

DEPORTATION OF CRIMINAL ALIENS AND THE TERMINATION OF JUDICIAL REVIEW BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

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I. INTRODUCTION

Perhaps the most intellectually challenging legal question which has baffled jurists might have been answered by the Anti-Terrorism and Effective Death Penalty Act of 1996.¹ It is the question of whether Congress has the power to eliminate all the subject matter jurisdiction of article III courts.² Congress took a bold step in 1996 with the Anti-

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

2. "The judicial Power of the United States, shall be vested in one supreme Court, and in such *inferior Courts* as the Congress may from time to time ordain and establish" U.S. CONST. art. III, § 1.

Terrorism and Effective Death Penalty Act,³ which eliminates all judicial review of a final order of deportation when an immigrant is deportable by reason of the commission of a criminal violation.⁴ Obviously, immigration law goes beyond the courts of any nation, and in fact affects the international community in the form of migration and forcible repatriation.

This Comment examines this constitutional question from an immigration perspective and breaks the analysis down into four sections to give the reader a better means to understand this complex, yet ever changing area of law. Section two provides rudimentary knowledge about federal court subject matter jurisdiction and thus leads into the second section which enumerates criminal ground for deportation in Australia, France, Canada, England, and the United States. As will be evident from the discussion *infra*, all five countries have different standards for deportation of criminal aliens.⁵ The homogeneous characteristic among Australia, France, Canada, and England is that a detached judiciary has jurisdiction to review orders of deportation. The exception is the United States. Is the American policy wise? Why is it that expeditious deportation of criminal aliens trumps the procedural safeguard of having one's case reviewed by a detached and independent judiciary?

Section four provides an in-depth analysis of the constitutionality of the Anti-Terrorism and Effective Death Penalty Act as it relates to the truncation of federal court subject matter jurisdiction. The impetus for the Anti-Terrorism and Effective Death Penalty Act was the Oklahoma City bombing.⁶ Many lives were lost, people felt insecure, thus they concluded

3. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

4. *Id.*

5. In Australia, a criminal alien is deportable if crime committed punishable by a sentence of one year or more, *Re S.J.*, No. T82/49 (Austl. Admin. App. Trib. Apr. 28, 1983); an alien is deportable from France when the alien's presence on French territory constitutes a serious threat to public order, *Djeroud v. France*, 14 Eur. Ct. H.R. 68 (1991). An alien is deportable from Canada if the alien has been sentenced to more than six months imprisonment and five or more years could have been imposed for the criminal violation, *Canepa v. Canada* [1992] D.L.R. 4th 589. An alien is deportable from England when the alien's deportation would be conducive to the public good, *R.v. Immigr. App. Trib., Imm. A.R. 227* (Eng. 1987). An alien is deportable from the United States when the alien commits a crime of moral turpitude, 8 U.S.C. §§ 1182, 1251 (1996).

6. Representative Schumer stated,

Mr. Speaker, in America there have always been paranoid extremists, . . . I have sat face to face with the victims of terrorism and the families of the victims of terrorism, from Pan Am 103 through the World Trade Center bombing to the atrocity in Oklahoma City. I have met them all. When I compare that pain and that danger to the exaggerated rhetoric I hear from extremists about this bill, I fear for America and I fear for the lives of ordinary Americans.

without evidence that the Oklahoma City bombing was the work of criminal aliens.⁷ This consensus knew no boundaries, espoused by both black and white, bourgeoisie, and proletariat.

It is difficult to take a dispassionate look at the Oklahoma City bombing because criticism of remedial measures might make the critic a Judas⁸ among us. Taking that for what it is worth, can one securely say that a law which promises deportation if one engages in terrorist activities has even one iota of deterrence effect to a person who has an ardent passion to disrupt the American diaspora? Can we say that criminal alien X will no longer blow up a building or release poisonous gases because of the severe punishment of deportation? It would be logical to answer no to these questions with the explanation that deportation is irrelevant because most likely the commission of such crimes are accompanied with the penalty of death.⁹ Now it becomes clear that deportation is not a threat to the terrorists but a threat to immigrants who, for whatever reason, commit a crime punishable by one year or more.

