63 Brook. L. Rev. 1381

Brooklyn Law Review
Winter 1997

Note

*1381 THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT: ANTI-IMMIGRATION LEGISLATION VEILED IN AN ANTI-TERRORISM PRETEXT

Lisa C. Solbakken

Introduction

In the wake of the 1993 World Trade Center and the 1995 Oklahoma City bombings, the American people no longer view terrorism as an act that only takes place on foreign soil.[1] These incidents brought terrorism to the "forefront of American public interest"[2] and thereby placed pressure on the federal legislature to respond. The result was a bi-partisan congressional venture, the Anti-terrorism and Effective Death Penalty Act[3] ("AEDPA" or "the Act"), which was signed into law on April 24, 1996 by President William J. Clinton.[4]

***1382** Hidden within this legislation is an unprecedented restriction of the constitutional rights and judicial resources traditionally afforded to legal resident aliens.[5] The AEDPA revamps alien removal procedures by eliminating judicial review after a final deportation order premised upon an enumerated conviction.[6] The Act also substantially expands the definition of those crimes that give rise to a deportation order.[7] Working in conjunction, these components of the AEDPA create a law ***1383** that "threaten(s) the most basic safeguards of due process and seek(s) to eliminate a meaningful role for the judiciary to perform its historic function of reviewing the implementation of immigration law."[8] Simultaneously, these constitutionally questionable provisions of the AEDPA possess a limited, if any, nexus between the purported purpose of the legislation and its practical effect.[9]

Part I of this Note details the pre-AEDPA criminal alien removal procedures applicable to permanent residents who are deportable due to a conviction of an enumerated offense. It then describes the AEDPA's expansion of those criminal offenses which provide the grounds for final orders of deportation,[10] and the summary elimination of judicial review of such orders mandated by section 440(a) of the Act.[11] Part II examines the scope of congressional authority to delegate adjudicative powers to non-Article III tribunals within the context of the plenary power that Congress has traditionally enjoyed over immigration law. This section analyzes the broad concentration of power granted to the Immigration and Naturalization Service ("INS") that is manifest in the AEDPA legislation, and the resulting conflict between this concentration and the constitutional doctrine of separation of powers.

This Note then addresses the practical effect that the AEDPA has upon the constitutional rights traditionally afforded to legal aliens. Part III discusses how the Act implicates ***1384** resident aliens' constitutionally protected liberty interest through its elimination of judicial review of final deportation orders. This elimination is then subjected to a due process analysis, which concludes that judicial review is a necessary procedural safeguard to a legal alien's liberty interest, and as such, the AEDPA is constitutionally infirm as applied to lawful resident aliens. Finally, Part IV suggests legislative amendments that may be made to the criminal aliens removal provisions of the AEDPA, so as to minimize the conflict between its enforcement and the constitutional rights granted to legal permanent residents.

I. The Removal of Criminal Aliens Following A Conviction for an Enumerated Offense: INS Procedure Before and After the Enactment of the AEDPA

Before discussing the ramifications of the AEDPA on alien removal procedures, it is necessary to delineate those procedures in place prior to the enactment of the legislation. A review of pre-AEDPA criminal alien removal procedures and a description of the AEDPA's expansion of those offenses that give rise to a final order of deportation highlight how the Act's elimination of judicial review encroach upon the constitutional rights previously guaranteed to legal aliens.

A. The Pre-AEDPA Criminal Alien Removal Procedures

Prior to the enactment of the AEDPA, legal aliens were deportable upon conviction of any one of a set of narrowly defined, enumerated crimes. These offenses were characterized by their gravity, and included all aggravated felonies, drug trafficking, firearms offenses, and crimes relating to national security, such as espionage.[12] The deportation orders for which these convictions were a condition precedent remained subject to judicial review. This circuit court review acted as a procedural safeguard protecting legal aliens from the potential ***1385** abuse of the discretion afforded to INS officials and ensured that the limited rights granted to these individuals were not violated.

It is important to note that this judicial review was neither immediately nor unequivocally granted. While section 106(a) of the Immigration and Nationality Act ("INA") provided that the "sole and exclusive procedure" for review of a final deportation order was the filing of a petition order for review with the United States Circuit Court of Appeals,[13] prior to the filing of this petition, the alien must have exhausted all administrative remedies available to her.[14] Additionally, the INS district director in the district where the reviewing court is located had to be served with the petition.[15] Generally, an automatic stay of deportation was granted pending determination of a petition for review,[16] during which time aliens in custody pending deportation were able to file a writ of habeas corpus.[17] Thus, a complex set of INS procedures protected the mechanism of judicial review from unwarranted or groundless appeals.

If an appeal was granted, the circuit court could reevaluate many of the factors determined by the tribunal that led to the finding of deportability. A final order of deportation had to be based on "clear, unequivocal, and convincing evidence,"[18] and in order to affirm, the appellate court needed to find that the decision was based upon "substantial" evidence upon reviewing the record as a whole.[19] Moreover, the finding of fact conducted by the tribunal was held to be conclusive when supported by "reasonable, substantial and probative evidence."[20]

Prior to the enactment of the AEDPA, the circuit courts were also charged with correcting errors of law within the ***1386** deportation proceeding. The court was also to note any lack of conformity to constitutional provisions evident in the proceeding.[21] In essence, the court reviewed the procedure that gave rise to the final order of deportation to ensure that the proceeding did not violate the alien's due process rights. The AEDPA eliminated this judicial review.[22]

1. The AEDPA's Elimination of Francis[23] Discretionary Waiver of Deportation

Francis relief, a judicially created right of appeal,[24] permitted a legal permanent resident alien, who had accumulated the requisite seven years of lawful, unrelinquished domicile, to petition for a discretionary waiver of a final deportation order.[25] Francis relief provided lawful resident aliens with a procedural safeguard to protect against an abuse of discretion in an INS deportation determination. The discretionary waiver helped to ensure equity prior to the deprivation of liberty that necessarily accompanies a deportation order.[26] Thus, Francis ***1387** relief implicitly recognized the heightened protection to be afforded legal aliens' liberty interests, as opposed to those of illegal aliens, for whom such relief was not available.[27]

Francis relief was granted on the basis of a balance of equities presented by the legal alien during deportation proceedings.[28] Factors deemed favorable in the circuit court's analysis included: (1) family connections in the United States; (2) period of residence (particularly where this for a long duration with its inception at a young age); (3) evidence of hardship that may occur to both the alien and her family if deportation is to occur; (4) history of employment; (5) the existence of either property or business ties; (6) evidence of community service; and (7) proof of rehabilitation.[29] Factors that weighed unfavorably included: (1) the nature of the conviction which provided a basis for deportation; (2) the existence of a criminal record; and (3) the presence of other evidence that is deemed indicative of bad character, such as other violations of

immigration law.[30]

The function that Francis relief performed in safeguarding an alien's liberty interest is illustrated in Diaz-Resendez v. INS.[31] Diaz-Resendez became a lawful resident alien at the age of seventeen years old.[32] He had been married to an American citizen for twenty-nine years, and was the father of ***1388** six children who were all born in the United States.[33] Two of those children were married adults, while the other four still resided at home. One of these children needed special education due to an injury sustained in a bicycle accident.[34] Diaz-Resendez's income averaged about $5000 a year from his work as a carpenter, construction worker and field hand. Diaz-Resendez was in good health, but his wife suffered from a dehabilatative medical condition.[35] Thus, he was the primary source of income for his family.[36]

On October 28, 1985, Diaz-Resendez was arrested at an INS check point after marijuana was found in the back of the car he was driving.[37] He explained that he agreed to sell the marijuana because of the dire financial straits facing his family. After he pled guilty to possession with the intent to distribute, the judge suspended all but four months of his three-year prison sentence.[38]

Subsequently, the INS ordered Diaz-Resendez's deportation.[39] Evidence in favor of the discretionary waiver presented at his deportation hearing included proof of employment and earnings, a favorable letter from his probation officer, and several other letters of recommendation.[40] The immigration judge denied the request for relief and the Board of Immigration Appeals ("BIA") affirmed this decision.[41]

The Fifth Circuit Court of Appeals reversed the BIA, holding that the court "abused its discretion by inexplicably departing from established precedent and failing to consider and meaningfully address the positive equities and favorable evidence when reaching its decision."[42] The court determined that the BIA subjected Diaz-Resendez's to disparate treatment without explanation, as other individuals with less favorable outstanding equities were granted the waiver.[43] The court ***1389** went on to note Diaz-Resendez' enduring period of residence and the hardship that his deportation would cause his family. These factors, coupled with his successful probation and abstention from criminal activity since his conviction, led the court to vacate and remand the deportation order.[44]

Fortunately for Diaz-Resendez, who would have been deported upon an order later found to be an abuse of agency discretion,[45] his case was decided prior to the enactment of the AEDPA. The AEDPA's summary elimination of judicial review would have compelled his deportation, despite the fact that this order resulted from proceedings which were found "arbitrary, irrational, or contrary to law."[46] The AEDPA's removal of the Francis discretionary waiver of deportation thus destroys the delicate balance that had been reached between the integrity of criminal alien removal procedures and lawful resident aliens' constitutionally protected liberty interests.

