Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under The AEDPA and IIRIRA

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During all these long years the man watches the doorkeeper almost incessantly. He forgets about the other doorkeepers and this one seems to him the only barrier between himself and the Law. . . . Finally his eyes grow dim and he does not know whether the world around him darkens or whether his eyes are only deceiving him. But in the darkness he can now perceive a radiance that streams inextinguishable from the door of the Law. . . . "What do you want to know now?" asks the doorkeeper. . . . "Everyone strives to attain the Law," answers the man, "how does it come about, then, that in all these years no one has come seeking admittance but me?" The doorkeeper perceives the man is coming to an end and that his hearing is failing, so he bellows in his ear: "No one could gain admittance through this door, since this door was intended for you. I am now going to shut it."

The adjectives "Orwellian," "Kafkaesque," and "draconian" have been used to describe two new immigration reform laws passed by Congress in 1996. Republican members of Congress pushed for tough immigration laws in response to national fears of terrorism, overpopulation, and unemployment. These new laws expanded the litany of

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* Senior Articles Editor, Boston College Third World Law Journal.
3 See Johnson, supra note 2, at 838-39; William Branigin, Sierra Club Debates Immigration, The Commercial Appeal (Memphis), Mar. 8, 1998, at A13; see also Michelle Mittelstadt, Wash.
crimes for which aliens can be summarily deported, eliminated waiver of deportation relief, and precluded judicial review of certain deportation orders.4

On the one-year anniversary of the Oklahoma City bombing, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).5 The AEDPA amended the Immigration and Nationality Act (INA)6 by changing the definition of an aggravated felony and adding to the list of crimes that constitute that offense.7 As a result, aliens convicted of aggravated felonies now are barred from applying for relief from deportation.8 The U.S. Attorney General’s office has been allowed little discretion to ensure fairness and prevent unconscionable results.9 Further, the AEDPA establishes mandatory detention provisions for aliens convicted of criminal offenses who are seeking entry, re-entry or waiting for a deportation hearing following conviction.10 Moreover, the Act operates retroactively, so that aliens are suddenly subject to deportation for crimes committed decades ago that now constitute aggravated felonies under the AEDPA.11 Because many of these crimes were not grounds for deportation when committed, aliens may have been encouraged by counsel to plead guilty in order to avoid deportation for more serious allegations.12

4 See Johnson, supra note 2, at 875–76 (final deportation orders based on criminal deportation grounds not subject to judicial review); see also Frank Trejo, FW Woman Trying to Fight Husband’s Deportation to Mexico, DALLAS MORNING NEWS, Dec. 13, 1996, at 39A [hereinafter Trying to Fight Husband’s Deportation].
7 For a detailed discussion of these provisions, see discussion infra Part II.A. and accompanying notes.
9 See id. at 133; see also Jules E. Coven, Changes to Grounds of Exclusion and Deportation: Changed Definition of “Aggravated Felony” and New Bars for EWIs and Overstays Under the Antiterrorism and Effective Death Penalty Act of 1996, 964 PLI/Corp. 93, 101–02 (1996).
10 See Coven, supra note 9, at 101–03.
12 See id.
Shortly after the passage of the AEDPA, Congress passed a second act containing even more provisions limiting alien rights and making deportation and exclusion much easier. President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) into law on September 30, 1996. The IIRIRA effectively eliminates judicial review of deportation orders based on criminal convictions, bars re-entry for individuals overstaying their visas, authorizes expedited removal orders by immigration officers at ports of entry, and blocks avenues by which deportation orders can be suspended or waived by denying federal court jurisdiction. In addition to the questionable constitutionality of many of the IIRIRA's provisions, the enforcement of these provisions is causing immigrant groups to form coalitions and lobbies in order to pressure members of Congress to reconsider the harsh effects of the laws. Legal scholars have attacked provisions of the AEDPA and IIRIRA as violations of principles of international law and the First Amendment.

The first section of this Note describes some of the extreme hardship cases that have arisen since the inception of these Acts, explores the current political climate and ultimately illustrates the inherent unfairness and impracticality of the current state of the law. These stories poignantly demonstrate how the specific provisions of the new laws are impacting real people. Moreover, these accounts set the stage for an exploration of the constitutional hurdles for both advocates and proponents of the new legislation and help to explain why immigration lobbies are pressuring members of Congress to curb the harsh effects of the AEDPA and IIRIRA.

The second section of this Note analyzes some of the most egregious provisions of these Acts in a constitutional light and addresses the inherent tension between alien rights and the plenary power of Congress over immigration. Most importantly, this section demon...
stratifies that the recent changes to immigration law do not effectively target the problem areas identified by Congress and discusses recent litigation over the AEDPA, focusing on the IIRIRA’s new “exclusive jurisdiction” provision.\textsuperscript{18}

The third section of this Note suggests changes to the AEDPA and IIRIRA. These suggestions attempt to resolve the major problems originally targeted by the reform movement, but avoid the establishment of overly inclusive and draconian immigration laws, such as those currently enacted under the AEDPA and IIRIRA.

I. THE EFFECTS OF THE NEW IMMIGRATION LAWS

A result-oriented analysis of these immigration laws is particularly needed because the laws themselves eliminate judicial review and most of the discretion formally exercised by immigration judges.\textsuperscript{19} Therefore, even the most unfortunate and unfair cases are now absolute, permanent, and unreviewable.\textsuperscript{20} Additionally, the results of deportation cases affect the individuals involved, both directly and indirectly, in the most fundamental ways.\textsuperscript{21} Deported aliens often lose everything that “makes life worth living,” including their families, friends, community, jobs, and religious freedom.\textsuperscript{22} In the most extreme cases, deported aliens fear for their personal safety and self-preservation.\textsuperscript{23} Entering with improper documentation, a common practice for asylum seekers, is now a mandatory bar on entry or re-entry.\textsuperscript{24} The Immigration and Naturalization Service (INS) has the authority to remove or exclude such individuals without a hearing or an appeal.\textsuperscript{25} Asylum seekers must

\textsuperscript{18} See infra Part II.C.
\textsuperscript{19} See Rannik, supra note 8, at 124.
\textsuperscript{20} See id; see also Wolchok, supra note 14, at 12–13 (quoting American Bar Association’s Governmental Affairs Director, Robert D. Evans); Trying to Fight Husband’s Deportation, supra note 4.
\textsuperscript{21} See generally Wolchok, supra note 14.
\textsuperscript{22} See Linda Kelly, Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights, 41 VILL. L. REV. 725, 763 (1996) (community ties that aliens make while residing in another country should be used as a basis for determining when deportation exceptions should be made). Justice Louis Brandeis once wrote that deportation may deprive an individual of “all that makes life worth living.” Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
\textsuperscript{23} See Wingerter, supra note 13, at 68.
\textsuperscript{24} See id. (presenting false documents may also have criminal consequences and to avoid the penalties associated with document fraud, the asylum seeker must succeed in the asylum application process).
\textsuperscript{25} See id.
establish a "credible fear" of persecution during an interview.\textsuperscript{26} Once "credible fear" is established, the asylum seeker is detained for further consideration.\textsuperscript{27}

