

Nova Law Review

Volume 22, Issue 1

1997

Article 5

Immigration Law

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Immigration Law: 1997 Survey of Florida Law

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I. INTRODUCTION

This article examines immigration cases arising in Florida for which decisions were rendered from June 1996 through June 1997. These cases discuss the recent changes in immigration law under the Illegal Immigration

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Reform and Immigrant Responsibility Act of 1996 ("IRIRA"),¹ and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").² These changes apply to the treatment of legal and undocumented aliens in the United States, some of whom have criminal convictions. Congress and the executive branch, through the Immigration and Naturalization Service ("INS") and the Board of Immigration Appeals ("BIA"), have determined the direction of immigration policy in the United States. This policy is characterized by harsh treatment of illegal and legal immigrants in the United States. New immigration provisions indicate tougher laws on criminal aliens, as well as the withdrawal of meaningful discretionary relief from all aliens. Other immigration laws seek to insulate federal immigration decisions from judicial review. These policies not only target illegal aliens, but also legal immigrants living in the United States who would otherwise qualify for permanent residency or citizenship under previously existing immigration laws. The highly publicized decision,³ involving the suspension of deportation proceedings initiated by the federal government of approximately 40,000 Nicaraguans living mostly in Florida, exemplifies these changes.⁴

Across the country, states have followed suit and have been interpreting some of these new provisions. With some exceptions in the area of criminal prosecutions, federal and state courts in Florida are outlining hard-line policies against legal and illegal aliens.

II. FEDERAL LEGISLATION ON IMMIGRATION

A. *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

During 1996, the executive branch and the 104th Congress turned their attention to immigration and, in some cases, radically altered relief available to lawful residents and others in the United States. The wholesale transformation of immigration law, under the guise of removing undocumented and criminal aliens, became a priority for the Republican-led Congress this past year. It was no surprise that one of the first changes in

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

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

3. *Tefel v. Reno*, 972 F. Supp. 608 (S.D. Fla. 1997).

4. *Id.*

immigration law involved current exclusion and deportation laws. The IIRIRA directly abolished the separate exclusion and deportation hearings and “replaced them with a uni[tary] removal proceeding.”⁵ The IIRIRA also cut back legal safeguards which historically protected legal residents from deportation. In some cases, long-term lawful permanent residents who have extensive familial and community ties are now subject to deportation without any relief available to them.

One of the most basic changes in relation to exclusion and deportation proceedings was IIRIRA’s modification of the “entry” doctrine.⁶ Before its passage, “aliens who [had] entered the U.S. whether lawfully or unlawfully, and who remain[ed], . . . [were] subject to deportation [proceedings].”⁷ Entry had been defined as: 1) a crossing into the territorial limits of the United States, i.e., physical presence; 2) an inspection and admission by an immigration officer; or 3) actual and intentional evasion of inspection at the nearest inspection point; coupled with 4) freedom from restraint.⁸ Before the IIRIRA, both illegal and legal aliens who entered the United States enjoyed the right to deportation proceedings before being forcefully expelled from the United States. Under the IIRIRA, aliens who are not inspected and admitted by an immigration officer are deemed to be seeking admission and are subject to exclusion under section 212(a) of the Immigration and Nationality Act (“INA”), regardless of when they effected an entry into the United States under prior law and how long they have actually lived here after entry without inspection.⁹

Another area of change has been in the treatment of criminal aliens. Specifically, the IIRIRA has changed the definition of “conviction.”¹⁰ Section 101(a)(48)(A) of the INA now states:

5. Opening Brief of Petitioner at 9, *N-J-B- v. Reno*, __ F. Supp. __ (11th Cir. 1997) (No. 97-4400).

6. H.R. REP. NO. 104-879, at 259 (1997).

7. DAVID S. WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* 166 (3d ed. 1992).

8. IRA J. KURZBAN, *KURZBAN’S IMMIGRATION LAW SOURCEBOOK* 25 (5th ed. 1994).

9. H.R. REP. NO. 104-879, at 262 (1997). Section 1101(a)(13)(A), title 8 of the *United States Code* states: “The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A) (Supp. II 1996).

10. H.R. REP. NO. 104-879, at 262 (1997). The definition of “conviction” has been broadened “for immigration law purposes to include all aliens who have admitted to or been found to have committed crimes. This will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication or suspension of sentences.” *Id.*

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.¹¹

Additionally, section 101(a)(48)(B) provides that any period imposed by the court will be included as part of a term of imprisonment, regardless of whether the court suspends the sentence or suspends execution.¹² What is more detrimental to aliens with criminal convictions is that these changes will apply to “convictions and sentences entered before, on, or after the date of the enactment of this Act.”¹³ Similarly, Congress has redefined the term “aggravated felony” to include virtually any felony including theft, assault, and small amounts of money or larceny transaction violations.¹⁴ Since an aggravated felon is barred from citizenship, as well as most forms of relief from removal including political asylum, withhold of deportation, voluntary departure, and cancellation of removal (formerly suspension of deportation), the definitional change has enormous impact.

The statute also substantially restricts relief for persons who have resided in the United States for long periods of time without any criminal problems. Congress abolished the suspension of deportation, which required a person to demonstrate seven years of continuous physical presence, good moral character, and establish hardship to himself or his family, or show that he is a United States citizen or lawful permanent resident.¹⁵ In its place,

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 322, 8 U.S.C. § 1101(a)(48)(A) (Supp. II 1996) (amending Immigration and Nationality Act of 1952 § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (1994)).

12. *Id.* § 1101(a)(48)(B).

13. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 322(c), Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996).

14. 8 U.S.C.A. § 1101(a)(43) (West Supp. 1997).

15. *Id.* § 1254(a)(1). The text of section 1254(a) provides:

[T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in case of an alien . . . who . . . is deportable under any law of the United States . . . [and] has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or

Congress established "cancellation of removal" which requires ten years of continuous physical presence and the establishment of exceptional and extremely unusual hardship but only to a United States citizen or a legal permanent resident spouse, parent, or child.¹⁶ The alien's own hardship is irrelevant.¹⁷

A crucial part of the new legislation deals with the courts' power to review INS decisions. Among them are the attempts to limit the courts' jurisdiction, as well as the scope of judicial review.¹⁸ Normally, individuals subject to removal by the Attorney General were able to seek relief from deportation by the courts. However, section 242(g) of the INA now provides that:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.¹⁹

Congress has also sought to eliminate review of discretionary decisions by the Attorney General regarding aliens in proceedings.²⁰ In addition,

to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Id.

16. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 240A, 8 U.S.C. § 1229b(b) (Supp. II 1996).

17. *Id.* Section 1229(b) states:

Cancellation of removal and adjustment of status for certain nonpermanent residents.

(1) In general. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Id.

18. *Id.* § 1252(g).

19. *Id.*

20. 8 U.S.C. § 1252(a)(2)(B) (Supp. II 1996). Courts no longer have jurisdiction to review "any judgment regarding the granting of relief" and "any other decision or action of the

Congress has sought to limit the power of the federal courts to grant injunctive relief.²¹

Congress and the INS have charted the future course of immigration law in this country by limiting the courts' power to grant relief, and facilitating the deportation of criminal aliens and countless others awaiting permanent residency status. Altogether, the IIRIRA demonstrates a sharp shift from the historical treatment of providing both legal and illegal aliens due process of law.

