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## The 1996 Immigration Legislation and the Assault on the Courts

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# THE 1996 IMMIGRATION LEGISLATION AND THE ASSAULT ON THE COURTS\*

*Lee Gelernt†*

## INTRODUCTION

In 1996, Congress passed, and President Clinton signed, two pieces of legislation that made sweeping changes to the Nation's immigration laws. The first law was the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted on April 24, 1996.<sup>1</sup> The second law, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), was enacted five months later, on September 30, 1996.<sup>2</sup>

The two Acts contain a number of provisions that have greatly restricted the substantive rights of immigrants. The two Acts also include a variety of procedural revisions that make it substantially more difficult for immigrants to enforce those rights that do remain in the aftermath of the 1996 legislation. Among the procedural revisions are a number of "court-stripping" provisions that restrict the power of the judicial branch to review certain immigration decisions of the Attorney General. It is these court-stripping provisions on

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† Senior Staff Counsel, ACLU Immigrants' Rights Project. This Essay is a revised version of a lecture originally given on April 5, 2001, as part of Brooklyn Law School's annual Edward V. Sparer Public Interest Law Fellowship Symposium. At the time of the lecture, the ACLU was preparing its briefs in two immigration court-stripping cases then pending before the Supreme Court, *INS v. St. Cyr* and *Calcano-Martinez v. INS*. Those cases subsequently were decided in June 2001. A postscript has been added addressing the decisions.

<sup>1</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996).

<sup>2</sup> Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 (1996).

which I want to focus, and that, in my view, are the most troubling provisions in the 1996 laws.

The 1996 court-stripping provisions not only have the potential to cause enormous hardship to immigrants and their families, but also raise serious and delicate constitutional issues, issues that have potentially far-reaching implications for the Judiciary's role in our tripartite constitutional system. Indeed, if the Justice Department's interpretation of the 1996 court-stripping provisions is upheld, it will be the first time in the peacetime history of this country in which a resident immigrant could be arrested, detained, and deported based solely on the Executive branch's unilateral assurance that it has complied with the law, without any court, at any time, reviewing whether the deportation order is fully consistent with the law. What is at stake, therefore, is the prospect of a radical departure from 200 years of unbroken constitutional practice and tradition in this country.

Rather than focusing too heavily on the pure legal issues raised by the 1996 court-stripping provisions, I would like to focus primarily on the practical consequences of these provisions. First, I want to give a quick sense of who is affected by the 1996 laws. Next, I want to provide an overview of the litigation brought by the ACLU Immigrants' Rights Project to challenge the court-stripping provisions, litigation that has now reached the United States Supreme Court in two companion cases, *INS v. St. Cyr*<sup>3</sup> and *Calcano-Martinez v. INS*.<sup>4</sup> Finally, I will briefly discuss some of the strategic thinking that has gone into litigating the 1996 court-stripping provisions.

## I. THE COURT-STRIPPING PROVISIONS

The 1996 immigration legislation contains a number of different provisions designed to restrict the power of the courts to review the Executive branch's immigration policies and decisions. I will focus on only one of these court-stripping

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<sup>3</sup> 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001).

<sup>4</sup> 232 F.2d 328 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001).

provisions—the one most heavily litigated to date and currently before the Supreme Court in the *St. Cyr* and *Calcano-Martinez* cases.

The provision states that “no court shall have jurisdiction to review” any deportation order that is based on one of a specified list of criminal offenses.<sup>5</sup> The wording of the provision raises a number of subtle interpretive questions, but for the present discussion I want to put most of those issues to one side. Instead, I will focus on two overriding points regarding the practical breadth of the provision.

First, the provision does not apply only to individuals who are in the country without documentation, so-called “illegal” immigrants. Rather, it applies to all non-citizens who have been convicted of one of the listed criminal offenses and are now subject to deportation on the basis of that conviction. It applies, therefore, to individuals who entered the country legally and who have been granted lawful permanent resident status, a status one step removed from U.S. citizenship. In street parlance, it applies to “green card” holders.

Included in this group are individuals who have lawfully resided in this country for years and who have contributed greatly to the United States and their local communities, not just through their labor and taxes, but also in myriad other ways, including service in the U.S. military. They are individuals who may have entered the country when they were small children, who have lived here continuously for virtually their entire lives, and who may now lack any genuine connection to their country of origin, including any familiarity with the language or customs of that country. These are also individuals who very likely have close family members—including spouses and children—living in the United States as either U.S. citizens or lawful permanent residents. In fact, one of the named parties before the Supreme Court in *Calcano-Martinez* has four children with U.S. citizenship and has lived in this country continuously since arriving thirty years ago at the age of three.

The second point I want to stress about the breadth of the court-stripping provision concerns the types of crimes to which it applies. The provision is not limited to the most

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<sup>5</sup> 8 U.S.C. § 1252(a)(2)(C) (2001).

serious criminal offenses. In fact, just the opposite is true. The provision also restricts access to the courts for lawful residents who have committed even minor crimes. As one court noted, the court-stripping provision would apply to such crimes as "turnstile jumping" in the subway<sup>6</sup>

Moreover, not only does the court-stripping provision apply to minor crimes, but it also applies regardless of whether the individual received *any* prison time. Individuals who committed offenses that were viewed as too minor to warrant a day of jail time are thus subject to the court-stripping provision. Equally significant, the court-stripping provision is triggered even when the offense was committed years or even decades ago, perhaps when the individual was only eighteen or nineteen years old.