142 CONG. REC. H3605, H3611 (daily ed. Apr. 18, 1996) (statement of Rep. Schumer).

7. Under the heading Middle-Eastern Suspect/Witness Sought, the author wrote:

At least three suspects/witnesses have reportedly been tentatively identified by the federal bombing task force and one or more may have been taken into custody. Several sources are reporting that three males of "middle-eastern extraction" are being sought in Texas and Oklahoma, and that some witnesses are being questioned at this hour by federal officers

(July 27, 1997) < <http://www.emergency.com/oklabomb.htm> > .

Clark Staten, the Executive Editor of ENN noted in his editorial perspective:

How could any number of these "experts" quickly jump to the conclusion that the perpetrators in Oklahoma City were "Moslem Extremists"? Most of the law enforcement officials and counter-terrorist analysts, interviewed by ENN, indicated that it was a matter of historic and analytical perspective not a quest to justify the condemnation of any ethnic group. Some, including ERRI, said that they had considered a domestic connection to the Waco Branch Davidian incident because of the date of the event, but had discounted it as details of the type of bomb and the tactics used were discovered. Most said that the circumstances surrounding the deadly atrocity in Oklahoma were just too similar to those seen in Lebanon, Israel, Egypt, England, and elsewhere to lead them to believe that this was a domestic attack. . . .

(visited July 27, 1997) < <http://www.emergency.com/oklabomb.htm> > .

8. See 26 *Mathew*: 47-49. One treacherous enough to betray a friend; one who disguises treachery as friendship. THE NEW GROLIER WEBSTER INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 521 (encyclopedic ed. 1972).

9. The United States Sentencing Guidelines provide in part that, "[t]he Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations." (visited July 27, 1997) < <http://www.uscc.gov/guide/ch2ta.htm> > .

The final section points out the unfair effects the statute will have on immigrants and the possibility and, most likely, certainty of abuse. The past is not necessarily reflective of the future, but the United States has a legacy of treating its *own* unfairly.¹⁰ Who will protect the immigrants?

II. FEDERAL COURT SUBJECT MATTER JURISDICTION

The Supreme Court of the United States has original jurisdiction in all actions in which ambassadors, public ministers, consuls, or vice consuls of a foreign state are parties.¹¹ The Supreme Court also has original jurisdiction in all controversies between the United States and a state, and all actions by a state against the citizens of the United States or against aliens.¹² Pursuant to Article III of the United States Constitution, Congress promulgated title 28 section 1251 of the United States Code.¹³ Congress

10. *Intermarriage prohibited; meaning of term "white person"*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as have no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

VA. CODE ANN. § 20-54 (1960 Repl. Vol.) *reprinted in* WALTER WADLINGTON, DOMESTIC RELATIONS 35 N.H. (1995).

Colored persons and Indians defined—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.

Id. § 1-14.

11. U.S. CONST. art. III, § 2, cl. 2.

12. In all cases affecting ambassadors, other public ministers and consuls, and those in which the state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Id.

13. (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states. (b) The Supreme Court shall have original but not exclusive jurisdiction of: 1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; 2) All controversies between the United States and a state; 3) All actions or proceedings by a state against the citizens of another state or against aliens.

has the power under article III of the United States Constitution to expand or contract the subject matter jurisdiction of the federal courts within the limitations of article III.¹⁴ This plenary power was unequivocally exercised when Congress gave the Supreme Court the right to issue writs of certiorari to hear appeals on final judgments involving federal questions.¹⁵

