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King Sang Chow v. Immigration and Naturalization Services: The Constitutionality of Section 440(a) of the Antiterrorism and Effective Death Penalty Act

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King Sang Chow v. Immigration and Naturalization Services: The Constitutionality of Section 440(a) of the Antiterrorism and Effective Death Penalty Act

I. Introduction

When President Clinton signed "The Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA), he praised the bill's comprehensive approach toward fighting domestic and international terrorism. While applauding the legislation's provisions increasing controls over biological and chemical weapons and strengthening penalties for a range of terrorist crimes, he lamented that the bill "also makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism." He called upon Congress to enact immigration reform to correct AEDPA provisions that "eliminat[e] remedial relief for long-term legal residents of the United States." Nearly a year and a half after the enactment of the AEDPA, immigration reform has no momentum on Capitol Hill, and the effects of the AEDPA are being felt by large numbers of permanent resident aliens whose petitions for review of final deportation orders are receiving uniform denials.

Protests and judicial challenges of the AEDPA abound in the federal court system. Arguments raised against the AEDPA range

2 See Statement by President William J. Clinton upon Signing S. 1965, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 29, 1996) ("This legislation is an important forward step in the Federal Government's continuing efforts to combat terrorism.").
3 Id.
4 Id.
5 See Morning Edition: Challenge to Immigrant Deportations (NPR radio broadcast, Aug. 20, 1997) available in 1997 WL 12822295 ("Officials at the Immigration and Naturalization Service say 93,000 criminal immigrants will be deported by the end of September, partly because Congress restricted rules that allow an immigrant to fight a deportation order.").
from the constitutionality of its "gatekeeping" provisions for filing second or successive habeas applications to its retroactive application to petitions pending at the time of its enactment.\(^7\)

Although the Supreme Court has examined neither the tension between the AEDPA and the due process rights of alien residents nor the challenges made under the doctrine of separation of powers, the intricacies are receiving attention from circuit courts and legal scholars. In time, these constitutional issues plaguing the AEDPA will certainly come before the Supreme Court.\(^8\) The Seventh Circuit confronted these challenges and refined the constitutional minimums required to meet due process challenges in *Kim Sang Chow v. INS*.\(^9\)

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\(^7\) See Felker v. Turpin, 116 S. Ct. 2333, 2337-38 (1996); see also Figueroa-Rabio v. INS, 108 F.3d 110 (6th Cir. 1997) (providing that the AEDPA may be applied to pending cases because it is a prospective jurisdictional statute); Arevalo-Lopez v. INS, 104 F.3d 100 (7th Cir. 1997) (holding that pursuant to the AEDPA, federal courts of appeal lacked jurisdiction to review BIA decisions); Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) (concluding that the application of the AEDPA to pending cases does not violate substantive rights, the Due Process Clause, or the judicial power provisions of Article III); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) (determining that as long as some form of habeas relief was available to the petitioner, the constitutional issue of whether an administrative body was able to make an independent judicial determination need not be addressed); Hincapie-Nieto v. INS, 92 F.3d. 27 (2d Cir. 1996) (holding that the repeal of the federal courts' jurisdiction over final deportation orders was constitutionally valid because other avenues of judicial relief were available); Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996) (finding that section 440(a) of the AEDPA revokes the court's jurisdiction over final petitions for review); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996) (affirming that absent express congressional intent, the effective date of section 440(a) was the date of its enactment); Dulidulao v. INS, 90 F.3d 396 (9th Cir. 1996) (holding that section 440(a) is a jurisdictional statute applying to pending cases and that it does not violate either the Due Process Clause or the separation of powers).


\(^9\) 113 F.3d 659 (7th Cir. 1997).
This Note explores the development of constitutional challenges to the AEDPA. Part II discusses the facts, procedural history, and recent Seventh Circuit resolution of King Sang Chow v. INS. Part III identifies and examines case law relevant to understanding the constitutional challenges brought under the Due Process Clause. Part IV explores the significance and implications of the Chow decision and other circuit court decisions in determining the scope of judicial review of final deportation orders. Finally, Part V concludes the Note by discussing the impact of Chow on the constitutionally mandated procedural due process requirements, as well as its impact on judicial review of final deportation orders.

II. Statement of the Case

A. Background and Lower Court Decisions

The petitioner, King Sang Chow, a native of Hong Kong and citizen of the United Kingdom, immigrated to the United States in 1971. Chow entered the United States as a permanent resident alien, married a U.S. citizen, and continued to reside in the United States. While living in the United States, Chow was convicted twice: 1) in 1977 for unlawful possession of a gun in New Jersey state court, and 2) in 1991 for the use of a telephone to expedite the distribution of heroin in the Eastern District Court of New York. Based on these convictions, the Immigration and Naturalization Service (INS) commenced deportation proceedings in 1992. Under the Immigration and Naturalization Act (INA), an Immigration Judge (IJ) determined that Chow was deportable pursuant to section 241(a)(2)(B)(i) as an alien charged with a controlled substance violation and pursuant to section 241(a)(2)(C)

\[10 \text{ See infra notes 14-83 and accompanying text.} \\
11 \text{ See infra notes 84-195 and accompanying text.} \\
12 \text{ See infra notes 196-230 and accompanying text.} \\
13 \text{ See infra note 231 and accompanying text.} \\
14 \text{ See Chow, 113 F.3d at 662.} \\
15 \text{ See id.} \\
16 \text{ See id.} \\
17 \text{ See id.} \]
as an alien charged with a firearm violation. The IJ denied Chow's request for discretionary relief from deportation under section 212(c) of the INA.

The Board of Immigration Appeals (BIA) and the Fifth Circuit upheld the IJ's decision. Based on a subsequent BIA decision, Chow moved the BIA to reopen the deportation proceedings by

18 See id.; see also Immigration and Naturalization Act § 241, which provided:

(a) Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens: ....

(2) Criminal offenses.

(B) Controlled Substances.

(i) Conviction. Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts. Any alien who is, or at any time after entry has been, a drug abuser or addict is deportable.

(C) Certain firearms offenses. Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part or accessory which is a firearm or destructive device (as defined in 18 U.S.C. § 921(a)) in violation of any law is deportable.


19 See Chow, 113 F.3d at 662; see also Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1996), repealed by Pub. L. No. 104-208, div. C, tit. III, § 304(b), 110 Stat. 3009-597 (1996) (stating that aliens lawfully admitted for permanent residence who have resided in the United States for at least seven consecutive years may apply for relief at the discretion of the Attorney General) [hereinafter INA]. However such relief "shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 1251(a)(2)(A)(ii), (B), (C), or (D) of this title . . . ."

8 U.S.C. § 1251. Thus, the possibility of relief under 212(c) in the present case is foreclosed. See supra note 18.

20 See Chow, 113 F.3d at 662.
arguing that he was entitled to relief from deportation. The BIA rejected Chow's motion and Chow filed a petition for review of that order in the Seventh Circuit. Maintaining that new facts qualified him for relief under sections 212(c) and 245 of the INA, Chow also filed a second motion to reconsider the deportation proceedings. Once again, the BIA denied his motion, and Chow filed a petition with the Seventh Circuit to review that order.

The Seventh Circuit consolidated Chow's claims and stayed the proceedings upon his request. During the stayed period, President Clinton signed AEDPA. Following the newly enacted legislation, the INS moved to dismiss Chow's claim asserting that section 440(a) of the AEDPA divested the court of jurisdiction over the matter.

