscript{99} Most of these courts have found that 28 U.S.C. § 2241 still provides for some degree of habeas corpus review.\textsuperscript{100} Although several courts have declined to specify the precise scope of review,\textsuperscript{101} those that have considered the scope issue can be divided into three general groups. The majority of courts find jurisdiction over a very narrow range of claims, holding that habeas review is available only in cases involving “grave constitutional error” or where removal might result in a “fundamental miscarriage of justice.”\textsuperscript{102}

\textsuperscript{99} See, e.g., Kolster v. INS, 101 F.3d 785, 791 (1st Cir. 1996) (“Because the INS acknowledges that some avenue for judicial review remains available to address core constitutional and jurisdictional concerns, we find that section 440(a)'s repeal of our jurisdiction to review final orders of deportation does not raise a constitutional issue.”); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996) (“[W]e do not foreclose judicial review of all claims by aliens arising in the course of deportation proceedings.”); Hincapie-Nieto v. INS, 92 F.3d 27, 30 (2d Cir. 1996) (noting that “at least some avenue for judicial relief remains available”); Yesil v. Reno, 958 F. Supp. 828, 837 & n.7 (S.D.N.Y. 1997) (stating that “some means of seeking judicial relief remain available”).
\textsuperscript{101} See, e.g., Mansour v. INS, 123 F.3d 423, 426 n.3 (6th Cir. 1997) (“Because the petitioner is before us seeking direct review of a final deportation order, we need not address the scope of review that is available on a petition for a writ of habeas corpus.”); Kolster, 101 F.3d at 791 (“As the nature and scope of habeas review available to aliens like Kolster is not properly before us at this time, we do not reach those questions.”); Hincapie-Nieto, 92 F.3d at 31 (“We express no opinion on the nature of the remedy or the scope of review that remains available in any court.”).
\textsuperscript{102} See infra Part II.A.
A second group has adopted a slightly broader approach, holding that habeas review is still available for all constitutional claims. A third group, which is considerably smaller than the others, holds that habeas review is still fully available for both constitutional and nonconstitutional claims.

A. Habeas Jurisdiction for Claims Involving a "Fundamental Miscarriage of Justice"

Of the courts that have considered the jurisdiction-stripping provisions of AEDPA and IIRIRA, the majority have concluded that habeas jurisdiction exists only over cases where removal might result in a fundamental miscarriage of justice. The court in *Mbiya v. INS* was the first to reach this conclusion. Mbiya was found deportable because he violated a controlled substance statute. The U.S. District Court for the Northern District of Georgia denied Mbiya's request for habeas corpus review on the grounds that, as a result of the 1996 amendments, the court lacked subject matter jurisdiction over his petition. Despite Mbiya's claims that AEDPA was unconstitutional based on the Suspension Clause and ex post facto prohibition, his petition was dismissed.

The *Mbiya* court proposed a balance between Congress's plenary power over immigration matters and the constitutional limits imposed by the Suspension Clause. The court held that the habeas corpus jurisdiction conferred by 28 U.S.C. § 2241 should be preserved, but only to the extent required by the Constitution. Without citing authority, the court determined that the Constitution requires the extension of habeas

103. See infra Part II.B.
104. See *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997); see also infra Part II.C. Constitutional claims are based on deprivations of rights protected by the U.S. Constitution. Nonconstitutional, or "subconstitutional" claims, on the other hand, refer to the interpretation and application of statutes, regulations, and administrative guidelines that do not arise directly out of the Constitution. See Motomura, *supra* note 16, at 561.
105. 930 F. Supp. 609.
106. Id. at 610.
107. Id.
108. U.S. Const. art. I § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").
109. Id. at 613.
110. Id. at 612.
Proper Scope of Habeas Corpus Review

corpus jurisdiction only in cases where removal would result in a “fundamental miscarriage of justice.”

