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Criminal Aliens Get Pinched: Sandoval v. Reno, AEDPA's and IIRIRA's Effect on Habeas Corpus Jurisdiction

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CRIMINAL ALIENS GET PINCHED: *SANDOVAL v. RENO*, AEDPA'S AND IIRIRA'S EFFECT ON HABEAS CORPUS JURISDICTION

I. INTRODUCTION

In 1996, the 104th Congress passed two immigration reform laws that made sweeping changes in immigration law, particularly regarding judicial review of deportation orders.[1] One year after the Oklahoma City bombing, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[2] into law.[3] Shortly thereafter, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[4] which contains both "transitional rules" and "permanent rules," was passed into law.[5] These two laws were enacted after some of

1. *See* Sandoval v. Reno, 166 F.3d 225, 227 (3d Cir. 1999) (stating that Congress passed two bills that made sweeping changes in field of immigration); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1445 (1997) (noting that IIRIRA made sweeping changes to judicial review); Sara A. Martin, Note, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683, 683 (1999) (noting that "[t]he adjectives 'Orwellian,' 'Kafkaesque,' and 'draconian' have been used to describe two new immigration reform laws passed by Congress in 1996" (citing Bill Maxwell, *Enter Here, and Abandon Basic Rights*, ST. PETERSBURG TIMES, Sept. 28, 1997, at 1D; Mike Swift, *Immigrants Rushing to Citizenship*, HARTFORD COURANT, Nov. 2, 1997, at A1)); Trevor Morrison, Note, *Removed from the Constitution? Deportable Aliens' Access to Habeas Corpus Under the New Immigration Legislation*, 35 COLUM. J. TRANSNAT'L L. 697, 697 (1997) (noting that Congress passed two statutes in 1996 affecting immigration laws); Ben L. Kaufman, *IRS Mistook Bad Books for Bad Motives*, CIN. ENQUIRER, July 25, 1999, at C6 (noting that these acts "limit[ ] judicial intervention in the Immigration & Naturalization Service ("INS"), which reports to the attorney general"); Neil A. Lewis, *With Immigration Law in Effect, Battles Go On*, N.Y. TIMES, Apr. 2, 1997, at A4 (noting that new laws make it difficult for immigrants); Henry Weinstein, *California and the West Court Backs Immigrants in Deportation Law*, L.A. TIMES, Sept. 2, 1998, at A3 (stating that "Congress attempted, among other things, to dramatically restrict the ability of federal courts to review actions by the Immigration and Naturalization Service").

2. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending scattered sections of 8 U.S.C.). Some of these provisions, especially the ones regarding judicial review of criminal aliens, do not relate to anti-terrorism or the death penalty.

3. *See* Martin, *supra* note 1, at 684 (stating that "[o]n the one-year anniversary of the Oklahoma City bombing, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996"); *see also* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulations in the Immigration Laws: Important Lessons for Citizens and Non-Citizens*, 28 ST. MARY'S L.J. 833, 839 (1997) (noting passage of AEDPA); Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 625 (1996) (same).

4. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

5. For a discussion of the "transitional rules" and the "permanent rules," see *infra* notes 39-56 and accompanying text.

the worst acts of terrorism directed towards American citizens in the United States history.[6] According to some commentators, these two laws reflect a continual hostility towards immigrants and may have been enacted to "quench" some of the existing anti-immigrant sentiment.[7]

Before the enactment of AEDPA and IIRIRA, non-citizens who were subject to a final order of deportation, including "criminal aliens,"[8] had a long- standing right to seek judicial review of that decision by appealing to the courts of appeals.[9] Additionally, and more important, aliens (criminal and non-criminal alike) could seek judicial review of deportation or exclusion decisions issued from the executive branch by filing a writ of habeas corpus in the district courts under 28 U.S.C. § 2241.[10] Habeas corpus has

6. *See* Colleen Caden, Note, Mojica v. Reno: *Upholding District Courts' Statutory Habeas Power Under the Immigration Laws of 1996*, 7 J.L. & POL'Y 169, 169-70 (1998) (stating that during 1990s, Americans experienced some of worst incidents of terrorism on domestic soil and that AEDPA and IIRIRA were enacted to wage war against future acts). These acts include the World Trade Center bombing of 1993 that killed six and injured 1042, the Oklahoma City bombing of the Alfred D. Murrah Federal Building that killed 168 and injured hundreds more, and the 1996 Olympic Park bombing in Atlanta that killed one and injured 111 people. *See id.* at 169 n.1 (citing bombings); *see also* Christopher John Farley, *America's Bomb Culture*, TIME, May 8, 1995, at 56 (providing numbers of deaths and injuries resulting from bombings in 1993); Kevin Sack, *Officials Show Bomb Parts in Atlanta*, N.Y. TIMES, Nov. 19, 1997, at A6 (summarizing bombings in Atlanta); Jo Thomas, *After Emotional Appeals, Bomb Jury Weights Penalty*, N.Y. TIMES, Jan. 6, 1998, at A10 (describing emotional impact of Oklahoma bombing).

7. *See* Linda Kelly, *The Fantastic Adventures of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 CONN. L. REV. 1045, 1071 n.140 (1999) (stating that "[w]hile more recent legislation has softened some of the harsher effects of these pieces of legislation, other proposals and federal and state action reflect a continuing hostility toward immigrants"); Melinda Smith, Comment, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163, 163-64 (1999) (contending that "[i]t may have been a desire to quench some of that anti-immigrant sentiment which motivated the 104th Congress to enact the extremely harsh provisions of the [AEDPA] and the [IIRIRA]"); *see also* Jason H. Ehrenberg, Note, *A Call for Reform of Recent Immigration Legislation*, 32 U. MICH. J.L. REF. 195, 195 (1998) (stating that AEDPA and IIRIRA "were aimed at alleviating negative public response to America's growing population of illegal immigrants").

8. See 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996) (stating that criminal aliens are persons who have "committed a criminal offense covered in section 1182(a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of [Title 8], or any offense covered by section 1227(a)(2)(A)(ii) of [Title 8] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of [Title 8]").

9. *See* Michelle Slayton, Comment, *Interim Decision No. 3333: The Brief, Casual, and Innocent Conundrum*, 33 NEW ENG. L. REV. 1029, 1049 (1999) (stating that aliens subject to final orders of deportation have been able to file appeals in federal courts to seek judicial review of those orders).

10. *See* Sandoval v. Reno, 166 F.3d 225, 229 (3d Cir. 1999) (noting prior to enactment of AEDPA, § 106(a)(10) of Immigration and Nationality Act provided for review of deportation order by allowing petitions for habeas corpus); *see also* Morrison, *supra* note 1, at 698 (stating that habeas corpus has long been used by aliens to seek judicial review of federal executive branch decisions to deport aliens

been considered a "high prerogative writ . . . the great object of which is the liberation of those who may be imprisoned without sufficient cause."[11] Congress, however, abrogated most of these rights by passing the AEDPA and IIRIRA, which, if read literally, may deprive criminal aliens of all judicial review of deportation orders, thereby creating unprecedented limitations on the availability of judicial review and habeas corpus.[12] These two congressional jurisdiction-stripping statutes are considered "the most significant limitations on federal jurisdiction since those enacted in connection with World War II price controls and draft legislation."[13] Therefore, the breadth of these two acts is an important issue, one that has plagued the various courts of appeals.[14]

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from United States). When the Immigration and Naturalization Service ("INS") brings deportation proceedings, the alien appears before an Immigration Judge ("IJ"), an administrative law judge under the Department of Justice. *See id.* (noting procedure). Aliens can then appeal decisions of the IJ to the Board of Immigration Appeals ("BIA"), which is also included in the federal executive branch. *See id.* at 698 n.8 (noting immigration structure under federal executive branch).

11. *Ex parte* Watkings, 28 U.S. (6 Pet.) 193, 202 (1830) (Marshall, C.J.).

12. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 961 (1998) ("The 104th Congress, in its impatience with the enforcement inefficiencies of the Immigration and Naturalization Service, enacted two statutes that, if taken literally, create unprecedented restrictions on the availability of habeas corpus to aliens being removed from the United States."); Morrison, *supra* note 1, at 697 (noting severity of two new statutes that may remove all judicial review of deportation orders by administrative agencies); *see also* Benson, *supra* note 1, at 1445 (noting that "the new provision limits the availability of the petition for review for people in disfavored groups or for people presenting disfavored claims"); Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 730 (1999) (stating "[a] major threat to the independence of the federal judiciary, this group of bills [including AEDPA and IIRIRA] diminished the power of the courts to curtail legislative and executive actions that violate the Constitution"); Darryl Van Duch, *ABA Goes Over Head of INS on Detainee Issue – ABA Says INS Refuses to Give Pro Bono Lawyers Access to Some Detainees*, NAT'L L.J., Feb. 15, 1999, at A7 (stating that tough new law, IIRIRA, repealed judicial review of INS decisions in most cases); Ehrenberg, *supra* note 7, at 195 (AEDPA and IIRIRA dramatically limit procedural rights of criminal aliens); Smith, *supra* note 7, at 164 (noting that AEDPA and IIRIRA "narrow the scope of the traditional constitutional rights of legal resident aliens to an unprecedented low").

13. Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2446 (1998). *See* Weinstein, *supra* note 1, at A3 (noting that "[o]pponents of the bill contended that it was a radical 'court stripping' measure").

14. *See Suspension and Supremacy, Jurisdiction and Judicial Power: Habeas Corpus After AEDPA and IIRIRA*, 98 COLUM. L. REV. 695, 695 (1998) (noting disagreement among courts).

> All courts agree that AEDPA places greater limits upon the occasions when a federal court may grant a writ of habeas corpus as post-conviction relief from a state court judgment found to violate federal law. But courts disagree on just how restrictive these new limits are. It is also uncertain whether IIRIRA, in conjunction with AEDPA, bars all federal court review of certain deportation and removal decisions of the [INS], including habeas review of this most common form of executive detention.

In a flurry of recent cases, including *Liang v. INS*,[15] *Sandoval v. Reno*,[16] *Catney v. INS*[17] and *DeSousa v. Reno*,[18] the United States Court of Appeals for the Third Circuit has considered the effect of the AEDPA and IIRIRA on criminal aliens. The Third Circuit primarily addressed the applicability of the new immigration statutes on habeas corpus jurisdiction in *Sandoval* and *Liang*.[19] In *Sandoval*, the court held that though direct review of criminal aliens' deportation orders did not survive the judicial review limitations of AEDPA and both the "transitional" and "permanent" rules of IIRIRA, habeas corpus jurisdiction in the district courts still remained intact following the "transitional" rules.[20] *Catney* and *DeSousa* both reinforced and expanded on *Sandoval*'s holding.[21] Although it appears that the district courts in the Third Circuit retain habeas corpus jurisdiction following the "transitional" rules, the various district courts are at odds with each other on this issue.[22] Furthermore, in *Liang*, the Third Circuit

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Id. Furthermore, "[n]o issue has been more studiously avoided by the courts, and more assiduously studied by law professors, than congressional control over the jurisdiction of the federal courts." David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2481 (1998).

15. 206 F.3d 308 (3d Cir. 2000).

