Casenotes

INS v. St. Cyr

I. INTRODUCTION

In *Immigration and Naturalization Service v. St. Cyr,* the Court interpreted recent sweeping legislation which had brought about significant changes in the area of immigration law.[1] The Court addressed two distinct issues of statutory interpretation, both of which arose out of provisions of the Antiterrorism and Effective Death Penalty Act of 1996[2] (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[3] (IIRIRA).[4] The first issue was whether provisions in either of these acts stripped the Court of its habeas jurisdiction in immigration cases.[5] The Court held that it had jurisdiction to hear petitions for writs of habeas corpus in such cases, and, therefore, went on to address the second issue.[6] The second issue was whether the provisions of AEDPA and IIRIRA which narrowed the class of deportable aliens who are eligible for a discretionary waiver of deportation were retroactive.[7] The Court held that these provisions were not retroactive.[8]

II. FACTS

AEDPA, enacted on April 24, 1996, and IIRIRA, enacted on September 30, 1996, both made significant changes to the Immigration and Nationality Act[9] (INA).[10] Section 401(e) of AEDPA repealed the provision in the INA granting courts power to hear petitions for writs of habeas corpus made by aliens being held for deportation.[11] Also, jurisdiction to judicially review administrative determinations from immigration proceedings was significantly consolidated.[12] Subject to certain exceptions, the new laws restricted judicial

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1. 533 U.S. 289 (2001).
2. AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
3. IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
4. *See St. Cyr*, 533 U.S. at 293.
5. *Id.*
6. *See id.* at 297-98.
7. *Id.* at 293.
8. *See id.* at 326.
9. 8 U.S.C. §§ 1101-1525 (1994).
10. *St. Cyr*, 533 U.S. at 292.
11. *Id.* at 309.
12. *Id.* at 311; 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), 1252(b)(9) (Supp. II 1996).

review to final orders and then only allowed review in the court of appeals and according to the procedures of the Hobbs Act.[13] Furthermore, in some cases, including those involving aliens who are being deported because of having committed a specified criminal offense, judicial review is no longer available at all.[14]

A second area of immigration law AEDPA and IIRIRA affected was the scope of eligibility for a waiver of deportation at the discretion of the Attorney General.[15] Under the INA as it stood before AEDPA and IIRIRA, any deportable immigrant who had an unrelinquished domicile of seven consecutive years and had not been convicted of an aggravated felony resulting in five years or more in prison could request a discretionary waiver of deportation from the Attorney General.[16] AEDPA enacted a section which laid out a list of offenses which would make any immigrants convicted thereof ineligible for discretionary waiver of deportation.[17] Only months later, the passage of IIRIRA narrowed the eligibility even more by removing the Attorney General's discretionary power to waive the deportation of any alien who had been "convicted of any aggravated felony."[18]

In 1986, Enrico St. Cyr was admitted to the United States as a lawful permanent resident.[19] On March 8, 1996, he was charged in a state court with selling a controlled substance and pled guilty.[20] The pre-AEDPA law which was applicable to St. Cyr at the time of his conviction made him deportable, but he was eligible to petition the Attorney General for a waiver of deportation.[21] St. Cyr's removal proceeding began in 1997 after both ADEPA and IIRIRA became effective.[22] Under the law as amended by these acts, St. Cyr was not eligible for a waiver of deportation.[23] The Attorney General refused St. Cyr's request for a waiver on the basis that under AEDPA and IIRIRA the Attorney General no longer had the discretionary power to grant such a waiver.[24]

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13. *St. Cyr*, 533 U.S. at 311; § 1252(a)(1).

14. *St. Cyr*, 533 U.S. at 311; § 1252(a)(2)(C).

15. *St. Cyr*, 533 U.S. at 297.

16. *Id.* at 295; 8 U.S.C. § 1182(c) (1994) (amended by AEDPA § 440(d), Pub. L. No. 104-132, 110 Stat. 1277 (1996) and repealed by IIRIRA § 304(b), Pub. L. No.104-208, 110 Stat. 3009-597 (1996)).

