16

"Court-Stripping" in the 1996 Immigration Laws: A Dangerous Precedent[1]

LUCAS GUTTENTAG
Immigrants' Rights Project, ACLU

One year ago, I called due process the "forgotten issue" in the debate over proposed immigration legislation (Guttentag, 1996). Now, Congress has enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and wholesale denials of fundamental procedural rights that are impossible to ignore. In particular, the provisions that "strip" the federal courts of their historic jurisdiction to review immigration deportation orders as well as INS practices and policies are at the forefront of legal challenges to the new laws. There is also a growing recognition that "court-stripping" in the realm of immigration law poses a grave threat to the role of the courts in other areas and to the rule of law itself.

Judicial review is a foundation of our democracy and is essential to the protection of individual rights. It ensures that no government official or agency – high or low – is above the law. It empowers the courts to enforce the rights enshrined in our Constitution and embodied in our civil rights laws. It translates those rights into reality.

Judicial review is especially critical in the immigration context because the impact of deportation is so great. Except for the most serious criminal penalties, it is hard to think of a government sanction that has harsher consequences than expelling a person from this country. In fact, in many cases, the effect of deportation far outstrips the criminal sentence. As the Supreme Court stressed more than half a century ago, deportation from the United States may deprive an individual of "all that makes life worth living."

Yet, IIRIRA and AEDPA appear to severely restrict, and in some cases totally eliminate, judicial review of a multitude of immigration decisions. At this point, I want to focus on two aspects of that. First, I will identify some of the new provisions of particular importance to the immigration practitioner because they affect federal court review of individual orders of deportation.

Second, and more importantly, I want to begin discussing the limitations on Congress's power to eliminate judicial review over deportation orders. The Constitution prohibits Congress from enacting statutes that vest the executive branch with a unilateral and unreviewable power of deportation. Even if Congress repealed all access to the courts - which it has not - the Constitution would entitle an immigrant to a judicial determination of the legality of a deportation order.

THE NEW REGIME: REVIEW OF DEPORTATION AND REMOVAL ORDERS

After IIRIRA, different schemes for judicial review apply depending on whether the individual was placed into deportation (or exclusion) proceedings before April 1, 1997, or into removal proceedings under the law as amended by IIRIRA on or after April 1.

Deportation/Exclusion Orders: Transitional Rules

Deportation or exclusion orders that became administratively final before October 31, 1996 are governed by the former INA § 106 (as amended by the AEDPA).

Deportation and exclusion orders that become administratively finally on or after October 31, 1996 – including after April 1, 1997 – are governed by the Transitional Rule contained in IIRIRA § 309(c)(4). This means that deportation or exclusion proceedings commenced any time before April 1, 1997 are "pipeline" cases and remain governed by the Transitional Rule, even if the final orders of deportation (or exclusion) are issued months or years after April 1, 1997.

The applicability of the IIRIRA § 309(c)(4) Transitional Rule to "pipeline" deportation and exclusion cases is subject to one important caveat: a case pending on April 1, 1997 can be converted to a removal case, and subject to the judicial review provisions of INA § 242, if the Attorney General invokes either of two special options. IIRIRA allows the Attorney General the "option to elect to apply new procedures": 1) where an evidentiary hearing has not commenced by April 1, IIRIRA § 309(c)(2), and 2) where there has not been a final administrative decision, IIRIRA § 309(c)(3). In the first instance, the Attorney General must give notice to the alien that the new process is being invoked. In the latter case, the Attorney General must "terminate and reinitiate proceedings." Under either provision, the Attorney General could not act before April 1, and orders that were administratively final before that date were not vulnerable to this special option.

The Transitional Rule amends former INA § 106 in many critical important respects and must be read in conjunction with that existing statute. Among the Transitional Rule's most important elements are 1) a 30-day time limit for filing petitions for review; 2) a requirement that both exclusion and deportation orders be reviewed only in the courts of appeals through a petition for review; 3) a restriction limiting venue to the circuit court where the immigration hearing was completed; 4) the elimination of automatic stays of deportation upon service of the petition on the INS; and 5) limitations on review of certain discretionary decisions and certain orders of deportation based on enumerated criminal convictions. Familiarity with the specific changes is essential for immigration practitioners.