Federal courts obtain their jurisdiction when the cause of action involves a federal question,¹⁶ or when the cause of action is based upon complete diversity.¹⁷ Federal courts inherently have limited subject matter jurisdiction.¹⁸ In *Owen*, Justice Stewart writing for the majority said, "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limit upon federal jurisdiction, whether imposed by the Constitution, or by the Congress must be neither disregarded nor evaded."¹⁹ Moreover, even the federal courts themselves have espoused the idea of their limited jurisdiction by imposing self-limitation.²⁰ In *Ankenbrandt*,²¹ the Court said that even though there may be subject matter jurisdiction by virtue of diversity, the federal courts will not hear cases involving divorce, child support, or alimony.²² Thus the long stance of limited federal jurisdiction is deeply rooted in the adjudicatory tradition of the federal courts.

28 U.S.C. § 1251 (1996).

14. U.S. CONST. art. III, § 1, cl. 1.

15. The Supreme Court may review cases from the court of appeals by the following methods: 1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; 2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.S. § 1254 (1996).

16. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C.A. § 1331 (West 1996).

17. 28 U.S.C. § 1332 (1996).

18. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

19. *Id.* at 374.

20. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

21. *Id.*

22. "[T]he domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Id.* at 703, 112 S. Ct. at 2214, 119 L.Ed 2d at 469.

The United States Congress has plenary power over immigration which arguably comes from article I of the Constitution,²³ or which emanates from the infinite number of penumbras to the Constitution itself. This is manifested by the creation of the Immigration and Naturalization Service, an executive agency which determines the number of aliens that can legally enter the United States. It has been said that Congress gives and Congress takes. This holds true for immigrants who have committed crimes of moral turpitude by virtue of deportation.²⁴ "Any alien who is convicted of a crime involving moral turpitude committed within five years or ten years [in the case of a lawful resident] after date of entry, and is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."²⁵

III. CRIMINAL GROUNDS FOR DEPORTATION

A. *Australia*

An immigrant who has committed a criminal offense punishable for a period of one year or more is deportable from Australia as mandated by the Migration Act of 1958, section 13(a).²⁶ While the Australian courts have recognized that, "the Australian community may take the view that it prefers not to accept the criminal into its society,"²⁷ the courts have not rigidly followed this rule. This holds true although the *S.J.* court noted that "the decision to deport may be made, not because the criminal represents any *significant future risk* to the Australian community if he remains"²⁸ The deportation process for a criminal violation seems to take on a two-step process in Australia. First, the criminal violation must be punishable for a period of one year or more.²⁹ Second, the court must analyze whether the violation was a violent or nonviolent crime.³⁰ If the offense was violent, "the damage to the community that would flow from

23. "The Congress shall have the power . . . [t]o establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

24. 8 U.S.C. §§ 1182, 1251 (1996).

25. 8 U.S.C. § 1251 (a)(H)(ii)(I) (1996).

26. *Re: S.J.*, No. T82/49 (Austl. Admin. App. Trib. Apr. 28, 1983).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

recidivism is great and must weigh heavily in favor of deportation.”³¹ However, if the crime was nonviolent such as false pretense, the order granting deportation will be revoked because there is “comparatively little damage likely to be suffered by any person in particular or by the community in general.”³² This bifurcation between violent and nonviolent crimes seems to be rationally based on a wise policy decision because it would be safe to infer that violent criminals pose the most serious threat to the community. However, this form of analysis is absent from American jurisprudence.³³ In fact, one could be deported from the United States for a nonviolent offense simply because it is punishable by one year or more.³⁴ Thus a legal immigrant could be deported for voting in a federal election.³⁵ It is simply wrong to conclude that Australia has the more preferable system. Deference and earned respect should be given to the American Legislatures for their policy rationale of excluding, and when appropriate deporting criminal aliens.

B. France

Criminal aliens are deportable from France when the alien’s presence on French territory constitutes a serious threat to public order pursuant to the Order (Ordonnance) of 2 November 1945 on the conditions for alien entry into and residence in France.³⁶

31. *Id.*

32. *Re.*: S.J., No T82/49 (Austl. Admin. App. Trib. Apr. 28, 1983).

33. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

34. “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 . . . is deportable.” 8 U.S.C.S. § 1251(a)(H)(2)(B)(I) (1996); “Any alien who is, or any time after entry has been, a drug abuser or addict is deportable.” 8 U.S.C.S. § 1251(a)(H)(2)(B)(ii) (1996); “Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.” 8 U.S.C.S. § 1251(a)(H)(4)(D)(5) (1996).

35. Section 216 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 states in part that:

[i]t shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House or Representatives, Delegate from the District of Columbia, or Resident Commissioner Any person who violates this section shall be fined under this title, imprisoned not more than one year, or both.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (1996).

36. *Djeroud v. France*, 14 Eur. H.R. Rep. 68 (1991).

However, even though a criminal alien may pose a serious threat to public order or public credit, it does not automatically mean that the alien will be deported. For instance, an alien who is, 1) a minor under eighteen; or 2) an alien who can prove that he or she has been a resident of France for more than fifteen years; or 3) an alien who over the past twenty years has not been definitively sentenced to a term of at least one year's imprisonment without suspension, or without several terms of imprisonment without suspension totaling at least one year, is not subject to deportation.³⁷ Moreover, a person cannot be deported if deportation would result in degrading treatment or torture in the person's home country.³⁸ This comes with two exceptions. First, an alien "sentenced to an unsuspended term of imprisonment of any duration for an offense covered by section 4 and 8 of Act 73-548 of June 1973 concerning collective housing is deportable."³⁹ Second, except aliens under eighteen, an alien is deportable in a case of imperative urgency when it constitutes an absolute necessity for the security of the state or for public safety.⁴⁰

C. Canada

Criminal aliens are deportable from Canada pursuant to the Immigration Act of 1976 where: 1) the immigrant has been sentenced to more than six months imprisonment, and 2) five or more years could have been imposed for the criminal violation.⁴¹

In early English common law, some foreign born nationals were classified as *denizens*.⁴² These are "aliens born, but who has obtained *ex donatione regis* letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative."⁴³ *Canepa v. Canada*⁴⁴ involved an alien claiming a *denizen* status. The *Canepa* court rejected the doctrine noting the absence of *stare decisis*, and espoused the idea that alien rights must be found under the Canadian Charter.⁴⁵ The *Canepa*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Canepa v. Canada* [1992] D.L.R. 4th 589.

42. W.C. SPRAGUE, BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 65 (1895) *reprinted in Canepa v. Canada* [1992] D.L.R. 4th 589.

43. *Id.*

44. *Id.*

45. *Id.*

court also noted that “[t]he most fundamental principle of immigration law is that noncitizens do not have an unqualified right to enter or remain in . . . [Canada].”⁴⁶ This logically extends to the court’s conclusion that deportation is not a punishment, and even if it was, it is not “cruel and unusual” because it is not excessive as to outrage standards of decency.⁴⁷

D. England

A person who is not a British citizen is subject to deportation from the United Kingdom if the Secretary of State finds that his deportation would be “conducive to the public good.”⁴⁸ The actual definition of what is “conducive to the public good” is unknown. However, House of Commons paper 159 states that “each case will be considered in light of the relevant circumstances known to the Secretary of State”⁴⁹ Furthermore, an alien ordered deported from the United Kingdom can only be heard to argue that his deportation violates a treaty in which England is a party if Parliament adopts the treaty.⁵⁰ This is because “[t]reaties and declarations do not become [English] law until they are made law by Parliament.”⁵¹

In deciding whether to execute a deportation order, the Secretary of State must use

every relevant factor known to him, including: age; length of residence in the United Kingdom; strength of connection with the United Kingdom; personal history, including character, conduct and employment record; domestic circumstances; the nature of the offense of which the person was convicted; previous criminal record; compassionate circumstances; [and] any representations received on the person’s behalf⁵²

46. *Id.*

47. *Id.*

48. *R. v. Immigr. App. Trib.*, Imm. A.R. 227 (Eng. 1987).