B. The Enumerated Crimes Which Provide the Substantive Grounds for Final Orders of Deportation

Even prior to the enactment of the AEDPA, the substance of those offenses which gave rise to a final order of deportation[47] varied in both degree of seriousness and clarity.[48] For ***1390** example, a pre-AEDPA ground for deportation included those persons who have twice been convicted of "crimes of moral turpitude."[49] This broad and vague category of criminal conduct can encompass a conviction ranging from embezzlement to shoplifting.[50]

Yet the AEDPA has expanded the definition of the enumerated crimes which may provide the substantive grounds for deportation. For example, the pre-AEDPA Immigration and Nationality Act provided for the deportation of any alien convicted of an "aggravated felony,"[51] which included such crimes as drug trafficking and murder.[52] The AEDPA enlarged the meaning of this term, so to include such acts as gambling offenses, prostitution crimes, and failure to appear before the court.[53] The AEDPA's similar treatment of such diverse offenses, coupled with the expansion in scope and definition of deportable crimes, has led to particularly harsh results for minor crimes. Moreover, the breadth of these AEDPA revisions harbors the potential for widespread abuse of discretion through arbitrary and erratic enforcement by INS officials.[54] ***1391** For example, under the AEDPA, marijuana use leads to the same result as an espionage offense, in that summary deportation without review by an Article III tribunal would be necessarily enforced. In both these instances judicial review is eliminated--despite how long the legal permanent resident has resided in the United States, how many of his or her family members are now citizens, or how productive, law abiding, or rehabilitated the individual has been since his or her

conviction. A legal alien's constitutionally protected liberty interest is thus left unprotected from arbitrary and unjust deportation determinations.[55]

C. AEDPA Provision at Issue

Section 440 of the AEDPA amends section 106(a) of the INA[56] to read: "Any final order of deportation against an alien who is deportable by reason of having committed (an enumerated offense), shall not be subject to review by any court." Essentially, regardless of whether a deportation proceeding was conducted in an arbitrary or capricious manner, this INS determination is not subject to judicial review. Due process requirements have evolved into a purely inter-agency inquiry, as the INS regulates itself without the traditional check provided by judicial oversight.[57] Essentially, the AEDPA's elimination of the safeguard of Francis relief leaves all final deportation determinations predicated upon an expanded number of enumerated offenses vulnerable to due process violations; thus, the Act renders the liberty interest possessed by resident aliens unprotected.

*1392 II. Article III Considerations and Separation of Powers Concerns

Theoretically, the congressional authority to preclude judicial review of deportation orders via section 440(a) of the AEDPA may be justified by two constitutional doctrines. The first holds that Article III, section 1 of the United States Constitution empowers Congress to limit (and even eliminate) the jurisdiction of Article III courts.[58] This principle would permit Congress to eliminate circuit court review of final deportation orders premised upon virtually any ground that Congress desires to articulate. A corollary justification, to be read in conjunction with this power to limit jurisdiction, is premised upon Congress' ability to delegate adjudicative functions to Article I tribunals.[59] The second justification that supports Congress' power to eliminate Article III review of deportation orders in the AEDPA is the plenary power which Congress has traditionally enjoyed over matters of immigration law.[60]

While these justifications appear to provide ample support for the AEDPA's section 440(a) revisions, upon closer scrutiny it is evident that they collide with the constitutional principle of separation of powers. When removed from a purely theoretical framework, the justifications lose their potency. Placing section 440(a) of the AEDPA within the context of a separation of powers analysis illustrates that the Act runs contrary to both the constitutional guarantees traditionally afforded legal aliens and traditional notions of fairness and justice.

A. Article III Limitations and Article I Delegations

Article III, section 1 of 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 Congress may from time to time ordain and establish."[61] From this clause developed the now "well-established principle that federal ***1393** courts . . . are courts of limited jurisdiction marked out by Congress."[62] With regard to the AEDPA, this doctrine must be read simultaneously with the judicially created practice of delegating adjudicative functions to non-Article III tribunals.

Congress' power to delegate adjudicative functions to executive agencies carries with it an implicit responsibility to protect the integrity of such power. To this end, it has been stated:

> Article III of the Constitution provides that the judicial power of the United States shall be vested in courts whose judges enjoy tenure during good behavior and protection against reduction in salary. By nearly universal consensus, the most plausible construction of this language would hold that if Congress creates any adjudicative bodies at all, it must grant them the protections of judicial independence that are contemplated by Article III.[63]

Yet, despite the possibility of such a common sense construction, Chief Justice Marshall supported a less stringent interpretation of Congress' delegatory powers. The 1828 decision in American Ins. Co. v. Canter[64] left abandoned any hope of "Article III literalism" and administrative adjudication as it is now understood came to exist.[65] Congress may exercise an

almost unfettered power to create adjudicative Article I tribunals,[66] none of which must possess the Article III safeguards to judicial independence, such as life tenure and undiminished salaries.[67] In the absence of such protections, administrative agencies function outside of the principle of the independent adjudicator.[68] Within this severe framework, it appears that ***1394** section 440(a) of the AEDPA fits neatly within accepted notions of broad congressional delegatory powers as delineated by constitutional law.[69]

However, AEDPA's broad and harsh immigration revisions should not be read in a theoretical vacuum. It remains the unique ability of the judiciary to keep congressional actions within the limits to which it is assigned by the Constitution, as "(t)he interpretation of the laws is the proper and peculiar province of the courts."[70] The Supreme Court has noted this role, citing the Framers intent that the judiciary "stand independent of the Executive and the Legislature" and "guarantee that the process of adjudication itself remained impartial."[71]

Thus, courts must review Congress' exercise of jurisdictional limitation as exhibited in section 440(a) of the AEDPA against the backdrop of the separation of powers doctrine. Such a framework is necessary in order to determine whether the elimination of Article III review of final deportation orders is an illegitimate encroachment upon the powers of the judicial ***1395** branch. The appropriate Article III analysis is set forth in Commodities Futures Trading Commission ("CFTC") v. Schor,[72] where the Supreme Court stated, "the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III."[73]

B. The Schor Test

In Schor, the Court articulated several factors to be considered when an act of Congress insulates an issue from Article III review, thereby potentially threatening the integrity of the judicial branch.[74] These factors include: (1) the degree to which the "essential attributes of power" are reserved to Article III courts, and the extent that the agency exercises the jurisdiction and powers normally vested only in Article III courts; (2) the importance of the right to be adjudicated; and (3) the concerns that prompted Congress to depart from Article III norms.[75]

1. Factors One and Two: The Nature of Article III Review of Administrative Actions

A strong presumption in favor of judicial review of administrative actions has been well established by the Supreme Court.[76] The Court has acknowledged the "serious constitutional ***1396** question" that arises upon the interpretation of a statute which denies any judicial forum to a colorable constitutional claim.[77] So meaningful is the right, that prior to such a preclusion, congressional intent to do so must be clear.[78]

Yet the legislative history of the AEDPA does not clearly address congressional intent to eliminate judicial review with regard to the removal of lawful resident aliens with an enumerated conviction. Congressional testimonies imply that opinion as to the alien removal procedures of the AEDPA are ambiguous at best.[79] House and Senate hearings that led to the creation of the bill discuss the exclusion and deportation of "terrorists," but do not profoundly address the preclusion of judicial review upon final deportation orders directed at legal aliens.[80] Rather, it appears that the removal procedures were a last-minute addition to the statute, thereby avoiding genuine debate over their constitutionality.[81] Proponents of the alien removal procedures were able to ride the political wave, as Congress' desire to pass the Act on the anniversary date of the Oklahoma City bombing obscured the impropriety of the provisions.[82]