B. *Antiterrorism and Effective Death Penalty Act of 1996*

Following the Oklahoma City federal building bombing,²² the country was faced with the growing danger of domestic terrorism.²³ Although primarily designed to target individuals who commit terrorist attacks in the United States,²⁴ the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") broadened the federal government's power over criminal aliens. Specifically, the AEDPA expanded the definition of an aggravated felony, allowed for the early deportation of nonviolent offenders, and limited the courts' authority to provide discretionary relief and review final orders of deportation.²⁵

Before the AEDPA was enacted, an "aggravated felony" was defined as murder, drug trafficking, illicit trafficking of firearms, money laundering, crimes of violence for which the term of imprisonment is at least five years, foreign convictions, and any attempt or conspiracy to commit those crimes.²⁶ With the advent of the AEDPA, an "aggravated felony" includes: 1) gambling offenses; 2) transportation for the purpose of prostitution; 3) alien smuggling for which the term of imprisonment imposed is at least five years; 4) document counterfeiting or fraud for which the term of imprisonment imposed is at least eighteen months; 5) an offense committed by an alien who was previously deported due to a criminal conviction; 6) commercial

Attorney General the authority for which is specified under this [chapter] . . . to be in the discretion of the Attorney General." *Id.*

21. *Id.* § 1252(f)(1).

22. 143 CONG. REC. S697-01 (daily ed. Jan. 28, 1997) (statement of Rep. Gorton). Senator Gorton stated that "[w]e must not allow the cowards responsibility [sic] for such atrocities as the downing of Pan Am Flight 103, the bombing of the World Trade Center, or the bombing of the Oklahoma City Federal building to gain from their actions." *Id.*

23. Statement by the President upon Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (April 24, 1996).

24. *Id.*

25. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1276-77 (1996) (codified as amended in section 8 U.S.C. § 1101(a)(43)).

26. KURZBAN, *supra* note 8, at 89-91.

bribery; 7) forgery; 8) counterfeiting; 9) trafficking in vehicles with identification numbers of which have been altered; 10) obstruction of justice for which a term of five years or more may be imposed; and 11) failure to appear before a court order to answer to or dispose of a charge of a felony for which a sentence of two years or more may be imposed.²⁷

The expanded definition of an aggravated felony clearly permits the deportation of more criminal aliens and substantially increases the likelihood that long-term permanent residents will not be eligible for virtually any form of relief, no matter how minor their criminal convictions. In accordance with other amendments aimed at expeditiously deporting the majority of aliens, the AEDPA facilitates the deportation of nonviolent criminal offenders before completion of their sentences.²⁸

The AEDPA, in conjunction with the IIRIRA, seriously curtails the courts' authority to grant relief from deportation, where deportation is based on criminal grounds. Congress amended section 106(a)(10) of the INA with section 440(a) of the AEDPA, which revokes the courts' exercise of judicial

27. Antiterrorism and Effective Death Penalty Act § 440(e)(1)-(7), 8 U.S.C. § 1101(a)(43) (Supp. II 1996).

28. 8 U.S.C.A. § 1231(a)(4) (West Supp. 1997). Section 1231(a)(4) states:

(A) Except as provided in section 259(a) of Title 42 and paragraph (2), the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole supervised release, probation, or the possibility of arrest or further imprisonment is not a reason to defer removal.

(B) The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—

(i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that the (I) alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title and (II) the removal of the alien is appropriate and in the best interest of the United States; or

(ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

Id.

review over final orders of deportation.²⁹ Equitable relief for deportable aliens has also been drastically cut back. Section 440(d) of the AEDPA amended 8 U.S.C §§ 212(c) and 1882(c), and “provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses.”³⁰ On June 27, 1996, the BIA decided *In re Soriano*³¹ and determined that applications for relief under 212(c) are barred only if filed after IIRIRA’s date of effectiveness.³² Consequently, section 440(d) should not be applied retroactively to applicants who were awaiting decisions on appeal prior to April 24, 1996. Nonetheless, on February 21, 1997, the Attorney General concluded that it should be applied retroactively.³³ The Attorney General argued that in passing 440(d), Congress withdrew the authority to grant prospective relief, and she stated that when a statute “either alters jurisdiction or affects prospective injunctive relief [it] generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases.”³⁴

As a result of the Attorney General’s decision, long-term lawful permanent residents will now be stripped of their ability to remain in the United States irrespective of the age or nature of their conviction. Ancient convictions for relatively minor matters will now result in the deportation of long-term permanent residents without relief. The only bright spot is the

29. Section 440(a)(10) of the AEDPA states: “[A]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section [1251(a)(2)(A)(iii), (B),(C), or (D)] of this title for which both predicate offenses are covered by section [1251(a)(2)(A)(i) of this title], . . . shall not be subject to review by any court.” 8 U.S.C. § 1105a(a)(10) (Supp. II 1996).

30. *Matter of Soriano*, BIA Int. Dec. No. 3289 (1996), 1997 WL 159795, at *1 (Feb. 21, 1997) (Reno, Attorney General) (citing 8 U.S.C. § 1182(c) (1996)). “Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well.” *Id.* See *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993).

31. *In re Soriano*, Int. Dec. No. 3289 (B.I.A. June 27, 1996).

32. *Id.*

33. *Soriano*, 1997 WL 159795, at *5–6.

34. *Id.* at *3. The Attorney General’s decision has now been rejected by two district courts at the time of the submission of this article. See *Mojica v. Reno*, 970 F. Supp. 130, 182 (E.D.N.Y. 1997) (Weinstein, J.) (striking down the interpretation of the Attorney General in *Matter of Soriano*, Int. Dec. No. 3289, 1997 WL 159795 at *1 (B.I.A. Feb. 21, 1997) which stripped long-term lawful permanent resident aliens, who commit virtually any offense, of their right to remain in the United States). See also *Yesil v. Reno*, 958 F. Supp. 828 (S.D.N.Y. 1997) (Chin, J.).

BIA's recent opinion finding that the statute does not apply to section 212(c) relief or exclusion proceedings.³⁵

III. FEDERAL CASES AND THE UNITED STATES SUPREME COURT

A. *Decisions Affecting Immigration Law*

The discussion that follows involves two of the most highly contested issues in relation to the recent changes in immigration law: federal jurisdiction and retroactivity. In an effort to further reduce assistance for aliens in the United States, with or without convictions, the AEDPA and the IIRIRA have sought to revoke the district courts' jurisdiction to review deportation orders issued by the Immigration and Naturalization Service. The elimination of judicial review indicates that aliens may no longer have a forum in which to argue possible violations of substantive rights. Although the removal of judicial review under section 440(a) of the AEDPA has been upheld in several circuit courts,³⁶ constitutional concerns are prevalent. Retroactive application of newly created statutory provisions and jurisdictional changes under the AEDPA and the IIRIRA are of equal constitutional concern for thousands of immigrants who otherwise would not be affected by the new legislation. The cases below will touch on these issues as they affect the legal rights of immigrants in the United States in light of traditional common law principles.

1. Restraints on Judicial Review

There are considerable arguments against the revocation of judicial review under section 440(a) of the AEDPA and the newly created section 242(g) of the INA. In a recent decision by the United States District Court for the Eastern District of New York, Senior Judge Weinstein held that there was "no indication that Congress intended to take the dramatic—and

35. In re Fuentes-Campos, Int. Dec. No. 3318 (B.I.A. May 14, 1997). The BIA held that before the amendment, section 212(c) barred relief for aliens who "had been convicted" of certain crimes and that the language of the statute covered aliens in exclusion and deportation proceedings. *Id.* at 4. However, section 440(d) eliminated such language and created a "more limited provision making relief unavailable to any alien 'who is deportable by reason of having committed any criminal offense . . .'" *Id.* As a result, the statute cannot bar 212(c) relief to aliens in exclusion proceedings.

