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Antiterrorism and Effective Death penalty Act of 1996: Implications Arising from the Abolition of Judicial Review of Deportation Orders, The;Legislative Reform

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THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: IMPLICATIONS ARISING FROM THE ABOLITION OF JUDICIAL REVIEW OF DEPORTATION ORDERS

I. INTRODUCTION

A. Impetus Behind Antiterrorism and Effective Death Penalty Act

Over the past decade, America's history of domestic tranquility has been seared by acts of domestic terrorism which have plunged this country into a new age plagued by the fear of domestic threats to our national security. Since the 1988 bombing of Pan American flight #103, this country has witnessed random domestic terrorist attacks of horrific proportions, most notably the 1993 bombing of the World Trade Center in New York City, the 1995 explosion at the Alfred D. Murrah Federal Building in Oklahoma City, and the most recent explosion in Atlanta's Centennial Park in the midst of the 1996 Olympic Games.

The Oklahoma City bombing, a tragedy that claimed the lives of 168 people, 19 of whom were children,[1] brought the issue of domestic terrorism to the forefront of American social concerns and created the political impetus to address and eliminate this new threat to the United States' national security. In response, the legislature has strived to combat the force of domestic terrorism through legislation aimed at deterring and preventing these senseless acts of violence. Consequently, the United States Senate passed the Comprehensive Terrorism Prevention Act of 1995[2] shortly after the Oklahoma City Bombing. Following the Comprehensive Terrorism Prevention Act of 1995, the House of Representatives, in March 1996, passed a similar resolution titled the Effective Death Penalty and Public Safety Act of 1996.[3] The United States Senate sought to temper the more stringent provisions of the proposed Effective Death Penalty and Public Safety Act and ultimately passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on April 17, 1996. President Clinton signed the AEDPA into law on April 24, 1996,[4] in commemoration of the Oklahoma City Bombing that occurred one year and five days earlier.[5]

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1. 142 CONG. REC. H3605, H3614 (daily ed. April 18, 1996).

2. The Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. 1st Sess. (1995), was passed by the United States Senate on June 7, 1995.

3. The Effective Death Penalty and Public Safety Act of 1996, H.R. 2703, 104th Cong., 2nd Sess. (1996), was passed by the United States House of Representatives on March 14, 1996 by a vote of 229-191. *See* Melissa A. O'Loughlin, Note, *Terrorism: The Problem and the Solution—The Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103, 105 (1996).

4. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

5. In debating the AEDPA, Senator Hatch (R-UT), who co-authored the bill with Senator Biden (D-DE), urged the Senate's quick passage of the bill "in an orderly, decent way . . . so that we can send it on to the House and they can do it, so that we can at least do what the Senate ought to do

B. Judicial Review of Deportation Proceedings

The driving force behind the AEDPA is a concern for the "rights and needs of crime victims and witnesses . . . in the criminal justice system."[6] However, the need for victim retribution may have come at the cost of basic liberties of legal aliens residing in the United States. Since its enactment, the AEDPA has generated controversy over its potential violation of the due process rights and civil liberties of legal aliens now residing in the United States. Among the AEDPA's most controversial provisions is Title IV, which affects the expediated deportation of criminal aliens and suspected alien terrorists. Title IV contains a series of amendments to the Immigration and Nationality Act ("INA").[7]

The first notable amendment made by the AEDPA curbs aliens' eligibility to seek a discretionary waiver of deportability which is available under section 212(c) of the INA.[8] Section 212(c) vests the United States Attorney General with discretionary authority to waive the deportation orders of statutorily-deportable aliens who have been lawful permanent residents of the United States for at least seven consecutive years.[9] The Attorney General's discretionary power under section 212(c) has been delegated to the Board of Immigration Appeals ("BIA") which determines whether to grant a waiver based on "hardship to the deportee and other equitable factors bearing for and against the deportee's plea to be allowed to remain [in the United States]."[10] Having considered these factors, the BIA then issues a waiver, or in the alternative, a final order of deportation. The AEDPA, however, bars certain aliens from applying for such section 212(c) discretionary relief.[11]

In addition, where the BIA does issue a final deportation order, the federal courts of appeal historically have had exclusive jurisdiction to review such orders pursuant to federal statute.[12] The AEDPA, however, also removes the power of federal courts of appeal to review final deportation orders and thus leaves criminal legal aliens with no right of judicial review over such orders. Section 440(a) of the AEDPA reads as follows:

> 440. CRIMINAL ALIEN REMOVAL.
> (a) JUDICIAL REVIEW. Section 106 of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a)(10), is amended to read as follows: (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section

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in commemoration of the lives of those who died last year [in the Oklahoma City explosion]." 142 CONG. REC. S3352-01 (daily ed. April 16, 1996).