49. *Id.*

50. *Id.*

51. *Id.*

52. Imm. A.R. 277 (quoting House of Commons paper 156).

E. United States

Aliens who have committed "crimes of moral turpitude" are subject to deportation and exclusion from the United States.⁵³ This is because crimes involving moral turpitude are regarded as evil, and persons committing such crimes have squalid moral sentiment towards the community. The logic behind deporting aliens who have committed crimes of moral turpitude stems from the notion that the United States was generous and overly benevolent in opening its borders to foreign nationals who have the opportunity to reap the benefits that the United States has to offer.

An alien who is recalcitrant to the laws of the United States shows disrespect to the American diaspora, and the establishment of civility. Such aliens who commit crimes of moral turpitude constructively relinquish all privileges to be domiciled in the United States. The crimes that have been traditionally held as "crimes of moral turpitude" within the meaning of United States immigration law⁵⁴ all seem to be specific intent crimes.⁵⁵ The only exception is rape, a general intent crime,⁵⁶ which is also regarded as a crime of moral turpitude.

Prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, aliens, whether convicted of a criminal offense or not, could appeal a final order of deportation to the federal courts.⁵⁷ On April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act.⁵⁸ This Act truncates the federal court's power to hear

53. See 8 U.S.C. §§ 1182, 1251 (1996).

54. Bribery is a crime of moral turpitude, see *United States v. Esperdy*, 285 F.2d 341 (2d Cir. 1961), cert. denied 366 U.S. 905 (1961); Forgery and Embezzlement are crimes of moral turpitude, *Baer v. Norene*, 79 F.2d 340 (9th Cir. 1935); Perjury is a crime of moral turpitude, *United States v. Uhl*, 70 F.2d 792 (2d Cir. 1934), cert. denied 293 U.S. 573 (1934); Murder is a crime of moral turpitude, *Fong Haw Tan v. Phelan*, 162 F.2d 663 (9th Cir. 1947), rev'd on other grounds 333 U.S. 6 (1947). But see *Sallano v. Doak*, 5 F. Supp. 561 (1933). Sex offenses are crimes of moral turpitude, *Marinelli v. Ryan*, 285 F.2d 474 (2d Cir. 1961). Even consensual sodomy is a crime of moral turpitude, *Velez-Lozana v. INS*, 463 F.2d 1305 (D.C. 1972); Tax offenses are crimes of moral turpitude, *Costello v. INS*, 311 F.2d 343 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 120 (1964); Weapon offenses are also crimes involving moral turpitude, *Re S 8 I & N Dec.* (BIA 1959).

55. Specific intent designates "a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime." *State v. Bridgeforth*, 750 P.2d 3, 5 (Ariz. 1988).

56. *State v. Guest*, 583 P.2d 836 (Alaska 1978).

57. *Kladis v. INS*, 343 F.2d 513 (7th Cir. 1965).

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

deportation cases on appeal in which the deportee has been convicted of a criminal violation.⁵⁹

IV. CONSTITUTIONALITY OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The jurisdictional limitation section of the Anti-Terrorism and Effective Death Penalty Act of 1996, which will instigate fervent constitutional debate on the viability of immigration law, states in part that “[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.”⁶⁰

Noteworthy, and perhaps what can be termed as a *troubling epiphenomenon*, was an issue pointed out by Representative Velazquez. Representative Velazquez remonstrated about the fact that the Anti-Terrorism and Effective Death Penalty Act is rooted in a bill that was rushed through Congress without adequate deliberation to meet the anniversary deadline of the Oklahoma City bombing.⁶¹ Surely the Act does not hide its meaning or purpose;⁶² however, constitutionality of statutes are judged on the basis of whether rights guaranteed by the Constitution are deprived or unreasonably infringed, or whether Congress’ action is within the purview of the Constitution itself.⁶³

The intriguing question now becomes whether the Anti-Terrorism and Effective Death Penalty Act of 1996 is a valid exercise of Congress’ power pursuant to article III of the United States Constitution, or whether Congressional action usurps federal court subject matter jurisdiction. In *Marbury v. Madison*, Justice Marshall said that the Supreme Court of the United States is the final arbiter of the Constitution.⁶⁴ Thus, it is upon the established precedents of the Supreme Court that Congress’ actions must be judged.