B. The Seventh Circuit's Decision

The Seventh Circuit acknowledged that, on its face, section 440(a) appeared to deprive the court of jurisdiction over the action. Prior to the enactment of the AEDPA, section 106(a) of the INA granted federal courts of appeal sole jurisdiction to consider petitions requesting review of final deportation orders. Section 440(a) of the AEDPA, however, amended section 106(a) so that "[a]ny final order of deportation against an alien who is

21 See id.
22 See id.
24 See Chow, 113 F.3d at 662.
25 See id.
26 See supra notes 1-2 and accompanying text.
27 See Chow, 113 F.3d at 663.
28 See id.
29 Prior to the AEDPA amendment, INA section 106(a) provided: "The procedures prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings . . ." 8 U.S.C. § 1105a(a) (Supp. 1994), repealed by Pub. L. No. 104-208, div. C, tit. III, §306(b), 110 Stat. 3009-612 (1996).
deportable by reason of having committed a criminal offense covered in [sections 241(a)(2)(A)(iii), (B), (C), or (D) of the INA], or any offense covered by [section 241(a)(2)(A)(i) of the INA], shall not be subject to review by any court.\textsuperscript{30} Chow’s convictions were described within two of these enumerated sections, and he did not contest the factual allegations of the charges against him.\textsuperscript{31} Thus, Chow appeared deportable.\textsuperscript{32}

Chow challenged the applicability of section 440(a) to his petition on several grounds. First, he argued that he was not seeking review of a final “order of deportation” within the meaning of section 440 of the AEDPA. Rather, he asserted his petition involved the review of two BIA orders denying motions to “reopen” or “reconsider” deportation proceedings which are not included in the Act’s definition of an “order of deportation.”\textsuperscript{33}

The Seventh Circuit rejected his argument by interpreting an “order of deportation” to include BIA orders and petitions for review of such orders.\textsuperscript{34} Furthermore, the court considered congressional intent and followed a line of Supreme Court and appellate court decisions that have interpreted an “order of deportation” to include orders denying motions to reopen and reconsider.\textsuperscript{35} Thus, the court rejected Chow’s claim that section 440(a) did not apply to his petition and concluded that it was outside of the jurisdiction of the court.\textsuperscript{36}

Secondly, since his petition for review was pending when the AEDPA was enacted, Chow objected to the application of 440(a) to his petition.\textsuperscript{37} The statutory language of section 440(a) does not

\textsuperscript{31} See Chow, 113 F.3d at 663.
\textsuperscript{32} See id. “A .32 caliber revolver is a firearm as defined in 18 U.S.C. § 921(a). Likewise, heroin is a controlled substance within the meaning of 21 U.S.C. § 802.” Id.; see also supra note 18 (detailing the relevant provisions of the Immigration and Naturalization Act § 241, 8 U.S.C. § 1251 (Supp. 1996)).
\textsuperscript{33} See Chow, 113 F.3d at 663.
\textsuperscript{34} See id.
\textsuperscript{35} See id. at 664 (citing Giova v. Rosenberg, 379 U.S. 18 (1964), Johnson v. INS, 962 F.2d 574 (7th Cir. 1992) and Oviawe v. INS, 853 F.2d 1428 (7th Cir. 1988)).
\textsuperscript{36} See id.
\textsuperscript{37} See id.
include an effective date. In the absence of Congressional direction to do so, courts usually do not apply a statute retroactively. The court noted, however, that “applying a newly enacted statute to a pending case will not always result in retroactive application.”

Relying on the recent Supreme Court decision in Landgraf v. USI Film Products, which prescribed the analysis for determining a statute’s application to pending cases, the court examined whether section 440(a) of the AEDPA should apply to Chow’s petition for review. Pursuant to Landgraf, when Congress does not delineate a statute’s proper reach, a court must rely upon “judicial default rules.” Under the “judicial default rules,” a statute is presumptively effective on the date of enactment. However, the Seventh Circuit’s application of a statute remained subject to certain limitations. In particular, if applying the statute to a pending action would attach new legal consequences to behavior transpiring prior to the statute’s enactment, thereby imposing a retroactive effect on the pending action, then the court should not apply it. The Seventh Circuit relied on the language of Landgraf which stated that a new legal consequence attached when the statute “impair[ed] rights. that a party possessed when enacted, increase[d] a party’s liability for past conduct or impose[d] new duties with respect to transactions already

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38 See 8 U.S.C. § 1105a(a) (Supp. 1996); see also supra note 29 and accompanying text (including text of amended provision). “Unlike section 440(a), several provisions in the AEDPA contain express statements regarding each provision’s effect on pending proceedings or pre-enactment events. However, some of these subsections provide that the subsections shall apply to pre-enactment conduct or pending proceedings, while others provide that they shall not so apply.” Chow, 113 F.3d at 665 n.3.

39 See Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).

40 Chow, 113 F.3d at 664.

41 511 U.S. 244 (1994).

42 See Chow, 113 F.3d at 665.

43 Id. (quoting Landgraf, 511 U.S. at 280).

44 See id. (citing Landgraf, 511 U.S. at 264).

45 See id.

46 See id. (citing Landgraf, 511 U.S. at 280).
completed.” Thus, the court needed to consider possible unfairness when making the decision to apply a statute to a pending action. Ultimately, the court had to “look to the nature and extent of the change in the law and the degree and connection between the operation of the new statute and the relevant past conduct.”

Individuals do not usually rely on jurisdictional statutes, such as 440(a), when conducting their activities. Specifically, jurisdictional statutes “regulate secondary conduct rather than primary conduct” and thereby limit an individual’s ability to invoke the presumption against retroactivity pursuant to Landgraf.

However, the Seventh Circuit examined whether Chow came within a narrowly defined exception allowing certain individuals to claim that the statute attached new legal consequences in situations where petitioning aliens might have relied on the availability of discretionary relief and judicial review when making decisions of legal strategy, such as the concession of deportability. The court rejected Chow’s argument that he conceded deportability and decided to forego an opportunity to contest deportability because he may have been entitled to discretionary relief and judicial review. Rather, the court determined that since Chow did not challenge the validity of his

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47 Id. (quoting Landgraf, 511 U.S. at 280).
48 See id. (citing Landgraf, 511 U.S. at 280).
49 Id. (citing Landgraf, 511 U.S. at 270).
50 See id.
51 Id. (citing Landgraf, 511 U.S. at 275).
52 See id.; see also infra notes 87-100 and accompanying text (discussing Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996) (refusing to apply section 440(a) to a pending petition because petitioning alien may have relied on discretionary relief or judicial review when he conceded deportability)). An alien “concedes deportability” when he admits the factual allegations or charges against him. Moreover, once an alien concedes deportability and no issue of law or fact remains, “the applications for some form of discretionary dispensation presents the only issue for decision.” CHARLES GORDON & HARRY N. ROSENFIELD, IMMIGRATION LAW & PROCEDURE 549-51 (1959).
53 See Chow, 113 F.3d at 666 (citing Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996)) (“[B]efore section 440(a) went into effect, an alien who conceded deportability might have been entitled to discretionary relief under section 212(c) of the INA and judicial review if the IJ and BIA denied him relief.”).
convictions, nor did he indicate what arguments he would have offered to contest his deportability or the findings of the IJ, section 440(a) barred review of his motions to reconsider and reopen deportation proceedings.\textsuperscript{54}