16. 166 F.3d 225 (3d Cir. 1999).

17. 178 F.3d 190 (3d Cir. 1999).

18. 190 F.3d 175 (3d Cir. 1999).

19. *See Liang*, 206 F.3d at 310 (discussing applicability of new immigration statutes to criminal aliens); *Sandoval*, 166 F.3d at 227 (same). Prior to *Liang* and *Sandoval*, *Morel v. INS* was one of the first cases to tackle the interpretation of the AEDPA. *Morel* concluded that the courts of appeals no longer have jurisdiction to review a claim of legal error by a criminal alien in a deportation proceeding. *See* Morel v. INS, 144 F.3d 248, 250-51 (3d Cir. 1998) (holding that "[i]n the case of aliens convicted of certain criminal offenses, AEDPA § 440(a) removes from [the courts of appeals] jurisdiction to review a claim of legal error in deportation proceedings"). The Morel court also noted that the subsequent adoption of IIRIRA, which further restructured the deportation process, did not affect the outcome of the case. *See id.* at 251. Furthermore, the Third Circuit in *Catney* held that, "following the passage of AEDPA and IIRIRA, [the court] no longer [has] jurisdiction to review a denial of discretionary relief to a criminal alien." *Catney*, 178 F.3d at 195 (citing 8 U.S.C. § 1252(c)(2)(C) (Supp. II 1996)); *accord Morel*, 144 F.3d at 252).

20. *See Sandoval*, 166 F.3d at 231-38 (concluding habeas jurisdiction survived, while direct review of certain orders did not); *see also Catney*, 178 F.3d at 195 (stating *Sandoval* concluded that habeas corpus jurisdiction survived 1996 acts' limitations on judicial review of criminal aliens' deportation orders, but direct review was repealed).

21. For a discussion of the holdings of these cases, see *infra* notes 162-73 and accompanying text.

22. *Compare* Kiareldeen v. Reno, 71 F. Supp. 2d 402, 406 (D.N.J. 1999) (finding that "[t]his court accompanies other courts of this circuit in their determination that district courts retain habeas corpus jurisdiction consonant with the 1996 amendments"), *with* Jacques v. Reno, 73 F. Supp. 2d 477, 481 (M.D. Pa. 1999) (holding that "the provisions of IIRIRA which bar judicial review prevent the assertion of habeas jurisdiction under § 2241 as well").

recently held that habeas corpus jurisdiction still remains in the district courts despite IIRIRA's "permanent" rules.[23]

This Casebrief focuses on the Third Circuit's interpretation of AEDPA's and IIRIRA's restrictions on criminal aliens' judicial review of final orders of deportation and their affect on habeas corpus jurisdiction. Part II discusses judicial review prior and subsequent to the passage of AEDPA and IIRIRA.[24] Part II also discusses the various courts of appeals' interpretation of these two acts.[25] Part III analyzes the Third Circuit's interpretation of the restrictions set by AEDPA and both the "transitional" and "permanent" rules of IIRIRA, on a criminal alien's right to judicial review of a final deportation order and its affect on habeas corpus jurisdiction.[26] Finally, Part IV summarizes the principal arguments made in cases under the AEDPA and IIRIRA and discusses the implications of the Third Circuit's decisions.[27]

II. BACKGROUND

A. *Habeas Corpus Jurisdiction Before and After the AEDPA and IIRIRA*

1. *Judicial Review Before the AEDPA and IIRIRA*

Before Congress amended the Immigration and Nationality Act[28] ("INA") in 1961, criminal aliens were entitled to challenge deportation orders through habeas corpus proceedings in the district courts.[29] When Congress did amend the INA, it provided that petitions for review by the court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportations."[30] Despite this language, Congress also enacted INA section 106(a)(10) which stated that "any alien held in custody pursuant to an order of deportation may obtain judicial

23. *See Liang*, 206 F.3d at 322 (holding that statutes did not eliminate habeas jurisdiction).

24. For a discussion of judicial review before and after AEDPA and IIRIRA, see *infra* notes 28-54 and accompanying text.

25. For a discussion of the interpretation of these acts by other courts of appeals, see *infra* notes 55-117 and accompanying text.

26. For a discussion of the Third Circuit's interpretation of AEDPA and IIRIRA, see *infra* notes 118-205 and accompanying text.

27. For a discussion of a possible outcome regarding criminal aliens' right to habeas corpus review, see *infra* notes 206-11 and accompanying text.

28. INA of 1952, ch. 477, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

29. *See* Andrea Lovell, Comment, *The Proper Scope of Habeas Corpus Review in Civil Removal Proceedings*, 73 WASH. L. REV. 459, 467-69 (1998) (noting that habeas corpus review was available before 1961). For a further discussion of habeas corpus before the 1961 INA amendment, see *infra* notes 141-52 and accompanying text.

30. INA § 106(a), 8 U.S.C. § 1105a(a) (1994), *amended by* Pub. L. No. 87-301 § 5(a), 75 Stat. 651, *repealed by* IIRIRA of 1996, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612.

review thereof by habeas corpus proceedings."[31] This INA section did not create a new right of habeas corpus jurisdiction, rather it was inserted to both preserve the right and to prevent a potential constitutional challenge if the "sole and exclusive" language of the INA precluded habeas corpus review.[32]

2. *Judicial Review Under the AEDPA*

In 1996, the AEDPA altered and severely limited judicial review for criminal aliens convicted of certain enumerated crimes.[33] First, AEDPA section 401(e) struck former INA section 106(a)(10) and was entitled "Elimination of Custody Review by Habeas Corpus."[34] Furthermore, AEDPA section 440(a) was enacted and included the following language: "Any final order of deportation against an alien who is deportable by reason of having committed [certain enumerated criminal offenses] shall not be subject to review by any court."[35] These amendments had two effects on criminal aliens: (1) they eliminated the INA's habeas corpus provision;

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31. INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (1994), *amended by* Pub. L. No. 87-301 § 5(a), 75 Stat. 651, *repealed by* IIRIRA of 1996, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612.

32. *See* Sandoval v. Reno, 166 F.3d 225, 234 (3d Cir. 1999) (noting that habeas jurisdiction was not destroyed by 1961 Act and that legislative history makes clear that provision 106(a)(10) was added to prevent 'sole and exclusive' language of 106(a) from being read to deprive courts of habeas jurisdiction, thereby creating constitutional problems); *see also* Lovell, *supra* note 29, at 470 (noting that INA expressly preserved habeas corpus jurisdiction to avoid constitutional problems). The House Report states:

> The section clearly specifies that the right to habeas corpus is preserved to an alien in custody under a deportation order. In that fashion, it excepts habeas corpus from the language which elsewhere declares that the procedure prescribed for judicial review in circuit courts shall be exclusive. The section in no way disturbs the Habeas Corpus Act in respect to the courts which may issue writs of habeas corpus: aliens are not limited to courts of appeals in seeking habeas corpus.

H.R. REP. NO. 87-1086, at 29 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2973. Furthermore, the Congressional Record stated:

> Nothing contained in the bill is, or can be, designed to protect an alien from obtaining review [of a deportation order] by habeas corpus . . . . [W]e were very much concerned over the possibility of writing an unconstitutional statute by depriving even an alien the right to a writ of habeas corpus.

87 CONG. REC. H12, 176-77 (1961) (statement of Rep. Walter).

33. *See* Lovell, *supra* note 29, at 470 (noting that AEDPA limited judicial review for criminal aliens who were convicted of certain enumerated crimes"); Morrison, *supra* note 1, at 702 (stating that AEDPA "works a significant withdrawal of access to habeas corpus for certain deportable aliens").

34. AEDPA of 1996 § 401(e), 110 Stat. 1214, 1268 (repealing INA § 106(a)(10), 8 U.S.C. § 1105a(a)(10) (1994)), *repealed by* IIRIRA of 1996, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612.

35. AEDPA of 1996 § 440(a), 110 Stat. 1214, 1276 (amending INA § 106(a)(10), 8 U.S.C. 1105a(a)(10) (1994)), *repealed by* IIRIRA of 1996, Pub. L. No. 104-208, § 306(b), 110 Stat. 3009-612.

and (2) they denied judicial review to these aliens.[36] There is dispute, however, concerning whether these sections eliminated an alien's right to habeas corpus review under § 2241.[37]

3. *Judicial Review After the IIRIRA*

Several months after the AEDPA was passed, Congress enacted the IIRIRA which provides a more in-depth revision of the INA.[38] This alteration of the judicial review structure for criminal aliens created two sets of rules: the "transitional rules" and the "permanent rules."[39] The transitional rules are for criminal aliens who were involved in removal proceedings that commenced before April 1, 1997.[40] The permanent rules are applicable where the removal proceedings commenced on or after April 1, 1997.[41]

The transitional and permanent rules of the IIRIRA continue to uphold the ban on judicial review of deportation decisions, previously established by AEDPA, for criminal aliens.[42] IIRIRA, however, adds further

36. *See* Cole, *supra* note 14, at 2487 (stating that AEDPA repealed INA provision allowing aliens in custody to seek habeas review of deportation orders); Lovell, *supra* note 29, at 470 (noting that AEDPA repealed habeas corpus provision in INA).

37. For a discussion of the various courts' of appeals interpretations, see *infra* notes 57-117 and accompanying text.

38. *See* Cole, *supra* note 14, at 2487 (stating that IIRIRA created "a much more comprehensive revision of the immigration laws"); Lovell, *supra* note 29, at 470 (noting that by completely repealing INA section 106, IIRIRA further revised INA).

39. *See* Immigration Reform and Immigrant Responsibility Act of 1996 § 309, 110 Stat. 3009-625 to -627 (codified as amended in scattered sections of 8 U.S.C.); *see also* Sandoval v. Reno, 166 F.3d 225, 229 (3d Cir. 1999) (noting that IIRIRA contained both "transitional rules" and "permanent rules"). Both the transitional and permanent rules were clarified by technical amendments. *See* Pub. L. No. 104-302, § 2, 110 Stat. 3656, 3657 (1997).

40. *See generally* DeSousa v. Reno, 190 F.3d 175, 180-81 (3d Cir. 1999) (noting that appellant was subject to transitional rules because deportation proceedings commenced before April 1, 1997); Catney v. INS, 178 F.3d 190, 192 (3d Cir. 1999) (noting that deportation proceedings commenced against appellant in 1992, making transitional rules applicable).

41. *See* Immigration Reform and Immigrant Responsibility Act of 1996 § 309, 110 Stat. 3009-625-27; *see also Sandoval*, 166 F.3d at 229 (noting effective dates of transitional rules and permanent rules).

42. *See Cole*, *supra* note 14, at 2487 (stating that IIRIRA continued ban on judicial review of deportation orders). The transitional rule states:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(I) of such Act (as so in effect).

