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Reno v. American-Arab Anti-Discrimination Committee, et al.: Judicial Review of Constitutional Claims under the IIRIRA

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COMMENT

RENO V. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL.: JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS UNDER THE IIRIRA

INTRODUCTION

Although Congress has power to regulate immigration[1] and federal court jurisdiction,[2] these powers are subject to an important limitation: Congress may not completely foreclose judicial review of constitutional claims.[3] In *Reno v. American-Arab Anti-Discrimination Committee* ("*AAADC*"), aliens challenged a federal immigration statute on grounds that it effectively foreclosed meaningful review of their constitutional challenges to deportation.[4] Consistent with prior decisions addressing judicial review, the United States Supreme Court narrowly interpreted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA" or "Act"), and upheld the Act's prohibition against judicial review of non-final orders.[5] The Court's interpretation of the Act in *AAADC* marks a significant change in immigration law, by severely restricting district court access as a means of challenging the constitutionality of non-final Immigration and Naturalization Service (INS) actions.[6]

Part I of this Comment discusses the background of the IIRIRA, as well as the process courts used to review deportation claims prior to enactment of the IIRIRA. Part II analyzes the Court's opinion in *AAADC*. Part III discusses how *AAADC* is consistent with other decisions addressing jurisdictional restrictions. Part III also outlines the various avenues of judicial review that remain available after *AAADC*. Part IV asserts that *AAADC* insulated the exercise of executive discretion from

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1. *See* U.S. CONST. art. I, § 8, cl. 4.

2. *See id.* at art. III, § 2.

3. *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (noting that a "serious constitutional question" would arise if an administrative statute were construed as foreclosing judicial review of constitutional claims (citing Weinberger v. Salfi, 422 U.S. 749, 762 (1975)); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984) ("[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights."). *See also* Webster v. Doe, 486 U.S. 592, 603 (1988) (explaining that Congress must be clear if it intends to preclude judicial review of constitutional claims). *But see* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 501 (1991) (Rehnquist, C.J., dissenting) (indicating that the Supreme Court has never held that Congress could not explicitly preclude judicial review of constitutional claims).

4. Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 941 (1999).

5. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 & 18 U.S.C.).

6. *See Reno*, 119 S. Ct. at 942–43.

judicial review, and thereby upheld the streamlined deportation process intended by Congress.

I. BACKGROUND

Congressional control over immigration has been described as "plenary" in nature.[7] According to the plenary powers doctrine, the judiciary accords great deference to Congress in the regulation of immigration.[8] Early immigration cases reflected a strong adherence to this doctrine as immigration issues were often determined political in nature and therefore outside of the judiciary's power.[9] These deferential decisions date back to as early as 1875, when in response to public reaction to the rapid increase in immigration, Congress began the enactment of restrictive legislation aimed at the exclusion of certain classes of immigrants.[10] Restrictive immigration legislation continued to be implemented throughout the early part of the twentieth century.[11] For example, the Immigration Acts of 1917 and 1924 set forth quotas for each nationality, as well as qualitative restrictions on the types of admissible aliens.[12] Immigration regulation was essentially controlled by these two Acts until 1952.[13]

In 1952, Congress overhauled established immigration law through the enactment of the Immigration and Nationality Act of 1952 ("INA").[14] The INA codified prior immigration laws and established the current system governing the immigration and naturalization process.[15] Since its

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7. For an interesting critique of the plenary powers doctrine, *see* Maureen Callahan VanderMay, *The Misunderstood Origins of the Plenary Powers Doctrine*, 35 WILLAMETTE L. REV. 147 (1999).

8. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.5, at 207 (1997).

9. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (upholding a statute which prohibited the return of Chinese laborers who had received certificates from the government evidencing their right to return to the United States). "Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination." *Chae Chan Ping*, 130 U.S. at 609. *See also* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding law requiring aliens entitled to remain in the United States to apply for a certificate of residence). "The question whether, and upon what conditions . . . aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject." *Fong Yue Ting*, 149 U.S. at 731.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8, 18, 22 & 50 U.S.C.); *see also* 3A AM. JUR. 2D *Aliens and Citizens* § 5 (1998) (discussing enactment of INA).

15. *See* RICHARD A. BOSWELL, IMMIGRATION AND NATIONALITY LAW, CASES AND MATERIALS 15 (2nd ed. 1992) (citing U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION, 7–12 (1980)).

implementation, the INA has continued to serve as the basic immigration law of the United States.[16] Prior to enactment of the IIRIRA in 1996, judicial review of most immigration actions was governed by INA Section 1105a.[17] 1105a stated that "the sole and exclusive procedure for . . . judicial review of all final orders of deportation" shall be set forth in the Hobbs Act.[18] Under the Hobbs Act, the courts of appeals had exclusive jurisdiction,[19] and judicial review was limited solely to the administrative record upon which the deportation order was based.[20]

The scope of Section 1105a was first interpreted by the Supreme Court in *Chen Fan Kwok v. INS*.[21] In that case, a final order of deportation had been entered against the petitioner pursuant to INA Section 242(b).[22] 242(b) provided for an administrative procedure that determined the deportation of aliens.[23] Pursuant to Section 242(b), a special inquiry officer entered an order of deportation based upon a record made before him.[24] An alien could request various forms of discretionary relief from the special inquiry officer during the course of the proceedings. At the conclusion of 242(b) proceedings, INS regulations provided that an alien under a final order of deportation could apply to the INS district director for a stay of deportation.