Chow's third objection to application of section 440(a) to his petition was that it attached new legal consequences to his past criminal behavior.\textsuperscript{55} At the time of his criminal conduct, pre-AEDPA, he was deportable only after judicial review of the BIA deportation order; however, after the statute's enactment, Chow was deportable without judicial review.\textsuperscript{56} He claimed that the withdrawal of judicial review impermissibly attached new legal consequences.\textsuperscript{57} The court disagreed and held that the withdrawal of judicial review "does not increase Chow's liabilities or penalties for the criminal conduct at issue because it merely alters the procedure by which the INS may effect his deportation."\textsuperscript{58} The court held that deportation, as a consequence of certain criminal acts did not, in itself, attach new liabilities to those acts; specifically, section 440(a) modified the procedure of deportation, but did not attach new legal consequences to Chow's pre-AEDPA behavior.\textsuperscript{59}

Finally, and most importantly for the present discussion, Chow challenged the constitutionality of section 440(a).\textsuperscript{60} He argued that section 440(a) violated his due process rights, the separation of powers doctrine, and Article III of the Constitution.\textsuperscript{61} Chow asserted that both the BIA proceedings and the language of section 440(a) violated his due process rights by denying him judicial review.\textsuperscript{62}

Relying on various precedents, the court quickly outlined both

\textsuperscript{54} See id. at 666-67.
\textsuperscript{55} See id. at 667.
\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} Id.
\textsuperscript{59} See id.
\textsuperscript{60} See id. at 668.
\textsuperscript{61} See id.
\textsuperscript{62} See id.
the due process rights of aliens and the plenary power of Congress in immigration matters. The Supreme Court has held that permanent resident aliens are entitled to due process in deportation proceedings. However, just months before Chow, the Seventh Circuit decided that aliens do not have a due process right to judicial review of BIA orders. Thus, with regard to Chow’s petition seeking review of the BIA’s decision, “section 440(a) does not offend his due process rights by foreclosing such review.”

While the Supreme Court has recognized that Congress may exercise its power over deportation and exclusion “with such opportunity for judicial review of their action as Congress may see fit to authorize or permit,” it has also recognized that such plenary power is subject to judicial intervention under the “paramount law of the Constitution.”

In Chow, the Seventh Circuit concluded that the “paramount law of the Constitution” does not threaten section 440(a)’s viability since resident aliens can seek other avenues of judicial review. If alternative forms of relief did not exist, the court acknowledged, “[W]e would be faced with the difficult task of determining to what extent Congress may limit the jurisdiction of lower federal courts to hear constitutional claims.”

63 See infra notes 196-229 and accompanying text.
64 See id. (citing Landon v. Plasencia, 459 U.S. 21, 33 (1982)).
65 See id. (citing Yang v. INS, 109 F.3d 1185, 1196-97 (7th Cir. 1997)).
66 Id. at 668.
67 Id. (quoting Carlson v. Landon, 342 U.S. 524, 537 (1952)).
68 Id. Specifically, alternative forms of relief include a writ of habeas corpus in district court pursuant to 28 U.S.C. § 2241, or a writ pursuant to 28 U.S.C. § 1651 or an art. I, sec. 9, cl. 2 writ in the Supreme Court. See id. at 669. 28 U.S.C. § 2241 provides the district courts jurisdiction to authorize writs of habeas corpus for persons “in custody in violation of the Constitution or laws . . . of the United States.” 28 U.S.C. § 2241(c)(1), (3) (1994); 28 U.S.C. § 1651 (1994). The All Writs Act provides courts with the ability to issue a stay of actions that will deprive the court of its current or prospective jurisdiction. Id. Finally, the Suspension Clause of the Constitution guarantees a writ of habeas corpus, subject to restriction only “in Cases of Rebellion or Invasion the Public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.
69 Chow, 113 F.3d at 668 (citing Kolster v. INS, 101 F.3d 785, 790 (1st Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27, 31 (2d Cir. 1996); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996)).
The court recognized that 440(a) does not eliminate all forms of judicial review and examined other circuit decisions holding that because some form of habeas relief exists, section 440(a) withstands constitutional scrutiny. The court also compared the language of section 440(a) to other sections of the AEDPA to determine whether Congress intended to eliminate all forms of judicial review under section 440(a). Since the language of 440(a) does not include "sweeping prohibition of judicial review," the court concluded that it does not preclude all forms of judicial review. Thus, "[b]ecause other avenues of judicial review remain open to permanent resident aliens and because the Constitution does not guarantee direct judicial review of deportation orders, [the court held] that section 440(a) does not offend due process."

Despite the availability of other means of judicial relief, Chow argued that the court should retain jurisdiction over his petition because he had invoked "judicial intervention under 'the paramount law of the Constitution.'" The court rejected his contention by examining the statutory limits of its jurisdiction. Because the court had been created by statute, it held that it only had jurisdiction over issues conferred upon it by that statute. Since Chow petitioned the court under section 106(a) of the INA, the Seventh Circuit could consider Chow's arguments only under the auspices of section 106(a), and the court's jurisdiction disappeared with the modification of that section. With regard to other avenues of judicial review, the court noted,

[W]hether Chow may seek a writ of habeas corpus in the district

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70 See Chow, 113 F.3d at 668; see also supra note 68 (describing various forms of statutory and constitutional habeas relief available to resident aliens).
71 See Chow, 113 F.3d at 668.
72 Id. at 669 (contrasting statutory language of section 440(a) with the expansive language of section 423(a)).
73 Chow, 113 F.3d at 669.
74 Id. at 669 (quoting Carlson v. Landon, 342 U.S. 524, 537 (1952)).
75 See id. at 669.
76 See id. (citing Sheldon v. Still, 49 U.S. 441, 449 (1850)). Courts created by statute have "no jurisdiction other than that which has been conferred upon them by statute." Id.
77 See id.
The Seventh Circuit then dismissed Chow’s arguments that section 440(a) violates Article II of the Constitution or the separation of powers doctrine. The court explained that Article III delineates judicial power and authorizes Congress to establish and define the jurisdiction of lower federal courts. The court concluded, “Because the Constitution does not prescribe how much judicial power must vest in the lower federal courts, but rather, leaves that decision to Congressional discretion, a statute which prescribes the limits of the courts’ jurisdiction is not unconstitutional unless it confers powers not enumerated therein.” Provided that Congress does not try to extend the lower courts’ jurisdiction beyond the bounds permitted by the Constitution, Congress has the authority to strip lower courts of their jurisdiction over certain cases or issues. Therefore, section 440(a) did not violate Article III of the Constitution by defining the jurisdictional limits of the appellate courts and granting the BIA sole discretion over deportation orders.

III. Background Law

Given the relatively recent enactment of the AEDPA, courts are still refining their interpretation of the law and wrestling with the novel legal issues raised by the Act. While most judicial decisions have reached consistent conclusions with regard to actions pending at the time of AEDPA enactment, at least one

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78 Id. at 669-70; see supra note 68.
79 See Chow, 113 F.3d at 670.
80 See id. (citing Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 485 U.S. 50, 57-60 (1982)).
81 Id.
82 See id.
83 See id.
84 See supra note 7.
court, in one case, refused to apply section 440(a) retroactively. Additionally, circuit courts have largely ignored or avoided the constitutional challenges to section 440(a) of the AEDPA. The nature of the due process and Article III separation of power claims, however, are demonstrated by surveying recent decisions in the First, Second, Seventh and Eleventh Circuits.