In short, the 1996 court-stripping provisions sweep broadly. They affect individuals who have been granted lawful status in this country, who have committed very minor crimes, and who have literally spent their entire lives here. Thus, however one may seek to justify the policy decision to pass the 1996 court-stripping provisions, it cannot be on the ground that the provisions were narrowly drafted to target only individuals who lack close ties to this country. Nor can the justification be that the provision affects only those individuals who have committed the most serious offenses.

I am not suggesting that the United States, as a sovereign nation, lacks the legal authority to deport lawful residents who have committed minor criminal offenses. Nor is my focus here on whether the United States should, as a matter of national policy or basic fairness, deport such individuals. That is an important discussion, but it is one for another time. My aim here is simply to ensure that there are no misconceptions about the sweep of the 1996 court-stripping provisions.

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<sup>6</sup> *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997) (discussing AEDPA § 440(d), which applies to same set of crimes as AEDPA § 440(a), the court-stripping provision), *aff'd sub nom.*, *Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom.*, *Reno v. Navas*, 526 U.S. 1004 (1999). The court-stripping provisions also would apply to such minor crimes as misdemeanor theft. *See, e.g.*, *United States v. Pacheco*, 225 F.3d 148, 153 (2d Cir. 2000) (holding that larceny constitutes an "aggravated felony").

Court stripping is serious business and has been rightly treated as such since the founding of this Nation. That is particularly true where, as here, the Justice Department is seeking to depart from 200 years of constitutional tradition and to diminish the judiciary's role to an extent never before seen in the history of this country. Given the seriousness of the endeavor, any discussion regarding the wisdom of the 1996 court-stripping provisions must be based on a clear sense of precisely who will be affected.

Let me turn then to the litigation over the court-stripping provisions. As I hope to show, although court-stripping issues may often have an abstract quality about them, the effect on long-time legal residents will be both concrete and quite devastating if the government's position were to prevail.

## II. THE COURT-STRIPPING LITIGATION

The ACLU Immigrants' Rights Project has been challenging the court-stripping provisions in every circuit in the country for the past five years, beginning with the passage of AEDPA in April 1996. It would be next to impossible for me to describe all the litigation that has taken place over the past five years, given its national scope and the variety of contexts in which the court-stripping issues have played out. Let me focus, therefore, on one specific context in which the court-stripping litigation has arisen most frequently. That context concerns the new "automatic deportation" provisions that were enacted in 1996 along with the court-stripping provisions. It is in this context in which the Supreme Court will consider the court-stripping issue this Term in *St. Cyr* and *Calcano-Martinez*.

Prior to 1996, non-citizens who committed criminal offenses *could* be deported on the basis of their criminal conviction. The critical point, however, was that deportation was not mandatory except in the most serious cases, generally cases where the individual served at least five years of prison time for an "aggravated felony" offense. In all other cases, an administrative immigration judge could grant lawful permanent residents who committed criminal offenses a

"waiver" of deportation, thereby allowing them to remain in the country and retain their lawful status. In other words, deportation was *not* automatic.

To qualify for consideration for a waiver, individuals had to satisfy two principal criteria set forth by Congress: they had to be lawful permanent residents and they must have resided continuously in the United States for at least seven years.<sup>7</sup> Individuals who met these statutory eligibility criteria were entitled to apply for a waiver of deportation and to have their applications adjudicated by immigration judges. An immigration judge then decided, in the exercise of discretion, whether to grant the waiver based on a balancing of various factors, such as the seriousness of the crime, demonstrated rehabilitation, the number of years the individual has lived in the United States, the individual's ties to the United States (including the presence of family members living lawfully in the United States), employment history, community service, military service, and any other factor that might appropriately be considered in assessing whether the individual deserved to remain in the country.<sup>8</sup>

In the past, the waiver was granted in approximately fifty percent of the cases.<sup>9</sup> The fact that the waiver was granted in roughly one out of every two cases is not surprising. To begin with, the waiver is available only to lawful permanent residents with at least seven years residence. Moreover, the immigration laws, even before 1996, cast an exceedingly wide net and thus subject individuals with even minor offenses to deportation. The power to grant a waiver to long-time lawful residents gave immigration judges the ability to tailor the law to individual circumstances and to avoid unnecessarily harsh consequences. The waiver was thus an indispensable feature of the deportation process, providing some assurance that the system would operate fairly and humanely, and would not

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<sup>7</sup> The immigration laws contain several different forms of "waivers." The waiver discussed above and the one at issue in the court-stripping cases before the Supreme Court is commonly referred to as a "212(c)" waiver. See Immigration and Naturalization Act, 8 U.S.C. § 1182(c) (1994) (repealed by IIRIRA).

<sup>8</sup> See, e.g., *Matter of Marin*, 16 I. & N. Dec. 581, 585, 1978 WL 36472 (1978) (listing factors).

<sup>9</sup> See *Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998) (citing Justice Department statistics), *cert. denied*, 526 U.S. 1004 (1999).

result in the deportation of long-time lawful permanent residents who have committed only minor crimes, who have substantial ties to this country, and for whom the United States is the only country they (and their children) may have ever known.

