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MOJICA v. RENO:* UPHOLDING DISTRICT COURTS' STATUTORY HABEAS POWER UNDER THE IMMIGRATION LAWS OF 1996

Colleen Caden[**]

INTRODUCTION

During the 1990's, American citizens experienced and witnessed some of this country's worst incidents of terrorism on domestic soil.[1] Responding to the public's outcry of fear and anger following these tragedies, Congress enacted the Antiterrorism and Effective Death Penalty Act[2] ("AEDPA") and the Illegal

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* 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).

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[1] Incidents of terrorism occurring within the borders of the United States include: the 1993 bombing of the World Trade Center in New York City that killed six people and injured 1,042 people; the 1995 explosion of the Alfred D. Murrah Federal Building in Oklahoma City that killed 168 people and injured hundreds of others; and the explosion at Centennial Olympic Park in Atlanta during the 1996 summer games that killed one person and injured 111 others. *See* Christopher John Farley, *America's Bomb Culture*, TIME, May 8, 1995, at 56; Kevin Sack, *Officials Show Bomb Parts in Atlanta*, N.Y. TIMES, Nov. 19, 1997, at 18; Jo Thomas, *After Emotional Appeals, Bomb Jury Weighs Penalty*, N.Y. TIMES, Jan. 6, 1998, at 10. In addition, three people were killed and more than twenty were injured by Ted Kaczynski's seventeen year reign of terror as the "Unabomber." Reuters, *Kaczynski Heads To Prison In Colorado*, WASH. POST, May 6, 1998, at A20. For a more in-depth look at this issue, see Symposium, *Domestic Terrorism: A Leadership Response*, 21 OKLA. CITY U. L. REV. 187 (1996).

[2] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-

Immigration Reform and Immigrant Responsibility Act[3] ("IIRIRA") to wage a war against domestic terrorism.[4] This war, however, has produced its own casualties: the curtailment of rights enjoyed by lawful permanent residents[5] and the Attorney General's intrusion upon the judiciary's duty to "say what the law is."[6]

United States Attorney General Janet Reno[7] interprets the AEDPA and the IIRIRA as eliminating the rights and privileges of lawful permanent residents to seek judicial review of final orders

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132, 110 Stat. 1214 (1996).

[3] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996).

[4] In 1996, President Bill Clinton signed the AEDPA and the IIRIRA into law. The impetus behind the legislation was a concern for the "rights and needs of crime victims and witnesses . . . in the criminal justice system." Sara Candioto, *The Anti-Terrorism and Effective Death Penalty Act of 1996: Implications Arising From the Abolition of Judicial Review of Deportation Orders*, 23 J. LEGIS. 159, 160 n.6 (1997) (quoting Renewing Our Commitment to Crime Victims, White House Memo for the Attorney General, Office of the Press Secretary, June 28, 1996, *available in* 1996 WL 10346814).

[5] An alien is defined in the Immigration and Nationality Act ("INA") as any person who is "not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 66 Stat. 153 (1952) (codified as 8 U.S.C. § 1101(a)(3) (1985)). A lawful permanent resident is a specific alienage classification which entitles individuals of foreign nationality to permanently reside in the United States, without granting them citizenship. *See* Immigration and Nationality Act § 101(a)(20) (codified at 8 U.S.C. § 1101(a)(20) (1985)). Some additional entitlements and requirements of lawful permanent residents include the authorization to work indefinitely in the United States, to maintain bank accounts, to serve in the armed forces and to pay taxes. Kiyoko Kamio Knapp, Note, *The Rhetoric of Exclusion: The Art of Drawing A Line Between Aliens and Citizens*, 10 GEO. IMMIGR. L.J. 401, 401 (1996). In 1991, an estimated 1.8 million foreign nationals obtained permanent residence. *Id.*

[6] Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to a particular case, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must determine the operation of each.").

[7] On March 12, 1993 Janet Reno was sworn in as the 78th United States Attorney General. Heather Mactavish, *Profile: Janet Reno's Approach To Criminal Justice*, 4 UCLA WOMEN'S L.J. 113, 113 (1993).

of deportation[8] and barring federal courts from reviewing these deportation decisions.[9] The effect of the AEDPA and the IIRIRA

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[8] A deportable alien is one who is presently in the United States but who has been deemed deportable by the INS. *See* 8 U.S.C. § 1227 (1998) (providing that any alien in and admitted to the United States shall be removed by the Attorney General if the alien: (1) violates any law of the United States, conditions of his admission or violates his nonimmigrant or conditional permanent residence status; (2) commits marriage fraud; (3) commits an aggravated felony or any other criminal offense enumerated in this statute; (4) fails to register under the provisions of the Alien Registration Act or commits document fraud; or (5) engages in any activity that endangers the public's security).

An alien who is lawfully admitted into the United States after an inspection and authorization by an immigration officer is considered a 'person' protected by the United States Constitution. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE, § 7.1, at 7-7 (4th ed. 1997). The individual found deportable is, therefore, entitled to participate in a deportation proceeding to adjudicate his or her right to remain in the United States. *Id.*

Lawful permanent residents' right to seek judicial review through habeas corpus petitions began with the 1917 Immigration Act and gained strength through a series of measures passed by Congress over the past fifty years. *See* Heikkila v. Barber, 345 U.S. 229, 234-35 (1953). In 1946, Congress adopted the Administrative Procedure Act ("APA") which provided for judicial review of administrative agency decisions, such as those rendered by an immigration judge or the Board of Immigration Appeals ("BIA"), through declaratory judgment actions. *See* Jorge v. Hart, No. 97 Civ. 1119, 1997 WL 53109, at *4 (S.D.N.Y. Aug. 29, 1997). In 1952, Congress adopted the INA as the first federal statute enacted to govern all aspects of immigration law. *See* FRAGOMEN & BELL, *supra*, § 1.3, at 1-5. Immigration law governs the admission and expulsion of aliens. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 545 (1990). The Supreme Court interpreted the INA to permit judicial review in district courts. *See* Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955). However, in 1961 Congress amended the INA to streamline what it perceived to be a deportation system plagued with successive review of deportation orders. *See* Marcello v. District Dir., 634 F.2d 964, 968 (5th Cir. 1981). The new provisions were intended to expedite deportation proceedings in the federal courts. Act of September 26, 1961, § 5a, Pub. L. No. 87-301, 75 Stat. 650 (repealed 1996).

[9] *See* Mojica v. Reno, 970 F. Supp. 130, 138 (E.D.N.Y. 1997) (stating that "[u]nder the government's reading [of AEDPA] legal permanent residents, many with relatively minor convictions, would now be subject to automatic deportation"), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998).

on lawful permanent residents is of historic proportion in that never before have they been denied access to the federal courts.[10]

In *Henderson*, the Second Circuit affirmed *Mojica's* finding that federal district courts have jurisdiction under 28 U.S.C. § 2241 to grant writs of habeas corpus but the court narrowed the scope of that review. *Henderson*, 157 F.3d at 122. The *Henderson* court stated:

> [W]e hold that federal courts have jurisdiction under section 2241 to grant writs of habeas corpus to aliens . . . . This is not to say that every statutory claim that an alien might raise is cognizable on habeas. But those affecting the substantial rights of aliens of the sort that the courts have secularly enforced—in the face of statutes seeking to limit judicial jurisdiction to the fullest extent constitutionally possible—surely are.

Id. Further, the *Henderson* court noted that the Attorney General's contention that *no* court has the power to review her interpretation of the immigration laws is incorrect:

> [T]his position is, to put it mildly, not only at war with the historical record described earlier in this opinion—for at least a hundred years, the courts have reviewed the executive branch's interpretation of the immigration laws, and have deemed such review to be constitutionally mandated—it is also hard to square with the core conception of habeas corpus as it has been applied over many centuries.

Id. at 120.

Included in the AEDPA and the IIRIRA are provisions that the government now contends deny lawful permanent residents access to federal courts. Section 440(a) of the AEDPA states that any final order of deportation issued against an alien who has committed a criminal offense "shall not be subject to review by any court." Antiterrorism and Effective Death Penalty Act § 440(a) (1996). IIRIRA's section 309(c) further eliminates judicial review of deportation by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed" one of the enumerated crimes. Illegal Immigration Reform and Immigrant Responsibility Act § 309(c). Due to the integral relationship between the AEDPA and the IIRIRA, the *Mojica* court analyzed both statutes in determining its subject matter jurisdiction. *Mojica*, 970 F. Supp. at 158. Moreover, AEDPA section 440(a) and IIRIRA section 309(c) contain nearly the same jurisdictional provisions and, thus, both raise the same question presented in this Comment: whether these amendments preclude habeas corpus review by a district court under 28 U.S.C. § 2241.

[10] Lawful permanent residents have always had the right to test the legality of their deportation order before the federal judiciary. *See Heikkila*, 345 U.S. at 234 ("Now, as before, he [the alien] may attack a deportation order only by

The court in *Mojica v. Reno*, however, resoundingly dismissed the Attorney General's statutory interpretation of the AEDPA and the IIRIRA, thereby protecting the rights of lawful permanent residents and restoring power to the judiciary. In *Mojica v. Reno*,[11] United States District Judge Jack B. Weinstein[12] held that the AEDPA and the IIRIRA neither repeal district courts' habeas corpus powers to hear deportation cases under 28 U.S.C. § 2241, nor do these statutes narrow the scope of section 2241.[13] The

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habeas corpus."). The Supreme Court's recognition of a lawful permanent resident's right to due process stems from the Constitution and is further buttressed by the harsh consequences of deportation. *See* Kwong Hai Chew v. Colding, 344 U.S. 590, 598 (1953) ("[W]e interpret this regulation as making no attempt to question a resident alien's constitutional right to due process."); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile."); Bridges v. Wixon, 326 U.S. 135, 162 (1945) ("No less may a statute on its face disregard the basic freedoms that the Constitution guarantees to resident aliens."). Moreover,

> [t]o deport one who so claims to be a citizen obviously deprives him of liberty . . . [i]t may result also in the loss of both property and life, or of all that makes like worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law.

Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[11] *Mojica*, 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998). The *Mojica* court is the first in the country to hold that 28 U.S.C. § 2241, the federal statute that grants district court judges the authority to hear writs of habeas corpus, has not been narrowed in scope by the passage of the AEPDA and the IIRIRA. *Id.* at 163. *Yesil v. Reno* was the first case in the country to hold that 28 U.S.C. § 2241 has not been repealed by the AEDPA or the IIRIRA. 958 F. Supp. 828, 838 (S.D.N.Y. 1997). The *Yesil* court, however, never reached the issue of section 2241's scope. *Mojica*, 970 F. Supp. at 163.

[12] Judge Weinstein was appointed United States District Judge for the Eastern District of New York on April 15, 1967. SECOND CIRCUIT REDBOOK 376 (Vincent Alexander ed., 1997). Weinstein was appointed Chief Judge in 1980 and assumed senior status on March 1, 1993. *Id.*

[13] 28 U.S.C. § 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice, thereof, the district courts and any circuit judge within their

Mojica court also suggested that lawful permanent residents be granted the same substantive constitutional rights as American citizens.[14] At a time when the majority of federal courts are interpreting the AEDPA and the IIRIRA as repealing in whole,[15]

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respective jurisdictions.