The Petitioner in *Chen Fan Kwok* conceded deportability in his 242(b) proceeding, and volunteered to leave the country.[25] He did not, however, leave and eventually a deportation order was entered against him. He then applied to the district director for a stay of deportation.[26] His request for a stay was denied, and he appealed to the Third Circuit.[27] The Third Circuit dismissed the petitioner's claim for lack of jurisdiction.[28] The circuit court reasoned that the petitioner was appealing the district director's denial of his request, and not the order entered against him in the 242(b) proceeding.[29] Thus, the Third Circuit found Section 1105(a) jurisdiction inapplicable as the Section granted jurisdiction to the courts of appeals only for claims appealing 242(b) final orders.[30]

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16. 66 Stat. 163.
17. 8 U.S.C. § 1105a (1994) (repealed 1996).
18. *Id.* § 1105a.
19. 28 U.S.C. § 2342 (1994).
20. 8 U.S.C. § 1105a(a)(4) (repealed 1996).
21. Cheng Fan Kwok v. INS, 392 U.S. 206 (1968).
22. *See Cheng Fan Kwok*, 392 U.S. at 207.
23. *See* 8 U.S.C. § 1252(b) (repealed 1996).
24. *Id.*
25. *See Cheng Fan Kwok*, 392 U.S. at 207.
26. *See id.*
27. *See id.* at 208.
28. *See id.* at 210.
29. *See id.* at 212.
30. *See* Cheng Fan Kwok v. INS, 381 F.2d 542, 545 (3d Cir. 1967).

On certiorari, the Supreme Court rejected the INS' argument that Section 1105a encompassed all appeals from orders directly affecting a deportation order.[31] The Court affirmed the Third Circuit's narrow interpretation of Section 1105a and limited the statute's application to appeals from determinations made pursuant to Section 242(b) proceedings, or motions to reopen such proceedings. For denials of discretionary relief entered by INS directors, the Court stated, "the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court."[32]

The Court's narrow reading of Section 1105a gave aliens access to district courts to challenge various INS practices. Many of these challenges involved constitutional challenges to deportation.[33] Because such claims could not be reviewed on the basis of the administrative record, courts found Section 1105a's proscription to be inapplicable to various INS actions and decisions involved in the deportation process.[34] Instead, courts exercised jurisdiction over these claims under federal question jurisdiction,[35] habeas corpus jurisdiction,[36] or 8 U.S.C. § 1329,[37] which provided federal jurisdiction for all claims arising under federal immigration law.[38]

The Court narrowly interpreted other jurisdictional provisions of the INA as well, allowing for class action challenges to INS practices.[39] For example, in *McNary v. Haitian Refugee Center Inc.*,[40] the Court interpreted the Immigration Reform and Control Act of 1986[41] ("Reform Act") in favor of allowing immediate judicial review for ancillary constitutional claims.[42] *McNary* involved a class action challenging the procedures by which the INS was administering the Special Agricultural Workers ("SAW") program enacted by the Reform Act. The court addressed the issue of whether Section 210(e) of the INA precluded district courts from exercising federal-question jurisdiction over constitutional

31. *See Cheng Fan Kwok*, 392 U.S. at 209–10. "If, as the Immigration Service urges, [1105a] embraces all determinations 'directly affecting the execution of a final deportation order, Congress has selected language inapposite to its purpose." *Id.* at 213.

32. *Id.* at 210.

33. *See* Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 944 (1999) (claims included "selective prosecution, in violation of equal protection or due process") (quoting 6 C. GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.03 [2][h] (1998)).

34. *See id.*

35. *See* 28 U.S.C. § 1331 (1994).

36. *See id.* § 2241 (1994).

37. 8 U.S.C. § 1329 (1994).

38. *See* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction* 86 GEO. L.J. 2481, 2486 (1998).

39. *See* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 490 (1991).

40. 498 U.S. 479, 486 (1991) (discussing 8 U.S.C. § 1160(e)).

41. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections 5, 7, 8, 20, 26, 29, 31, 42 & 50 U.S.C. (1986)).

42. *See McNary*, 498 U.S. at 497–98.

claims involving INS procedures.[43] Section 210(e) prohibited judicial review of a final administrative determination of "special agricultural worker" status except in the context of an order of exclusion or deportation.[44]

The Court held that "given the absence of clear congressional language mandating preclusion of federal jurisdiction and the nature of respondents' requested relief," federal-question jurisdiction was proper.[45] The Court stated that it assumed Congress was aware of the "well settled presumption favoring interpretations of statutes that allow judicial review of administrative action."[46] In interpreting the statute to allow for judicial review prior to a final deportation order, the Court reasoned that even in the context of a deportation proceeding, a court of appeals would not likely be in a position to provide "meaningful review" of constitutional claims.[47] Judicial review of collateral constitutional claims challenging INS practices would be limited to the administrative record of individual applicants, making it impossible to establish a class wide pattern of unconstitutional practices.[48] Moreover, a court of appeals reviewing a collateral constitutional challenge would lack the fact-finding capabilities of a district court.[49] According to the Court, restricting review of an individual deportation order to the court of appeals was essentially a denial of judicial review of constitutional and statutory claims.[50]

By the mid-1990's, the topic of illegal immigration began to receive significant public attention.[51] In 1995, the House Subcommittee on Immigration and Claims held hearings on the removal of criminal and illegal aliens.[52] According to the opening statement of Chairman Lamar

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43. *See id.* at 483.

44. *Id.* at 479.

45. *Id.* at 483–84.

46. *Id.* at 496 (*citing* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986)).

47. *Id.* at 497.

48. *See id.*

49. *See id*

50. *See id.* In dissent, Justices Rehnquist and Scalia stated that the "strong presumption" in favor of judicial review of administrative action was only applicable in the absence of a clear congressional intent to prohibit such review. The presumption was inapplicable because the statute clearly prohibited review of INS actions outside the context of review of final deportation or exclusion orders. According to the dissent, Congress clearly intended to preclude judicial review of constitutional claims, which it could rightfully do. The Court had never held that Congress could not explicitly preclude judicial review of constitutional claims, and, in the instant case, the dissent believed such a denial was proper. *See id.* at 502–04.

51. *See* Jason H. Ehrenberg, Note, *A Call for Reform of Recent Immigration Legislation*, 32 U. MICH. J.L. REFORM 195, 196 (1998) (discussing how in the mid-1990's the rising cost of illegal immigration provoked Congress to overhaul INS proceedings).

52. *See Removal of Criminal and Illegal Aliens: Hearing before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Congress, 1, 3 (1995) ("We also need to look at legislative reforms to streamline the removal process, to tighten the criteria for relief from deportation, and to remove the potential for procedural abuses.") (statement of Lamar Smith, Chairman of the Subcomm.).