36. Ira Kurzman, *The Disappearing Federal Courts*, THE CHAMPION, Aug. 1997, at 13. See, e.g., Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997); Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

arguably unconstitutional—step of repealing the habeas statute [section 2241 of title 28] with roots traceable to our nation’s beginnings.”³⁷ The district courts continue to have judicial authority to issue writs of habeas corpus, and to hold otherwise “would call into question the most basic tenets of our tripartite system of government.”³⁸ Furthermore, the court emphasized that “despite the AEDPA’s withdrawal of jurisdiction, ‘some means of seeking judicial relief remain[s] available.’”³⁹

On the other hand, the Eleventh Circuit has concluded that section 440(a) of the AEDPA does eliminate the courts’ jurisdiction to hear *appeals* from final orders of deportation of persons with criminal convictions.⁴⁰ In the case of *Boston-Bollers v. INS*, the defendant entered the United States in 1987 as a lawful permanent resident.⁴¹ On June 19, 1992, Boston-Bollers pled guilty to a charge of second degree murder.⁴² By March of 1993, the INS “issued an order to show cause charging that Boston-Bollers was subject to deportation on account of his second degree murder conviction.”⁴³ Boston-Bollers filed a petition for review with the Eleventh Circuit Court, after an appeal to the immigration judge and the Board of Immigration Appeals proved unsuccessful.⁴⁴ The primary issue was whether section 440(a)(10)⁴⁵ prevented the review of the denial of discretionary relief from deportation of a long-term lawful permanent resident.⁴⁶

The court held that, upon the President’s signature on April 24, 1996, courts no longer had jurisdiction over petitions pending review on final orders of deportation of persons with criminal convictions.⁴⁷ The opinion discussed several propositions in support of the holding. First, “passage of

37. *Mojica v. Reno*, 970 F. Supp. 130, 160 (E.D.N.Y. 1997) (Weinstein, J.).

38. *Id.* at 157.

39. *Id.* at 161 (quoting *Yesil v. Reno*, 958 F. Supp. 828, 837 & n.7 (S.D.N.Y. 1997)).

40. *Boston-Bollers v. INS*, 106 F.3d 352 (11th Cir. 1997) (per curiam).

41. *Id.* at 353.

42. *Id.*

43. *Id.*

44. *Id.* at 354.

45. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 440(a)(10) states: “Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.” 8 U.S.C. § 1101(a)(43) (Supp. II 1996).

46. *Boston-Bollers v. INS*, 106 F.3d 352, 354 (11th Cir. 1997). The United States Constitution states “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

47. *Boston-Bollers*, 106 F.3d at 355.

the AEDPA is not [a] retroactive application affecting substantive rights, but [it] is a prospective application of a jurisdiction-eliminating statute."⁴⁸ Second, the court held that restrictions on the federal courts' jurisdiction did not violate the Due Process Clause since "[t]he power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as congress may see fit to authorize or permit."⁴⁹ Third, section 440(a)(10) was not invalid under Article III because it is the duty of the political branches of the federal government to regulate "the relationship between the United States and our alien visitors."⁵⁰

In *Ramirez-Centeno v. Wallis*,⁵¹ the United States District Court for the Southern District of Florida held that the court lacked jurisdiction pursuant to section 242(g) to review orders of deportation of cases filed after the Act's date of effectiveness.⁵² Benito Ramirez-Centeno acknowledged deportability on February 1, 1991, based on an illegal entry into the United States in 1990.⁵³ Ramirez-Centeno petitioned for political asylum claiming that he had been "a member of the Nicaraguan Social Christian Party" when he resided in Nicaragua and that he had worked with the Contras in 1985.⁵⁴ His claim was dismissed by the immigration judge, and on December 14, 1994, his appeal to the Board of Immigration Appeals was also dismissed.⁵⁵ Consequently, Ramirez-Centeno requested the district court to grant a writ of habeas corpus enjoining deportation.⁵⁶ The court adopted the Seventh Circuit's position that "the general effective date of . . . section 309(a) is 'the first day of the first month beginning more than 180 days after the date of the

48. *Id.* at 354. See *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). The court also indicated that a majority of the circuits have ruled consistently with this decision. See *Kolster v. INS*, 101 F.3d 785, 791 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1842 (1997); *Mendez-Rosas v. INS*, 87 F.3d 672, 676 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 694 (1997); *Qasguargis v. INS*, 91 F.3d 788, 789 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1080 (1997); *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996).

49. *Boston-Bollers*, 106 F.3d at 355 (citing *Carlson v. Landon*, 342 U.S. 524, 537 (1952)).

50. *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))).

51. 957 F.Supp. 1267, 1269 (S.D. Fla. 1997).

52. *Id.* at 1269.

53. *Id.* at 1268.

54. *Id.*

55. *Id.* at 1269.

56. *Ramirez-Centeno*, 957 F. Supp. at 1269.

enactment of this Act,' or April 1, 1997."⁵⁷ Beginning April 1, 1997, the court would no longer have subject matter jurisdiction over pending cases. Since Ramirez-Centeno's claim was pre-April 1, 1997, the court had jurisdiction to hear the case. Nonetheless, the effect of this provision will mean the withdrawal of judicial review from thousands of aliens who annually receive orders of deportation.

The government also argued that the AEDPA "eliminated *all* habeas review of final deportation orders."⁵⁸ As a result, the court did not have the power to issue a writ in Ramirez-Centeno's case. Section 1105(a)(10) of title 8, *United States Code*, as amended by the AEDPA, states that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense [without regard to the date of its commission] shall not be subject to review by any court."⁵⁹ The court concluded that section 440(a) of the AEDPA withdrew the court's power to grant writs of habeas corpus to aliens who are deportable by reason of their criminal convictions.⁶⁰ Specifically, the "amended language of section 1105a(a)(10) refers only to deportations as the result of criminal activity, while the original language referred to all deportations."⁶¹

The court also favored a strict interpretation of custody in relation to orders of deportation.⁶² The court cited *Marcello v. District Director of INS*,⁶³ and stated "that 8 U.S.C. § 1105a require[s] that individuals seeking relief from final orders of deportation must be in the actual custody of the Immigration and Naturalization Service and not merely preparing to be deported."⁶⁴ Since Ramirez-Centeno had not pled guilty and was not in the custody of the INS, the court would be unable to issue the writ of habeas corpus.⁶⁵ Other jurisdictions, however, have insisted that physical restraint

57. *Id.* (citing Illegal Immigration Reform and Immigrant Responsibility Act, § 309(a), 110 Stat. 3009 (1996)). The Seventh Circuit decision of *Lalani v. Perryman*, 105 F.3d 334, 336 (7th Cir. 1997), held that "on April 1, 1997 all cases filed and currently pending that fall within the boundaries of section 242(g) would be dismissed from federal court for lack of jurisdiction." *Id.*

58. *Id.* at 1270.

59. 8 U.S.C. § 1105a(a)(10) (1996) *repealed by* 8 U.S.C.A. § 1252(a)(2)(C) (West Supp. 1997).