Immigration Reform and Immigrant Responsibility Act of 1996 § 309(c)(4)(G), 110 Stat. 3009-626. "By congressional directive, the transitional rules are not part

restrictions on criminal aliens.[43] These restrictions hit criminal aliens the hardest "because they are apparently denied any judicial review of detention or removal decisions."[44]

On one hand, one of the transitional rules, IIRIRA section 309(c)(4)(G), provides: "[T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense [enumerated in this section.]"[45] Also, during this transition period, AEDPA section 440(a) is still applicable.[46] Furthermore, IIRIRA amended INA section 242(g) to state:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter.[47]

This rule is applied retroactively, making it applicable to both the transitional and permanent rules.[48] The restriction on judicial review, however, has been interpreted narrowly by the United States Supreme

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of the INA and are not codified in the United States Code." *Sandoval*, 166 F.3d at 229 n.3. On the other hand, the permanent rule provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Immigration Reform and Immigrant Responsibility Act of 1996 § 306(a)(2), 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996).

43. *See, e.g.*, IIRIRA of 1996 § 303(a), 8 U.S.C. § 1226(e) (Supp. II 1996) (denying judicial review). These new laws deny judicial review of decisions to detain criminal aliens pending removal. *See id.* This provision provides that:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

Id.

44. Cole, *supra* note 14, at 2507. The author notes, however, that while the INS may make thousands of decisions each year that will be immune from all judicial review because of the AEDPA and IIRIRA, these decisions should be read in such a manner that aliens (including criminal aliens) are entitled to a broad form of habeas corpus. *See id.* at 2504.

45. IIRIRA of 1996 § 309(c)(4)(G), 110 Stat. 3009-626 to -627.

46. *See Sandoval*, 166 F.3d at 229 n.1 (noting applicability of AEDPA § 440(a)).

47. IIRIRA of 1996 § 306(a)(2), 8 U.S.C. § 1252(g) (Supp. II 1996) (amending INA § 242(g)).

48. *See* IIRIRA of 1996 § 306(c)(1), 110 Stat. 3009-612 (noting retroactivity of statute). This provision states that:

Court in *Reno v. American-Arab Anti-Discrimination Committee*[49] *(American-Arab)*. The Court said this rule is to be applied only in three discrete actions listed in the rule and not to the "universe of deportation claims."[50] Therefore, final orders of removal are not covered by this section.

On the other hand, one of the permanent rules amended by IIRIRA, INA section 242(b)(9), provides that: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien . . . shall be available only in judicial review of

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> [T]he amendments made by subsections (a) and (b) [that contain the permanent rules for judicial review shall apply as provided under section 309, except that] subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Id.

49. 525 U.S. 471 (1999). The issue in this case was whether jurisdiction to review selective enforcement of the immigration laws by the Attorney General was repealed by INA section 242(g). *See id.* at 474 (noting issue). The Court held that section 242(g) deprived the courts of jurisdiction to hear the respondents claim. *See id.* at 492 (vacating judgment of United States Court of Appeals of the Ninth Circuit). Although the Court noted that there was a circuit split regarding the issue of whether habeas corpus review is available after IIRIRA, it did not resolve the issue. *See id.* at 480 n.7 (noting disagreement among various courts of appeals).

50. *See id.* at 482 (stating that section 242(g) is not "zipper" clause, but is much narrower). The Third Circuit has interpreted this case by stating that INA section 242(g) "only applies to suits challenging the government's selective enforcement of the immigration laws." DeSousa v. Reno, 190 F.3d 175, 182 (3d Cir. 1999).

> One treatise cited by the United States Supreme Court states:
> To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated deferred action. A case may be selected for deferred action treatment at any stage of the administrative process.

6 C. GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03[2][h] (1998). The INS discretion over deportation, however, opened up the door to potential litigation where the INS does not exercise its discretion:

> [I]n each such instance, the determination to withhold or terminate deportation is confined to administrative discretion . . . . Efforts to challenge the refusal to exercise such discretion on behalf of specific aliens sometimes have been favorably considered by the courts, upon contentions that there was selective prosecution in violation of equal protection or due process, such as improper reliance on political considerations, on racial, religious, or nationality discriminations, on arbitrary or unconstitutional criteria, or on other grounds constituting abuse of discretion.

Id. at § 72.03[2][a] (footnotes omitted). Because of the increase in litigation, the Supreme Court noted INA section 242(g) provides that if the INS's three acts of discretion are reviewable at all, they will not create separate rounds of judicial intervention. *See American-Arab,* 525 U.S. at 485 (noting purpose of INA section 242(g)).

a final order under this section."[51] Another one of the permanent rules, however, excludes criminal aliens from the judicial review that INA section 242(b)(9) affords. INA section 242(a)(2)(C) states that: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense [enumerated in this section]."[52] This provision is severe because it precludes criminal aliens from obtaining judicial review of final orders of deportation and does not affirmatively provide them with an alternative.[53] While the meaning of the transitional and permanent rules seems similar, the difference between them has been another source of controversy between the courts of appeals in deciding whether habeas corpus jurisdiction remains in the district courts.[54]

B. *Recent Circuit Responses to the 1996 Acts*

Enactment of the AEDPA in 1996 created confusion in the courts of appeals.[55] Although the circuit courts basically agree on the breadth and scope of the judicial review limitations imposed by these acts,[56] they disagree whether § 2241 habeas corpus jurisdiction remains in the district courts.[57]

1. *Circuit Holding That Habeas Corpus Jurisdiction Remains Under the Transitional Rules*

Many of the courts of appeals have held that habeas corpus jurisdiction remains in the district courts after the enactment of the two statutes. The United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits,[58] before and af-

51. IIRIRA of 1996 § 306(a)(2), 8 U.S.C. § 1252(b)(9) (Supp. II 1996) (amending INA section 242(b)(9)).

52. IIRIRA of 1996 § 306(a)(2), 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996) (amending INA section 242(a)(2)(C)).

53. *See id.* (noting exclusion of criminal aliens).

54. *Compare* Max-George v. Reno, 205 F.3d 194, 202-03 (5th Cir. 2000), *petition for cert. filed*, (U.S. Aug. 23, 2000) (No. 00-6280) (noting that § 2241 habeas corpus jurisdiction does not remain under permanent rules), *with* Requena-Rodriguez v. Pasquarell, 190 F.3d 299, 304 (5th Cir. 1999) (holding that habeas corpus jurisdiction remains in district courts under transitional rules).

55. *See* Lovell, *supra* note 29, at 460 (noting various holdings among courts of appeals and district courts); Martin, *supra* note 1, at 702 (noting difference among courts of appeals).

56. *See generally* Goncalves v. Reno, 144 F.3d 110, 125-26 (1st Cir. 1998) (noting that each circuit court has held they no longer may entertain petitions for review filed by criminal aliens).

57. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 480 n.7 (1999) (noting circuit split). The scope of habeas corpus that remains available is an entirely separate issue which is too broad for the scope of this article. For a discussion of that issue, see Cole, *supra* note 14, at 2494-2506.

58. *See* Richardson v. Reno, 180 F.3d 1311, 1315 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000) (holding that § 2241 habeas corpus jurisdiction was re-

ter *American-Arab*, have held that, under the transitional rules, habeas jurisdiction remains in the district courts.[59] These circuits agree on two basic points—that Congress has the constitutional authority to withdraw jurisdiction over petitions for review under the repealed INA section 106, but that some type of habeas corpus jurisdiction remains in the district courts.[60] Furthermore, these circuits use similar rationales in upholding habeas corpus jurisdiction.[61]

First and foremost, the United States Supreme Court decision in the various courts of appeals cite to *Felker v. Turpin*[62] for the proposition that habeas corpus jurisdiction was not repealed.[63] In that case, AEDPA section 106(b) directed that state inmates wanting to file "second or successive" habeas corpus petitions must get permission from the court of appeals, and that a grant or denial of that request "shall not be appealable and shall not be the subject of a petition for . . . writ of certiorari."[64] Stating that there was no mention of original habeas jurisdiction in the rule, the United States Supreme Court, relying on *Ex parte Yerger*,[65] held that because there was no express mention of habeas corpus jurisdiction, and

pealed). The Eleventh Circuit, however, found that under the permanent rules, § 2241 habeas corpus jurisdiction does not remain. *See id.*

59. *See* Magana-Pizano v. INS, 200 F.3d 603, 609 (9th Cir. 1999) (holding habeas corpus jurisdiction continues to exist after *American-Arab*); Pak v. Reno, 196 F.3d 666, 673 (6th Cir. 1999) (same); Bowrin v. INS, 194 F.3d 483, 489 (4th Cir. 1999) (holding that habeas corpus jurisdiction remains under transitional rules); Wallace v. Reno, 194 F.3d 279, 285 (1st Cir. 1999) (holding that transitional rules do not preclude deportable aliens governed by IIRIRA "from challenging their final deportation orders through habeas where they have no other way to assert in court that their deportation is contrary to the Constitution or laws of the United States"); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1145 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1539 (2000) (same); Requena-Rodriguez, 190 F.3d at 304 (same); DeSousa v. Reno, 190 F.3d 175, 180 (3d Cir. 1999) (same); Shah v. Reno, 184 F.3d 719, 724 (8th Cir. 1999) (same); Mayers v. INS, 175 F.3d 1289, 1301 (11th Cir. 1999) (same); Henderson v. INS, 157 F.3d 106, 122 (2d Cir. 1998) (holding habeas corpus jurisdiction remains under transitional rules).

60. *See Goncalves*, 144 F.3d at 126 (citing Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits).

61. For a discussion of the similar rationales used, see *infra* notes 62-88 and accompanying text.

62. 518 U.S. 651 (1996). The issue in *Felker* was whether AEDPA sections 106(b)(1) and (b)(2), which amended 28 U.S.C. § 2244(b), also eliminated the United States Supreme Court's original habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254. *See id.* at 660 (noting that Supreme Court retained original habeas jurisdiction).

63. *See Goncalves*, 144 F.3d at 126 (noting that many courts have cited *Felker* holding disfavoring repeals and have held that § 2241 habeas jurisdiction remains available).

64. AEDPA of 1996 § 106(b)(3)(E), 28 U.S.C. § 2244(b)(3)(E) (Supp. II 1996).

65. 75 U.S. (8 Wall.) 85 (1868). The Court considered the effect of the repeal of an 1867 statute that authorized the federal courts to entertain habeas corpus proceedings by prisoners. *See id.* at 86-87 (discussing statute). The Court found that its prior power to entertain habeas corpus proceedings under the 1789 Judiciary Act was not repealed. *See id.* at 106 (noting holding).

because jurisdictional repeals by implication are not favored, AEDPA section 106(b) did not divest the Supreme Court of its original habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254.[66] With this in mind, the courts of appeals have held that, because of *Felker*, only a clear, plain or express statement removing § 2241 habeas jurisdiction from the district courts will suffice.[67] These courts subsequently found that there was no mention of habeas corpus in the transitional jurisdiction-stripping statutes, including the retroactive INA section 242(g); therefore, they held that habeas jurisdiction was not repealed.[68]

Second, in upholding habeas jurisdiction, some courts of appeals cite to the "Suspension Clause" of the United States Constitution.[69] The Suspension Clause states that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[70] In *Swain v. Pressley*[71] the United States Supreme Court held that although Congress repealed habeas corpus jurisdiction from the district court, the Suspension Clause was not violated because "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."[72] Under the IIRIRA, however, there is no collateral remedy for criminal aliens.[73] Because there is no collateral remedy available, the Suspension Clause has been cited by some circuits to uphold habeas corpus jurisdiction.[74]

Third, in dealing with INA section 242(g), the federal government has repeatedly contended that because this provision channels all review into the courts of appeals as provided by INA section 242, habeas jurisdic-

66. *See Felker*, 518 U.S. at 660 (discussing judicial policy that repeals by implication are not favored).