Smith, the government's loss of control over the deportation process had caused a "crisis in deportation." [53] Smith argued that one reason for this loss of control was that aliens who had resided in the United States for only short periods of time "often file meritless claims for asylum, dilatory procedural motions, or frivolous appeals, all in an effort to extend their stay."[54]

During the election year of 1996, United States immigration policy was the subject of heated political debate,[55] as well as the focal point of what some have deemed "anti-immigrant sentiment."[56] In the fall of that year, Congress approved the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[57] which drastically changed immigration law and the process by which aliens could obtain judicial review of deportation actions.[58] According to the Conference Report accompanying the IIRIRA, the purpose of the Act was to "improve deterrence of illegal immigration to the United States by . . . reforming exclusion and deportation law and procedures."[59]

One of the most significant changes instituted by the IIRIRA was a restriction on judicial review of challenges to the removal process.[60] Section 1252(g) states that:

> [E]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this act.[61]

Members of Congress who believed that the IIRIRA removed judicial review of many INS decisions and eliminated important safeguards

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53. *Id.* at 1.

54. *Id.* at 2.

55. *See* Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 205–06 (1998) (reporting that during this period Congress constantly kept calling on the Commissioner of INS to defend the naturalization process).

56. Christopher W. Rudolph, *Globalization, Sovereignty, and Migration: A Conceptual Framework*, 3 UCLA J. INT'L L. & FOR. AFF. 325, 326–27 (1998).

57. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of Titles 8 & 18 U.S.C.).

58. *See* Cole, *supra* note 38, at 2486–87.

59. H.R. CONF. REP. NO. 104-828, at 1 (1996).

60. *See* 8 U.S.C. § 1252(g) (1997).

61. *Id.* § 1252(g). Section 1252(b)(9), another amended provision, entitled "Exclusive Jurisdiction" provides that:

> [J]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

Id. § 1252(b)(9) (1997).

against abuse criticized this provision.[62] Nevertheless, Congress passed the IIRIRA, and President Bill Clinton signed it into effect in September of 1996.

II. RENO V. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE

A. *Facts and Procedural History*

In 1987, the INS instituted deportation proceedings against eight aliens because of their affiliation with the Popular Front for the Liberation of Palestine (PFLP), a group known for international terrorist activities.[63] The INS charged all eight under the provisions of the INA, portions of which were subsequently repealed, which allowed for the deportation of aliens who advocate world communism.[64] It also charged six of the aliens with routine status violations.[65] The aliens responded by filing an ancillary action in district court challenging the constitutionality of the INA and seeking declaratory and injunctive relief against the Attorney General, the INS, and various immigration officials.[66] The INS dropped the communist-advocation charges, but it retained the routine status violation charges against six of the aliens. It also charged the other two, who were permanent residents, under another section of the INA, which allowed for the deportation of aliens who were members of essentially terrorist organizations.[67]

INS regional counsel William Odencrantz publicly stated that the INS was seeking deportation of the eight individuals because of their affiliation with the PFLP.[68] In response, the eight individuals amended their complaint to include a claim that the INS was selectively enforcing immigration laws in violation of their First and Fifth Amendment rights.[69] The district court preliminarily enjoined the INS from deporting the eight aliens based on the aliens' showing that INS had targeted them for deportation solely on the basis of their affiliation with the PFLP and because the INS did not enforce routine status requirements against aliens

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62. *See* 142 CONG. REC. H11054 (daily ed. September 25, 1996) (statement of Rep. Mink).

63. *See* Reno v. American-Arab Anti-Discrimination Comm., 119 S.Ct 936, 938; *see also* Brief for Petitioner, Reno v. American-Arab Anti-Discrimination Comm., 119 S.Ct 936 (No. 97-1252) (1999), *available in* 1998 WL 411431:

> From its founding in 1967, the PFLP has proclaimed the United States to be one of its principal enemies . . . . Among its many acts of international terrorism, the PFLP hijacked five aircraft in one weekend in 1970, killed 16 United States citizens at Israel's Lod Airport in 1972, assassinated the United States Ambassador to Lebanon in 1976, and conducted a campaign of attacks against moderate Palestinian officials during the mid-1980's, including assassinations.

Id. at *2 n.1.

64. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 938.

65. *See id.* at 939.

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

who were not members of terrorist groups.[70] The district court also found that the possibility of deportation, combined with the chill to the aliens' first amendment rights, constituted irreparable harm.[71]

The Court of Appeals for the Ninth Circuit affirmed the district court's injunction as to six of the individuals and reversed as to two of the PFLP members.[72] The Ninth Circuit rejected the Attorney General's arguments that selective enforcement claims were inappropriate in the immigration context and that Section 1105a of the Immigration and Nationality Act precluded pre-final order review.[73] The Ninth Circuit remanded the case to the district court, which entered an injunction in favor of the two PFLP members.

While the Attorney General's appeal of this last decision was pending, Congress passed the IIRIRA, which repealed the judicial review scheme set forth in Section 1105a.[74] The Attorney General filed motions in the district court and the court of appeals arguing that Section 1252(g) deprived it of jurisdiction over the action.[75] The Ninth Circuit consolidated the Attorney General's appeal from the district court's denial of that motion with the appeal already pending in the circuit and affirmed the existence of jurisdiction under Section 1252, as well as the injunctions.[76]

The Attorney General appealed, and the United States Supreme Court granted certiorari.[77] The Supreme Court reversed the Ninth Circuit and ruled that IIRIRA Section 1252(g) deprived the federal courts of jurisdiction over the action.[78]

B. Supreme Court Decision

1. Majority Opinion

Justice Scalia, writing for the Court, reviewed the facts and history of the case in Part I of the opinion.[79] In Part II, the Court addressed the issue of whether the federal courts lacked jurisdiction over the AAADC action pursuant to Section 1252(g).[80] The Court framed the issue in the context

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70. *Id.*

71. *See id.*

72. *See* Reno v. American-Arab Anti-Discrimination Comm., 70 F.3d 1045, 1052 (9th Cir. 1995).