***1397** Even if congressional intent with regard to this provision of the AEDPA were clear,[83] the Supreme Court has "never held that Congress may eliminate all access to judicial review over the core constitutional rights of due process and liberty that are at issue in a deportation order."[84] This leads to the somewhat broader consideration of the AEDPA legislation--does Congress possess the power to eliminate review of final deportation orders as performed by the "independent adjudicator" as characterized by the Article III courts?[85] Such congressional delegations are riddled in contradiction and ***1398** controversy, found not only in scholarly commentary,[86] but also in the Supreme Court decisions themselves.[87]

The elimination of judicial review mandated by the AEDPA is arguably an impermissible usurpation of "the essential attributes of judicial power"[88] of the judiciary. The provision eliminates, in its entirety, the possibility of reviewing an agency action that has been challenged as unconstitutional. Thus, "the extent to which the non-Article III forum exercises . . . powers

normally vested in the Article III courts," may be characterized as an absolute transfer of those functions traditionally performed by the judiciary.[89] In this sense, the AEDPA delegates unfettered control to the INS, a non-Article III tribunal, to police or check the agency's own actions. The INS becomes the sole arbiter of legal aliens' due process rights.[90] While Congress undoubtedly possesses substantial discretion to proscribe the manner in which a right they have created may be adjudicated,[91] the right to review of a final proceeding to ensure that it comports with the Constitution is not a congressionally created principle.[92] As such the elimination of all means of independent oversight should be barred as an illegitimate encroachment upon the judicial power that is retained by Article III.

***1399** 2. Factor Three: The Purpose of the AEDPA Juxtaposed Against the Departure From Article III Norms

The third and final factor of the Schor test is the purpose behind the Act, or the "concerns that drove Congress to depart from the requirements of Article III."[93] The underlying purpose of the AEDPA is to afford American citizens greater protection against acts of terrorism.[94] To that end, numerous provision of the AEDPA relate to such issues as the designation of terrorist organizations and explosives tagging.[95] Yet with regard to the AEDPA's criminal alien removal procedures, Congress moved beyond the scope of its legitimate anti-terrorism purpose. This is not to suggest that the concern over the current state of immigration policy in the United States is unfounded.[96] However, a counter-terrorism statute, packed with complex provisions denoting terrorist behavior, is an inappropriate forum in which to address such immigration concerns. This is particularly evident due to the broad scope of the AEDPA's revisions. The fate of a resident alien's liberty interest with reference to final orders of deportation should not be dramatically reconstructed in the heat of anti-terrorist fervor.

Ultimately, the AEDPA has rewritten immigration law so that lawful resident aliens may be deported from the United States for a minor criminal offense committed in years past, without judicial review to ensure just proceedings. The enforcement of section 440(a) of the AEDPA permits what is "essentially a police agency to also decide guilt and innocence."[97] Moreover, this power is executed in the absence of the underlying values of fairness and equity historically protected by Article III review of final orders of deportation.

*1400 III. Section 440 of the AEDPA within a Due Process Context: The Use of Congress' Plenary Power to Balance Away Lawful Resident Aliens' Constitutional Rights

The United States Supreme Court had at one time articulated that the only procedural due process protections available to aliens are notice and the opportunity to be heard "at a meaningful time and in a meaningful manner."[98] Congress' ability to grant aliens' no greater rights than these was justified by the plenary power that it is said to enjoy over immigration law.[99] Thus, while the power to regulate immigration is not among those expressly granted to Congress by the constitution, it had been stated that "over no conceivable subject is the legislative power of Congress more complete than it is over (immigration)."[100]

***1401** Yet Congress' plenary power remains subject to constitutional restraints.[101] For example, the Supreme Court has recognized that even aliens who are unlawfully on American soil possess a "substantive due process right to liberty during deportation proceedings."[102] Within this context, the Court has stated that it is "the role of the judiciary . . . (to) determin(e) whether procedures meet the essential fairness of the Due Process Clause,"[103] and that "(m)eticulous care must be exercised lest the (deportation) procedure . . . not meet th(is) essential standards of fairness."[104]

Such judicial oversight is particularly important in the instance of legal permanent residents, who have a stronger claim to due process protection than illegal aliens.[105] As the Court has stated, "(t)he point is straight forward: the Due Process Clause provides that certain substantive rights--life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures."[106] Consequently, it would appear that judicial review is a necessary procedural protection upon a challenge to a resident alien's substantive right to liberty. Yet prior to such a determination, those rights currently granted to legal aliens must be evaluated.

A. The Constitutional Protections Afforded Resident Aliens

There is great ambiguity that surrounds the application of constitutional law to the due process claims of aliens. One

commentator stated, "little constitutional immigration law has ever taken root."[107] In the 1886 decision Yick Wo v. ***1402** Hopkins,[108] the Supreme Court held that aliens are deemed "persons for the purposes of Fourteenth Amendment protections."[109] This determination is said to have extended to aliens many of the protections found within the Bill of Rights.[110]

Yet the Court has also acknowledged a "limited judicial responsibility under the Constitution" to review immigration policy.[111] The first time that the Court heard a due process claim premised upon a denial of judicial review of a deportation order was in 1903. In Yamataya v. Fisher, the Supreme Court declared:

> (T)his court has never held, nor must now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in the "due process of law" as understood at the time of the adoption of the Constitution.[112]

Despite decades of such pronouncements made by the ***1403** Court,[113] there remains considerable controversy over whether or not procedural safeguards such as judicial review remain a due process guarantee afforded to aliens.

Historically, judicial review of an agency determination has taken the form of a requirement when a tribunal seeks to enforce a duty or obligation upon an unwilling defendant.[114] However, commentators have noted that courts have consistently refused to review the substantive content of federal immigration statutes for compliance with constitutional guarantees.[115] This is in contrast to the "flowering constitutional protections" that have developed for aliens in arenas other than immigration law.[116]

Even modern Supreme Court decisions lend themselves to contradiction. For example, as articulated, the Court has stated that the only due process concerns of an alien subject to removal are proper notice and the opportunity to be heard in an administrative setting.[117] Yet within that same case, the Court also stated that the power to deport is "subject to judicial intervention under the paramount law of the Constitution," implying that the basic requirements of due process remain, and that upon a claimed violation, an independent judicial remedy must remain available.[118] It has been said that:

> ***1404** The moment any human being from a country at peace with us comes within the jurisdiction of the United States . . . he becomes subject to all their laws, is amenable to their punishment and entitled to their protection. Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guarantees of the constitution.[119]

Such a representation of an aliens' substantive rights is evident in Plyler v. Doe,[120] where the Court intimates a willingness to recognize the constitutional claims of illegal immigrants.[121] In Plyler, the Court struck down a state regulation denying public education to children of illegal aliens. The Court refused to classify public education as a fundamental "right" granted by the Constitution.[122] However, the Court also refused to term it as a mere " 'benefit' indistinguishable from other forms of social welfare legislation."[123] Rather, the Court reaffirmed the principle that an alien's presence on American soil is not a "constitutional irrelevancy," and suggested that public education fell within the nebulous area upon the continuum of liberties that exist for aliens.[124]

***1405 B. The Mathews Test**

It is through such a continuum of privileges, entitlements, and rights that the elimination of judicial review of deportation orders mandated by the AEDPA, as it relates to an alien's liberty interest, must be evaluated. In the 1976 case, Mathews v. Eldridge, the Supreme Court set forth a three-part test that is to be used for determining the scope of the due process protections afforded to a claim that an agency policy constitutes an unconstitutional deprivation of liberty.[125] In Mathews, the Court confronted the issue of whether or not a hearing was necessary prior to a termination of Social Security disability benefit payments in order to comport with the requirements of due process.[126] The Court set forth three factors to include in the analysis: (1) the private interests that are to be affected by the official administrative action; (2) the risk of an erroneous deprivation of the interest through the procedures that are used--and the value, if any, of additional or substitute safeguards;

and (3) the government interest involved, including the costs that additional or substitute procedural requirements would entail.[127]

The first prong of Mathews, the interest implicated by the AEDPA, is noted as its purported purpose: to "deter terrorism, provide justice for victims, (and to) provide for an effective ***1406** death penalty."[128] Yet this must be juxtaposed against the liberty interest afforded legal aliens--or the freedom from a deportation order issued at an unjust or infirm procedure. This interest has been deemed "of the highest order in the realm of individual rights."[129] In light of the severe consequence of an irreversible final order of deportation, the procedures implicating this right must be independently scrutinized.[130] Moreover, the conclusion that a possible deprivation of liberty interest necessitates impartial review finds further support in the Supreme Court's implication that the constitutional standard applied to deportation proceedings is greater than that necessary for the exclusion of aliens.[131]

Significantly, the Mathews framework permits "review of some unconstitutional rights of sufficient importance."[132] Thus, even in the absence of recognizing the implication of a liberty interest pursuant to a deportation order, the requirement of independent adjudication remains warranted.[133] The Court has stated that while generally it will not interfere upon a finding of fact by the executive agency, the judiciary should ***1407** intervene upon various claims, where, for example, (1) the finding was not supported by the evidence, (2) there was an erroneous application of the law,[134] or (3) there was a denial to a fair hearing.[135] Such claims are precisely those left unprotected by the AEDPA's mandatory preclusion of judicial review.