Deportation also affects those left behind, often U.S. citizens, by banishing their loved ones, tearing families apart, and eliminating any economic support the deported alien provided.\textsuperscript{28} One immigration scholar has noted that although notions of family unity have been afforded constitutional recognition and protection when applied in other areas of law, "it is not clear that the right to family unity withstands an attack by U.S. immigration law."\textsuperscript{29}

A. Specific Hardship Cases

Martin Munoz, a thirty-seven-year-old Mexican native, spent five months in the Denton County Jail in Texas awaiting his deportation hearing while his wife worked adamantly for his release.\textsuperscript{30} Munoz is married to a U.S. citizen and supports three children and four step-children.\textsuperscript{31} His wife and step-children view the future with fear and uncertainty.\textsuperscript{32} On December 11, 1997, Martin Munoz was deported under a provision of the AEDPA that expanded the list of criminal acts which constitute aggravated felonies and mandate deportation.\textsuperscript{33} The crime for which Mr. Munoz was deported occurred in 1990.\textsuperscript{34} He had already served a sentence of five years of probation and 160 hours of community service.\textsuperscript{35}

The story originates in 1990, when Rosalia Munoz called the police to her house with the hope that they would place her intoxicated husband in a "drunk tank" until he was sober.\textsuperscript{36} In all likelihood, it was

\textsuperscript{26} See id.
\textsuperscript{27} See id.
\textsuperscript{28} See Trying to Fight Husband's Deporation, supra note 4.
\textsuperscript{29} Kelly, supra note 22, at 730. A number of Supreme Court cases protected the sanctity of the family as an institution "deeply rooted in this Nation's history and tradition." See id. at 730 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). In Moore, the Court held that the extended family's right to live together was a liberty interest protected under the Due Process clause of the Fourteenth Amendment. See 431 U.S. at 499, 502, 504-06 (Powell, J., plurality opinion).
\textsuperscript{30} See Trying to Fight Husband's Deporation, supra note 4; Long Arm of Immigration Law, supra note 11.
\textsuperscript{31} See id.
\textsuperscript{32} See Trying to Fight Husband's Deporation, supra note 4.
\textsuperscript{33} See id.
\textsuperscript{34} See id.; Long Arm of Immigration Law, supra note 11.
\textsuperscript{35} See id.
\textsuperscript{36} See Long Arm of Immigration Law, supra note 11.
a phone call that Rosalia Munoz has lived to regret. The police arrived, and after an officer pushed Mr. Munoz over a couch, a scuffle ensued. The incident resulted in Mr. Munoz's conviction for aggravated assault on a police officer. After serving his probationary sentence and completing community service, Mr. Munoz received a letter assuring him that the conviction had been removed from his record.

Seven years later, Mr. Munoz was arrested for public intoxication. Instead of merely spending the night in jail, however, Mr. Munoz was denied bail and detained for the entire five months preceding his deportation hearing. He was subsequently deported under the AEDPA for a past crime which was not a ground for deportation under the prior version of the INA. Mr. Munoz's appeal was summarily rejected by a federal court under a provision of the IIRIRA eliminating judicial review of such cases. Although Rosalia Munoz has spent hours on the phone with her husband's attorney searching for a solution, there is little she or others can do to prevent the deportation of family members under the new laws.

Daniel Kozuba, a Canadian native who came to the United States at age five, found himself in a similar predicament. His story begins over ten years ago, when he suffered with a drug addiction which led to three arrests and one conviction. Although Kozuba faced deportation after his release from a state prison in 1993, he convinced an immigration judge to grant him a waiver of deportation, a discretionary relief no longer available under the new laws. The INS appealed

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57 See id.
58 See id.; Trying to Fight Husband's Deportation, supra note 4.
59 See Long Arm of Immigration Law, supra note 11.
60 See id.
61 See id.
62 See Trying to Fight Husband's Deportation, supra note 4. For a more complete explanation of the differences between the current and former states of immigration law, see discussion infra Part II.
63 See Trying to Fight Husband's Deportation, supra note 4; see also Wolchok, supra note 14, at 12 (provision bars federal court review of final deportation orders based on criminal convictions).
64 See Long Arm of Immigration Law, supra note 11.
65 See id.
66 See id. The waiver of deportation relief that was available under INA section 212(c) and the suspension of deportation relief that was available under INA section 244(a) were consolidated into the "cancellation of removal" provision under section 240A of the IIRIRA. See William C.B. Underwood, Note, Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases, 72 Ind. L.J. 885, 892 (1997). This new provision requires a showing of "exceptional and extremely unusual hardship," 10 years of continuous physical
the waiver, but while the appeal was pending, the AEDPA was passed and his case was reversed.\textsuperscript{48} Much like Mr. Munoz, Mr. Kozuba is married to a U.S. citizen, and his familial and community ties exist within the United States.\textsuperscript{49} As Mr. Kozuba explained, “I thought I had proved myself. I have gotten my life together. And now they want to take everything away from me. . . . I can’t imagine going back.”\textsuperscript{50}

On May 19th of the same year that both Mr. Munoz and Mr. Kozuba faced deportation, Mazen Al-Najjar, a forty-year-old Palestinian refugee and American-educated engineer, was handcuffed while having breakfast with his family and transported to an undisclosed location.\textsuperscript{51} He subsequently was placed in an INS holding facility in a Manatee County, Florida jail and denied bail under a provision of the AEDPA which allows the government to use informant testimony and “secret evidence” to detain and deport suspected terrorists.\textsuperscript{52} The use of such evidence often renders deportation hearings mere formalities, and the final orders of such hearings cannot be appealed or reviewed.\textsuperscript{53} Al-Najjar was never permitted to see the evidence against him, nor has he been formally charged with any crime.\textsuperscript{54}

Sharon Rowe-Johnson tells the story of her brother’s devastating encounter with the new deportation legislation.\textsuperscript{55} Sharon and her brother emigrated from Jamaica more than twenty-five years ago.\textsuperscript{56} Her brother retired from the U.S. Navy in 1996 following a twenty-year career which included service in the Persian Gulf War.\textsuperscript{57} He was jailed in September of 1997 and faced a deportation order following a routine background check conducted pursuant to his 1996 application for citizenship. The background check uncovered a 1983 conviction for marijuana possession in Japan.\textsuperscript{58} INS officials explained that the agency

\textsuperscript{1} See \textit{Long Arm of Immigration Law}, supra note 11.
\textsuperscript{48} See \textit{Long Arm of Immigration Law}, supra note 11.
\textsuperscript{49} See id.
\textsuperscript{50} Id.
\textsuperscript{51} See Maxwell, supra note 2; \textit{Trying to Fight Husband’s Deportation}, supra note 4; \textit{Long Arm of Immigration Law}, supra note 11.
\textsuperscript{52} See Maxwell, supra note 2.
\textsuperscript{53} See id; see also Underwood, supra note 47, at 893–94.
\textsuperscript{54} See Maxwell, supra note 2.
\textsuperscript{55} See Swift, supra note 2.
\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} See id.
had no choice but to apply the mandatory deportation rules promulgated by the recent immigration reform legislation.\textsuperscript{59}