Removal Orders

INA § 239 establishes a new "removal" process that, beginning April 1, 1997, is commenced by service of a "notice to appear" under § 239(a). INA § 242 sets forth the standards and procedures governing judicial review of such removal orders once they become administratively final.[2] It completely replaces former INA § 106. A special subsection of § 242 provides for very limited review of final removal orders entered under the expedited removal process in INA § 235(b)(1) that is applicable to certain arriving aliens. The principal elements of INA § 242, filing, stays, departure, venue, briefing schedules, review, discretionary relief, criminal convictions, asylum, reopening-reconsideration motions, and consolidation, follow.

Filing Deadlines. All petitions for review must be filed in the court of appeals within 30 days of the removal becoming final (INA § 242(b)(1)).

Stays. Service of the petition for review on the INS does not automatically stay removal of an individual (INA § 242(b)(3)(B)). Counsel must seek a stay in every case.

Departure from the United States. In contrast to former INA § 106 (as well as the Transitional Rule), INA § 242 does not contain any provision that the court loses jurisdiction if the alien departs from the United States after issuance of an order. For practitioners, several consequences flow from this change. First, a stay of deportation must be sought and obtained in each case. Second, the failure to obtain a stay will not terminate the court's jurisdiction and hence the capacity to pursue the appeal. Third, one important ground for requesting a stay – preservation of the court's jurisdiction – is no longer available. Therefore, the other practical and equitable reasons why a stay is warranted must be presented more fully.

Venue. Only in the circuit where the immigration judge (IJ) completed the proceedings does venue for the petition for review lie. (INA § 242(b)(2)).
Briefing Schedule. Strict new rules govern briefing in the courts of appeals. The petitioner's opening brief must be filed within 40 days of the date on which the administrative record is available. The reply brief is due fourteen days after the government's opposition brief. These limits are subject to modification only if the court so orders for "good cause shown" (INA § 242(b)(3)(C)). If the petitioner fails to file a brief within the stated time, the court must dismiss the appeal unless a manifest injustice would result (INA § 242(b)(3)(C)). The statute imposes no statutory deadlines on the INS. This lopsided and unduly harsh provision will undoubtedly result in dismissal of many bona fide claims unless compassion, fairness, and principles of due process cause the courts to temper their impact.

Scope and Standard of Review. Findings of fact are conclusive unless "any reasonable adjudicator would be compelled to conclude to the contrary," and a decision that an alien is not admissible is "conclusive unless manifestly contrary to law" (INA § 242(b)(4)(B),(C)). This appears to be an explication of the standard in *INS v. Elias-Zacarias*, 502 U.S. 478, 1992, and should have little practical consequence. Practitioners and courts should note that only the determination that "an alien is not admissible" must be shown to be "contrary to law." That standard does not apply to other claims not related to admissibility.

Discretionary Relief. Two provisions restrict review of discretionary decisions. The first applies only to the specifically enumerated grounds of relief. It provides that no court shall have jurisdiction to review "any judgment regarding the granting of relief under INA §§ 212(h) [waiver of inadmissibility for criminal grounds], 212(i) [waiver of inadmissibility for

fraud or misrepresentation], 240A [cancellation of removal], 240B [voluntary departure], or 245 [adjustment of status]" (INA § 242(a)(2)(B)(i)).[3]

The second, more sweeping section provides that no court shall have jurisdiction to review "any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [asylum]" (INA § 242(a)(2)(B)(ii)). By its terms, this restriction is applicable only if a provision in Title II of the INA specifically states that the decision is "in the discretion of the Attorney General" and the Attorney General is acting under that authority.

Several additional considerations bear noting. First, in *INS v. Yang*, 117 S.Ct. 350, 1996, the Supreme Court recently noted that though the Attorney General's discretion may be "unfettered at the outset," it cannot depart irrationally from past practice. Second, the restriction on review should apply only when the petitioner is challenging the actual result of a lawful exercise of discretion. It should not apply to a claim that the Attorney General failed to exercise discretion altogether or failed to exercise it lawfully. Third, whatever the scope of this provision may be, it must be read in harmony with other more specific provisions of § 242 and the INA that authorize or assume judicial review of certain discretionary acts. For example, INA § 242(b)(6) specifically contemplates judicial review of motions to reopen and reconsider.[4]

Criminal Convictions. Section 242, like AEDPA and the Transitional Rule, limits review of orders issued against "criminal aliens" who are removable under one of the criminal conviction deportation grounds enumerated in the preclusion-of-review statute (INA § 242(a)(2)(C)).[5] The analogous restriction in AEDPA and the Transitional Rule are the subject of pervasive legal challenges regarding the applicability of the statute, its proper construction with other jurisdictional provisions – including the federal habeas corpus statute codified at 28 U.S.C. § 2241, and its constitutionality (*see* discussion of Judicial review notwithstanding IIRIRA, below).

