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United States Supreme Court Amicus Brief.

Deboris CALCANO-MARTINEZ, et al., Petitioners,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 00-1011.
February 26, 2001.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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***i** QUESTION PRESENTED

Amicus will address the following question:

Whether the Immigration and Nationality Act (8 U.S.C. § 1252), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIKA"), divests federal courts of jurisdiction to review questions of statutory interpretation presented by a final removal order, either on direct review in the courts of appeals or under the habeas corpus jurisdiction of the district courts.

INTEREST OF THE AMICUS CURIAE

Pursuant to this Court's Rule 37.3, amicus curiae American Bar Association ("ABA" or "Amicus") respectfully submits this brief urging this Court to hold that Immigration and Nationality Act ("INA") section 242, codified at 8 U.S.C. § 1252, does not preclude federal court jurisdiction over Petitioners' claims challenging the statutory basis for a final removal order.[1]

STATEMENT OF INTEREST

The ABA is a voluntary national membership organization of the legal profession. The ABA has over 400,000 members representing every state and territory and the District of Columbia. Its membership and constituency ***ii** include prosecutors, public defenders, attorneys in private practice, legislators, law professors, law enforcement and correction personnel, law students and a number of nonlawyer associates in related fields.

The ABA has a historic interest in questions concerning the jurisdiction of federal courts to hear and decide claims by aliens seeking fair enforcement and implementation of our nation's immigration laws in accordance with the Constitution.

Consistent with its objective of securing fair and constitutional implementation of immigration laws, the ABA's policymaking House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee, consisting of representatives of nine ABA entities with relevant expertise (e.g., in administrative law), has assisted in organizing numerous pro bono immigration representation efforts and trained volunteer attorneys from the private bar to counsel immigrants in deportation proceedings and represent them on appeal. The ABA has previously submitted briefs as amicus curiae in several matters before this Court concerning the right of aliens to judicial review of orders affecting their ability to remain in this country. *See, e.g.*, Amicus Brief of ABA in *McNary v. Haitian Refugee Ctr.*, 498 U.S. 477 (1991) (endorsing view subsequently adopted by this Court that district court had jurisdiction to hear broad-based challenge to INS procedures affecting resident alien farmworkers).

The ABA appears as amicus curiae in this proceeding because the question presented herein has serious implications for the administration of justice and, in particular, for the constitutional rights of certain classes of resident aliens to a judicial forum in which their statutory and constitutional challenges to orders of removal may be heard.

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*1 STATEMENT OF THE CASE

In the interest of judicial economy, Amicus respectfully refers the Court to the statement of the case contained in the

Petitioners' Brief.

SUMMARY OF ARGUMENT

Amicus confines its discussion to the issue of whether the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), divests the federal courts of jurisdiction to review questions of statutory interpretation presented by a final removal order, either on direct review in the courts of appeals or under the habeas corpus jurisdiction of the district courts. The text of the INA, and the legal and historical backdrop against which it was drafted, demonstrate that it does not.

As a matter of textual construction (and historical fact), IIRIRA cannot be properly read to eliminate traditional habeas inquiry of final removal orders. When Congress enacted IIRIRA - which does not expressly refer to foreclosing habeas inquiry - it was presumptively aware of this Court's two well-established principles of construction regarding restrictions on habeas jurisdiction. First, congressional repeal of habeas jurisdiction must be explicit, and may not be accomplished by implication. Second, there is a fundamental distinction between legislation that curbs judicial "review" of executive actions and legislation that purports to limit the constitutionally protected habeas inquiry into executive detention. The latter is more vigorously protected against impairment by Congress. This habeas inquiry encompasses examination of all statutory or constitutional bases for questioning the lawfulness of a removal decision.

Reading the INA to preclude habeas inquiry into the validity of removal decisions is not only incorrect as a matter ***2** of statutory construction, but also it would offend Article I, section 9, Clause 2 of the Constitution. Habeas relief to persons seeking federal court inquiry into final removal orders has been guaranteed by the Constitution and by this Court's precedents. Accordingly, where, as here, a construction exists that does not require the Court to render an act of Congress unconstitutional, sound rules of judicial restraint require adopting that reasonable construction.

To demonstrate the historical basis for principles requiring habeas inquiry, section I traces an unbroken line of cases dating back to the beginning of federal immigration regulation in which this Court has made clear that the constitutional right to a judicial forum for habeas inquiry is available to aliens challenging orders of deportation. Section II then describes how, although the scope of the right is not fully settled in every respect, "it clearly encompasses" challenges to the Attorney General's construction of a statute resulting in a final order of deportation.

Applying these established background norms and principles of construction, section III demonstrates that the Government's interpretation of IIRIRA cannot stand. Provisions of IIRIRA that refer only to a restriction of "review" without reference to habeas corpus inquiry are properly interpreted either as not impairing habeas jurisdiction under 28 U.S.C. § 2241, or as requiring at least the level of scrutiny that existed under the pre-1952 legal regime. Whether the Court applies the text of 28 U.S.C. § 2241, or at least the level of habeas inquiry mandated by the Constitution under the pre-1952 habeas regime, Petitioners are entitled to a judicial determination of claims challenging the lawfulness of their final removal orders in either the district courts or the courts of appeal.

Finally, although Amicus urges the Court to read the statute appropriately, and thereby to avoid unnecessarily reaching this constitutional question, Amicus notes that the ***3** construction endorsed by the Government would violate the constitutional right to habeas review, and would be beyond the authority of Congress.

ARGUMENT

Petitioners in this action seek a judicial forum in which to challenge the validity of a Board of Immigration Appeals ("BIA") removal order. A companion case, *INS v. St. Cyr,* presents the type of claim Petitioners intend to raise: whether Petitioners are entitled to consideration by the Attorney General for discretionary relief from removal under former INA section 212(c).[2] In Petitioners' case, the Second Circuit determined that, although Petitioners were not entitled to direct review in the Court of Appeals of the BIA's removal orders, they were entitled to examination of those orders on habeas petition in the district court. The court relied upon and applied Judge Calabresi's careful opinion in *Henderson v. INS,* 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas,* 526 U.S. 1004 (1999), which had reached a similar conclusion under the transitional rules of IIRIRA § 309(c)(4).