\section*{B. A Turbulent Political Climate}

True stories illustrate the inherent flaws in the approach Congress is taking with respect to immigration law and policy.\textsuperscript{60} In these individual cases, in which the application of the draconian legislation is unconscionable, government officials have little opportunity to exercise discretion, and deported or excluded aliens have no opportunity for judicial review of the deportation hearing.\textsuperscript{61} Moreover, aliens waiting for a deportation hearing can be detained indefinitely without the protection afforded to citizens detained for criminal offenses under the Constitution.\textsuperscript{62}

Even officials within the INS recognize the devastating potential of the AEDPA and IIRIRA.\textsuperscript{63} In its final report to Congress on September 30, 1997, the U.S. Commission on Immigration Reform described the retroactive application of the new laws to old offenses as “manifestly unfair.”\textsuperscript{64} While INS Commissioner Doris Meissner conceded the importance of targeting criminal aliens for deportation, she also argued that the laws may require adjustment to provide the INS greater discretion.\textsuperscript{65} Meissner stated that “[t]he new laws affect a broad class of people with any kind of criminal history. . . . But to eliminate, as Congress did, all discretion, was an overreach.” Meissner also noted that the effects of the laws will require close scrutiny: “There’s an evolutionary process here. We have to see some of these things in practice before we know what’s working and what isn’t.”\textsuperscript{66}

The results thus far indicate that the laws are not working. Ethnic and immigrant groups, as well as opponents of the legislation within the legal and academic communities, are responding.\textsuperscript{67} “There is a growing awareness that the law went too far,” says Lucas Guttentag, Director of the American Civil Liberties Union immigrant rights pro-

\begin{thebibliography}{99}
\item \textsuperscript{59} See id.
\item \textsuperscript{60} See Swift, \textit{supra} note 2.
\item \textsuperscript{61} See Underwood, \textit{supra} note 47, at 887, 894–95.
\item \textsuperscript{62} See Wolchok, \textit{supra} note 14, at 13.
\item \textsuperscript{63} See Swift, \textit{supra} note 2; \textit{Long Arm of Immigration Law}, \textit{supra} note 11.
\item \textsuperscript{64} Swift, \textit{supra} note 2.
\item \textsuperscript{65} See \textit{Trying to Fight Husband's Deportation}, \textit{supra} note 4.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} See Swift, \textit{supra} note 2.
\end{thebibliography}
The Caribbean-American Network of Democrats (Caribnet), has created a non-political fund to help support the families of, and pay legal fees for, local immigrants facing deportation. INS offices have initiated information campaigns in an attempt to educate the immigrant population about the new requirements and provisions. However, Rosemary Moreno, Executive Director of El Concilio Immigration Project in Fresno, California, says the INS should have initiated a radio and outreach program prior to the passage of the new legislation. “Immigration needs public relations to make their work easier... If people are educated, it will make the work easier for everybody. People are coming to INS offices unprepared,” Moreno complains.

In response to a growing awareness of the new immigration laws, resident aliens are applying for citizenship in unprecedented numbers. However, Republican supporters of the strict measures adopted through the AEDPA and IIRIRA cite recent immigration statistics as evidence of the laws’ success. Deportation statistics have increased dramatically since the new legislation was passed. Nearly 112,000 criminal and other illegal immigrants were deported from the U.S. in the fiscal year 1997, as compared to approximately 69,000 in 1996. Republican Senator Spencer Abraham, who chairs the immigration subcommittee and authored parts of the new laws, stated during a recent speech on the Senate floor that “[o]ur goal was to deport convicted criminal aliens starting with the thousands currently in our jails.

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68 Long Arm of Immigration Law, supra note 11.
69 See Swift, supra note 2.
70 See id.
72 Id.
73 See Swift, supra note 2.
For a nation built on the assimilation of foreigners, this is an unparalleled time for the making of Americans. Between 1991 and 1997, naturalization petitions by immigrants increased nearly eightfold, from about 200,000 a year to a record total of more than 1.5 million in the just-concluded federal fiscal year. More immigrants applied to become citizens in fiscal 1997 than in the entire decade of 1911–20, one of the heaviest immigration periods in the 20th century.

74 See Naftali Bendavid, Deportations up As INS Tries to Please Congress, CHI. TRIB., Oct. 31, 1997, at 5.
75 See id.
76 See id. The INS reported that in the city of Chicago alone, deportation of illegal immigrants rose from 441 during the fiscal year 1996, to 1,181 in 1997. See id.
and prisons. . . . Law-abiding people, not hardened criminals should be filling our priceless immigration slots."77

Senator Abraham and other supporters of the recent immigration reform have minimized the harsh results, characterizing them as an INS effort to undermine the legislation by aggressively pursuing the minor cases to prove a point.78 As an example of supporters' repsones, Dan Stein, Director of the Federation for American Immigration reform, has stated that:

The INS has been weakening the law at every point, and virtually any provision that inconveniences aliens here is under attack from various immigration lobbies. . . . You shouldn't torpedo a sound policy because there are a few hardship cases. . . . With 30 million people who want to move to the country tomorrow, why do you want to let in people of bad moral character?80

The uproar over the new legislation also is affecting the political climate on local and national levels.81 Immigrants who fear deportation have applied for citizenship in unprecedented numbers and some Republicans fear that this new body of voters will dilute their majority in Congress.82 Additionally, lobbying efforts by immigrant advocacy groups have resulted in the relaxation of several of the laws' provi-

77 Long Arm of Immigration Law, supra note 11; see also Trying to Fight Husband's Deportation, supra note 4, (Senator Abraham echoing similar sentiments on the goals of the new laws).
78 See Trying to Fight Husband's Deportation, supra note 4.
79 Long Arm of Immigration Law, supra note 11.
80 Swift, supra note 2. To remedy the hardship cases, Stein offers the following:
Maybe we should look at the miniscule number of cases where more discretion might be in order, but before we do that, I'd like to see a much stronger effort on the administration of deporting individuals who do in fact commit serious crimes and under our laws have forfeited the right to stay in our communities. . . . It's hard to understand why the INS and Meissner can't handle those very exceptional cases on an administrative basis. Meissner appears to be more interested in finding a way to seriously weaken and damage the integrity of the provisions mandating the deportation of criminal aliens than in making the new law work.
Trying to Fight Husband's Deportation, supra note 4.
81 See Swift, supra note 2.
82 See id. For example, Republicans in California and Texas charged that during the 1996 campaign, the Clinton administration "was plotting to make new Democratic voters by naturalizing large numbers of immigrants." Id. History suggests that Republican fears may be well founded. See id. Gary Gerstle, a historian at Catholic University who studies the effects of immigration, reported that similar restrictions supported by Republicans in the 1920s caused a surge in naturalization, producing a larger Democratic party voting body that ultimately facilitated the passage of President Roosevelt's New Deal. See id.
sions.\(^{83}\) For example, Congress approved a compromise measure allowing illegal immigrants whose permanent residency applications were filed by January 14, 1998, to remain in the United States while the government processes their paperwork in exchange for a $1,000 fine.\(^{84}\)