Shortly after the *Mbiya* decision, several other district courts considered the same jurisdictional issue. In *Duldulao v. Reno*, the court dismissed petitioner’s claims of inadmissible hearsay and abuse of discretion for lack of subject matter jurisdiction. The *Duldulao* court carefully differentiated between habeas review and direct review, noting that habeas corpus is an “extraordinary remedy.” For this reason, habeas review should be allowed only pursuant to the “fundamental miscarriage of justice” standard for enforcement of due process requirements. Although Duldulao’s claims might have been properly considered on direct review prior to the enactment of AEDPA, they were not claims of constitutional magnitude for purposes of habeas corpus review. Several other courts have recently adopted the *Mbiya* court’s jurisdictional standard for allowing habeas corpus review.

While these courts agree on the application of a “fundamental miscarriage of justice” standard, they are divided as to what that standard is. The *Mbiya* court provided the example that this standard would allow an alien claiming mistaken identity an avenue for habeas corpus relief from deportation. The courts following *Mbiya* suggest that “fundamental” due process claims and other “grave” constitutional errors should be considered as well. Although courts adopting this standard have yet to clarify their precise meaning, it is clear that these courts take jurisdiction over only an extremely narrow range of habeas corpus claims.

---

111. Id.
113. Id. at 480.
114. Id.
115. Id. at 482.
B. **Habeas Jurisdiction for All Constitutional Claims**

Although the majority of courts allow habeas corpus relief only when "grave" constitutional questions are concerned, some courts grant a slightly broader scope of review. For example, in *Salazar-Haro v. INS*,119 the Third Circuit held that where any constitutional rights are at stake, judicial review may not be eliminated by statute. Although the court expressly limited its holding to cases where petitioners seek final review of removal orders,120 this holding appears to be considerably broader than the *Mbiya* approach. A federal district court in the Southern District of California reached the same conclusion in *Vargas v. Reno*, reasoning that "there must be a judicial forum in which an alien subject to a deportation order may raise his constitutional claims."121 Interestingly, the *Vargas* court interpreted the Suspension Clause as prohibiting Congress from barring aliens' constitutional claims, "grave" or not.122 It held that aliens have a Fifth Amendment right not to be deported without due process, and that "this can only be guaranteed if there is judicial review of deportees' constitutional claims."123

C. **Habeas Jurisdiction for All Claims**

Not all courts interpret AEDPA and IIRIRA as limiting the scope of their habeas corpus jurisdiction. At least one court has held that habeas corpus review remains fully available, despite the 1996 amendments. In *Mojica v. Reno*, a federal district court in the Eastern District of New York held that AEDPA and IIRIRA "leave undisturbed the independent authority of federal district courts to entertain habeas petitions under section 2241 of Title 28."124 The court relied upon the "clear statement rule," recently articulated by the U.S. Supreme Court in *Felker v. Turpin*,125 which prohibits Congress from repealing jurisdiction by implication.126 The *Mojica* court emphasized that no mention is made of

---

119. 95 F.3d 309 (3d Cir. 1996).
120. *Id.* at 311.
122. *Id.* at 1542.
123. *Id.* at 1541.
section 2241 as an independent grant of jurisdiction in either amendment to the INA.\textsuperscript{127} Since Congress is presumed to know the law, if it had meant to repeal section 2241 jurisdiction, it would have done so expressly.\textsuperscript{128} The \textit{Mojica} court thus determined that full habeas review for both constitutional and nonconstitutional claims remained available pursuant to 28 U.S.C. § 2241. Although no courts have held that habeas review of nonconstitutional claims remains available, at least one has suggested that possibility.\textsuperscript{129}

III. FEDERAL COURTS HAVE HABEAS CORPUS JURISDICTION OVER ALL FINAL ORDERS OF REMOVAL

Several statutory arguments support an interpretation of AEDPA and IIRIRA that does not limit the federal district courts’ habeas corpus jurisdiction under 28 U.S.C. § 2241. Additionally, pre-1952 case law and modern due process analysis confirm that habeas corpus review of both constitutional and nonconstitutional claims is required by the Constitution. For many important removal-related issues, habeas provides the only opportunity for review by an Article III court.