In 1996, the situation changed dramatically. Congress eliminated the possibility of waivers in almost all cases and enacted substantive provisions mandating that deportation would now be *automatic* in virtually all cases where the individual had been convicted of a criminal offense, even for those who committed only minor crimes and had not served a day of jail time. These new automatic deportation provisions would have had drastic consequences if the Attorney General had sought to apply them only prospectively. But the Attorney General took the position that the new provisions should be applied in all cases—prospectively and retroactively—even if the crime had been committed decades ago.

Immigrants with pre-1996 crimes who were denied the right to apply for a waiver immediately went to court and argued that the Attorney General had misinterpreted the 1996 laws by applying the new automatic deportation provisions retroactively to cases involving pre-1996 events. The Justice Department defended the Attorney General's decision to apply the new provisions retroactively, arguing that the Attorney General had correctly interpreted the new deportation provisions to apply both prospectively and retroactively. More fundamentally, however, the Justice Department offered a threshold jurisdictional defense. It argued that the 1996 court-stripping provisions eliminated the power of the courts to review the Attorney General's decision to apply the new automatic deportation provisions retroactively.

According to the Justice Department, it now had the unilateral and unreviewable power to arrest, physically detain and deport long-time lawful permanent residents based solely on the Attorney General's interpretation of the new automatic deportation laws, and no court, including the U.S. Supreme Court, could review the legality of the deportation, even by habeas corpus. Thus, even if it were manifestly clear to a federal court that Congress had never intended to apply these automatic deportation provisions retroactively, the Justice Department's view is that the courts are powerless to correct



the error and must stand by while long-time lawful residents are detained and deported based on a mistaken interpretation of the law

If the government's jurisdictional position were to prevail, it will mean that the Justice Department would effectively serve the dual role of prosecutor and judge. The Attorney General would decide which immigrants to place into deportation proceedings, would then prosecute their cases, and if any dispute arose during that prosecution as to the meaning of the automatic deportation laws, would unilaterally resolve those disputes. The prospect of an executive agency acting in this dual role as prosecutor and judge is troubling under any circumstances. It is particularly unsettling where an individual's liberty is at stake and the Attorney General is under enormous political pressure to enforce the Nation's immigration laws. As the Supreme Court has made clear, court-stripping provisions will be viewed with less disfavor in areas that are "relatively immune from political pressures."<sup>10</sup> That is plainly not the case in the politically and emotionally charged area of immigration.

To be clear, the ACLU has never argued, and is not arguing before the Supreme Court, that any immigrant has a right to be granted a waiver. The ACLU is arguing only that the lawful residents in these cases have a right to *apply* for a waiver and that Congress never intended to eliminate this right retroactively. If we prevail, it will not mean that individuals are entitled to remain in the country, but only that these individuals will have an opportunity to appear before an immigration judge in the hope of persuading the judge that they deserve continued residence in the United States. If, on the other hand, the government's position prevails, then potentially thousands of legal immigrants will be subject to mandatory and automatic deportation, with all the hardship that such deportations entail.

The lower federal courts have overwhelmingly rejected the government's arguments and have held that the 1996 court-stripping provisions do not leave the courts powerless to review the Attorney General decision to apply the new automatic deportation provisions retroactively. Specifically, the

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<sup>10</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986).

courts of appeals have concluded, as a matter of statutory construction, that although the 1996 court-stripping provisions eliminated most forms of judicial review, the provisions did not eliminate habeas corpus review—the historic means of testing whether individuals have been unlawfully deprived of their liberty. Importantly, the courts have also stressed that the court-stripping provisions would have raised serious constitutional concerns had they eliminated *all* avenues of review, including habeas corpus, over the Attorney General's interpretation of a federal law.<sup>11</sup>

The courts of appeals have also overwhelmingly rejected the government's position on the merits and have held that the Attorney General erred in finding that the new automatic deportation provisions are fully retroactive. Although the lower courts have arrived at differing conclusions about whether the new automatic deportation provisions might be applied in a

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<sup>11</sup> The circuit decisions fall into two basic categories: those involving AEDPA's and/or IIRIRA's "transitional" jurisdictional rules, and those involving IIRIRA's permanent provisions, which generally apply to cases in which administrative immigration proceedings commenced on or after April 1, 1997. See *Henderson*, 157 F.3d at 117-18 n.7 (noting effective dates for the three sets of provisions), *cert denied sub nom.*, *Reno v. Navas*, 526 U.S. 1004 (1999). The three sets of provisions present the same basic issues. The cases before the Supreme Court, *St. Cyr* and *Calcano-Martinez*, fall under IIRIRA's permanent provisions; the Court denied certiorari in the cases governed by AEDPA's and/or IIRIRA's transitional rules.

Cases under IIRIRA's permanent rules finding habeas jurisdiction: *Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 2590 (2001); *I.N.S. v. St. Cyr*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001); *Calcano-Martinez v. INS*, 232 F.3d 328 (2d Cir. 2000), *aff'd*, 533 U.S. 348 (2001); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), *cert. denied sub nom.*, *Rodriguez v. INS*, 121 S. Ct. 2590 (2001); *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000). *But see* *Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), *vacated*, 121 S. Ct. 2585 (2001); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000).