. . . .

(c) The Writ of habeas corpus shall not extend to a prisoner unless—
(1) He is in custody under color or by color of the authority of the United States or . . . ;

. . . .

(3) He is in custody in violation of the Constitution or laws or treatises of the United States.

28 U.S.C. § 2241(a), (c)(1), (c)(3) (1994). The writ of habeas corpus stems from the Constitution and is implemented through federal statutes. *See* RONALD P. SOKOL, FEDERAL HABEAS CORPUS 30-38 (1969). It functions to test the legality of restraints on a person's liberty. *Id.*

Habeas corpus has never been treated as a right limited to United States citizens. Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1046 (1998). In the immigration context, habeas corpus has been used to challenge the constitutionality of substantive immigration laws as well as the procedures utilized in enacting statutes. Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1469 (1997). Habeas corpus, for example, has been used to review the INA's statutory interpretation, to review the INA's use of discretion under statutes and to review evidentiary challenges at administrative hearings. *Id.* Supreme Court precedents dating back to 1787 have confirmed "the applicability of the writ of habeas corpus to the detention involved in the physical removal of aliens from the United States." Neuman, *supra*, at 1044. For example, in *Nishimura Ekiu v. United States*, the alien-petitioner was detained in San Francisco and not permitted entry by customs officials. 142 U.S. 651, 656 (1892). The petitioner filed a writ of habeas corpus and the court responded by holding that "[a]n alien immigrant prevented from landing by any such officer claiming authority 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." *Id.* at 660. Further, in *Jung Ah Lung v. United States*, the Court upheld the power of the district courts to review habeas corpus petitions filed by aliens deemed excludable under the Chinese Exclusion Act. 124 U.S. 621 (1888). The Court stated: "We see nothing in these acts which in any manner affects the courts of the United States to issue writs of habeas corpus." *Id.* at 628-29.

[14] *Mojica*, 970 F. Supp. at 146-51.

[15] *See, e.g.*, United States *ex rel.* Morgan v. McElroy, 981 F. Supp. 873

or amending in part,[16] the power of district courts and the rights of lawful permanent residents, the *Mojica* opinion, with its "rigorous and detailed analysis,"[17] remains a watershed.[18]

(S.D.N.Y. 1997) (concluding that section 2241 barred all avenues of judicial review, including habeas corpus); Mayers v. Reno, 977 F. Supp. 1457 (S.D. Fla. 1997) (finding that Congress has "eliminated all avenues of judicial review of criminal orders of deportation under habeas corpus"); Theck v. INS, No. C 96-4668, 1997 WL 37565 (N.D. Cal. Jan. 14, 1997) (holding courts of appeals have exclusive jurisdiction to hear habeas petitions under 28 U.S.C. § 2241).

[16] Nearly all of the circuit courts to consider this issue have held that district courts retain jurisdiction under section 2241; however, none of them hold, as did the *Mojica* court, that section 2241's power remains unaffected by the AEDPA and the IIRIRA. Rather, the circuits are split as to how narrow the scope of section 2241 review is in the deportation context. *See* Magana-Pizano v. INS, 152 F.3d 1213, 1221 (9th Cir. 1998) (holding that "to the extent habeas remedies in immigration cases are protected by the Suspension Clause, relief is afforded through the statutory remedy of 28 U.S.C. § 2241"); Gonclaves v. Reno, 144 F.3d 110, 123-25 (1st Cir. 1998) (holding that "no express congressional intent in the language of either the AEDPA or IIRIRA prevents an alien . . . from seeking a writ of habeas corpus under 28 U.S.C. § 2241" but declining to define the jurisdictional limits of the statute); Mansour v. INS, 123 F.3d 423, 426 (6th Cir. 1997) (holding that habeas corpus review remains available under the AEDPA, however, the court does not define its scope); Ramallo v. Reno, 114 F.3d 1210, 1214 (D.C. Cir. 1997) (holding that habeas corpus review remains intact but not defining its scope); Fernandez v. INS, 113 F.3d 1151, 1154 (10th Cir. 1997) (stating that habeas corpus review exists for "substantial" constitutional errors); Williams v. INS, 114 F.3d 82, 83 (5th Cir. 1997) (holding that a "limited opportunity" to apply for a writ of habeas corpus remains under the AEDPA but declining to define the perimeters of such review); Yang v. INS, 109 F.3d 1185, 1196 (7th Cir. 1997) (acknowledging habeas corpus but limiting its use based on the type of claim); Salaazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996) (holding that the AEDPA withdraws jurisdiction of the circuit courts, but stating "we do not foreclose judicial review of all claims by aliens arising in the course of deportation proceedings"), *cert. denied*, 117 S. Ct. 1842 (1997).

[17] Billett v. Reno, 2 F. Supp. 2d 368, 372 (W.D.N.Y. 1998) (stating "[i]n *Mojica*, Judge Weinstein employed a rigorous and detailed analysis of the issues involved in determining whether or not the court had jurisdiction").

[18] Judge Weinstein found that statutory habeas corpus under 28 U.S.C. § 2241 is not limited to constitutional issues but may be used to challenge INA's interpretations of statutes. *Mojica*, 970 F. Supp. at 163. Only a handful of district courts have adopted the *Mojica* holding that the scope of section 2241 has remained unaffected by the AEDPA and the IIRIRA. *See* Lee v. Reno, 15 F. Supp. 2d 26 (D.D.C. 1998); Avelar-Cruz v. Reno, 6 F. Supp. 2d 744 (N.D. Ill.

Although the *Mojica* decision discusses numerous issues of great constitutional magnitude, this Comment focuses on two issues: the court's subject matter jurisdiction under the federal habeas statute and the court's discussion of awarding substantive constitutional rights to lawful permanent residents.[19] This Comment argues that the *Mojica* court properly held that the 1996 immigration laws neither eliminate the district courts' habeas

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1998); Billett v. Reno, 2 F. Supp. 2d at 372; Thompson v. Perryman, No. 98 C 1596, 1998 WL 473471 (N.D. Ill. Aug. 7, 1998). Rather, most district courts around the country have held that a limited avenue of judicial review exists in federal courts for challenging final orders of deportation. *See, e.g.*, Duldulao v. Reno, 958 F. Supp. 476, 479 (D. Haw. 1997) ("This court is persuaded that the scope of habeas corpus review has been limited after the passage of AEDPA, and therefore the fundamental miscarriage of justice standard strikes the proper balance between the role of habeas corpus and the Congress' plenary power in immigration matters."); Yesil v. Reno, 958 F. Supp. 828, 838 (S.D.N.Y. 1996) (declining to determine whether the scope of the district courts' habeas corpus jurisdiction had been amended under the AEDPA, the court held that the petitioner's case presented a fundamental miscarriage of justice and substantial constitutional claims); Mybia v. INS, 930 F. Supp. 609, 612 (N.D. Ga. 1996) ("[T]he court finds that, with respect to aliens subject to orders of deportation for having committed crimes enunciated by Congress, the Constitution requires only that the writ of habeas corpus extend to those situations in which the petitioner's deportation would result in a fundamental miscarriage of justice."). Unlike *Mojica*, these courts found that the scope of section 2241 is only available in deportation situations where there exists the threat of "a fundamental miscarriage of justice." A substantial constitutional claim or miscarriage of justice is generally defined as one which is "cognizable under traditional habeas proceedings such as allegations of constitutional due process or equal protection violations." Galaviz-Medina v. Wooten, 27 F.3d 487, 492 (10th Cir. 1994).

[19] Before the court were two additional issues. The first issue was whether the Attorney General could retroactively apply AEDPA section 440(d), which expanded the number of crimes for which a criminal alien could be summarily deported, to criminal aliens who were in deportation proceedings *prior* to the enactment of AEDPA. *See Mojica*, 970 F. Supp. at 168. The effect of retroactive application is the elimination of a section 212(c) hearing for those who were entitled to one prior to the enactment of AEDPA. *Id. See infra* note 47 (discussing section 212(c) hearings). For a closer look at the debate surrounding the retroactive application of AEDPA section 440, see Candioto, *supra* note 4. The second issue was whether the district court had the power to review an administrative agency's interpretation of a statute. *Mojica*, 970 F. Supp. at 180.

powers under 28 U.S.C. § 2241[20] nor abridge the scope of the district courts' power. Part I discusses the facts of *Mojica v. Reno* and its holding. Part II examines the *Mojica* court's analysis of habeas corpus powers under section 2241. Part III analyzes the viability of the *Mojica* court's vision for the future of immigration law—a future in which lawful permanent residents are awarded substantive constitutional rights. Finally, this Comment concludes that although the *Mojica* court's statutory interpretation of the AEDPA and the IIRIRA is wholly supported by Supreme Court precedent, Congress is unlikely to accord any aliens substantive constitutional rights in the current political climate.

I. THE BACKGROUND OF *MOJICA V. RENO*

Guillermo Mojica is a native and citizen of Colombia and has been a lawful permanent resident of the United States for twenty-five years.[21] A resident of Queens, New York since his arrival in June of 1972,[22] he is married to a naturalized United States citizen with whom he has two American citizen daughters.[23]

In 1988, Mojica pled guilty to conspiring to distribute cocaine,[24] served a one-year sentence and was released from

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[20] Habeas corpus has always been a due process right guaranteed to resident aliens. SOKOL, *supra* note 13, at 57-59; *see also* Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (holding that an alien may challenge the legality of an exclusion order by habeas corpus).

[21] *Mojica*, 970 F. Supp. at 140. Mojica's case was consolidated with that of Saul Navas, a 22-year-old citizen of Panama who has been a lawful permanent resident since 1987. *Id.* at 138. The facts of the *Navas* case will not be reviewed here because they raise the same questions of law as the *Mojica* case. *See supra* note 8 (discussing the statutory definition of lawful permanent resident).

[22] *Mojica*, 970 F. Supp. at 140.

[23] *Id.*

[24] *Id.* Mojica was convicted of violating 21 U.S.C. § 846 which provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (1970). The United States Code Annotated comment further states:

> [U]nder 'common understanding and practices,' this section, by reference, sufficiently apprises all persons of the illegality of any

prison.[25] He had never before been convicted of a crime.[26] Four years later, Mojica renewed his Alien Registration Card without any inquiry by the government into his conviction or any mention of deportation.[27] In 1995, he applied for United States citizenship.[28]

On January 9, 1996, he and his wife flew into John F. Kennedy Airport in New York from Ecuador where they had been on vacation visiting family.[29] Upon their arrival, Mojica was detained overnight at the airport by the Immigration and Naturalization Service[30] ("INS") and was told to report to their offices in Manhattan on February 12, 1996.[31] He was also ordered to bring certified copies of his now eight-year-old criminal case disposition.[32] Contemporaneously, the INS sent Mojica a notice that his naturalization interview was scheduled for March 12, 1996.[33] On February 12, 1996, Mojica and his lawyer went to the INS office, whereupon the INS confiscated Mojica's passport and green card.[34] He was told by INS that they would contact him; however,

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agreement to possess and distribute totally prohibited drugs such as heroin and, thus, adequately informs the public of the criminal potential of conduct proscribed and withstands constitutional scrutiny under U.S.C.A. Constitutional Amendment 5.