60. *Ramirez-Centeno*, 957 F. Supp. at 1270.

61. *Id.*

62. *Id.* at 1271.

63. 634 F.2d 964 (5th Cir. 1981).

64. *Ramirez-Centeno*, 957 F. Supp. at 1271. See *Marcello v. District Dir. of INS*, 634 F.2d 964, 968 (5th Cir. 1981).

65. *Ramirez-Centeno*, 957 F. Supp. at 1271.

is not necessary for habeas jurisdiction.⁶⁶ Although it appeared that the district court disfavored the attempts at curtailing judicial review, it ultimately failed to provide relief from deportation.

Another judge in the Southern District of Florida in *Tefel v. Reno*,⁶⁷ disagreed with the analysis that section 242(g) revokes the district court's jurisdiction over orders of deportation.⁶⁸ Petitioners Roberto Tefel and others similarly situated, sought declaratory, injunctive, and mandatory relief against the Immigration and Naturalization Service, the Department of Justice, and the Board of Immigration Appeals for denying them the right to seek suspension of deportation.⁶⁹ On May 20, 1997, United States District Judge James Lawrence King rejected the government's arguments that 242(g) and other statutes barred judicial review, and, in a lengthy order,⁷⁰ granted a temporary restraining order.⁷¹ On June 24, 1997, Judge King incorporated the May 20, 1997 opinion regarding jurisdiction and then proceeded to issue a detailed preliminary injunction preventing the INS from deporting class members. On July 11, 1997, upon the heels of much criticism concerning the federal government's decision to pursue the mass deportations, the Attorney General declared that the deportations would not be effectuated.⁷² Instead, the administration would introduce to Congress a legislative proposal that "would enable applicants for suspension of deportation whose cases were pending prior to April 1, 1997, and who meet the standards which applied at that time, to be granted such relief on a case by case basis."⁷³

66. *Mojica v. Reno*, 970 F. Supp. 130, 164 (E.D.N.Y. 1997) (Weinstein, J.). The court cited to *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995), noting that "so long as he is subject to a final order of deportation, an alien is deemed to be 'in custody.'" *Id.* at 164.

67. 972 F. Supp. 608 (S.D. Fla. 1997).

68. *Id.* at 608.

69. Brief for Petitioner at 3, *Tefel v. Reno*, 972 F. Supp. 608 (S.D. Fla. 1997) (97-0805).

70. *Tefel*, 972 F. Supp at 608.

71. *Id.* at 620. The court used the traditional four-part test of whether: "(1) there is a substantial likelihood of success on the merits, (2) the TRO is necessary to prevent irreparable injury, (3) the injury to the plaintiff outweighs any harm to the non-movant, and (4) the TRO would serve the public interest." *Id.* (citing *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995)).

72. Carol Rosenberg, *A Break for Central Americans*, THE MIAMI HERALD, July 11, 1997, at A1, A13.

73. *Administration Proposes Finetuning for 1996 Immigration Law to Mitigate Harsh Effects of Applying New Rules to Pending Cases*, Department of Justice, Press Release, July 10, 1997, at 1-2.

Judge King's May 20, 1997, Order Denying Defendant's Motion to Dismiss for Lack of Jurisdiction addressed section 242(g) in relation to the plaintiff's case.⁷⁴ The court held that there was "a strong presumption that the actions of federal agencies are reviewable in the federal courts unless nonreviewability is explicitly demonstrated in the statutory language."⁷⁵ This conclusion is consistent with a long line of Supreme Court cases cited by the district court.⁷⁶ Judge King also argued that this presumption of reviewability is greater in light of constitutional claims that may arise.⁷⁷ Based on the statutory language of section 242(g), he also concluded that the statute did not "bar the review of the decisions or actions of lower level government officials."⁷⁸

Additionally, if the amendments were to deny the power of district courts to exercise judicial review over claims regarding deportation, aliens would be unable to have their constitutional claims heard. The plaintiff's due process, equal protection, and estoppel claims would not be addressed by an immigration judge or the BIA because they lack jurisdiction over these matters.⁷⁹ Furthermore, the district court is the only forum in which a factual record could be developed for the Eleventh Circuit to review.⁸⁰ If jurisdiction is eliminated, Congress would be "intrud[ing] upon the judiciary's essential function by denying any judicial forum to a plaintiff who asserts a violation of constitutional rights."⁸¹

In another unrelated area regarding jurisdiction and aliens, the Eleventh Circuit recently decided the case of *Foy v. Schantz, Schatzman, & Aaronson, P.A.*⁸² This decision is important in several aspects as it relates to aliens filing and maintaining suits in federal court based on diversity of jurisdiction. The Eleventh Circuit resolved the question of whether "an alien

74. *Tefel*, 972 F. Supp. at 612.

75. Order Denying Defendant's Motion to Dismiss at 2-3, *Tefel*, (97-0805).

76. *Id.* (citing *Felker v. Turpin*, 116 S. Ct. 2333 (1996); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Rosas v. Brock*, 826 F.2d 1004 (11th Cir. 1987); *Abbott Lab. v. Gardner*, 387 U.S. 136, 140-41 (1967)).

77. *Id.* at 3. In *Tefel*, the judge would later hold that the government's policy inducing the Nicaraguan immigrants led to the emergence of due process and equal protection concerns. See Order Granting Preliminary Injunction at 33-37, *Tefel*, (97-0805).

78. Order Denying Defendant's Motion to Dismiss at 4, *Tefel*, (97-0805). Section 242(g) states in pertinent part, that "no court should have jurisdiction to hear any cause or claim by or on behalf of any client arising from decision or action by the Attorney General." Immigration and Nationality Act, 8 U.S.C. § 1182 (1994).

79. Order Denying Defendant's Motion to Dismiss at 8, *Tefel*, (97-0805).

80. *Id.* at 10.

81. *Id.*

82. 108 F.3d 1347 (11th Cir. 1997).

who intends to reside in this country permanently but who has not yet attained official permanent resident immigration status . . . should be considered an alien admitted for permanent residence” within the meaning of 28 U.S.C. § 1332(a).⁸³ In this case, Appellant Foy filed a diversity action claiming legal malpractice against a Florida firm.⁸⁴ However, at the time he applied, he was not yet a permanent resident; he was waiting for a green card from the INS.⁸⁵ The trial court found no diversity between the parties because it interpreted section 1332(a) to include someone who had applied for a “green card” but had not yet received it, and the person satisfied other criteria for residency in Florida.⁸⁶ The court dismissed the action for lack of subject matter jurisdiction.⁸⁷

The Eleventh Circuit held that the word “admitted” under section 1332(a) applied only to those persons who had been granted lawful permanent residence by the INS, regardless of what status individual states conferred to aliens residing within their borders.⁸⁸ Foy could, therefore, be considered a citizen for purposes of diversity because, even though he had applied for permanent residency, he was not yet a lawful permanent resident at the time of filing the suit.⁸⁹

B. *Presumption against Retroactivity*

Another issue which has arisen under new immigration laws is the question of their retroactive effect. An overview of the traditional common law principles upon which our legal system has been based will demonstrate the unsoundness of the retroactive application of the criminal alien provisions under AEDPA section 440(d) as expressed in the Attorney General’s decision in *Matter of Soriano*.⁹⁰ The Attorney General’s decision on retroactivity appears to fly in the face of the Supreme Court’s recent

83. *Id.* at 1348. Section 1332(a) of title 28 states that “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” *Id.* (citing 28 U.S.C. § 1332(a) (1995)).