This case raises important questions of constitutional law, and has significant consequences both for ensuring the integrity of this Court's long-standing jurisprudence in the area of habeas inquiry, and for protecting the rights of hundreds of individuals who each year would otherwise be removed from the United States because of legal errors committed by Executive Branch officials. As James Madison recognized, banishing a long-term permanent resident such as these Petitioners "from a country into which he has been invited … where he may have formed the most ***4** tender of connections, where he may have vested his entire property" is among the most severe actions that the executive may take against an individual. *See* Madison's Report on the Virginia Resolutions (1800) (noting that it is "difficult to imagine a doom" greater than this).[3] The Great Writ of Habeas Corpus, guaranteed by the Constitution, provides a crucial safeguard against unlawful exercises of this grave power. Indeed, over the past decade, judicial inquiry has spared hundreds of people from being wrongfully removed from this country. Executive Office for Immigration Review, U.S. Department of Justice, Statistical Yearbook (1999), Table 74.

In this brief, Amicus will confine itself to the jurisdictional issue raised by the Government: whether a judicial forum remains available for Petitioners' claims challenging an order of removal under the INA as permanently amended by IIRIRA. As Amicus will argue - and as the First, Second, Third, and Ninth Circuits have found - the federal courts do retain their historical authority to resolve Petitioners' statutory challenges to the lawfulness of their final removal orders.

As set forth below, the Court should affirm the decision that Congress has not suspended the right of aliens in habeas corpus proceedings to challenge in federal court the legality of executive removal orders against statutory claims such as those brought by Petitioners.

*5 I.

THE CONSTITUTION GUARANTEES TO ALIENS THE RIGHT TO CHALLENGE THE LAWFULNESS OF THEIR DETENTION AND DEPORTATION BY WRIT OF HABEAS CORPUS.

The legal issues raised by Petitioners in this case - namely their challenges to the lawfulness of final orders commanding their arrest and permanent removal from the United States - fall squarely within the scope of the Constitution's guarantee of the writ of habeas corpus, which may not be abrogated by Congress.

A. *The Right To Habeas Corpus Is Derived From The English Common Law And Is Safeguarded By The Constitution*

Since its earliest decisions concerning the writ of habeas corpus, this Court has recognized that the federal writ derives from the common law and that "the great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). The writ historically has served as "the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not …." Joseph Story, Commentaries on the Constitution of the United States § 1333 (1833).

As Blackstone explained, the value of the writ lies in commanding the government to provide a legal accounting *in court* for its decision to deny a person's liberty:

> [T]he glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity ***6** of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, Commentaries on the Laws of England * 133.

The Founders considered the principle that physical liberty may be restrained only in accordance with law so fundamental to the preservation of ordered liberty that they guaranteed the Great Writ against legislative or other encroachment in Article I, Section 9 of the Constitution, which provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. Congress immediately vested habeas jurisdiction over claims regarding persons deprived of liberty under or by color of federal authority in the First Judiciary Act of 1789, 1 Stat. 73, 81-82. That jurisdiction has remained in place ever since, and is currently codified at 28 U.S.C. § 2241. Although the Suspension Clause permits Congress to replace the habeas corpus procedure with a functionally equivalent avenue of judicial review, this Court has emphasized that that statutory avenue must be adequate and effective, and its scope must be commensurate with constitutional habeas corpus relief. *See Swain v. Pressley,* 430 U.S. 372, 383-84 (1977); *United States v. Hayman,* 342 U.S. 205, 223 (1952); *see also United States ex rel. Tanfara v. Esperdy,* 347 F.2d 149, 152 (2d Cir. 1965) (finding petition for review adequate means of testing legality of detention under deportation order); *cf. Felker v. Turpin,* 518 U.S. 651, 664 (1996) (statutory restrictions on multiple habeas applications by state prisoners that lie "well within the compass" of the evolution of judicial doctrine on abuse of the writ do not violate Suspension Clause).

*7 B. *The Guarantee of Habeas Corpus Inquiry Applies With Particular Force To Orders Involving Executive Detention*

That the writ is available to persons who have been detained pursuant to decisions or orders of the Executive Branch is beyond question. Indeed, judicial inquiry into the lawfulness of executive detention, which entails inquiry into the lawfulness of removal orders (see infra at I. C), lies at the traditional core of the writ. *See Felker,* 518 U.S. at 663-64; *Swain,* 430 U.S. at 380 n.13; *id.* at 386 (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention."). In fact, the scope of inquiry when habeas corpus is applied to actions of *executive* officials has always been greater than the scope of inquiry when it is employed as a remedy for prisoners confined after a federal or state *court* criminal conviction.[4] American habeas law inherited from England a fundamental distinction between confinement by order of a "superior" court or court of record, and confinement by order of an "inferior" tribunal or officer, with the requirement that judicial inquiry into the latter must be fuller in scope. *See Ex parte Watkins,* 28 U.S. (3 Pet.) 193 (1830); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens,* 98 Colum. L. Rev. 961, 982-85 (1998) [Hereinafter, "Neuman, *Habeas Corpus*"]. Thus, historically, "[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention." *Developments in the Law - Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1238 (1970); *Ex parte Randolph,* 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, Cir. J.) ("[T]he authority, ***8** whether given by a legislative act, or otherwise, must be strictly pursued. Such agents cannot act on other persons, or other subjects, than those marked out in the power, nor can they proceed in a manner different from that it prescribes.").[5]

C. *Habeas Corpus Review Is Guaranteed To Aliens Challenging Orders Of Deportation*

This Court has always held that habeas corpus is available to review immigration decisions such as those at issue here. Even before the federal government began regulating immigration in 1875, the federal courts had employed the writ of habeas corpus in the analogous contexts of the extradition of foreign criminals and the return of deserting foreign seamen. *See, e.g., In re Kaine,* 55 U.S. (14 How.) 103 (1853) (extradition); *Ex parte D'Olivera,* 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3967) (Story, Cir. J.) (desertion); Neuman, *Habeas Corpus,* at 990-1004. More significantly, shortly after Congress adopted the first federal immigration statutes, this Court rejected the government's claim that exclusion did not restrain an alien of his liberty within the meaning of habeas corpus doctrine. *See United States v. Jung Ah Lung,* 124 U.S. 621, 626 (1888); *see also Chin Yow v. United States,* 208 U.S. 8, 12-13 (1908) (Holmes, J.).[6] Innumerable decisions since *Junk Ah Lung* confirm that the inquiry on habeas corpus into the lawfulness of detention necessarily includes inquiry into the legality ***9** of the order of exclusion or deportation on which the detention is based.