The second Mathews factor--the risk of erroneous deprivation of the right--is of great concern,[136] and necessitates the evaluation of many issues. Among these are: (1) the expertise and experience of the agency with regard to the issue raised; (2) the procedural protections provided by the agency; and (3) the degree of bias or "institutional tunnel vision."[137] There is no question that the INS possesses both the technical expertise and experience to determine the grounds for deportation of an alien. Yet this expertise does not extend to challenges of deportation orders premised upon a constitutional violation.[138] The agency's skill in this instance cannot parallel that of Article III review, which is the "traditional and historic means of ensuring that a procedure comported with due process."[139]

Moreover, the procedural protection of review by the BIA does little to counter this dilemma, as the absence of independent adjudication remains. The possibility of legal errors made by the BIA is the exact evil that the judicial review of final ***1408** deportation orders was designed to protect against. The necessity of such review has not gone unnoticed. For example, Chief Judge Posner of the Seventh Circuit has stated that, "(t)he proceedings of the Immigration and Naturalization Service are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality."[140]

And finally, with reference to the third Mathews factor, the probable value of additional or substitute procedural safeguards, which would be akin to the procedures that were in place prior to AEDPA's enactment, is great. To reinstate circuit court review would provide a means by which to ensure that the deportation proceeding comported with the requirements of due process. Judicial review would provide the procedural protection necessary to prevent possible impingement of the substantive right to liberty.

Viewed from the fiscal perspective, it again appears that pre-AEDPA procedures are more beneficial. The government's interest in enacting the AEDPA was to create a tool by which the government would protect the citizenry from the violence perpetrated by acts of terrorism. To this end, the Act authorized a disbursement of one billion dollars over a four year period for these counter-terrorism efforts, of which the FBI will receive the largest share.[141] Without equivalent resources, implementation of the AEDPA's removal procedures increases the burden placed upon the INS.[142] Due to the AEDPA's requirement, the INS is being forced to engage in "wholesale and costly reordering of agency hiring, training, and organization, (which) threatens to strain INS detention facilities."[143] In essence, as the INS provides the traditional adjudicative functions ***1409** mandated by the AEDPA, a larger fiscal and administrative burden is placed upon the agency than that which the substitute procedural requirement of Article III review would entail.

IV. Recommendations and Conclusion

Several circuits have found that the AEDPA does not violate the Constitution by either the summary elimination of judicial

review or the aforementioned separation of powers analysis.[144] Yet even upon the alternative determination that AEDPA is not violative of a lawful resident alien's due process rights, the statute should be amended as it is unjust in its current form.[145] Section 440(a) is riddled with constitutional questions as to the legitimacy of its scope. Its controversial nature has not gone unnoticed, and some commentators have suggested that the bill be revised by Congress.[146]

Revisions that Congress should consider include reinstating Francis relief for permanent resident aliens. By doing so, the conflict between the constitutional rights granted to the legal aliens and the purpose behind the legislation is averted. ***1410** Such action also would eliminate the separation of powers concerns that stem from the AEDPA's revisions, as the principle of the independent adjudicator, safeguarding the liberty interest that is possessed by a lawful resident alien, would be reinstated. Providing discretionary relief based upon a balance of the equities will also acknowledge the heightened protection granted to the rights of lawful residents, and will be consistent with the current trend of constitutional immigration law.

Congress may also consider clearly delineating those offenses that qualify as a crime of moral turpitude, while narrowing the definition of acts that constitute an "aggravated felony." This would insulate legal aliens from broad agency interpretations of these terms and may help exclude those aliens who committed petty offenses from the harsh deportation penalty. Finally, Congress should articulate a particular time frame of post-conviction lawful behavior and evidence of rehabilitation as explicit factors to be weighed by the INS within the deportability equation.

Such legislative amendments would soften the harsh blow which the AEDPA has visited upon legal permanent resident aliens. It would also provide a firmer nexus between the deportation of aliens with prior convictions and the goal of the legislation--protecting the American citizenry from acts of terrorism.

Footnotes

1 The bombing of the World Trade Center in New York City occurred on February 26, 1993. On April 19, 1995, a bomb exploded in the Alfred P. Murrah Federal Building in Oklahoma City, killing eighteen people and injuring another 500. This was declared the worst terrorist incident ever to take place in the United States. Raphael F. Perl, Congressional Research Service, Terrorism: Background and Issues for Congress 1 (Issue Brief, May 23, 1996).

2 Raphael F. Perl, Congressional Research Service, Terrorism, the Future, and U.S. Foreign Policy (Issue Brief, July 3, 1996).

3 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 22, 28, 40, 42, 50 U.S.C.).

4 Perl, supra note 1, at 2. Upon signing the legislation, President Clinton voiced opposition to the immigration provision in the bill, calling them "ill-advised" and stating that they "reach beyond the scope of counter terrorism efforts." Richard C. Reuben, McDeportation: The New Anti-terrorism Law Allows Border Guards to Summarily Exclude Aliens Without documents, 82 A.B.A. J. 34 (Aug. 1996).
The various provisions of the AEDPA include: habeas corpus restrictions, victim's rights provisions, exceptions to foreign immunity for civil damage suits against foreign states for death or personal injury resulting from certain terrorist acts, alien terrorist removal procedures, provisions relating to explosive tagging, controls over terrorist funding and prohibitions against financial transactions with terrorist states, assistance to countries that aid terrorist states or that provide military assistance to them, proscriptions concerning misuse of nuclear materials; and restrictions on biological and chemical weapons. See generally AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22 28, 40, 42, 50, U.S.C.).

5 "Terrorism-related provisions aside, the (AEDPA) contains several more and farther reaching revisions of immigration law. For example, aliens who enter the U.S. without inspection will now be subject to removal through exclusion proceedings rather that deportation proceedings, regardless of how long that they have resided here . . . (v)arious categories of deportable crimes are expanded, the timetable for deportation is shortened . . . ." Perl, supra note 2, at 10.

[6] Subsequent to the enactment of the AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Pub. L. No. 104-208, Div. C., 1996 U.S.C.A.A.N. (110 Stat.) 3009-546 (codified in scattered sections of 8 U.S.C.). Aspects of the AEDPA has been modified by IIRIRA. See, e.g., AEDPA 440(a), 110 Stat. at 1276-77 (repealed by IIRIRA 1996) and IIRIRA 309(c)(4)(G), U.S.C.A.A.N. (110 Stat.) at 3009-626 (codified at 8 U.S.C. 1101) (Supp. II 1996). Analysis of the legislative history of IIRIRA is beyond the scope of the Note. However, the AEDPA & the IIRIRA remain substantively similar. Thus, this Note's critique of the scope and effects generated by the AEDPA are applicable to its corollary.

[7] Various constitutional challenges to the AEDPA continue to mount; however, the issue of the constitutionality of the criminal alien removal procedures within the statute have yet to be considered by the Supreme Court. The bulk of these challenges have concerned the retroactive application of the statute. See Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996) (the AEDPA's removal of jurisdiction for appellate review of petitions for discretionary waivers may not be retroactively applied where alien admitted deportability prior to statute's enactment). Cf. Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996). An interesting case that addressed the AEDPA is Lewin v. INS, No. 94-70867, 1996 U.S. App. LEXIS 16346 (9th Cir. June 17, 1996), where the Ninth Circuit bypassed the constitutional and jurisdictional issues posed by the legislation, and decided the case on the "balance of equities" standard that was in place prior to the AEDPA's enactment. In applying the doctrine of hypothetical jurisdiction, the court cited "the difficult, even arcane, issues regarding retroactivity and constitutionality" of the AEDPA. Id. at *2. See also Zavala-Zaragoza v. INS, 92 F.3d 1195 (9th Cir. 1996).
The Supreme Court vacated and remanded a case to be considered in light of the AEDPA, where the issue was whether, upon an alien's conviction for a narcotics offense, the alien must demonstrate unusual or countervailing equities prior to exclusion of the deportation order. INS v. Elramly, 117 S. Ct. 31 (1996). The Ninth Circuit had held that the Board of Immigration Appeals ("BIA") had abused its discretion in denying the alien's petition for discretionary relief from deportation without first considering the nature of the offense and how it reflects on the undesirability of the alien as a permanent resident. INS v. Elramly, 49 F.3d 535 (9th Cir. 1995).