59. *Id.*

60. *Id.*

61. 142 CONG. REC. H3612 (daily ed. Apr. 18, 1996). Representative Velazquez in disgust said, “Mr. Speaker, rushing this bill to the floor to meet a publicity deadline is irresponsible. Once again we are sacrificing our people to play election year politics. Americans and their civil rights are too important to allow this.” *Id.*

62. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). Justice Learned Hand writing about deciphering the meaning and purpose of statutes wrote, “[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or objective to their meaning.” *Id.*

63. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

64. *Id.*

In *Ex Parte McCordle*, the Supreme Court explicated the limitations that can be placed on the federal courts' subject matter jurisdiction.⁶⁵ *McCordle* involved a petitioner who filed for a writ of habeas corpus alleging unlawful restraint by the military force.⁶⁶ The writ was issued and returned to the military commander. McCordle was not in the military but was held in the custody of the military because he had published articles allegedly incendiary and libelous. Upon a hearing, McCordle was remanded to military custody. McCordle appealed to the Supreme Court, and his case was heard before the Justices. Before the decision was rendered, Congress repealed the February 5, 1867 Act which gave the Supreme Court jurisdiction to hear the matter. Chief Justice Chase, writing for the majority noted that "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this Court is given by the express words."⁶⁷ This opinion removed all obfuscation and doubt of Congress' power to limit the jurisdiction of the federal courts. In fact, the opinion went on further to say that the opinions or motives of Congress are irrelevant.⁶⁸ Under the *McCordle* framework, Congress could remove the subject matter jurisdiction of the Federal Courts even if Congress was motivated by some form of animus. However, *Ex Parte McCordle* does not stand for the proposition that Congress' power is absolute in jurisdictional expansion and limitation.

United States v. Klein involved a statute passed by Congress which gave the President the power to grant pardons and return property to individuals who were thought to be in opposition of the United States.⁶⁹ On August 12, 1863, the President granted Wilson a pardon; on January 1, 1867, the Act giving the President the power to grant pardons was repealed. Three years later in 1870, Congress passed another Act which stated that any pardons granted to any person by the President because such persons were disloyal are invalid. Therefore, the jurisdiction of the Supreme Court in the case shall cease and the court shall forthwith dismiss the suit of such claimant.⁷⁰ The Court reasoned that if the Act only denied the right of appeal in a particular class of cases, there would be no doubt

65. *Ex Parte McCordle*, 74 U.S. 506 (1868).

66. *Id.*

67. *Id.* at 513.

68. *Id.*

69. *United States v. Klein*, 80 U.S. 128 (1871).

70. *See id.* at 129.

Congress' action was constitutional.⁷¹ However, the Court went on to say that Congress ventured into another coordinate branch of the government when it would ex post facto override an executive decision of the President. The Court stated, "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."⁷² Therefore, although there is no doubt that Congress may limit the subject matter jurisdiction of the federal courts, Congress must be certain that it does not step into the department of another coordinate branch of the government. The Anti-Terrorism and Effective Death Penalty Act of 1996 does not pose the separation of powers problem illuminated in *Klein*. The Act, without usurping any executive power simply states that a deportee will not have a right to review in federal courts because of the deportee's deportable status as a convicted criminal.⁷³ This in no way infringes on the executive branch of the government, but simply limits the federal courts' jurisdiction.