A. The Exception to Retroactive Application of Section 440(a) Recognized in the Seventh Circuit

The same circuit court that applied 440(a) retroactively in Chow previously refused to apply the statute retroactively in Reyes-Hernandez v. INS. Reyes-Hernandez developed an exception to the generally accepted retroactivity of section 440(a) to pending petitions. Reyes-Hernandez, a lawful permanent resident of the United States, was convicted of possession of cocaine and of a subsequent comparable violation. He conceded deportability, but sought relief under section 212(c) of the INA. After a hearing, an IJ denied Reyes-Hernandez’s application, and the BIA affirmed this denial and issued a final order of deportation.

Reyes-Hernandez moved for review of the deportation order pursuant to section 106(a) of the INA, as codified in 8 U.S.C. § 1105a(a), which, prior to AEDPA enactment, granted federal courts of appeals exclusive jurisdiction to review final orders. However, in April of the same year, the AEDPA was signed and section 440(a) of the AEDPA amended section 106(a) of the INA.

85 See infra notes 87-100 and accompanying text (discussing Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996)).
86 See, e.g., Fernandez v. INS, 113 F.3d 1151, 1155 (1997) (stating that “[the court] express[es] no opinion on these matters, but simply observe[s] that they are left undecided by today’s opinion”).
87 89 F.3d 490 (1996).
88 See id.
89 See id. at 491.
90 See id.; see also supra note 19 (detailing the discretionary relief available pursuant to section 212(c) of the INA).
91 See Reyes-Hernandez, 89 F.3d at 491.
to preclude judicial review of final orders of deportation in cases involving any of the enumerated crimes.\footnote{See 8 U.S.C. § 1251 (1996).} Because no effective date was included within the amendment, the court relied on \textit{Landgraf} to help determine whether to apply the provision retroactively.\footnote{See Reyes-Hernandez, 89 F.3d at 492; see also \textit{Landgraf} v. USI Film Prods., 511 U.S. 244, 256 (1994) (holding that absent clear congressional intent or implication, a legislative enactment affecting substantive rights must not be applied retroactively).} The court noted, "If a new procedural or jurisdictional provision would if applied in a pending case attach a new legal consequence to a completed event, then it will not be applied in that case unless Congress has made clear its intention that it shall apply."\footnote{\textit{Id.}; see also supra notes 42-51 and accompanying text (discussing the requirements of \textit{Landgraf}).} Thus, the court examined whether Reyes-Hernandez would have conceded deportability had he known that his option to seek judicial relief under 212(c) and his opportunity for review by this court would be barred by the AEDPA.\footnote{See Reyes-Hernandez, 89 F.3d at 492 (recognizing that § 440(d) of the \textit{Immigration and Naturalization Act} amended § 212(c) of the INA to make aliens convicted of certain enumerated crimes ineligible for relief under that section).}

Moreover, the court contemplated Congressional intent and determined, "[W]e think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability."\footnote{\textit{Id.}} The court concluded that making the concession of deportability a bar to relief under section 212(c) attaches a new legal consequence under \textit{Landgraf}.\footnote{\textit{Id.}} Thus, the court held that section 440(a) does not apply retroactively to cases in which deportability was conceded before the enactment of the AEDPA, provided that "the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability."\footnote{\textit{Id.} at 493.} The court maintained its jurisdiction over the petition for review in this limited circumstance even though section 440(a) is usually construed to divest federal courts of appeals of their authority to

\footnote{93 See 8 U.S.C. § 1251 (1996).}
\footnote{94 See Reyes-Hernandez, 89 F.3d at 492; see also \textit{Landgraf} v. USI Film Prods., 511 U.S. 244, 256 (1994) (holding that absent clear congressional intent or implication, a legislative enactment affecting substantive rights must not be applied retroactively).}
\footnote{95 \textit{Id.}; see also supra notes 42-51 and accompanying text (discussing the requirements of \textit{Landgraf}).}
\footnote{96 See Reyes-Hernandez, 89 F.3d at 492 (recognizing that § 440(d) of the \textit{Immigration and Naturalization Act} amended § 212(c) of the INA to make aliens convicted of certain enumerated crimes ineligible for relief under that section).}
\footnote{97 \textit{Id.}}
\footnote{98 See \textit{id.} at 492-93.}
\footnote{99 \textit{Id.} at 493.
review such deportation orders.\textsuperscript{100}

\textbf{B. The Second Circuit's Application of Section 440(a)}

In \textit{Hincapie-Nieto v. INS}, the Second Circuit examined the effect of the AEDPA on petitions filed for review prior to the statute's effective date.\textsuperscript{101} The petitioner, a lawful permanent resident of the United States, was convicted of drug violations and served a twenty-month prison sentence.\textsuperscript{102} When the INS commenced deportation proceedings under sections 241(a)(2)(B)(i) and 241(a)(2)(A)(iii) of the INA, the petitioner conceded deportability but sought discretionary relief under section 212(c) of the INA.\textsuperscript{103} The IJ denied petitioner relief and ordered deportation.\textsuperscript{104} After the BIA affirmed the IJ's decision, the petitioner filed an application with the court for review of BIA's order, but the Government moved to dismiss for lack of jurisdiction.\textsuperscript{105}

Like other circuit courts,\textsuperscript{106} the Second Circuit determined that section 440(a)'s bar to judicial review may be applied to petitions filed prior to the effective date of the Act.\textsuperscript{107} Quoting \textit{Landgraf}, the court noted, "[A]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'"\textsuperscript{108} The Second Circuit compared the case before it to \textit{Hallowell v. Commons}, which had been cited in
Landgraf. In Hallowell, the Supreme Court considered a statute that deprived federal courts of jurisdiction over certain Indian disputes and granted such authority to the Secretary of the Interior. Similarly, section 440(a) removed jurisdiction over pending petitions for review from the federal courts of appeals and withdrew the possibility of judicial review for petitioning aliens. Reasoning by analogy, the Second Circuit held that "Hincapie-Nieto's prior right of judicial review via a petition for review is no more a substantive right than was Hallowell's prior right to have his claim adjudicated in a district court."

In Hincapie-Nieto, the court discussed and ultimately rejected the Seventh Circuit's creation in Reyes-Hernandez of an exception to retroactive application to pending petitions for aliens who maintained a colorable defense but conceded deportability. The court expressed skepticism of the rationale behind the Reyes-Hernandez exception. Namely, the court doubted that "any alien concedes deportability only because of the expected possibility of section 212(c) relief and the availability of a petition for review of the denial of such relief. It is far more likely that deportability is conceded because there is no conceivable defense available." Therefore, the court remained unconvinced by Reyes-Hernandez and refused to assert jurisdiction.