17. *St. Cyr*, 533 U.S. at 297; 8 U.S.C. § 1182(c) (Supp. II 1996) (repealed by IIRIRA § 304(b), Pub. L. No.104-208, 110 Stat. 3009-597 (1996)).

18. *St. Cyr*, 533 U.S. at 297 (citing 8 U.S.C. § 1229(a)(3) (Supp.V 1994)).

19. *St. Cyr*, 533 U.S. at 293.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *St. Cyr*, 533 U.S. at 293.

St. Cyr filed a petition for a writ of habeas corpus in federal district court alleging that the ADEPA and IIRIRA provisions repealing aliens' eligibility for discretionary relief based on convictions for certain types of crimes did not apply to those who were convicted of such offenses before the new laws were enacted.[25] The district court ruled that it had jurisdiction to hear the case and went on to agree with St. Cyr that he was eligible for a discretionary waiver.[26] The court of appeals affirmed the district court on both points.[27]

III. DECISION AND RATIONALE

A. *Habeas Corpus Jurisdiction*

In the majority opinion Justice Stevens noted that though section 401(e) of AEDPA repealed a prior specific grant of habeas jurisdiction in immigration cases, the Court must determine whether that provision, or provisions in IIRIRA, repealed the habeas jurisdiction under the general habeas statute, 28 U.S.C. § 2241.[28] *Ex parte Yerger*[29] and *Felker v. Turpin*[30] both stand for the proposition that a clear statement of congressional intent is required to repeal habeas jurisdiction.[31] The Court applied this rule of statutory construction by pointing out that a statute would have to specifically mention 28 U.S.C. § 2241 in order to repeal the general habeas jurisdiction granted by that section.[32] None of the new statutory provisions which the Immigration and Naturalization Service (INS) argued repealed habeas jurisdiction specifically mentioned 28 U.S.C. § 2241.[33]

The Court observed that section 401(e) of AEDPA repealed the habeas jurisdiction granted under the INA, but said nothing about the general habeas statute.[34] The INS argued that the fact the title of section 401(e) is "Elimination of Custody Review by Habeas Corpus" indicated Congress's intent to repeal habeas jurisdiction completely and not just that granted under the INA.[35] The Court rejected this argument by invoking the rule that a title is only considered in statutory interpretation when it illuminates some

25. *Id.*
26. *Id.*
27. Immigration and Naturalization Serv. v. St. Cyr, 229 F.3d 406 (2000).
28. *See St. Cyr*, 533 U.S. at 298.
29. 75 U.S. (8 Wall.) 85, 102 (1869) ("[W]e are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law . . . .").
30. 518 U.S. 651, 660-61 (1996) (Court refusing to find that a statute repealed 28 U.S.C. § 2241 by implication).
31. *St. Cyr*, 533 U.S. at 298-99.
32. *See id.* at 309.
33. *Id.*
34. *See id.*
35. *Id.*

meaning in the text which is ambiguous.[36] According to the Court the text contained no ambiguity; it repealed the habeas jurisdiction granted under the INA.[37] Because the text does not specifically mention 28 U.S.C. § 2241, section 401(e) of AEDPA does not repeal courts' habeas jurisdiction under the general habeas statute.[38]

The INS also contended that three provisions of IIRIRA eliminated habeas jurisdiction altogether in immigration cases.[39] Although these three provisions also do not specifically refer to the general habeas statute, the Court's determination that these sections did not completely repeal courts' habeas jurisdiction was primarily based on the distinction it drew between "judicial review" and "habeas corpus."[40] The pertinent provisions of IIRIRA restrict "judicial review" to final orders, and even then review is allowed in the court of appeals but not the district court.[41] Furthermore, in some cases, including those where an alien is deportable due to a drug conviction as St. Cyr is in this case, the courts have no "jurisdiction to review" at all.[42] The Court maintained that the phrases "judicial review" and "jurisdiction to review" did not include review by habeas corpus because, "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings."[43] This led to the Court's conclusion that habeas jurisdiction was not affected by the sections of IIRIRA that restrict or eliminate judicial review.[44]

The Court sought to buttress its conclusions further by discussing the rule that statutes must be construed in a way that will not raise serious constitutional issues if such an interpretation is "fairly possible."[45] This rule is pertinent because the Court concluded that interpreting AEDPA and IIRIRA as completely abolishing habeas jurisdiction in immigration cases would raise a serious question as to the constitutionality of such a repeal.[46] Therefore, in the Court's view, as long as at it was fairly possible to interpret AEDPA and

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36. *See St. Cyr*, 533 U.S. at 308-09 (citing Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).