84. *Foy*, 108 F.3d at 1348.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1349. The Eleventh Circuit is not alone in its reliance on the plain statutory language of § 1332(a). See *Chan v. Mui*, No. 92-CIV8258, 1993 WL 427114, at *1 (S.D.N.Y. Oct. 20, 1993); *Miller v. Thermarite*, 793 F. Supp. 306, 308 (S.D. Ala. 1992) (finding that aliens without green cards are not considered permanent residents for jurisdictional purposes).

89. *Foy*, 108 F.3d at 1349.

90. Int. Dec. No. 3289, at 1 (B.I.A. Feb. 1997).

decisions of *Lindh v. Murphy*⁹¹ and *Hughes Aircraft Co. v. United States*,⁹² which clarify and amplify the Court's decision in *Landgraf v. USI Film Products*.⁹³ As the Supreme Court stated in *Landgraf*: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."⁹⁴ Consequently, there is a presumption against retroactive legislation, and "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment."⁹⁵ Retroactive application will "create a situation in which people who have lived in the community, have established themselves as valuable members of society, and who are needed to support their families, are summarily deported without regard to the present and future interests of their families or the community at large."⁹⁶ Such is the case of *Tefel*.

On February 20, 1997, the BIA interpreted the IIRIRA in regard to the provisions on suspension of deportation. In the landmark case, *Matter of N-J-B*,⁹⁷ the BIA resolved the issue of retroactivity created by the language of the IIRIRA. In a seven to five decision, the court held that, with respect to the respondent's claim for suspension of deportation, if a person had been

91. 117 S. Ct. 2059 (1997). The Supreme Court held that the amendments of the AEDPA in relation to habeas corpus reform did not apply to pending noncapital cases. *Id.* at 2061. This case is significant in regard to the issue of retroactivity, because it re-enforced the notion that in the absence of an "express command, the court must determine whether the new statute would have a retroactive effect." *Id.* at 2062. Since section 107 of the AEDPA applies special habeas corpus procedures in capital cases and section 107(c) expressly provides that the amendment "shall apply to cases pending on or after the date of enactment of this Act[.]" the amendments to noncapital cases, which lack such express language, should be applied prospectively. *Id.* at 2063. Furthermore, retroactive application would "have [a] substantive as well as purely procedural effect[.]" *Id.* This is an example of how, without express language, the Supreme Court will uphold the presumption against retroactivity.

In *Mojica v. Reno*, the Eastern District Court of New York held that "[w]ithout manifest congressional design expressed in clear statutory language, the default rule in statutory interpretation requires prospective implementation." 970 F. Supp. 130, 172 (E.D.N.Y. 1997). The court found that such express language is lacking and that normally Congress has no trouble in expressing retroactive application of the legislation it creates. *Id.*

92. 117 S. Ct. 1871 (1997).

93. 511 U.S. 244 (1994).

94. *Id.* at 265.

95. *Id.* at 269-70; see also *Hughes Aircraft Co.*, 117 S. Ct. at 1876 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (noting that the "presumption against retroactive legislation is deeply rooted in our jurisprudence.")).

96. *Mojica*, 970 F. Supp. at 170.

97. Int. Dec. No. 3309, 17 Immigr. Rep. B1-173 (B.I.A. 1997).

served with an Order to Show Cause before he or she accrued seven years of continuous physical presence in the United States, then he or she was ineligible for suspension even if the case was on appeal after obtaining suspension before an immigration judge.⁹⁸

Specifically, the BIA analyzed section 309(c)(1) of the IIRIRA as establishing the Act's effective date as April 1, 1997, and found that section 309(c)(5)⁹⁹ created an exception in regard to claims of suspension of deportation of aliens who received notices to appear before, on, or after the Act.¹⁰⁰ INA section 240A(d)(1) provides that any period of continuous physical presence will be terminated "when an alien is served a notice to appear under section 239(a)."¹⁰¹ The BIA held that the term used in section 239(a) of the Act was consistent with the formal document titled "Order to Show Cause" ("OSC"), which is mentioned in 8 U.S.C. § 1252b.¹⁰² The BIA held that the terms "notice to appear" and OSC were synonymous and that

98. Petitioner's Brief, *Matter of N-J-B- v. Reno*, Int. Dec. No. 3309, 17 Immigr. Rep. B1-173 (B.I.A. 1997) (No. 97-4400), at 3. Section 240A(d) states:

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or (4) of this title, whichever is earliest.

8 U.S.C.A. § 1229b(d)(1) (West Supp. 1997).

99. Section 309(c)(5) states: "TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [section 1229b(d) of this title] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of enactment of this Act." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 309(c)(5), 8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments).

100. *In re N-J-B-*, Int. Dec. No. 3309, 17 Immigr. Rep. at 19 (B.I.A. 1997).

101. Immigration and Nationality Act of 1952 § 240A(d)(1), 8 U.S.C.A. § 1229b(d)(1) (West Supp. 1997).

102. 8 U.S.C. § 1252b(a) states:

In deportation proceedings under section 242 [8 U.S.C. § 1252], written notice (in this section referred to as an "order to show cause") shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien's counsel of record, if any) specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of law. (D) The charges against the alien and the statutory provisions alleged to have been violated

8 U.S.C.A. § 1252b(a) (West Supp. 1997).

receipt of an OSC terminated the seven years of continuous physical presence.¹⁰³

The petitioner contended that OSCs are not synonymous with the new notice to appear, arguing that a notice to appear was only first used in section 304 of the IIRIRA.¹⁰⁴ Furthermore, in INA section 239(a), “Congress provided extensive and detailed requirements for new notices to appear[,]” which never applied to OSCs under prior law.¹⁰⁵ In a brief to the Eleventh Circuit, the petitioner argued that retroactive application of section 309(c)(5) “ignores basic rules of statutory construction, is contrary to the statute’s legislative history, violates principles concerning the retroactive application of statutes as established by the Supreme Court, and violates petitioner’s due process and equal protection rights.”¹⁰⁶ The petitioner maintained that the majority’s holding violated the rule of statutory construction, which dictates that “[n]o statute may be read as to render any word or phrase surplusage” when it disregards the phrase “under section 239(a).”¹⁰⁷ Similarly, by refusing to give the word “under” its ordinary meaning, the BIA ignored the rule that “legislative purpose is expressed by the ordinary meaning of the words used.”¹⁰⁸

Concerning the legislative intent behind the amendments, the petitioner argued that when the House first introduced the bill (the Senate receded section 309 to the House), section 309(c)(5) provided that the period of

103. *In re N-J-B-*, Int. Dec. No. 3309, 17 Immig. Rep. at B1-178 (BIA 1997).

104. Petitioner’s Brief, *N-J-B-*, Int. Dec. No. 3309, 17 Immig. Rep. B1-173 (B.I.A. 1997) (No. 97-4400), at 15 n.5.

105. *Id.* at 16.

Most significantly, § 239(a) requires that all “notices to appear” shall state “[t]he time and place at which the proceedings will be held” and “[t]he consequences under § 1229a(b)(5) [§ 240(b)(5)] . . . of the failure, except under exceptional circumstances, to appear at such proceeding.” Orders to show cause under pre-IIRIRA § 242B(a)(1) were not required to include either of these advisals.

Id. (quoting 8 U.S.C. § 1229(a)(1)(G) (Supp. II 1996).

106. *Id.* at 10.

