Richardson v. Reno: What Is the Proper Application of the Illegal Immigration Reform and Immigrant Responsibility Act to Criminal Aliens?*

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I. INTRODUCTION

The Suspension Clause of the United States Constitution carries a guarantee: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public

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Safety may require it."[1] The Supreme Court has held that this mandate is not violated so long as habeas review or its equivalent remains available.[2] Despite this protection, in *Richardson v. Reno*[3] the Eleventh Circuit Court of Appeals held that the permanent provisions of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") preclude "habeas [corpus] jurisdiction over an alien's petition challenging his removal proceedings and detention pending removal proceedings."[4] The practical result of this holding is to eliminate the availability of all judicial review, including habeas corpus review, to aliens held removable by the United States Immigration and Naturalization Service ("INS") because they committed certain criminal offenses.[5]

This Casenote questions the *Richardson* court's holding. Specifically, this Casenote argues that precluding all judicial review, including habeas corpus review, for criminal aliens held removable by the INS violates the Suspension Clause of the United States Constitution. Further, to interpret IIRIRA as eliminating the availability of habeas corpus relief in these circumstances calls into question the constitutionality of the statute due to constitutional limits on Congress's power to control the jurisdiction of Article III courts.

II. IIRIRA

In 1996, Congress made a significant change to statutory immigration law: the Illegal Immigration Reform and Immigrant Responsibility Act

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1. U.S. CONST. art. I, § 9, cl. 2.
2. Swain v. Pressley, 430 U.S. 372, 381 (1977) (stating that the Suspension Clause is not violated by the substitution of a remedy that is neither inadequate nor ineffective to test the legality of a person's detention).
3. 180 F.3d 1311 (11th Cir. 1999).
4. *Id.* at 1315. Currently, the availability of judicial review for removal orders varies widely depending on the circuit in which the alien sits. *See* Liang v. INS, 206 F.3d 308, 320 (3d Cir. 2000) ("[T]raditional habeas review under § 2241 survived the enactment of . . . IIRIRA." (quoting Jurado-Gutierrez v. Greene, 190 F.3d 1135, 1145-46 (1999))); Ho v. Greene, 204 F.3d 1045, 1049 (10th Cir. 2000) (stating that the district court retained jurisdiction over aliens' habeas petition challenging their detention pending execution of final removal orders, to the extent the permanent provisions of IIRIRA applied). *But see* Max-George v. Reno, 205 F.3d 194, 199 (5th Cir. 2000) ("[T]he jurisdictional limitation described throughout § 1252 [of IIRIRA is] sufficiently explicit [to eliminate habeas corpus]."); Alanis-Bustamante v. Reno, 201 F.3d 1303, 1307 (11th Cir. 2000) (holding that the permanent provisions of IIRIRA preclude habeas review).
5. *See* 8 U.S.C. § 1252(a)(2)(C) (Supp. IV 1998) ("Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense . . . .").

of 1996.[6] "[A]imed at alleviating the negative public response to America's growing population of illegal immigrants,"[7] the permanent provisions of IIRIRA became effective on April 1, 1997.[8]

Like its predecessor, the Immigration and Nationality Act ("INA"),[9] IIRIRA provides for the removal of certain criminal aliens.[10] However, IIRIRA significantly expanded the types of crimes for which an alien can be removed. "Previously, only murder, drug trafficking, firearms trafficking, and crimes of violence punishable by imprisonment of at least five years"[11] were considered aggravated felonies, the commission of which constituted grounds for removal. IIRIRA expanded the definition of aggravated felony to include "thefts, burglaries, crimes of violence punishable by a sentence exceeding one year, rape, sexual abuse of a minor, money laundering, fraud or tax evasion of $10,000 or more, kidnapping, child pornography, RICO offenses, pimping, and document trafficking."[12] The expanded definition applies retroactively.[13]