Asylum. IIRIRA § 604 extensively revises the procedures governing applications for asylum under INA § 208 (*see* Pistone and Schrag, 1996). The new law imposes three exceptions to the statutory right to apply for asylum[6] and restricts the Attorney General's discretionary authority to grant asylum under several circumstances. These exceptions include instances where the alien is inadmissible or removable on grounds relating to terrorist activity (unless the Attorney General invokes a narrow exception) (IIRIRA § 604(a), enacting INA § 208(b)(2)(A)(v)). IIRIRA compounds the harsh effect of these new restrictions by prohibiting judicial review of the Attorney General's application of them (IIRIRA § 604(a), enacting INA §

208(a)(3) and 208(b)(2)(D)).

Section 242 further provides that the Attorney General's discretionary judgment as to grant relief under INA § 208(a) is conclusive unless "manifestly contrary to the law and an abuse of discretion" (INA § 242(b)(4)(D)). Though seemingly harsh in intent, the particular formulation appears to codify the standard of review articulated in *Elias-Zacarias,* 502 U.S. 478, 1992.

Motions to Reopen and Reconsider. Review of a motion to reopen or reconsider must be consolidated with the review of the final order of removal (INA § 242(b)(6)). This provision explicitly contemplates continuing judicial review of these orders.

Consolidation of Questions for Judicial Review. Section 242 contains a general consolidation clause that "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this title . . .shall be available only in judicial review of a final order . . ." (INA § 242(b)(9)). This provision is analogous to the "sole and exclusive" language in former INA §106, which does not appear in that form in § 242. The precise scope of the consolidation requirement must await clarification by the courts. It appears to preserve the principle that matters arising "in the course of" a removal proceeding will be subject to review as part of the final order (*see Cheng Fan Kwok v. INS*, 392 U.S. 206, 1968). Those matters that are not a part of the final order are presumptively reviewable independently of the final order.[7] The consolidation requirement is also subject to constitutional limitation. For example, where resolution of a constitutional issue cannot await issuance of a final order, then the statutory preference for consolidation must give way to the constitutional right to litigate a constitutional claim.[8]

Expedited Removal Orders

Individual Orders. IIRIRA § 302 established a special removal process, codified at INA § 235(b), for aliens arriving in the United States if an immigration officer determines they are inadmissible under INA § 212(a)(6)(C) or (7).[9] Section 242(e) allows for judicial review of such removal orders only by habeas corpus and is restricted to whether the petitioner is an alien, whether the petitioner was ordered removed under the expedited removal process, and whether the petitioner can prove by a preponderance of the evidence that she or he is a lawful permanent resident or has been admitted as a refugee or granted asylum (new INA § 242(e)(2)). If the alien makes such a showing, the court may order only that the petitioner receive a regular removal hearing under INA §240 (new INA § 242(e)(4)). The restriction on review applies even if the alien asserts a "credible fear"

of persecution and is seeking asylum.

As discussed more fully below, Congress cannot limit the scope of habeas corpus review in this manner. During the period when habeas corpus was the sole means of review, the courts routinely considered claims by aliens in both deportation and exclusion proceedings (*see* judicial review notwithstanding, IIRIRA, infra). Review never depended upon an alien making an "entry" or being "admitted" into the United States. The effort by Congress there to abridge the writ to deny review over the merits of an alien's claim to entry appears plainly impermissible.

Challenges to the System. IIRIRA specifically addresses challenges to the validity of the expedited removal system. INA § 242(e)(3) states that judicial review of the implementation of INA § 235(b) is available only in the U.S. District Court for the District of Columbia and must be filed within 60 days after the date that a challenged section, regulation, directive, guideline, or procedure is first implemented (IIRIRA § 306, enacting INA §242(e)(3)(A) and (B)). The statute also limits challenges to the validity of the system to whether the section or any regulation issued to implement it is constitutional and whether a regulation or written directive, policy guideline, or procedure issued by the Attorney General to implement the process is in violation of law (IIRIRA § 306, enacting INA § 242(e)(3)(A)(ii)). INA § 242(e)(1) provides that a court may not certify a class action in any action challenging expedited removal for which judicial review is authorized by the subsection (IIRIRA § 306, enacting INA § 242(e)(1)(B)).