73. *See American-Arab Anti-Discrimination Comm*, 70 F.3d at 1048.

74. *See* 8 U.S.C. § 1252(g) (1994 ed. & Supp. III 1997).

75. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 939.

76. *See id.*

77. *See* Reno v. American-Arab Anti-Discrimination Comm., 118 S. Ct. 2059 (1998) (order granting certiorari).

78. *See* Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 958 (1999).

79. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 938–39.

80. *See* 8 U.S.C. 1252(g) (1994 ed. & Supp. III 1997).

of Sections 306(c)(1) and 309(c)(1), two conflicting provisions concerning the effective date of the IIRIRA.[81] Section 309(c)(1) states that the revised removal procedures, including the judicial-review procedures of Section 1252, will not apply to aliens already in exclusion or deportation proceedings on the Act's effective date.[82] However, Section 306(c)(1) states that only Section 1252(g) "shall apply without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings."[83] The Court noted that both the Government and respondents had interpreted Section 1252(g) as applying to nearly all deportation claims.[84]

The Court found that this broad interpretation was problematic for several reasons. If Section 1252(g) covered all deportation claims and incorporated all the other jurisdiction-related provisions of Section 1252, then Section 309(c)(1) would be rendered meaningless.[85] If, on the other hand, Section 1252(g) did not incorporate the other jurisdiction-related provisions of Section 1252, thus giving Section 309(c)(1) meaning, Section 1252(g) would stand alone.[86] Applying the parties' broad interpretation of Section 1252(g) to this scenario would mean that judicial review of all deportation claims would be nonexistent, even after the entry of a final order.[87] The answers to this dilemma that were offered by the Attorney General and both parties where rejected by the Court as implausible.[88]

According to the Court, the "seeming anomaly" that prompted the parties', as well as the Ninth Circuit's, "strained reading" of Section 1252(g) was really a "mirage."[89] This "anomaly" stemmed from a mistaken belief that Section 306(c)(1) could not be read to envision a straightforward application of the jurisdictional provisions of Section 1252 incorporated in Section 1252(g).[90] Furthermore, such an application of 306(c)(1) would produce in all pending INS cases jurisdictional restrictions identical to those contained in the IIRIRA.[91] Thus, the effective date provisions of Section 309(c)(1) would be nullified.[92] The Court went on to state that the belief that Section 306(c)(1) could not be applied in a straightforward manner rested on another mistaken assumption—that Section 1252(g) covers all deportation claims.[93]

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81. *See American-Arab Anti-Discrimination Comm.*, 119 S.Ct at 938–41.
82. Pub. L. No. 104-208, § 309(c)(1) (1996).
83. Pub. L. No. 104-208, § 306(c) (1996).
84. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 941.
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. *Id.* at 943.
90. *Id.*
91. *See id.*
92. *See id.*
93. *See id.*

To the contrary, the Court ruled that 1252(g) applies to only three separate actions that the Attorney General may take: the "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders."[94] By interpreting Section 1252(g) narrowly to only three distinct actions, the Court reconciled Section 306(c)(1) with Section 309(c)(1).[95] Section 306(c)(1) could thus be applied without swallowing Section 309(c)(1).[96]

In support of this narrow interpretation, the Court pointed to other actions, such as the decision to open an investigation, which it believed was not encompassed by 1252(g).[97] The Court further justified its interpretation by explaining that 1252(g) serves the purpose of excluding from non-final-order review those transitional cases pending on the effective date.[98] Moreover, 1252(g) serves the continual function of excluding from non-final-order review those collateral cases challenging the Attorney General's choice to initiate one of the discretionary actions specified in Section 1252(g).[99] According to the Court, 1252(g) was aimed at reducing judicial restraint of the Attorney General's exercise of prosecutorial discretion as well as the fragmentation and prolongation of removal proceedings.[100]

Next, the Court addressed the issue of whether the doctrine of constitutional doubt required the Court to interpret Section 1252(g) in such a way as to permit immediate review of the selective enforcement claims.[101] The AAADC had argued that constitutional doubt applied because the final review under Section 1252(a)(1) was unavailing due to a lack of factual development, habeas relief was unavailable, and either review would come too late to prevent the "chilling effect" upon First Amendment rights.[102]

The Court declined to apply the doctrine and noted that as a general matter, an alien unlawfully in this country has no constitutional right to assert the selective enforcement defense against his removal.[103] The Court discussed the difficulty in proving such a claim.[104] Furthermore, according to the Court, the interest of the deportation target in avoiding selective treatment is less compelling than in a criminal context because deportation is not a punishment but is sought to bring an end to an on-

94. *Id.* (citing 8 U.S.C. § 1252(g)).
95. *See id.*
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*
101. *See id.* at 944.
102. *Id.* at 945.
103. *See id.*
104. *See id.*

going violation of U.S. law.[105] In reaching its decision, the Court noted that it would not rule out the possibility of a case in which discrimination was so outrageous that its reluctance to question executive discretion would not be overcome.[106]

2. Justice Ginsburg's concurrence

Although Justice Ginsburg agreed that Section 1252(g) deprived the courts of jurisdiction over the AAADC's prefinal-order suit,[107] she declined to prejudge the question of whether the AAADC may assert a selective enforcement objection when, and if, it sought review of a final order of removal pursuant to Section 1252(a)(1).[108] Part I of her concurrence addressed the question of when the Constitution requires immediate judicial intervention in federal administrative procedures.[109] As a framework for addressing this issue, Ginsburg discussed the cases addressing federal injunctions to stop state procedures in order to secure constitutional rights.[110] Ginsburg interpreted these decisions as suggesting that interlocutory intervention in INS proceedings would be feasible, notwithstanding a statutory bar, if "the INS acts in bad faith, lawlessly, or in patent violation of constitutional rights."[111] This test would be more stringent then the requirements for a preliminary injunction and would also require a demonstration of a strong likelihood of success on the merits.[112] Ginsburg believed that the merits of the AAADC's case were too uncertain to establish such a likelihood.[113]