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

7. Jason H. Ehrenberg, *A Call for Reform of Recent Immigration Legislation*, 32 U. MICH. J.L. REFORM 195, 195 (1998).

8. Goncalves v. Reno, 144 F.3d 110, 116 (1st Cir. 1998).

9. Immigration and Nationality Act, ch. 477, 66 Stat. 163, 204 (1952).

10. *See* 8 U.S.C. § 1227(a)(2)(A)(i) (Supp. IV 1998) ("Any alien who is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."); *id.* § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable."); *id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *see also id.* § 1182(a)(2) (1994 & Supp. IV 1998) (providing that any alien convicted of a crime involving moral turpitude or a violation of any law or regulation relating to a controlled substance is inadmissible and thus is ineligible to be admitted to the United States).

11. Ehrenberg, *supra* note 7, at 198.

12. *Id.*; *see also* 8 U.S.C. § 1101(a)(43) (1994 & Supp. IV 1998).

13. 8 U.S.C. § 1101(a)(43) ("Notwithstanding any other provision of law (including any effective date), the term [aggravated felony] applies regardless of whether the conviction was entered before, on, or after September 30, 1996."). Retroactive application of IIRIRA has permitted the INS to commence removal proceedings against a new class of aggravated felons, regardless of how long ago they committed their offenses. *See generally* Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); Bruce Robert Marley, Comment, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855 (1998); Michelle Slayton, Comment, *Interim Decision No. 3333: The Brief, Casual, and Innocent Conundrum*, 33 NEW ENG. L. REV. 1029 (1999).

IIRIRA also effected a change in the level of discretion afforded the Attorney General. Specifically, under the INA, the Attorney General was granted "discretion to withhold the deportation of criminal aliens in certain circumstances."[14] Section 305 of IIRIRA eliminated this discretion and invoked automatic removal on the grounds that an alien who has been convicted of an aggravated felony represents a "per se danger to the American public and is therefore ineligible for relief from the Attorney General."[15]

The form of removal proceedings is governed by § 1229a.[16] Section 1229a provides that an "alien may file one motion to reconsider a decision that the alien is removable from the United States . . . within 30 days of the date of entry of a final administrative order of removal."[17] Further, an "alien may file one motion to reopen proceedings . . . within 90 days of the date of entry of a final administrative order of removal."[18]

The language of § 1252(a)(2)(C) precludes direct judicial review of a final administrative order of removal in certain circumstances.[19] Section 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in § 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title."[20]

III. THE *RICHARDSON* DECISION

A. Factual Background

Ralph Richardson ("Richardson"), a citizen and national of Haiti, had resided continuously in the United States as a lawful permanent resident since 1968.[21] On October 26, 1997, Richardson and his family returned

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14. Ehrenberg, *supra* note 7, at 200.

15. *Id.*

16. 8 U.S.C. § 1229a (Supp. IV 1998); *see also id.* § 1228 (Supp. IV 1998) (providing for expedited removal of aliens convicted of committing aggravated felonies). Under the INA, the legal rights of aliens depended on whether they were classified as "deportable" (i.e., aliens who had entered the United States) or "excludable" (i.e., aliens who had not yet entered the country); Slayton, *supra* note 13, at 1041–42. IIRIRA combined "excludable" and "deportable" aliens into one class of "removable" aliens. *See* 8 U.S.C § 1229a(e)(2). Removal proceedings are now the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." *Id.* § 1229a(a)(3).

17. 8 U.S.C. § 1229a(c)(5)(A)–(B).

18. *Id.* § 1229a(c)(6)(A)–(C).

19. *Id.* § 1252(a)(2)(C) (Supp. IV 1998).