[8] Rhonda McMillion, Immigration Rights a Concern: ABA Questions Bill Restricting Asylum, Benefits for Legal Aliens, 82 A.B.A. J. 90 (Feb. 1996).

[9] It has been contended that "(i)ronically, the new law gives the terrorists it was designed to reach more legal protections than many () immigrants . . . ." Reuben, supra note 4, at 34 (quoting Brian K. Bates, an immigration lawyer with Quan, Burdette, & Perez in Houston, TX: "Suspected terrorists under the Act have the right to appointed counsel, the right to bond proceedings, the right to a court hearing, and the right to judicial review in removal proceedings . . . .) (emphasis added).

[10] IIRIRA renames the process formerly known as "deportation proceedings" as "removal proceedings." See IIRIRA § 304(a)(3), 8 U.S.C. 1229-1229a (Supp. II 1996). As the AEDPA was signed into law prior to IIRIRA, this Note will continue to refer to an order expelling a legal resident alien as a deportation order, resulting from deportation proceedings.

[11] Within the context of immigration law, individuals who are not citizens or nationals of the United States are referred to as "aliens." 8 U.S.C. § 1101(a)(3) (1994). A legal alien is one who has attained permanent resident status through either §§ 245A, 210, 210A, or 249 of the INA, 8 U.S.C. §§ 1155a, 1160, 1161, 1259 (1994).

[12] Austin T. Fragomen, Jr. & Steven C. Bell, Immigration Fundamentals: A Guide to Law and Practice, 7-56 to 7-91 (3d. ed. 1994).

[13] 8 U.S.C. § 1105a(a) (1994).

[14] 8 U.S.C. § 1105a(c) (1994).

[15] 8 U.S.C. § 1105a(a)(7) (1994). The deportation order could have been executed prior to the service of the petition for review. Id.

[16] Fragomen & Bell, supra note 12, at 8-16. Aliens who were convicted of aggravated felonies were generally not entitled to an automatic stay. Additionally, these individuals had a reduced period in which to seek review. See 8 U.S.C. § 1105a(a)(1), (3) (1994).

[17] 8 U.S.C. § 1105a(a)(10)(c) (1994).

[18] Woodby v. INS, 385 U.S. 276, 277 (1966).

[19] 8 U.S.C. § 1105a(a)(4) (1994).

[20] Id.

[21] See Rosenberg v. Fleuti, 374 U.S. 449 (1963); Tan v. Phelan, 333 U.S. 6 (1948). Generally, when interpreting the governing statute or regulation, the court was to give deference to the construction favored by the INS. However, when it was a deportation statute, the court was to construe it in favor of the alien. See generally INS v. Wang, 450 U.S. 139 (1981).

[22] AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 22, 28, 40, 42, 50 U.S.C.).

[23] Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

[24] The Second Circuit extended § 212(c) discretionary waiver of exclusion of the INA to deportation proceedings based upon the equal protection doctrine. The court determined that there was no rational basis to distinguish between long-time residents in a deportation proceeding and those in exclusion proceedings. Francis, 532 F.2d at 272. This decision was adopted by the INS. Fragomen & Bell, supra note 12, at 7-65. "(This) was sensible because failure to provide the relief in deportation proceedings only encouraged long-time residents to leave the country and seek readmission in order to be put into exclusion proceedings where the relief could be sought." Fragomen & Bell, supra note 12 at 7-65. Because of this origin, a legal alien would not be eligible for Francis relief unless the alien is similarly situated to those aliens excludable under § 212(c). In re Granados, 16 I. & N. Dec. 726 (BIA 1979). Thus, no Francis relief may be afforded to those aliens who are convicted of an aggravated felony where they are sentenced to more than five years in prison as there is not comparable grounds for exclusion. 8 U.S.C. § 1251(a)(2)(A)(iii) (1994). For the same reason, those aliens who are convicted of a firearms offense covered by 8 U.S.C. § 1251(a)(2)(C) of the INA are not eligible for the discretionary waiver. See In re Hernandez-Casillas, 983 F.3d 231 (5th Cir. 1993).

[25] Fragomen & Bell, supra note 12, at 7-67.

[26] Fragomen & Bell, supra note 12, at 8-23. See, e.g., Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992) (court reversed as arbitrary a BIA determination that resident alien had failed to demonstrate unusual or outstanding equities).

[27] Id.

[28] See, e.g., In re Marin, 16 I. & N. Dec. 581 (1978).

[29] Id. at 584-85. See also In re Matter of Edwards 10 I. & N. Dec. 506 (1963); In re Matter of G.A., 7 I. & N. Dec 274 (1956); In re Matter of F., 6 I. & N. Dec 537 (1955); In re Matter of S., 6 I. & N. Dec. 392 (1954); In re Matter of M., 5 I. & N. Dec. 598 (1954); In re Matter of G.Y.G., 4 I. & N. Dec. 211 (1950); In re Matter of M., 3 I. & N. Dec. 804 (1949) (seventh proviso); In re Matter of V. I., 3 I. & N. Dec. 571 (1949) (seventh proviso).

[30] In re Marin, 16 I. & N. Dec. at 584. See, e.g., In re Carrasco, Interim Decision 2579 (BIA 1977), aff'd on other grounds, Carrasco-Favela v. INS, 563 F.2d 1220 (5th Cir. 1977); In re Edwards, 10 I. & N. Dec. 506 (1963); In re M., 3 I. & N. Dec. 804 (1949); In re V., I. & N. Dec. 293 (1942) (seventh proviso); In re G., 1 I. & N. Dec. 8 (1940) (seventh proviso).
It should be noted that as the perceived gravity of the crime the alien is convicted of increases, so does the level of equities that must be shown. Cordoba-Chaves v. INS, 946 F.2d 1244, 1247 (7th Cir. 1991).

[31] 60 F.2d 493 (5th Cir. 1992). See also Akinyemi v. INS, 969 F.2d 285, 289-90 (7th Cir. 1992) (case remanded due to BIA failure to consider rehabilitation as a positive factor in the balance of the equities).

[32] Diaz-Resendez, 60 F.2d at 493.

[33] Id.

[34] Id.

[35] Id.

[36] Id.

[37] Diaz-Resendez, 60 F.2d at 494.

[38] Id.

[39] Id.

[40] Id. at 495.

[41] Id.

[42] Diaz-Resendez, 60 F.2d at 498.

[43] Id. at 497. See Matter of Buscemi, Interim Decision 3058 (April 13, 1988); see also Israel v. INS, 785 F.2d 738, 740 (9th Cir. 1986); Martinez-Montoya v. INS, 904 F.2d 1018, 1023 (5th Cir. 1990).

[44] Diaz-Resendez, 60 F.2d at 497-98.

[45] Id. See also Foti v. INS, 375 U.S. 217 (1963); Bal v. Moyer, 883 F.2d 45 (7th Cir. 1989).

[46] Diaz-Resendez, 60 F.2d at 497-98. Deference is generally given to the INA determinations, unless persuasive factors exist that indicate the BIA erred. Id. See also Zamora-Morel v. INS, 905 F.2d 833, 838 n.2 (5th Cir. 1990); Blackwood v. INS, 803 F.2d

1165 (11th Cir. 1986).

47 Section 440(a) of the AEDPA revised § 106(a) of the INA to read:
Any final order of deportation against any alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(ii)(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 in any court.

48 Section 241(a)(2)(B) of the INA permits the deportation of aliens convicted of an offense related to a controlled substance, such as a marijuana offense, drug addiction and drug abuse. Fragomen & Bell, supra note 12, at 7-59. In cases of a single conviction for marijuana possession, the weight of the amount possessed must exceed 30 grams. 8 U.S.C. § 1251(a)(2)(B)(I) (1994). Section 241(a)(2)(C) of the INA addresses the deportation of any alien convicted of purchasing, possessing, selling, offering for sale, using, owning, or carrying in violation of the law, "any weapon part or accessory that is a firearm or destructive device." 8 U.S.C. § 1251(a)(14) (1994). Weapons considered to be destructive devices, and are thus covered by this section, are defined in 18 U.S.C. § 921(a) (1994). Section 241(a)(2)(D) of the INA allows for the deportation of any alien convicted under the Selective Service Act, espionage statutes, or of any offense concerning with the national defense, if the INS designates that alien as an "undesirable resident" of the United States. 8 U.S.C. § 1251(a)(2)(D) (1994). For a discussion of the factors that are considered when making such a determination, see In re S., 5 I. & N. Dec. 425 (1953).