The principle of stare decisis answered the constitutionality of the Anti-Terrorism and Effective Death Penalty Act of 1996 in 1850 in *Sheldon v. Sill*.⁷⁴ In *Sheldon*, the Judicial Act prohibited the federal courts from hearing cases in any suit to recover the contents of any promissory note. The Supreme Court in upholding the constitutionality of the statute said:

[I]f the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress [H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.⁷⁵

This same linear form of reasoning was also expounded in *Lauf v. Shinner*.⁷⁶ *Lauf* involved a statute enacted by Congress which provided that

71. *Id.* at 145.

72. *Id.* at 147.

73. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

74. *Sheldon v. Sill*, 49 U.S. 441 (1850).

75. *Id.* at 448.

76. *Lauf v. Shinner*, 303 U.S. 323 (1938).

no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute.⁷⁷ The Court in upholding the constitutionality of the statute said, “[T]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”⁷⁸

Likewise, the Anti-Terrorism and Effective Death Penalty Act of 1996 falls within the same ambit of congressional definition and limitation of the federal courts’ subject matter jurisdiction. The Act affirmatively limits the federal courts’ jurisdiction to review cases involving deportable aliens who have been convicted of a criminal violation. It is upon this same principle that *Ex Parte McCardle*⁷⁹ and its progeny are based. “[T]he appellate powers of the [Supreme] Court are not given by the judicial act, but are given by the Constitution,” they are, nevertheless, “limited and regulated by . . . acts [of Congress]”⁸⁰ The Supreme Court and the lower federal courts have long recognized that the federal judicial system is inherently limited, and that Congress may define and limit the federal court’s subject matter jurisdiction within the purview of article III.⁸¹

An alien who has been convicted of a criminal offense and subsequently ordered deported cannot argue but for the Anti-Terrorism and Effective Death Penalty Act he would have had a fundamental right to appeal.⁸² The right to appeal is not a fundamental right. It is a legislative grace which can be given and taken away by Congress. In *Ross v. Moffitt*, the Supreme Court said that the government is not obliged to provide an appeal after a conviction.⁸³ Moreover, the Anti-Terrorism and Effective Death Penalty Act only prevents judicial review of a deportation order. The Act does not preclude criminal aliens from appealing their criminal convictions. But even if the Act did, it would still not run afoul of the Constitution because there is no fundamental right to judicial review.⁸⁴

77. *Id.* at 327.

78. *Id.* at 330.

79. *Ex Parte McCardle*, 74 U.S. 506 (1868).

80. *Id.* at 513.

81. U.S. CONST. art. III.

82. *See McKane v. Durston*, 153 U.S. 684 (1894). The Court held that a state need not provide any appeal at all. Based on this rationale, the same principle applies to the Federal government.

83. *Ross v. Moffitt*, 417 U.S. 600 (1974).

84. *Id.* at 606.

V. THE CERTAINTY OF FAIRNESS IS FOREVER GONE

Representative Scott in opposing the Anti-Terrorism and Effective Death Penalty Act said, “[O]ur rights [will be dilapidated] if we have secret trials where people can be deported, based on evidence presented in private”⁸⁵ At first glance the Representative’s statement might seem like a hyperbole. However, the practical effect of the Anti-Terrorism and Effective Death Act is that it will run into procedural irregularities. There are no safeguards in the Act to decipher whether criminal aliens are given fair deportation hearings.⁸⁶ The fact that there is a deportation hearing should not lead one to the conclusion that criminal aliens are afforded their procedural safeguards under the Fifth Amendment of the Constitution. In fact, what the Act has done is similar to what the lawmakers in *Yick Wo v. Hopkins*⁸⁷ did. The Board of Immigration appeals will have plenary power to determine which criminal alien gets deported, without their actions reviewable by the detached judiciary.⁸⁸ This leaves ajar the door for possible abuses which will go uncorrected. The logical question one might ask is, “What about procedural due process?” Procedural due process is not guaranteed for a criminal alien facing deportation under this new Act.⁸⁹