The sections authorizing limited challenges to the expedited removal system were an apparent response to criticism of the even more restrictive "summary exclusion" enacted by AEDPA, which was in turn repealed by IIRIRA (IIRIRA § 308(d)(5) (repealing AEDPA § 422)). Expedited removal allows for very limited IJ review of a negative "credible fear" determination and § 242 allows for some litigation to challenge the new procedure, but not individual credible fear determinations. The 60-day time limit begins running once a policy is actually implemented and, therefore, begins anew each time the INS changes a policy or procedure.

It is highly doubtful, however, that Congress can constitutionally bar entrants who arrive more than 60 days after first implementation from litigating the lawfulness of the expedited removal procedure as applied to them. The bar on class action suits will also run afoul of the Constitution if it operates to deny individuals a meaningful opportunity to litigate constitutional rights or precludes meaningful relief for constitutional or other violations.

JUDICIAL REVIEW NOTWITHSTANDING IIRIRA

Many, if not all, of IIRIRA's restrictions on judicial review raise profound questions of statutory construction and constitutional rights. So far, the courts have grappled mainly with the restriction on review imposed by AEDPA §440(a) because it became law five months before IIRIRA. The broad language of § 440(a), providing that certain final orders "shall not be subject to review by any court," has compelled the courts to begin to consider the more general issue of Congress' power to eliminate judicial review over orders that cause the expulsion – directly or indirectly – of a noncitizen from the United States. The analysis in relation to AEDPA is directly applicable to IIRIRA.

Two arguments present themselves for limiting the court-stripping provisions enacted by IIRIRA and AEDPA. First, as a matter of statutory construction, the new laws have not amended or repealed certain independent grounds of jurisdiction. In particular, the right to the writ of habeas corpus (28 U.S.C. § 2241) and the courts' historic power to preserve their own jurisdiction under the All Writs Act (28 U.S. C. § 1651) are embodied in venerable statutes, both of which trace their origins to the First Judiciary Act of 1789. These cannot be repealed through general language in amendments to unrelated statutes such as the INA. The Supreme Court has long held and recently reiterated that "implied" repeals are not allowed in relation to the federal habeas corpus statute, 28 U.S.C. § 2241 (*see Felker v. Turpin*, 116 S.Ct 2333, 1996). The same is true for the All Writs Act, 28 U.S.C. § 1651 (*see Felker*, 116 S.Ct at 2341; Stevens concurring).

Second, the Constitution entitles immigrants to judicial review of a deportation order. In addition to guaranteeing the Writ of Habeas Corpus, the Constitution limits congressional power to repeal the role of the federal courts in our tripartite system of government. The right to judicial review arises both from the right of individual aliens under the Due Process Clause not to be deported without a judicial forum in which to raise claims that the government has erred, and from the structure of our Constitution manifested by the separation of powers principle in Article III, which constrains Congress and the President from passing laws that deprive the judiciary of its historic constitutional role. The precise limits on the power of Congress are uncertain and subject to jurisprudential debate. The core role of the judiciary is incontrovertible, however, and the courts have never countenanced a system of unilateral executive branch deportation that is insulated from judicial review.

Habeas Corpus

The historic – and most fundamental – basis for judicial review of immigration orders is the writ of habeas corpus. Because of the nature of depor-

tation, aliens have always been able to challenge their deportation or exclusion through habeas corpus. Before former INA § 106 created the petition-for-review procedure in 1961, habeas corpus was the means for obtaining review of deportation and exclusion orders.[10] When Congress enacted INA § 106 to channel review to the courts of appeals in 1961, it expressly acknowledged the continuing constitutional right of aliens to obtain review in habeas corpus proceedings. (*see* remarks of Rep. Walter, legislation sponsor, 1961 Cong. Rec. 12176, 12177, July 10; H.R. Rep. 1086, 87th Cong. 1st Session, Aug. 30, discussion, U.S.C.C.A.N. 2950, 2973; remarks of Rep. Libionati, 1961 Cong. Rec. 12179, July 10.)