37. *See id.*

38. *Id.*

39. *Id.* at 310-11. The three sections cited by the INS are codified at 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9).

40. *See St. Cyr*, 533 U.S. at 311.

41. *Id.*; 8 U.S.C. §§ 1252(a)(1), 1252(b)(9) (Supp. II 1996).

42. *St. Cyr*, 533 U.S. at 311; 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996).

43. *St. Cyr*, 533 U.S. at 311 (citing Heikkila v. Barber, 345 U.S. 229, 235 (1953) in which the Court found the issue was not subject to judicial review but still allowed habeas jurisdiction).

44. *See St. Cyr*, 533 U.S. at 312-14.

45. *Id.* at 299-300 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932); Ashwander v. TVA, 297 U.S. 288, 341, 345-48 (1936) (Brandeis, J., concurring); United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

46. *See St. Cyr*, 533 U.S. at 300.

IIRIRA as not repealing the habeas jurisdiction granted under 28 U.S.C. § 2241, the Court was required to use that interpretation.[47]

The validity of the Court's use of the rule of constitutional construction rested entirely on its conclusion that one of the possible interpretations might make the pertinent statute unconstitutional. Therefore, the Court discussed its reasons for this conclusion at length. Article I, section 9, clause 2 of the Constitution provides that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Court stated that at the very least this clause protects the writ of habeas corpus as it stood at common law when the Constitution was ratified in 1789.[48] Several cases cited by the Court indicated that up until and at that time aliens could exercise the writ.[49] Furthermore, the writ was used to review executive detention.[50] The Court relied on these cases as well as *Heikkila v. Barber*[51] which stated that some level of judicial intervention is "required by the Constitution."[52] Based on these cases, the Court determined that a statute which repeals habeas jurisdiction and does not provide for some collateral source of review for aliens being held for deportation who wish to seek review of an executive determination may very well constitute an unconstitutional suspension of habeas corpus.[53] This was an additional reason for the Court's ultimate conclusion that when St. Cyr filed his petition for a writ of habeas corpus in the district court, that court had jurisdiction to decide the case.[54]

B. Retroactivity

After determining that jurisdiction was proper, the Court attacked the INS's argument that sections of AEDPA and IIRIRA made St. Cyr ineligible

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47. *See id.* at 299-300.

48. *Id.* at 301 (citing *Felker*, 518 U.S. at 663-64).

49. *See St. Cyr*, 533 U.S. at 301-02 (citing *e.g.*, United States v. Villato, 2 U.S. (2 Dall.) 370 (C.C.D. Pa. 1797) (releasing Spanish citizen on writ of habeas corpus); *Ex parte* D'Olivera, 7 F. Cas. 853 (C.C.D. Mass. 1813) (No. 3,967) (granting Portuguese sailor's petition for writ of habeas corpus).

50. *See St. Cyr*, 533 U.S. at 301-02 (citing *e.g.*, Respublica v. Keppele, 2 U.S. (2 Dall.) 197 (Pa. 1793) (releasing fourteen-year-old runaway on basis that executive detention was based on incorrect ruling that minors could be made indentured servants); *D'Olivera*, 7 F. Cas. 853 (releasing arrested sailor on basis that warrant was filled out incorrectly); *In re* Randolph, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J., on circuit) (releasing Navy purser picked up after audit on account from years ago on basis that the account was settled and auditor did not have jurisdiction to open it back up)).

51. 345 U.S. 229 (1953).

52. *St. Cyr*, 533 U.S. at 300.