21 U.S.C.A. § 846 (West 1970).

[25] *Mojica*, 970 F. Supp. at 140.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 141.

[30] The Immigration and Nationality Act delegates jurisdiction over immigration matters to the Attorney General who, in turn, has redelegated responsibilities to the Immigration and Naturalization Service. *See* 8 U.S.C.A. § 1103 (West 1998). The INS has basic authority to inspect aliens at the border, admit them to the United States, and regulate their movement within the borders of the United States. *See* 8 U.S.C.A. § 1357 (1970). Additional responsibilities of the INS include: investigation, arrest and commencement of proceedings against deportable aliens. *See* FRAGOMEN & BELL, *supra* note 8, § 1.4, at 1-17 to 1-18.

[31] *Mojica*, 970 F. Supp. at 141.

[32] *Id.*

[33] *Id.*

[34] *Id.* A green card is issued to lawful permanent residents as evidence of

they did not return either piece of identification.[35] On April 10, 1996, not having heard from the INS, Mojica's attorney sent a letter to the INS asking to have Mojica's green card returned.[36] No reply was received.[37] On April 24, 1996, President Bill Clinton signed the AEDPA into law.[38]

On May 28, 1996, Mojica's attorney sent a second letter to the INS requesting that proceedings against Mojica be expedited.[39] The following morning, on his own initiative, Mojica went to the INS offices to ask for his passport back.[40] At approximately 4:30 p.m., the INS admitted Mojica into the United States as a lawful permanent resident and then immediately arrested him.[41] The arrest warrant alleged that Mojica was "within the United States in violation of the immigration law."[42] The INS charged him, by retroactively applying the AEDPA's newly broadened criminal

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their authorization to live and work in the United States. *INS Issues First High-Tech 'Green Cards,'* IMMIGRATION AND NATURALIZATION SERVICE NEWS RELEASE (Immigration and Naturalization Service, Office of Public Affairs, Washington, D.C.), Apr. 21, 1998.

[35] *Mojica*, 970 F. Supp. at 141.

[36] *Id.*

[37] *Id.*

[38] *Id. See also supra* note 4 (discussing President Clinton's signing of AEDPA).

[39] *Mojica*, 970 F. Supp. at 141.

[40] *Id.*

[41] *Id.*

[42] *Id.*

provisions,[43] as deportable because of his eight-year-old drug trafficking violation.[44]

Mojica was transported to Louisiana and held in custody for more than five weeks before being brought before an immigration judge on July 5, 1996.[45] The case was adjourned until August 2, 1996, when Mojica conceded deportability and was found

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[43] The AEDPA has broadened the definitions of criminal offenses for which an alien can automatically be deported. 8 U.S.C.A. § 1227 (West 1998). For instance, prior to the AEDPA, an alien was deportable for committing a crime of moral turpitude within five years of entry, where the sentence imposed was one year or more. 8 U.S.C.A. § 1251(a)(2)(A) (West 1996). Today, under the AEDPA, an alien found guilty of a crime of moral turpitude can be automatically deported if the potential sentence is a year or more. *See generally* 8 U.S.C. § 1251 (1996) (enumerating criminal offenses under the AEDPA). Additionally, the category of aggravated felonies has been expanded. As one practitioner illustrated:

> The definition of aggravated felony has been broadly expanded. The following is a sampling of some of the newly added crimes: fraud or deceit where the loss to the victim exceeds $10,000 (formerly $200,000), tax offenses under 26 U.S.C. § 7201 where revenue loss to the government exceeds $10,000 (formerly $200,000) and a theft offense including receipt of stolen property when the term of imprisonment is one year.

Michael D. Patrick, *The Consequences of Criminal Behavior*, N.Y.L.J., July 27, 1998, at 3. Another legal commentator stated:

> In 1988, Congress first created the category of aggravated felony as a means of singling out the worst criminals for special treatment . . . over the years more and more crimes were added. . . the effect of this is to render virtually all . . . felonies as aggravated felonies, including thefts and burglaries where the sentence imposed exceeds one year.

Kari Converse, *Defending Immigrants in Peril*, THE CHAMPION, Aug. 1997, at 10.

[44] *Mojica*, 970 F. Supp. at 142. AEDPA section 440(d) broadened the category of crimes for which an alien can be deported. Section 440(d), titled "Classes of Excludable Aliens," provides: an alien "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offers are covered by section 241(a)(2)(A)(I)." *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214 (1996). Prior to section 440(d)'s enactment, Mojica would not have been subject to deportation for his drug trafficking conviction.

[45] *Mojica*, 970 F. Supp. at 142.

deportable.[46] He applied for a discretionary waiver of deportation pursuant to Immigration and Nationality Act section 212(c).[47] The immigration judge, however, found him to be ineligible for relief because the AEDPA eliminated section 212(c) relief for aliens in deportation proceedings who have been convicted of certain crimes, including drug trafficking.[48] The immigration judge applied the AEDPA retroactively, thereby finding Mojica ineligible for section 212(c) relief, even though he was in deportation proceedings for a crime committed eight years before the passage of the AEDPA.[49] On February 3, 1997, the Board of Immigration Appeals ("BIA") dismissed Mojica's appeal.[50]

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[46] *Id. See supra* note 8 (defining deportability).

[47] *Id.* Under the INA section 212(c), a legal permanent resident who lived in the United States for seven consecutive years and was accused of any crime triggering deportation could be assured that even if he or she pled guilty or was convicted of a crime, he or she would be able to seek a section 212(c) waiver of deportation. *Mojica*, 970 F. Supp. at 137. A section 212(c) waiver allowed the INS, at its discretion, to waive the exclusion of a lawfully admitted permanent resident who was returning to the United States to a lawful unrelinquished domicile of seven consecutive years. *See* FRAGOMEN & BELL, *supra* note 8, § 7.1, at 7-3. Among the factors weighed by an immigration judge in this post-conviction proceeding are: family ties within the United States, evidence of hardship to the individual and family if the deportation was executed and existence of ties to property or a business in the United States. *See generally* Lok v. INS, 611 F.2d 107 (2d Cir. 1982); Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

[48] *Mojica*, 970 F. Supp. at 142. *See also* Antiterrorism and Effective Death Penalty Act § 440(d).

[49] *Mojica*, 970 F. Supp. at 141.

[50] *Id.* On June 27, 1996, the BIA issued a decision in *In re Soriano* in which it held that the AEDPA's bar to section 212(c) relief should not be applied to aliens who had section 212(c) applications pending on or before April 24, 1996. Int. Dec. 3289, 1996 WL 426888 (BIA June 27, 1996). On September 12, 1996, the Attorney General vacated the BIA's decision in *Soriano*. Int. Dec. 3289, 1996 WL 426888 (AG Op. Feb. 21, 1997). On February 3, 1997, the BIA dismissed Mojica's appeal. *Mojica*, 970 F. Supp. at 142. Subsequently, on February 21, 1997, the Attorney General issued her opinion in *Soriano* holding that the AEDPA section 440(d) had eliminated section 212(c) discretionary relief and, further, that section 440(d) should be applied retroactively to all deportation proceedings pending on April 24, 1996. Int. Dec. 3289, 1996 WL 426888 (AG Op. Feb. 21, 1997). This ruling served as a validation of the immigration judge's

On March 4, 1997, Mojica filed a habeas corpus petition under 28 U.S.C. § 2241[51] in the Eastern District of New York challenging the Attorney General's denial of a discretionary section 212(c) hearing.[52] Mojica did not challenge the findings of his deportation hearing;[53] rather, he asserted the right to a section 212(c) hearing.[54]

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decision in *Mojica*.

[51] 28 U.S.C. § 2241 (1984).

[52] *Mojica*, 970 F. Supp. at 135. The role of the immigration judge is to conduct deportation and exclusion hearings and render decisions on these matters. *See* Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1300, 1300 (1986). The BIA, consisting of five attorneys, reviews cases on appeal from the immigration judges. *Id.* The BIA, created by the Attorney General, is an arm of the Department of Justice. The Attorney General has the power to review BIA decisions. *Id.* Her powers are codified at 8 U.S.C.A. § 1357 (West 1998). Prior to the enactment of the AEDPA and the IIRIRA, an alien could appeal the BIA's decisions to the federal courts if he had exhausted all of his administrative remedies and he was about to be deported. *See* FRAGOMEN & BELL, *supra* note 8, § 8.5, at 8-24.

[53] A deportation hearing is a civil administrative hearing, not a criminal proceeding, held before an immigration judge. *See* FRAGOMEN & BELL, *supra* note 8, § 7.5. An immigration judge is authorized to administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses. FRAGOMEN & BELL, *supra* note 8, § 7.1, at 7-5. The alien may be represented by counsel, at his own expense, at this proceeding. FRAGOMEN & BELL, *supra* note 8, § 7.1, at 7-5. Further, the alien has the right to examine the evidence, to present evidence on his behalf and to cross-examine witnesses presented by the government. FRAGOMEN & BELL, *supra* note 8, § 7.1, at 7-5. In this hearing the government must establish that the alien should be deported by "clear, convincing and unequivocal evidence." *See* Woodby v. INS, 385 U.S. 276, 284 (1966) ("We hold that no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged are true."). Prior to the enactment of the 1996 law, if the alien was found deportable, he had the right to apply for various forms of relief, including a section 212(c) waiver of deportation. *See* FRAGOMEN & BELL, *supra* note 8, § 7.4, at 7-105 to 7-113.

[54] The question of law raised by Mojica's section 2241 habeas corpus petition, although not addressed in this Comment, is whether section 440(d) of the AEDPA may be retroactively applied to lawful permanent residents who had committed crimes prior to the enactment of the AEDPA, thereby depriving them of a section 212(c) hearing. *See supra* note 19 (discussing the debate surrounding the retroactive application of section 440(d)).

The *Mojica* court held unconstitutional "the new policy and practice of the United States Attorney General to automatically deport certain legal permanent residents"[55] under the AEDPA without an opportunity for judicial review.[56] The court simultaneously rendered a decision of equal constitutional magnitude: a district court retains full subject matter jurisdiction under 28 U.S.C. § 2241 to adjudicate cases of lawful permanent residents who are challenging final orders of deportation under the AEDPA.[57] The court further suggested that legal permanent residents should be granted substantive constitutional rights.[58] In reaching its conclusion on the issue of subject matter jurisdiction, the *Mojica* court engaged in a two-step process of statutory interpretation.[59] Part II

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[55] *Mojica*, 970 F. Supp. at 136.