6. *See* RENEWING OUR COMMITMENT TO CRIME VICTIMS, White House Memorandum for the Attorney General, Office of the Press Secretary, June 28, 1996, *available in* Westlaw, 1996 WL 10346814.

7. 8 U.S.C. §§ 1251-59 (1994 & Supp. 1996).

8. INA § 212(c) (codified as 8 U.S.C. § 1182(c) (1994 & Supp. 1996)).

9. *Id.*

10. Reyes-Hernandez v. Immigration and Naturalization Serv., 89 F.3d 490, 491 (7th Cir. 1996), citing *In re* Marin, 16 I.&N. Dec. 581, 585 (B.I.A. 1978).

11. *See* 8 U.S.C. § 1182(c) (1994 & Supp. 1996).

12. 8 U.S.C. § 1105a(a) (1994) provides that federal courts possess "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 . . . ."

241(a)(2)(A)(i), shall not be subject to review by any court.[13]

This article focuses on the impact of section 440(a)'s destruction of judicial review for deportation orders. There is currently a debate over whether section 440(a) is to be applied retroactively, thus barring judicial review of petitions pending at the time of the AEDPA's enactment. This article examines both the benefits and drawbacks of retroactive application of legislation. Second, this article addresses the current circuit split in the federal courts of appeal over the proper application of section 440(a). Finally, this article suggests an amendment to section 440(a) to clarify and resolve the existing circuit split.

C. Overview of the Debate on the Retroactive Application of Section 440(a)

Because Congress did not specify the effective date of section 440(a), it is unclear whether the AEDPA is retroactive[14] in application. The federal circuits are currently split over whether the AEDPA, signed into law in April 1996, should apply *ex post facto* to bar judicial review of appeals filed before April 1996, which were pending on the date the AEDPA came into effect.

The Second Circuit, in *Hincapie-Nieto v. Immigration and Naturalization Service*,[15] ruled that section 440(a) should apply retroactively because the statute is merely jurisdictional in nature and does not take away any substantive rights of the parties involved.[16] Likewise, in *Mendez-Rosas v. Immigration and Naturalization Service*,[17] the Fifth Circuit declared that section 440(a) has retroactive application because it is a jurisdictional statute.[18] The Fifth Circuit went on to explain that a party may rebut the presumption of retroactivity for jurisdictional statutes if the petitioner can show that the statute in some way curtails a substantive right.[19] Because the petitioner in *Mendez-Rosas* offered no such rebuttal, however, the Fifth Circuit adhered to a retroactive interpretation of section 440(a).[20] The Ninth Circuit, in *Duldulao v. Immigration and Naturalization Service*,[21] struck down the petitioner's argument that a retroactive application of section 440(a) was unconstitutional.[22] The Ninth Circuit rejected the petitioner's argument by explaining that there is no constitutional guarantee to judicial review of deportation orders.[23]

In contrast, the Seventh Circuit, in *Reyes-Hernandez v. Immigration and Naturalization Service*,[24] did not apply section 440(a) because such application would create new legal consequences for an alien who had conceded his deportability in reliance on the possibility of judicial review of his deportation orders or the alternative hope of

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13. AEDPA § 440(a) (codified as 8 U.S.C. § 1105a(a)(10) (1994 & Supp. 1996)).
14. A retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913).
15. Hincapie-Nieto v. Immigration and Naturalization Serv., 92 F.3d 27 (2d Cir. 1996).
16. *Id.* at 29.
17. Mendez-Rosas v. Immigration and Naturalization Serv., 87 F.3d 672 (5th Cir. 1996).
18. *Id.* at 676.
19. *Id.*
20. *Id.*
21. Duldulao v. Immigration and Naturalization Serv., 90 F.3d 396 (9th Cir. 1996).
22. *Id.* at 399-400.
23. *Id.* at 400.
24. Reyes-Hernandez v. Immigration and Naturalization Serv., 89 F. 3d 490 (7th Cir. 1996).

obtaining 212(c) relief.[25] The Seventh Circuit reasoned that aliens would not likely concede deportability in the first place were they aware of the imminent passage of 440(a) and its removal of judicial review of final deportation orders.