This concurrence also addressed the AAADC's argument that the inability to raise selective enforcement claims during the administrative process made immediate judicial review necessary.[114] Ginsburg recognized Congress' strong interest in avoiding delay of deportation proceedings and found the opportunity to raise a claim during the judicial review phase sufficient.[115] Moreover, she emphasized the Attorney General's position that the reviewing court of appeals may transfer a case to a district court for resolution of pertinent issues of material fact.[116]

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105. *See id.*
106. *See id.* at 947.
107. *Id.* (Ginsburg, J., concurring).
108. *See id.*
109. *See id.* at 947–48
110. *See id.* at 948.
111. *Id.*
112. *See id.*
113. *See id.* at 949.
114. *See id.*
115. *See id.*
116. *See id.*

In Part II of her concurrence, Ginsburg disagreed with the Court's approach to selective enforcement claims in the immigration context.[117] She believed that the viability of such objections should be left an open question.[118] Under the Court's selective prosecution doctrine, the decision to prosecute cannot be based upon an unjustifiable standard such as race or other arbitrary classification, including the exercise of constitutional rights.[119] According to Ginsburg, selective enforcement of immigration laws should not be exempt from that prescription.[120] If the Government sought deportation of an individual based on unconstitutional reasons, the redress for that violation should not be lessened because deportation was less significant or harmful than incarceration.[121] Ginsburg summarized her opinion by stating that if the AAADC were to demonstrate a strong likelihood of ultimate success on the merits and a chilling effect on current speech, and if the Court were to find the agency's actions flagrantly improper, immediate judicial intervention would be in order.[122]

3. Justice Stevens' Concurrence

Justice Stevens' concurrence focused on the conflict between the effective date provisions of 306(c)(1) and 309(c)(1).[123] His resolution to this anomaly differed from the majority's because he believed that the Act contained a scrivener's error.[124] According to Stevens, the plain meaning of Sections 1252(b)(9) and (g) was clear: the former postpones judicial review of removal proceedings until the entry of a final order of removal while the later deprives courts of jurisdiction over collateral challenges to ongoing proceedings.[125] If the word "Act" was substituted for the word "Section" in the opening phrase of Section 1252(g), the substitution would remove any obstacle to giving effect to the plain meaning of Sections 306(c)(1) and 309(c)(1).[126] Judicial review of collateral attacks would be effective immediately while aliens already in deportation hearings would not be affected by the Act's revised removal procedures.[127] Stevens recognized the ambiguity in the text of Section 309 because it refers to the "case" of an alien in deportation proceedings, which could include AAADC's collateral attack.[128] He resolved this ambiguity by reasoning that because such a reading would be inconsistent

117. *See id.* at 950
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.* (Stevens, J., concurring).
124. *See id.*
125. *See id.* at 951.
126. *Id.*
127. *See id.*
128. *Id.*

with Section 306, Congress intended Section 309 to apply only to the INS deportation proceedings that it expressly mentioned.[129]

Despite the scrivener's error, Stevens believed that Congress' intent for disposition of proceedings such as AAADC's was clear and the case should be dismissed.[130] Stevens agreed with Section III of the Court's opinion and also agreed with Souter's explanation of why Section 1252(g) applies broadly to removal proceedings.[131] However, he did not share in Souter's decision to apply the constitutional doubt doctrine.[132]

4. Justice Souter's Dissent.

According to Justice Souter, because the Act contains two mutually exclusive effective date provisions that cannot be reconciled, the doctrine of constitutional doubt should be invoked to avoid potential constitutional difficulty.[133] According to his interpretation of the statute, Section 306(c)(1) retroactively applies Section 1252(g).[134] The problem is that Section 309(c)(1)(A) makes Section 1252 inapplicable to an alien who is already in deportation proceedings.[135] Thus, it would appear that aliens who did not obtain judicial review prior to the Act's enactment date and who were in proceedings as of the Act's effective date could never obtain judicial review of the Attorney General's decision to commence proceedings, adjudicate cases or execute removal orders.[136] The two effective date provisions appear to remove any form of judicial review of such decisions by the Attorney General for aliens in deportation proceedings between those two dates.[137]

Justice Souter believed that the issue of judicial review was further complicated by Section 309(c)(1)(B) which provides that in the case of aliens who are already in proceedings before the effective date, the proceedings, including judicial review thereof, will continue without regard to Section 1252.[138] Consequently, he interpreted Section 309(c)(1)(B) as preserving preexisting judicial review for the same class of aliens to whom Section 306(c)(1) bars review.[139] Justice Souter concluded that the conflicting effective date provisions found in Sections 306(c)(1) and 309(c)(1) could not be reconciled.[140]

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129. *See id.*
130. *See id.*
131. *See id.*; *see also infra* notes 138–60 and accompanying text.
132. *See id.*
133. *See id.* at 952. (Souter, J., dissenting).
134. *See id.*
135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.* at 953.
139. *See id.*
140. *See id.*

Justice Souter disagreed with the Court's attempt to solve the "interpretive anomaly."[141] In his opinion, the Court interpreted Section 1252(g) too narrowly.[142] According to Souter, it would be illogical for Congress to want to preserve interim review of those actions, such as the decision to open an investigation, but not of the other actions described in Section 1252(g).[143] Furthermore, Souter noted that there was no plausible explanation of why the exclusivity provisions of Section 1252(g) should not apply after the effective date to review of those decisions by the Attorney General that the Court gave as examples.[144]

In support of its decision, the Court suggested that Congress could not have intended the words "'commence proceedings, adjudicate cases, and execute removal orders'" to stand for the entire deportation process because such language, the Court believed, was not precise legislative drafting.[145] Yet, Justice Souter felt that one could just as plausibly conclude that Congress employed subject headings to bar review of all the stages in the deportation process to which challenges might be brought.[146] Moreover, the Court's examples, such as the decision to open an investigation, could easily fall under one of the three stages in the deportation process that Congress had addressed.[147]