49 8 U.S.C. §§ 1251(a)(2)(A)(i), (ii) (1994). The crimes which lead to this result may not arise from a single criminal scheme; however, they may be the result of a single trial. Fragomen & Bell, supra note 12, at 7-55. Moreover, judicial recommendations against deportation have been eliminated from this provision by the 1990 amendments to the INA. Fragomen & Bell, supra note 12, at 7-55.

50 See Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97, 108 n.46 (1998).

51 8 U.S.C. § 1251(a)(2)(A)(iii) (1994). Conviction of such an offense any time after entry may lead to deportation. The term "aggravated felony" includes "murder, any illicit trafficking in any controlled substance or in any destructive devices, any offense relating to the laundering of monetary instruments, any crime of violence for which the term of imprisonment imposed . . . is at least five years, or any attempt or conspiracy to commit any such act." Fragomen & Bell, supra note 12, at 7-56 (citing INA § 101(a)(43)).

52 8 U.S.C. § 1251(a)(2)(iii) (1994).

53 See AEDPA § 440(e)(1) (codified at 8 U.S.C. 1101(a)(43) (Supp. II 1996)).

54 See Amanda Masters, Is Procedural Due Process in a Remote Processing Center a Contradiction in Terms? Gandarillas-Zambrana v. Board of Immigration Appeals, 57 Ohio St. L.J. 999, 1025 n.5 (1996).

55 Note that the AEDPA also severely limits the availability of § 212(c) relief (discretionary waiver of excludability for long-time permanent resident returning from trips abroad). 8 U.SC.S 1182(c) (1994). The waiver, which was traditionally applicable to all grounds of exclusion except for those security related or when the immigrant was an aggravated felon who had served term of at least five years in prison, was limited by § 440(d) of the AEDPA. As it now stands, waiver relief has been eliminated. See supra note 6.

56 For a discussion of this provision prior to the enactment of the AEDPA see supra note 47 and accompanying text.

57 The BIA may still hear such challenges. Fragomen & Bell, supra note 12, at 8-3. For a discussion of circuit court reversals of BIA

determinations premised upon factual and legal errors, see infra note 136.

58 U.S. Cont. art. III, § 1.

59 See generally Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 916, (1988).

60 This justification is discussed within the context of a due process challenge to the AEDPA. See infra Part III.

61 U.S. Const. art. III, § 1.

62 Aldinger v. Howard, 427 U.S. 1, 15 (1976). See also Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("there can be no question of the power that the power of Congress thus to define and limit the jurisdiction marked out by Congress") (citing Kline v. Burke Const. Co., 260 U.S. 226, 234 (1922) (Congress "may give, withhold or restrict jurisdiction at its discretion.")).

63 See Fallon supra note 59, at 916.

64 26 U.S. (1 Pet.) 511 (1828).

65 Fallon, supra note 59, at 917.

66 William W. Millard, Eroding the Separation of Powers: Congressional Encroachment on Federal Judicial Power: CFTC v. Schor, 53 Brook. L. Rev. 669, 669-70 (1987).

67 These tribunals may create statutory rights, define these rights, assign burdens of proof, and delegate the adjudication of disputes that arise as a result of these special tribunals. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982).

68 Fallon, supra note 59, at 919. Professor Fallon suggests that Article III literalism is impractical, but notes that the doctrine and institutions that emanate from the abandonment of such a reading may threaten the values that provide at the basis for Article III. Fallon, supra note 59, at 919.
The inequities that may play out in the absence of independent adjudication upon the application of the AEDPA's alien removal proceedings was noted by Judge Jack B. Weinstein in Mojica v. Reno, 970 F. Supp. 130, 171 (E.D.N.Y. 1997) (retroactive application of the AEDPA "flies in the face of what appears to be Congress's design in enacting (the statute)").

69 As such, the few circuits that have heard challenges to the AEDPA predicated on this broad concentration of power transferred to the executive have upheld the AEDPA. See, e.g., Kolster v. INS, 101 F.3d 785 (1st Cir. 1996). In Kolster v. INS, the First Circuit held "(b)ecause . . . some avenue for judicial review remains available to address core constitutional concerns, we find that section 440(a)'s repeal of our jurisdiction to review final orders does not raise a constitutional issue." Id. at 971. This was despite the AEDPA's repeal of statutory authority for habeas review of final deportation orders in § 106(a)(10) of the INA. Id.

70 The Federalist, No. 78, at 492 (Alexander Hamilton) (B. Wright ed. 1961). The importance and necessity of the judiciary's power to review the constitutionality of legislation as was indoctrinated in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). ("(I)t is emphatically the province and the duty of the judicial department to say what the law is.") This doctrine collides with the plenary power the Supreme Court has emphasized Congress enjoys over immigration law. See infra note 100 and accompanying text.

[71] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co. 458 U.S. 50, 58 (1992). "A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of the government." United States v. Will, 449 U.S. 200, 217-18 (1980). See also Millard, supra note 66, at 669 n.2.

[72] 478 U.S. 833, 847-59 (1986).

[73] Id. at 847 (1986). Professor Richard H. Fallon articulates three values that underlie the Article III guarantees of life tenure and salary stabilization. The first is those values that are implicit in the separation of powers principle, such as protection from arbitrary and capricious results that may occur with the broad concentration of power over an issue within one branch of the government. The second is fairness to litigants in the face of partial officials within the executive or legislative branches. Finally, Professor Fallon notes that the integrity of the judicial branch is dependant upon the ability to review the basic lawfulness of an agency's action. Fallon, supra note 59, at 937-942.

[74] Schor, 478 U.S. at 851.

[75] Id. (citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589-93 (1984)).

[76] See Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984); Southern R. Co. v. Seaboard Allied Mining Corp., 442 U.S. 444, 462 (1979); Dunlop v. Bachowski, 421 U.S. 560, 568 (1975); Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967); Schilling v. Rogers, 363 U.S. 666, 670-77 (1960). In the Article III analysis of Schor, the Court articulates that the distinction between the public versus private nature of a right will be noted. Schor, 478 U.S. at 853. The deference that may be given to a "private" right--one for which state law provides the rule of decision--is not to be dispositive. Id. at 853-54. The right to judicial review of a final deportation order would qualify as a "public right," as it arises "between the Government and the persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." Crowell v. Benson, 285 U.S. 22, 50 (1932).

[77] But see Morawetz, supra note 50, at 100 n.17.

[78] See Webster v. Doe, 486 U.S. 592, 603 (1988) (citing Johnson v. Robinson, 415 U.S. 361, 373-74 (1974)). See also Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 (1986).

[79] Debate essentially revolved around the AEDPA's terrorist designations, and its habeas corpus and asylum revisions. 142 Cong. Rec. H3605; see also 104 S. Rep. No. 48 (1995). On these topics, the bill was often critiqued as "excessively harsh where it ought not to be, and much too weak where (it) need(s) toughness." 142 Cong. Rec. H3605, 3609.

[80] See generally Jennifer A. Beall, Note, Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism, 73 Ind. L.J. 693 (1998).

[81] See generally Reuben, supra note 4.

[82] See generally Reuben, supra note 4. "The changes (in the AEDPA) were made without legislative debate and without regard for other, more comprehensive efforts at reform that were nearing completion . . . . Only a handful of people knew that these provisions were slipped in there, and were changing law that's been around for decades . . . ." Id. at 34 (quoting Carol Wolchok, staff liaison for ABA Coordinating Committee on Immigration Law). Buttressing this perspective is the INS's apparent disappointment with the provisions that eliminated judicial review. David Martin, INS General Counsel, stated that the removal procedures in the AEDPA were done in haste, and "did not receive sufficient scrutiny." Id.

This Note does not suggest a lack of evidence of congressional and executive intent to increase the removal of immigrants convicted of crimes in general. To the contrary, such plans have existed for some time. See Containing Costs of Incarceration of Federal Prisoners and Detainees: Prisons and Related Issues: Hearings Before the Subcomm. on Commerce, State, and Justice of the House Appropriations Comm., 104th Cong., at 106-63 (1995) (testimony of James A. Puleo, Executive Associate Commissioner for Programs at the INS calling for the "expediting of the identification and removal of criminal aliens"). However, such intentions are not manifest in the debate surrounding the AEDPA, which supports the contention that the provisions of the AEDPA did not receive the appropriate scrutiny.