The courts' varying applications of section 440(a) create discrepancies in the rights afforded to criminal aliens subject to section 440(a). As the law currently stands, an alien with a petition for a discretionary waiver pending in the Seventh Circuit at the time of the AEDPA's enactment is entitled to judicial review over his final deportation orders, whereas an alien in the Second, Fifth, and Ninth Circuits is not entitled to the right of judicial review. This schism in the judicial system destroys any hope of a uniform procedural mechanism for appeals from deportation orders.[26]

The solution to the discrepancy produced by section 440(a), however, lies with Congress and not with the judiciary. Under the plenary power doctrine,[27] "Congress has virtually unlimited power to regulate the admission, exclusion, and deportation of aliens from the United States."[28] In accord with this doctrine, the judiciary lacks the power to examine the constitutionality of a retroactive application of section 440(a). In fact, "'(o)ver no conceivable subject is the legislative power of Congress more complete' than it is over [the admission and exclusion of aliens on United States soil]."[29]

Because the plenary power doctrine vests Congress, not the Court, with control over immigration and deportation issues, legal aliens are not ensured the same level of constitutional protection as United States citizens. The discrepancy over the retroactive application of section 440(a), then, cannot be resolved within the ambit of the Constitution. Rather, the issue must be resolved at its source, Congress.

D. Resolution of the Retroactivity Issue

Under the mandate of the plenary power doctrine, there is no immediate hope that the judiciary will resolve the issue of whether section 440(a) should be applied retroactively. On September 16, 1996, the Supreme Court vacated and remanded *Elramly v. Immigration and Naturalization Service*,[30] an immigration case pending on its fall oral argument calendar, directing the Ninth Circuit Court of Appeals to reevaluate the case in light of the recently-enacted AEDPA. Elramly, who was convicted of a narcotics offense, was subject to section 440(a) and thus precluded from judicial re-

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25. *Id.* at 492-93.

26. *See generally Immigration Law Service*, 17: 359-368 (1995 & Supp.) (discussing appeals to Board of Immigration Appeals). *See also* 8 U.S.C. 1252(b) (1996) (addressing administrative proceedings to determine deportability of aliens). In *In re* Marin, 16 I.&N. Dec. 581, 585 (B.I.A. 1978), the Board of Immigration Appeals laid out a list of equitable factors to be considered in determining whether to grant relief from an Immigration Judge's deportation order: "the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country." *Id.* at 584.

27. This paper does not attempt to address the history of the plenary power doctrine other than to relate its application to the issue of the retroactive application of § 440(d).

28. Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1613 (1995) (quoting Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 939 (1995)).

29. *Id.* at 1614 (quoting Reno v. Flores, 507 U.S. 292, 305 (1993)).

30. Elramly v. Immigration and Naturalization Serv., 73 F.3d 220 (9th Cir. 1995).

view of deportation orders. Nadine Wettstein, an immigration lawyer who writes amicus curiae briefs on behalf of the American Immigration Lawyers' Association, responded to the Supreme Court's action by saying that "[i]t's not entirely clear what [the Court's decision to remand] means, . . . [i]t means, for one, that there's no Soriano case and no Elramly case, and no case currently pending in the Supreme Court that will decide whether [the AEDPA's prohibitions against deportation waivers and judicial review] are retroactive."[31]

Given the plenary power doctrine and the Supreme Court's recent refusal to address the retroactivity of section 440(a), Congress must alleviate the controversy by amending section 440(a) to specify the statute's effective date. This clarification would alleviate the inconsistent judicial treatment of deportable aliens with petitions for judicial review pending on the date of the AEDPA's enactment.

II. CONTEMPORARY DEBATE OVER RETROACTIVE APPLICATION

The notion that there is "no punishment without law, no punishment without a crime, and no crime without a legal punishment"[32] stands as a cornerstone in American jurisprudence and is protected by the *ex post facto* prohibition in the Constitution.[33] Justice Marshall explained the *ex post facto* prohibition's two objectives as, first, "giv[ing] fair warning of the effect [of legislation] and permit[ting] individuals to rely on the meaning [of legislation] until explicitly changed . . . [and, second,] restrict[ing] governmental power by restraining arbitrary and potentially vindictive legislation."[34] Opponents of retroactive laws cite fair warning and the ability of individuals to assess the consequences of their conduct under the law existing at the time the conduct occurred as essential ingredients of American democracy.