Cases under AEDPA's and IIRIRA's transitional provisions finding habeas jurisdiction include: *Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert denied sub nom.*, *Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). See also *Lee v. Reno*, 15 F. Supp. 2d 26 (D.C.D.C. 1998). *But see* *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000) (finding no habeas jurisdiction, but reserving question whether Attorney General's decision may be reviewed by petition for review in the court of appeals).

partially retroactive fashion, no circuit has accepted the Attorney General's position that these new provisions are fully retroactive and apply to all cases.<sup>12</sup>

Of course, in the absence of the threshold finding that the courts retained jurisdiction to review the Attorney General's legal rulings, none of these retroactivity rulings would have been possible. Long-time legal residents would have been deported automatically and the courts would have been powerless to stop the deportations, despite the fact that the courts have now concluded that Congress never authorized full retroactive application of the new automatic deportation provisions.

### III. THE ACLU'S LITIGATION STRATEGY

Finally, I have been asked to discuss briefly some of the strategic thinking that has gone into litigating these court-stripping cases. Needless to say, the ACLU has had to make countless tactical and strategic decisions over the past five years of litigation. As an initial matter, we obviously had to develop and choose among legal arguments to present to the courts. But presenting the pure legal arguments was only part of our task. We also wanted to tell the courts the "story" of our court-stripping cases: what the cases are about in practical terms, why the issues are important, what is fundamentally at stake, and what the consequences are for the affected individuals if the court rules against them. What I want to discuss here concerns how we ultimately chose to characterize

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<sup>12</sup> Cases under IIRIRA's permanent rules include *I.N.S. v. St. Cyr*, 229 F.3d 406 (2d Cir. 2000), *aff'd*, 533 U.S. 289 (2001); *Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000).

Cases decided under AEDPA's and IIRIRA's transitional provisions sustaining a retroactivity challenge: *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom.*, *Reno v. Navas*, 526 U.S. 1004 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999), *cert. denied*, 529 U.S. 1041 (2000); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). *But see* *DeSousa v. Reno*, 190 F.3d 175 (3d Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998), *cert. denied*, 528 U.S. 1153 (2000).

the issues in our court-stripping cases, i.e., what story we ultimately chose to tell the courts.

Deciding how to frame one's case so that it appears compelling in human terms can be a difficult task, often considerably more difficult than developing the strictly legal arguments. In the court-stripping cases, at least three factors made the task even more difficult. First, for reasons I will discuss, we were not able to control the flow of the litigation. Second, as I have already suggested, court-stripping issues can have a technical, abstract feel to them, even for federal judges accustomed to dealing with such issues, and thus, do not always lend themselves to compelling storytelling. Third, our cases had several potential stories worth telling. That may seem like a luxury rather than a problem, but in the end the prospect of choosing the wrong story, or choosing to tell too many stories, may have been what caused us the greatest concern.

We ultimately chose to tell the following three stories: (1) the life stories of the individual petitioners in the cases directly before the court; (2) the broader story of how the 1996 legislation affected the immigrant community as a whole; and (3) the story of judicial review in the United States and the institutional role our courts have historically played in protecting the rights of vulnerable groups, including immigrants.

The challenge for us was to decide how best to tell each story and to convey to the courts what in our view was most fundamentally troubling about the 1996 court-stripping provisions. I cannot recreate all of our thinking, but let me try and give you a quick sense of how we viewed each of the three stories.

The first and narrowest story is the story of the individual immigrant petitioners: What were the petitioners' lives like before the 1996 legislation, what has happened to them as a result of the legislation, and most importantly, what will happen to them in the future if the courts rule in favor of the government? The story of the individual petitioners obviously needed to be told, as it almost always does in every case. The question, then, was not whether we were going to tell this story, but the prominence to give it.

Ultimately, we chose not to focus too heavily on the specific facts of the individual petitioners. As an initial matter, it seemed to us that the court-stripping issues raised concerns that went well beyond the facts of any given individual and that an inordinate amount of attention on individual petitioners potentially could deflect the court from these broader issues. We therefore believed that a broader story had to be told. The best way to tell a broad story in a given case is, of course, through concrete, specific examples, and generally, those examples would and should be based on the circumstances of the individual petitioners who are actually before the court. The problem for us, however, was that we did not control the flow of the litigation, and thus, could not be certain that the test cases that initially reached the courts would involve representative petitioners who would illustrate the larger, fundamental concerns at stake.

The reason we could not control the flow of litigation was principally because of the nature of immigration law, which put us in a purely defensive litigating posture. Immigrants receive individual deportation hearings before immigration judges, whose decisions are then appealable to the Board of Immigration Appeals. Any judicial review of the final administrative decision generally would be through an appeal on behalf of the individual. At the time the 1996 laws were passed, there were probably hundreds of individual immigration cases pending in the federal courts. When the 1996 legislation went into effect, the Justice Department invoked the new court-stripping provisions in many, if not most, of these cases, making each one a potential test case. We had to react defensively, find the cases that happened to be moving the quickest through the federal courts, and litigate the court-stripping issue in those cases.