A. \textit{Congress Did Not Intend to Foreclose Section 2241 Habeas Review of All Claims}

Three canons of statutory construction suggest that courts should not interpret AEDPA or IIRIRA so as to repeal, or limit, the habeas corpus jurisdiction conferred on them by 28 U.S.C. § 2241. First, as mentioned by the \textit{Mojica} court, Congress may not repeal the habeas corpus jurisdiction of federal district courts by implication. Second, statutory ambiguities should be resolved in favor of the alien in the deportation context. Finally, courts generally do not interpret jurisdiction-stripping

\textsuperscript{127} Id. at 160.
\textsuperscript{128} Id.
\textsuperscript{129} See Yesil v. Reno, 958 F. Supp. 828 (S.D.N.Y. 1997). Because Yesil presented substantial constitutional claims based on due process, the court did not specifically hold that non-constitutional claims continued to be reviewable in habeas corpus. \textit{Id.} at 839. However, the court did hold that 28 U.S.C. § 2241 was not repealed by AEDPA because such repeal cannot be made by implication. \textit{Id.} at 837–38. The court rejected the government’s “plain language” argument for finding express repeal. \textit{Id.} at 838. The court also declared that Congress may not eliminate habeas review over final orders of deportation unless there is some alternative avenue for review. \textit{Id.}

475
provisions in one statute to limit the jurisdiction conferred on them by other statutes.

1. Jurisdiction May Not Be Repealed by Implication

Because neither AEDPA nor IIRIRA make any mention of 28 U.S.C. § 2241 as an independent jurisdictional ground, habeas corpus review pursuant to that statute must remain fully available. In *Felker v. Turpin*, the U.S. Supreme Court recently reaffirmed the principle that repeals of jurisdiction by implication are disfavored.130 This rule is often referred to as the "clear statement rule." Only a clear statement of congressional intent will suffice to eliminate jurisdiction.131 The *Felker* Court considered section 106(b)(3)(E) of AEDPA, which bars appeals to the U.S. Supreme Court of circuit court denials of successive habeas petitions.132 The Court held that this provision did not eliminate its original jurisdiction to hear such petitions under section 2241.133 In reaching this holding, the *Felker* Court followed the precedent set by *Ex parte Yerger*,134 a U.S. Supreme Court decision from 1868. The *Yerger* Court considered whether the Judiciary Act of 1868, which repealed an 1867 Act extending original habeas jurisdiction to all cases involving restraints of liberty, also repealed the original habeas jurisdiction granted to the U.S. courts by section 14 of the Judiciary Act of 1789.135 The Court noted that no mention was made of section 14 and stated that any repeal of jurisdiction granted by that Act must have been by implication only.136 Given the importance of habeas corpus to the U.S. legal system, the Court held that "repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy."137

The "clear statement rule" set forth in *Felker* and *Yerger* prohibits the repeal of habeas corpus jurisdiction by implication. Although AEDPA and IIRIRA explicitly eliminated direct judicial review of certain removal orders by federal district courts, neither makes reference to

---

131. See *Mojica*, 970 F. Supp. at 159.
133. Id. at 2337.
134. 75 U.S. 85 (1868).
135. Id. at 95.
136. Id. at 105.
137. Id.
proper scope of habeas corpus review, such as habeas corpus review pursuant to 28 U.S.C. § 2241. The Mojica court correctly determined that the 1996 amendments did not repeal or amend section 2241. The court relied on the maxim that Congress is presumed to know the law, and concluded that it would have expressly made reference to section 2241 if it had intended to do so. The purpose of the "clear statement rule," according to the Mojica court, is to ensure that "courts do not have to resort to divining phantom or unarticulated Congressional intentions to repeal habeas jurisdiction where there is statutory silence."