President Clinton also approved a safe harbor provision for Central Americans who sought asylum in the U.S. during the past decade from civil wars in their home countries.\(^{85}\) The safe harbor provision makes Nicaraguan and Cuban refugees automatically eligible for legal permanent residence.\(^{86}\) The provision also allows those from El Salvador, Guatemala and Eastern Europe to apply for the suspension of deportation relief that was available under the old version of the INA, but was subsequently eliminated by the AEDPA.\(^{87}\)

In late December 1997, President Clinton instituted a rarely used "deferred enforced departure" order to postpone the deportation of eligible Haitians for at least one year while the Executive Branch works with Congress to produce "a long-term legislative solution."\(^{88}\) Eligible Haitians are those who applied for asylum prior to December 31, 1995.\(^{89}\) Congressional sources estimate that the safe harbor provision will affect as many as 400,000 Central Americans and between 30,000 and 40,000 Haitians.\(^{90}\)

Moreover, in the past two years since the AEDPA and IIRIRA were passed, the INS has found it necessary to invoke the Transition Period Custody Rules (TPCR) to suspend the full application of the mandatory detention requirements.\(^{91}\) This measure allowed the INS and the immigration courts to release a lawfully admitted alien who was deportable for a criminal offense after considering the nature of the offense, the likelihood the person would appear for further proceedings, and what danger the person posed to the community.\(^{92}\)

\(^{83}\) See Mittelstadt, supra note 3.

\(^{84}\) See Michelle Mittelstadt, Immigration Curbs Ease, but Debate Still Grows, CHI. SUN-TIMES, Nov. 14, 1997, at 34.

\(^{85}\) See id.

\(^{86}\) See id.

\(^{87}\) See id; see also Branigin, supra note 3.

\(^{88}\) Branigin, supra note 3.

\(^{89}\) See id.

\(^{90}\) See id.


\(^{92}\) See id. The TPCR did not apply to aliens who committed certain serious criminal offenses and was initiated due to the INS' lack of detention capacity and personnel to fully implement the IIRIRA detention requirements. See id. At the time of her testimony, Meissner believed that
II. Specific Changes Made by the New Immigration Laws

The specific problems that require immediate attention and adjustment can be identified by comparing immigration law before the passage of the AEDPA and IIRIRA to the present state of the law. While making this comparison, it is important to keep in mind the danger and permanence of the unfair results of the AEDPA and IIRIRA.

A. Provisions Affecting Criminal Aliens

The new laws have dramatically increased the types and degrees of crimes that can result in mandatory deportation. Primarily, the definition of an "aggravated felony," which is grounds for deportation, has been expanded. Section 436 of the AEDPA amends section 241(a)(2)(A)(i)(II) of the INA by extending deportation to aliens convicted of a crime of moral turpitude within five years of their date of entry, for which a sentence of one or more years is statutorily permitted, regardless of whether the alien is actually sentenced to any time at all. Under the prior provision, the alien must have been actually sentenced to one year or more in order to invoke a deportation proceeding. Therefore, the prior provision usually did not extend to minor offenses, such as first-time shoplifting convictions, and incorporated the judicial discretion and fairness exercised throughout a criminal proceeding.

Additionally, various provisions of the AEDPA amend section 1101(a)(43) of the INA by adding to the list of aggravated felonies. This new definition is much broader than under common criminal law statutes. This provision was expanded to include gambling offenses,

the INS continued to lack sufficient detention capacity and would have to continue exercising the discretion allowed under the TPCR. See id.

93 See Wingerter, supra note 13.
94 See Coven, supra note 9, at 95–98.
95 See id. at 95–96.
96 See id. at 96.
97 See id.; Wingerter, supra note 13.
98 See Wingerter, supra note 13.
99 See id.
transportation for prostitution, alien smuggling, illegal entry or re-entry if the alien has a past conviction for an aggravated felony, document fraud, commercial bribery, obstruction of justice and failure to appear before a court for a felony charge.

This indicates that the changes instituted do not necessarily encourage the deportation of only hardened criminals or those who pose serious threats to safety, as supporters of the legislation claim. Provisions for deporting such individuals were already available under the old legislation. Ironically, the new provisions target perpetrators of less serious technical offenses and those whose sentences were commuted or suspended due to mitigating circumstances weighed during their criminal trials.

The retroactive application of the new criminal alien provisions is proving to be one of the most unfair and unnecessary aspects of the law. Individuals applying for naturalization in response to the new


108 See Swift, supra note 2.

109 See discussion infra Part III.

110 See Rannik, supra note 8, at 124-30; Swift, supra note 2.

legislation, but who have past convictions for acts which constitute felonies under the new law, have found themselves trapped. Similar to the case of the retired naval officer, some aliens who choose to apply for naturalization are finding that, instead of becoming U.S. citizens, "armed INS agents are appearing in the early morning hours . . . to arrest and deport them." Therefore, this policy clearly discourages naturalization, while encouraging certain aliens to remain "illegal."

The expanded definition of deportable criminal acts alone reflects unsound and draconian policy-making. However, the retroactive application of such laws, coupled with the mandatory detention of criminal aliens awaiting deportation or exclusion orders, borders on being an unconstitutional violation of due process. Like most constitutional challenges to immigration legislation, however, any due process claim will have to address the plenary power doctrine, an age-old theory affording Congress exclusive and virtually unchecked power over immigration matters.

The plenary power doctrine states simply that Congressional authority over matters of immigration is absolute and unchecked. The U.S. Supreme Court has explained,

For reasons long held as valid, the responsibility for regulating the relationship of the United States and our alien visitors has been committed to the political branches of the Federal Government. . . . Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.

1999) (holding that 8 U.S.C. § 1252(g), codified version of IIRIRA "exclusive jurisdiction" provision, applies retroactively). But see Goncalves v. Reno, 144 F.3d 110, 126-27 (1st Cir. 1998) (holding that Congress did not intend for the AEDPA's § 440(d) restrictions on § 212(c) relief from deportation to apply retroactively), Henderson v. Reno, 157 F.3d 106, 128 (2d Cir. 1998) (same). See also Long Arm of Immigration Law, supra note 11; Wingerter, supra note 13.

112 See Swift, supra note 2.
113 See id.

114 See generally Anne E. Pettit, Note, One Manner of Law: The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine, 24 FORDHAM URB. L.J. 165 (1996). The plenary power doctrine is essentially an extra-constitutional theory which asserts that exclusive federal legislative authority over matters of immigration is an inherent attribute of sovereignty. See id. at 173. Analogizing this power to war and foreign affairs powers, the Supreme Court has claimed little authority to review such legislative decisions. See id.