20. *Id.*

21. Richardson v. Reno, 162 F.3d 1338, 1342 (11th Cir. 1998), *vacated*, 526 U.S. 1142 (1999), *aff'd*, 180 F.3d 1311 (11th Cir. 1999) [hereinafter *Richardson I*].

from a two-day trip to Haiti.[22] The INS detained Richardson at Miami International Airport.[23] Upon questioning, he admitted that he had two prior criminal convictions, including a conviction for cocaine trafficking.[24] This admission resulted in Richardson's detention at the Krome Detention Center.[25] Richardson was detained, without opportunity for release on bond, while the INS instituted removal proceedings against him on the basis of his criminal convictions.[26]

On November 13, 1997, Richardson requested that the INS release him from custody.[27] This request was denied on December 4, 1997.[28] On November 18, 1997, while awaiting a response from the INS, Richardson requested a release on bond pending his deportation from the immigration judge at the Krome Detention Center.[29] This request was denied, without a hearing, on November 24, 1997.[30] Following that decision, Richardson filed a petition in the Southern District of Florida for habeas corpus relief pursuant to 28 U.S.C. § 2241.[31] In his petition,

22. *Richardson I*, 162 F.3d at 1343.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* Section 1182 provides that any alien convicted of a violation of any law or regulation relating to a controlled substance is inadmissible, and thus, is ineligible to be admitted to the United States. *See* 8 U.S.C. § 1182(a)(2) (1994 & Supp. IV 1998).
27. *Richardson I*, 162 F.3d at 1343.
28. *Id.*
29. *Id.*
30. *Id.* The immigration judge found that Richardson was seeking admission pursuant to 28 U.S.C. § 1101(a)(13)(C)(v) (1994 & Supp. IV 1998). *Richardson I*, 162 F.3d at 1343. Section 1101 provides that "[a]n alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws *unless* the alien ... has committed [certain crimes]." 28 U.S.C. § 1101(a)(13)(C)(v) (emphasis added). Since aliens seeking admission to the United States can only request release from detention from a district director, the immigration judge denied Richardson's request for lack of jurisdiction. *Richardson I*, 162 F.3d at 1343.
31. *Id.*; *see also* Richardson v. Reno, 994 F. Supp. 1466, 1468 (S.D. Fla. 1998), *rev'd*, 162 F.3d 1338 (11th Cir. 1998), *vacated*, 526 U.S. 1142 (1999), *aff'd*, 180 F.3d 1311 (11th Cir. 1999). Section 2241 provides:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
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> ...
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States ... or
>
> ...

Richardson argued that the immigration judge's decision violated his constitutional right, as a lawful permanent resident alien, to a bond hearing.[32] The district court held that it had jurisdiction over Richardson's petition and that Richardson was entitled to an individualized bond hearing.[33] The court reasoned that "there is a strong presumption in favor of judicial review of administrative action."[34] Therefore, in the absence of express congressional intent to repeal habeas jurisdiction, it retained jurisdiction, pursuant to IIRIRA, over Richardson's writ.[35]

On appeal, the Eleventh Circuit Court of Appeals reversed and ordered the district court to dismiss Richardson's habeas petition.[36] The court held that "IIRIRA strips all jurisdiction, including § 2241 habeas, from the district courts, places exclusive judicial review in the court of appeals, and delays even that judicial review until after a final administrative agency order."[37] The court reasoned that the broad, jurisdiction-limiting language of § 1252(g) sufficiently illustrated congressional intent to repeal the district court's habeas jurisdiction.[38]

On June 1, 1999, the Supreme Court granted certiorari, vacated the Eleventh Circuit's judgment, and remanded the case for further consideration[39] in light of its decision in *Reno v. American-Arab Anti-Discrimination Committee*.[40]

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

28 U.S.C. § 2241 (Supp. IV 1998).

32. *Richardson*, 994 F. Supp. at 1468. Specifically, Richardson disputed the immigration judge's finding that he was an "arriving alien" within the purview of § 1101. *Id.*

33. *Id.* at 1468–69.

34. *Id.* at 1468.

35. *See id.* at 1469 ("Congress knows how to repeal habeas jurisdiction. Where it intends to do so, it states that intention expressly.").

36. *Richardson I*, 162 F.3d 1338, 1342 (11th Cir. 1998), *vacated*, 526 U.S. 1142 (1999), *aff'd*, 180 F.3d 1311 (11th Cir. 1999).