[56] *Id.* at 182 ("It is enough to hold now that *Soriano* was wrong on the merits. It constituted an arbitrary abuse of power by the Attorney General."). In *In re Soriano*, the Attorney General found that the language of the AEDPA section 440(d) did not specify whether the statute was to be applied to pending deportation proceedings and held that it did apply to all pending section 212(c) waiver cases. Int. Dec. 3289, 1996 WL 426888 (AG Op. Feb. 21, 1997).

[57] *Mojica*, 970 F. Supp. at 159. ("[T]he court cannot here find that Congress repealed Section 2241 by implication.").

[58] Judge Weinstein never specifically states that lawful permanent residents should be awarded a panoply of substantive constitutional rights; however, his entire discussion of aliens' rights emphasizes why they should be granted these rights. *Id.* at 142-153. For example, he writes: "If we are not a melting pot, it is generally true that we have at least constitutionally offered full integration to all citizens and residents, providing open access to our social, political, technological and economic structures." *Id.* at 144. The Judge continues, "[t]here have been major exceptions to our constitutional and statutory river of equal rights policy and our national ethos of openness." *Id.* Further, he writes that "[i]n the 1960s . . . the issue was no longer 'whom we shall welcome,' but how many, and how they could be treated with dignity, due process and equality as legal residents once they arrived." *Id.* at 145.

[59] The *Mojica* court rejected the government's twofold argument. First, the government argued that because section 106(a) did not explicitly include section 2241 as an exception to its "sole and exclusive" jurisdiction, Congress repealed the district courts' section 2241 powers in deportation orders. *Id.* at 160. Second, the government contended that section 106(a)(10) had limited district court jurisdiction of final deportation orders to the issues concerning denial of discretionary relief. *Id.* at 161.

will examine the unprecedented analysis and reasoning of the court's decision.

II. AVOIDING A CONSTITUTIONAL VIOLATION

The *Mojica* court was one of the first courts in the country to retreat from the brink of unconstitutionality by properly preserving a lawful permanent resident's right to judicial review.[60] Without this right, the Attorney General would have absolute power to deport these individuals.[61] Recognizing the dangers of interpreting

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[60] The United States Constitution is silent on the issue of immigration and, in particular, deportation proceedings. However, the Constitution in many places confers rights on "persons" and not just citizens. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the government for redress of a grievance"); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . "); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved . . . .").

Congress' authority over immigrants, therefore, has been limited by the Supreme Court's constitutional interpretations of individual rights. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (finding aliens protected by the Fifteenth and Sixteenth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (finding aliens protected by the Fourteenth Amendment). The Supreme Court has stated that deportation implicates the fundamental interests "basic to human liberty and happiness" and that these interests are protected by the Constitution. Wong Yang Sung v. McGrath, 33 U.S. 33, 50 (1950). *See also* Bridges v. Wixon, 326 U.S. 135, 154 (1945) (stating that deportation proceedings meet the "essential standards of fairness"); Ng Fung Ho. v. White, 259 U.S. 276, 284 (1922) (stating that individuals subject to deportation are entitled to Fifth Amendment protections guaranteeing due process of law).

[61] Brief of Amicus Curiae by the American Civil Liberties Foundation for Petitioners at 10, Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997) (Nos. 97-1085; 97-1869). If the authority to deport aliens is given to the Attorney General, she will have control of the entire deportation process from beginning to end. *Id.* Currently, the Immigration and Naturalization Service arrests aliens, an

the AEDPA, the IIRIRA and the 1961 Immigration Act[62] for their alleged policy goals,[63] the court implemented a plain meaning statutory analysis to hold that statutory habeas corpus was unaffected by the enactment of the 1996 immigration laws.

A. The District Courts Retain Full Habeas Corpus Powers Under Section 2241 to Hear Petitions for Final Orders of Deportation

The 1996 Supreme Court decision in *Felker v. Turpin*,[64] applying the clear statement rule, substantiates the *Mojica* court's

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immigration judge and the BIA hears their cases and the judiciary hears their appeals. *Id.* However, if aliens are precluded from appealing to the federal judiciary, the Attorney General will also have the power to deport these individuals without any form of review. *Id.* Thus, aliens would be subjected to an immigration system that is permitted to interpret statutes and enforce them at its discretion. *Id.* These discretionary decisions, in turn, would be insulated from judicial scrutiny. *See* Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 SAN DIEGO L. REV. 861, 863 (1994) (stating that discretion has been used to justify potentially arbitrary immigration decisionmaking and further has "become a mantle insulating immigration decisions from meaningful review").

[62] In 1961, Congress amended the INA and enacted section 106(a) which provided that the courts of appeal "shall be the sole and exclusive procedure for the judicial review of final orders of deportation." Immigration and Nationality Act § 106(a) (repealed by Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996)). The legislative intent behind § 106(a) was to "expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts." Foti v. United States, 375 U.S. 217, 225 (1963). INA section 106(a)(10) stated that "any alien in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." Immigration and Nationality Act § 106(a)(10). *See infra* note 79 (discussing the legislative history of section 106 and interpretive case law).

[63] *Mojica*, 970 F. Supp. at 162 ("'Accommodation' of general policy goals based on suggest[ions] of congressional intent are, however, not appropriate in this context."). The policy goals referred to by the *Mojica* court include expediting the removal of criminal aliens from the United States and the elimination of judicial review of decisions rendered by INS officials. *Id. See also* Converse, *supra* note 43, at 10.

[64] 518 U.S. 651 (1996).

plain meaning approach to the AEDPA, the IIRIRA and the 1961 Immigration Act.[65] The *Mojica* court accurately noted that "[o]nly upon a clear statutory statement—a specific, express and unambiguous directive—can a court conclude that Congress meant to repeal an independent area of jurisdiction."[66] The *Mojica* court applied this rule to each statutory provision in question.

1. The Impact of the AEDPA and the IIRIRA on Section 2241 Powers

The *Mojica* court first determined that neither the AEDPA nor the IIRIRA eliminate district courts' section 2241 powers.[67] The court correctly rejected the government's argument that the title of AEDPA section 401(e), "Elimination of Custody Review By Habeas Corpus," repealed INA habeas jurisdiction under Section 2241.[68] The *Mojica* court, applying the clear statement rule enunciated in *Felker v. Turpin*, found that because this language does not mention section 2241 of Title 28, it cannot be read to repeal it.[69]

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[65] The clear statement rule was first delineated by the Supreme Court in *Ex Parte Yerger*, 75 U.S. 85, 92 (1868). The jurisdictional modifying question presented in *Yerger* was whether a congressional act revoked the Supreme Court's power to entertain habeas power under section 14 of The Judiciary Act of 1789. *Id.* at 88. The Court held that the Act did not eliminate its jurisdiction because it "contained no repealing words" and "repeals by implication are not favored." *Id.* at 104. In *Felker v. Turpin*, the Court considered whether a jurisdiction-modifying provision under the AEDPA eliminated the Supreme Court's authority to hear habeas petitions brought under section 2241. 518 U.S. 651, 660 (1996). The Court, citing to *Yerger*, unanimously held that because the "AEDPA makes no mention of our authority to hear habeas petitions filed as original matters in this court . . . we decline to find a . . . repeal of 2241 of Title 28 . . . by implication . . . ." *Id.* (citing *Ex Parte Yerger*, 75 U.S. at 660). The Supreme Court's holding in *Felker* is the most recent affirmation of the clear statement rule.

[66] *Mojica*, 970 F. Supp. at 159.

[67] *Id.* at 163.

[68] *Id.* at 158.

[69] *Id.* at 159. The court in *Yesil v. Reno* also dismissed this argument on the same grounds:

Similarly, the court rejected the government's statutory interpretation that AEDPA section 440(a) repealed section 2241.[70] AEDPA section 440(a) provides that "any final order of deportation against an alien who is deportable by reason of having committed [certain crimes] shall not be subject to review by any court."[71] Therefore, since there were no repealing words in this provision specifically referring to section 2241, a repeal of section 2241 cannot be read into the statute.[72]

Lastly, the IIRIRA's transitional provision, section 309(c)(4)(G) states "there shall be no appeal permitted" in the case of certain criminal aliens. Again, there is no mention of section 2241. None of the aforementioned provisions specifically address section 2241 habeas review, much less repeal it.[73] The *Mojica* court, therefore,

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> [T]he government argues that the plain language of the AEDPA repeals habeas jurisdiction under Section 2241 not implicitly but "expressly," pointing among other things, to the heading of Section 401(e): "Elimination of Custody Review by Habeas Corpus." The government is simply incorrect. The plain language does not expressly repeal Section 2241. Nor does the heading to Section 401(e) carry much weight, for other headings contradict the government's argument. Section 401 is entitled "Alien Terrorist Removal" and is part of Subtitle A, "Removal of Alien Terrorists." In contrast, Section 440 is entitled "Criminal Alien Removal" and is part of Subtitle D, "Criminal Alien Procedural Improvements." Hence one could reasonably argue, on the basis of the headings, that Section 401 has no application to Yesil at all, as no suggestion has been made that he was an "Alien Terrorist."

958 F. Supp. 828, 838 (S.D.N.Y. 1997) (citations omitted).

[70] *Mojica*, 970 F. Supp. at 160.

[71] *Id.*

[72] *Id.* The *Mojica* court states: "Congress is expert in the process of lawmaking. Had it desired to repeal section 2241, or render it inapplicable to challenges deportation orders, it would have taken the necessary steps to do so." *Id. See also Ex Parte Yerger*, 75 U.S. 85, 105 (1868) (stating "repeals by implication are not favored").

[73] *Mojica*, 970 F. Supp. at 160 ("This—as Congress is doubtlessly aware—is the purpose of the clear statement rule: courts do not have to resort to divining phantom or unarticulated congressional intentions to repeal habeas corpus jurisdiction where there is statutory silence.").

precisely implements the clear statement rule: without a clearly expressed mandate, no repeal is permitted.[74]

As noted in *Mojica*, nearly every district court in the country to address the issue of habeas jurisdiction has held that the AEDPA and the IIRIRA have not withdrawn their section 2241 habeas jurisdiction.[75] The *Mojica* opinion distinguishes itself from these courts by holding that the scope of section 2241 is not narrowed in any aspect by the 1996 immigration laws.[76] The majority of district courts have not strictly applied the *Felker v. Turpin* clear statement rule. Instead, these courts narrowed judicial review under section 2241 to only those cases that present "substantial constitutional" claims[77] so as to accommodate Congress' intentions in passing the AEDPA and the IIRIRA. The Mojica court's approach to analyzing the AEDPA and the IIRIRA is, therefore, strikingly different from these courts.[78]

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[74] *See supra* note 65 (delineating the clear statement rule).