115 See id. at 169-70.
Consistently, both the Supreme Court and lower courts have interpreted this doctrine to allow the application of congressional rules to non-citizens that would be unconstitutional if applied to citizens.\textsuperscript{119}

As early as 1886, however, the Supreme Court held in \textit{Yick Wo v. Hopkins}\textsuperscript{120} that "there is a notion of fundamental human rights that protects individuals" regardless of citizenship or alienage status.\textsuperscript{121} This case became the "foundation of the aliens' rights tradition."\textsuperscript{122} Yet, the broad language of the holding in \textit{Yick Wo}, that the Fourteenth Amendment was "not confined to the protection of citizens," but rather was "universal in application" to all persons regardless of nationality, skin color, or race, was interpreted narrowly in cases that followed.\textsuperscript{123} These cases held that the same degree of scrutiny should be applied to a legal challenge under the Fourteenth Amendment made by an alien as to a claim made by a citizen, so long as a matter of immigration was not involved.\textsuperscript{124} Therefore, in matters of immigration, the plenary power doctrine still reigns.\textsuperscript{125}

For example, in \textit{Duldulao v. INS},\textsuperscript{126} the Ninth Circuit upheld retroactive application of provisions of the AEDPA which eliminated the jurisdiction of a federal Court of Appeals to review an alien's final deportation order.\textsuperscript{127} The court's reasoning touched upon two major points.\textsuperscript{128} First, the court found the new statutory elimination of judicial review was purely jurisdictional, rather than substantive in nature.\textsuperscript{129} Therefore, the presumption that newly-enacted statutes affecting substantive rights or obligations only apply prospectively was not invoked.\textsuperscript{130}

\textsuperscript{119} See Fiallo, 430 U.S. at 792; Auguste v. Reno, 118 F.3d 723, 726 (11th Cir. 1997); Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996).  
\textsuperscript{120} See generally 118 U.S. 356 (1886).  
\textsuperscript{121} Rannik, supra note 8, at 130; see also Hiroshi Motomura, \textit{Immigration Law After a Century of the Plenary Power: Phantom Constitutional Norms and Statutory Interpretation}, 100 \textit{Yale L.J.} 545, 566 (1990) (crediting \textit{Yick Wo} and its progeny with the establishment of an alien individual rights doctrine to counter the plenary power doctrine).  
\textsuperscript{122} Kelly, supra note 22, at 739.  
\textsuperscript{123} See id. (quoting \textit{Yick Wo}, 118 U.S. at 369).  
\textsuperscript{124} See id. at 739 n.77.  
\textsuperscript{125} See id. at 745.  
\textsuperscript{126} See 90 F.3d 396 (9th Cir. 1996).  
\textsuperscript{127} See id. at 398.  
\textsuperscript{128} See id. at 396-98.  
\textsuperscript{129} See id. at 399.  
\textsuperscript{130} See id. at 400.
Second, the court held that the provision of the AEDPA denying judicial review of certain final deportation orders did not offend either the doctrine of separation of powers or due process rights.\textsuperscript{131} The court relied heavily upon the plenary power doctrine's rich historical precedent, reasoning that "the power of Congress to regulate the admission of aliens and to define the jurisdiction of lower federal courts defeated each asserted basis of unconstitutionality."\textsuperscript{132} Additionally, since the Supreme Court has long held that "deportation is not a criminal proceeding and has never been held to be punishment . . . no judicial review is guaranteed by the Constitution."\textsuperscript{133}

This reasoning defeats challenges to the legality of detention under immigration laws as well.\textsuperscript{134} Aliens who are detained for months while awaiting a deportation order are not being criminally "punished" such that any constitutional rights are being violated.\textsuperscript{135} The reality, however, is that the conditions and consequences that detained aliens are forced to endure are often far worse than criminal punishment.\textsuperscript{136} Moreover, there is often little or no information made available to the detained alien concerning the length of, or basis for, the detention.\textsuperscript{137}

B. Bans on Waivers and Suspensions of Deportation

Another provision of the new legislation, making life more difficult for criminal and non-criminal aliens alike, is the elimination of the various forms of discretionary relief that were available under past versions of the INA.\textsuperscript{138} The section 212(c) waiver, a form of relief

\textsuperscript{131} See Dulidulao, 90 F.3d at 398.
\textsuperscript{132} Id. at 399.
\textsuperscript{133} Id. at 400 (quoting Carlson v. Landon, 342 U.S. 524, 537 (1952)).
\textsuperscript{134} See Carlson, 342 U.S. at 537--38.
\textsuperscript{135} See id.
\textsuperscript{136} See Wolchok, supra note 14, at 13 (for example, mandatory detention results in overcrowding of local jails and, consequently, in transporting detained aliens to remote locations).
\textsuperscript{137} Compare U.S. v. Zadvydas, 986 F. Supp. 1011, 1027 (E.D. La. 1997) (permanent detention unconstitutional), with Trans v. Caplinger, 847 F. Supp. 469, 474--76. (W.D. La. 1993) (indefinite detention constitutional). See also Louis Freedberg, An Anti-Terrorism Bill that Went Way Too Far, S.F. CHRON., Aug. 17, 1997, at 7. Daniel Magana-Pizano, a 25 year-old Mexican immigrant was detained at an INS detention facility in Eloy, Arizona for over 15 months, earning one dollar a day doing household chores. See id. Most of his time, however, was spent doing nothing but waiting for his day in court. See id. This day finally came in October 1998 and resulted in a Ninth Circuit Court of Appeals ruling declaring that the elimination of all avenues of judicial review of executive decisions violates the Constitution. See William Branigin, Court Makes It Harder to Deport Criminals, WASH. POST, Sept. 2, 1998, at A2. The decision allows Magana-Pizano to pursue his claim for a waiver of deportation and to avoid immediate deportation. See id.
\textsuperscript{138} See Rannik, supra note 8, at 124--25.
available before the passage of the AEDPA, allowed immigration judges to exercise discretion where removal of a particular criminal alien may not have been appropriate. Most criminal aliens could petition an immigration judge for a “waiver of deportation” under section 212(c) of the INA. Aliens eligible for such relief were granted hearings which evaluated the fundamental fairness of deporting a particular alien. Aliens who had significant ties to the U.S. and were facing deportation for a relatively minor crime were often granted relief under this provision. Under the INA, the immigration judge was required to “balance the adverse factors indicating the alien’s undesirability as a permanent resident with the social and human considerations presented on his behalf.” The Board of Immigration Appeals (BIA) established factors to be considered by an immigration judge granting section 212(c) relief, including: nature and grounds of exclusion, significance of immigration law violations, existence of a criminal record, family ties with the U.S., duration of residence, and evidence that hardship would incur upon the alien’s family if deportation was ordered. A careful consideration of these factors allowed immigration judges to weigh the alien’s overall value to his community and friends against any danger posed to society. Because immigration judges across the country often exercised their discretion with varying degrees of leniency, the BIA was given the authority to review the decisions de novo to preserve uniformity.