37. *Id.* at 1345.

38. *Id.* at 1345, 1354. Section 1252(g) provides:

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

8 U.S.C. §1252(g) (Supp. IV 1998).

39. Richardson v. Reno, 526 U.S. 1142 (1999). Upon remand, the Eleventh Circuit Court of Appeals affirmed its holding. Richardson v. Reno, 180 F.3d 1311, 1318 (11th Cir. 1999) [hereinafter *Richardson II*].

40. 525 U.S. 471 (1999).

B. The Holding

American-Arab involved resident aliens who filed suit against the Attorney General alleging that they had been targeted for removal due to their affiliation with a politically unpopular group.[41] The United States Supreme Court considered whether their constitutional claim was precluded by § 1252(g).[42] Adopting a narrow interpretation of the provision, the Court held that § 1252(g) only precluded judicial review of the Attorney General's discrete acts of commencing proceedings, adjudicating cases, and executing removal orders.[43] Thus, § 1252(g) does not preclude judicial review of final orders of deportation.

Based on the Supreme Court's holding in *American-Arab*, the *Richardson II* court, on remand, modified its reasoning. Specifically, the court reasoned that since Richardson's habeas petition did not involve a decision or action to commence proceedings, adjudicate cases, or execute removal orders, the jurisdiction-limiting provisions of § 1252(g) did not apply.[44] Despite its change of heart with respect to the application of § 1252(g), the Eleventh Circuit maintained its position that "IIRIRA precludes § 2241 habeas jurisdiction over an alien's petition challenging his removal proceedings and detention pending removal proceedings."[45] In support of its contention that the district court's exercise of habeas jurisdiction over Richardson was improper, the court maintained that § 1252(b)(9) "provides clear evidence of Congress' desire to 'abbreviat[e] judicial review [including habeas corpus review] to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies.'"[46]

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41. *Id.* at 472.
42. *Id.* at 473.
43. *Id.* at 482. Because the aliens' challenge to the Attorney General's decision to commence removal proceedings against them fell "squarely within § 1252(g)," the Court held that IIRIRA deprived it of jurisdiction over the action. *Id.* at 487.
44. *Richardson II*, 180 F.3d at 1314.
45. *Id.* at 1315.
46. *Id.* at 1314 (quoting *Richardson I*, 162 F.3d at 1354). Section 1252(b)(9) provides:

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

8 U.S.C. § 1252(b)(9) (Supp. IV 1998).

C. Analysis

The Supreme Court has not specifically addressed the scope of § 1252(b)(9). However, in *American-Arab* it referred, in dicta, to § 1252(b)(9) as an "unmistakable 'zipper' clause" that "covers the universe of deportation claims."[47] The *Richardson II* court interpreted the dicta of the Supreme Court so as to apply § 1252(b)(9) to an alien's habeas corpus petition regardless of what aspect of the removal proceeding the petitioner challenged.[48] In applying § 1252(b)(9), the *Richardson II* court held that the grant of "judicial review" contained therein is exclusive in that it precludes all other forms of judicial review, including habeas corpus.[49] Thus, pursuant to § 1252(b)(9), "Richardson's § 2241 petition must await a final . . . removal order [by the Board of Immigration Appeals] and can occur [only] in the court of appeals through a petition to review that final order."[50]

The *Richardson II* court's reasoning is deficient on several grounds. First, the plain language of IIRIRA indicates that § 1252(b)(9) is not applicable in this case. Section 1252(b) explicitly limits its application to removal proceedings which fall under § 1252(a)(1).[51] A removal proceeding in which an alien is removable by reason of having committed a criminal offense is governed by § 1252(a)(2)(C), not § 1252(a)(1).[52] Given the clarity of the statutory language, it is inappropriate to expand judicially the coverage of § 1252(b)(9).[53]

Second, the court's assertion that IIRIRA's limitation of ordinary appellate review encompasses habeas corpus review is problematic.