Finally, examining the constitutionality of AEDPA, the Second Circuit clarified that federal courts are not precluded from all alien claims emerging from deportation proceedings. After consulting with government attorneys, the court recognized other habeas corpus remedies the petitioner might have. While the

109 See id. (citing Hallowell v. Commons, 239 U.S. 506, 508 (1916)).
110 See Hallowell, 239 U.S. at 508.
111 See Hincapie-Nieto, 92 F.3d at 29.
112 Id.
113 See id.; see also supra notes 87-100 and accompanying text.
114 See Hincapie-Nieto, 92 F.3d at 30.
115 Id.
116 See id.
117 See id.
118 See id. (requesting government to comment on whether the abolition of the court's jurisdiction to review the petition would also preclude other available forms of
AEDPA bars judicial review of certain criminal acts committed by aliens, and thus precluded Hincapie-Nieto from challenging his deportation order by petition for a writ of habeas corpus, he could have challenged his detention by application for habeas corpus if he were taken into INS custody. Ultimately, the court held, “Since the Government acknowledges that at least some avenue for judicial relief remains available, we see no infirmity in the repeal of our prior jurisdiction to entertain Hincapie-Nieto’s petition for review of his deportation order.”

C. The First Circuit’s Application of Section 440(a)

The First Circuit also considered the applicability of the AEDPA on pending cases, as well as possible constitutional objections to the Act. In Kolster v. INS, the petitioner, a lawful permanent resident of the United States, was indicted for conspiracy to possess cocaine with intent to distribute. After pleading guilty, petitioner was sentenced to a two-year prison term. Despite the sentencing judge’s recommendation that the petitioner not be deported upon his release, the INS charged that petitioner was deportable pursuant to sections 241(a)(2)(B)(i) and 241(a)(2)(A)(iii).

During a hearing before an IJ, petitioner conceded his deportability, but requested a continuance in order to pursue a waiver of deportation under 212(c). The IJ denied his request for relief and ordered Kolster’s deportation. The BIA affirmed the IJ’s decision and Kolster filed a petition for review with the habeas relief petitioner might have).

119 See id. at 31.
120 Id.
121 See Kolster v. INS, 101 F.3d 785, 786 (1st Cir. 1996).
122 See id.
123 See id.
124 See id. (noting that § 241(a)(2)(B)(i) is a controlled substance offense and § 241(a)(2)(A)(iii) lists aggravated felonies).
125 See id. at 786.
126 See id. “As to Kolster’s request for a continuance, the Immigration Judge found that Kolster did not have statutory eligibility for section 212(c) relief, and therefore pretermitted his application for a waiver of deportation.” Id.
First Circuit Court of Appeals.\textsuperscript{127} While the petition was pending, Congress enacted the AEDPA, and the INS filed a motion to dismiss the case for lack of subject-matter jurisdiction under section 440(a).\textsuperscript{128}

Following other circuit courts, the First Circuit also relied on Landgraf to provide the framework for determining whether the statute should be applied to pending cases.\textsuperscript{129} The court noted the absence of clear congressional intent with regard to the effective date for 440(a), looked to the "judicial default rule," and determined that 440(a) did not retroactively impair Kolster's substantive rights, liabilities or duties.\textsuperscript{130} Despite petitioner's argument that Landgraf merely contemplated a change of tribunals and not the complete denial of judicial review, the court held that the Supreme Court's reliance on Hallowell was significant.\textsuperscript{131} In Hallowell, the statute in question similarly deprived federal district courts of jurisdiction and granted the Secretary of the Interior "final and conclusive" authority.\textsuperscript{132} Similarly, section 440(a) grants final authority in an administrative tribunal, namely the BIA.\textsuperscript{133}

Kolster argued that he conceded deportability in reliance on the application for a waiver pursuant to section 212(c).\textsuperscript{134} Unpersuaded by the Seventh Circuit's decision in Reyes-Hernandez, the First Circuit held, "[I]t is unclear to us that deportability, which is a largely mechanical determination based on facts which may often be objectively ascertained, would

\begin{itemize}
\item \textsuperscript{127} See id.
\item \textsuperscript{128} See id.
\item \textsuperscript{129} See id. at 788 (declaring that application of statute to pending cases is a "question of legislative intent and not a constitutional question").
\item \textsuperscript{130} See id.
\item \textsuperscript{131} See id.; see also supra notes 109-12 and accompanying text (discussing Hallowell and its relevance to the revocation of federal court jurisdiction over pending petitions for review).
\item \textsuperscript{132} See Kolster, 101 F.3d at 788 (citing Hallowell v. Commons, 239 U.S. 506, 508 (1916)); see also supra note 110 and accompanying text (discussing Hallowell).
\item \textsuperscript{133} See id. at 788 (suggesting that a change from an Article III court to an administrative decision maker does not effect retroactivity analysis, but not addressing its effect on the constitutional analysis).
\item \textsuperscript{134} See id. at 788-89.
\end{itemize}
realistically be conceded because of the availability of discretionary relief or of judicial review of the denial of such relief.  

Furthermore, the petitioner never contended that he had a colorable defense to deportability.  Finally, in light of prior decisions, the court noted that aliens do not have a "cognizable reliance interest" in the possibility of section 212(c) judicial relief.

The First Circuit next considered the constitutional challenges raised by the petitioner. Specifically, Kolster asserted that section 440(a)'s bar of judicial review of final deportation orders, based on statutorily enumerated crimes, violated the Due Process Clause and the separation of powers as found in Article III of the Constitution. With respect to his due process claim, Kolster argued that deportation denied him a constitutionally protected liberty interest and that the Due Process Clause ensures certain procedural protections, including judicial review. The INS contended that section 440(a) was "clearly a constitutional exercise of Congress's well-established power to provide or withhold jurisdiction from statutorily-created courts, as well as its plenary power over matters of immigration and naturalization." Even with the INS's explanation, the court recognized the gravity of the constitutional challenge and solicited additional briefing as to the availability of habeas corpus review for aliens who are

135 Id. at 789.

136 See id. (citing Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996)); see also Campos v. INS, 16 F.3d 118, 120 (6th Cir. 1994) (holding that where a provision of the Immigration Act of 1990 made the operative language of section 212(c) inapplicable, a petitioner's request for a waiver of deportation must be denied); Barreiro v. INS, 989 F.2d 62, 64 (1st Cir. 1993) (precluding petitioner's waiver of deportation despite the fact that his seven-year prison sentence, largely served before the Immigration Act of 1990, was nevertheless within the Act's provision prohibiting waiver for an alien convicted of aggravated felony who had at least a five-year prison sentence for that felony).

137 See Kolster, 101 F.3d at 789. "The availability of purely discretionary relief does not create substantive rights in otherwise deportable criminal aliens, nor does the availability of judicial review of denial of that discretionary relief." Id.

138 See id. at 790.

139 See id.

140 See id.

141 Id.
covered by section 440(a)'s preclusion of judicial review.\textsuperscript{142}

The First Circuit recognized the breadth of Congress's plenary power over immigration matters, but noted that the Supreme Court had observed:

[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation.\textsuperscript{143}

Significantly, the court framed the constitutional issue at hand by asking:

Where the consequences of the decision are the deportation of a continuously present alien, may Congress, by precluding judicial review of final deportation orders, place final authority over a question of law . . . in the hands of an administrative body (i.e., the BIA), or does the Constitution require an independent judicial determination of questions of law, or at least of whether the agency's determination was a reasonable construction of the statute?\textsuperscript{144}

However, the court was not compelled to answer the constitutional challenges since other avenues of judicial review were available to the petitioner.\textsuperscript{145} The INS acknowledged that habeas review mandated by the Constitution still existed and thus provided a means for judicial review of the constitutional and jurisdictional issues involved.\textsuperscript{146} Therefore, given the alternative

\textsuperscript{142}See id.