67. *See, e.g.*, Pak v. Reno, 196 F.3d 666, 672-73 (6th Cir. 1999) (discussing *Felker* and noting that clear statement is needed to repeal habeas jurisdiction); Sandoval v. Reno, 166 F.3d 225, 231-32 (3d Cir. 1999) (same); *Goncalves*, 144 F.3d at 119-20 (same).

68. *See, e.g., Goncalves*, 144 F.3d at 121 (concluding that § 2241 habeas jurisdiction has not been repealed because "[h]ad Congress wished to eliminate any possible habeas jurisdiction under 28 U.S.C. § 2241, it could easily have inserted an explicit reference, but it did not"); Yang v. INS, 109 F.3d 1185, 1195 (7th Cir. 1997) (noting that INA section 242(g) "abolishes even review under § 2241, leaving only the constitutional writ [of habeas corpus], unaided by statute").

69. *See, e.g., Sandoval*, 166 F.3d at 237 (citing Suspension Clause); Jean-Baptiste v. Reno, 144 F.3d 212, 218 (2d Cir. 1998) (same).

70. U.S. CONST. art. I, §9, cl. 2.

71. 430 U.S. 372 (1977). This case considered an amendment to the District of Columbia Code, modeled after 28 U.S.C. § 2255, that repealed habeas corpus jurisdiction but substituted a collateral remedy. *See id.* at 375-76 (stating issue).

72. *Swain*, 430 U.S. at 381.

73. *See generally* IIRIRA of 1996 § 309(c)(4)(G), 110 Stat. 3009-626 to -627 (denying criminal aliens judicial review).

74. *See, e.g., Sandoval*, 166 F.3d at 237 (citing Suspension Clause to support upholding habeas corpus jurisdiction); *Jean-Baptiste*, 144 F.3d at 218 (same).

tion has been repealed.[75] The courts of appeals that have upheld habeas jurisdiction have dealt with this argument in two ways.[76] First, as stated above, some courts say that INA section 242(g) does not explicitly mention habeas jurisdiction; therefore, that type of jurisdiction is not repealed.[77] Secondly, other courts of appeals have countered this argument by saying that, consistent with *American-Arab*, final orders of deportation are not decisions to "commence proceedings, adjudicate cases, or execute removal orders."[78] Those courts, however, did not address the issue of whether habeas jurisdiction was available if the case fell within one of those three categories.[79]

Fourth, as an argument avoiding the repeal of habeas jurisdiction, some circuits interpret the transitional rules to not destroy habeas jurisdiction in order to avoid constitutional problems.[80] Under Supreme Court precedent, there is an obligation to read statutes in a manner that avoids serious constitutional problems.[81] According to *Webster v. Doe*,[82] the United States Supreme Court has stated that "'serious constitutional question[s]' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[83] According to the circuits that have considered this issue articulated by *Webster*, constitutional problems would arise, implicating the Suspension Clause and Article III, if

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75. *See, e.g.*, Pak v. Reno, 196 F.3d 666, 671 (6th Cir. 1999) (noting government's argument); Wallace v. Reno, 194 F.3d 279, 283 (1st Cir. 1999) (same); Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1144 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 1539 (2000) (same).

76. For a discussion of INA section 242(g), see *infra* notes 77-79 and accompanying text.

77. *See, e.g., Jurado-Gutierrez*, 190 F.3d at 1144-47 (noting that habeas corpus jurisdiction was not repealed by language of AEDPA or IIRIRA).

78. *See, e.g., Pak*, 196 F.3d at 671 (noting that final orders of deportation are not subject to INA section 242(g)); *Wallace*, 194 F.3d at 284 (same); *Jurado-Gutierrez*, 190 F.3d at 1144 (same); Mayers v. INS, 175 F.3d 1289, 1297 (11th Cir. 1999) (same). The purpose of this rule was to streamline the process and to prevent multiple appeals before a final order. *See* Reno v. American-Arab Anti-Discrimination Comm., 535 U.S. 471, 485 (1999).

79. *See, e.g., Wallace*, 194 F.3d at 284 (not discussing effect if case falls within one of three categories); *Pak*, 196 F.3d at 671 (same); *Jurado-Gutierrez*, 190 F.3d at 1144 (same); *Mayers*, 175 F.3d at 1297 (same).

80. *See, e.g., Pak*, 196 F.3d at 673 (noting that retaining habeas jurisdiction avoids serious constitutional problems); Sandoval v. Reno, 166 F.3d 225, 237 (3d Cir. 1999) (same).

81. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (noting obligation for statutory interpretation); United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) (stating that statutory interpretation by courts should avoid "grave and doubtful constitutional questions").

82. 486 U.S. 592 (1988).

83. *Webster*, 486 U.S. at 603 (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

all forms of judicial review, including habeas corpus, were stricken.[84] Those circuits have concluded that habeas corpus jurisdiction remains to review aliens' constitutional challenges and, therefore, have avoided serious constitutional questions.[85]

Finally, some circuits have interpreted AEDPA section 401(e), which repealed INA's section 106(a)(10) habeas jurisdiction for final orders, to hold that habeas jurisdiction was not revoked.[86] These courts held that despite the "sole and exclusive" language of INA section 106(a), INA section 106(a)(10) did not provide the only route to habeas corpus review.[87] Rather, the courts said that habeas corpus review under § 2241 was an independent option to section 106(a)(10), thus repealing that INA section did not also repeal § 2241 habeas jurisdiction.[88]

2. *Circuit Holding Habeas Corpus Jurisdiction Does Not Remain Under Transitional Rules*

While many of the circuits have held that AEDPA and IIRIRA do not repeal habeas corpus jurisdiction, the Seventh Circuit has held otherwise.[89] In *LaGuerre v. Reno*,[90] the United States Court of Appeals for the Seventh Circuit considered the effect of AEDPA on habeas corpus jurisdic-

84. *See, e.g., Pak*, 196 F.3d at 673 (upholding habeas corpus prevents "thorny constitutional issues"). These constitutional problems include whether these rules would suspend the writ of habeas corpus contrary to the Suspension Clause of the United States Constitution. *See id.* (noting Suspension Clause). Furthermore, repealing habeas corpus may violate Congress's power to strip Article III courts of jurisdiction. *See id.* (noting Article III).

85. *See* Jean-Baptiste v. Reno, 144 F.3d 212, 218 (2d Cir. 1998) (recognizing need for judicial review of criminal aliens' constitutional challenges). *But see* LaGuerre v. Reno, 164 F.3d 1035, 1040 (7th Cir. 1998) (noting that although habeas corpus jurisdiction does not survive, court created exception that "direct review remains available under section 440(a) for aliens wishing to challenge their deportation on constitutional grounds").

86. *See* Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1145 (10th Cir. 1999), *cert. Denied*, 120 S. Ct. 1539 (2000) (discussing AEDPA § 401(e)); Mayers v. INS, 175 F.3d 1289, 1298-1300 (11th Cir. 1999) (same); Goncalves v. Reno, 144 F.3d 110, 121 (1st Cir. 1998) (same).

87. *See Jurado-Gutierrez*, 190 F.3d at 1145 (noting that § 2241 was alternative option to INA section 106(a)(10)); *Mayers*, 175 F.3d at 1298-1300 (same); *Goncalves*, 144 F.3d at 121 (same).

88. *See Jurado-Gutierrez*, 190 F.3d at 1145, 1153 (upholding habeas corpus jurisdiction); *Mayers*, 175 F.3d at 1298-1300 (same); *Goncalves*, 144 F.3d at 121 (same). The Tenth Circuit has "frequently recognized the district court's jurisdiction to hear an alien's habeas corpus claim brought pursuant to 28 U.S.C. § 2241 during the period from 1961, when Congress enacted INA § 106(a)(10), through 1996." *Jurado-Gutierrez*, 190 F.3d at 1145.

89. *See LaGuerre*, 164 F.3d at 1040 (holding § 2241 habeas corpus jurisdiction repealed).

90. 164 F.3d 1035 (7th Cir. 1998). In this case, the defendants had been ordered deported because of drug-related offenses. *See id.* at 1037 (noting reason for deportation).

tion.[91] The Seventh Circuit noted that prior to INA section 106, habeas corpus was the method of judicial review for orders of deportation.[92] The Seventh Circuit said, however, that after section 106, review was directed towards the court of appeals "without preliminary recourse to the district courts."[93] The Seventh Circuit then stated that habeas jurisdiction was preserved by section 106, and that the best analysis of section 106's repeal is that the repeal allowed habeas jurisdiction only in limited situations.[94] Section 106 was repealed and then replaced by section 440(a).[95] *LaGuerre* held that this new provision effectively repealed habeas jurisdiction.[96] Furthermore, the Seventh Circuit held that the Suspension Clause does not require preserving statutory habeas jurisdiction.[97] The Seventh Circuit was "[m]indful of the presumption that executive resolutions of constitutional issues are judicially reviewable" and read an exception into AEDPA section 440(a) that a "deportee can seek review of constitutional issues in the court of appeals directly . . . ."[98] This decision to create an exception, however, has been criticized.[99]

3. *Circuits Holding Habeas Corpus Jurisdiction Does Not Remain Under Permanent Rules*

The United States Court of Appeals for the Fifth and Eleventh Circuits were the first two circuits to discuss the impact of IIRIRA's permanent rules on a federal district court's habeas corpus jurisdiction over criminal aliens.[100] Both courts held that the permanent rules divested the district courts of their § 2241 habeas jurisdiction over criminal aliens.

In *Richardson v. Reno*,[101] the United States Court of Appeals for the Eleventh Circuit was the first circuit court to consider the effect of AEDPA

91. *See id.* (noting criminal aliens' petition for habeas corpus).

92. *See id.* at 1038 (noting mode of judicial review prior to 1961).

93. *Id.* (citing 8 U.S.C. § 1105a (1994)). The stated purpose of channeling review into the courts of appeals was "to thwart the dilatory tactics frequently employed by the lawyers for deportable aliens." *Id.* (citing *Foti v. INS*, 375 U.S. 217, 225-26 (1963)).

94. *See id.* (noting best view reconciling INA section 106(a)(10) and § 2241).

95. *See id.* (noting repeal of INA section 106(a)(10) by AEDPA § 401(e)).

96. *See id.* at 1040 (noting that habeas corpus did not survive).

97. *See id.* at 1038 (doubting that Suspension Clause requires preserving habeas corpus to challenge final orders of deportation). The LaGuerre court said that at the time of the enactment of the Constitution, habeas corpus was extremely limited. *See id.* (noting original reach of habeas corpus). Congress subsequently authorized a broader reading of habeas corpus. *See id.* (noting habeas corpus was broadened). The Seventh Circuit held, however, that "it cannot be that curtailing an 'optional' statutory enlargement violates the [S]uspension [C]lause." *Id.*

98. *Id.* at 1040 (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)).