Statutory Habeas. In general, the district courts exercise habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241. The statute confers jurisdiction or courts to grant writs of habeas corpus for persons "in custody in violation of the Constitution or laws . . . of the United States" and for persons "in custody under or by color of the authority of the United States" (28 U.S.C. § 2241(c)(1) and (3)). That basis of jurisdiction is unchanged by AEDPA and IIRIRA. Neither law altered 28 U.S.C. § 2241, and the Supreme Court has been unambiguous that habeas corpus jurisdiction under § 2241 cannot be amended or repealed absent express language. In *Felker v. Turpin*, 116 S.Ct. 2333, 1996 – decided shortly before Congress passed IIRIRA – the Supreme Court reiterated that under the well-established "clear statement" rule, § 2241 jurisdiction cannot be repealed "by implication." The absence of any reference in the AEDPA or IIRIRA to § 2241 means that the courts' preexisting jurisdiction to review final orders in § 2241 habeas proceedings remains intact.

Constitutional Habeas. If habeas were not available as a matter of statutory construction, it would be compelled as a matter of constitutional right. The elimination of all opportunity for "judicial intervention" for an alien facing expulsion is unconstitutional. The writ of habeas corpus is guaranteed by the Constitution and cannot be suspended except where "in Cases of Rebellion or Invasion the Public safety may require it" (U.S. Constitution, Art. I, § 9, Cl.2 (the "Suspension Clause")).

In 1953 the Supreme Court, in *Heikkila v. Barber*, 345 U.S. 229, 1953, found that aliens facing deportation or exclusion were constitutionally entitled to judicial review of that order. Specifically, *Heikkila* considered the availability of habeas corpus review for such aliens and found that habeas review is constitutionally required. The Court recounted the history of judicial review of immigration orders. It noted that the 1891 and 1917 Immigration Acts had intended to prohibit judicial review "to the fullest extent permitted under the Constitution," *Heikkila v. Barber*, 345 U.S. at 234 (*see also* at 235; "except insofar as it was required by the Constitution" the

1917 Act preculuded review). Yet, the Court found that, under the 1891 and 1917 Acts, an alien had always been able to "attack a deportation order" in habeas corpus (*Heikkila v. Barber*, 345 U.S. at 235). Since such review was not statutorily authorized - and indeed, the Court found that Congress had sought to prohibit all review to the maximum degree allowable under the Constitution - the review that the Supreme Court and the lower courts had actually exercised was necessarily that which the Constitution requires. Therefore, the decisions of the Supreme Court and lower courts reviewing deportation and exclusion orders issued under the 1891 and 1917 Acts demonstrate the constitutional basis for such review.[11]

The INS has contested the scope of claims that may be raised and the standard of review that is available in a habeas action. The correct process for determining the constitutionally required scope of habeas review is to analyze the review that courts actually exercised over deportation and exclusion orders under the 1891 and 1917 Acts, when the only review available was that "required by the Constitution." The caselaw demonstrates that the review actually afforded encompasses a broad array of claims. Between 1891 and 1952, the Supreme Court and the lower courts consistently adjudicated habeas petitions raising constitutional as well as non-constitutional challenges to deportation and exclusion orders. The courts reviewed the procedures by which orders were obtained, the propriety of denying discretionary relief, and whether the order was based on a manifest abuse of discretion or the absence of any evidence to support it.[12]

The Supreme Court decisions also confirm the availability of habeas review where aliens challenged only the denial of discretionary relief and not the underlying determination of deportability. In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 1954, the Court exercised jurisdiction and reversed a denial of discretionary relief over the specific objection of the dissenting Justices that "we think a refusal to exercise that discretion [to suspend deportation] is not reviewable in habeas corpus" (at 269; Jackson dissenting).[13]

The purpose and scope of habeas corpus in the immigration context are critically different than in the more familiar habeas review of a criminal conviction. Therefore, the doctrines that have developed to limit habeas relief in the postconviction criminal cases are not applicable to habeas review of immigration decisions.

In the immigration context, the habeas writ seeks initial judicial review of an administrative decision where no judicial proceeding of any kind has occurred. The immigration habeas is the only judicial check on the legality of the executive branch's deportation decision.