This Court has consistently preserved habeas corpus scrutiny of the lawfulness of deportation orders against efforts by

Congress to render them final and conclusive. The Court recounted this history in *Heikkila v. Barber*, 345 U.S. 229, 233-35 (1953), and concluded that statutes adopted between 1891 and 1917, which it had interpreted as narrowing the available scope of review, had precluded review "to the fullest extent possible under the Constitution." *Id.* at 234. These limitations remained in force until the Court ruled that the enactment of the Immigration and Nationality Act of 1952 had made the judicial review provisions of the Administrative Procedure Act ("APA") applicable to proceedings arising thereunder. *See Shaughnessy v. Pedreiro,* 349 U.S. 48 (1955). As discussed more fully in Section II below, the inquiry afforded under the pre-1952 statutes preserved judicial authority over issues of both constitutional and statutory law.

This Court's vigilance in not permitting Congress to eliminate habeas review of immigration decisions reflects this Court's understanding of the fundamental limits on congressional power regarding the treatment of aliens. This Court affirmed aliens' entitlement to habeas corpus in *Nishimura Ekiu,* 142 U.S. 641 (1892), in the midst of public agitation against Chinese immigrants in the 1890s, and reaffirmed this principle in *Heikkila* in the midst of public agitation against Communist aliens in the 1950s. The Court has made clear that Congress's power over immigration does not trump all constitutional protections, and especially not guarantees of separation of powers and proper procedure. As the Court explained in ***10** *INS v. Chadha,* 462 U.S. 919 (1983), invalidating a legislative veto over discretionary relief from deportation:

The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo,* "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."

462 U.S. at 940-41 (citations omitted). Congress's broad substantive power over immigration policy is tempered by judicially enforceable procedural guarantees, especially in connection with deportation proceedings, in which this Court has consistently held due process norms applicable, and especially in connection with lawful permanent resident aliens, such as Petitioners. *See Landon,* 459 U.S. at 32-34 (1982) (emphasizing constitutional status of permanent residents and affirming their procedural due process rights in exclusion proceedings); *Johnson v. Eisentrager,* 339 U.S. 763, 770-71 (1950) (emphasizing constitutional rights of aliens within United States, while denying enemy aliens overseas access to habeas corpus). Just as Congress cannot deprive aliens of these other constitutionally mandated procedural rights, Congress cannot deprive aliens of the privilege of the writ of habeas corpus.

*11 II.

THE GUARANTEED SCOPE OF REVIEW OF DEPORTATION ON HABEAS CORPUS ENCOMPASSES BOTH CONSTITUTIONAL AND NONCONSTITUTIONAL CHALLENGES TO THE LAWFULNESS OF THE DEPORTATION ORDER, AND INCLUDES CHALLENGES TO EXECUTIVE INTERPRETATION OF A STATUTE AS RETROACTIVELY ELIMINATING A FORM OF DISCRETIONARY WAIVER OF DEPORTABILITY.

A. *This Court Has Always Preserved Federal Court Jurisdiction To Conduct Habeas Inquiry, Including Review Of Statutory Interpretation, Against Congressional Attempts To Confer Finality On Deportation Orders*

The requirement that habeas corpus must be available for both constitutional and nonconstitutional challenges to the lawfulness of deportation orders flows both from the nature of the writ and from this Court's decisions regarding the finality of immigration orders. Although the Court has not had occasion to set forth every element required by the Constitution for habeas inquiry into executive removals, the Court has made clear that the minimum that the Constitution requires includes the judicial scrutiny exercised under the pre-1952 immigration acts with regard to final orders of deportation. *See Heikkila v. Barber*, 345 U.S. 229, 233-35 (1953).

***12** In the 1890s, congressional dissatisfaction with judicial correction of executive decisions led to the enactment of provisions purporting to confer finality on executive orders of exclusion.[7] This Court, however, in the seminal case of *Nishimura Ekiu v. United States,* 142 U.S. 651 (1892), held that an alien prevented from landing was "doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." *Id.* at 660. The Court upheld the power of Congress to entrust factfinding to executive officers, but it limited the effect of statutory finality to executive findings *of fact. See id.* at 660. In so ruling, the Court did not describe exclusion as *sui generis,* but found this treatment to be consistent with other processes of nonjudicial detention, like extradition. *Id.* (citing *Benson v. McMahon,* 127 U.S. 457 (1888), and *In re Oteiza,* 136 U.S. 330 (1890)).[8] The Court concluded that, so long as the inspector's decision was within the jurisdiction or authority conferred upon him by the statute (the opinion used those terms interchangeably), it could not be impeached or reviewed by the courts. *Id.* at 663-64.

The following year, in *Fong Yue Ting v. United States,* 149 U.S. 698, 713 (1893), the Court explained that Congress could also constitutionally authorize executive adjudication in deportation cases, "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to ***13** intervene."[9] Once again, the Court's approval was limited to the propriety of executive factfinding, and it continued to note the parallel between deportation and extradition. *Id.* at 713-14.