107. *Id.* at 22 (citing *Kungys v. United States*, 485 U.S. 759 (1988); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

108. Petitioner’s Brief at 22, *N-J-B-* (No. 97-4400) (citing *Ardestani v. INS*, 502 U.S. 129 (1991); *INS v. Phinpathya*, 464 U.S. 183, 188 (1984)). The petitioner also argues that a third rule of statutory construction was violated by the BIA’s decision. *Id.* Specifically, the rule which dictates that “[d]ifferent words or phrases used in the same statute have different meanings.” *Id.* According to Petitioner, “[t]he BIA majority violated this principle when it failed to recognize that only notices to appear served under § 239(a) interrupt physical presence. It also ignored this canon when it failed to note the distinction between notices to appear that are ‘served,’ and notices to appear that are ‘issued.’” *Id.*

continuous physical presence “shall be deemed to have ended on the date the alien was served an order to show cause.”¹⁰⁹ However, the Berman Amendment, adopted in early 1996, established the current language of section 309(c)(5) and “intentionally deleted the operative language that service of an order to show cause ends physical presence.”¹¹⁰ As a result, the final change incorporated as the legislation, which did not reject the Berman Amendment, could not have intended to incorporate language it had previously rejected.

The petitioner finally contended that various sections under the IIRIRA, when read together, provide a correct interpretation of the relevant statutory sections. Particularly, section 309(c)(1) states that the old law continues to be applicable to deportation and exclusion proceedings before April 1, 1997.¹¹¹ Section 309(c)(2) states that the Attorney General may choose to apply the new law to pending cases where an evidentiary hearing has not been held.¹¹² Similarly, section 309(a)(3) provides that the Attorney General may, at any time before there is a final order of deportation or exclusion,

109. *Id.* at 33 (citing 104 CONG. REC. at H10898 (daily ed. Sept. 24, 1996)). When H.R. 2022 was introduced into the House on August 5, 1995, section 309(c)(5) provided:

Transitional Rule with Regard to Suspension of Deportation. – In applying section 244(a) of the Immigration and Nationality Act (as in effect before the date of the enactment of this Act) with respect to an application for suspension of deportation which is filed before, on, or after the date of the enactment of this Act and which has not been adjudicated as of 30 days after the date of the enactment of this Act, the period of continuous physical presence under such section shall be deemed to have ended on the date the alien was served an order to show cause pursuant to section 242A of such Act (as in effect before such date of enactment).

Petitioner’s Brief at 33, *N-J-B-* (No. 97-4400) (citing H.R. 2022, 104th Cong. § 309(c)(5) (1995)).

110. *Id.* at 34 (citing H.R. REP. NO. 104-469, pt. 1, at 183–84 (1996)).

111. *Id.* at 14. Section 309(c)(1) of the IIRIRA states, “GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date . . .” 8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments).

112. Petitioner’s Brief at 14, *N-J-B-* (No. 97-4400). Section 309(c)(2) of the IIRIRA states, in pertinent part:

ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES. – In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle).

8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments).

terminate proceedings and initiate a removal proceeding by serving a notice to appear under section 309 of the new law.¹¹³ According to petitioner, when analyzed together, section 240A(d)(1) terminates the period of continuous physical presence necessary for suspension:

“When the alien is served a notice to appear under §239(a)” . . . INA § 240A(d) “shall apply to notices to appear issued before, on, or after the date of enactment of this Act [September 30, 1997]” . . . [and] when the Attorney General elects to apply the new law to old cases, old Orders to Show Cause are effectively converted into the new Notice to Appear under 239(a).¹¹⁴

In other words, “the prior-issued Order to Show Cause would terminate a suspension applicant’s physical presence only when and if the Attorney General elected to apply the new law to him under § 309(c)(2) or § 309(c)(3), and actually or constructively served him with a notice to appear under § 239.”¹¹⁵ The Attorney General suggested she agrees with this view by vacating *Matter of N-J-B*.¹¹⁶

In response, on November 14, 1997, Congress passed legislation titled the Nicaraguan and Central American Relief Act,¹¹⁷ amending section 309(c) of the IIRIRA.¹¹⁸ The result is a statutory codification of the decision in *Matter of N-J-B*, solidifying retroactive application of IIRIRA, with such exceptions that would provide relief to certain aliens. The Act grants adjustment of status to permanent residency to Nicaraguan and Cuban nationals who have not been convicted of an aggravated felony and who

113. Petitioner’s Brief at 14, *N-J-B* (No. 97-4400). Section 309(c)(3) states: ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS. – In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinstate proceedings under chapter 4 of title II [of] the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinstated proceeding.

8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments).

114. Petitioner’s Brief at 26, *N-J-B* (No. 97-4400) (quoting 8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments)).

115. *Id.*

116. Letter from Janet Reno, Attorney General, *Department of Justice*, to Newt Gingrich, Representative, *House of Representatives*, (July 10, 1997) (on file with author).

117. H.R. 2607, 105th Cong. § 201 (1997) (enacted).

118. *Id.* § 203

were residing in the United States prior to December 31, 1995.¹¹⁹ Furthermore, Guatemalan and Salvadorian nationals who have entered the United States before October 1, 1990 and September 19, 1990, respectively, who have not been convicted of an aggravated felony, and who registered for benefits under the ABC settlement agreement may apply for suspension of deportation under the previously existing laws.¹²⁰ In addition, the law grants to persons from the former Soviet Union and the Eastern Bloc countries the right to seek suspension of deportation under pre-IIRIRA rules, if they entered the United States before December 31, 1990, and filed an application for asylum on or before December 31, 1991. However, the law intentionally excluded Haitian nationals who will have to seek cancellation of removal under the strict guidelines of the IIRIRA or seek remedial legislation separately.¹²¹

C. *Other Policies on Criminal Aliens*

The United States District Court for the Southern District of Florida, in *United States v. Lazo-Ortiz*,¹²² demonstrated an example of the rigid penalties awaiting criminal aliens¹²³. In this case, the defendant unlawfully reentered the United States after being deported.¹²⁴ In 1990, Lazo-Ortiz had committed a manslaughter offense.¹²⁵ The government requested that he be given a sentence enhancement of not less than twenty years by virtue of section 1326(b)(2)¹²⁶ of the Immigration and Nationality Act or under the United States Sentencing Commission Guidelines ("USSG").¹²⁷ However, in 1990, the statutory definition of "aggravated felony" did not include crimes of violence such as manslaughter. At that time, the defendant instead would have been held to a sentence enhancement of not more than ten years under

119. *Id.* § 202.

120. *Id.* § 203.

121. *Id.*

122. 954 F. Supp. 254 (S.D. Fla. 1996).

123. *Id.* at 255.

124. *Id.*

125. *Id.*

126. Section 1326(b)(2) of title 8, *United States Code*, states that any alien whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under title 18, *United States Code*, imprisoned not more than 20 years, or both. 8 U.S.C. § 1326(b)(2) (Supp. II 1996).