In contrast to the presumption against retroactive application of legislation, however, is the notion that "a court is to apply the law in effect at the time it renders its decision."[35] Several cases within the last two decades have introduced a presumption in favor of retroactivity absent some resulting "manifest injustice."[36] *Bradley v. School Board of City of Richmond*[37] and *Thorpe v. Housing Authority of Durham*[38] are the seminal cases that set forth the presumption of retroactivity. *Bradley* voices the presupposition that courts must apply the law in effect at the time a decision is rendered absent two exceptions: a "result of manifest injustice or . . . [a] statutory direction or legislative history to the contrary."[39] Hence, if Congress neglects to expressly prohibit retroactive application of a legislative act, and if the court finds that no "manifest injustice" would result from retroactive application of the act, then the new law will be applied to all cases pending at the date of its enactment. The *Thorpe-Bradley* presumption of retroactivity has generated obvious controversy on the Court. Justice

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31. *U.S. Supreme Court Sends Back Immigration Case for Consideration Under New Antiterrorism Law*, West's Legal News, Sept. 17, 1996, *available in* 1996 WL 521848.

32. This embodiment of the principle of legality was stated by Paul Feuerback, who established the Bavarian penal code in 1901.

33. U.S. CONST. art. I, § 9, cl. 3 and art. I, § 10, cl. 1 proscribe all retroactive application of punitive law. *See also* Calder v. Bull, 1 L. Ed. 648 (1798).

34. Weaver v. Graham, 450 U.S. 24, 28-9 (1981).

35. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).

36. *Id.* at 711.

37. *Bradley*, 416 U.S. 696 (1974).

38. Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969).

39. *See Bradley*, 416 U.S. at 711.

Scalia recently noted his regret "that the Court has chosen not to resolve the conflict between the two relatively recent cases . . . [because] [t]he *Thorpe-Bradley* presumption of retroactivity . . . misleads prospective litigants and confuses judges of the lower courts."[40]

The Supreme Court, however, recently handed down a decision that provides more substantive direction in the current debate over retroactivity. *Landgraf v. USI Film Products*[41] involved an alleged sexual harassment claim under Title VII of the United States Code. While the petitioner's appeal was pending in *Landgraf*, Congress enacted the Civil Rights Act of 1991,[42] introducing the potential for compensatory and punitive damages for intentional discrimination in violation of Title VII. The Supreme Court thus considered the issue of when a new statute should take effect. In *Landgraf*, the Supreme Court noted that it "regularly applie[s] intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction [exists] when the underlying conduct occurred or when the suit was filed, . . . [but] when the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."[43] The Second, Fifth, and Ninth Circuits have cited this distinction on its face to stand for the proposition that AEDPA section 440(a), which removes federal courts' jurisdiction to review final deportation orders, is a jurisdictional statute and thus should be retroactively applied. However, these courts have failed to note that the *Landgraf* decision delineates a test to determine whether legislation is retroactive: "[t]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment."[44] Because new procedural rules merely "regulate secondary rather than primary conduct, . . . [their application at the time a decision is rendered] does not make application of the rule at trial retroactive."[45] However, where "new legal consequences" attach to prior events due to the subsequent passage of legislation, the Court's "traditional presumption teaches that [the newly-enacted legislation] does not govern absent clear congressional intent favoring such a result."[46]

Ultimately, the Supreme Court in *Landgraf* categorized the Civil Rights Act of 1991 as retroactive, holding that its application would "attach an important new legal burden"[47] to the conduct of the employer, a result the court will not imply in the absence of clear congressional intent in the statute itself. Hence, the *Landgraf* Court declined to apply the Civil Rights Act of 1991 retroactively.