[75] *See, e.g.*, Lee v. Reno, 15 F. Supp. 2d 26 (D.D.C. 1998); Avelar-Cruz v. Reno, 6 F. Supp. 2d 744 (N.D. Ill. 1998); Billett v. Reno, 2 F. Supp. 2d 368 (W.D.N.Y. 1998); Barrett v. INS, 997 F. Supp. 896 (N.D. Ohio 1998); Rusu v. Reno, 999 F. Supp. 1204 (N.D. Ill. 1998); Gutierrez-Martinez v. Reno, 989 F. Supp. 1205 (N.D. Ga. 1998); Thompson v. Perryman, No. 98 C 1596, 1998 WL 473471 (N.D. Ill. Aug. 7, 1998); Zisimopoulos v. Reno, No. Civ. A 98-1863, 1998 WL 437266 (E.D. Pa. July 15, 1998); Morisath v. Smith, 998 F. Supp. 1333 (W.D. Wash. 1997); Zadvydas v. Caplinger, 986 F. Supp. 1011 (E.D. La. 1997); Vargas v. Reno, 996 F. Supp. 1537 (S.D. Cal. 1997); Gutierrez v. Greene, 977 F. Supp. 1089 (D. Colo. 1997); Duldulao v. Reno, 958 F. Supp. 476 (D. Haw. 1997); Eltayeb v. Ingham, 950 F. Supp. 95 (S.D.N.Y. 1997); Jurado-Moore v. INS, 956 F. Supp. 878 (D. Neb. 1997); Thomas v. INS, 975 F. Supp. 840 (W.D. Ca. 1997); Ozoanya v. Reno, 968 F. Supp. 1 (D.D.C. 1997); Yesil v. Reno, 958 F. Supp. 476 (S.D.N.Y. 1997); Jennifer v. Powell, 937 F. Supp. 1245 (E.D. Mich. 1996). *See supra* note 16 (listing the circuit courts that have similarly upheld section 2241's habeas corpus power).

[76] *Mojica*, 970 F. Supp. at 163.

[77] *See supra* note 19 (discussing district court cases that restrict judicial review under section 2241).

[78] *See supra* notes 16 and 18 (discussing the respective decisions of the circuit and district courts analyzing the AEDPA and the IIRIRA).

2. The 1961 Immigration Act

The real battle over the district courts' section 2241 habeas corpus jurisdiction, however, lies with the 1961 Immigration Act (the "Act").[79] The Act was passed by Congress to expedite and

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[79] The controversy over the district courts' jurisdiction to review final orders of deportation under section 2241 stems from the ambiguous jurisdictional modifying mandates of section 106 of the 1961 Immigration Act. Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650 (repealed 1996). After the passage of the 1961 Immigration Act, the Supreme Court never addressed the issue of whether habeas corpus relief remained available to the district courts in challenges to deportation orders under section 106(a)(10) or section 2241. *See id.* However, the Court did hold that matters directly incident to final orders of deportation fell within section 106(a)'s grant of direct review jurisdiction to courts of appeals. *See* Jorge v. Hart, No. 97 Civ. 1119, 1997 WL 531309, at *5 (S.D.N.Y. Aug. 28, 1997) (citing Giova v. Rosenberg, 379 U.S. 18, 85 (1964); Foti v. INS, 375 U.S. 217, 232 (1963)). In addition, the Court held that decisions not directly related to deportation did not fall within section 106(a)'s grant of jurisdiction to courts of appeals to review deportation orders. *Id.* (citing Cheng Fan Kwok v. INS, 392 U.S. 206, 216 (1968)). Federal courts around the country, acknowledging that sections 106(a) and 106(a)(10) were not "models of clarity," attempted to resolve the ambiguity. *See* Daneshvar v. Chauvin, 644 F.2d 1248, 1250 (8th Cir. 1981); United States *ex rel.* Marcello v. District Dir., 634 F.2d 964 (5th Cir.), *cert. denied*, 452 U.S. 917 (1981).

Until the passage of the AEDPA, section 106 was the law governing judicial review of deportation orders. Section 106(a) granted courts of appeals "sole and exclusive authority" for all "judicial review of all final orders of deportation . . . made against aliens in the United States." Act of Sept. 26, 1961 § 5a, Pub. L. No. 87-301, 75 Stat. 650, 651-53; 8 U.S.C. § 1105a(a) (repealed 1997). Section 106(a)(10) provided that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10) (1994) (repealed 1996). The ambiguities in the language as well as the interplay of these provisions with federal habeas corpus statute section 2241 have left circuit courts split over their interpretations.

A minority of courts interpret the provisions as eliminating section 2241 powers in the district courts. For example, the Eighth Circuit in *Daneshvar v. Chauvin* held that the district courts did not have the jurisdiction to review any matter relating to deportation orders. 644 F.2d 1248, 1250 (8th Cir. 1981). Rather, it held that under section 106(a)(10) the district courts could only hear habeas corpus petitions when the deportation itself was not an issue. The court stated:

> [I]t makes more sense, and furthers the congressional purpose to avoid delay . . . to construe section 106(a) to confer exclusive jurisdiction on courts of appeals in all cases where the validity of a final order of deportation is drawn in question, and to limit section 106[(a)(10)] to review of the denial of discretionary relief where deportability itself is not an issue.

Id. at 1251. The court rejected the petitioner's argument that 106(a)(10) granted district courts jurisdiction whenever the petitioner is "in custody," while section 106(a) gave courts of appeals the jurisdiction to hear those cases where the petitioner is not in custody. *Id.* The court dismissed this argument as not "mak[ing] a great deal of sense since nothing would be left of the courts of appeals' jurisdiction and, further, would contradict the legislative intent to avoid delay in deporting aliens." *Id.* In so holding, however, the court did not cite to any legislative authority or statutory language supporting its restrictive interpretation of section 106. *See also* Salehi v. District Dir., 796 F. Supp. 1286, 1290 (10th Cir. 1986); El-Youseff v. Meese, 678 F. Supp. 1508, 1514 (D. Kan. 1988).

The majority of courts, though, hold that district courts' habeas jurisdiction under section 2241 remains unaffected by the section 106 provisions. For example, the often quoted Fifth Circuit decision of *United States ex rel. Marcello v. District Director* held that sections 106(a) and 106(a)(10) did not repeal the district court of its section 2241 powers and that there was no statutory language or legislative history to indicate that its section 2241 powers had been amended. 634 F.2d at 971-72. The court concluded that sections 106(a) and 106(a)(10) were enacted by Congress to provide for two modes of review, "one available to aliens not 'held in custody' and the other for those who were." *Id.* at 972. The court reasoned that Congress intended "to abolish in as many cases as possible, the district court step in direct appeals and the employment by the alien of both modes of successive review." *Id.* Thus, the court only limited the district courts' review of deportation cases where the petitioner was "in custody" under section 106(a)(10). *Id.*

The Supreme Court's decision in *Foti v. INS* evidences additional support for the *Marcello* court's holding. 375 U.S. 217 (1963). The *Foti* Court spoke only to the narrow issue of whether "the Federal Courts of Appeals have the initial, exclusive jurisdiction under Section 106(a) of the INA, to review discretionary determinations of the Attorney General." *Id.* at 229. In its decision, however, the Supreme Court specifically stated: "And, of course, our decision in this case in no way impairs the preservation and availability of habeas corpus relief." *Id.* at 231. This dicta has been interpreted as reaffirming the *Marcello* court's holding that sections 106(a) and 106(a)(10) do not affect a district court's habeas corpus powers. *See* Orozco v. INS, 911 F.2d 539 (11th Cir. 1990); Williams v. INS, 795 F.2d 738 (9th Cir. 1986).

improve upon what it perceived to be an inefficient system of judicial review of deportation orders.[80] Until the passage of the AEDPA, section 106 of the Act was the law governing judicial review of deportation orders. Section 106(a) granted courts of appeals "sole and exclusive authority" for judicial review of all final orders of deportation.[81] Further, section 106(a)(10) provided that an alien held in custody pursuant to an order of deportation could seek judicial review by habeas corpus proceedings.[82] At issue in *Mojica*, therefore, was: (1) whether Congress had limited habeas corpus jurisdiction under section 106(a)(10) so as to provide a single avenue of judicial review in the court of appeals under section 106(a); and (2) the interpretation of case law on the interplay of section 106(a) and section 106(a)(10).

The government's position on the statutory analysis of the 1961 Immigration Act was that INA's section 106(a) provision provided the courts of appeals with "sole and exclusive" jurisdiction to review final deportation orders;[83] because section 2241 was

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Since the passage of the AEDPA and the IIRIRA, the controversy over INA section 106's jurisdictional mandate continues to remain unresolved. AEDPA's section 440(a), which repealed INA section 106(a)(10), provides that "[a]ny final order of deportation against an alien who is deportable by reason of having committed [certain crimes] shall not be subject to judicial review by any court." *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 106(a)(10), 66 Stat. 163 (1952) (codified as 8 U.S.C. § 1105a(a)(10) and amended April 26, 1996 by Antiterrorism and Effective Death Penalty Act §§ 401(e), 440(a)). The IIRIRA, enacted six months later, further eliminated judicial review of deportation cases in the courts of appeals stating that "there shall be no appeal of any discretionary decisions under the [INA] section 212(c)" and "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by having committed a criminal offense covered in [INA] Section 212(a)(2) or Section 241(a)(2)(A)(iii), (B), (C), or (D)." *See generally* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, Section 306, 110 Stat. 3009 (1996).

[80] *See* Jorge v. Hart, No. 97 Civ. 1119, 1997 WL 531309, at *5 (S.D.N.Y. Aug. 28, 1997).

[81] Act of Sept. 26, 1961 § 5a, Pub. L. No. 87-301, 75 Stat. 650, 651-53; 8 U.S.C. § 1105a(a) (repealed 1997).

[82] 8 U.S.C. § 1105a(a)(10) (1994) (repealed 1996).

[83] Mojica v. Reno, 970 F. Supp. 130, 161-62, *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F. 3d 106 (2d Cir 1998).

not cited as an exception to the provision, Congress intended to repeal section 2241.[84] Moreover, the remaining portion of section 106(a)(10) limited district courts' power to review deportation orders concerning issues relating only to discretionary relief; therefore, when the AEDPA repealed section 106(a)(10), judicial review by district courts was lost.[85] Thus, the government contended that the district courts' section 2241 habeas jurisdiction was eliminated thirty-seven years ago and today, at most, deportable aliens only retain a right to appeal to the courts of appeals when there is a fundamental miscarriage of justice.[86] Further, the government interpreted Second Circuit case law under *Garay v. Slattery*[87] to preclude district court habeas review under section

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[84] *Id.*

[85] After the passage of the 1961 Immigration Act, most courts ruling on the scope of section 106(a)(10) held that the district courts did have some form of habeas corpus jurisdiction despite the ambiguous language of section 106(a)(10); however, their opinions and rationale regarding the scope of that power have varied greatly. *Compare* Marcello v. District Dir., 634 F.2d 964 (5th Cir. 1981) (stating that there is little indication, either in the statute or the legislative history that suggests the congressional plan and purpose in enacting section 1105 was to restrict habeas corpus review in the district courts), *with* Daneshavar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981) (stating that section 1105 is to be construed as restricting district courts' power to review final orders of deportation).