[83] See Brief for the Respondent, Kolster v. INS, 101 F.3d 785 (1st Cir. 1996). The United States contends that congressional intent to eliminate judicial review through § 440(a) of the AEDPA is clear. To that end, they cite Senator Abraham:
The provisions at issue . . . require that aliens who are convicted of serious crimes in courts of law in this country be deported upon completion of their sentences without further judicial review. These expedited deportation procedures will apply to almost half a million aliens currently residing in this country who are deportable because they have been convicted of serious felonies. (citations omitted).
Id. at 10. But see Morawetz, supra note 50, at 100 n.17 (noting that the United States Department of Justice contends that constitutional questions are excepted from the AEDPA's removal of judicial review).

[84] Brief for the Petitioner at n.7, Lewin v. INS, 87 F.3d 1320 (9th Cir. 1996). See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialect, 66 Harv. L. Rev. 1362, 1365 (1953); see also Gerald Gunther, Congressional Power to Curtail Federal Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 898 (1984).

[85] Deportation proceedings are conducted by a Special Inquiry Officer (immigration judge). These individuals are accountable to the same bureaucracy which investigates the aliens. 8 U.S.C. 1101(b)(4) (1994). Thus, their impartiality when reviewing the determinations made by the investigators is questionable.

[86] "Although Schor takes significant steps . . . its call for ad hoc judgements indicates a continuing acceptance of doctrinal uncertainty." Fallon, supra note 59, at 932.

[87] "The Supreme Courts jurisprudence concerning the power to substitute legislative courts and administrative agencies for 'constitutional courts' created under (A)rticle III has long been abounded with confusion." Fallon, supra note 59, at 916. See, e.g., Maryellen Fullerton, No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts, 49 Brook. L. Rev. 207 (1983); Millard, supra note 66, at 669; Commodity Futures Trading Common v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[88] Schor, 478 U.S. at 851.

[89] Id.

[90] This "wholesale importation . . . of jurisdiction" has left even the INS questioning the statute's breadth. Reuben, supra note 4, at 2. Paul Virtue, Deputy General Counsel for the INS, states that the AEDPA "leaves (the INS) with no choice. We think that the statute ought to be changed, and we are working on that, but until it is, we have to enforce it." Reuben, supra note 4, at 2.

[91] Northern Pipeline Constr. Co., 458 U.S. at 80.

[92] See supra note 23 and accompanying text.

[93] Schor, 478 U.S. at 851.

[94] See supra notes 1-4 and accompanying text.

[95] See generally AEDPA, supra note 3.

[96] To the contrary, it has been noted that there is "(r)ising American concern over a perceived immigration crisis . . . ." Linda S. Bosniak, Membership, Equality, and the Difference that Alienage Makes, 69 N.Y.U. L. Rev. 1047, 1047 (1994).

[97] Charles Finnie, Playing Cop and Judge; Is the INS Suited to Handle the Deportation Powers it gained Under New Anti-terrorism Law? American Lawyer Media, L.P. The Recorder, May 10, 1996, at 1.

[98] Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See also Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[99] Armstrong, 380 U.S. at 552. Justice Felix Frankfurter described the plenary power as follows: "(T)he underlying policies of what classes of aliens shall be allowed to enter and what classes of aliens shall be allowed to stay, are for Congress exclusively to determine even though such determination may be deemed to offend American traditions and may, as has been the case, jeopardize peace." Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring). The plenary power has also been defined as a doctrine which "allows the government to subordinate the interests of aliens to the perceived interests of the nation . . . ." Bosniak, supra note 96, 1047.

[100] Oceanic Stream Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (upholding tax on carriers which had transported illegal aliens). The Court has also stated "(w)hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). See also Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("it is important to underscore the limited scope of judicial inquiry into immigration legislation"); Kleindiest v. Mandel, 408 U.S. 753, 765-766 (1972) ("reaffirmations of (the plenary power doctrine) have been legion"); Shaughnessy v. United States ex. rel. Mezei, 345 U.S. 206, 212 (1953).
The doctrine emanating from Knauff and Mezei have been greatly criticized. See Frank H. Wu, The Limits of Borders: A Moderate Proposal for Immigration Reform, 7 Stan. L. & Pol'y Rev. 35, 44-47 (Summer 1996); Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 2021 (1984) (rule from the cases validates "deplorable governmental conduct toward both aliens and American citizens); John Figgis, Developments in the Law-- Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1322-24 (1983) (cases are anomalous in that they suggest that no constitutional restraints exist upon Congress' exercise of its exclusion power).

[101] Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 Harv. L. Rev. 853, 862 (1987); Bosniak, supra note 96, at 1092.

[102] Doherty v. Thornburgh, 943 F.2d 204, 208 (2d Cir. 1991), cert. dismissed, Doherty v. Barr, 503 U.S. 901 (1992). See also St. John v. McElroy, 917 F. Supp. 243, 246-50 (S.D.N.Y. 1996) (the liberty interest possessed by legal permanent residents "is of the highest constitutional import"); Landon v. Plasencia, 459 U.S. 21, 34 (1982).

[103] Landon, 459 U.S. at 34.

[104] Bridges v. Wilson, 326 U.S. 135, 154 (1945).

[105] Landon, 459 U.S. at 32.

[106] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). See also FDIC v. Mallen, 486 U.S. 230 (1988); Brock v. Roadway Express, Inc., 481 U.S. 252 (1987).

[107] Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625, 1626 (1992) (hereinafter Motomura, Procedural Surrogates). Professor Motomura provides an extensive history of the Supreme Court's decisions concerning deportation and due process rights afforded aliens that were acknowledged, yet rarely applied on a practical level. The article also contends that "(b)ecause of the anomalous structure that the plenary power doctrine imposes on constitutional immigration law, procedural decision are often the only vehicle for taking substantive constitutional rights seriously, and procedural surrogates for substantive constitutional rights have evolved as a result." Id. at 1631.

[108] 118 U.S. 356 (1886).

[109] Id. at 369.

[110] Bosniak, supra note 96, at 1060-61. See also Motomura, Procedural Surrogates, supra note 107, at 1627; Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 Yale L.J. 545, 566 (1990) (hereinafter Motomura, Phantom Norms); T. Alexander Aleinkoff, Federal Regulation of Aliens and the Constitution, 83 Am. J. Int'l L. 862, 865 (1989); David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. Pitt. L. Rev. 165, 180 (1983).

[111] Rodriguez v. Bell, 430 U.S. 787, 793 n.5 (1977).

[112] 189 U.S. 86, 100 (1903). See also United States ex. rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927) ("(d)eporation without a fair hearing or on charges unsupported by any evidence is a denial of due process"); United States ex. rel. Tisi v. Tod, 264 U.S. 131, 133 (1924) (error of an administrative tribunal "may . . . be so flagrant as to convince a court that the (deportation) hearing was not a fair one"). Cf. Zakonaite v. Wolf, 226 U.S. 272, 275 (1912) ("fair though summary hearing" by immigration officials may be constitutionally conclusive). It appears that there is a "readiness to recite the procedural due process requirement and a reluctance to apply it for the alien's benefit." Motomura, Procedural Surrogates, supra note 107, at 1643.

[113] United States ex. rel. Vajtauer, 273 U.S. at 106 ("(d)eporation without a fair hearing or on charges unsupported by the evidence is a denial of due process"); United States ex. rel. Tisi, 264 U.S. at 134 (error of administrative tribunal "may . . . be so flagrant as to convince a court that the (deportation) hearing was not a fair one"); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912) (hearing may be conclusive if fairly conducted). Cf. Zakonaite v. Wolf, 226 U.S. 272, 275 ("fair though summary hearing" by immigration official may be constitutionally conclusive). It appears that there is a "readiness to recite the procedural due process requirement and a reluctance to apply it for the alien's benefit." Motomura, Procedural Surrogates, supra note 107, at 1643.

[114] See Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1984); Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 16 (1983).

[115] See, e.g., Michael Scaperlanda, 81 Iowa L. Rev. 707, 713-14; Stephen H. Legomsky, Immigration Law and the Principle of the Plenary Congressional Power, 1884 Sup. Ct. Rev. 255, 256; Motomura, Procedural Surrogates, supra note 107, at 1626 (1992).