III. CIRCUIT COURT SPLIT OVER APPLICATION OF 440(a)

A. Arguments Against A Retroactive Application

The BIA recently addressed the issue of retroactivity on a related AEDPA section governing appeals from an immigration judge's discretionary decision on deportation orders. In *In re Soriano*,[48] the BIA ruled that AEDPA section 440(d)[49] is not to

40. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 854 (1990).
41. Landgraf v. USI Film Products, 511 U.S. 244 (1994).
42. 2 U.S.C. § 1209 (1994).
43. *Landgraf*, 511 U.S. at 257.
44. *Id.* at 255.
45. *Id.* at 258.
46. *Id.* at 262.
47. *Id.* at 264.
48. *In re* Bartolome Jhonny Soriano, File A39186067, 1996 WL 426888 (B.I.A. June 27, 1996).

be applied retroactively. The BIA reasoned that "Congress did not intend by its silence to disrupt the expectations of those aliens whose applications for section 212(c) relief were pending on April 24, 1996."[50] In rejecting a retroactive application of section 440(d), the BIA traced the Supreme Court's treatment of statutory interpretation and cited the Court's observation that "when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive, 'settled expectations should not be lightly disrupted.'"[51] The BIA therefore concluded that a retroactive application of AEDPA section 440(d) would disrupt Soriano's expectations of eligibility for section 212(c) relief. The Attorney General, however, vacated *Soriano* on September 12, 1996.[52]

While *Soriano* was vacated, the rationale behind the BIA's decision provides some guidance for circuit courts faced with similar cases involving the AEDPA. The Seventh Circuit, led by Judge Posner, recently expressed an opinion aligned with that of the BIA.

In *Reyes-Hernandez*, the Seventh Circuit held that a retroactive application of AEDPA section 440(a) would create a "mousetrap" for criminal aliens.[53] By tempting aliens to concede deportability in exchange for the safeguard of judicial review, section 440(a) lured such legal aliens into a trap and then snatched away the benefit of judicial review with the Act's passage.[54]

In this case, Antonio Reyes-Hernandez became a legal permanent resident of the United States in 1981, following his marriage to a United States citizen.[55] Since that time, Reyes-Hernandez was convicted twice on charges of cocaine possession.[56] Reyes-Hernandez conceded deportability following these convictions but applied for a discretionary deportation waiver under section 212(c) of the INA.[57] An immigration judge reviewed Reyes-Hernandez's 212(c) petition and denied the application.[58] The BIA affirmed this denial in October 1995 and issued a final deportation order.[59] The petitioner thus sought judicial review of this final deportation order from the Seventh Circuit Court of Appeals, as was his right under the then existing law.[60]

Shortly before the oral argument in Reyes-Hernandez's appeal, the AEDPA was signed into law. The Seventh Circuit considered the effects of both sections 440(a) and 440(d) on the petitioner's appeal. Judge Posner did not apply these sections retroactively on the ground that such an application would create new legal consequences for the petitioner. Citing *Landgraf*, Posner explained that "[t]he test of the interpretive principle laid down in Landgraf . . . is whether 'the new provision attaches new legal con-

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49. AEDPA § 440(d) (codified as 8 U.S.C. § 1182 (1994 & Supp. 1996)) completely bars 212(c) discretionary relief to aliens who have committed one of the specific offense referenced within the AEDPA statute.

50. *Id.* at *5.

51. *Soriano* at *4 (citing Landgraf v. USI Film Products, 511 U.S. 244 (1994)).

52. *See supra* note 31.

53. *Reyes-Hernandez*, 89 F.3d at 492.

54. *Id.*

55. *Id.* at 491.

56. *Id.*

57. *See supra* note 8 and accompanying text.

58. *Reyes-Hernandez*, 89 F.3d at 491.

59. *Id.*

60. *See* 8 U.S.C. § 1105a(a) (giving federal courts exclusive jurisdiction to review final deportation orders before its amendment by the AEDPA); *see also supra* note 12 and accompanying text.

sequences to events completed before its enactment.'"[61] Posner reasoned that Reyes-Hernandez had only conceded deportability in reliance on his eligibility for 212(c) relief and judicial review of final deportation orders. To apply sections 440(a) and 440(d) to Reyes-Hernandez's pending appeal would create 'new legal consequences' that were unknown to the petitioner at the time he conceded deportability. The Seventh Circuit held, in light of these circumstances, that it was improbable that "Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief . . . only to dash that hope after they had conceded deportability."[62]

The Seventh Circuit concluded that sections 440(a) and 440(d) could not be applied retroactively to those appeals pending on the date the AEDPA was signed into law where the "applicant for discretionary relief would have had at least a colorable defense to deportability."[63]