Later, once the Court had emphasized the need for observance of procedural due process in immigration cases, *see Yamataya v. Fisher,* 189 U.S. 86 (1903), it modified its doctrine concerning finality of factfinding by insisting that both the fairness of the administrative hearing and the existence of *some* evidentiary basis for the finding must be open to review on habeas. *See, e.g., Chin Yow v. United States,* 208 U.S. 8 (1908); *Tang Tun v. Edsell,* 223 U.S. 673 (1912); *United States ex rel. Vajtauer v. Commissioner of Immigration at Port of New York,* 273 U.S. 103 (1927); Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence",* 25 San Diego L. Rev. 631, 637-41 (1988).[10]

As this Court emphasized in *Heikkila v. Barber,* 345 U.S. 229, 234-35 (1953), these finality provisions had "the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." The Court, contrasting the due process "some evidence" test with the APA test of substantial evidence on the record as a whole, reaffirmed the existence of this constitutionally protected core of habeas inquiry by noting that full APA review ***14** was broader in scope than habeas inquiry, especially with regard to findings of fact. *Id.* at 236 & n.11 (citing *Vajtauer,* 273 U.S. 103, and *Bridges v. Wixon,* 326 U.S. 135 (1945)). The Court later concluded that the full "abuse of discretion" analysis developed under the APA was also broader than the core habeas inquiry. *See United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954). The constitutional requirement of an avenue for judicial inquiry into the legal basis for removal, however, including issues of statutory interpretation, has not been questioned.

Heikkila is particularly instructive in clarifying the unique and protected position of traditional habeas by contrasting the term "judicial review" with habeas inquiry. The Court's emphasis on the phrase "judicial review" reflects a recurring distinction in terminology. Courts have repeatedly stated that particular decisions were not subject to review but were subject to the narrower inquiry on habeas. *See, e.g., Terlinden v. Ames,* 184 U.S. 270, 278 (1902) (extradition); *Nishimura,* 142 U.S. at 663 (observing that while exclusion decision subject to habeas inquiry it could not be "impeached or reviewed").

Thus, as the nature of the writ demands, and as the cases under the pre-1952 statutes demonstrate, the enforcement of this irreducible constitutional minimum has involved statutory as well as constitutional challenges to the lawfulness of executive decisions. *See generally Henderson v. INS,* 157 F.3d 106, 114-16 (2d Cir. 1998) (collecting and discussing cases in which the courts reviewed such challenges). This Court regularly employed habeas corpus as a means to keep executive officials within the bounds of their statutory authority in exclusion and deportation matters. The Court corrected errors of law in the construction of exclusion and deportation grounds in such habeas cases as *Gegiow v. Uhl,* 239 U.S. 3 (1915) (rejecting executive's broad interpretation of public charge exclusion provision); ***15** *Mahler v. Eby,* 264 U.S. 32 (1924) (rejecting executive's interpretation of findings necessary for deportation after conviction under espionage act); *Kessler v. Strecker,* 307 U.S. 22 (1939) (rejecting executive's interpretation of ideological deportation provision); *Delgadillo v. Carmichael,* 332 U.S. 388 (1947) (rejecting executive's interpretation of "entry"); and *Fong Haw Tan v. Phelan,* 333 U.S. 6 (1948) (rejecting executive's interpretation of multiple criminal conviction deportation provision).[11] As Justice Holmes wrote in *Gegiow*:

The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus.

239 U.S. at 9.

The constitutional scheme and this Court's precedents enforcing the constitutional right of habeas corpus reflect the fact that without judicial control over statutory interpretation, executive officials would have effective power to deport aliens for any reason they chose. The Government's current interpretation of the INA would avoid this result only in part by construing the language of 8 U.S.C. § 1252(a)(2)(C) as making the courts of appeals' determination of whether an alien "is removable" on listed grounds part of their determination of jurisdiction. This interpretation, however, does not go far enough. Rather, interpretation of the statutory text of § 1252 must be informed by the constitutional right to judicial inquiry when the executive ***16** violates any statutory prohibition on the deportation of an alien from this country.[12]

In summary, the constitutional minimum scope of habeas review of findings of deportability enforced by this Court has included the assurance of procedural fairness, the determination of both constitutional and nonconstitutional issues of law, and a review of findings of fact under the "some evidence" standard. *See* Neuman, *Habeas Corpus, supra,* at 1016-20. Application of this standard to encompass issues relating to discretionary relief is addressed below in Section II.C.

B. *The Government's Contention That Habeas Inquiry Need Not Extend To Statutory Challenges Rests Upon A Misunderstanding Of This Court's Statements About The Scope Of Factfinding And Conflates Habeas Inquiry Regarding Executive Detention With Habeas Relief From Criminal Convictions*

Notwithstanding the foregoing precedents, the Government has maintained in the courts of appeals that the scope of inquiry required by *Heikkila* includes only constitutional issues, or an even narrower category. That argument has relied on taking assorted quotations from this Court's opinions out of context. Restored to their proper context, these passages do not support the Government's argument.

***17** First, one element of the constitutionally required habeas inquiry is the due process review of *factfinding* under the "some evidence" test. Statements in pre-1952 deportation cases such as *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U.S. 103 (1927), and *United States ex rel. Tisi v. Tod,* 264 U.S. 131 (1924), that executive *factfinding* is reviewable *only* for due process violations do not provide any support for limiting habeas inquiry into errors of statutory interpretation. The opinions in which these statements appeared in fact always measured the deportation orders against the specific terms of the statute. Similarly, Justice Clark's statement in *Heikkila* that "the function of the courts [on habeas] has always been limited to the enforcement of due process requirements," 345 U.S. at 236, was referring to the scope of review of factfinding, which is the subject of the passage in which it appears.[13]