“Suspension of deportation” relief under section 244 of the INA was also available to aliens facing deportation. Prior to the passage of the IIRIRA, such relief was available in cases where the alien could

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139 See id. at 124.
140 See id.
141 Aliens were eligible for section 212(c) waivers if they maintained lawful unrelinquished domicile for seven consecutive years and were not convicted of one or more aggravated felonies for which a sentence of five years was served. See id. at 134.
142 See id. at 129.
143 See Rannik, supra note 8, at 134–35.
144 Id. at 135; see also Matter of Marin, 16 I. & N. Dec. 581, 581 (BIA 1978).
145 See Matter of Marin, 16 I. & N. at 584–85. Other factors included service in the Armed Forces, employment history, property and business ties, value to the community, proof of rehabilitation, and evidence of good or bad character. See id.
146 See Rannik, supra note 8, at 135.
147 See id. at 137–38. A Miami immigration judge recalled granting only four or five section 212(c) discretionary waivers over a three and one-half year period; however, the Executive Office of Immigration Review statistics reveal that more section 212(c) waivers were granted than denied during the years 1989–1991 and 1994–1995. See id. at 136–37 n.80.
148 See Underwood, supra note 47, at 892.
demonstrate that deportation would result in “extreme hardship” to the alien or a U.S. citizen or permanent resident who is the alien’s spouse, parent or child. The standard for aliens deported for more serious offenses was “exceptional and extremely unusual hardship” under section 244(a)(2).

In 1994, the “suspension of deportation” relief provision was amended by adding a third paragraph to section 244(a) which lowered the standard for suspending deportation for battered spouses and children. The new standard required only a showing of three years of continuous residence and good moral character.

Unfortunately, the IIRIRA consolidated the relief provisions under sections 212(c) and 244(a) into the “cancellation of deportation” provision under section 240(A). Although section 244(a)(3) was preserved under 240(A)(b)(1), the 244(a)(1) “extreme hardship” standard was replaced by the stricter “exceptional and extremely unusual hardship” standard. In addition, the new provision requires a ten year period of continual presence and a showing of good moral character. Section 244(a)(2) relief was eliminated altogether. Therefore, there are no longer differing standards to accommodate aliens convicted of less serious crimes, and many aliens will not be eligible for any relief at all since they have been present for less than ten continuous years. Although the ten year continuous residence requirement attempts to accommodate aliens with strong U.S. ties, it is both an overinclusive and underinclusive standard. Prior to the passage of the IIRIRA, the immigration judge was able to consider actual ties, regardless of the length of continuous residence, so that aliens who came to the U.S. in order to be reunited with family members would be considered

149 See id. at 891.
152 See id.
153 See Underwood, supra note 47, at 893.
154 See id.
155 See id.
156 See Rannik, supra note 8, at 147. Aliens who have not been convicted of an “aggravated felony” can seek relief under 240(A)(a) if they can establish (1) they have lawfully been admitted for permanent residence for not less than five years, and (2) have resided continuously in the U.S. for not less than seven years. See id. at 138-39.
157 See Foster, supra note 115, at 237. “[L]ength of residence is not sufficiently calibrated to the strength of an alien’s interest to serve as a proxy for close ties to the U.S.” because often aliens come to the U.S. in order to be reunited with lost family members. Id. at 237.
more favorably than those who had been here for ten years but contributed little to their community and failed to develop strong U.S. ties.\textsuperscript{158}

The new "cancellation of deportation" provision significantly curtails the discretionary power of the immigration judge, since the alien must first meet the statutory eligibility requirements and the unforgiving "exceptional and extremely unusual hardship" standard.\textsuperscript{159} While it remains unclear with what degree of severity this new standard will be enforced, its application will most likely parallel its application under the old version of the INA for serious offenses.\textsuperscript{160} Therefore, combining the previous 212(c) and 244(a) waivers into the single "cancellation of deportation" provision establishes an egregiously high threshold.\textsuperscript{161} Aliens convicted of minor offenses, or who have been present for less than ten continuous years, will be summarily denied a waiver under the new laws.\textsuperscript{162} Such provisions appear to target the minor offender rather than the dangerous criminal, and punish those who have not been present illegally for long periods of time.

C. Preclusion of Judicial Review and Habeas Corpus

The most controversial portions of the new legislation restrict and eliminate federal court review of immigration law decisions by blocking access to habeas corpus.\textsuperscript{163} Section 440(a) of the AEDPA amends section 106(a)(10) of the INA, which allowed aliens living in the U.S. and facing deportation to seek federal judicial review by habeas corpus.\textsuperscript{164} This was considered a fundamental right since the final deportation orders were made by immigration judges within the Department of Justice and were subject to appeal to the BIA, which was also part of the Department of Justice.\textsuperscript{165} Review by an Article III court was deemed

\textsuperscript{158} See id.

\textsuperscript{159} See Underwood, supra note 47, at 898–900. Additionally, it is unclear whether an immigration judge will continue to evaluate the "hardship" standard using the same factors promulgated by the BIA in prior cases. See id. at 903.

\textsuperscript{160} See id. at 902–03.

\textsuperscript{161} See id. at 894.

\textsuperscript{162} See id. at 898–900.


\textsuperscript{164} See id. at 702.

\textsuperscript{165} See id. at 700. “Ultimately, habeas corpus functions to insure the integrity of the process by which the state deprives individuals of their liberty.” Id. at 722 & n.137 (quoting WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980)).
essential to the separation of powers and preserved notions of fundamental fairness.\textsuperscript{166} In spite of this, section 440(a) of the AEDPA reads: “Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in various sections of INA shall not be subject to review by any court.”\textsuperscript{167} The IIRIRA takes this restriction one step further in its “exclusive jurisdiction” provision by repealing section 440(a) of the AEDPA and adding section 242(a)(2) (C) to the INA. The new section reads: “Except as provided in this section and notwithstanding any other provision of law . . . no other court shall have jurisdiction to review any final order of removal.” This language ensures that there is no confusion over the matter.\textsuperscript{168}

Circuit courts have skirted the issue as to whether eliminating access to habeas corpus review for deportation and exclusion orders violates the Suspension Clause of the Constitution, and the Supreme Court has not granted certiori on the matter.\textsuperscript{169} While courts have unanimously upheld the validity of the provisions of the AEDPA and IIRIRA restricting judicial review, some have interpreted these provisions as preserving avenues to habeas corpus review to ensure their constitutionality.\textsuperscript{170} Other courts have cited the plenary power of Congress over matters of immigration, suggesting that deportation is part of a field of government activity where “conventional safeguards of liberty simply do not apply.”\textsuperscript{171}

The trend in the circuit court decisions is to move towards a loosening of the strict interpretation of the IIRIRA’s “exclusive juris-

\textsuperscript{166} See id. at 700. In Heikkila v. Barber, the Supreme Court upheld congressional restrictions on judicial review of deportation and exclusion decisions, noting that the restrictions precluded review “to the fullest extent possible under the Constitution.” 345 U.S. 229 (1953). The restrictions in this case did not interfere with the alien’s right to seek habeas corpus, suggesting that to do so would be unconstitutional. See id. at 237.