\textsuperscript{143}Id. (quoting Landon v. Plasencia, 459 U.S. 21, 32-33 (1982) (internal citations omitted)).

\textsuperscript{144}Id.

\textsuperscript{145}See id.

\textsuperscript{146}See id. at 790-91.

The INS's precise position is that such constitutionally compelled habeas review, or its equivalent, remains, and that we need not here determine "whether the jurisdictional basis for 'constitutional habeas' review of a deportations order would be 28 U.S.C. § 2241, 28 U.S.C. § 1651, or a 'free
avenues of judicial review, the court declared that section 440(a)’s repeal of jurisdiction for judicial review of final deportation orders did not violate the Constitution.\(^{147}\)

\section*{D. The Eleventh Circuit’s Application of Section 440(a)}

Constitutional issues relating to section 440(a)’s bar of judicial review were raised before the Eleventh Circuit in \textit{Boston-Bollers v. INS}.\(^{148}\) Petitioner, a lawful permanent resident of the United States, pled guilty to a charge of second degree murder and was sentenced to a twelve-year prison term.\(^{149}\) After his sentencing, the INS commenced deportation proceedings against the petitioner, and thereupon the petitioner conceded his deportability based on his conviction and requested relief pursuant to section 212(c) of the Immigration and Nationality Act.\(^{150}\) The IJ refused to grant discretionary relief and ordered petitioner’s deportation.\(^{151}\) The BIA upheld the judge’s decision and mandated a final deportation order.\(^{152}\) Petitioner filed a petition for judicial review in the Eleventh Circuit and the INS filed a motion to dismiss for lack of jurisdiction upon the enactment of the AEDPA.\(^{153}\)

The Eleventh Circuit concluded that 440(a) “is not retroactive application affecting substantive rights, but is a prospective application of a jurisdiction eliminating statute.”\(^{154}\) With respect to the constitutional challenges, the court relied on the plenary power of Congress over matters involving immigration and noted that since deportation is a civil and not a criminal proceeding, “[n]o judicial review is guaranteed by the Constitution.”\(^{155}\) Furthermore,
the court held that section 440(a) does not violate Article III of the Constitution since the political branches of government have traditionally had control over immigration issues. Quoting the Supreme Court in *Reno v. Flores*, the Eleventh Circuit noted, "[O]ver no conceivable subject is the legislative power of Congress more complete." The court upheld the notion that congressional authorization provided the only reason why federal appellate courts previously held jurisdiction to review final orders of deportation. Thus, the court concluded, "[S]ection 440(a) not only does not violate Article III, it is illustrative of the concept of separation of powers envisioned by the Constitution."

**E. The Seventh Circuit's First Impression of the Constitutional Challenges of Section 440(a)**

The Seventh Circuit considered the implications and constitutionality of certain sections of the AEDPA in *Yang v. INS*. The four petitioners in the case either conceded deportability or were determined to have committed crimes enumerated within section 241(a)(2), codified as 8 U.S.C. § 1251, and the IJ ordered their deportation. The INS filed a motion for the court to dismiss petitioners' request for judicial review. All four petitioners objected to the dismissal on the grounds that the AEDPA provisions divesting the court of jurisdiction did not apply to deportation proceedings instituted before April 24, 1996. Quickly dismissing the petitioners' argument, the court noted, "[e]very court of appeals that has considered the question has held that the current version of section 106(a)(10) applies to pending cases."

156 See id.
157 Id. (citing *Reno v. Flores*, 507 U.S. 292, 305 (1993)).
158 See id.
159 Id.
160 109 F.3d 1185 (1997). This case represents the first time the Seventh Circuit addressed the constitutional objections to AEDPA. See id.
161 See id. at 1189; see also supra note 18.
162 See *Yang*, 109 F.3d at 1190.
163 See id.
164 Id.
Recognizing the need to address its previous holding in *Reyes-Hernandez*, the Seventh Circuit explained the underlying policy considerations of the court.\(^{165}\) In *Reyes-Hernandez*, the court was concerned that an alien, with a colorable defense, might concede deportability in order to facilitate judicial relief pursuant to section 212(c), only then to be deprived of the possibility of judicial relief under the amended section 106(a)(10).\(^{166}\) The *Yang* court refuted the perception that conceding deportability might expedite a request for relief under section 212(c) and asserted that concession “complicates, and sometimes forecloses, that possibility.”\(^{167}\) In this case, *Yang* was the only petitioner to claim that he had a colorable defense to deportation; thus, he potentially was within the narrow exception created by *Reyes-Hernandez*.\(^{168}\) Although his defense was colorable, the court refused to find *Yang* within the exception since he was unable to demonstrate “how the change of law pulled the rug out from under his litigating strategy.”\(^{169}\)

The court next considered whether *Yang* could renew his argument that he was not deportable under sections 241(a)(2)(C) and 241(a)(2)(A)(ii) in order to convince the court that judicial review was permissible regardless of section 106(a)(10).\(^{170}\) The court looked to the Department of Justice where three of four counsel concluded that judicial review was not permissible under those circumstances.\(^{171}\) According to the majority view, the court lacked jurisdiction if the BIA found that a person was an alien deportable for a statutorily enumerated reason.\(^{172}\) The one differing Justice Department attorney argued in a dissenting opinion that the “court may (indeed, must) determine for itself whether the petitioner is (i) an alien (ii) deportable (iii) by reason

\(^{165}\) See id. at 1191; see supra notes 87-100 and accompanying text.

\(^{166}\) See id.

\(^{167}\) Id.

\(^{168}\) See id.

\(^{169}\) Id. “Reyes-Hernandez is a decision with a limited domain[,] ... a domain that it would be inappropriate to expand given the force of precedent in other circuits.” Id.

\(^{170}\) See id. at 1191-92. These former two statutory sections enumerate firearm and multiple criminal conviction offenses. See id.

\(^{171}\) See id. at 1192.

\(^{172}\) See id.; see supra note 18.
of a criminal offense listed in the statute." According to this view, the court must give deference to the BIA’s determinations, but "if even with deferential review the BIA’s conclusions cannot be sustained, then 106(a)(10) falls out of the picture." The court further articulated that the dissent’s position found support in the statutory language. Specifically, the court suggested that "[w]hen judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists." Moreover, the court argued, "We think it highly unlikely that Congress meant to enable the Attorney General to expel an alien with a clean record just by stating that the person is a criminal, without any opportunity for judicial review of a claim of mistaken identity or political vendetta." The court further noted that giving the statute such an interpretation helps resolve potential constitutional dilemmas.