2. Statutory Ambiguities Must Be Resolved in the Alien's Favor

In addition to the prohibition on repeals by implication, a second canon of statutory construction requires courts to construe statutory ambiguities in favor of aliens facing deportation. The U.S. Supreme Court so held in Fong Haw Tan v. Phelan:

We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. The requirement that courts construe ambiguities in favor of the alien denotes a policy preference for protecting aliens whose fundamental liberty interests are at stake. Although the Yerger and Felker decisions specifically refer only to the complete repeal of jurisdiction, they should be interpreted in this context to apply equally to any limitations placed on the scope of habeas corpus review. In other words, Congress should be required to expressly limit the scope of federal district courts' jurisdiction if it intends to do so at all.

---


139. Mojica, 970 F. Supp. at 160.

140. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citation omitted).
Where there is any doubt as to whether Congress intended to limit the availability of judicial review in cases where aliens are subject to final orders of removal, courts should read the applicable statutes in the light most favorable to the alien. AEDPA and IIRIRA are ambiguous insofar as they refer specifically to the INA rather than to habeas corpus jurisdiction generally. In this instance, AEDPA and IIRIRA should not be read as limiting the scope of habeas corpus jurisdiction in removal proceedings. Since Congress did not express a clear and unambiguous intent to limit the scope of section 2241, courts should find that this independent jurisdictional grant is still fully available for all claims.

3. Courts Do Not Favor Interpretations That Repeal Their Jurisdiction

To refuse to find limits on the scope of section 2241 habeas corpus review in this context would be consistent with the historic reactions of courts to congressional attempts to limit their powers of review.\textsuperscript{141} Restrictions on jurisdiction generally have been read quite narrowly, and there is an evident judicial preference for preserving jurisdiction wherever possible.\textsuperscript{142} As early as 1868, in \textit{Ex parte McCordale},\textsuperscript{143} the U.S. Supreme Court noted that the repeal of one statutory grant of jurisdiction may not affect others.\textsuperscript{144} The same reasoning was recently employed in \textit{McNary v. Haitian Refugee Center}.\textsuperscript{145} In that case, the Court held that although section 302(a) of the Immigration Reform and Control Act of 1986 barred district courts from reviewing most final administrative determinations of Seasonal Agricultural Worker status, the courts

\textsuperscript{141} See Lucas Guttentag, \textit{The 1996 Immigration Act: Federal Court Jurisdiction—Statutory Restrictions and Constitutional Rights}, 74 Interpreter Releases 245, 246 (1997); see also Abbott Labs. v. Gardner, 387 U.S. 136 (1967) ("The courts should restrict access to judicial review only upon a showing of "clear and convincing evidence" of a contrary legislative intent.").

\textsuperscript{142} One commentator noted:

Current law is characterized by a strong presumption that Congress did not preclude judicial review of agency actions as recently espoused in \textit{Bowen v. Michigan Academy of Family Physicians}. The Supreme Court has also ruled that the courts can "restrict access to judicial review only upon a showing of clear and convincing evidence of a contrary legislative intent." Peter Hill, \textit{Did Congress Eliminate All Judicial Review of Orders of Deportation, Exclusion, and Removal for Criminal Aliens?}, Fed. Law., Mar.—Apr. 1997, at 43, 44 (citations omitted).

\textsuperscript{143} 74 U.S. 506 (1868).

\textsuperscript{144} Although the Court in that case declined to find jurisdiction over McCordale's petition for habeas corpus, it specifically reserved the right to exercise jurisdiction over similar cases in the future on alternative grounds. \textit{Id.} at 515.

continued to have general federal question jurisdiction over the issue. "We hold that given the absence of clear congressional language mandating preclusion of federal jurisdiction . . . the District Court had jurisdiction to hear respondents' constitutional and statutory challenges to INS procedures." The McNary Court stressed that it was attempting to preserve the availability of meaningful judicial review for petitioners. The case stands for the principle that even where Congress may have intended to eliminate or limit access to judicial review, limitations in one statute should not be presumed to apply to other independent statutory bases of jurisdiction unless expressly stated.