Because the Attorney General was a party in each of the cases, the Justice Department was at least aware of each case. But even the Justice Department could not completely control the flow of cases. For the most part, the order in which cases arose was out of anyone's control and depended simply on where in the pipeline an individual case happened to fall when the 1996 legislation passed. Given the possibility that the cases that happened to reach the courts first might not involve representative petitioners whose stories would illustrate the

larger legal and practical issues raised by court-stripping provisions, we decided against devising an entire national litigation strategy that would significantly depend on the facts of a particular case. We concluded, therefore, that we had to tell two broader stories in addition to whatever story we were able to tell about the individual petitioners in each case.

The first of these broader stories concerned the effect the new laws would have on the immigrant community as a whole. Part of this story was simply to describe the broad sweep of the court-stripping provisions and to explain who in the immigrant community potentially would be affected by these provisions. Thus, as I have previously mentioned, we had to make certain that the courts understood that the provisions covered long-time lawful permanent residents who may have committed only minor crimes decades ago and who have significant ties to this country. But we also had to do more than simply describe the breadth of the provisions. We had to move from the abstract to the concrete and specific, and to convey as best we could the immense hardship that would be imposed on immigrant communities throughout the country if the government prevailed in this litigation. Our challenge was to ensure that the human side of what was occurring was not obscured by a blur of aggregate statistics and overly-generalized images about the immigrant community.

Toward that end, what we have sought to convey to the courts is that because of the 1996 laws there are now families in every immigrant community throughout the United States sitting down at kitchen tables having profound conversations about their futures. The individuals affected by the new laws are explaining to their spouses and children that they may face deportation for something they did many years ago and that, as a consequence, their families may have to make a choice. One choice for these families is to move together to a new country and remain as a family, even if it means moving to a country that their spouses and children have never visited and that these individuals left decades ago; indeed, the children and spouses may be U.S. citizens who have lived here their entire lives and for whom moving to a small, possibly impoverished, country in Eastern Europe, Asia, Central America, Africa, or the Middle East was previously unimaginable. Alternatively, the family can choose to do what

immigrant families from every ethnic group in every generation have done for hundreds of years. They can allow their children to remain in the United States, either with the remaining spouse or with other family members, in the hope that the children will have the opportunity for a better life—even if it means that they will not be there to watch their children grow up.

Children and spouses will inevitably ask why after all this time deportation is necessary. The answer will be that the Justice Department has decided that deportation is now automatic and mandatory for individuals who have committed certain crimes, regardless of how long ago the crime was committed, how minor the crime may have been, or how much their spouses and children may depend upon them. This, in turn, will provoke the next logical question: If you think the decision is wrong, why can't you "go before a judge" and explain the situation? That this last question is routinely asked should not be surprising. For immigrants, it is the very right to go before a judge that, in their minds, is one of the features that critically separates the United States from other countries that lack the same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago—that "[t]he history of American freedom is, in no small measure, the history of procedure."<sup>13</sup>

This leads me to the final story that we have sought to tell the courts—the history of judicial review in the United States, both generally and with respect specifically to immigrants. The story is a familiar one. The Framers believed in an independent judiciary that would not fear reprisal from political majorities. Over the years, the judiciary has been criticized from all sides. Some believe the courts have moved too slowly to enforce the rights of unpopular groups, while others have argued that the judiciary has overstepped its bounds. By and large, however, the Framers' vision has proved extraordinary. No matter how politically unpopular or vulnerable any individual or group may be in this country, they have been able to enforce their rights because our

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<sup>13</sup> *Malinski v. New York*, 324 U.S. 401, 414 (1945).

constitutional system has allowed the courts to serve their vital and constitutionally-assigned checking role over the two political branches.

We have not attempted to tell every aspect of our country's judicial review story, nor could we do so given its long and complicated history. Instead, we have focused largely on providing the courts with some measure of historical perspective to make them aware of the unprecedented nature of the government's position.

In particular, we have sought to provide the courts with an historical overview of immigration law and policy in this country. That history reveals a country that has welcomed immigrants and celebrated their contributions like no other nation in the world. But it also reveals a country with a cyclical hostility toward newcomers that has resulted in bitter, vicious bigotry toward *every* immigrant group when they first arrived in the United States. And with this hostility has often come restrictive new laws, including court-stripping laws designed to insulate the immigration process from judicial scrutiny. Yet even during the most virulent periods of anti-immigrant hostility, an unflinching judiciary rejected *every* attempt to short-circuit the system and abandon the principle of judicial review in response to ephemeral popular passions or perceived short-term gains.

Thus, as I have already emphasized, if the government's interpretation of the 1996 court-stripping provisions were to prevail, it would be the first time in this country's history that resident immigrants could be taken into custody, deprived of their liberty, and then deported without having a full opportunity to test the legality of their custody and deportation in court. A departure of that magnitude from our constitutional traditions should give us all pause.

Nor is the historical significance limited to the immigration area. There simply has never been a time in this country's history during which any individual, citizen or immigrant, could be deprived of his or her liberty without access to the courts to test the legality of the government's actions. At a minimum, the Great Writ of habeas corpus, inherited from England and enshrined in our Constitution, has always been available during peacetime.