127. The manual for sentencing states that while the base offense level is eight for aliens unlawfully entering or remaining in the United States, "[i]f the defendant previously was deported after a conviction for an aggravated felony, increase [is] by [sixteen] levels." U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(2) (1995).

section 1326(b)(1).¹²⁸ The court carefully avoided this issue and held that USSG section 2L1.2(b)(2) was nonetheless applicable.¹²⁹ Based on the sentencing commission's guidelines, "all defendants sentenced on or after November 1, 1991, who have an aggravated felony conviction [are] eligible for the sixteen-level increase without regard to the date such felony was committed."¹³⁰ Defendants who have convictions for crimes of violence which occurred before passage of the new laws will receive longer sentences. The effect of this policy on criminal aliens is indicative of a violation of the *ex post facto* prohibition under the United States Constitution, since the law enforced did not exist at the time of the offense.¹³¹

IV. FLORIDA STATE CASES ON IMMIGRATION

The following cases show how Florida state courts are attempting to preserve the protections afforded defendants in criminal prosecutions. As federal sanctions against aliens with criminal convictions increase, and as their opportunities to remain in the United States decrease due to these convictions, the actions of state courts in vacating convictions becomes substantially more important.

A. Prosecution of Criminal Aliens

The following cases concern rule 3.172(c)(8) of the *Florida Rules of Criminal Procedure*, which requires a trial judge to inform every defendant pleading guilty or nolo contendere that if he is not a citizen of the United States, he may be subject to deportation.¹³² In *Hen Lin Lu v. State*,¹³³ the

128. 8 U.S.C. § 1326(b)(1) (Supp. II 1996). Under this section, any alien . . . whose [deportation] was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than [ten] years, or both.

Id.

129. *Lazo-Ortiz*, 954 F. Supp. at 256.

130. *Id.* Application Note 7 states: "'Aggravated felony,' as used in subsection (b)(2), means . . . any crime of violence (as defined in 18 U.S.C. § 16, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years . . ." Application Note 7 to U.S.S.G. § 2L1.2.

131. U.S. CONST. art. I, § 9, cl. 1.

132. See, e.g., *Hen Lin Lu v. State*, 683 So. 2d 1110, 1111 (Fla. 4th Dist. Ct. App. 1996). Rule 3.172(c)(8) of the *Florida Rules of Criminal Procedure* states:

appellant pled guilty to the charge of burglary.¹³⁴ In a motion for post-conviction relief, he claimed that the trial court did not inform him of the possibility of deportation as a result of the plea.¹³⁵ Hen Lin Lu had signed a preprinted form informing him of the possibility of deportation.¹³⁶ The issue to be resolved was whether a “plea form *alone* is sufficient to demonstrate compliance with rule 3.172(c)(8).”¹³⁷

The Fourth District Court of Appeal held that, although a judge may use preprinted forms, he or she “must orally verify that the defendant has intelligently consumed the written information contained within it.”¹³⁸ Furthermore, the court transcripts must affirmatively show that the defendant’s plea was intelligent and voluntary.¹³⁹ Upon consideration, the court found that nothing in the record indicated that Hen Lin Lu’s signature on the form communicated “an intelligent and voluntary waiver of his rights.”¹⁴⁰

Similarly in *Perriello v. State*,¹⁴¹ after a conviction and sentence as a consequence of a plea bargain, Defendant Perriello, an Italian citizen,

Determination of Voluntariness: Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands . . . that if he or she pleads guilty or nolo contendere the trial judge must inform him or her that, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases.

FLA. R. CRIM. P. 3.172(c)(8).

133. 683 So. 2d 1110 (Fla. 4th Dist. Ct. App. 1996).

134. *Id.* at 1111.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Hen Lin Lu*, 683 So. 2d at 1112.

139. *Id.* The court examined *Koenig v. State*, 597 So. 2d 256 (Fla. 1992) and *State v. Blackwell*, 661 So. 2d 282 (Fla. 1995). *Id.* In *Koenig*, the Supreme Court of Florida held that nothing in the record showed that Koenig understood the form he signed or that his attorney told him about its content. *Koenig*, 597 So. 2d at 258. On the contrary, in *Blackwell*, the court found the plea agreements acceptable because before accepting them, the court confirmed with each defendant that he or she had read the form and understood it. *Blackwell*, 661 So. 2d at 284. The pleas had been sufficient pursuant to rule 3.172(c)(8) because they met the intelligence and voluntary requirements. *Hen Lin Lu*, 683 So. 2d. at 1112.

140. *Hen Lin Lu*, 683 So. 2d at 1112.

141. 684 So. 2d 258, 259 (Fla. 4th Dist. Ct. App. 1996).

received notice of deportation proceedings instituted by the INS.¹⁴² In response, Perriello filed a motion for post-conviction relief, asserting that the trial court did not inform him of the possibility of deportation.¹⁴³ The defendant appealed upon denial of this motion.¹⁴⁴ The fourth district held that since nothing in the court transcript showed that the trial judge had informed Perriello of the possibility of deportation, as required by rule 3.172(c)(8) of the *Florida Rules of Criminal Procedure*, the defendant had been prejudiced and must be permitted to withdraw the plea and go to trial.¹⁴⁵ Interestingly, Perriello signed a written plea agreement warning him of possible immigration problems.¹⁴⁶ Nonetheless, the court reasoned that there was no evidence that showed that he understood the consequences of his plea because the deportation warning was one short paragraph in a seven page document and Perriello had minimal English skills and a low education level.¹⁴⁷

In another case, the State conceded that the trial court did not inform the defendant before he pleaded *nolo contendere*, as directed in *Florida Rule of Criminal Procedure* 3.172(c)(8), that he may be subject to deportation.¹⁴⁸ As a result of the conviction, defendant Beckles was taken into INS custody.¹⁴⁹ Evidently, the State's failure to inform him ultimately prejudiced Beckles.

Consistent with the above summarized cases, the Fourth District Court of Appeal held in *Sanders v. State*,¹⁵⁰ that a criminal alien should be allowed to withdraw her plea of *nolo contendere* and proceed to trial.¹⁵¹ The State failed to inform defendant Sanders of the possibility of deportation before she accepted the plea.¹⁵² The court rejected the argument that, because the defendant made false statements regarding to her citizenship status, she should be impeded from alleging error.¹⁵³ Rather, "[c]ompliance with rule 3.172(c)(8) is mandatory, thus the rule contemplates a trial court will not inquire regarding citizenship."¹⁵⁴

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 259–60.

146. *Perriello*, 684 So. 2d at 259.

147. *Id.* at 260.

148. *Beckles v. State*, 679 So. 2d 892, 892 (Fla. 3d Dist. Ct. App. 1996).

149. *Id.*

150. 685 So. 2d 1385 (Fla. 4th Dist. Ct. App. 1997).

151. *Id.* at 1385.

152. *Id.*

153. *Id.*

154. *Id.*

In sharp contrast, the Third District Court of Appeal has relied on strict, often bizarre interpretations designed to have harsh effects on aliens. In *Chaar v. State*,¹⁵⁵ the third district affirmed the trial court's order denying Bilal Chaar's petition for writ of *coram nobis*.¹⁵⁶ In 1987, Chaar pled nolo contendere to possession of cocaine and drug paraphernalia.¹⁵⁷ Chaar voluntarily left the country under threat of deportation and has now been denied reentry because of his state conviction.¹⁵⁸ Even though the trial judge failed to inform the defendant of the possibility of deportation, as is required regardless of the ultimate immigration consequences, the court bizarrely noted that Chaar departed on his own will and that deportation proceedings were not instituted against him as a direct result of the plea.¹⁵⁹

In *Ross v. State*,¹⁶⁰ defendant Victor William Ross pled guilty to a cannabis possession charge in 1980, and the trial court withheld adjudication.¹⁶¹ In 1996, the INS notified Ross of ensuing deportation proceedings, which Ross claimed were based on the 1980 plea.¹⁶² Ross argued that the trial judge failed to inform him of the possible consequences of pleading guilty.¹⁶³ Ross asserted that the trial court advised him that the withholding of adjudication was not a conviction and it should not cause any immigration problems.¹⁶⁴ There was no transcript of the plea colloquy to verify these assertions.¹⁶⁵ The court avoided the issue of whether such a misstatement was an error of fact or law and, therefore, did not decide whether a writ of *error coram nobis* was appropriate in this case.¹⁶⁶ The court affirmed the trial court holding that without a plea transcript, the

155. 685 So. 2d 1037 (Fla. 3d Dist. Ct. App. 1997).