Neither Reyes-Hernandez nor any other Seventh Circuit case raised constitutional objections to section 106(a)(10). Thus, in Yang, the Seventh Circuit examined potential challenges for the first time. The court first discussed the possibility of seeking either the constitutional writ of habeas corpus or a writ under 28 U.S.C. § 2241. The court placed little weight on the constitutional writ since it did not provide petitioners with what they needed, namely "review of discretionary decisions by the political branches of government." Furthermore, the court noted

173 Yang, 109 F.3d at 1192.
174 Id.
175 See id.
176 Id.
177 Id.
178 See id. See generally infra notes 196-223 and accompanying text (discussing the potential constitutional restrictions of the AEDPA in light of the Due Process Clause and the separation of powers provisions of Article III).
179 See Yang, 109 F.3d at 1195.
180 See id. ("[O]ur prior opinions . . . did not consider constitutional objections to section 106(a)(10) . . . and the time has arrived to do so.").
181 See id.; see generally supra note 68 (describing the various forms of statutory and constitutional habeas relief available to resident aliens).
182 Yang, 109 F.3d at 1195.
that the intent of the legislation was to facilitate removal of criminal aliens and "not to delay removal by requiring aliens to start the review process in the district court rather than the court of appeals." As for the possible writ under 28 U.S.C. § 2241, the court held that the petitioners' claim would not be viable since it alleged error and not that the Attorney General refused to acknowledge existence of a discretionary power. Thus, the petitioners' only viable potential avenue for judicial review was section 106(a).

The Yang court next analyzed whether it was constitutionally permissible for Congress to preclude the possibility of judicial review under section 106(a). The Supreme Court had previously recognized that lawful aliens of the United States are entitled to due process of law before they are deported. Accordingly, the court observed that the AEDPA provides an alien with notice of the charges, an opportunity to present evidence, assistance of counsel, and appellate review. Moreover, the INS maintains the burden of proving by "clear, unequivocal, and convincing" evidence that the alien is deportable. Thus the process available ensures that the fundamental requirements of due process, notice, and the opportunity to be heard are met. According to the Seventh Circuit, amended section 106(a) secures an independent judicial role in determining whether an alien is deportable such that both an agency and a court together must conclude that a person is "(i) an alien who is (ii) deportable (iii) by reason of serious crimes." Thus, "[u]nless the Constitution bestows a right to have Article III judges review an executive decision to implement an established right to deport an alien, section

183 Id.
184 See id.
185 See id. at 1196.
186 See id.
187 See id. (citing Landon v. Plasencia, 459 U.S. 21, 32-33 (1982)).
188 See id. at 1196.
189 Id. (quoting Woodby v. INS, 385 U.S. 276, 286 (1966)).
190 See id.
191 Id.
106(a)(10) must be respected."

With respect to the petitioners’ claim that Article III prevents political branches from restricting the powers of the judicial branch, the court relied on the Supreme Court’s explanation in *Carlson v. Landon*: “The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, ‘with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.”’ Since Article III authorizes Congress to establish lower courts and to determine their jurisdiction, the limitations of section 106(a)(10) do not offend the doctrine of separation of powers. In conclusion, the court noted, “Section 106(a)(10) applies to this case, forecloses judicial review, and comports with constitutional limitations on the authority of the political branches.”

**IV. Significance of the Case**

Given its relative novelty, the AEDPA promises to continue to plague the U.S. court system with nuances and challenges unforeseen by its drafters. As illustrated in *Chow* and other circuit court decisions discussed, section 440(a) of the AEDPA has divested federal courts of their power to review certain final deportation orders. With the exception of the Seventh Circuit’s decision in *Reyes-Hernandez*, federal courts have consistently affirmed the application of section 440(a) to pending petitions for review. Indeed, the anomaly to retroactivity created by the *Reyes-Hernandez* decision has been narrowly construed and has

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192 Id.

193 Id. (quoting Carlson v. Landon, 342 U.S. 524, 537 & n.28 (1952) (citing United States ex. rel. Turner v. Williams, 194 U.S. 279, 290-91 (1904))).

194 See id. at 1197.

195 Id. “Unless Article III compels Congress to vest in the inferior federal courts as much judicial power as Article III permits them to possess—an inconceivable reading of the Constitution—it interposes no obstacle to the amended section 106(a)(10).” Id.

196 See, e.g., Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996); Mendez-Rosas v. INS, 87 F.3d 672 (5th Cir. 1996); Duldulao v. INS, 90 F.3d 396 (9th Cir. 1996).

197 See supra notes 106-07 and accompanying text.
been met with skepticism in other circuits.\(^{198}\)

Despite the nearly unanimous application of the AEDPA's section 440(a) to pending suits, the statute itself has provoked numerous constitutional challenges concerning due process and the separation of powers doctrine.\(^{199}\) Thus far, these constitutional challenges have been rejected or largely ignored by the federal courts.\(^{200}\) As the Seventh Circuit's recent decisions in \textit{Yang} and \textit{Chow} reveal, there is an underlying and unresolved tension between Congress's plenary power over immigration matters and the due process rights of lawful resident aliens. Revisiting the plenary doctrine extensively referenced in the cases above illuminates the impact of the AEDPA on the due process rights of lawful alien residents such as King Sang Chow and Ter Yang.

The plenary power doctrine was instituted more than a century ago when the Supreme Court confirmed congressional authority to send resident aliens home in \textit{Fong Yue Ting v. United States}.\(^{201}\) Nearly a century later, the Supreme Court still recognized that the "power to expel or exclude aliens . . . [is] . . . a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."\(^{202}\) Although without textual support in the Constitution and mercurial in its dimensions, the plenary power doctrine essentially provides that "Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled."\(^{203}\) In fact, not a single challenge of federal

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\(^{198}\) See supra notes 101-95 and accompanying text.

\(^{199}\) See Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997); Kolster v. INS, 101 F.3d 785 (1st Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996).

\(^{200}\) See generally Kolster, 101 F.3d at 785 (determining that as long as some form of habeas review existed, the scope of judicial review as a matter of statutory interpretation did not require addressing the constitutional issues).

\(^{201}\) 149 U.S. 698 (1893).

\(^{202}\) Dululao v. INS, 90 F.3d 396, 399 (9th Cir. 1996) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

legislation proscribing the deportation of resident aliens has succeeded. Furthermore, some general constitutional restrictions on legislative action, such as the Ex Post Facto Clause, are inapplicable to any immigration matters. From this vantage point, the potential for conflict between plenary power over immigration matters, essentially shielded from judicial intervention, and the private rights of lawful resident aliens is apparent.

The "absoluteness" of the plenary power doctrine has been eroded slightly by judicial decisions carving out exceptions for due process claims. The Supreme Court affirmed that it would hear procedural due process challenges to deportation orders in the Japanese Immigrant Case. In that case, the Court held that

\[\text{The court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.}\]

Resolving the struggle between these two competing legal traditions is paramount to the AEDPA and its ultimate effect on deportation proceedings of lawful resident aliens.

Judicial history clearly demonstrates the long standing struggle to balance the constitutional rights of resident aliens with Congress's power and political agenda. At issue in Chow and Yang is the minimal constitutional requirements accorded to resident aliens so as not to offend due process. In Yang, the Seventh Circuit had the opportunity to investigate the due process

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205 See Constitutional Requirement of Judicial Review, supra note 8, at 1850.
206 189 U.S. 86, 100 (1903).
207 Id.
208 See generally Constitutional Requirement of Judicial Review, supra note 8, at 1850 (suggesting that the Due Process Clause and Article III present constitutional limits on Congress's plenary power over immigration legislation).
challenges to section 440(a) of the AEDPA. While the court in Yang squarely rejected the argument that 440(a) violated the Fifth Amendment’s Due Process Clause, it did not entirely foreclose the possibility of judicial review of constitutional claims under 440(a).