The postconviction criminal habeas is fundamentally different. There, the habeas arises only after a judicial process with several levels of appeals has run its course. The habeas court is being asked to review the results of

a prior judicial proceeding where the defendant had the right to the full panoply of criminal appeals. The habeas petition seeks additional collateral review of a state or federal court criminal conviction after other avenues of direct appellate review are exhausted or foregone. In the interests of finality, comity, and federalism, the Courts have imposed criteria that require a degree of deference to the prior judicial determination. None of those concerns are implicated in the immigration habeas. (*See Sunal v. Large*, 332 U.S. 174, 177 n3, 1947; criminal habeas doctrine not applicable to immigration cases where agency order not subject to judicial review.)

Due to the restrictions imposed on judicial review by IIRIRA and AEDPA, an immigration habeas vindicates the core constitutional function of the Great Writ: to obtain a judicial determination of the legality of the Executive's coercive custody power.[14] That review cannot be truncated by Congress.

Due Process and Separation of Powers

The Due Process Clause and the Article III Separation of Powers principle may constitute independent constitutional grounds for judicial review of deportation, exclusion and removal orders.[15] Unlike many other governmental actions, deportation necessarily involves an individual's fundamental liberty interest, *Ng Fung Ho v. White*, 259 U.S. 276, 284, 1922, and involves coercive government action that is distinct from other administrative decisionmaking.[16] Hence, some recourse to a judicial forum must be available.[17] However, the extent to which the Fifth Amendment or Article III may compel such review need not be decided so long as habeas corpus remains available to address the claims discussed above.

CONCLUSION

Never before in our history have aliens been subject to deportation without any opportunity to challenge the fairness and legality of their removal in a judicial proceeding. When Congress attempted court-stripping legislation in other contexts in the past, it was recognized for what it was: an attack on judges enforcing the constitutional rights of vulnerable and powerless groups, an attack on courts that thwart majoritarian excesses, and a threat to the very structure of our Constitution, which establishes a balance and separation among the three branches of government. Those earlier proposals – to prohibit the courts from integrating public schools, from enforcing freedom of reproductive choice, and from barring coercive religious practices – were all defeated.

This time Congress' target is vulnerable immigrants who have no political power and no widespread public support. The 1996 legislation was enacted without public attention and with seemingly little opposition. But

the consequences go far beyond the immediate immigrant "victims" who are deprived of their "day in court." If the court-stripping provisions are allowed to survive, the 1996 laws will have violated the most revered element of our Constitution that establishes the United States as a society governed by the rule of law.

NOTES

[1]Portions of this paper have appeared in *Interpreter Releases* (1997, Federal Publications; reprinted with permission of Interpreter Releases) and in *Immigration Law and Procedure* (1997, Matthew Bender & Co. Inc.; reprinted with permission, all rights reserved).

[2]IIRIRA § 306(a) enacts a new INA § 242 entitled "Judicial Review of Orders of Removal." Section 306(b) repeals existing INA § 106. The former INA § 242 is amended and moved to new INA § 241.

[3]In addition, as discussed below, §§ 348 and 349 of IIRIRA amend INA § 212(h) and (i), respectively, to impose separate limits on judicial review of those waivers.

[4]"When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order."

[5]The enumerated grounds are: "INA § 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by INA § 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by INA § 237(a)(2)(A)(i)."

[6]IIRIRA § 604(a), enacting INA § 208(a)(2); the statutory right to apply is not applicable if: 1) the Attorney General determines that an alien may be removed, pursuant to a bilateral or multilateral agreement, to a safe third country; 2) the alien did not apply for asylum within one year after arriving in the United States; and 3) the alien previously applied and had the application denied. The second and third exceptions may be overcome if the alien demonstrates to the satisfaction of the Attorney General the existence of changed circumstances materially affecting the applicant's eligibility or extraordinary circumstances relating to a delay in filing.

7Compare Foti v. INS, 375 U.S. 217, 1963 (suspension of deportation reviewable as part of final order) with *Cheng Fan Kwok v. INS*, 392 U.S. 206, 1968 (stay of deportation not reviewable as part of final order). INA § 242(g) is also relevant to determining of which issues will be channeled to the court of appeals.

[8]*American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 9th Cir. 1997 (constitutional claim challenging initiation of deportation proceedings may be litigated prior to issuance of final order).

[9]Expedited removal commences on April 1, 1997, at ports of entry, IIRIRA § 302 enacting INA § 235(b)(1)(A). The Act also permits the Attorney General to apply this process to aliens in the United States who have not been admitted or paroled (*i.e.*, EWI) and who have not been physically present in the United States continuously for two years, IIRIRA § 302 enacting INA § 235(b)(1)(A)(iii)(I) and (II).