47. Reno v. Am.-Arab Anti-Discrimination Comm., 526 U.S. 471, 482–83 (1999); *see also Richardson II*, 180 F.3d at 1315 ("[T]he Supreme Court in *American-Arab, albeit in dicta*, described the text of [§ 1252(b)(9)] as a 'general jurisdictional limitation.'") (emphasis added).

48. *Richardson II*, 180 F.3d at 1315.

49. *Id.* As discussed *supra* Part III.B., the court reasoned that § 1252(b)(9) "provides clear evidence of Congress' desire to 'abbreviat[e] judicial review [including habeas corpus review] to one place and one time: only in the court of appeals and only after a final removal order and exhaustion of all administrative remedies.'" *Id.* at 1314 (quoting *Richardson I*, 162 F. 3d at 1354).

50. *Id.*

51. 8 U.S.C. § 1252(b) ("With respect to review of an order of removal *under subsection (a)(1) of this section*, the following requirements apply . . . ." (emphasis added)).

52. *Id.* § 1252(a)(2)(C) ("Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title . . . .").

53. *See* City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337 (1994) (stating that courts must first look to the plain language of the statute when interpreting statutory language).

"The Supreme Court has long distinguished between judicial review of an appeal and 'the courts' power to entertain petitions for writs of habeas corpus.'"[54] Throughout the history of immigration statutes, "aliens without other recourse have traditionally been able to obtain review by habeas corpus, even in the face of statutory language precluding all other review."[55] In *Heikkila v. Barber*,[56] for example, the Supreme Court upheld an alien's right to challenge his executive detention by filing a writ of habeas corpus even though the 1917 Immigration Act explicitly precluded judicial review.[57] "In so holding, the Court rejected the conclusions of several lower courts that judicial review included habeas corpus."[58] It follows that IIRIRA's limitation of appellate review does not extend to habeas corpus jurisdiction.

Equally problematic is the court's assertion that the sweeping language of § 1252(b)(9) sufficiently illustrates congressional intent to repeal the district court's habeas corpus jurisdiction.[59] The court attempts to bolster its argument by citing to § 1252(e)(2), which expressly provides for habeas review in certain limited circumstances.[60] Specifically, the court argues that the existence of this provision "evidences Congress' ability to create statutory habeas review . . . when it so desires."[61] The court's argument is not persuasive in light of two Supreme Court precedents.

In *Ex parte Yerger*[62] and *Felker v. Turpin*,[63] the United States Supreme Court "establish[ed] the propositions that courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute, and, consequently, that only a

54. Pak v. Reno, 196 F.3d 666, 671 (6th Cir. 1999) (quoting Sandoval v. Reno, 166 F.3d 225, 235 (3d Cir. 1999) (citing Heikkila v. Barber, 345 U.S. 229, 235 (1953))).

55. *Id.*; *see also* Jean-Baptiste v. Reno, 144 F.3d 212 (2d Cir. 1998); Mansour v. INS, 123 F.3d 423, 426 (6th Cir. 1997) (holding that the transitional rules of IIRIRA, which barred judicial review of deportation orders based on specified criminal offenses, were not unconstitutional since judicial involvement in the form of habeas review remained available).

56. 345 U.S. 229 (1953).

57. *Id.* at 234–35.

58. *Pak*, 196 F.3d at 672 (citing *Heikkila*, 345 U.S. at 235–36).

59. *Richardson II*, 180 F.3d 1311, 1314–15 (11th Cir. 1999).

60. *Id.* at 1314; *see also* 8 U.S.C. § 1252(e)(2) (Supp. IV 1998) ("Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings . . . .").

61. *Richardson II*, 180 F.3d at 1314.

62. 75 U.S. (8 Wall.) 85 (1868).

63. 518 U.S. 651 (1996).

plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice."[64] "*Felker* and *Yerger*... adopted a general rule of construction that any repeal of the federal courts' historic habeas jurisdiction must be explicit and make express reference specifically to the statute granting jurisdiction."[65] As indicated above, § 1252(b)(9) does not contain such explicit language.[66] Rather, it repeals habeas power only by implication.