B. Repeal of Habeas Jurisdiction Would Be Unconstitutional

Even if Congress had expressed a clear intent to foreclose all judicial review for criminal aliens, AEDPA and IIRIRA would be unconstitutional. The courts that have considered the jurisdictional effects of these amendments agree that the Constitution requires some avenue for judicial review. The proper process to determine the scope of that review is defined by case law interpreting statutes that, like AEDPA and IIRIRA, limited judicial review to the minimum required by the Constitution. Even when such legislation was in effect prior to 1952, courts routinely found jurisdiction over a wide range of claims. Furthermore, a detailed due process analysis bolsters the conclusion that full habeas corpus review of constitutional and nonconstitutional claims must remain available despite the jurisdiction-stripping provisions in the 1996 amendments.

1. The Proper Scope of Habeas Jurisdiction Is Defined by Pre-1952 Decisions

In Heikkila v. Barber, the U.S. Supreme Court recognized that courts interpreting the 1891 and 1917 Immigration Acts consistently reviewed both constitutional and nonconstitutional claims in habeas corpus, despite the fact that judicial review was statutorily limited to the fullest

146. Id. at 483–84 (emphasis added).
147. Id. at 484.
148. See cases cited supra note 99.
149. See Guttentag, supra note 141, at 258.
extent possible under the Constitution. The Heikkila Court also found that these jurisdiction-stripping acts "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." The fact that courts continued to review all claims during this time indicates that habeas corpus review of even nonconstitutional claims is constitutionally mandated. This conclusion was reached by Professor Henry Hart, who suggested that since the courts in habeas corpus have always enforced statutory requirements, "Justice Clark must . . . be understood [in Heikkila] as saying that the Constitution gives the alien a right, among others, to have the statutes observed."

Whether or not Congress intended to eliminate the statutory grant of habeas corpus jurisdiction previously codified at INA section 106(a)(10), the Constitution operates independently to provide aliens access to the writ. Although the pre-1952 courts did not specify the provisions upon which they relied, constitutional limits may be found in the Suspension Clause, the separation of powers doctrine, and the due process requirement. Because habeas corpus review of both constitutional and nonconstitutional claims is required by the Constitution, the jurisdiction-stripping provisions in AEDPA and IIRIRA should not affect federal district courts' authority to review a broad range of removal-related issues in habeas corpus proceedings.

2. Due Process Provides Significant Protections for Aliens

Careful balancing of the three Mathews v. Eldridge factors confirms that habeas corpus review of even nonconstitutional claims is required by

151. Id. at 234–35.
152. See Morrison, supra note 33, at 701 ("Thus the Heikkila Court saw habeas as a constitutional minimum of judicial review below which no statute could go.").
154. See supra note 108.
155. A complete discussion of separation of powers in the removal context is beyond the scope of this Comment. For more detailed analysis, see, for example, M. Isabel Medina, Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 29 Conn. L. Rev. 1525 (1997).
156. See discussion infra Part II.B.2.
the Constitution. Only three factors are balanced: the private interests at stake, the risk of erroneous deprivation of those interests, and the government's interests. The Mathews test makes no distinction between constitutional and nonconstitutional claims. Rather, the focus is on whether the first two interests are so weighty in comparison with the third as to require judicial review of all claims. In the removal context, the minimal interest the government has in streamlining judicial review is clearly outweighed by the life and liberty interests at stake for the alien and the risk of erroneous deprivation when review is provided by an agency that lacks sufficient neutrality.