156. *Id.* at 1038.

157. *Id.*

158. *Id.* The court relied on *State v. Ginebra*, which held that "the trial court judge is under no duty to inform a defendant of the collateral consequences of his guilty plea." *State v. Ginebra*, 511 So. 2d 960, 960-61 (Fla. 1987). However, in *State v. Sallato*, the court left open the possibility that the defense counsel's provision of "positive misadvice" may constitute ineffective assistance of counsel resulting in deportation. 519 So. 2d 605, 606 (Fla. 1988).

159. *Chaar*, 685 So. 2d at 1038.

160. 22 Fla. L. Weekly D1073 (Fla. 3d Dist. Ct. App. Apr. 30, 1997).

161. *Id.* at D1073.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Ross*, 22 Fla. L. Weekly at D1073.

166. *Id.* The district court noted that in *Malcolm v. State*, "[i]t is well settled in Florida that the function of a writ of error coram nobis is to correct fundamental errors of fact and that the writ is not available to correct errors of law." *Malcolm v. State*, 605 So. 2d 945, 947 (Fla. 3d Dist. Ct. App. 1992).

defendant could not receive the relief he sought.¹⁶⁷ In effect, the court held that the *government* could assert estoppel because of the loss of the transcript, notwithstanding Ross' affidavit about the lack of notice. Ross would not only have to assert that "he would not have entered into the plea agreement but in addition, that had he gone to trial, he most probably would have been acquitted."¹⁶⁸ The court then proceeded to entertain Ross' claims that deportation was unreasonable because of his many years of gainful employment, long standing position in the United States, since the 1980 incident, and the fact that his children were citizens of this country.¹⁶⁹ Any analysis of the strength of these arguments went unheard. Rather, the court found that the proper forum for these claims was the Immigration and Naturalization Service or the Florida Pardon Board.¹⁷⁰ Yet, under the new laws of the IIRIRA and the AEDPA, Ross will be unable to receive relief from deportation and a pardon is of no avail.¹⁷¹ In contrast, had he been properly informed of the consequences in 1980, he could have sought relief

167. *Ross*, 22 Fla. L. Weekly at D1073. The court agreed with the trial court that "[w]ithout a proper record of what was said during the plea colloquy, it is impossible for the state to defend against the petition, or for the trial court to make an informed evaluation of defendant's claims." *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(48) (Supp. II 1996). The statute states:

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, *if adjudication of guilt has been withheld*, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Id. (emphasis added). Since the trial court withheld adjudication, Ross has a conviction pursuant to immigration laws and is, therefore, a deportable alien. Furthermore, 8 U.S.C. § 1251(a)(2)(B)(i), states:

Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1251(a)(2)(B)(i) (1994).

from INS. The Third District Court of Appeals has granted rehearing en banc in *Ross*.

B. *The Right of Criminal Aliens to Bond*

In order to guarantee the protected freedoms of all criminal defendants, immigration laws that affect the criminal prosecution of aliens will be strictly applied. The case of *Santos v. Garrison*,¹⁷² shows how the Fourth District Court of Appeal has preserved the right of bond to all criminal defendants, regardless of citizenship.¹⁷³ Petitioner Jose Santos had an initial bond set at his first appearance and was subsequently released on bond.¹⁷⁴ At a later hearing it was discovered that Santos was an undocumented alien and the court immediately revoked his bond.¹⁷⁵ Although the government insisted that the bond be revoked, the fourth district granted Santos petition for writ of habeas corpus and issued an order vacating the bond revocation.¹⁷⁶ The court reiterated that an increase or revocation of bond may only be imposed if there is a “change in circumstances or upon information not disclosed to the court at the time bond was previously established.”¹⁷⁷ In addition, it is the state’s burden, and not the defendant’s, to bring any new information to light.¹⁷⁸

The court held that to detain undocumented aliens under section 439 of the AEDPA, the accused must have been convicted of a felony and there must be “receipt of an appropriate hold from the Immigration and Naturalization Service for the purpose of taking the individual into federal custody.”¹⁷⁹ In this case, it was the State that failed to inquire whether

172. 691 So. 2d 1172 (Fla. 4th Dist. Ct. App. 1997).

173. *Id.* at 1173.

174. *Id.* at 1172.

175. *Id.*

176. *Id.*

177. *Santos*, 691 So. 2d at 1172.

178. *Id.*

179. *Id.* at 1173. Section 1252c(a) states:

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who – (1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such a period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

Santos was an illegal alien and it was the petitioner who acknowledged his status.¹⁸⁰ Furthermore, no showing was made that Santos had been convicted of a felony, and there was no proof of an appropriate hold from INS that Santos was to be taken into federal custody.¹⁸¹

C. Probation Condition on Aliens

The Fourth District Court of Appeal held in *Madrigal v. State*,¹⁸² that as a special condition on probation, the presence of an undocumented alien within the state is not, in and of itself, criminal.¹⁸³ The defendant in this case entered a nolo contendere plea on several counts, ranging from aggravated assault on a law enforcement officer to discharging a firearm in public.¹⁸⁴ He was sentenced accordingly and the order of probation required “appellant, who apparently was an illegal alien, to remain outside the United States and indicated that being in the United States and particularly Saint Lucie County shall be a violation of probation.”¹⁸⁵ The court employed the formula found in *Biller v. State*,¹⁸⁶ to determine whether such a condition was valid.¹⁸⁷ Specifically, a condition of probation is invalid “if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.”¹⁸⁸ The court concluded that the condition was improper because the defendant’s presence in the United States was not criminal.¹⁸⁹

V. CONCLUSION

The AEDPA and IIRIRA pose new, difficult challenges for lawful permanent residents and others seeking relief from deportation. The recent

8 U.S.C.A. § 1252c(a) (West Supp. 1997).

180. *Id.*

181. *Santos*, 691 So. 2d at 1172–73.

182. 683 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1996).

183. *Id.* at 1095.

184. *Id.* at 1094.

185. *Id.*

186. 618 So. 2d 734 (Fla. 1993).

187. *Madrigal*, 683 So. 2d at 1095.

188. *Id.* (quoting *Biller v. State*, 618 So. 2d 734, 734–35 (Fla. 1993)).

189. *Id.* The court stated that “although entering the United States at a time or place other than as designated by immigration officers can constitute a crime, 8 U.S.C. Sec. 1325, the record does not establish that the [defendant’s] presence in the United States is in itself criminal.” *Madrigal*, 683 So. 2d at 1095 (quoting *Martinez v. State*, 627 So. 2d 542, 543 (Fla. 2d Dist. Ct. App. 1993)).

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federal court cases challenging some of these provisions, particularly in regard to their retroactive application, have arisen in Florida and have taken center stage in the interpretation of these laws.