Of course, none of these stories matters if the law is clear-cut, but rarely is that the situation in cases that find their way to the Supreme Court. More often than not, there will be some degree of ambiguity in the relevant legal texts. It is in this context in which the stories we have tried to tell will hopefully make some difference, not by appealing to the individual policy preferences and sympathies of the judges and Justices, but by helping to illuminate the values underlying the governing legal texts and by showing what Congress may have been thinking when it enacted the 1996 laws.

Thus, for example, the fact that the government's jurisdictional position would create an unprecedented situation in American history may militate strongly in favor of the Court requiring express and unmistakable evidence that Congress intended to depart so radically from our constitutional traditions. Similarly, the fact that the government's interpretation of the 1996 automatic deportation laws would cause such enormous hardship to the immigrant community might lead the Court to assume that Congress did not intend such a result in the absence of clear and unambiguous evidence of that intent in the text of the new law. In the end, however, it remains to be seen whether the Supreme Court will find the 1996 laws ambiguous in any respect, and if so, whether any of the themes that I have discussed will influence the Court's view of how that ambiguity should be resolved.

## CONCLUSION

In his celebrated dialogue on the federal courts, Professor Henry Hart suggested that the courts must remain open for any individual, citizen or immigrant, who is threatened with a loss of liberty, and that any peacetime law that barred access to the courts in such a situation would be unconstitutional. In his view, however, the issue was largely an academic one because he did not envision a time when Congress would ever enact such a law. Presciently, though, he observed that if the issue ever did arise, immigrants might

provide the constitutional testing crucible given their political vulnerability and their already-diminished constitutional status.<sup>14</sup>

Now, after more than 200 years of our Nation's constitutional history, the government is arguing that Congress had finally taken this extraordinary step. The stakes are thus high. We are hopeful that the Supreme Court will reject the government's position and reaffirm the bedrock principle that no individual may be deprived of his or her liberty without access to the courts. That would be a victory not just for immigrants and their families, but also for the Nation's commitment to maintaining a constitutional democracy based on the rule of law—a commitment that has now withstood challenge for more than two centuries.

## POSTSCRIPT

On June 25, 2001, the Supreme Court issued its decisions in *St. Cyr*<sup>15</sup> and *Calcano-Martinez*.<sup>16</sup> The Court ruled, five to four, against the government on both the court-stripping and retroactivity issues.

The jurisdictional question before the Court was whether the courts have jurisdiction to review the Attorney General's decision to apply the new automatic deportation provisions retroactively. That question, in turn, raised two distinct issues. The first concerned the proper mechanism and forum to challenge the Attorney General's retroactivity decision—a district court habeas corpus action under the general federal habeas statute, 28 U.S.C. § 2241,<sup>17</sup> or a “petition for review” filed in the court of appeals directly from the Board of Immigration Appeals (the primary means since 1961 of challenging a deportation order). On this issue, the Court concluded that IIRIRA's jurisdictional provisions barred the courts of appeals from reviewing the Attorney General's

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<sup>14</sup> Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396-98 (1953). See also *id.* at 1388-91.

<sup>15</sup> 533 U.S. 289, 121 S. Ct. 2271 (2001).

<sup>16</sup> 533 U.S. 348, 121 S. Ct. 2268 (2001).

<sup>17</sup> 28 U.S.C. § 2241 (2001).

retroactivity decision by means of a petition for review, and that insofar as review of the Attorney General's decision remained available, it must be sought in a district court habeas action.<sup>18</sup> The Court then squarely rejected the government's position that IIRIRA's jurisdictional provisions had eliminated access to § 2241 and stressed that, under its prior precedents, § 2241 habeas jurisdiction could be repealed only by an express and unambiguous directive, a directive the Court found lacking in the 1996 legislation.<sup>19</sup> Accordingly, the Court held in *St. Cyr* that the immigrant in that case had properly sought review in a district court habeas action.<sup>20</sup> The Court also issued a short, separate opinion in *Calcano-Martinez* dismissing for lack of jurisdiction the petitions for review filed by the three immigrants in that case.<sup>21</sup>

The second jurisdictional issue confronted by the Court was whether the scope of review in a § 2241 habeas action encompassed a challenge to the Attorney General's decision to apply the new automatic deportation provisions retroactively, *i.e.*, a statutory (non-constitutional) claim challenging whether *St. Cyr* was eligible to apply for a discretionary waiver of deportation. The Court did not dispute that the 1996 jurisdictional provisions had restricted federal jurisdiction and acknowledged that immigrants deportable on the basis of certain criminal offenses (those enumerated in 8 U.S.C. § 1252(a)(2)(C)) were likely no longer entitled to the same type of broad judicial review that previously had been available under the Immigration and Nationality Act.<sup>22</sup> But the Court held that *St. Cyr*'s statutory challenge was nonetheless reviewable.

The Court noted that although the ultimate grant or denial of a waiver was within the discretion of the Attorney General, *St. Cyr* was not challenging the Attorney General's exercise of discretion, but rather, whether he was *statutorily* eligible to apply for the waiver. Thus, the Court stressed that *St. Cyr*'s challenge to the Attorney General's retroactivity decision raised a pure question of law regarding the proper

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<sup>18</sup> *Calcano-Martinez*, 121 S. Ct. at 2269-70; *St. Cyr*, 121 S. Ct. at 2283-87.

<sup>19</sup> *St. Cyr*, 121 S. Ct. at 2278-80, 2283-87.