a. The Private Interests at Stake

Although the U.S. Supreme Court has never held that deportation constitutes criminal punishment, aliens in removal proceedings face severe deprivations of liberty. The alien's interest in remaining in the United States, where he or she may have found family, friends and employment, is significant. Many legal permanent residents moved to the United States at a very young age and may not speak the language or be familiar with customs in their home countries. The consequences of deportation may be particularly severe when an alien faces persecution or death upon return to the home country. In that sense, life, as well as liberty interests, may be at stake. In fact, one court referred to deportation as a "sanction which in severity surpasses all but the most Draconian criminal penalties." Throughout this century, courts have articulated that "deportation is always a harsh measure," and that it may "result . . . in loss of both property and life; or of all that makes life worth living." In Landon v. Plasencia, the U.S. Supreme Court itself

158. Id. at 335.
160. See Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").
161. Fong Yue Ting, 149 U.S. at 740.
162. Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977).
164. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
recognized that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly." For this reason, removal is said to occupy a "middle ground" between civil and criminal law in terms of this balancing test.

b. The Risk of Erroneous Deprivation

Also significant is the risk of erroneous deprivation. The lack of independence between the adjudicative agencies—the IJs and the Board of Immigration Appeals (BIA)—and the INS may undermine the neutrality generally afforded by independent review. Each of these agencies is part of the Department of Justice. Because the INS serves a prosecutorial function, adjudication at the IJ and BIA levels is not sufficiently insulated to provide an alien with an impartial hearing, particularly if the alien's claim involves allegations of abuse of discretion or other prosecutorial misconduct. Furthermore, whereas Article III judges are entitled to life tenure, IJs and BIA judges may be appointed and removed at the discretion of the Attorney General. The Attorney General also has the authority to review BIA decisions with which she does not agree. Courts have long recognized the difference in the level of due process protection provided by administrative appellate review as opposed to review by an impartial Article III court.

Because of this lack of impartiality, the risk of error in a removal proceeding is significantly greater than the risk of error in a criminal proceeding. Absent habeas review, aliens in removal proceedings now have no access to a courtroom whatsoever, whereas criminal defendants receive habeas review only after criminal convictions and appeals in a

167. 28 C.F.R. § 0.1 (1997).
168. See Medina, supra note 155, at 1540.
170. 8 C.F.R. § 3.1(h) (1997).
171. See Crowell v. Benson, 285 U.S. 22, 61 (1932) ("[W]hen fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'") (citation omitted).
variety of judicial proceedings. Furthermore, criminal aliens may not petition for writs of habeas corpus until all other judicial remedies have been exhausted and thus benefit from several layers of judicial review.

Interestingly, the majority of courts that follow the Mbiya approach discussed above have improperly imported a criminal law standard into civil immigration habeas proceedings. The "fundamental miscarriage of justice" standard applied by these courts actually arose in a criminal case involving federal post-conviction relief. Courts that apply this standard in the removal context "fundamentally misconceive[ ] the nature and purpose of the habeas corpus guarantee. The Great Writ assures that independent judges will examine the legality, not just the constitutionality, of detention ordered by the executive." The "fundamental miscarriage of justice" standard looks at the content of the particular claim being raised, rather than at the general due process requirement that the alien is entitled to have the decision reviewed by an independent Article III court. This emphasis on the content of the claim is appropriate in the criminal context because the defendant has already had some judicial review of his or her case. However, it is inappropriate in the removal context given that civil habeas petitions are now the only means by which an alien may obtain judicial review.

c. The Government's Interests

The third factor, the government's interests, is much less weighty than the other two factors. The government clearly has an interest in eliminating the dangers posed by alien terrorists in the United States. But this interest is only marginally served by denying aliens access to an Article III court. Moreover, alien terrorist removal procedures are governed by an entirely different statutory provision than removal procedures for other criminal aliens. Allowing these other criminal aliens access to federal courts in no way undermines Congress's intent to