\textsuperscript{168} See Morrison, supra note 163, at 707.

\textsuperscript{169} See discussion infra Part III.

\textsuperscript{170} There is disagreement on this point in the Courts of Appeals. Compare Hose v. INS, 141 F.3d 932, 935 (9th Cir.) (habeas not available), withdrawn and reh’g en banc granted, 161 F.3d 1225 (1998), Richardson v. Reno, 162 F.3d 1338 (11th Cir. 1998) (same), and Yang v. INS, 109 F.3d 1185, 1195 (7th Cir. 1997) (same), with Goncalves, 144 F.3d at 122 (habeas available), and Henderson, 157 F.3d 117–22 (same). See also Magana-Pizano v. INS, 152 F.3d 1213, 1220 (9th Cir. 1998) (elimination of habeas unconstitutional), vacated and remanded and cert. granted, 119 S. Ct. 1137 (Mar. 8, 1999); Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997) (section 1252(g) removes statutory habeas, but leaves constitutional habeas intact).

\textsuperscript{171} See Morrison, supra note 163, at 706.
diction” provision. This trend parallels the changing political climate and the pressure being exerted on the President and Congress to curb the law’s harshest effects.172

Illustrating this trend, the Eleventh Circuit in *Auguste v. Reno*173 vacated the judgment of the Southern District of Florida which had granted habeas corpus relief to Herve Auguste, a French citizen ordered to be deported by the INS.174 The trial court granted Auguste habeas corpus relief on the basis that his waiver to any right to a deportation hearing pursuant to the Visa Waiver Pilot Program (VWPP), 8 U.S.C. § 1187 (1994), was not “knowing and intelligent.”175 Upon finding that the record was “woefully inadequate to support a finding that Herve Auguste made a knowing and intelligent waiver of his due process right to deportation proceedings,” the district court granted Auguste’s petition and ordered that formal deportation proceedings be conducted.176

At the time that Auguste’s petition was filed, judicial review of deportation was governed by INA section 106, providing that “any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.”177 This section of the INA was repealed on September 30, 1996, when President Clinton signed the IIRIRA into law.178 The new section 242(g) “exclusive jurisdiction” went into effect on April 1, 1997.179 Since section 242(g) applies “without limitation to claims arising from all past, pending or future exclusion, deportation, or removal proceedings” under the INA, as of April 1, 1997, no court had jurisdiction to review Auguste’s deportation order except as provided by newly amended 8 U.S.C.A. § 1252.180

Auguste’s counsel argued that the principle of separation of powers and the Fifth Amendment Due Process clause prohibit Congressional elimination of judicial review.181 The court rejected these arguments based on the plenary power doctrine and reliance on the

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172 See discussion supra Part I.
173 118 F.3d 723 (11th Cir. 1997).
174 See id. at 724.
175 Id.
176 Id. at 724–25.
177 Id. at 725.
178 See Auguste, 118 F.3d at 725.
179 See id.
180 Id.
181 See id. at 726.
precedents of other circuit courts upholding the AEDPA provision eliminating judicial review.\textsuperscript{182}

By applying the plenary power doctrine, the court found that "section 1252 'not only does not violate Article III, it is illustrative of the concept of separation of powers envisioned by the Constitution.'\textsuperscript{183} Similarly, the court dismissed the Due Process argument after briefly stating that "deportation of an alien is neither a criminal proceeding nor a punishment," such that "no judicial review is guaranteed by the Constitution."\textsuperscript{184}

The D.C. Circuit concurred with the Eleventh Circuit's reasoning in \textit{Ramallo v. Reno}.\textsuperscript{185} This case held that the "exclusive jurisdiction" provision of the IIRIRA was constitutional so long as habeas corpus remained available to aliens raising constitutional questions.\textsuperscript{186}

The \textit{Ramallo} case involved a government appeal of a district court ruling that enforced a cooperation agreement the government allegedly entered into with Marena Ramallo, a Bolivian native, in 1986.\textsuperscript{187} In August of 1996, Ramallo pled guilty to a charge of conspiracy to import cocaine and served five and one-half months in prison.\textsuperscript{188} During the course of her subsequent deportation proceedings, Ramallo claimed that she entered into an agreement with the government.\textsuperscript{189} This agreement provided that in exchange for her cooperation in prosecuting drug traffickers and her waiver of objections to her deportability, the government would agree not to deport her and restore her to her status as a lawful permanent resident.\textsuperscript{190} Consequently, Ramallo filed suit in the district court to enforce the agreement when the government attempted to execute her deportation order regardless of the prior agreement.\textsuperscript{191} The district court ruled in favor of Ramallo.\textsuperscript{192} The government appealed, claiming that the dis-

\textsuperscript{182} See \textit{id}. The analysis used in \textit{Boston-BoUers v. INS}, 106 F.3d 352, 355 (11th Cir. 1997), upholding the constitutionality of section 440(a)(10) of the AEDPA, which removed all judicial review from final orders of deportation against aliens that committed certain offenses, "applies with equal force in the instant case." \textit{Id}.

\textsuperscript{183} \textit{Auguste}, 118 F.3d at 726 (quoting \textit{Boston-BoUers}, 106 F.3d at 355).

\textsuperscript{184} See \textit{id}. (quoting Carlson v. Landon, 342 U.S. 524, 537; \textit{Boston-BoUers}, 106 F.3d at 355).

\textsuperscript{185} See 114 F.3d 1210 (D.C. Cir. 1997).

\textsuperscript{186} See \textit{id}. at 1210–12.

\textsuperscript{187} See \textit{id}. at 1211.

\textsuperscript{188} See \textit{id}.

\textsuperscript{189} See \textit{id}.

\textsuperscript{190} See \textit{Ramallo}, 114 F.3d at 1211.

\textsuperscript{191} See \textit{id}.

\textsuperscript{192} See \textit{id}.
district court never had jurisdictional authority under the IIRIRA, which was passed subsequent to the district court’s decision. 193 Under the doctrine of “residual jurisdiction,” the U.S. Court of Appeals for the District of Columbia vacated the district court’s judgment. 194

The D.C. Circuit Court of Appeals acknowledged that a statute which deprives “jurisdiction from all courts to vindicate constitutional rights poses serious constitutional objections,” in addressing the constitutionality of the jurisdiction-stripping provisions of the IIRIRA’s “exclusive jurisdiction” clause. 195 However, the court upheld the IIRIRA provision on the ground that the government had conceded that habeas corpus review remained available to the appellee to raise substantial constitutional questions. 196

While it appears that the D.C. Circuit has preserved the narrow avenue of habeas corpus for aliens facing deportation, the Ninth Circuit has gone a step further to prevent the injustice of a literal application of the “exclusive jurisdiction” provision of the IIRIRA. 197

In American-Arab Anti-Discrimination Committee v. Reno, 198 the Ninth Circuit created an exception to the IIRIRA’s section precluding judicial review when the alien brings a constitutional claim. 199 This provision allows judicial review of “only” final orders. 200 Therefore, under the plain language of the statute, “decisions by the Attorney

193 See id.
194 See id. at 1213.

As it is clear that we lack jurisdiction over the subject matter of the instant action, we are faced with the question of whether we must now allow the District Court’s decision to stand. . . . [W]e believe that Congress intended to afford this court residual jurisdiction to clear the decks of cases in which the District Court has entered judgment, but in which there can be no review by the Court of Appeals due to its lack of jurisdiction pursuant to IIRIRA.