Just a few months later, however, the Seventh Circuit decided Chow. Thus, Chow represents a broadened statutory interpretation of section 440(a). Chow prohibits petitioners convicted of any of the crimes enumerated in 440(a) from judicial review under section 106(a) of the INA. The court refused to read an exception for constitutional claims into the language of 440(a) of the AEDPA. Chow makes deportable without judicial review any petitioner convicted of crimes specified in 440(a), even petitioners with constitutional challenges.

Along with the majority of circuit courts, the Seventh Circuit relied on the availability of other avenues of habeas corpus to protect against due process challenges. Despite the court’s attempts in Chow to present other forms of habeas corpus relief as viable options, the same court had previously lamented that the constitutional writ available pursuant to Article I, section 9, clause 2 writ “does not offer what our petitioners desire: review of discretionary decisions by the political branch of government.” Moreover, as also observed in Yang, beginning April 1, 1997, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRA) abolished review under 28 U.S.C. § 2241, thus

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210 See Yang v. INS, 109 F.3d 1185, 1195 (7th Cir. 1997).
211 See id.
212 113 F.3d 659 (7th Cir. 1997).
213 See id. at 666.
214 See id. at 669. “However, that Congress’s power to grant or restrict judicial review in deportation proceedings is subject to judicial intervention under the Constitution does not imply necessarily that a federal court of appeals such as this one may retain jurisdiction over a petition raising constitutional claims.” Id.
215 See id.
216 See, e.g., Kolster v. INS, 101 F.3d 785, 790 (1st Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27, 31 (2d Cir. 1996).
217 Yang, 109 F.3d at 1195.
leaving section 106(a) as many petitioners’ only alternative.\footnote{218} Because section 106(a) has been all but foreclosed, can the agency’s final determination, without any plausible options for judicial review, be considered constitutional? Thus far, courts have not been required to address this question.\footnote{219} Nevertheless, it poses an interesting and inevitable issue under the AEDPA.

Moreover, as Chow demonstrates, without the protection of judicial review, resident aliens can be deported if they have been convicted of one of the crimes enumerated in section 241(a)(2)\footnote{220}. As the Seventh Circuit earlier submitted in Yang, “[i]ntrusion of a reason other than a statutorily permissible one might well affect the operation of section 106(a).”\footnote{221} Neither case explored the possibility of deportation being ordered pursuant to section 241(a)(2), but in reality stemming from the Attorney General’s political agenda.\footnote{222} Potential grounds for abuse of discretion include racism, religious differences, discrimination born from previous wars, and lingering cold war anxieties.\footnote{223} Thus, the danger of the Chow decision, barring all constitutional challenges, becomes obvious in light of such potential abuses of discretion.

“By stripping federal courts of the ability to hear certain cases, Congress can prevent judicial ‘interference’ with its preferred substantive outcomes, but such preemptive strikes must not run

\footnote{218} See id.; see also 8 U.S.C § 1252(g) (1994) (“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 of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”).

\footnote{219} “[C]ourts have largely resisted prodding by scholars and litigants to place some limits on the federal power over this subject matter.” WEISSBRODT, supra note 204, at 57.

\footnote{220} See Yang, 109 F.3d at 1192.

\footnote{221} Id.

\footnote{222} See id. at 1192.

Suppose a future petitioner were to contend that the Attorney General regularly remitted the deportation of criminal aliens who are Christian, but not those who are Moslem. A contention that this had occurred might mean that the order of deportation was not ‘by reason of having committed a criminal offense’ listed in section 241(a)(2), but was by reason of religion.

\footnote{223} See WEISSBRODT, supra note 204, at 58.
afoul of the Constitution." Given the limitations on other avenues of judicial review, as well as an agency's desire to effectuate public policy goals, such as expedited deportation of lawful resident aliens, the possibility of due process violations should be carefully monitored.

Pursuant to the precedent of Chow, the Seventh Circuit was subsequently compelled to decline to imply an exception for constitutional challenges in Shmael Turkhan v. INS. Referring to Chow, the court noted, "We held . . . that section 440(a) bars all claims brought pursuant to INA section 106(a) if the petitioner is deportable for having committed one of the criminal offenses specified by section 440(a)." Even though the petitioner asserted that he received inadequate assistance of counsel and that the BIA violated due process by refusing to consider his mislabeled brief, judicial review of these concrete constitutional claims was precluded. As demonstrated by this decision, Chow effectively denies judicial review of all constitutional challenges brought pursuant to 440(a).

Chow and the Seventh Circuit's subsequent decision in Turkhan manifest the most expansive reading courts have thus far given to section 440(a). For example, the Ninth Circuit in Dudulao v. INS suggested that judicial review may still exist for certain constitutional challenges. Specifically, the court's opinion emphasized, "The availability and scope of collateral habeas review where the 'paramount law of the Constitution' may require judicial intervention was not an issue before us." Thus, the Ninth Circuit, as well as several other circuit courts, have not construed section 440(a), as necessarily barring all constitutional

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225 123 F.3d 487 (7th Cir. 1997).
226 Id. at 490.
227 See id.
228 Dudulao v. INS, 90 F.3d 396 (9th Cir. 1996).
229 Id. at 400 n.4.
230 See, e.g., Hincapie-Nieto v. INS, 92 F.3d 27 (2d Cir. 1996) (holding that at least some avenue of judicial review exists through a writ of habeas corpus); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996) ("To the extent . . . that constitutional rights applicable to aliens may be at stake, judicial review may not be withdrawn by statute.").
challenges. Against the legal history thus far created, *Chow* marks the most sweeping statutory interpretation of section 440(a) completely depriving the judiciary of any role in the issuance of final deportation orders.

V. Conclusion

The AEDPA's section 440(a), stripping federal courts of judicial review of final deportation orders, is subject to statutory interpretation and constitutional restraints. Whereas the Supreme Court has not yet considered the constitutionality of section 440(a), individual courts have begun to interpret the Act's provisions and determine what constitutional minimums must be met to avoid violating the Fifth Amendment's Due Process Clause or the principles of separation of powers of Article III of the Constitution.

The Seventh Circuit's decision in *Chow* represents the barest requirements needed to pass constitutional muster. In *Chow*, the court interpreted section 440(a) as a bar to all claims brought pursuant to section 106(a) of the INA, provided that the petitioner was convicted of one of the crimes enumerated in section 440(a) and some other avenue of judicial review was available. The court went so far as to reject the petitioner's constitutional challenges—both due process and the separation of powers claims—to section 440(a).

As precedent, *Chow* appears to deny future petitioners the possibility of judicial review in a federal court even for legitimate constitutional challenges, as long as some form of habeas relief exists. In other words, petitioners will be unable to seek judicial review of decisions in which there is reason to believe the government has erred or even where an abuse of discretion has occurred. However, if a future petitioner can prove that other avenues of judicial review are unavailable, or perhaps is able to prove their futility, courts will be forced to reconsider the constitutionality of section 440(a) in the absence of habeas relief.

While section 440(a) thus far has been deemed constitutionally valid, one scholar has cautioned:

The right to judicial review of Executive Branch action is a cornerstone of our democracy. Without it, the rights guaranteed by the Constitution are of little value. Never in our history have
aliens been subject to a legal regime where they could be deported or excluded without any recourse to the judiciary to determine the fairness and legality of their removal.\textsuperscript{231}

Thus, section 440(a) promises to expedite the removal of criminal aliens from the United States, but at the same time potentially threatens the protection of fundamental fairness that our Constitution affords both natural citizens of the United States as well as permanent resident aliens.

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