---

172. See Guttentag, supra note 141, at 259.
173. Id.
175. Brief of Amici Curiae Law Professors at 18, Mojica v. Reno, decision pending (2d Cir.) (No. 97-2599/2600).
quickly remove alien terrorists. The government also has an interest in conserving judicial resources.  However, the limitations on habeas corpus review imposed by AEDPA and IIRIRA may not reduce costs to a level significantly lower than the review provided under the INA. Professor Lenni Benson suggests that if no statutory grant of habeas corpus jurisdiction remains, courts will expend significant resources determining which claims are "constitutional" for purposes of habeas corpus review. Litigating subject matter jurisdiction may actually lead to longer delays and increased litigation and detention expenses.

There are also government interests that weigh directly in favor of habeas corpus review. For example, the government has an interest in ensuring that a fair process is implemented in the removal context. Consider the problems created by Bashaw v. Department of Justice. In that case, two border patrol agents violated a regulation requiring them to notify the district director in instances where Soviet nationals might be seeking asylum in the United States. Although the alien involved indicated that he deserted his ship for "political and moral reasons," the agents ordered him forcibly returned to the ship. An international outcry resulted, and sixty senators requested an investigation into the incident. This demonstrates that implementation of a procedure that provides almost no due process protections for the alien can create opportunities for increased error and could potentially lead to disrepute in the international community.

A balancing of the three due process factors thus reveals that due process requires independent review by the judiciary of final orders of removal. The alien's life and liberty interests are clearly significant, as are the risks of erroneous deprivation in proceedings that are not subject to review by independent courts. Furthermore, the government's interests in preventing alien terrorist activity and in judicial economy are not substantially furthered by denying aliens any access to the courts.

179. See Benson, supra note 174, at 1487-88.
180. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (stating that government has interest in "foster[ing] the dignity and well-being of all persons within its borders").
182. Id. at 675.
C. Limitations on Habeas Corpus Jurisdiction Would Prohibit Courts from Hearing a Number of Important Claims

The majority of courts, which interpret AEDPA and IIRIRA as limiting their habeas corpus jurisdiction to “constitutional” claims, deprive aliens of the opportunity to bring significant statutory and abuse of discretion challenges before federal district courts. This position is not just erroneous and unconstitutional; it is bad policy. Many nonconstitutional removal-related issues need to be reviewed independently by an impartial judiciary.

1. Claims Involving Statutory Interpretation

It is essential that district courts continue to review claims involving statutory interpretation. For example, the INA presently includes no definition of the term “moral turpitude,” one of the enumerated crimes that leaves aliens with no independent review.184 Because this concept is vague, it is an area of potential inconsistency for which judicial review is extremely important.185 In the past, Article III courts regularly reviewed these determinations.186 For example, in Goldeshtein v. INS, the Ninth Circuit overturned a published BIA decision holding that money-laundering was a crime of moral turpitude.187

Even crimes defined by the INA have given rise to challenges based on statutory interpretation. For example, certain “aggravated felonies” are not as clear as the statute might indicate.188 Determining whether a

---


186. See, e.g., Jordan v. DeGeorge, 341 U.S. 223, 232 (1951) (holding that crime of conspiracy was crime of moral turpitude for deportation purposes); Hamdan v. INS, 98 F.3d 183, 189 (5th Cir. 1996) (vacating BIA order and remanding for consideration of whether simple kidnapping is crime of moral turpitude).

187. Goldeshtein v. INS, 8 F.3d 645, 649–50 (9th Cir. 1993).

crime committed is an aggravated felony is especially important, because once criminals are considered aggravated felons for deportation purposes, their opportunities for discretionary relief are drastically restricted. In addition to defining specific crimes, courts have played a critical role in determining what constitutes a "conviction" for deportation purposes. Only aliens who are actually "convicted" of the crimes enumerated by AEDPA and IIRIRA are barred from judicial review.