There are no other federal circuits rejecting a retroactive application of section 440(a). The Fifth Circuit, however, in *Mendez-Rosas*,[64] suggested that it would have declined to attach a retroactive application to 440(a) had the petitioner properly rebutted the presumption of retroactivity attached to jurisdictional statutes. The *Mendez-Rosas* court reasoned that

> [r]ebuttal of this presumption [of retroactivity in the case of jurisdictional statutes] requires some showing that the jurisdictional nature of this action curtailed one or more of Petitioner's substantive rights. [However, because] [p]etitioner does not challenge the fact that he is an alien properly found deportable by reason of his conviction, . . . [he] has failed to show that any of his substantive rights have been curtailed.[65]

Hence, the Fifth Circuit's decision suggests that if Mendez-Rosas had contested the substantive grounds on which he was found deportable rather than merely arguing that the BIA had abused its discretion in denying his 212(c) petition, then the court may have declined to apply 440(a) retroactively to his case.

B. Arguments For A Retroactive Application

In contrast to the Seventh Circuit, the Second Circuit, in *Hincapie-Nieto*, ruled that section 440(a) removed the court's jurisdiction to review a petition pending at the date of the AEDPA's enactment because the statute was purely jurisdictional, affecting only the right of the court, itself, and not the substantive rights of the petitioner.[66]

Hincapie-Nieto became a legal permanent resident in the United States in 1975 and was convicted in 1992 on charges of conspiracy to distribute, and possession with intent to distribute, cocaine.[67] Hincapie-Nieto served a twenty-month sentence and during his two-year term of supervised release, the Immigration and Naturalization Service instituted deportation proceedings against him based on his prior conviction.[68]

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61. *Reyes-Hernandez*, 89 F.3d at 492 (quoting *Landgraf*, 511 U.S. at 255).
62. *Id.*
63. *Id.* at 493.
64. *Mendez-Rosas*, 87 F.3d at 676; *see also* text accompanying note 77.
65. *Mendez-Rosas*, 87 F.3d at 676.
66. *Hincapie-Nieto*, 92 F.3d at 31.
67. *Id.* at 28.
68. *Id.*

Hincapie-Nieto conceded his deportability and applied for discretionary relief under section 212(c) of the INA. Hincapie-Nieto's 212(c) application was denied by an immigration judge and the denial was affirmed by the BIA.[69] Hincapie-Nieto thus proceeded to appeal to the Second Circuit for review of his final deportation orders pursuant to federal statute.[70]

In holding that it was barred from judicial review by section 440(a), the Second Circuit cited the Supreme Court's rationale in *Landgraf*[71] that "'[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'"[72] The Second Circuit drew an analogy between Hincapie-Nieto's predicament and that of the petitioner in *Hallowell v. Commons*,[73] a suit brought by an heir to establish title on an allotment of land made to his decedent. In *Hallowell*, a statute was passed while the case was pending that removed the court's jurisdiction over the dispute and vested exclusive jurisdiction in the Secretary of the Interior.[74] The Second Circuit analogized the statutory removal of the court's jurisdiction in the *Hallowell* case with section 440(a)'s removal of the Second Circuit's jurisdiction in the case of *Hincapie-Nieto*. In addition, the Second Circuit addressed the contrast between its decision in *Hincapie-Nieto* and the Seventh Circuit's decision in *Reyes-Hernandez*. Acknowledging Judge Posner's precautions against a retroactive application of section 440(a), the Second Circuit countered that it was "skeptical that any alien concedes deportability only because of the expected . . . 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."[75] Having acknowledged and rebutted the Seventh Circuit's contradicting decision, the *Hincapie-Nieto* court conceded that it had no jurisdiction to review the petitioner's final deportation orders, but recognized Hincapie-Nieto's option to file a habeas corpus petition to challenge his detention by the INS pending deportation.[76]

The Ninth Circuit likewise embraced a retroactive application of section 440(a)'s bar to judicial review. In *Duldulao*, the Ninth Circuit held that section 440(a) applied retroactively and that such an application did not offend the separation of powers.[77] Judge O'Scannlain, referencing the plenary power doctrine, explained that the courts of appeal have "jurisdiction to review certain final orders of deportation and exclusion against aliens only because Congress has conferred it."[78] O'Scannlain noted that because the Constitution vests Congress with the power to define lower federal courts' jurisdiction over matters involving the exclusion and deportation of aliens, the retroactive application of section 440(a)'s removal of jurisdiction does not offend the separation of powers doctrine.[79]