Because the contradiction between Sections 303(c)(1) and 309(c)(1) was irreconcilable, Justice Souter argued that 309(c)(1) should prevail for several reasons.[148] First, it seemed highly improbable that Congress meant to raise a permanent barrier to those aliens in the deportation proceedings on the Act's effective date.[149] Second, such a preclusion of judicial review would raise the serious constitutional question as to whether Congress may block every remedy for enforcing a constitutional right.[150] Because Justice Souter thought that Section 309(c)(1) should prevail over Section 306(c)(1), the law afforded the AAADC an opportunity to litigate its claims in district court.[151]

Justice Souter stated that this approach avoided the problem of addressing the unbriefed issue of whether selective enforcement claims could be brought in the immigration context.[152] He addressed the Court's statement that the alien's interest in selective enforcement was less com-

141. *Id.*
142. *See id.*
143. *See id.*
144. *See id.*
145. *Id.* at 954 (quoting 8 U.S.C. § 1252(g) (1994 & Supp. III 1997)).
146. *See id.*
147. *See id.*
148. *See id.* at 955.
149. *See id.*
150. *See id.*
151. *See id.* at 956.
152. *See id.*

pelling than in the criminal context.[153] Like Justice Ginsburg, Souter did not think that there was a real difference in interest between selective enforcement in either context.[154] Therefore, prosecutorial discretion should not be exercised to violate protected liberties in either context.[155]

III. ANALYSIS

A. *The Court's interpretation of Section 1252(g) is consistent with its interpretations of other jurisdiction stripping statutes*

The Court's interpretation of Section 1252(g) is consistent with its interpretation of other statutes that have appeared to foreclose jurisdiction. The Supreme Court has held that absent clear statutory language precluding judicial review, such statutes will be interpreted in favor of finding federal question jurisdiction.[156] In *AAADC*, the Court found express intent to limit judicial review. However, the Court limited this jurisdictional prohibition to only three types of executive action and insured that judicial review was not entirely foreclosed.[157] The Court's willingness to interpret laws in favor of judicial review has been consistently demonstrated by its decisions addressing jurisdiction-stripping laws.[158]

For example, *in Bowen v. Michigan Academy of Family Physicians*, a group of family physicians challenged the constitutionality of a Medicare Act regulation that authorized different payments for similar physician service.[159] The Secretary of Health and Human Services argued that Congress had prohibited judicial review of all questions arising from payment of benefits under the Medicare program. The Court began its opinion by emphasizing the presumption that Congress intends judicial review of administrative actions to remain available. According to the Court, the presumption in favor of judicial review of administrative action "may be overcome by inferences of intent drawn from the statutory

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153. *See id.*

154. *See id.*

155. *See id.*

156. *See* Johnson v Robison, 415 U.S. 361, 373 (1974) (stating that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear); *see also* McNary v. Haitian Refugee Center, 498 U.S. 479, 483 (1991) ("We hold that given the absence of clear congressional language mandating preclusion of federal jurisdiction . . . the District Court had jurisdiction to hear respondents' constitutional and statutory challenges to INS procedures.").

157. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 941.:

> If, on the other hand, the phrase 'except as provided in this section' were (somehow) interpreted not to incorporate the other jurisdictional provisions of §1252—if §1252 stood alone, so to speak—judicial review would be foreclosed for all deportation claims in all pending deportation cases, even after entry of a final order.

Id.

158. *See* Erwin Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM L. REV. 295 (1999) ("[I]t seems accurate to say that unless federal statutes completely preclude all federal jurisdiction, congressional restrictions on jurisdiction likely will be upheld.").

159. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 669 (1986).

scheme as a whole."[160] The Court stated that a "serious constitutional question" would arise if it interpreted the statute to foreclose all judicial review of constitutional claims.[161]

Similarly, in *Webster v. Doe*, the Court narrowly interpreted the jurisdictional provision of a statute in favor of allowing for judicial review of constitutional claims.[162] In Webster, a discharged employee brought suit against the Central Intelligence Agency, claiming that he was fired because of his sexual orientation.[163] The government argued that the discretionary termination decisions of the CIA Director, made pursuant to Section 102(c) of the National Security Act ("NSA"), were barred from judicial review under the Administrative Procedure Act ("APA"). The Court held that the statutory language and structure of NSA Section 102(c) sufficiently precluded judicial review under the APA of the Director's discretionary termination decisions.[164] The Court narrowly interpreted the jurisdictional prohibition contained in Section 102(c) as inapplicable to constitutional claims arising from the Director's actions.[165] The Court emphasized the need for a heightened showing of Congressional intent to preclude judicial review of constitutional claims in order to avoid serious constitutional concerns.[166] Because the Government did not make such a showing, the Court found that the District Court had jurisdiction over the discharged employee's constitutional claims.[167]

B Available Forums after Reno v. AAADC

The Court's holding in *AAADC* effectively foreclosed the loophole created by *Chen Fan Kwok v. INS* for parallel challenges to deportation. After *AAADC*, an alien's access to district court is significantly restricted if the action is deemed to fit into one of the three categories of discretionary action enumerated in Section 1252(g). In the context of federal laws regulating immigration, the substantive due process accorded aliens is only that of rationality review.[168] Yet, aliens are still protected by the procedural due process requirements set forth in *Matthews v. Eldridge*.[169] In light of *AAADC*, aliens have several options for obtaining judicial review of constitutional claims that satisfy procedural due process.

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160. *Michigan Academy of Family Physicians*, 476 U.S. at 673.
161. *Id.* at 681 n.12.
162. Webster v. Doe, 486 U.S. 592, 603 (1988).
163. *See Webster*, 486 U.S. at 596.
164. *Id.* at 601.
165. *Id.* at 603.
166. *Id.*
167. *Id.*
168. *See* CHEMERINSKY, *supra* note 8, § 9.5.4 at 621.
169. *See* Matthews v. Eldridge, 96 S. Ct. 893, 903 (1976).

1. Appeals from Final Orders of Deportation

As an initial option for obtaining judicial review, an alien may appeal from a final order of deportation.[170] In *INS v. Chadha*,[171] the Court ruled that an appeal of a final order encompasses all matters on which the final order is contingent, including constitutional claims.[172] Once the appeal has been filed, the reviewing court of appeals may remand the case for further fact finding.[173] Although an alien may receive judicial review of constitutional claims at the appellate level, it is unclear whether claims of selective prosecution can receive review at all.