[10]For a short time, review of final orders was available under the then newly enacted Administrative Procedure Act (APA). *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 1955, (APA review of deportation orders); *Brownell v. Shung*, 352 U.S. 180, 1956, (APA review of exclusion orders).

[11]Professor Henry Hart (1953), in his celebrated dialogue on Congress power to regulate federal court jurisdiction, discussed the possibility of Congress cutting off all judicial review for aliens facing deportation and concluded that doing so would be in "direct violation" of the Suspension Clause. *See also Kolster v. INS*, 101 F.3d 785, 1st Cir. 1996 (elimination of court of appeals review permissible because habeas remains available).

[12]*See, e.g., Mahler v. Eby*, 264 U.S. 32, 41-43, 1924 (habeas review based on absence of sufficient findings and lack of evidence to support warrant of deportation); *Zakonaite v. Wolf*, 226 U.S. 272, 274, 1912 (habeas review of insufficient evidence); *Gegiow v. Uhl*, 239 U.S. 3, 8-10, 1915 (rejecting executive's broad interpretation of public charge exclusion provision); *Kessler v. Strecker*, 307 U.S. 22, 29-30, 1939 (rejecting executive's interpretation of ideological deportation provision); *Delgadillo v. Carmichael*, 332 U.S. 388, 390-391, 1947 (rejecting executive's interpretation of "entry"); *See generally Uyemura v. Carr*, 99 F.2d 729, 732, 9th Cir. 1938; *United States ex rel. De Sousa v. Day*, 22 F.2d 472, 2d Cir. 1927; *Engel v. Zurbrick*, 51 F.2d 632, 633, 6th Cir. 1931; *Nocchi v. Johnson*, 6 F.2d 1, 2, 1st Cir. 1925; *Jouras v. Allen*, 222 F. 756, 758-59 (8th Cir. 1915).

[13]*See also United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77, 1957 (Court considered petitioner's claims on the merits to determine whether Attorney General had "applied the correct legal standards in deciding whether . . . the statutory prerequisites for [discretionary] suspension of deportation [had been met].") Both *Accardi* and *Hintopoulus* were decided under the 1917 Act.

[14]*See Swain v. Pressley*, 430 U.S. 372, 386, 1977, (Burger concurring ("the traditional Great Writ was largely a remedy against executive detention) (citing P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System*, Pp. 1513-1514, 2d ed. 1973) ("it was of course the clear contemporaneous understanding [of the Framers] that the fundamental function of the writ was to test executive detentions")).

[15]The AEDPA § 440(a) decisions leave this issue unresolved. In each of those cases, the courts found or assumed another basis avenue of review, namely habeas corpus. Their discussion of Due Process and Article III do not address a situation where no alternative avenue for review exists and is, therefore, dicta on that question.

[16]The Supreme Court reaffirmed the special nature of certain civil proceedings in *M.L.B. v. S.L.J.*, 117 S.Ct 555, 1996 (denial of appeal of parental termination based on parent's inability to pay fees violates Due Process and Equal Protection because of importance of interest at stake).

[17]*Crowell v. Benson*, 285 U.S. 22, 61, 1932 ("when fundamental rights are in question, this Court has repeatedly emphasized the difference in security of *judicial* over administrative action"); historically, "[j]udicial control . . . [has been] at its maximum when coercive governmental conduct was involved" Monaghan, 1983); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84, 1936, Brandeis concurring ("[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied). In addition, the opportunity for review must be measured against the three-part test of *Mathews v. Eldridge*, 424 U.S. 319, 1976.

REFERENCES

Guttentag, L.
1996 "Immigration Legislation and Due Process: The Forgotten Issue." In *In Defense of the Alien, Vol. XIX*. Ed. L. F. Tomasi. New York: Center for Migration Studies.

Hart, H.
1953 "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," *Harvard Law Review*, 66:1362, 1393-1397.

Monaghan, H. P.
1983 "Marbury and the Administrative State," *Columbia Law Review*, 83:1, 15-16.

Pistone and Schrag
1996 "The 1996 Immigration Act: Asylum and Expedited Removal - What the INS Should Do," *Interpreter Releases*, 73:1565. Nov. 11.