99. *See* Wallace v. Reno, 194 F.3d 279, 284-85 (1st Cir. 1999) (noting that *LaGuerre* is "at odds with the explicit statutory bar on any direct review contained in AEDPA § 440(a)").

100. For a discussion of the Fifth and Eleventh Circuit decisions, see *infra* notes 101-17 and accompanying text.

101. 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000).

and IIRIRA's permanent rules on a district court's § 2241 habeas jurisdiction.[102] Here, the Eleventh Circuit held that the overall judicial review scheme enacted in INA section 242 repealed § 2241 jurisdiction.[103] The *Richardson* court said that AEDPA's repeal of habeas jurisdiction under INA section 106 and the express provision in INA section 242(e)(2) for limited jurisdiction indicated congressional intent to repeal § 2241 habeas jurisdiction.[104] Furthermore, the *Richardson* court noted that INA section 242(b)(9) is "a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'"[105] It then held that § 2241 habeas jurisdiction was repealed and that, in order to seek judicial review, criminal aliens must wait for a final removal order and then proceed to the court of appeals under a petition for review as provided for in INA section 242.[106] At first glance, the "no court shall have jurisdiction to review any final order of removal" language of INA section 242 seems to preclude the *Richardson* court's suggestion for the criminal alien to petition for review. The court held, however, that there is sufficient review under INA section 242(a)(2)(C) because the appeals court has jurisdiction to determine if the jurisdictional bar applies to that person.[107] Furthermore, the *Richardson* court curiously stated that "[i]f the bar applies, jurisdiction remains to consider whether the level of judicial review remaining . . . in a particular case satisfies the Suspension Clause."[108] The court also noted that INA section 242(a)(2)(C) does not prevent constitutional questions; rather, the section deals with operational decisions made by the Immigration and Naturalization Service ("INS").[109] Therefore, even though criminal aliens do not have the right to petition

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102. *See id.* at 1313 n.2 (noting permanent rules apply in this case).

103. *See id.* at 1315 (holding that IIRIRA precludes § 2241 habeas jurisdiction).

104. *See id.* at 1314 (noting that INA section 242(e)(2) evinces congressional intent to preclude statutory habeas corpus review in this situation).

105. *Id.* at 1315 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999)). The *Richardson* court stated that "[a]s the Supreme Court stated, INA § 242 was intended to assure that issues of law and fact are not subject to 'separate rounds of litigation.'" *Id.* (citing *American-Arab*, 525 U.S. at 485).

106. *See id.* (noting constitutionality of limitation on § 2241 by IIRIRA). The *Richardson* court held that the combination of the "zipper clause," along with the broad revisions of INA section 242, are sufficient enough for the requirements in *Felker* to repeal habeas corpus review. *See id.*

107. *See id.* (noting criminal aliens' rights). In determining whether the jurisdictional bar applies, the court will "determine whether [the person] is actually an alien, is deportable, and deportable for a reason covered by INA § 242(a)(2)(C)." *Id.* at 1316.

108. *Id.* The *Richardson* court also noted that if the bar does not apply, then a criminal alien can pursue judicial review of constitutional and statutory issues under INA sections 242(b)(2) and 242(b)(9). *See id.* (noting alternatives for judicial review).

109. *See id.* at 1316 n.5 (noting applicability of INA section 242(a)(2)(C)). The *Richardson* court cited to *Webster* and *LaGuerre* for this proposition. *See id.*

for a writ of habeas corpus in the Eleventh Circuit, these aliens are provided a source of constitutional review.

In *Max-George v. Reno*,[110] the United States Court of Appeals for the Fifth Circuit was the second circuit court to consider the effects of the AEDPA's and IIRIRA's permanent rules on a district court's § 2241 habeas corpus jurisdiction.[111] Although the Fifth Circuit previously held that habeas corpus jurisdiction remains under the transitional rules, the *Max-George* court held that the permanent rules divest the district courts of their § 2241 habeas jurisdiction over criminal aliens.[112]

The *Max-George* court first held that the combination of the "notwithstanding any other provision of law" language in INA section 242(a)(2)(C), along with § 2241 being "any other provision of law," and the Supreme Court's characterizing INA section 242(b)(9) as "an unmistakable 'zipper' clause," though not as explicit as mentioning habeas corpus in the statute, evinces sufficiently explicit congressional to repeal § 2241 habeas jurisdiction under *Felker*.[113] Second, the *Max-George* court stated that "[t]o some degree, IIRIRA's stripping of § 2241 jurisdiction implicates the guarantee that the 'Privilege of the Writ' preserved by the Constitution can not be suspended," but the court went on to note that the distinction between the writ preserved in the Suspension Clause and the writ available in § 2241 is "immaterial when considered in the immigration context, where . . . Congress regularly makes rules that would be unacceptable if applied to citizens."[114] The court stated, however, that the breadth of the Suspension Clause need not be considered here because there is still judicial review that is substantial enough to satisfy any Suspension Clause claim a criminal alien may raise.[115] The judicial review that remains is the court's determination, under INA section 242(a)(2)(C), whether "(1) the specific conditions that bar jurisdiction in the court of appeals exist, (2) the conditions barring jurisdiction are constitutionally applied to the petitioner, and (3) the level of judicial review remaining is constitutionally adequate . . . ."[116] As of the date of this publication, the Eleventh and Fifth Circuits are the only two circuits holding that the permanent rules have divested the district courts of their § 2241 jurisdiction.

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110. 205 F.3d 194 (5th Cir. 2000), *petition for cert. filed*, (U.S. Aug. 23, 2000) (No. 00-6280).

111. *See id.* at 197 (noting matter of first impression).

112. *See id.* at 199 (noting holding).

113. *See id.* at 197-99 (analyzing IIRIRA's permanent rules). The *Max-George* court also noted that Congress was aware of the *Felker* decision because *Felker* was decided three months before IIRIRA was enacted. *See id.* at 198 (noting timing of *Felker* decision).

114. *Id.* at 201 (citing *Reno v. Flores*, 507 U.S. 292, 305-06 (1993)).

115. *See id.* at 202 (noting that "any Suspension Clause guarantee which Max-George can claim is satisfied").

116. *Id.*

The Third Circuit is the only other circuit to discuss the impact of the permanent rules on habeas jurisdiction.[117]

III. THE THIRD CIRCUIT UPHOLDS § 2241 HABEAS CORPUS JURISDICTION UNDER BOTH TRANSITIONAL AND PERMANENT RULES

The Third Circuit has recently considered the effect of AEDPA and IIRIRA on criminal aliens' right to judicial review of deportation orders and their effect on habeas corpus jurisdiction under both the transitional and permanent rules.[118] One of the first decisions by the United States Court of Appeals for the Third Circuit was *Sandoval v. Reno*, upheld the right to habeas corpus for a criminal alien who fell within the transitional rules.[119] Furthermore, the Third Circuit subsequently considered a criminal alien's right to judicial review and habeas corpus in *Catney v. INS*[120] and *DeSousa v. Reno*.[121] Finally, in *Liang v. INS*, the Third Circuit upheld § 2241's grant of habeas corpus jurisdiction in the district courts under the permanent rules.[122]

A. Sandoval v. Reno

1. *Background of* Sandoval

In *Sandoval v. Reno*, the Court of Appeals for the Third Circuit held that criminal aliens under the transitional rules retained the right of § 2241 habeas corpus review after the enactment of AEDPA and IIRIRA.[123] Sandoval filed a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania asserting a violation of his equal protection rights, and that a provision of the INA, amended by AEDPA, did not apply to him.[124] The district court held that it had

117. For a discussion of the Third Circuit's decision, see *infra* notes 177-205 and accompanying text.

118. *See* Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1999) (discussing 1996 acts); DeSousa v. Reno, 190 F.3d 175 (3d Cir. 1999) (same); Catney v. INS, 178 F.3d 190 (3d Cir. 1999) (same); Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999) (same); Morel v. INS, 144 F.3d 248 (3d Cir. 1998) (same).

119. *See Sandoval*, 166 F.3d at 237 (concluding that criminal aliens retained habeas corpus jurisdiction). The *Sandoval* court stated that "because neither AEDPA nor IIRIRA contains a clear statement that Congress sought to eliminate habeas corpus jurisdiction under 28 U.S.C § 2241, we conclude that § 2241 survives the 1996 amendments." *Id.* at 238.

120. For a discussion of *Catney*, see infra note 169 and accompanying text.

121. For a discussion of *DeSousa*, see *infra* notes 171-70 and accompanying text.

122. For a discussion of *Liang*, see *infra* notes 177-204 and accompanying text.

123. *See Sandoval*, 166 F.3d at 237 (holding that district court retained jurisdiction over habeas corpus petition).

124. *See id.* at 228. Sandoval, who is a citizen of Mexico, entered the United States and was later granted permanent resident status. *See id.* After Sandoval was granted the right to remain in the United States in order to qualify for citizenship, he was convicted of marijuana possession and was subject to deportation. *See id.* Sandoval then requested that he be granted a four-month stay in order to meet the

retained habeas jurisdiction under § 2241 to hear the claims asserted.[125] The case, including whether the district court had jurisdiction, was subsequently brought up on appeal.[126]

Sandoval first discussed the applicable transitional changes that evolved from AEDPA and IIRIRA, including the retroactive INA section 242(g).[127] The Third Circuit then proceeded to review recent cases construing these 1996 amendments.[128] The Third Circuit noted that the First, Second and Ninth Circuits had held that, notwithstanding these amendments, the district courts retained habeas corpus jurisdiction.[129] Furthermore, the court stated that the Seventh and Eleventh Circuits held

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seven-year legal immigrant qualification so that he would be eligible for discretionary relief under INA section 212(c). *See id.* This discretionary relief would have allowed the Attorney General to use discretion to admit Sandoval as a citizen, notwithstanding that he was deportable. *See id.* The immigration judge denied this request for a stay. *See id.* Sandoval then turned to the Board of Immigration Appeals to have that decision reviewed. *See id.* While the appeal was pending, AEDPA was passed—repealing the discretionary relief for persons in Sandoval's position. *See id.* Because of the statute, the Board of Immigration Appeals dismissed Sandoval's appeal, making the deportation order administratively final. *See id.* Within this time, however, Sandoval attained the seven-year requirement before his deportation. *See id.* For that reason, Sandoval filed a motion for the Board of Immigration Appeals to reopen his case, and he also filed a motion to the district court to request a stay. *See id.* The motion for the stay was denied. *See id.* Therefore, Sandoval filed a writ of habeas corpus in the district court, asserting that INA section 212(c) does not apply to him and that section 212(c) violates equal protection. *See id.*

125. *See id.* (noting that district court held that it retained habeas jurisdiction). Furthermore, the district court held that the AEDPA did not apply to Sandoval, and ordered the INS to entertain his INA section 212(c) request. *See id.* at 228-29 (noting district court's holding).

126. *See id.* at 229 (noting that government appealed district court's decision). "While this appeal was pending, the BIA denied Sandoval's motion to reopen, and Sandoval then filed a Petition for Review with [the court of appeals]." *Id.* The appeal and the Petition for Review were subsequently combined. *See id.*

127. *See id.* at 229-30 (discussing statutory changes). For a discussion of the transitional changes that took place under AEDPA and IIRIRA, see *supra* notes 33-54 and accompanying text.