In *AAADC*, the Court noted that their ruling generally denies aliens the defense of selective prosecution.[174] According to the Court, when the INS has not held a hearing, Section 2347(b)(1) authorizes remand to a district court.[175] The Court declined to address the issue of whether the language of the statute could be interpreted to require a hearing on a particular issue, such as selective enforcement.[176] Justice Ginsburg believed that such review was available, and stated that if a court of appeals could not review selective enforcement claims, the statute may be unconstitutional.[177] Moreover, she noted the Attorney General's position that the reviewing court of appeals may transfer a case to district court for further fact-finding.[178] Justice Ginsburg as well as the Court found the opportunity to raise a collateral challenge at the appellate level sufficient.[179]

2. Flagrant violations of constitutional rights

In extreme circumstances, aliens may have the option to obtain immediate judicial review. Although the Court declined to directly address the issue, it appeared to suggest immediate judicial intervention, prior to the exhaustion of administrative remedies, in a situation involving "outrageous" violations of constitutional rights.[180] In her concurring opinion, Justice Ginsburg stated that if the respondents were able to demonstrate a strong likelihood of success on the merits, a chilling effect on current

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170. 8 U.S.C. § 1252(b)(9) (1994 & Supp. III 1997); *see also* 8 U.S.C. § 1252(a)(1) (1997): Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

Id.

171. Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 938 (1983).

172. *See Chadha*, 462 U.S. at 938.

173. *See* 28 U.S.C. § 2347(c) (1994).

174. *See* Reno v. American-Arab Anti-Discrimination Comm., 119 S. Ct. 936, 947 n.10 (1999).

175. *See American-Arab Anti-Discrimination Comm.*, 119 S. Ct. at 947 n.10

176. *See id.*

177. *See id.* at 948.

178. *See id.* at 960.

179. *See id.*

180. *Id.* at 947.

speech, and "flagrantly improper" administrative action, "precedent and sense would counsel immediate judicial intervention."[181] Although the Court criticized Ginsburg's analysis of cases involving immediate judicial intervention[182] the majority, combined with Ginsburg's concurrence, seems to suggest immediate, prefinal-order judicial intervention in extreme situations.

3. Habeas Corpus Jurisdiction

Depending on the jurisdiction, habeas corpus jurisdiction may be a third option for obtaining judicial review. In *AAADC*, the Court noted that the circuits were split as to the availability of habeas corpus in the wake of IIRIRA.[183] The Court did not directly address this conflict and the circuit courts remain split. It now appears that the availability of habeas corpus jurisdiction is contingent upon the jurisdiction, as well as whether the court views a constitutional claim as fitting into one of the three categories under Section 1252(g) that the Supreme Court declared to be insular and discrete.[184]

For example, in *Jurado-Guitierrez*, the Tenth Circuit held that the IIRIRA did not preclude traditional habeas corpus jurisdiction pursuant to 28 U.S.C. §2241.[185] *Jurado-Guitierrez* involved the consolidated appeal of four immigration cases challenging the constitutionality of an INA provision.[186] The INA provision at issue allows aliens in exclusion proceedings to apply to the Attorney General for a discretionary waiver of their deportation order, but does not permit the same opportunity for aliens in removal proceedings.[187] The Government had argued that Section 1252(g), among other sections of the INA amended by the IIRIRA and AEDPA, precluded habeas corpus jurisdiction over the aliens' petitions.[188] The Tenth Circuit rejected the Governments argument, and citing *AAADC*, held that Section 1252(g) only barred challenges to three dis-

181. *Id.* at 950.

182. *See id.* at 945 n.10. The majrity critized Ginsburg's analysis of cases involving immediate judicial intervention, but seemed to suggest that pre-final order judicial intervention is appropriate in extreme situations.

183. *See id.* at 939.

184. *Compare* Hypolite v. Blackman, No. 99-0549, 1999 WL 499146, at *3 (M.D.Pa. July 13, 1999) (holding that *Reno v. American-Arab Anti-Discrimination Comm.* and the IIRIRA did not preclude habeas corpus jurisdiction over collateral constitutional claims because no express denial of habeas jurisdiction existed) *with* Zawadzka v. INS, No. 96 C 8398, 1999 WL 417357 (N.D. Ill. June 16, 1999) (holding that the IIRIRA and *Reno v. American-Arab Anti-Discrimination Comm.* effectively removed habeas corpus jurisdiction over claims specified in § 1252(g) but that direct appellate review was still an available option).

185. Jurado-Gutierrez v. Greene, 190 F.3d 1135 (10th Cir. 1999).

186. *Id.*

187. *Id. See* 8 U.S.C.A §1182(c) (1997). This provision of the INA was amended by the AEDPA to prohibit aliens, deportable because of their conviction for certain offenses, from applying to Attorney General for a discretionary waiver of their deportation order).

188. *Id.* at 1144.

tinct actions by the Attorney General.[189] Because the aliens were not challenging one of these three actions, but were instead requesting review of final deportation orders, Section 1252(g) did not bar habeas corpus jurisdiction. According to the court, aside from challenges to the actions enumerated in Section 1252(g), traditional habeas corpus jurisdiction under 28 U.S.C. § 2241 remains a viable source for judicial review.[190]

Similarly, in *Mustata v. Department of Justice*, the Sixth Circuit found that Section 1252(g) did not bar the petitioner's writ of habeas corpus.[191] There, petitioners filed a writ of habeas corpus the day before their deportation order took effect and claimed Fifth Amendment violations due to ineffective assistance of counsel.[192] The district court dismissed the petition for lack of subject matter pursuant to Section 1252(g).[193] On appeal, the Sixth Circuit noted the Supreme Court's narrow interpretation of Section 1252(g) as well as the Court's statement of other administrative actions not covered by Section 1252(g).[194] The Sixth Circuit concluded that the petitioner's claim of ineffective assistance of counsel did not fall within one of the three discrete actions listed in Section 1252(g) and therefore habeas corpus jurisdiction was proper.[195]

Yet, in *Singh v. Reno*, the Seventh Circuit found habeas corpus jurisdiction to be generally unavailable after the enactment of the IIRIRA.[196] *Singh* involved issues similar to those in *Jurado-Guitierrez* . In *Singh*, the petitioner had been convicted of second degree reckless homicide.[197] Following his conviction, the INS had issued an order to show cause as to why the petitioner should not be deported.[198] Two years later, in 1994, an immigration judge closed the proceedings because the INS paperwork was incomplete.[199] In order to finalize the matter, the pe-

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189. *Id.* (Quoting the Court's language in *Reno v. AAADC* that section 1252(g) did not apply to all claims arising from the deportation process).