Since *Felker* was decided before IIRIRA was enacted, we must assume that Congress was "aware of the [Supreme] Court's holding that it cannot repeal habeas jurisdiction under § 2241 by implication, but only by express command."[67] Therefore, had Congress intended to eliminate habeas corpus review under § 2241, it would have inserted an explicit reference to that provision.[68] Based upon the above, even if § 1252(b)(9) were held to apply to criminal aliens, its jurisdiction limiting provisions would not preclude the availability of habeas corpus.

Finally, the *Richardson II* court's interpretation of IIRIRA does not pass constitutional muster. The Constitution of the United States mandates that "[t]he 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."[69] In *Swain v. Pressley*,[70] the United States Supreme Court held that this mandate is not violated so long as habeas corpus review or its equivalent remains available.[71]

As indicated above, a removal proceeding in which an alien is held removable by reason of having committed a criminal offense is governed by § 1252(a)(2)(C).[72] The plain language of § 1252(a)(2)(C) eliminates the availability of "judicial review" for certain criminal aliens.[73] Under *Richardson II*, this limitation applies equally to all forms of judicial

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64. Sandoval v. Reno, 166 F.3d 225, 232 (3d Cir. 1999).
65. Pak v. Reno, 196 F.3d 666, 672 (6th Cir. 1999) (citing Goncalves v. Reno, 144 F.3d 110, 120 (1st Cir. 1998)).
66. *See supra* note 46.
67. *Pak*, 196 F.3d at 672–73 (citing *Felker*, 518 U.S at 661).
68. *Id.* at 672; *cf. Sandoval*, 166 F.3d at 235 (finding that there is not a "sufficiently clear statement of congressional intent to repeal the general grant of habeas jurisdiction" under IIRIRA's provisional rules). *But cf.* Max-George v. Reno, 205 F. 3d 194, 199 (5th Cir. 2000) ("While Congress could theoretically have been more explicit by specifically mentioning habeas corpus in general or § 2241 in particular, we believe the jurisdictional limitation described throughout § 1252 was sufficiently explicit.").
69. U.S. CONST. art. I, § 9, cl. 2.
70. 430 U.S. 372 (1977).
71. *See id.* at 381 ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus.").
72. *See supra* text accompanying notes 51–53.
73. *See supra* text accompanying notes 19–20.

review: ordinary appellate review and collateral review.[74] Therefore, the practical result of the *Richardson II* court's holding is to unconstitutionally eliminate all forms of judicial review, including habeas corpus, to aliens held to be removable because they committed certain criminal offenses.

While the *Richardson II* court seems to concede that § 1252(a)(2)(C) eliminates all forms of judicial review, it maintains that the Suspension Clause is not violated because, "[a]t a minimum, judicial review remains available... under [§ 1252(a)(2)(C)] to determine if the specific conditions exist that bar jurisdiction in the court of appeals."[75] Further, "[i]f the bar applies, jurisdiction remains to consider whether the level of judicial review remaining in [§ 1252(a)(2)(C)] in a particular case satisfies the Suspension Clause. If not, ... adequate and effective judicial review of statutory and constitutional issues [remains available] under [§ 1252(b)(9)]."[76] This reasoning is faulty. According to the court, a criminal alien can only raise a claim of substantial constitutional error pursuant to § 1252(b)(9), that is, judicial review by the court of appeals. As indicated above, however, the plain language of IIRIRA does not provide for application of § 1252(b)(9) to criminal aliens.[77] Further, there is no other provision granting the federal courts of appeal jurisdiction over substantial constitutional claims raised by criminal aliens.