Finally, the Fifth Circuit, in *Mendez-Rosas*, held that section 440(a) addresses a

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69. *Id.*
70. *See supra* note 12.
71. *Landgraf*, 511 U.S. at 258.
72. *Hincapie-Neito*, 92 F.3d at 29 (quoting *Landgraf*, 511 U.S. at 258 (quoting Hallowell v. Commons, 239 U.S. 506, 508 (1916)).
73. *See Hallowell*, 239 U.S. at 506.
74. *Id.* at 508.
75. *Hincapie-Nieto*, 92 F.3d at 30.
76. *Id.* at 31.
77. *Duldulao*, 90 F.3d at 400.
78. *Id.* at 399.
79. *Id.* at 400.

jurisdictional issue, and thus requires a presumption of retroactive application that bars judicial review of appeals pending at the date of the AEDPA's enactment.[80] The Fifth Circuit, however, noted the possibility of rebutting the presumption of section 440(a)'s retroactive application. The Court explained that where "some indication that the jurisdictional rule curtail[s] a substantive right, such as an impairment of rights which a party possessed when he acted, an increase in a party's liability for past conduct, or an imposition of new duties with respect to transaction already completed,"[81] the statute will not be applied retroactively.[82]

C. Conclusion

The reasoning behind the Supreme Court's neglect to apply the recently-enacted Civil Rights Act of 1991 in *Landgraf v. USI Film Products*[83] provides a suitable framework for assessing the application of AEDPA section 440(a) to pending appeals. Toward that end, the courts of appeal should examine the 'new legal burden' that AEDPA section 440(a) places on legal aliens who admit their deportability in the hope of obtaining judicial review of their final deportation orders. The petitioners in *Duldulao, Hincapie-Nieto, Mendez-Rosas,* and *Reyes-Hernandez* each conceded deportability based in part on the prospect of judicial review of the B.I.A.'s final deportation order. AEDPA section 440(a)'s removal of such judicial review adds an obvious 'new legal burden' to the plight of those petitioners who conceded their deportability before the Act's passage. Thus far, however, only the Seventh Circuit has found that the application of section 440(a) would "attach a new legal consequence"[84] so detrimental to the petitioner's situation that the court refused to apply section 440(a) retroactively.

The Second, Fifth, and Ninth Circuits must note the Supreme Court's warning that "prospectivity remains the appropriate default rule . . . [because it] generally coincide[s] with legislative and public expectations."[85] In light of the fact that Congress made no provisions for a retroactive application of the statute, the courts of appeal should abide by the proper default rule of *ex post facto* prohibition rather than adhering to a presumption of retroactivity.

IV. PROPOSED AMENDMENT TO SECTION 440(a)

Because the plenary power doctrine expressly reserves the power to regulate immigration and deportation proceedings in the United States, the power to resolve the current split among federal circuits lies within the legislative, not the judicial, branch. Accordingly, Congress should amend AEDPA section 440(a) to include the statute's effective date as follows:

> The amendments made by this section (amending 8 U.S.C. § 1105a(a)) shall apply to all aliens against whom deportation proceedings are initiated after the date of enactment of this Act [April 24, 1996].

By setting forth an express clause governing the date of effectiveness for section 440(a), Congress meets its responsibility to direct and oversee the immigration and

80. *Mendez-Rosas,* 87 F.3d at 674.
81. *Id.*
82. *See infra* note 83 and accompanying text.
83. Landgraf v. USI Film Products, 511 U.S. 244 (1994).
84. *See Reyes-Hernandez,* 89 F.3d at 492.
85. *See Landgraf,* 511 U.S. at 257.

deportation process in the United States. The judiciary's inconsistent applications of section 440(a) will be resolved by such an amendment, and all aliens will be ensured of receiving a uniform application of due process under the American legal system. As the Supreme Court noted in *Landgraf*, "[r]equiring clear intent [by Congress specifying the effective date of legislation] assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[86] In light of the current circuit split over AEDPA section 440(a), Congress must now step forward and weigh both the benefits and drawbacks of a retroactive application of section 440(a). The discrepancy in due process protection currently afforded to aliens under section 440(a) suggests that more drawbacks than benefits have resulted from retroactive application of the statute. Thus, it is imperative that Congress amend section 440(a) to apply only to deportation hearings enacted after the AEDPA's passage.

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86. *Id.*

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