Some lower courts, most notably the Seventh Circuit in *Yang v. INS*, 109 F.3d 1185, 1195-96 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS,* 522 U.S. 1027 (1997), have recently been misled by references to the jurisdictional importance of constitutional issues appearing in older cases that arose on direct appeal to this Court. These discussions of jurisdiction related to the unique procedural posture of the case and the pleading requirements for bringing a case to this Court *on direct appeal* from the district courts. In those cases, the presence of a constitutional issue was essential to this Court having jurisdiction on direct appeal. *See, e.g.,* ***18** *Vajtauer,* 273 U.S. at 105 (citing Judicial Code § 238 as authorizing direct appeal); *United States ex rel. Tisi v. Tod,* 264 U.S. at 132 (same); *United States ex rel. Mensevich v. Tod,* 264 U.S. 134, 135-36 (1924) (same). In that period, habeas cases raising only statutory issues would reach this Court on certiorari from the courts of appeals rather than on direct appeal from the district courts. *See, e.g., Gegiow v. Uhl,* 239 U.S. 3 (1915). Thus, in cases such as *Vajtauer,* this Court's discussions concerned the basis for its own appellate jurisdiction, not the basis for the lower court's habeas jurisdiction.[14]

The Government also persuaded some district courts to redefine the scope of the writ by reference to the standards derived from the use of habeas corpus for challenges to criminal convictions. *See, e.g., Mbiya v. INS,* 930 F. Supp. 609, 612 (N.D. Ga. 1996). But the standard applicable to a person who has already had one or more opportunities to present his legal claims to a court cannot be applied to a ***19** person who has *never* had an opportunity to have *any* court rule on his challenge to the lawfulness of *executive* detention. *See, e.g., Henderson*, 157 F.3d at 120; *Bowrin v. INS,* 194 F.3d 483, 490 (4th Cir. 1999); *Shah v. Reno,* 184 F.3d 719, 723-24 (8th Cir. 1999); *see also* Section I.A *supra.*

A similar conflation occurred in the Seventh Circuit's decision in *LaGuerre v. Reno,* 164 F.3d 1035 (7th Cir. 1998), *cert. denied,* 528 U.S. 1153 (2000). Although the *LaGuerre* opinion alluded to the history of habeas corpus, it did not take note of the traditional understanding that executive officials who violate a statute in ordering detention have acted in excess of their "jurisdiction." *See id.* at 1038 (citing *Felker v. Turpin,* 518 U.S. 651, 663 (1996), and Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 465-74 (1963)).[15] The *LaGuerre* opinion also failed to explore the implications of this Court's decisions in *Heikkila v. Barber,* 345 U.S. 229 (1953), and *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

Attempts to conflate the scope of habeas inquiry into removal orders with review of post-conviction cases fundamentally misconceives the nature and purpose of the habeas corpus guarantee, which originated in the system of English law where there was no separate category of constitutional errors. To adopt the approach of these lower courts would threaten "the core conception of habeas corpus as it has been applied over many centuries," *Henderson,* 157 F.3d at 120, and would deprive all residents of the United States, not only aliens, of a central constitutional protection against unauthorized executive detention.

20 C. *Habeas Review Of Deportation Orders Encompasses Not Only Deportability, But Also The Lawfulness Of Denials Of Discretionary Relief.

The Government has maintained that the level of inquiry preserved by 8 U.S.C. § 1252 does not extend to the BIA's interpretation of the retroactive effect of statutes governing discretionary relief. However, where the immigration laws have given aliens the right to apply for a discretionary waiver of exclusion or deportation, the inquiry on habeas must also extend to whether the officials have observed any applicable limits on their authority to deny the waiver. The statutory ability to seek discretionary waivers is an important legal right. *See Chadha v. INS,* 634 F.2d 408, 425-26 (9th Cir. 1980) (Kennedy, J.), *aff'd,* 462 U.S. 919 (1983) (noting that such waivers serve to avoid the hardship and suffering that strict application of deportation grounds may entail). This Court has characterized rulings on discretionary relief from deportation as "an integral part of the proceedings which have led to the issuance of a final deportation order," *Foti v. INS,* 375 U.S. 217, 223 (1963), and as one of the " 'matters on which the validity of the final order is contingent,' " *INS v. Chadha,* 462 U.S. 919, 938 (1983) (quoting *Chadha v. INS,* 634 F.2d at 412). As such, transgression of constitutional or statutory limitations on the agency's power must be open to inquiry on habeas review of any resulting detention.

The right to habeas inquiry concerning whether a person has a statutory right to apply for discretionary relief does not require that habeas inquiry must be available with regard to every form of discretionary relief. In some instances, discretion is conferred in such a manner that, aside from constitutional requirements, there is no law to apply, and hence no basis for habeas review. *See Mada-Luna v. Fitzpatrick,* 813 F.2d 1006 (9th Cir. 1987) (regarding deferral of action). Nevertheless, discretion ordinarily is not so limitless, and ***21** even though the ultimate grant of relief may be "a matter of grace," it remains true that inquiry is proper at least as to whether the applicants "have been given a *right* to a discretionary determination." *Jay v. Boyd,* 351 U.S. 345, 354 (1956) (emphasis added); *Dessalernos v. Savoretti,* 356 U.S. 269, 269 (1958) (finding petitioner "entitled to have his application for suspension of deportation considered").[16] The federal courts have long enforced statutory bounds on the official's discretion to deny relief, especially when the officials have failed to exercise the discretion delegated to them.

In the case at bar, Petitioners challenge a statutory interpretation by the Government that would foreclose any right of Petitioners to seek discretionary relief. By longstanding pre-IIRIRA administrative and judicial interpretation, Petitioners would have been eligible under INA section 212(c) to apply for waiver of grounds for their removal. *See Francis v. INS,* 532 F.2d 268 (2d Cir. 1976); *Matter of Silva,* 16I. & N. Dec. 26 (BIA 1976); *Matter of S-*, 6I. & N. Dec. 392 (BIA 1954). This form of relief applies only to aliens, such as Petitioners, who are lawful permanent residents and who have resided in the United States at least seven years.[17] In IIRIRA, Congress reformulated ***22** section 212(c) relief prospectively as cancellation of removal under 8 U.S.C. § 1229b(a). The Attorney General held that this amendment deprived her of authority to grant relief to Petitioners under the previously applicable standards of section 212(c). Petitioners' challenge to that interpretation raises a claim of statutory construction relating to failure to exercise discretion, not an objection to the manner in which discretion is exercised.[18]