If executive officials are granted unchecked authority to interpret immigration statutes in any way they choose, extreme arbitrariness might result. In the past, officials have interpreted statutes "to exclude able-bodied immigrants in time of oversupply of labor, and to create a new racial exclusion of Hindus on the ground that prejudice would prevent them from finding work." That these determinations had to be rejected by the U.S. Supreme Court highlights the importance of judicial review of these types of decisions.

2. **Claims of Abuse of Executive Discretion**

Because so much authority is presently vested in the Attorney General, it is critical that claims involving abuse of discretion be reviewable in habeas corpus proceedings. AEDPA and IIRIRA not only expanded the grounds for removal, but also limited the possibility that an alien convicted of one of the enumerated crimes might obtain discretionary relief. Prior to 1996, INA section 212(c) granted the Attorney General the ability to give an alien a "second chance" based on ameliorating circumstances. Such circumstances included length of

189. See Hill, supra note 142, at 44.

190. See generally Legomsky, supra note 30, at 410–30 (explaining that certain probation and diversion programs may not constitute "convictions" for deportation purposes).


192. See id. at 14 (citing Healy v. Backus, 243 U.S. 657 (1917) (regarding Hindu workers), and Gegiof v. Uhl, 239 U.S. 3 (1915) (Holmes, J.) (regarding oversupply)).

193. See Hill, supra note 142, at 44 ("There can be little doubt that most aliens with aggravated felony convictions are not eligible for any relief from removal... regardless of the number of years the offender has resided in the U.S. or how young s/he was upon initially becoming a legal permanent resident.").

Proper Scope of Habeas Corpus Review

residence, family and job opportunities in the United States, and prior criminal convictions. In 1996, section 212(c) was replaced by section 240A, also known as cancellation of removal. However, aggravated felons and aliens deportable for security reasons are ineligible for section 240A relief. Where an alien is removable on other grounds, such as a drug offense or crimes of moral turpitude, the decision to grant relief is left to the discretion of the Attorney General.

In addition to cancellation of removal, aliens convicted of "particularly serious crimes" whom the Attorney General believes might pose a danger to the United States are statutorily ineligible for asylum. Crimes that are "particularly serious" are not defined by the statute, although aggravated felonies automatically qualify. In cases involving lesser crimes, this determination has generally been fact-specific. Judicial review has been extremely important in this area, and the discretionary decisions made by the Attorney General should continue to be checked by Article III courts.

IV. CONCLUSION

The U.S. Supreme Court declared in the nineteenth century that "[t]he great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." In 1996, Congress enacted two pieces of restrictive legislation that appeared to place the writ beyond the reach of aliens who, however rightly or wrongly, have been convicted of crimes. Given that Congress did not expressly eliminate the courts' jurisdiction to hear habeas petitions brought under 28 U.S.C. § 2241, the courts should not interpret the statutes as stripping them of any of their jurisdiction. Moreover, even if Congress had intended to prohibit the courts from hearing habeas petitions of aliens, the Constitution prohibits it from doing so. Numerous pre-1952 cases

197. INA § 240A(c), 8 U.S.C. § 1229b(c).
198. INA § 240A(a), 8 U.S.C. § 1229b(a).
202. Ex parte Yerger, 75 U.S. 85, 95 (1868).
heard all kinds of claims in habeas corpus at a time when habeas jurisdiction was limited to that required by the Constitution. Congress cannot overrule these cases by legislative fiat. Similarly, the Due Process Clause of the Fourteenth Amendment requires that aliens have an opportunity to have their claims heard by an Article III court before they are deported, perhaps to face persecution or even death. Thus, notwithstanding the 1996 legislation, federal district courts should continue to hear a broad range of constitutional and nonconstitutional issues raised in habeas corpus petitions by criminally convicted aliens. After all, if habeas corpus is to continue to function as "the great bulwark of personal liberty," it must remain available to those whose liberty most precariously hangs in the balance.