<sup>20</sup> *Id.* at 2283-87.

<sup>21</sup> *Calcano-Martinez*, 121 S. Ct. at 2269 (stating that petitioners must proceed with habeas petitions if they wish to obtain relief).

<sup>22</sup> *St. Cyr*, 121 S. Ct. at 2283-87.

interpretation of a federal statute and that review of non-constitutional questions of law were authorized by the plain terms of § 2241.<sup>23</sup> The Court also undertook a comprehensive historical analysis of habeas precedent and found that questions of law historically had been reviewable in both the immigration and non-immigration areas. As the Court noted, habeas jurisdiction under the general federal habeas corpus statute has been available since 1789 and has routinely been available for non-citizens to challenge deportation and exclusion orders, even during those periods when Congress had eliminated all review except that required by the Constitution.<sup>24</sup> Finally, and significantly, the Court emphasized that the absence of review over a pure question of law concerning the proper interpretation of a federal statute would raise substantial constitutional questions and that these constitutional concerns strongly militated in favor of construing the 1996 legislation to permit review.<sup>25</sup>

Having found habeas jurisdiction in *St. Cyr*'s case, the Court turned to the merits. The Court noted that the waiver provision under which *St. Cyr* had sought relief from deportation<sup>26</sup> had been repealed by IIRIRA as of April 1, 1997 (IIRIRA's general effective date)<sup>27</sup> and that *St. Cyr* had been placed into administrative immigration proceedings after that date.<sup>28</sup> The Court further noted that the new waiver provisions created by IIRIRA applied to an extremely narrow class of immigrants<sup>29</sup> and that *St. Cyr* was not eligible to apply for a

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<sup>23</sup> *Id.* at 2275-78, 2283-84.

<sup>24</sup> *Id.* at 2279-84.

<sup>25</sup> *Id.* at 2279-82, 2287. That jurisdiction over deportation decisions need not be as broad as that authorized by the Administrative Procedure Act ("APA"), and that it can be limited to the comparatively narrower scope of review available in habeas corpus, is unremarkable and consistent with historical precedent. Congress began regulating immigration in 1875. In 1891, Congress began passing a series of "finality" provisions which had the effect of eliminating all review except "insofar as required by the Constitution." *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). These finality provisions governed for more than sixty years, until passage of the 1952 Immigration and Nationality Act. During this sixty year period, the Court consistently affirmed an alien's right to habeas corpus review, but also rejected attempts by aliens to obtain broader review, such as that authorized by the APA. *Heikkila*, 345 U.S. at 234-35; *St. Cyr*, 121 S. Ct. at 2281-84.

<sup>26</sup> 8 U.S.C. § 1182(c) (1997) (repealed).

<sup>27</sup> *St. Cyr*, 121 S. Ct. at 2287. See also *id.* at 2275-78.

<sup>28</sup> *Id.* at 2275, 2287.

<sup>29</sup> *Id.* at 2277.

waiver under these new waiver provisions.<sup>30</sup> But the Court rejected the Attorney General's position that relief under the old waiver provision was no longer available for any individual placed into immigration proceedings after April 1, 1997. The Court held that the repeal of the old waiver provisions did not apply retroactively to all cases commenced after April 1, 1997, and that *St. Cyr*, who had pled guilty to his deportable criminal offense prior to passage of AEDPA and IIRIRA, remained eligible to apply for a waiver of deportation under the pre-1996 provision.<sup>31</sup>

In holding that *St. Cyr* remained eligible to apply for a waiver under the pre-1996 laws, the Court applied the familiar two-step retroactivity test.<sup>32</sup> Under this test, the Court stressed that application of the new waiver laws to *St. Cyr*'s case would have a retroactive effect and thus could not be applied to him in the absence of an express and unambiguous directive in the statute—a directive the Court found lacking.<sup>33</sup> Among other factors, the Court noted that *St. Cyr*'s pre-AEDPA/IIRIRA conviction had been pursuant to a plea agreement and that immigrants may have entered into pre-Act pleas on the understanding that pleading guilty would not subject them to automatic deportation.<sup>34</sup>

Because *St. Cyr*'s pre-AEDPA/IIRIRA conviction had been pursuant to a plea agreement, the Court had no occasion to decide any of the other possible factual permutations on the retroactivity issue, such as whether immigrants could seek relief under the old waiver provisions if their pre-AEDPA/IIRIRA convictions had not been pursuant to a plea agreement, or whether relief under the old waiver provisions remained available for immigrants whose criminal *conduct*, but not convictions, occurred before passage of AEDPA and IIRIRA. Importantly, however, the Court provided significant guidance on these remaining issues. In particular, the Court rejected the government's attempt to place immigration in a separate category for purposes of retroactivity analysis and

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<sup>30</sup> *Id.*

<sup>31</sup> *St. Cyr*, 121 S. Ct. at 2293.

<sup>32</sup> See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *St. Cyr*, 121 S. Ct. at 2287-88, 2290 (setting forth the two-step test).

<sup>33</sup> *St. Cyr*, 121 S. Ct. at 2287-93.