128. *See Sandoval*, 166 F.3d at 230-31 (discussing cases).

129. *See id.* at 230 (citing circuit cases). The *Sandoval* court cited to other circuits, including *Goncalves v. Reno*, 114 F.3d 110 (1st Cir. 1998), which held that Congress did not eliminate § 2241 habeas corpus jurisdiction, and *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), which reasoned that § 2241 habeas remained intact and preserved the constitutionality of the foreclosure of judicial review. Furthermore, *Sandoval* noted that while the United States Court of Appeals for the District of Columbia Circuit did not reach this issue, the district court in that circuit held that § 2241 jurisdiction was not repealed by either AEDPA or IIRIRA. *See Sandoval*, 166 F.3d at 230 (discussing *Lee v. Reno*, 15 F. Supp. 2d 26 (D.D.C. 1998)). The *Sandoval* court also stated that other circuits that had not directly addressed the issue had held that because AEDPA and IIRIRA divested the district courts of jurisdiction to entertain Petitions for Review, the courts retained some degree of habeas corpus jurisdiction. *See id.* at 231 (citing *Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir. 1998); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Ramallo v. Reno*, 114 F.3d 1210, 1214 (D.C. Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154 n.3 (10th Cir. 1997)).

otherwise.[130] *Sandoval* then reiterated its previous holding that AEDPA section 440(a) had precluded the court from hearing claims of legal error in a petition for review filed by a criminal alien.[131]

Second, the court analyzed the "longstanding doctrine disfavoring repeals of jurisdictional statutes by implication."[132] In order to do so, the circuit examined *Ex parte Yerger*,[133] *Ex parte McCardle*[134] and *Felker*.[135] The court concluded that these decisions, "[r]ead together[,] . . . establish the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a plain statement of congressional

130. *See Sandoval*, 166 F.3d at 230-31 (noting holdings of Seventh and Eleventh Circuits). The *Sandoval* court cited to *Richardson v. Reno*, 162 F.3d 1388 (11th Cir. 1998), *aff'd*, Richardson v. Reno, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000), which held that IIRIRA amendments eliminated § 2241 habeas corpus jurisdiction, and *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), which noted that AEDPA section 440(a) deprived the district court of habeas corpus jurisdiction for criminal aliens. The Seventh Circuit, however, created an exception to AEDPA by allowing criminal aliens to bring constitutional challenges in a petition for review, notwithstanding the general bar in AEDPA. *See LaGuerre*, 164 F.3d at 1040 (noting exception).

131. *See Sandoval*, 166 F.3d at 231 (citing *Morel v. INS*, 144 F.3d 248 (3d Cir. 1998)).

132. *Id.*

133. 75 U.S. (8 Wall.) 85 (1868).

134. 74 U.S. (7 Wall.) 506 (1868).

135. *See Sandoval*, 166 F.3d at 231-32 (citing Supreme Court precedent). For a discussion of *Felker*, see *supra* notes 62-68 and accompanying text. In order to substantively examine *Felker*, the *Sandoval* court analyzed *Yerger* and *McCardle*. *See Sandoval*, 166 F.3d at 231-32.

The *Sandoval* court noted that in *McCardle*, the Court was entertaining a habeas petition. *See id.* at 232 (discussing *McCardle*). The Court had jurisdiction to hear the appeal based on an 1867 statute granting appellate jurisdiction. *See id.* In 1868, while the case was pending, Congress passed a bill that repealed the section of the statute granting the habeas proceedings. *See id.* The Court held that its appellate jurisdiction was stripped. *See id. Sandoval* noted, however, that *McCardle* was not faced with a statute that stripped all review from the Court. *See id.* (noting limitation of jurisdiction-stripping statute). Furthermore, *McCardle* stated that "[c]ounsel seems to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error . . . . [The statute repealing 1867 jurisdiction] does not affect the jurisdiction which was previously exercised." *Ex parte McCardle*, 74 U.S. (7 Wall.) at 515.

Next, *Sandoval* noted that *Yerger* analyzed the same statute repealing jurisdiction in *McCardle*. *See Sandoval*, 166 F.3d at 232. The Court, however, addressed its habeas jurisdiction under the 1789 Judiciary Act. *See id.* (discussing *Yerger*). *Yerger* held that the 1868 statute did not repeal its habeas jurisdiction. *See id.* (noting *Yerger*'s holding). The Court went on to say:

> [T]here are no repealing words in the Act of 1867. If it repealed the Act of 1789, it did so by implication . . . . Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former Act can stand together with the new Act.

Ex parte Yerger, 75 U.S. (8 Wall.) 85, 105 (1868).

intent to remove a particular statutory grant of jurisdiction will suffice."[136] With this idea in mind, the court then proceeded to examine each of the transitional amendments.[137]

2. Sandoval *Court's Analysis of AEDPA Section 401(e)*

The *Sandoval* court began its analysis by examining AEDPA section 401(e), the provision that struck INA's section 106(a)(10) habeas jurisdiction, which the government contended eliminated § 2241 habeas corpus jurisdiction.[138] In analyzing this issue, the court examined the history of habeas corpus for immigrants more thoroughly than any other appeals court. The court began by noting that even though section 106(a)(10) was enacted as part of the 1961 Immigration and Nationality Act, "habeas jurisdiction over the Executive's detention of aliens has considerably longer lineage."[139] This jurisdiction was recognized in 1888 by the United States Supreme Court in *United States v. Jung Ah Lung*.[140] The Third Circuit continued by stating that Congress, prompted by dissatisfaction with judicial intervention in this area, enacted the Immigration Act of 1891, which stated that: "All decisions made by the inspection officers . . . shall be final unless [appealed to the relevant executive officers.]"[141] The court noted, however, that the Supreme Court upheld the availability of habeas notwithstanding the finality provision.[142] The Immigration Act of 1917 was then passed and carried forward the provisions that the Attorney General's deportation decisions were final.[143] The Administrative Procedures Act ("APA") was then passed, and the United States Supreme Court in

136. *Sandoval*, 166 F.3d at 232.

137. *See id.* (stating "[i]nformed by this, we examine each of the 1996 statutory provisions").

138. For a discussion of these rules, see *supra* notes 86-88 and accompanying text.

139. *Sandoval*, 166 F.3d at 233.

140. 124 U.S. 621 (1888). In this case, a Chinese laborer, who was being held in executive detention, filed for a writ of habeas corpus. *See id.* at 623. The Court rejected the argument that general statutory habeas jurisdiction "was taken away by the Chinese Restriction Act, which regulated the entire subject matter, and was necessarily exclusive." *Id.* at 626. The Court then stated that "[w]e see nothing in these Acts which in any manner affects the jurisdiction of the courts of the United States to issue a writ of habeas corpus." *Id.* at 628-29.

141. *Sandoval*, 166 F.3d at 233. The court cited to a commentator for the proposition that "[t]hese finality provisions were apparently prompted by congressional dissatisfaction with judicial intervention in this area." *Id.* (citing Neuman, *supra* note 12, at 1008).

142. *See id.* (citing *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)). The Court in *Nishimura Ekiu* stated that "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). From this, the *Sandoval* court reasoned, the writ of habeas corpus was firmly established over one hundred years ago. *See Sandoval*, 166 F.3d at 233 (noting establishment of right).

143. *See id.* (discussing consequences of Immigration Act of 1917).

Heikkila v. Barber[144] decided that the judicial review provided by the APA did not extend to immigration cases.[145] The Third Circuit, however, pointed out that "the Court expressly concluded that habeas jurisdiction persisted even during this period, stating that in light of its decision that the APA did not enlarge the alien's rights, 'he may attack a deportation order only by habeas corpus.'"[146] After this decision, the Immigration and Nationality Act of 1952 superseded the 1917 Act.[147] *Sandoval* recognized that in *Shaughnessy v. Pedreiro*,[148] the United States Supreme Court held that aliens could seek APA judicial review in the district courts and the courts of appeals. This decision came in spite of the fact that the 1952 Act retained the provision providing for finality of deportation decisions made by the Attorney General.[149]

Sandoval then noted that Congress in 1961 amended the Immigration and Nationality Act[150] in light of this backdrop.[151] The court reasoned that the "sole and exclusive" language of this act was not addressed to habeas jurisdiction, but was addressed to the judicial review provided under the APA.[152] *Sandoval* then stated that section 106(a)(10) was not a

144. 345 U.S. 229 (1953).

145. *See Sandoval*, 166 F.3d at 233 (noting conclusion in *Heikkila*). *Sandoval* noted that the Court in *Heikkila* held that "the Immigration Act was 'a statute precluding judicial review' within the meaning of the APA." *Id.* To reach this conclusion, the Court examined the period between 1891 and 1952 and noted that the legislation "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." *Heikkila*, 345 U.S. at 234-35.

146. *Sandoval*, 166 F.3d at 233 (quoting *Heikkila*, 345 U.S. at 235).

147. *See id.*

148. 349 U.S. 48 (1955). *Shaughnessy* examined the APA to determine whether it applied to cases that arose under the Immigration and Nationality Act of 1952. *See id.* (discussing APA). The United States Supreme Court specifically focused on the section that provided: "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." 60 Stat. at 244 (codified as amended at 5 U.S.C. § 1009). The Court made it clear that "the subsequent 1952 Immigration and Nationality Act [provides] no language which 'expressly' supersedes or modifies the expanded right of review granted by § 10 of the [APA]." *Shaughnessy*, 349 U.S. at 51. Therefore, the Court held that the APA's "generous review provision" permitted deportation challenges under the Declaratory Judgment Act were subject to review by the district court. *See id.*

149. *See Sandoval*, 166 F.3d at 234 (noting result of 1952 Act). Aliens were therefore permitted to petition for APA judicial review in the various courts of appeals and district courts as a result of *Shaughnessy*. *See id.* (noting affect of *Shaughnessy* decision).

150. INA of 1952, sec. 5(a), § 106, 75 Stat. 650, 651 (1961).

151. *See Sandoval*, 166 F.3d at 234 (noting congressional passage of INA).