[116] Motomura, Procedural Surrogates, supra note 107, at 1626.

[117] Carlson v. Landon, 342 U.S. 524, 537-38 (1952).

[118] Id. at 533 (citing Fong Yue Ting v. United States, 149 U.S. 698, 713-15, 728 (1893)).

[119] Fong Yue Ting, 149 U.S. at 754 (Field J., dissenting) (emphasis added).

[120] 457 U.S. 202 (1982). See also Board of Regents v. Roth, 408 U.S. 564 (1972) (failure to rehire nontenured university professor without hearing relating to termination not a violation of due process); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipient is entitled to a evidentiary hearing prior to the termination of benefits); Perry v. Sindermann, 408 U.S. 593 (1972) (full trial court hearing necessary prior to termination of nontenured college professor's position). See generally Doug Rendleman, The New Due Process: Rights and Remedies, 63 Ky. L.J. 531 (1975), Peter N. Simon, Liberty and Property in the Supreme Court: A Defense of Roth and Perry, 71 Calif. L. Rev. 146 (1983).

[121] See also Landon v. Plasencia, 459 U.S. 21 (1982). In Landon, the Court expressed a willingness to recognize the due process rights of an alien who had left the country briefly and was attempting to reenter. Id. at 36-37.

[122] Plyler, 457 U.S. at 221.

[123] Id.

[124] Id. at 219. There has been substantial scholarly discussion over the erosion of the plenary doctrine, and the introduction of more conventional constitutional rights into the sphere of immigration law. See Bosniak, supra note 96, at 1062, 1130; Motomura, Phantom Norms, supra note 110, at 606; Schuck, supra note 100, at 75. See generally Motomura, Procedural Surrogates, supra note 107.

[125] Mathews, 424 U.S. 319, 334-35 (1976). See Landon v. Plasencia, 459 U.S. 21, 34 (1982) (Court applies the Mathews analysis to the expulsion procedures afforded legal permanent aliens.).

[126] Mathews, 424 U.S. at 334-35.

[127] Id. Many of the courts that have heard challenges to the AEDPA provision at issue accept the conclusion that the court is divested of jurisdiction with little to no analysis in support of this conclusion. See, e.g., Arevalo-Lopez v. INS, 104 F.3d 100 (7th Cir. 1997); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Solorio-Almanza v. INS, 101 F.3d 706 (9th Cir 1996).
It is interesting to note that the Mathews test has previously been used to determine that certain AEDPA provisions are unconstitutional as applied to lawful permanent residents. In Thomas v. McElroy, the United States District Court for the Southern District of New York held that an AEDPA revision which mandated the detention of a released aggravated felon prior to an excludablity determination was constitutionally infirm. No. 96 Civ. 5065, 1996 U.S. Dist. LEXIS 12445 (S.D.N.Y. August 23, 1996). As in Thomas, the application of the Mathews analysis to the elimination of judicial review mandated by S440(a) the AEDPA illustrates that the denial of Article III review uniformly to all deportation orders constitutes a violation of due process guarantees of lawful permanent residents.

[128] AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[129] Thomas, 1996 U.S. Dist. LEXIS 12445 at *8.

[130] It has been suggested that "(w)hile more recent decisions of lower courts and even of the Supreme Court seem to indicate greater solicitude for the due process claims of aliens, such rights have not yet been recognized generally." David Moyce, Petitioning on Behalf of an Alien Spouse: Due Process Under The Immigration Laws, 74 Calif. L. Rev. 1747, 1759 (1986). See also L. Jaffe, Judicial Control of Administrative Action 648 (1965) (implying that review of administrative action may be necessary where the determination carries "grave consequences to the individual").

[131] See Landon v. Plasencia, 459 U.S. 21, 47-48 (1982). The concept of exclusion differs from that of deportation, the latter of which is presently at issue. Exclusion proceedings commence when an alien has attempted to enter the United States, but is denied entry due to some provision of the INA. Deportation proceedings occur when an alien has already entered, whether or not this has been accomplished by lawful means. For a thorough discussion of the term "entry," and the difference between exclusion and deportation, see Fragomen & Bell, supra note 12, at 7-1 to 7-5.

[132] Judah A. Schecter, De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights, 88 Colum. L. Rev. 1483, 1502 (1988). Schecter notes that Professor Jaffe also suggests such a possibility. "An interest similar to that implicated in Ng Fung Ho v. White, 259 U.S. 276 (1922), the existence of which 'makes life worth living,' id. at 284, would certainly fall within this category." Id. at n.14.

[133] See discussion of the nature and importance of judicial review of administrative actions supra note 103-16 and accompanying text.

[134] It has been stated by the Court that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function . . . ." Crowell v. Benson, 285 U.S. 22, 54 (1932).

[135] Ng Fung Ho, 259 U.S. at 284 (emphasis added). See also Gegiow v. Uhl, 239 U.S. 3 (1915); Chin Yow v. United States, 208 U.S. 8 (1908); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902).

[136] Article III courts have vacated or reversed BIA decisions based upon both legal and factual errors. See, e.g., Gomez-Saballos v. INS, 79 F.3d 912, 917 (9th Cir. 1996) (lack of expertise in assessing relevant country conditions); Delmundo v. INS, 43 F.3d 436, 441 (9th Cir. 1994) (considering irrelevant factors and evidence); Hartooni v. INS, 21 F.3d 336, 343 (9th Cir. 1994) (decided cases based on speculation and through the use of boilerplate language); Braun v. INS, 992 F.2d 1016, 1020 (9th Cir. 1993); Goldeshtein v. INS, 8 F.3d 645, 650 (9th Cir. 1993) (misinterpretations of the INA); Canas-Segovia v. INS, 902 F.2d 717, 727 (9th Cir. 1990), vacated, 970 F.2d 599 (9th Cir. 1992) (applying the wrong standard of law).

[137] Schecter, supra note 132, at 1502-03 (citing Miller v. Fenton, 474 U.S. 104, 114 (1985); Buettner v. City of St. Cloud, 277 N.W.2d 199, 204 (Minn. 1979)). See also Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 262 (1985) (noting the historic distrust of agency adjudication).

[138] It has been stated that the fairness and administrative competence of the INS has been "harshly criticized." Schuck, supra note 100, at 16.

[139] Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1984).

[140] Salameda v. INS, 70 F.3d 447, 449 (7th Cir. 1995) (emphasis added). See, e.g., Watkins v. INS, 63 F.3d 844, 849-50 (9th Cir. 1995); Osorio v. INS, 18 F.3d 1017, 1028-30 (2d Cir. 1994); Osmani v. INS, 14 F.3d 13, 14 (7th Cir. 1994); Roderiguez-Barajas v. INS, 922 F.2d 94, 97 (7th Cir. 1993); Bastanipour v. INS, 980 F.2d 1129, 1131, 1133 (7th Cir. 1992); Osaghae v. INS, 942 F.2d 1160, 1163-64 (7th Cir. 1991).

[141] Perl, supra note 1, at 15.

[142] It has been noted that the INS is "absurdly understaffed." Salameda, 70 F.3d at 449. In 1994, the BIA had an effective membership of four who were to handle the more than 14,000 appeals that they received that year. Id.

[143] Finnie, supra note 97, at 1.

[144] See Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996); Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996). Cf. Reyes-Hernandez v. INS. 89 F.3d 490 (7th Cir. 1996).

[145] The elimination of INA § 212(c) discretionary waiver by the immigration judge and the restriction of habeas corpus relief, act in conjunction with the aforementioned elimination of judicial review to result in an unfair statute that leaves a final deportation order unprotected from abuse. While elaborate discussion of these provision are beyond the scope of this Note, they deserve mention. Section 440(d) of the AEDPA amends S212(c) of the INA, making this discretionary waiver unavailable to those aliens who have been convicted of an enumerated offense. Factors that were ordinarily considered when making such a determination include: (1) family ties in the United States; (2) the length of time that the alien resident has spent in the United States; (3) the length of time that the alien has spent employed; and (4) evidence of hardship that may occur upon the alien's deportation. Moreover, there is no "savings clause" in the AEDPA, which would ordinarily preserve an avenue of relief for an alien who was convicted prior to the statute's enactment. This elimination would still hold despite evidence that the offense was committed long ago, and evidence that since release, the alien has remained a productive and law abiding resident. See supra note 7 and accompanying text; see generally Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97 (1998) (addressing the relationship between IIRIRA and the AEDPA).

[146] See generally Perl, supra note 1.