<sup>34</sup> *Id.* at 2291-93.

made clear that the Court's general retroactivity jurisprudence applies with equal force to immigration legislation.<sup>35</sup> Thus, any further government attempts to apply the new waiver laws retroactively to cases involving pre-AEDPA/IRIRA events must be analyzed in light of the same strong presumption against retroactive legislation that governs in other areas of the law

The Court's decisions prompted separate dissents from Justices Scalia and O'Connor. Justice Scalia, joined by Chief Justice Rhenquist and Justice Thomas, dissented on the jurisdictional issue, without reaching the merits of the Attorney General's retroactivity decision.<sup>36</sup> Justice Scalia argued that the 1996 legislation had eliminated all means of reviewing the Attorney General's retroactivity decision, including a district court habeas corpus action under 28 U.S.C. § 2241,<sup>37</sup> and that the complete preclusion of review was constitutional under the Suspension Clause for two principal reasons.<sup>38</sup>

As an initial matter, Justice Scalia argued broadly that the 1996 legislation's restrictions on judicial review did not violate the Suspension Clause because Congress in the 1996 Acts "has not temporarily withheld operation of the writ, but has permanently altered its content."<sup>39</sup> In Justice Scalia's view, "To 'suspend' the writ was not to fail to enact it, much less to refuse to accord it particular content."<sup>40</sup> To suspend the writ was, rather, to "temporarily but entirely eliminat[e] the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals."<sup>41</sup> He contended that this latter problem was "a distinct abuse of majority power, and one that had manifested itself often in the Framers' experience."<sup>42</sup> Justice Scalia's second and narrower argument was that the Suspension Clause did not guarantee

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<sup>35</sup> *Id.* at 2292-93.

<sup>36</sup> *St. Cyr*, 121 S. Ct. at 2293; *Calcano-Martinez*, 121 S. Ct. at 2271.

<sup>37</sup> *St. Cyr*, 121 S. Ct. at 2293-98.

<sup>38</sup> Justice Scalia rejected out of hand any suggestion that the preclusion of review raised constitutional problems under the Due Process Clause or Article III. *Id.* at 2302-04.

<sup>39</sup> *Id.* at 2300.

<sup>40</sup> *Id.* at 2999.

<sup>41</sup> *Id.*

<sup>42</sup> *St. Cyr*, 121 S. Ct. at 2999.

review of the Attorney General's decision because the petitioners conceded they were deportable on the basis of their prior criminal convictions and were challenging only whether they were eligible to apply for a waiver of deportation, a form of relief whose ultimate grant or denial rested in the discretion of the Attorney General.<sup>43</sup>

Justice O'Connor also dissented on the jurisdictional issue without reaching the merits.<sup>44</sup> Like Justice Scalia, she believed that the 1996 legislation repealed all jurisdiction over the Attorney General's retroactivity decision and that the total preclusion of review was constitutional. She found it unnecessary, however, to address Justice Scalia's broad constitutional contention regarding the circumstances under which restrictions on habeas corpus constitute a "suspension" of the writ, and instead rested her dissent solely on the narrower ground offered by Justice Scalia—that petitioners were challenging their eligibility for a *discretionary* form of relief, and not the threshold finding that they had committed a deportable offense.<sup>45</sup>

The Court's 5-4 decisions in *St. Cyr* and *Calcano-Martinez* have given hope to thousands of immigrants and their families throughout the Nation. More broadly, the decisions represent a sweeping affirmation of the constitutional values and principles that had come under attack as a result of the 1996 legislation—values and principles that were held in especially high esteem by the Framers.

Indeed, before passage of the Bill of Rights in 1791, the Constitution as originally enacted by the Framers in 1787 included few specific protections for individual rights. Notably, however, two of the individual rights it did include were protection against suspension of the writ of habeas corpus<sup>46</sup> and protection against retroactive legislation.<sup>47</sup> The Court's

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<sup>43</sup> *Id.* at 2301-03.

<sup>44</sup> *Id.* at 2293; *Calcano-Martinez*, 121 S. Ct. at 2270.

<sup>45</sup> *St. Cyr*, 121 S. Ct. at 2293.

<sup>46</sup> Suspension Clause, U.S. CONST., art. I, § 9, cl. 2.

<sup>47</sup> Ex Post Facto Clause, U.S. CONST., art. I, § 10, cl. 1. The Supreme Court has held that the Ex Post Facto Clause does not apply to civil immigration legislation. *See, e.g.,* *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). Consequently, the Ex Post Facto Clause was not directly implicated in the *St. Cyr* and *Calcano-Martinez* cases. However, even in cases not strictly governed by the Ex Post Facto Clause, the Court frequently has looked to its Ex Post Facto jurisprudence to illuminate the

decisions protecting these two bedrock constitutional principles would thus have been significant under any circumstances. The decisions are particularly impressive because they protected these cherished rights on behalf of a disadvantaged and politically vulnerable class of individuals whose only recourse was to turn to the best traditions of the federal courts.

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general anti-retroactivity principle embodied by the Clause, and has stressed that the general principle has long and deep roots in our country, dating back to English common law. *See, e.g.,* *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997); *St. Cyr*, 121 S. Ct. at 2288 (noting that “presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic”) (internal quotation marks and citations omitted). *See also St. Cyr*, 121 S. Ct. at 2293 (relying on Court’s *Ex Post Facto* Clause decision in *Landsey v. Washington*, 301 U.S. 397 (1937)).