Additionally, the *Richardson II* court's interpretation may unconstitutionally limit the jurisdiction of Article III courts. The power of Congress to regulate the flow of aliens into the United States has historically been described by the courts as "plenary."[78] Courts have consistently justified this deference by describing "the power to control the flow of aliens ... [as] an inherent and necessary exercise of national sovereignty."[79] Accordingly, federal courts have accepted the authority of Congress to limit their jurisdiction with respect to removal orders

74. *See Richardson II*, 180 F.3d 1311, 1315 (11th Cir. 1999).
75. *Id.*
76. *Id.*
77. *See supra* text accompanying notes 51–53.
78. Henry E. Velte, Note, Mansour v. INS*: Sixth Circuit Holds Judicial Review of Final Orders of Deportation Against Certain Criminal Aliens Available Solely Through Habeas Corpus Proceedings*, 6 TUL. J. INT'L & COMP. L. 671, 675 (1998) (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (internal quotation omitted)).
79. *Id.* (citing Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)).

against aliens.[80] However, no court has identified a specific constitutional provision which explicitly grants Congress this seemingly limitless power to regulate immigration.[81] Further, "[t]he grant of plenary power to Congress over immigration matters has been afforded far less deference when the exercise of that power interfered with substantive constitutional rights, including the right to seek habeas corpus."[82]

In *Communications Workers of America v. Beck*,[83] the United States Supreme Court indicated that, whenever possible, a statute should be interpreted in a manner that renders it constitutionally valid.[84] The holding of *Richardson II* should be rejected because it conflicts with this demand. A constitutional reading of IIRIRA must preserve access to the writ of habeas corpus under § 2241.

IV. APPLICATION OF IIRIRA TO CRIMINAL ALIENS

A. *Subject Matter Jurisdiction*

Section 1252(a)(2)(C) effectively precludes all forms of judicial review for aliens held removable by reason of having committed a criminal offense. However, as previously discussed, this limitation on judicial review should not be interpreted to include habeas corpus.[85] Thus, it should be recognized that, even after IIRIRA, criminal aliens retain their constitutional right to seek writs of habeas corpus in the district courts. However, in this and other contexts the availability of habeas relief has been somewhat limited. Specifically, before an alien may seek habeas corpus relief, he must first show that he has adequately

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80. *See* Carlson v. Landon, 342 U.S. 524, 537 (1952) (finding that Congress has the power to regulate exclusion, admission, and expulsion of aliens and, thus, may delegate this power exclusively to executive officers with "such opportunity for judicial review of their action as Congress may see fit to authorize or permit"); *see also* Hines v. Davidowitz, 312 U.S. 52 (1941) (stating that Congress has the exclusive power to regulate aliens).

81. Velte, *supra* note 78, at 675 (citing Margaret Gaisford, Note, *Ideologically Excluded Aliens and Their Entitlement to Fundamental Procedural Rights*, 13 SUFFOLK TRANSNAT'L L.J. 229, 231–32 (1989)).

82. *Id.* (citing Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950–51(1997)); *see also* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (holding that aliens are not wholly without constitutional protection); Mansour v. INS, 123 F.3d 423, 426 (6th Cir. 1997) (holding that the statutory elimination of federal court jurisdiction to review a final deportation order is not unconstitutional so long as "some avenue for judicial review remains available"); Salazar-Haro v. INS, 95 F.3d 309, 310–11 (3d Cir. 1996) (holding that "[t]o the extent . . . constitutional rights applicable to aliens [are] at stake, judicial review may not be withdrawn by statute").

83. 487 U.S. 735 (1988).

84. *Id.* at 762.

85. *See supra* Part III.C.

exhausted his administrative remedies and that he is "in custody."

B. Exhaustion Requirement

In *Nakaranurack v. United States*,[86] the Ninth Circuit held that an alien challenging a removal order by means of a writ of habeas corpus must first exhaust all available administrative remedies.[87] The court expressed concern that "routinely allowing aliens to bypass the normal review process by the simple expedient of filing habeas petitions could easily result in the exception swallowing the rule."[88] Accordingly, the court concluded that "an alien may petition for habeas [corpus] review of a deportation order *only* if the issues raised concerning the validity of that deportation order had not and could not have been determined in a prior judicial proceeding."[89] Although *Nakaranurack* was decided pre-IIRIRA, the court's reasoning regarding exhaustion is sound.