152. *See id.* (stating that historical sequence supports this proposition). The *Sandoval* court reasoned that by "locating APA review power in the courts of appeals, Congress sought to eliminate APA review by means of declaratory judgment actions in the district courts, a form of review that *Shaughnessy* had permitted." *Id.* The court continued by stating that "[t]he 'sole and exclusive' provision was not, as the government suggests, an effort to make APA review in the circuits work to the exclusion of habeas action." *Id.* (citing *Foti v. INS*, 375 U.S. 217, 231 (1963).

new right that conferred habeas jurisdiction on the district courts, but "is best understood as congressional acknowledgment that the district courts continued to have habeas jurisdiction even though APA review was channeled to the courts of appeals."[153] Therefore, the court held, this refutes the contention that AEDPA section 401(e) repealed the original grant of habeas corpus jurisdiction embodied in § 2241 and does not overcome the presumption against finding repeals by implication.[154]

3. *Sandoval Court's Analysis of AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G)*

Next, *Sandoval* analyzed the transitional rules.[155] The court held that because neither of the two transitional rules specifically mentioned habeas jurisdiction under § 2241, there was not a sufficiently clear statement of intent to repeal the general grant of habeas jurisdiction under *Felker* and *Yerger*.[156] Furthermore, the court held that references to "review" in AEDPA, and "appeal" in IIRIRA, are properly understood to relate to judi-

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Sandoval noted that the court in *Foti* held that its decision in that case—that the court of appeals has initial, exclusive jurisdiction to review denial of suspension of deportation—"in no way impairs the preservation and availability of habeas corpus relief." *Id.*

153. *Id.* Legislative history states that INA section 106(a)(10) was added to prevent a constitutional problem if the "sole and exclusive" language were interpreted to bar the courts from hearing petitions for habeas corpus. *See id.* The House Report states:

> The section clearly specifies that the right to habeas corpus is preserved to an alien in custody under a deportation order. In that fashion, it excepts habeas corpus from the language which elsewhere declares that the procedure prescribed for judicial review in circuits courts shall be exclusive. The section in no way disturbs the Habeas Corpus Act in respect to the courts which may issue writs of habeas corpus: aliens are not limited to courts of appeals in seeking habeas corpus.

H.R. REP. NO. 87-1086, at 29 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2973. Therefore, *Sandoval* concluded that INA section 106(a)(10) did not confer habeas jurisdiction on the district court; "[s]uch jurisdiction, recognized since the late nineteenth century, existed independently of the 1961 Act." *Sandoval*, 166 F.3d at 234.

154. *See Sandoval*, 166 F.3d at 234-35 (noting presumption against appeal by implication was not overcome). The *Sandoval* court also noted that the title of AEDPA section 401(e), "Elimination of Custody Review by Habeas Corpus," is not dispositive because a title alone cannot limit the meaning of the text, and there is nothing in the text of AEDPA which references habeas corpus. *See id.* at 235 ("'[T]he title of a statute . . . cannot limit the plain meaning of the text. For interpretive purposes, [it is] of use only when [it] shed[s] light on some ambiguous work or phrase.'" (citing *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) (quoting *Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947))).

155. For a discussion of the transitional rules, see *supra* notes 38-50 and accompanying text.

156. *See Sandoval*, 166 F.3d at 235 (noting conclusion). For a discussion of *Felker* and *Yerger*, see *supra* notes 62-68 and accompanying text.

cial review under the APA.[157] The court supported this proposition by stating that the Court in *Heikkila* "was clear that 'judicial review' precluded by the 1917 Acts did not include habeas corpus."[158] Therefore, the transitional rules foreclosed judicial review under the APA and did not repeal § 2241 habeas jurisdiction.[159]

4. Sandoval *Court's Analysis of INA Section 242(g)*

Continuing its analysis, the court considered the issue of whether INA section 242(g) repealed habeas corpus jurisdiction over criminal aliens from the district courts. *Sandoval* held that because this provision does not expressly repeal § 2241, the principle disfavoring implied repeals upholds habeas jurisdiction.[160] This decision came in spite of *Argentine Republic v. Amerada Hess Shipping Corp.*,[161] a United States Supreme Court opinion holding that the principle disfavoring repeals by implication did not apply.[162] *Sandoval*, however, held that *Amerada Hess* was not dispositive because the applicability of the repealed statute *Amerada Hess* was uncertain, and there was no long history of jurisdiction in that type of case.[163] Be-

157. *See Sandoval*, 166 F.3d at 235 (noting what words "review" and "appeal" reference). The *Sandoval* court stated that this conclusion is warranted because "in the immigration context, the Court has historically drawn a sharp distinction between 'judicial review'–meaning APA review–and the courts' power to entertain petitions for writs of habeas corpus." *Id.* Furthermore, *Heikkila* rejected the holdings of three courts of appeals that "[took] the position that habeas corpus itself represented judicial review." Heikkila v. Barber, 345 U.S. 229, 235-36 (1953).

158. *Sandoval*, 166 F.3d at 235 (citing *Heikkila*, 345 U.S. at 235-36). It is presumed that Congress knew the distinction between judicial review and habeas corpus because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979). Also, "it is not only appropriate but . . . realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." *Id.*

159. *See Sandoval*, 166 F.3d at 235 (noting court's conclusion).

160. *See id.* (noting that principles of *Felker* and *Yerger* apply). For a discussion of *Yerger*, *Felker* and the principle disfavoring repeals of jurisdiction, see *supra* notes 62-68 and accompanying text.

161. 488 U.S. 428 (1989).

162. *See Sandoval*, 166 F.3d at 236 (noting Supreme Court's conclusion in *Amerada Hess*). The Supreme Court stated that the principle did not apply because "Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA, and the express provision [granting immunity to foreign states except as provided by the FISA,] preclude a construction of the Alien Tort Statute" that would allow foreign states to be sued. *Amerada Hess*, 488 U.S. at 438.

163. *See Sandoval*, 166 F.3d at 236 (noting that "*Amerada Hess* does not tilt the determination here in favor of the government's position [that INA section 242(g) repealed habeas jurisdiction]"). Because the statute was uncertain, the Court stated that:

> Congress's failure in the FSIA to enact an express pro tanto repealer of the Alien Tort Statute speaks only faintly, if at all, to the issue involved in this case. In light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have

cause there is a long history of habeas corpus jurisdiction available to aliens held in executive custody, *Sandoval* concluded that jurisdiction under § 2241 is preserved.[164]

5. Sandoval *Court's Constitutional Discussion*

Finally, *Sandoval* discussed two principles of statutory interpretation.[165] First, the court said that its interpretation complies with the judicial requirement to interpret statutes to "avoid serious constitutional problems, such as those [it] would face were IIRIRA read to take away habeas jurisdiction as well as APA review."[166] Secondly, the court noted that repealing all review of executive detention, including habeas corpus, would not satisfy the Suspension Clause.[167] Therefore, the court held that, despite AEDPA and IIRIRA, criminal aliens still retain habeas corpus jurisdiction under § 2241.[168]

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concluded that Congress also needed to amend pro tanto the Alien Tort Statute.

Amerada Hess, 488 U.S. at 437.

164. *See Sandoval*, 166 F.3d at 237-38 (holding that habeas jurisdiction remains intact). For the proposition that precedent historically supports habeas corpus jurisdiction for aliens, the court cites *Ex Parte Bollman*, 8 U.S. (7 Cranch) 75 (1807). In *Bollman*, the United States Supreme Court commented on the Judiciary Act of 1789, § 2241's predecessor, stating:

> [T]his act was passed by the first Congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."
>
> Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted.

Ex parte Bollman, 8 U.S. at 95.

165. *See Sandoval*, 166 F.3d at 237-38 (discussing constitutional considerations).

166. *Id.* at 237 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

167. *See id.* (discussing *Swain v. Pressley*, 430 U.S. 372 (1977)). For a further discussion of the Suspension Clause and substitution of a collateral remedy, see *supra* notes 69-74 and accompanying text. After discussing *Swain*, the *Sandoval* court stated that a "statute removing all review of executive detention, however, would not provide an adequate and effective collateral remedy." *Sandoval*, 166 F.3d at 237.

The government also contended that there was an effective collateral remedy because courts of appeals could still entertain claims of substantial constitutional error. *See id.* (noting government contention). The *Sandoval* court, however, rejected this argument because neither act provides for that type of review. *See id.* (rejecting government's contention).

168. *See Sandoval*, 166 F.3d at 238 (noting that § 2241 survives 1996 acts).

B. Catney v. INS *and* DeSousa v. Reno

Following *Sandoval*, the impact of AEDPA and IIRIRA's transitional rules was considered by the Third Circuit in *Catney* and *DeSousa*. In *Catney*, the Third Circuit held that courts no longer have jurisdiction to entertain criminal aliens' Petitions of Review of final orders, "including such aliens' claims of statutory or constitutional error."[169] Furthermore, in *DeSousa*, the Third Circuit held that INA section 242(g), as interpreted by the Supreme Court in *American-Arab*, did not apply to the appellee and did not affect the remainder of *Sandoval's* ruling regarding criminal aliens' right to habeas corpus.[170] Despite these decisions, the District Court for the Middle District of Pennsylvania held that *American-Arab* requires a different result and, despite *DeSousa*'s discussion and examination of the applicability of *American-Arab* to habeas corpus jurisdiction, the jurisdiction granted by § 2241 was effectively repealed.[171] The other district courts in the Third Circuit, however, have followed the decisions handed down by the court of appeal.[172]

C. Liang v. INS

Liang was the final decision in a flurry of cases dealing with the judicial review amendments of AEDPA and IIRIRA.[173] The Third Circuit, creating a division between itself and the Fifth and Eleventh Circuits, held that the district courts retain their § 2241 habeas corpus jurisdiction in

169. Catney v. INS, 178 F.3d 190, 196 (3d Cir. 1999). The *Catney* court noted that it was unclear whether *Sandoval* had denied the court of appeals jurisdiction to hear claims of "substantial constitutional error." *See id.* (concluding court of appeals does not have such jurisdiction).

170. *See* DeSousa v. Reno, 190 F.3d 175, 182-83 (3d Cir. 1999) (discussing affect of *American-Arab* on habeas corpus jurisdiction).

171. *See* Jacques v. Reno, 73 F. Supp. 2d 477, 481 (M.D. Pa. 1999) (holding that, regardless of *Sandoval*, *American-Arab* "compels a conclusion that the provisions of IIRIRA which bar judicial review prevent the assertion of habeas jurisdiction under § 2241 as well").

172. *See, e.g.*, Kiareldeen v. Reno, 71 F. Supp. 2d 402 (D.N.J. 1999) (following Third Circuit decisions); Velasquez v. Reno, 37 F. Supp. 2d 663 (D.N.J. 1999) (same).