[86] *Mojica*, 970 F. Supp. at 160. In its brief, the government contends that because section 2241 is not referenced in the enumerated exceptions to the "sole and exclusive" procedure adopted by INA section 106, section 2241 cannot independently operate as an exception. Respondents' Memorandum of Law in Support of Respondents' Motion to Dismiss Petitioners'/Plaintiffs' Complaint for Declaratory and Injunctive Relief and Petition for a Writ of Habeas Corpus at 12, Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997) (Nos. 97-1085; 97-1869) [hereinafter Respondents' Memorandum of Law]. Thus, with respect to final deportation orders, INA section 106(a)(10)'s authorization of habeas review was not in addition to, but in substitution for, the general authorization of habeas review at section 2241. *Id.* The government interprets a fundamental miscarriage of justice to be one that violates any provision of the Constitution. *Id.* at 27 ("Specifically, these statutes [AEDPA and IIRIRA] do not violate Article III's principle of Separation of Powers, the Fifth Amendment's Due Process Clause or the Suspension Clause.").

[87] 23 F.3d 744 (2d Cir. 1994). According to the government's interpretation of *Garay*, only matters ancillary to the deportation order can be addressed by the district court. *Id.* Thus, the government concluded that prior to the AEDPA, the

106.[88] The government contended that the *Garay* court held INA section 106(a)(10) to preclude district courts from considering appeals of final orders of deportation.[89] Instead, a habeas petitioner would have to bring a challenge pertaining to a final order to the court of appeals.[90] The *Mojica* court, however, rejected both of these arguments.

Applying the clear statement rule, the *Mojica* court concluded that neither section 106(a) nor section 106(a)(10) repealed section 2241 habeas power because these provisions do not mention or refer to section 2241.[91] Moreover, although the government's argument that section 2241 habeas jurisdiction was eliminated by the 1961 Immigration Act finds some support in case law,[92] there is precedent to support an alternative interpretation: section 106 does not preclude a district court's habeas review.[93]

With regard to Second Circuit case law, the *Mojica* opinion noted that the court in *Garay* never stated that section 106 barred district courts from section 2241 review of final orders of deportation.[94] In *Garay*, the court held that the district court could not hear a stay of deportation.[95] The issue before the court, therefore,

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district court did not have jurisdiction to review Mojica's case and cannot have the jurisdiction today. *Id.* Judge Weinstein, however, rejected these theories and ruled that, although the language of the AEDPA and the IIRIRA purports to eliminate all judicial review on its face, there is no express mention of a repeal of the district courts section 2241 habeas powers in these laws or in the section 106 provisions. *Mojica,* 970 F. Supp. at 163. Thus, no repeal can or will be implied.

[88] *Mojica*, 970 F. Supp. at 162.

[89] Respondents' Memorandum Of Law, *supra* note 86, at 18.

[90] *Id.*

[91] *Id.* at 163.

[92] *See, e.g.*, Salehi v. District Dir., 796 F.2d 1286 (10th Cir. 1986); Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981); El-Youssef v. Meese, 678 F. Supp. 1508 (D. Kan. 1988).

[93] *See, e.g.*, Orozco v. INS, 911 F.2d 539, 541 (11th Cir. 1990) (recognizing that "challenges to deportation proceedings are cognizable under 28 U.S.C. § 2241"); Williams v. INS, 795 F.2d 738, 744 (9th Cir. 1986) (stating that "habeas jurisdiction exists whenever the petitioner is in custody, regardless of the reach of section 106(a)'s exclusive jurisdiction").

[94] *Mojica*, 970 F. Supp. at 162.

[95] 23 F.3d 744, 746 (2d Cir. 1994).

was not whether the 1961 Immigration Act precluded district courts from reviewing challenges to final deportation orders.[96] As the petitioners in *Mojica* noted in their brief, the interpretation that the government gleaned from *Garay* is inferential.[97] Specifically, the petitioners' argued:

> The Second Circuit has never addressed whether the 1961 Act permitted an alien to challenge a deportation order in a habeas action and the government relies solely on negative inferences . . . in which the court found that review was available to challenge other types of immigration decisions ancillary to a final order.[98]

Furthermore, even if the *Garay* court implicitly intended to repeal the district courts' section 2241 jurisdiction, the *Mojica* court's analysis of INA section 106 is wholly supported by the statute's language and legislative history.[99] Therefore, the *Mojica* court acknowledged these differences in interpretation, but dismissed

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[96] *Id.* at 744.

[97] Petitioners' Brief at 41 n.25, Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y.) (Nos. 97-1085; 97-1869).

[98] *Id.*

[99] The court in *Jorge v. Hart* agreed with the *Mojica* court's interpretation of section 106 and stated that the "problem" with the Second Circuit's interpretation of the pre-AEDPA provision is that:

> [T]he language, legislative history, structure and purpose of the INA reveal that the majority of the circuits properly interpreted INA Section 106 and its interplay with Section 2241, and that under Section 106, district courts actually had habeas corpus jurisdiction to review deportation orders when the alien was in custody . . . the best way to have construed Section 106(a)(10) was a operating in tandem with Section 2241 to confer jurisdiction on district courts to review deportation orders and to issue writs when the alien was in custody.

No. 97 Civ. 1119, 1997 WL 531309, at *8 (S.D.N.Y. Aug. 29, 1997) (citations omitted). In affirming *Mojica*, the Second Circuit did not mention its decision in *Garay* or the debate surrounding its interpretation. *See* Henderson v. INS, 157 F.3d 106 (2d Cir. 1998). Rather, the court wrote that its decision to uphold section 2241 habeas review is "guided by a century's worth of Supreme Court decisions" granting immigrants the writ of habeas corpus in deportation proceedings. *Id.* at 106.

them as "debatable."[100] The *Mojica* decision relies, instead, on the clear statement rule.[101]

The *Mojica* court's interpretation of the 1961 Immigration Act is supported by the Act's legislative history. The following is an excerpt from the House Report:

> In substance an alien aggrieved by [a deportation] order may seek judicial review by filing a petition in the U.S. circuit court of appeals. The writ of habeas corpus is specifically reserved to an alien held in custody pursuant to an order of deportation.
>
> . . . .
>
> The section carefully preserves the writ of habeas corpus to an alien detained in custody pursuant to a deportation order.
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> . . . .
>
> 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.*
>
> . . . .
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> Overall, the committee emphasizes that regardless of any time limitations upon the judicial procedure provided by the bill, there is always available to an alien in custody under a deportation order the right to apply for a writ of habeas corpus for the purpose of questioning the validity of the order.[102]

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[100] *Mojica*, 970 F. Supp. at 160.

[101] *Id.* at 159.

[102] H.R. REP. NO. 1086, 87th Cong. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2950, 2966, 2971, 2973, 2974 (emphasis added).

The language clearly states that an alien can seek habeas relief in a district court. Further, the reference to "The Habeas Corpus Act" can be interpreted as a specific reference to section 2241.[103]

There is additional legislative history, not cited in *Mojica*, which further supports the court's conclusion. For instance, the following excerpts are from speeches delivered on the House floor prior to the passage of the 1961 Immigration Act:

> Nothing contained in this bill is, or can be, designed to prevent an alien from obtaining review by habeas corpus.[104]
>
> . . . .
>
> I think this is a bad bill. I do not think that it will accomplish its purpose, for even though you pass this bill, it does not preclude a district court judge from doing a writ.[105]

A letter in the Congressional Record from the then Deputy Attorney General Byron R. White, explaining to the Justice Department his view of the 1961 legislation, adds additional support to Judge Weinstein's holding:

> Aliens seeking review of administrative orders should be given full and fair opportunity to do so, but the present possibilities of review pose undesirable obstacles to deportation of aliens who have been ordered deported and have had their day in court. *An alien subject to a deportation order, having lost his case in declaratory judgment or injunction proceeding may thereafter sue out a writ of habeas corpus when taken into custody. Moreover, as the*

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[103] Section 2241 traces its ancestry to the Constitution. *See* SOKOL, *supra* note 13, at 38 (quoting Jones v. Cunningham, 371 U.S. 236, 238 (1963) ("The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available.")). Habeas corpus was then given statutory roots in the Habeas Corpus Act of May 27, 1679 and section 2241 was specifically established in section 14 of the Judiciary Act of 1789. *See* Sunal v. Large, 157 F.2d 165, 167 (4th Cir. 1946) (explaining that 28 U.S.C. § 451 is a decedent of The Habeas Corpus Act), *aff'd*, 332 U.S. 712 (1947); *see also* SOKOL, *supra* note 13, at 40.

[104] 107 CONG. REC. 12,176 (1961) (statement of Rep. Walter).

[105] 107 CONG. REC. 12,179 (1961) (statement of Rep. Libonati).

> *law now stands, it is possible to seek relief by habeas corpus repeatedly.*[106]

Therefore, on grounds of statutory interpretation and legislative history,[107] the *Mojica* court was correct in holding that the district courts still have section 2241 habeas corpus powers to review final orders of deportation.

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[106] H.R. REP. NO. 565, at 1 (1961) (emphasis added).

[107] With respect to the AEDPA and the IIRIRA, the *Mojica* court never explicitly addresses the government's legislative history argument that the AEDPA's intent was to preclude all judicial review, including section 2241. That is, perhaps, because the government only offered the remarks of Michigan Senator Spencer Abraham to support this proposition and none of the Senator's remarks addressed the specific language of the AEDPA that is in controversy. Respondents' Memorandum of Law, *supra* note 86, at 16. Clearly, Senator Abraham's remarks illustrate the legislators' intent to end the abuse of successive petitions challenging final orders of deportation. *See* 142 CONG. REC. S4363-64 (1996).

Recently, and contrary to the government's argument in *Mojica*, Senator Abraham publicly expressed that the intent of the 1996 Immigration Laws was not to summarily deport legal permanent aliens convicted of crimes. *See* Mirta Ojito, *Old Crime Returns to Haunt an Immigrant*, N.Y. TIMES, Oct. 15, 1997, at B1. Rather, the Senator suggested that the laws are having too harsh an impact on immigrants:

> Joseph P. McMongile, communications director for Senator Spencer Abraham, a Michigan Republican who supports tougher laws against immigrants who are criminals, said the immigration agency was going too far. "It is puzzling to us that I.N.S. continues to pursue cases involving individuals who have committed crimes 20 years ago, rehabilitated themselves and are making contributions to society," he said.

Id. His assertion, therefore, strongly suggests that the 1996 Immigration Laws were never intended to leave aliens seeking relief from deportation without an avenue of judicial review. *Id.* Mr. McMonigle also stated: "The dispute over how to interpret the 1996 laws may prompt members of Congress to call immigration hearings and, if necessary, introduce a bill next year amending some of the language of the law . . . ."