Because Petitioners' claims concern a pure question of law regarding their right to seek discretionary relief under section 212(c), their claims are properly and necessarily subject to habeas inquiry. Indeed, in cases under the pre-1952 statutory regime, the lower federal courts routinely applied the constitutionally guaranteed writ of habeas corpus to ensure the lawful exercise of discretion under the Seventh Proviso, the statutory predecessor to section 212(c).[19] *See, e.g., United States ex rel.*

Devenuto v. Curran, 299 F. 206 (2d Cir. 1924) (upholding reasonableness of rule adopted for administration of discretion); *Hee Fuk Yuen v. White*, 273 F. 10, 13 (9th Cir.) (same), *cert. denied sub nom., Pang Hing v. White*, 257 U.S. 639 (1921); *United States ex rel. Patti v. Curran*, 22 F.2d 314 (S.D.N.Y. 1926) (overturning failure to exercise discretion unsupported by statute or regulations), *appeal dismissed*, ***23** 18 F.2d 953 (2d Cir. 1927); *Gabriel v. Johnson*, 29 F.2d 347 (1st Cir. 1928) (upholding existence of evidence to sustain finding of ineligibility).

Similarly, this Court and lower federal courts employed the writ of habeas corpus under the pre-1952 regime to ensure the lawful exercise of the authority to grant other forms of discretionary relief under the 1917 Act. *See, United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (finding adequate allegation of failure to exercise discretion in accordance with regulations on suspension of deportation under the 1917 Act);[20] *United States ex rel. Adel v. Shaughnessy*, 183 F.2d 371, 372 (2d Cir. 1950) (Frank, J.) (courts can review for clear abuse of discretion or a clear failure to exercise discretion); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950) (L. Hand, C.J.) (denial of suspension of deportation reviewable on habeas if “the ground stated is on its face insufficient”).

The decisions under the pre-1952 regime agree that the agency’s imposition of eligibility requirements for discretionary relief that are not authorized by law constitutes a failure to exercise discretion, rendering a resulting deportation order unlawful and therefore subject to correction on habeas. *Accardi*, 347 U.S. at 268; *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950); *United States ex rel. de Sousa v. Day*, 22 F.2d 472 (2d Cir. 1927); *Gonzalez-Martinez v. Landon*, 203 F.2d 196 (9th Cir.), *cert. denied*, ***24** 345 U.S. 998 (1953); *United States ex rel. Berman v. Curran*, 13 F.2d 96 (3d Cir. 1926). In such cases the courts have not hesitated to grant a habeas remedy, even though the executive would still have the opportunity to deny relief as a matter of properly exercised discretion.[21]

Thus, the constitutional right to habeas corpus review of deportation decisions also applies when the unlawfulness inheres in the refusal to exercise discretion. The Constitution requires that habeas remain available to review errors of law and unconstitutionally arbitrary denials, even if the operative standard is narrower than the standards generally applicable under the APA.

III.

SECTION 1252 DOES NOT PRECLUDE FEDERAL COURT JURISDICTION TO EXAMINE THE LEGALITY OF THE BIA’S DETERMINATION THAT RELIEF UNDER FORMER INA SECTION 212(c) IS UNAVAILABLE TO PETITIONERS.

As the court below and numerous other circuits have properly found, Congress did not intend to impair the constitutionally guaranteed right to habeas corpus inquiry when it enacted IIRIRA. Congress did not explicitly repeal habeas corpus jurisdiction under 28 U.S.C. § 2241 for removal cases, and its restriction of “review” in section 1252(a)(2)(C) does not refer to habeas inquiry.

*25 A. *Section 1252 Does Not Explicitly Enact A Partial Repeal Of 28 U.S.C. § 2241.*

In Felker v. Turpin, 518 U.S. 651 (1996), this Court reiterated the rule that repeals by implication of habeas are disfavored. *Id.* at 658-61; *see Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869). *Felker* was decided three months before the enactment of IIRIRA on September 30, 1996, and the decision upheld aspects of Congress’s April 1996 revisions of the procedure for postconviction habeas corpus. 518 U.S. at 664; *see, e.g., Mahadeo v. Reno*, 226 F.3d 3, 14 (1st Cir.) (finding proximity of *Felker* to enactment of IIRIRA “particularly revealing”), *petition for cert. filed Dec. 11, 2000 (No. 00-962); Flores-Miramontes v. INS*, 212 F.3d 1133, 1136 (9th Cir. 2000) (finding proximity “particularly relevant”). Given the lively interest of Congress in its habeas corpus reforms, the traditional presumption that Congress is aware of this Court’s decisions applies with particular force to IIRIRA.

In view of the text and timing of IIRIRA, it would be a disservice to Congress to read expansively subsections of § 1252 that make no specific mention of habeas corpus or of 28 U.S.C. § 2241 as barring access to the writ.

B. *The Reference To "Review" In Section 1252(a)(2)(C) Does Not Encompass Habeas Corpus Inquiry*

In employing the term "review," and omitting the term "habeas corpus," in 8 U.S.C. § 1252(a)(2)(C), Congress acted against the background of this Court's decisions previously discussed at length that protect the right to habeas corpus against inadvertent or casual impairment.

Language in section 1252(a)(2)(C) providing that there shall be no "review" is thus most naturally interpreted as denying the alien the full scope of APA review, and as affording the alien access to only the narrower form of ***26** habeas corpus inquiry preserved under the pre-1952 immigration statutes, as discussed supra in section II. Such an interpretation is bolstered by the traditional distinction between "review" and habeas corpus noted by this Court in *Heikkila v. Barber,* 345 U.S. 229, 236 (1953); *Nishimura Ekiu v. United States,* 142 U.S. 651, 663 (1892), and other cases.

C. *Two Alternative Readings Of Section 1252 Are Consistent With This Court's Jurisprudence*

Section 1252 may properly be read in one of two ways. One reading, consistent with this Court's decisions in *Felker* and *Yerger,* is that habeas corpus jurisdiction remains available in the district court under 28 U.S.C. § 2241. This interpretation would entail merely affirming the jurisdictional rulings of the court of appeals, and holding that the preclusion of direct review is constitutionally permissible because habeas corpus jurisdiction over these Petitioners' claims is available in the district court.