Id.

195 Ramallo, 114 F.3d at 1211.
196 See id. at 1214.

197 Cf. Ramallo, 114 F.3d at 1211; American-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367 (9th Cir. 1997). The Ninth Circuit decision was vacated subsequent to the writing of this Note pursuant to the Supreme Court ruling in Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 142 L.Ed. 2d 940 (Feb. 1999). Certiorari was granted at 118 S. Ct. 2059, 141 L.Ed. 2d 137 (June 1, 1998), limited to the narrow question: “[W]hether, in light of the IIRIRA, the court below had jurisdiction to entertain the respondent’s challenge to deportation proceedings prior to the entry of a final order of deportation.” Id. The opinion of the Court stated that 8 U.S.C. § 1256(g), the codification of the IIRIRA’s “exclusive jurisdiction” provision, deprived the federal court of jurisdiction, following a lengthy analysis of contradictory statutory language as to the retroactivity of the jurisdiction-stripping provision. See 119 S. Ct. at 946–47.
198 119 F.3d at 1367.
199 See 1997 WL 784345 (9th Cir.) at 1 (O’Scannlain, J., dissenting).
200 See id.
General to commence proceedings and to adjudicate cases are simply not reviewable until the final order stage.\textsuperscript{201}

The Ninth Circuit relied upon the "constitutional avoidance" doctrine in drawing out the new exception.\textsuperscript{202} This doctrine states that where a statute is ambiguous, it should be interpreted in such a way as to avoid any constitutional infirmities.\textsuperscript{203} By implying that the IIRIRA would be unconstitutional if interpreted as to effectively eliminate aliens' rights to judicial review, the Ninth Circuit has reduced the absolute authority of the plenary power tradition in the realm of immigration law.\textsuperscript{204}

The dissent by Judge O'Scannlain in \textit{American-Arab Anti-Discrimination Committee v. Reno} noted that the majority decision put the Ninth Circuit in contradiction with the opinion of the Eleventh Circuit in \textit{Auguste v. Reno} and the D.C. Circuit opinion in \textit{Ramallo v. Reno}.\textsuperscript{205}

Today the Ninth Circuit nullifies the express intent of the elected branches of our government by carving out yet another exception, one which is neither contemplated nor permitted by the plain language of the statute. In doing so we are in tension with two other circuits which have addressed the IIRIRA's jurisdiction-stripping provisions.\textsuperscript{206}

Justice O'Scannlain also intimated that the decision in \textit{American-Arab Anti-Discrimination Committee v. Reno} contradicted the prior decision by the Ninth Circuit in \textit{Duldulao v. INS}.\textsuperscript{207}

\section*{III. Suggestions for Reform}

The recent immigration legislation clearly implicates constitutional problems that must ultimately be resolved by a Supreme Court ruling that ends the war between the plenary power doctrine and alien rights jurisprudence.\textsuperscript{208} The passage of the AEDPA and IIRIRA also

\begin{footnotesize}
\textsuperscript{201} Id.
\textsuperscript{202} See id.
\textsuperscript{203} See id.
\textsuperscript{204} See 1997 WL 784545 (9th Cir.) at 1 (O'Scannlain, J., dissenting).
\textsuperscript{205} See id.
\textsuperscript{206} Id.
\textsuperscript{207} See id.
\textsuperscript{208} Past Supreme Court decisions hold that certain constitutional protections are afforded to aliens on the same grounds as U.S. citizens. \textit{See Wong Wing v. U.S.}, 163 U.S. 228, 237 (1896) (Congress may not impose a sentence of hard labor upon aliens illegally present in the U.S. unless after trial by jury); \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 369 (1886) (Fourteenth Amendment
\end{footnotesize}
reflects unwise politics and unsound policy-making. Advocates of the tougher legislation cite reasons for the reform that simply are not supported by the actual changes instituted.

By restoring the definition of “aggravated felony” to include only those crimes which are universally considered dangerous, the government can continue its mission to make America’s streets safer without passing overly-inclusive legislation. Additionally, by restoring the condition that criminal aliens be subject to deportation only if they have actually been sentenced to one year or more for crimes of moral turpitude, the government would incorporate principles of fairness and mitigating circumstances already evaluated by a judge in a criminal proceeding. This policy avoids deporting non-dangerous criminals and maintains administrative efficiency.

Congress should also restore the section 212(c) “waiver of deportation” and the section 244(a) “suspension of deportation” provisions in order to maintain principles of fairness and avoid instituting unjust hardships on aliens and families that will result from mandatory deportations. These forms of relief from deportation also reward aliens who have made significant contributions to society or their communities.

Most fundamentally, however, the AEDPA and IIRIRA must be interpreted to allow deported or excluded aliens access to habeas corpus review by an Article III court and to secure judicial review for aliens who are bringing statutory or constitutional claims. This interpretation must also afford judicial review to aliens who bring claims under the First Amendment or other provisions of the Constitution. This approach will preserve the balance of power within the federal government structure and ensure aliens at least a minimum assurance of protection under the Constitution. To do otherwise would open the floodgate of Congressional power over immigration and alien

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209 See discussion supra Parts I–III.
210 See Long Arm of Immigration Law, supra note 11.
211 See Rannik, supra note 8, at 204.
212 See discussion supra Part II.A.
213 See discussion supra Part II.B.
214 See discussion supra Part II.B.
215 See discussion supra Part II.C.
216 See generally Morrison, supra note 163.
rights, which in the present climate of paranoia and prejudice could result in many embarrassing precedents and unwarranted aberrations of justice.\textsuperscript{217}

\textbf{CONCLUSION}

The United States has a history of blaming "foreigners" for domestic troubles, and has subsequently taken political and legal measures against non-citizens that would not be tolerated if directed at citizens. First evidenced by the famous Alien and Sedition Acts of the 1790s, and further illustrated by the terrors of the "communist threat" during the McCarthy era, blaming "foreigners" or non-citizens during troubled times has left the U.S. with many blemishes on its civil rights record. The AEDPA and IIRIRA present a great new threat to the U.S. civil rights tradition. Through these new laws, Congress is waging a virtual war against the non-citizen by exaggerating the actual threat posed and inciting the country with paranoia through anti-terrorism propaganda. By promoting and demanding fair and well-reasoned immigration laws, the U.S. can avoid making the same embarrassing historical mistakes in the new millenium.

\textsuperscript{217} See Johnson, \textit{supra} note 2, at 834 (providing a brief history of the laws enacted in the U.S. during times of domestic political turmoil which restricted civil liberties and suppressed freedom of expression, particularly for those who did not enjoy the constitutional protection afforded to citizens).