B. *The Scope of the District Court's Section 2241 Habeas Power Has Not Been Narrowed*

The *Mojica* court not only held that it retains section 2241 habeas powers under the AEDPA and the IIRIRA, but it is was the first court in the country to state that "the scope of Section 2241 [relief] remains unaffected."[108] In so holding, the court rejected the rationale of numerous district courts that conclude that section 2241's scope has been narrowed[109] to allow review of only constitutional questions of "fundamental miscarriage[s] of justice."[110] Upon finding that the AEDPA and the IIRIRA have not fully eliminated their habeas jurisdiction,[111] these courts avoid the

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[108] Mojica v. Reno, 970 F. Supp. 130, 163 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F. 3d 106 (2d Cir. 1998).

[109] *Id.* at 162. *Mbiya v. INS* was the first court in the country to deal with habeas petitions under AEDPA section 440(a). 930 F. Supp. 609 (N.D. Ga. 1996). The *Mbiya* court held that it had habeas corpus powers under section 2241, but only to hear petitions "in which the petitioner's deportation would result in a fundamental miscarriage of justice." *Id.* at 612. The court reasoned that its section 2241 powers were curtailed because "the newly amended section 1105a(a)(10) strongly suggests that Congress intended to preserve the writ of habeas corpus under section 2241 in these cases only to the extent required by the Constitution." *Id.* It concluded under this restrictive view that only issues of due process qualified as "fundamental miscarriages of justice." *Id.* The court's statutory interpretation has been called an implausible "feat of acrobatics," since nowhere in the statute is any such limitation enunciated. Note, *The Constitutional Requirement of Judicial Review For Administrative Deportation Decisions*, 110 HARV. L. REV. 1850, 1860 (1997). Despite the tenuous grounds on which its holding is premised, the majority of district courts have followed the *Mbiya* court. *See* Duldulao v. Reno, 958 F. Supp. 476 (D. Haw. 1997); Moore v. INS, 956 F. Supp. 878 (D. Neb. 1997); Eltayeb v. Ingham, 950 F. Supp. 95 (S.D.N.Y. 1997); Powell v. Jennifer, 937 F. Supp. 1245 (E.D. Mich. 1996).

[110] *Mojica*, 970 F. Supp. at 162. *See also Duldulao,* 958 F. Supp. at 480; *Eltayeb*, 950 F. Supp. at 99; *Mbiya*, 930 F. Supp. at 613; *Powell*, 937 F. Supp. at 1252. A substantial constitutional claim or a miscarriage of justice is defined by the courts as one which is "cognizable under traditional habeas proceedings such as allegations of constitutional due process or equal protection violations." Galaviz-Medina v. Wooten, 27 F.3d 487, 492 (10th Cir. 1994).

[111] *But see* Theck v. INS, No. C. 96-4668, 1997 WL 37565 (N.D. Cal. Jan. 14, 1997) (holding courts of appeals have exclusive jurisdiction to hear habeas

serious constitutional ramifications raised by the AEDPA and the IIRIRA by leaving open only the single, albeit narrow, avenue of judicial review required by the Constitution. The *Mojica* decision, in holding to the contrary, is unprecedented.

The *Mojica* court noted that the rationale for diminishing the scope of section 2241 is to effectuate Congress' policy goal of expediting the deportation of criminal aliens and restricting judicial review of final orders of deportation to the greatest extent possible.[112] In rejecting "accommodation"[113] of these general policy goals, the *Mojica* court correctly pointed to the *Felker* Court's holding that limitations to jurisdictional power cannot be implied but must be expressly stated.[114] As discussed earlier, section 2241 was never mentioned in the AEDPA, the IIRIRA or the 1961 Immigration Act.[115] The court, therefore, concluded in lieu of an express abridgement of section 2241 power, that the district courts' habeas power has not been amended.[116] Thus, the *Mojica* court held, in accordance with the mandate of the *Felker* Court, that its section 2241 powers are fully intact.[117]

The *Mojica* court's analysis, therefore, stands on solid legal ground. None of the courts that have modified section 2241's

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petitions under 29 U.S.C. § 2241); United States *ex rel.* Morgan v. McElroy, 981 F. Supp. 873 (S.D.N.Y. 1997) (concluding that section 2241 barred all avenues of judicial review, including habeas corpus); Mayers v. Reno, 977 F. Supp. 1457 (S.D. Fla. 1997) (finding that Congress has "eliminated all avenues of judicial review of criminal orders of deportation under habeas corpus").

[112] *Mojica*, 970 F. Supp. at 162.

[113] *Id.* at 163 ("'Accommodation' of general policy goals based on 'suggest[ions]' of congressional intent are, however, not appropriate in this context. Fidelity to *Felker* and *Yerger* and the requirements of the clear statement rule militates against reading such limitations into the scope of section 2241").

[114] *Id.*

[115] *See supra* note 65 (discussing the clear statement rule enunciated by the Supreme Court in *Felker v. Turpin*).

[116] *Mojica*, 970 F. Supp at 163.

[117] *Id.* On appeal, the Second Circuit affirmed the *Mojica* court's analysis and noted: "[I]n the absence of a clear statement from Congress indicating its intent to do so, we are reluctant to snip words from the middle of the habeas statute." Henderson v. INS, 157 F.3d 106, 120 n.1 (2d Cir. 1998). The *Henderson* court, however, found that section 2241 jurisdiction remains available only to those aliens who have "substantial" constitutional claims. *Id.* at 122.

breadth of power have substantiated their holdings with any support from either the text of the AEDPA or the IIRIRA or the legislative history of these statutes.[118]

III. LAWFUL PERMANENT RESIDENTS ARE ENTITLED TO SUBSTANTIVE CONSTITUTIONAL RIGHTS

Immigration law is at a crossroads and stands ready to embark upon significant transformation. Following the enactment of the AEDPA and the IIRIRA, one scholar called 1996 "the year in which immigration law died,"[119] while yet another applauded the demise of the plenary power doctrine.[120] At this critical juncture,

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[118] For example, the court in *Mbiya v. I.N.S.*, 930 F. Supp. 609 (N.D. Ga. 1996), stated:

> Nevertheless the provisions of AEDPA make clear that Congress desired to expedite the deportation of criminal aliens and to restrict all judicial review of final orders of deportation to the greatest extent possible . . . [and this] strongly suggests that Congress intended to preserve the writ of habeas corpus under Section 2241 in these cases only to the extent required by the Constitution.

Id. at 612.

[119] Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704 (1997).

[120] Motomura, *supra* note 8, at 548. In early immigration cases, the Supreme Court established the plenary power doctrine which instilled Congress and the Executive Branch with broad, and often, exclusive authority in immigration matters. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Harisiades v. Shaughnessy, 342 U.S. 580 (1952). When implemented, this doctrine allows Congress to regulate—with few constitutional limits—the admission of aliens into the United States. *See* Benson, *supra* note 13, at 1412. Thus, as Hiroshi Motomura explains, the "courts [under the doctrine] should only rarely, if ever, and in a limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled." *See* Motomura, *supra* note 7, at 545. The seminal case in which the Supreme Court announced this policy of judicial deference was *The Chinese Exclusion Case.* Chae Chan Ping v. United States, 130 U.S. 581 (1889). In that opinion Justice Field wrote: "[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary." *Id.* at 606.

However, in recent decades, scholars have reported an erosion of the plenary power doctrine and, today, with the radical changes that the AEDPA and

the *Mojica* opinion offers a new vision for a field deemed "radically isolated and divergent" from the rest of the legal system.[121] It urges that legal resident aliens and, in turn, immigration law should be protected by the substantive guarantees of the Constitution.[122]

The Supreme Court for nearly a century has promulgated the plenary power doctrine through which it provides Congress and the executive branch with almost exclusive power over immigration regulations.[123] The judiciary, under the plenary power doctrine, has traditionally viewed immigration law as separate and distinct

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the IIRIRA have initiated, scholars are pondering what new trend in immigration law will emerge. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1629 (1992).

[121] Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (calling immigration law a "maverick" and a "wild card" in American public law because it "has been so radically isolated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animates the rest of our legal system").

[122] Aliens have traditionally been extended only procedural Constitutional rights. *See* Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 966. ("Although states are prohibited, in most cases, from treating aliens differently than citizens and although aliens are entitled to many of the criminal protections of the Bill of Rights, the federal government remains largely free from constitutional constraints in its treatment of aliens."). As Scaperlanda commented:

> For more than a century the Supreme Court has recognized that aliens are 'persons' entitled to constitutional protection. In many respects, this protection has proven illusory. Although states are prohibited, in most cases, from treating aliens differently than citizens, and although aliens are entitled to many of the criminal procedure protections of the Bill of Rights, the federal government remains largely free from constitutional constraints in its treatment of aliens.

Id. at 965.

[123] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (stating that unnaturalized and nonresident foreigners seeking admission to the United States are subject to "the decisions of executive or administrative officers, acting with in the powers expressly conferred by Congress, are due process of law"). *See also* Motomura, *supra* note 8, at 545.

from other areas of the law because of its close ties to foreign policy.[124] This connection to politics has prompted the judiciary to be more deferential to the political branches and administrative agencies.[125] The *Mojica* court, however, explicitly rejected the plenary power doctrine.[126] The court stated that the Attorney General was "undeserving of deference"[127] for her incorrect and unsubstantiated interpretation and application of the AEDPA.[128] More significantly, the court emphasized the importance of the district courts' power to provide lawful permanent residents with constitutional protections, such as the right to habeas corpus review.[129] By first acknowledging that resident aliens are entitled

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[124] Schuck, *supra* note 121, at 14.

[125] The three federal bodies that administer immigration procedures are: the Immigration and Naturalization Service ("INS"), the Department of State and the Department of Labor. *See* Motomura, *supra* note 120. The INS, which handles most immigration matters, oversees border enforcement, deportation of aliens, visa petitions, adjustments of immigration status, and citizenship adjudication. *See* Motomura, *supra* note 120. The Department of State issues visas abroad through embassies and consulates. The Department of Labor processes petitions for employment-related visas to ensure compliance with all labor statutes and regulations. *See* Motomura *supra* note 120.

[126] The plenary power doctrine and the rationale for its rejection was described by the *Mojica* court as follows:

> [A]n older view [of foreign policy] was that aliens need not be protected under the Constitution in the same way as citizens. Treatment of foreign aliens was viewed as an aspect of foreign relations, intimately related to foreign policy interests. Thus . . . where the distinction between citizen and alien appears to have little significance for U.S. foreign relations, discrimination against aliens needs reconsideration.

Mojica v. Reno, 970 F. Supp. 130, 147 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F. 3d 106 (2d Cir. 1998) (quoting and referencing LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 293-97 (2d ed. 1996)).

[127] *Mojica*, 970 F. Supp. at 181.

[128] *Id.* at 182.