This interpretation flows naturally from the text. Section 1252(b)(9) would preserve habeas corpus jurisdiction over final removal orders that are not subject to direct review under § 1252(a)(1). The title of § 1252(b)(9) is "Consolidation of questions for judicial review." Section 1252(b)(9) is also qualified by the introductory language that appears at the beginning of subsection 1252(b), which reads "With respect to review of an order of removal under subsection (a)(1), the following requirements apply." Thus, if § 1252(b)(9) is a "zipper clause,"[22] then it serves only to consolidate review of orders subject to direct review, not to preclude habeas jurisdiction over orders that are not subject to direct review. The traditional distinction between ***27** "review" and habeas inquiry would also support an interpretation of the phrase "Judicial review" in § 1252(b)(9) as meaning APA-style review.

Alternatively, the Court may also construe § 1252 as channeling the required habeas inquiry into the court of appeals on direct review, thereby rendering the exercise of district court habeas jurisdiction in such cases unnecessary. As this Court has recognized, the Habeas Corpus Suspension Clause protects the substance rather than the form of the privilege of the writ. *See Swain v. Pressley,* 430 U.S. 372, 383-84 (1977); *United States v. Hayman,* 342 U.S. 205, 223 (1952). The constitutional requirement would be equally satisfied if aliens were required to seek their remedy in the courts of appeals in the first instance. *See Hayman,* 342 U.S. at 223 & n.40 (discussing requirement of exhaustion of alternative judicial remedies); *United States ex rel. Tanfara v. Esperdy,* 347 F.2d 149, 152 (2d Cir. 1965) (upholding replacement of habeas corpus by direct review of deportation orders).

The Government argues, and some lower courts have observed, that channeling the inquiry directly into the courts of appeals would serve the goal of streamlining the removal of aliens. Congress's power over the jurisdiction of the lower federal courts entitles it to designate any of these avenues, or a hybrid system of review, but Congress must permit some effective avenue for judicial resolution of constitutional and statutory challenges to removal orders.

Thus, while Amicus takes no position on which of these reasonable interpretations of § 1252 best reflects the intent of Congress, the Court should choose among these reasonable constructions that do not violate the constitutional right to habeas corpus inquiry in deportation proceedings.

*28 IV.

IF SECTION 1252 WERE READ AS BARRING ACCESS TO THE WRIT OF HABEAS CORPUS WITH RESPECT TO PETITIONERS' CLAIMS, THEN IT WOULD VIOLATE THE CONSTITUTION.

If the Court were to conclude that a provision of § 1252 prohibits inquiry into the lawfulness of a deportation order on habeas corpus, without providing a substantially equivalent and effective mode of review, that provision would be unconstitutional. Such a prohibition would not be a mere regulation of jurisdiction of the federal courts, because it would permit no alternative forum.[23]

As Henry Hart emphasized, Congress's power to define the jurisdiction of the lower federal courts is subject to constitutional limits, and the explicit limit of the Suspension Clause applies to deportation. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1393, 1397 (1953). When a federal court is unavoidably confronted with an invalid preclusion statute, "its duty is ***29** simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction." *Id.* at 1387; *see United States v. Mendoza-Lopez,* 481 U.S. 828 (1987); *Thunder Basin Coal Co. v. Reich,* 510 U. S. 200, 219 & n.* (1994) (Scalia, J., concurring in the judgment).

Well-established principles of statutory construction require that, where reasonably possible, this Court interpret Congress's acts to avoid a grave constitutional question. *See Jean v. Nelson,* 472 U.S. 846, 854 (1985) (interpreting immigration statute and regulations to avoid constitutional question); *United States v. Witkovich,* 353 U.S. 194, 201-02 (1957) (same). Here, such a construction is not only possible, but it yields the most natural reading of Congress's intent.

CONCLUSION

The Court's past fidelity to the Great Writ provides the fundamental answer to the jurisdictional question currently before this Court. This Court should affirm federal court jurisdiction over constitutional and statutory challenges to the BIA's orders.

Footnotes

FN
* Counsel of Record

1 This brief is filed with the consent of both petitioner and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, Amicus states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amicus, its members or its counsel has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption of the positions in this brief or reviewed the brief prior to filing.

2 In *St. Cyr,* the Second Circuit affirmed a district court determination that the replacement of INA section 212(c) by cancellation of removal under 8 U.S.C. § 1229b(a) does not apply retrospectively.

3 Reprinted in 4 Debates, Resolutions and Other Proceedings, in Convention, on the Adoption of the Federal Constitution 555 (Jonathan Elliot 2d ed. 1836).

4 This case does not involve the current scope of the Suspension Clause in relation to postconviction relief, and Amicus takes no position on that issue.

5 Although both inquiries are sometimes phrased in terms of "jurisdiction," in the case of executive tribunals the term "jurisdiction" encompasses the broad range of legal issues determining the tribunal's authority to order the detention of the individual. *See* Neuman, *Habeas Corpus,* at 982-84.

6 Because aliens have greater constitutional rights in deportation proceedings than in exclusion proceedings, see *Landon v. Plasencia,* 459 U.S. 21 (1982), the application of the same protection to deportation has followed *a fortiori.*

7 Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1085; Act of Aug. 18, 1894, eh. 301, 28 Stat. 390. The finality provision was understood as applying in deportation cases, see *Yamataya v. Fisher,* 189 U.S. 86, 96, 102 (1903), and expressly extended to deportation cases in the 1917 recodification. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889.

8 Extradition, it should be noted, is a process applicable both to U.S. citizens and to aliens. *See e.g., Charlton v. Kelly,* 229 U.S. 447, 465-68 (1913).

9 In view of the Government's arguments in proceedings below, it is worth emphasizing that the Court referred to a constitutional requirement of judicial intervention, not to a power of review limited to constitutional errors.