190. *Id.* at 1144, 1145. ("We find that the lack of any mention of §2241 habeas review in the plain language of the statute, combined with the long historical precedent surrounding habeas corpus review in immigration cases establishes that traditional habeas review under §2241 survived the enactment of...[the] IIRIRA.")

191. Mustata v. Department of Justice, 179 F.3d 1017, 1019 (6th Cir. 1999).

192. *See Mustata*, 179 F.3d at 1018.

193. *See id.* at 1019.

194. *See id.* at 1020.

195. *See id.* at 1022.

196. Singh v. Reno, 182 F.3d 504 (7th Cir. 1999). See also LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1999), holding habeas corpus jurisdiction unavailable to alien challenging the denial of his application for a waiver of deportation:

> If, as we believe in agreement with the government, the deportee can seek review of constitutional issues in the court of appeals directly, as under the prior regime governing judicial review of deportation, then the layering of judicial review is avoided, judicial review is curtailed as Congress intended, but enough of a safety valve is left to enable judicial correction of bizarre miscarriages of justice.

Id. at 1040.

197. See *Singh*, 182 F.3d at 507.

198. *Id.*

199. *Id.*

titioner had requested that the hearing be rescheduled.[200] Because of INS "foot dragging", the matter was not heard rescheduled until 1996, and rescheduled again several more times.[201] During this time, Congress passed the AEDPA and IIRIRA, which authorized deportation for the criminal convictions, such as the petitioners, and barred such individuals from applying for a discretionary waiver of deportation.[202] Following entry of a final order of deportation, the petitioner filed a petition for a writ of habeas corpus jurisdiction in district court. The Seventh Circuit reversed the district court and held that habeas corpus jurisdiction was not proper pursuant to Section 1252(g).[203] The Seventh Circuit noted the Supreme Court's interpretation of Section 1252(g) in Reno v. AAADC as limited to those listed discretionary actions. Yet, according to the Seventh Circuit, Section 1252(g) prohibited habeas review of challenges to removal orders, such as the petitioners.

4. Class Action Challenges to INS Practices

In light of the streamlined review process, class actions, such as the suit in *McNary v. Haitian Refugee Center*, may be an important means of challenging INS practices.[204] In *McNary*, the Court acknowledged that to establish unfair INS practices, the respondents had adduced a substantial amount of evidence that would have been irrelevant to an individual determination on appeal.[205] Furthermore, the Court noted that the court of appeals reviewing an individual case would not likely have an adequate record as to a pattern of INS abuses.[206] The Court acknowledged that in "pattern in practice" cases, district court fact-finding is essential.[207] In the wake of *AAADC*, the feasibility of such actions may depend upon whether the particular jurisdiction views the underlying claim as a challenge to executive discretionary action.[208]

For example, in *Alvidres-Reyes v. Reno*, the Fifth Circuit found that it lacked subject matter jurisdiction over a class action claim of fifty illegal aliens because the action essentially challenged executive discretionary action.[209] On the other hand, in *Tefel v. Reno*, the Ninth Circuit distinguished between the implementation of a program affecting an entire

200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 509.
204. McNarry v. Haitian Refugee Ctr., 498 U.S. 479 (1991).
205. *See Haitian Refugee Ctr.*, 498 U.S. at 497.
206. *See id.*
207. *See id.*
208. *Compare* Alvidres-Reyes v. Reno, 180 F. 3d 199, 206 (5th Cir. 1999) (holding that federal courts lack subject matter jurisdiction over aliens' class action because the action challenged essentially discretionary decisions) *with* Tefel v. Reno, 180 F.3d 1286, 1297 (11th Cir. 1999) (determining that district court jurisdiction was proper for class wide challenges to INS practices).
209. *Alvidres-Reyes*, 180 F. 3d at 206.

class of individuals and individual challenges to INS actions.[210] The court of appeals found jurisdiction to be proper because the aliens were challenging a program, pattern or scheme by immigration officials that allegedly violated the constitutional rights of aliens.[211] In *Tefel*, neither *AAADC* nor Section 1252(g) altered jurisdiction over the class-wide allegations of constitutional violations committed by the INS.[212]

IV. CONCLUSION

The Court's holding in *AAADC* is consistent with its history of interpreting jurisdictional restrictions in a manner that does not foreclose all judicial review. In the wake of *AAADC*, judicial review of claims arising from the deportation process has been significantly streamlined. However, aliens continue to have narrow opportunities for judicial review. Individuals may still raise constitutional claims at the appellate level in the context of a final order of deportation. Also, *AAADC* appears to suggest that immediate judicial intervention remains available in situations involving gross violations of constitutional rights. Because the circuits are split on the availability of habeas corpus review under the IIRIRA, aliens may have this option in certain jurisdictions.

Although judicial review has not been completely foreclosed, the key to obtaining review may lie in how a claim is framed. The Court has emphasized that claims based on the three discretionary actions listed in Section 1252(g) are reviewable only as an appeal from a final order of deportation. Yet, because the concept of what is included as one of the three discretionary actions is subjective, courts will vary as to whether an alien's claim fits into one of these categories. Consequently, aliens should characterize their claims so as to not challenge one of the three discretionary actions in order to have the best opportunity to obtain judicial review in the wake of *AAADC*.

Meghan Dougherty

210. *Tefel*, 180 F.3d at 1286.
211. *See id.* at 1297.
212. *See id.* at 1298.