This dogmatic condition has not always been the case.⁹⁰ In *Mendoza*, the defendants were arrested in Lincoln, Nebraska on October 23, 1984. They were deported on November 1, 1984. On December 12, 1984, they were once again separately arrested in Lincoln, Nebraska. While being prosecuted for illegal entry into the United States, the defendants asserted a collateral attack on their prior deportation hearing. The defendants claimed that the Immigration Law Judge inadequately informed them of their right to counsel at the hearing. The defendants also contend that they unknowingly waived their right to a suspension of deportation. The Supreme Court held that the prior deportation hearing violated the aliens’ procedural due process rights.⁹¹ The Anti-Terrorism and Effective Death Penalty Act permanently precludes this type of collateral attack on a deportation order. Abuses like that in *Mendoza* are

85. *Supra* note 6 (statement of Rep. Schumer).

86. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

87. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the ordinance gave certain counsel members plenary power to issue licenses to operate laundry service. The counsel members used this power to effectuate their racial animus towards the Chinese immigrants.

88. *See* Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

89. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

90. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987).

91. *Id.* at 837.

bound to occur in the application of this new Act. The only problem is that the criminal aliens who are stripped of their procedural safeguards will no longer have redress in the courts of law.

For illustration purposes assume X, an immigrant, was born in the middle east. He is now twenty-five years old, and has been residing legally in the United States for the last twenty-three years. In all respects but for his nationality, X is a typical twenty-five-year-old American. Recently, X's girlfriend broke up with him and as a result X has been calling her continuously. She took umbrage to this and obtained a protective order against X. Assume further that after the protective order was issued, the court found that X was in violation. What result? Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, X is deportable.⁹² At the deportation hearing the trier of facts is Judge Unfair who lives up to her name. She abused her power and discretion and ordered X deported. What result? X is going back to the Middle East.⁹³ "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense shall not be subject to review by any court."⁹⁴

Stupified? Flabbergasted? This outcome is fundamentally wrong. What about the length of X's residence in the United States? What about the strength of X's connection to the United States? What about X's personal history? What about the nature of the offense which X allegedly committed? What about the fact that X has no previous criminal record? These are all questions which should be answered before X, or any other

92. Any alien who at any time after entry is enjoined under protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection was order was issued is deportable. For purposes of this clause, the term 'protection order' means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts . . . whether obtained by filing an independent action or as a pendente lite order in another proceeding.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 (1996).

93. The author intentionally omitted the sentences, "X is going back home." This is because it cannot reasonably be said that the Middle East is X's home. He has been away for almost all his life; he grew up in a different setting, culture, values, norms and traditions. In all respects, X is an American.

94. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.

immigrant, is deported. A sound immigration policy is necessary, a fair one is paramount.⁹⁵

VI. CONCLUSION

Federal court jurisprudence has laid the principle that Congress, pursuant to article III of the United States Constitution, may define and limit the jurisdiction of the federal courts. The Anti-Terrorism and Effective Death Penalty Act of 1996, though dogmatic to some, effectuates this well established principle. In essence, this is the same type of limitation that the federal courts have upheld since time immemorial. What remains is the lost cries of immigrants wrongly deported. The United States Constitution guarantees many things, the notable exception being moral fairness. The Australian, French, Canadian, and English cases all point out a process which is no longer available in the United States: review by the independent judiciary.

One cannot blame the American legislatures for abhorring criminal aliens, and their efforts to get them out of the United States as quickly as possible. One also should not question the Legislatures' motive;⁹⁶ but this paper questions the wisdom of the termination of judicial review by the Anti-Terrorism and Effective Death Penalty Act. We can be tough on criminal aliens without trampling on and rampantly traversing the Due Process Clause.

95. The author offers no conclusion or opinion as to whether the Anti-Terrorism and Effective Death Penalty Act is fair, but made statements so that the reader can ponder and conclude without influence as to fairness.

96. *See generally supra* note 6.