10 Since some of these cases used habeas corpus to enforce procedural due process limitations on exclusion procedures, it may be helpful to observe that they predate this Court's later announcement of the *Knauff* doctrine, which limited the effect of procedural due process in proceedings for the exclusion of nonresident aliens. *See United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537 (1950).

11 These are pre-*Heikkila* decisions in which this Court *rejected* executive interpretations; the Court examined and *upheld* executive interpretations in numerous other cases.

12 Compare 8 U.S.C. § 1253(b)(3) (prohibiting return of refugee to country where life or freedom would be threatened) with *United States ex rel. Mensevich v. Tod,* 264 U.S. 134 (1924) (examining on habeas under the pre-1952 regime the legality of an order to return an alien to a particular country); *Wenglinsky v. Zurbrick,* 282 U.S. 798 (1930) (per curiam) (directing district court to grant the writ where alien ordered deported to wrong country); *Gorcevich v. Zurbrick,* 48 F.2d 1054, 1055 (6th Cir. 1931) ("It is now well settled that, if a deportation warrant is erroneous in the name of the country to which the alien is to be deported, the warrant is unlawful, and detention under it is invalid.").

13 Moreover, Justice Clark's other opinions reflect his understanding that "due process" includes "conformity to statutory grounds." See *Brownell v. Tom We Shun,* 352 U.S. 180, 182 n.1 (1956) (Clark, J.); *see also United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954) (Clark, J.) (speaking of the use of habeas to ensure the "due process required by the regulations"). That broader usage is understandable in light of the traditional function of

habeas corpus as a guarantor of the rule of law.

14 Another sentence that the Government has taken out of context is the passing observation in *Carlson v. Landon,* 342 U.S. 524, 537 (1952), that the Constitution did not guarantee "judicial review" of a deportation order. That statement was qualified in the original by the need for "judicial intervention under the 'paramount law of the Constitution,' " and this Court's supporting footnote cited habeas decisions that scrutinized the statutory bases for deportation orders and examined the factual bases of those orders under the "some evidence" standard. *See id.* at 537 n.27. Indeed, one of those decisions was quite vehement on the subject. See *Mahler v. Eby,* 264 U.S. 32, 43-45 (1924) ("It is essential that, where an executive is exercising delegated legislative power, he should substantially comply with all the statutory requirements in its exercise ...."). The Court in *Carlson* was denying the need for full APA judicial review and contrasting such direct review with an attack on habeas. In another case decided the same day as *Carlson,* both majority and dissenting opinions listed the right to habeas corpus among the constitutional rights of aliens, citing *Nishimura Ekiu* as authority. See *Harisiades v. Shaughnessy,* 342 U.S. 580, 586 n.9 (1952); *id.* at 599 & n.5 (Douglas, J., dissenting).

15 Because Professor Bator's article was about postconviction relief, it understandably supplied the court with little information about habeas corpus as a remedy for executive detention. *See* Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act,* 113 Harv. L. Rev. 1963, 1981 & n.104 (2000).

16 Attempts to analogize exercise of this relief to a Presidential pardon are not instructive in cases involving the delegated power to grant discretionay relief from removal, because the power to pardon is an inherent constitutional power of the President not subject to direction by Congress. *See Schick v. Reed,* 419 U.S. 256, 266 (1974); *United States v. Klein,* 80 U.S. (13 Wall.) 128, 147-48 (1871).

17 The Government has mischaracterized the situation of a deportable permanent resident under the U.S. immigration laws in its argument that deportation of a permanent resident "is necessary in order to bring to an end an ongoing violation of United States law." Petition for Cert., *INS v. St. Cyr* (No. 00-0767) (quoting *Reno v. American-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 491 (1999)). The INA *authorizes,* but does not *require,* the Attorney General to remove permanent residents on grounds enumerated in 8 U.S.C. § 1227(a), and a deportable permanent resident commits no wrong, whether civil or criminal, by remaining in the United States when no removal proceedings have been commenced, or while a decision is being made on whether deportability should be waived.

18 The standards of eligibility for INA section 212(c) relief were not regarded as being too discretionary to be reviewable before 1996, and Petitioners' claim of continuing eligibility is clearly a matter on which there is "law to apply."

19 The court of appeals described the Seventh Proviso, and its evolution into INA section 212(c), in *Francis v. INS*, 532 F.2d 268, 270-71 (2d Cir. 1976).

20 In *Accardi*, the dissenting opinion denied that irregularities in a proceeding for discretionary relief under the 1917 Act could be examined on habeas corpus. *See* 347 U.S. at 269-71 (Jackson, J., dissenting). Justice Clark's opinion for the majority rejected this argument, noting that "we are not here reviewing and reversing the *manner* in which discretion

is exercised … [but rather] the Board's alleged *failure to exercise* its own discretion." *See* 347 U.S. at 268 (emphasis in original).

21 Petitioners also challenge the BIA's action on constitutional grounds. With respect to these constitutional challenges, it is clear that refusing any judicial inquiry into constitutional issues concerning discretionary relief from deportation would abdicate "the primary responsibility of the Judiciary." *Chadha v. INS*, 634 F.2d at 414.

22 This Court characterized section 1252(b)(9) as a "zipper clause" in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999).

23 Contrary to the Government's suggestion in the court of appeals, *this* Court is not available as an alternative forum. See Brief for Respondent, *Calcano-Martinez v. INS*, at 73 n*. The constitutional limits on this Court's original jurisdiction would forbid this Court to serve as the court of initial jurisdiction for habeas inquiry into deportation orders. The grant of a writ of habeas corpus directly to an executive official, in a case that is not within the jurisdiction of any lower court, would be an exercise of original jurisdiction. Such writs could be granted on behalf of "Ambassadors, other public Ministers and Consuls," U.S. Const., Art. III, § 2, cl. 1, but not on behalf of ordinary aliens. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807).

Moreover, the recent immigration statutes cannot reasonably be interpreted as contemplating that state courts would exercise habeas jurisdiction to review federal immigration decisions, even if such review were constitutionally permissible.

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