173. *See* Liang v. INS, 206 F.3d 308, 310 (3d Cir. 2000). This *Liang* decision involved the consolidation of three cases to determine whether the appeals court has jurisdiction over a petition for review of a criminal alien's deportation order. *See id.* The court noted that a necessary issue to decide was whether the district courts retain habeas corpus jurisdiction under § 2241 subsequent to IIRIRA's permanent rules. *See id.* The court stated that they had "held that AEDPA and the transitional rules of IIRIRA deprived us of jurisdiction over a petition for review from a final order of removal entered against an alien convicted of certain crimes listed in the statutes." *Id.* at 310 (citing *Catney*, 178 F.3d at 190; *Morel v. INS*, 144 F.3d 248 (3d Cir. 1998)). The *Liang* court went on to note, however, that "the district courts retain jurisdiction under the general statutory grant of habeas corpus jurisdiction, 28 U.S.C. § 2241, to review statutory and constitutional challenges to the deportation order." *Id.* (citing *Sandoval*, 166 F.3d at 225; *DeSousa*, 190 F.3d at 175).

spite of the restrictions in IIRIRA's permanent rules.[174] The importance of this issue is noted by the American Civil Liberties Union and a group of twenty-six law professors, both filing amicus briefs.[175]

1. Liang*'s Discussion of AEDPA's and IIRIRA's Transitional Rules*

The Third Circuit began its analysis of this issue by discussing AEDPA and the transitional rules of IIRIRA.[176] The court discussed its reasoning for previously holding that habeas corpus jurisdiction remains in the district courts subsequent to the passage of IIRIRA's transitional rules.[177] The court then noted that the "vast majority of other courts of appeals have adopted principles similar to those enunciated in *Sandoval* and have also found the district courts retain habeas jurisdiction after the enactment of AEDPA's and IIRIRA's transitional rules."[178] The court also noted that the Seventh Circuit has held otherwise.[179] The court then went on to analyze the permanent rules of IIRIRA.[180]

2. Liang *Court's Analysis of Repeals by Implication*

The *Liang* court first quoted the relevant provisions of IIRIRA's permanent rules, including INA sections 242(a)(2)(C) and 242(b)(9).[181] The court stated that "[t]here is no reason why the jurisdictional rulings in this case under the permanent rules should be any different than that we reached under the transitional rules."[182] While the language of the transitional and permanent rules are different, the court noted that these comprehensive provisions are comparable.[183] Furthermore, and more important, the court noted that because the language, "notwithstanding any other provision of law," which appeared in the transitional and which also appears in the permanent rules, did not then persuade the court that habeas corpus jurisdiction should be repealed, "there is no reason why it would have a different effect now."[184] Therefore, if the government were to succeed, it had to convince the court that other language of the permanent rules required a different result.[185]

174. *See id.* at 323 (noting that its "decision perpetuates the division in the courts of appeals interpreting the amendments to the immigration laws").

175. *See id.* at 310.

176. *See id.* at 313.

177. *See id.* at 313-15.

178. *Id.* at 315.

179. *See id.* at 316 (noting that Seventh Circuit, in "interpreting AEDPA and the transitional rules, has held to the contrary").

180. *See id.* at 316-23 (analyzing permanent rules).

181. *See id.* at 316-17.

182. *Id.* at 317.

183. *See id.* (noting similarity of provisions).

184. *Id.*

185. *See id.* (noting that government tried to convince court that section 242(b)(9) required different result). For a discussion of the permanent rules, see *supra* notes 51-54 and accompanying text.

The major problem with concluding that the language under the permanent rules should produce a contrary result to that reached under the transitional rules, the court noted, is that neither section 242(a)(2)(C) nor section 242(b)(9) refers to § 2241 or habeas corpus jurisdiction.[186] This distinction is important because *Liang* noted its prior pronouncement in *Sandoval* that, consistent with the Supreme Court's decision in *Felker*, "a repeal of habeas jurisdiction will not be found by implication" and stated that this holding is applicable to the permanent rules.[187] The court then said that there have not been "intervening developments" in *American-Arab* that require the reconsideration of this idea in *Sandoval*.[188]

The potential intervening development that the Third Circuit analyzes is the Supreme Court's statement in *American-Arab* that INA's section 242(b)(9) forum limitation is an "unmistakable 'zipper' clause."[189] Although *Liang* noted that section 242(b)(9) was a broader provision than section 242(g), the court stated that the Supreme Court did not consider whether this provision eliminated habeas jurisdiction.[190] Furthermore, *American-Arab* has noted the controversy and left open the issue about whether the district courts are deprived of their habeas corpus jurisdiction.[191] Therefore, the court stated that, as in the transitional rules, section 242(b)(9) did not express an intent to divest the district courts of their § 2241 habeas jurisdiction.[192]

3. Liang *Court's Discussion of the Fifth and Eleventh Circuits*

The *Liang* court next went on to discuss the Fifth and Eleventh Circuits' decisions, which both held that the permanent rules divested the district courts of their habeas jurisdiction.[193] While discussing the decision in *Richardson*, the *Liang* court focused primarily on the United States Court of Appeals for the Fifth Circuit's decision in *Max-George*.[194]

The Third Circuit stated that *Max-George* held the phrase "notwithstanding any other provision of law" in section 242(a)(2)(C) "'clearly pre-

186. *See id.* (noting that permanent rules do not "expressly refer to habeas jurisdiction or to § 2241").

187. *Id.* (discussing *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999) and citing *Felker v. Trupin*, 518 U.S. 651 (1996)).

188. *Id.* at 318.

189. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 483 (1999).

190. *See Liang*, 206 F.3d at 318 (noting Supreme Court's lack of consideration of issue). Furthermore, the Supreme Court's decision was regarding a civil suit for relief under 28 U.S.C. § 1331, not a petition for habeas corpus under § 2241. *See id.* (noting posture of case).

191. *See American-Arab*, 525 U.S. at 480 n.7 (noting circuit split).

192. *See Liang*, 206 F.3d at 319 (noting lack of congressional intent to divest district courts of habeas jurisdiction).

193. *See id.* at 219-21 (discussing Fifth and Eleventh Circuit decisions that held to contrary).

194. *See id.* (discussing cases).

cludes habeas jurisdiction under 28 U.S.C. § 2241.'"[195] The *Liang* court, noted however, that this language did not preclude habeas jurisdiction in *Sandoval* and also stated that the review which the rule references is judicial review under the APA and not review of petitions for habeas corpus.[196] The *Liang* court said *Max-George*'s conclusion that habeas corpus is "'any other provision of law' fails to recognize or give effect to this historical distinction maintained by successive Supreme Court opinions."[197] Furthermore, the court said that both the Fifth and Eleventh Circuit decisions "to repeal habeas jurisdiction under the belief that Congress need not explicitly mention habeas corpus in order to repeal the district court's habeas jurisdiction, [is] at odds . . . with the reasoning of the other courts of appeals that have read the Supreme Court's precedent . . . to require explicit statutory reference to habeas or § 2241 to effect congressional repeal of habeas jurisdiction."[198] Therefore, the court in *Liang* said that if Congress wanted to repeal habeas jurisdiction, it would have made its intent explicit in the statute.[199]

4. Liang *Court's Discussion of the Suspension Clause*

The *Liang* court finally discussed the Suspension Clause of the Constitution and its protection of the privilege of the writ of habeas corpus.[200] First, the court disagreed with *Max-George* "to the extent the court's discussion suggests that aliens are not entitled to the constitutional protection of habeas corpus," and said that "the Supreme Court cases cited and discussed in detail in *Sandoval*. . . pronounce precisely the opposite."[201] Second, the Third Circuit stated that the Suspension Clause would not be violated if the district courts were divested of their habeas jurisdiction so long as there is "'a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention.'"[202] The *Liang* court noted however, that because there is no provision giving the circuit courts jurisdiction to examine substantial constitutional claims, habeas corpus jurisdiction must remain in the district courts to avoid a violation of the

195. *Id.* at 319 (quoting *Max-George v. Reno*, 205 F.3d 194, 198 (5th Cir. 2000)).

196. *See id.* at 319-20 (noting holding in *Sandoval* compared to *Max-George*).

197. *Id.* at 320.

198. *Id.*

199. *See id.* at 321 (stating Congress should have made its intent explicit in statute if Congress wanted to repeal habeas jurisdiction). The *Liang* court also noted that "this approach obviates the serious constitutional problems that would arise were we to adhere to our previous opinions holding we have no jurisdiction over petitions for review filed by an alien with a criminal convictions and read the permanent rules to strip the district courts of habeas jurisdiction." *Id.*

200. *See id.* (discussing Suspension Clause). For a discussion of the Suspension Clause, see *supra* notes 69-74 and accompanying text.

201. *Id.* (citing Supreme Court precedent).

202. *Id.* (quoting *Swain v. Pressley*, 430 U.S. 372, 381 (1977)).

Suspension Clause.[203] The Third Circuit concluded by saying that many judges would prefer a system where the alien's constitutional and statutory claims are reviewed in the court of appeals directly, but that "it is not the way in which we read the legislation . . . and it is our obligation to interpret the statutes we are given, while at the same time interpreting the Constitution in accord with the Supreme Court's precedent."[204]

IV. PRACTITIONER NOTES AND CONCLUSION

In sum, the passage of AEDPA and IIRIRA has created much confusion among the courts. Among the sources of this confusion are the ways to interpret the holding in *Felker* and the principle stated in the Suspension Clause. A practitioner in the circuits which have not interpreted the restrictions enunciated in AEDPA and IIRIRA, or a Third Circuit practitioner going before the United States Supreme Court, must focus on these two difficult issues in order to prevail.

First, the practitioner must argue that *Felker* and prior Supreme Court precedent requires AEDPA and IIRIRA to be interpreted not to divest district courts of habeas jurisdiction because these statutes are not explicit enough to overcome the requirement that "habeas jurisdiction can only be effected by express congressional command."[205] Secondly, the practitioner must also argue that, contrary to the assertions of *Max-George*, the Suspension Clause's privilege of habeas corpus applies to criminal aliens.[206] Finally, the practitioner must also note that while Congress may divest habeas corpus jurisdiction from the district courts, there is no adequate or effective "collateral remedy . . . to test the legality of a person's detention" because of the exclusions of criminal aliens in INA section 242(a)(2)(C).[207] From these arguments, the practitioner should be able

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203. *See id.* at 322-23 (noting lack of provision granting circuit courts jurisdiction to review substantial constitutional claims). Although INA section 242(a)(1) gives the circuit courts jurisdiction to review final orders of deportation, a criminal alien is excepted from this provision under INA section 242(a)(2)(C). *See id.* at 322. Furthermore, the court rejected the contention that it has jurisdiction to review substantial constitutional claims even though they have "jurisdiction to determine whether [under INA section 242(a)(2)(C)] each petitioner (1) [is] an alien, (2) is removable, and (3) is removable by reason of having committed a qualifying crime." *Id.* (quotation marks omitted). The *Liang* court stated that if this contention were true, "it would create the awkward situation of requiring analysis of the merits of a petitioner's challenge in making a preliminary jurisdictional determination." *Id.*

204. *Id.* at 323. The *Liang* court then dismissed the appellants petitions without prejudice to the pending habeas corpus petition. *See id.* (holding claim dismissed).

205. *Cf. Liang*, 206 F.3d at 317. For a discussion of *Felker*, see *supra* notes 62-67 and accompanying text.

206. For a discussion of the Suspension Clause, see *supra* notes 69-74 and accompanying text.

207. *See Swain*, 430 U.S. at 381.

to preserve a criminal alien's right to petition for habeas corpus in the district courts.

Despite the severe limitations that these acts have placed on criminal aliens, the Third Circuit has firmly established that, under both the transitional and permanent rules, these criminal aliens will be able to partially challenge final orders of deportation under a petition for habeas corpus.[208] While the Supreme Court is not likely to resolve the split among the circuits that arose from the transitional rules, due to their transitional nature, the Court most likely will need to resolve the circuit split resulting from the permanent rules.[209] Otherwise, there will be a great inequity; criminal aliens in jurisdictions such as the Third Circuit will be able to petition for the great writ of habeas corpus, while criminal aliens in jurisdictions such as the Fifth and Eleventh Circuits will be deprived of that privilege.

Matthew J. Droskoski

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208. For an analysis of the Third Circuit's holdings, see *supra* notes 118-205 and accompanying text.

209. *See* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1991 (2000) (noting likelihood of Supreme Court granting certiorari on issue of permanent rules).