As indicated above, § 1229a specifically identifies the administrative appellate remedies available to an alien held to be removable.[90] The section permits a removable alien to file one motion to reconsider[91] and one motion to reopen the removal proceedings.[92] Under § 1252(a)(2)(C), there is plainly no judicial review of a final order of removal for an alien who is held to be removable because he has committed a criminal act. However, as discussed above, the Supreme Court has repeatedly rejected the notion that "judicial review" includes habeas corpus. Therefore, the statute's failure to provide for judicial review does not strip the courts of habeas corpus jurisdiction which has been explicitly granted to them by § 2241.

C. Custody Requirement

In order to grant a writ of habeas corpus, the court must first find that the petitioner was "in custody" at the time the writ was filed.[93] In the

86. 68 F.3d 290 (9th Cir. 1995).
87. *Id.* at 293.
88. *Id.*
89. *Id.* at 294.
90. *See supra* text accompanying notes 16–18.
91. 8 U.S.C. § 1229a(c)(5) (Supp. IV 1998).
92. 8 U.S.C. § 1229a(c)(6) (Supp. IV 1998).
93. 28 U.S.C. § 2241(c) (Supp. IV 1998); *see also* Spencer v. Kemna, 523 U.S. 1, 7 (1998) (holding that the "in custody" requirement is satisfied as long as petitioner was incarcerated at the time the habeas petition was filed).

context of immigration-related habeas petitions, custody has been construed broadly to include restraints on liberty beyond physical incarceration or detention (i.e., constructive custody).[94] Thus, in *Flores v. INS*,[95] the court found "sufficient immediacy of action and interference with freedom to support habeas corpus jurisdiction" where aliens were under deportation orders, but were not being physically detained by the INS.[96] Likewise, in *Nakaranurack*, the court held that the "in custody" requirement is satisfied by "situations in which an alien is not suffering any actual physical detention."[97] The court reasoned that "so long as he is subject to a final order of deportation, an alien is deemed to be 'in custody'" for purposes of habeas corpus jurisdiction.[98]

As the above authority indicates, the petitioner's physical incarceration status is not determinative for purposes of habeas corpus jurisdiction. Rather, a petitioner may be deemed to be "in custody" for purposes of habeas corpus so long as he is subject to a final order of removal.

V. CONCLUSION

As this Casenote indicates, application of the Eleventh Circuit's holding in *Richardson v. Reno* would effectively eliminate all forms of judicial review, including habeas corpus, for aliens held to be removable from the United States because they committed certain criminal offenses. The court's holding can be criticized on several grounds: it is inconsistent with the plain language of the statute, it conflicts with Supreme Court precedent, and it suffers from constitutional infirmities. As such, the position represented by the court's holding should be summarily rejected by the United States Supreme Court. Such rejection would go a long way toward achieving standardization of federal immigration laws.

TERI E. O'BRIEN

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94. *See* Duran v. Reno, 193 F.3d 82, 84 (2d Cir. 1999) (holding that custody for habeas corpus purposes is not limited to actual, physical confinement) (citing Frazier v. Wilkinson, 842 F.2d 42, 44–45 (2d Cir. 1988)); *see also* Hensley v. Municipal Court, 411 U.S. 345, 351–53 (1973).

95. 524 F.2d 627 (9th Cir. 1975).

96. *Id.* at 629.

97. Nakaranurack v. United States, 68 F.3d 290, 293 (9th Cir. 1995).

98. *Id.*; *see also* Mustata v. United States, 179 F.3d 1017, 1022 n.4 (6th Cir. 1999) (finding that an alien is constructively in custody when he is subject to a final order of deportation); Then v. INS, 37 F. Supp. 2d 346, 354 n.8 (D.N.J. 1998) (stating that the "in custody" requirement is satisfied where an alien is "subject to a final order of deportation but not yet deported").