[129] "Yet if the writ is to be an efficacious check in the confinement and deportation of liberty attending physical removal of persons from the United States, judicial review of [deportation and] removal must not be precluded." *Id.* at 153 (quoting Trevor Morrison, *Removed From The Constitution?: Deportable Aliens Access to Habeas Corpus Under the New Immigration Legislation*, 35

to this procedural constitutional protection in deportation proceedings before a federal court, the court began an analysis that emphatically undermined the plenary power doctrine.[130]

Historically, the Supreme Court's only exception to the plenary power doctrine has been its willingness to grant aliens procedural due process rights because of the harsh consequences wrought by deportation.[131] It has also been proposed that procedural issues are more appropriate for the judiciary to decide, since these questions relate to "values of accuracy, participation and predictability;"[132] whereas, the political branches are better equipped to weigh substantive policy issues.[133] Regardless of the reasoning behind the plenary power doctrine, courts have retained a hands-off

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COLUM. J. TRANSNAT'L L. 697, 721 (1997)).

[130] The plenary power doctrine is rooted in the notion of a sovereign's unlimited right "to decide whether, under what circumstances and with what effects it would consent to enter into a relationship with a stranger . . . the government simply holds no other legal obligation to those who sought to enter or remain without its consent." *See* Schuck, *supra* note 121, at 6.

[131] *See* Woodby v. INS, 385 U.S. 276, 285 (1966) (noting that "[t]his Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification"). Further, the Supreme Court has emphasized the importance of aliens' procedural rights:

> Though deportation is not technically a criminal proceeding, it visits great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most severe one—cannot be doubted. Meticulous care must be exercised lest the procedure which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945). Lastly, the Court has recognized aliens' constitutional rights to due process:

> To deport one who so claims to be a citizen obviously deprives him of liberty . . . . It may result also in less of both property and liberty and life, or all that makes life worth living. Against the danger of such deprivation without sanctions afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantees of due process of law.

Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[132] *See* Motomura, *supra* note 120, at 1646.

[133] *See* Motomura, *supra* note 120, at 1646.

policy on substantive due process issues in deportation cases.[134] The result of this practice has been that aliens, even lawful permanent residents, are not accorded the substantive guarantees of the Constitution, but only its minimal procedural guarantees.[135]

The *Mojica* opinion suggests that the judiciary should depart from the plenary power doctrine and extend substantive constitutional rights to lawful permanent residents.[136] The court based its finding on two grounds: the role of immigrants in American society[137] and international human rights obligations.[138]

The court first contended that immigrants have always served as the foundation of the United States, a "melting pot" of diverse religions, ethnicities and races.[139] In particular, the *Mojica* court viewed immigrants, especially lawful permanent residents, as representing a positive infusion of labor and diversity in our society.[140] According to Judge Weinstein, since immigrants founded our country, they should be welcomed and treated with dignity, due process and equality.[141] Therefore, the court reasoned, since immigrants have played—and continue to play—a vital

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[134] *See* Scaperlanda, *supra* note 122, at 990.

[135] *See* Scaperlanda, *supra* note 122, at 966. *But see* Benson, *supra* note 13, at 1484 (discussing the problems inherent with the "constitutionalization" of immigration law).

[136] The *Mojica* opinion directs its attention only to legal resident aliens and not other categories of aliens, such as illegal aliens or refugees. Mojica v. Reno, 970 F. Supp. 130, 142-46 (E.D.N.Y. 1997), *aff'd in part, dismissed in part, question certified sub nom.* Henderson v. INS, 157 F. 3d 106 (2d Cir. 1998).

[137] *Id.* at 143.

[138] *Id.* at 146.

[139] The *Mojica* court described the contributions immigrants have made to the United States accordingly:

> Ours is a nation of immigrants and their descendants . . . . This country has grown and prospered in a climate of constant refreshment by the introduction into our midst of adventurous spirits willing to leave the security and predictability of what they knew in their lands and rulers they adjured for the hope of full equality of rights and opportunities within our borders.

Id. at 143.

[140] *Id.* at 145.

[141] *Id.* at 146.

role in this country's growth, they are entitled to constitutional rights and not simply procedural privileges.

Second, in a lengthy discussion of internationally recognized human rights policies, the court looked to international laws that provide aliens with protection from arbitrary exile.[142] In its comprehensive analysis of human rights, the court did not suggest that these laws should be adopted into the Constitution but rather, in the words of one scholar that:

> With the advent of international human rights . . . the implicit or explicit agreement by the nations of the world to respect those individual rights absolute sovereign power no longer reigns paramount over individual rights. Given this new international terrain, the [Supreme] Court is no longer justified in brushing aside aliens' constitutional claims for fear of interfering with the national sovereign.[143]

The *Mojica* opinion emphasizes that the purpose of the plenary power doctrine—to serve the needs of a nation before those of the individual—is no longer being adhered to by the international community.[144] Instead, the rights of individuals are superseding rights once held solely by the sovereign state.[145] Thus, the demise of the plenary power doctrine can also be seen on the world stage.

The passage of the AEDPA and the IIRIRA has brought immigration law to a crossroads[146] and the *Mojica* decision boldly

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[142] *Id.* at 146-52. The court cites to a number of treaties and covenants including the Universal Declaration of Human Rights, the European Convention on Human Rights, the Fundamental Freedoms as well as the *Restatement (Third) of the Foreign Relations Law of the United States* (1987). *Id.*

[143] *See* Scaperlanda, *supra* note 122, at 1029.

[144] *Mojica*, 970 F. Supp. at 146-147.

[145] *See* Scaperlanda, *supra* note 122, at 1029.

[146] *See* Motomura, *supra* note 8, at 1629 (contending that the demise of the plenary power doctrine has sufficiently been eroded so as to prompt questions about what immigration law should look like in the next century and, hence, this puts us at a crossroads). Motomura, *supra* note 8, at 1629. Motomura suggests, as does Judge Weinstein, that one path would be to apply mainstream constitutional principles to immigration law. Motomura, *supra* note 8, at 1631. Further, he suggests that immigration law has broader significance as a public law. Motomura, *supra* note 8, at 1631. Specifically, he states that "[b]ecause how our

proposes a future in which the judiciary and lawful permanent residents can enjoy a fuller application of constitutional principles.[147] Despite the fact that these theories have been proposed by scholars,[148] they have not been embraced by the courts—until now. Judge Weinstein, however, stands alone in suggesting that aliens should be awarded additional rights under the Constitution. No other district court to address the habeas corpus issue in the deportation context has touched upon this topic. Nor did the Second Circuit address this topic in *Henderson v. INS.*[149] This is not surprising, however, in light of the fact that the majority of these courts have significantly curtailed aliens' rights under the statutory habeas provision. Although the *Mojica* court's opinion represents progressive thinking, it is unlikely that it will be embraced by the judiciary or the legislature.[150]

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law treats outsiders puts in sharper relief much of how we treat ourselves, immigration law offers a superb vantage point for mapping the contours of mainstream public law." Motomura, supra note 8, at 1631.

[147] *See Mojica*, 970 F. Supp. at 142-51 (discussing the history of immigration and the human rights obligations of the United States).

[148] *See* Scaperlanda, *supra* note 122; Motomura, *supra* note 8.

[149] 157 F.3d 106 (2d Cir. 1998).

[150] In 1993, the *Washington Times* reported that every year for that previous decade most Americans polled in a national survey opposed more immigration into the United States. *See* Samuel C. Francis, *Suddenly Finding The Country Awash*, WASH. TIMES, July 6, 1993, at E1. The article further explained that "Americans didn't dislike immigrants themselves and don't think they're bad or inferior. They just know immigrants are not Americans and don't have the same claims in the country as people who are. This land is our land, but it's not necessarily everybody's land." *Id.* Similarly, a *USA Today*/CNN/Gallup poll conducted in 1993 found that 65% of those polled said that the United States should admit fewer newcomers; 55% believed immigrant diversity threatened American culture; and 64% said immigrants hurt the economy by lowering wages. *See* Editorial, *Beware of Immigration Problems*, USA TODAY, July 14, 1993, at 12A.

Americans are not alone. There has been a worldwide trend towards enacting anti-immigration laws and tightening borders so as to prevent immigration. Most notably, France enacted anti-immigration laws in 1993 that allow police to conduct random identity checks of individuals and gave mayors the right to block marriages between foreigners and French citizens. *See* William Drozdiak, *France's Tightened Immigration Laws Under Fire*, WASH. POST, Aug. 8, 1993, at A28. England also passed similar laws in 1993. *See* Heather Mills,

In the *Mojica* opinion, Judge Weinstein contends that lawful permanent residents should be afforded substantive constitutional rights as dictated by domestic and international law. Unfortunately, however, the *Mojica* court's proposal comes at a time in history when the United States is tightening its borders to prevent threats that non-citizens pose to its security.[151] In this climate, it is highly unlikely that Americans will be receptive to such a radical change of course in immigration policy—even for lawful permanent residents.[152]

CONCLUSION

Mojica v. Reno stands alone in holding that section 2241 habeas corpus power remains unaffected after the enactment of the 1996 immigration laws. Despite Congress' expressed intent to eliminate immigrants' access to judicial review, *Mojica* adamantly refused to

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Curbs on Asylum Seekers 'Already Too Tight,' THE INDEPENDENT (London), Oct. 26, 1995, at 2. The Asylum and Immigration Act of 1993 which dramatically cut the number of refugees seeking asylum. *Id.* Proposals were also raised in 1995 with the goal of "effectively wiping out asylum" in Great Britain. *Id.* Most recently, Swiss voters narrowly rejected a referendum which would have disqualified all illegal immigrants from refugee status and given the government control over any wages earned by asylum-seekers. *See* Associated Press, *Swiss Voters Narrowly Reject Adding Anti-Immigration Clause to Constitution,* BALTIMORE SUN, Dec. 2, 1996, at 10A.

[151] The legislative intent in passing the AEDPA and the IIRIRA was to protect American citizens from the threat of foreign terrorists. *See supra* note 1 (describing the recent terrorist acts committed on American soil).

[152] In the 1996 law journal note, *The Rhetoric of Exclusion: The Art of Drawing A Line Between Aliens and Citizens*, Kiyoko Kamio Knapp wrote:

> The public still perceives the growing presence of aliens as a threat . . . . A Business Week/Harris poll suggests resentment against immigrants is growing among the general public: sixty-eight percent of respondents said that the influx of immigrants poses a threat to America. One can observe, across the political spectrum, hostility toward the rapidly growing population of foreign nationals. To conservatives, the emergence of cultural pluralism will delete "American" public values. Liberals, on the other hand, fear tyrannical "tribal" loyalties.

Knapp, *supra* note 8, at 414.

close the federal courthouse doors to them. Instead, *Mojica* strictly implemented the clear statement rule handed down by the Supreme Court, thereby, declining to go beyond the plain meaning of the AEDPA and the IIRIRA and into analysis rooted in Congressional politics.[153]

Accompanied by its passionate discussion of the history of American immigration and international human rights, this decision may yet persuade other jurisdictions to broadly interpret section 2241 and to follow its lead in moving immigration law beyond the crossroads and into a future governed solely by constitutional law.

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[153] *See supra* note 1 (explaining the incidents of terrorism that provoked the enactment of AEDPA and IIRIRA). *See also supra* note 150 (describing anti-immigration sentiments).