53. *See id.* at 315. The Court acknowledged that there was some merit to the opposing arguments but stated that there was enough evidence that the suspension clause would be violated to create a serious constitutional problem if the interpretation urged by the INS was adopted by the Court. *Id.*

54. *See id.* at 314-15.

for a discretionary waiver of deportation based on an offense he had been convicted of before those statutes were enacted.[55] Declaring St. Cyr ineligible for discretionary relief would have required applying AEDPA and IIRIRA to actions which took place before they became effective.[56] The Court followed its prior decisions in *Landgraf v. USI Film Products*[57] and *Bowen v. Georgetown University Hospital*[58] which made it clear that in order for statutes to be interpreted as having a retroactive effect, Congress must have made it clear that they intended that particular provision to be applied retroactively.[59] The Court applied the two-part analysis it laid out in *Landgraf* to determine if a statute was to be applied retroactively.[60]

The first step in the *Landgraf* analysis was to determine whether Congress sufficiently demonstrated its intent to make the statutes in question retroactive.[61] The Court rejected all of INS's arguments that Congress had shown the required manifestation of this intent.[62] First, the Court did not accept the idea that the comprehensiveness of the changes made by AEDPA and IIRIRA made it clear that they were supposed to completely and immediately wipe out all prior immigration laws.[63] Comprehensiveness was not enough to make a statute retroactive in *Landgraf* and the majority refused to make it so here.[64] Second, the INS argued that the promulgation of an effective date meant the acts were to be applied in all situations after that date regardless of retroactive effect.[65] The Court rejected this on the basis that the mere establishment of an effective date did not indicate that Congress had considered the harsh effects of retroactive application and decided to mandate it anyway.[66] A further reason the Court cited for rejecting these arguments was that in sections of AEDPA and IIRIRA Congress made it abundantly clear that those particular sections were to be applied retroactively, but it did not do so with the provisions at issue.[67]

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55. *See id.*
56. *St. Cyr*, 533 U.S. at 314-15.
57. 511 U.S. 244 (1994).
58. 488 U.S. 204 (1988).
59. *See St. Cyr*, 533 U.S. at 315-16.
60. *See St. Cyr*, 533 U.S. at 317, 320.
61. *Id.* at 316.
62. *See id.* at 317-26.
63. *See id.* at 317.
64. *See id.*; *Landgraf*, 511 U.S. at 260-61.
65. *St. Cyr*, 533 U.S. at 317-18.
66. *See id.* at 317 (citing *Landgraf*, 511 U.S. at 257 in which the Court said a "statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date").
67. *See St. Cyr*, 533 U.S. at 317-20.

The second step in the *Landgraf* analysis was to determine whether applying the AEDPA and IIRIRA sections to determine whether St. Cyr was eligible for discretionary relief would actually result in an impermissible retroactive effect.[68] The INS argued that since deportation proceedings look forward to a person's rights to stay in the country in the future, application of deportation laws are never retroactive, but the Court struck down this argument.[69] The Court focused on the unfairness for aliens who agreed to a plea bargain by which they pled guilty but were sentenced to less than the five years of imprisonment which would have made them ineligible for discretionary relief prior to AEDPA and IIRIRA.[70] Imposing the sections of AEDPA and IIRIRA on such aliens which make them ineligible anyway would have a harsh retroactive effect by depriving them of an important benefit they thought they were receiving as part of the plea bargain in exchange for their relinquishment of their right to a trial.[71] Because Congress did not clearly mandate retroactive application, and the application sought by the INS would be retroactive in this case, the Court held that the pertinent sections of AEDPA and IIRIRA were not to be applied to aliens whose convictions were a result of plea bargains the terms of which would have made such aliens eligible for discretionary relief under the law at the time of the plea bargain.[72]

C. Dissenting opinion by Justice Scalia in which Chief Justice Rehnquist and Justice Thomas joined and Justice O'Connor joined in part.

Justice Scalia's vituperative dissent was based on his conclusion that AEDPA and IIRIRA unquestionably took away the district court, and all courts', habeas jurisdiction in matters involving the deportation of aliens due to criminal convictions.[73] Justice Scalia asserted that IIRIRA was abundantly clear that the courts' habeas jurisdiction under 28 U.S.C. § 2241 was repealed in regards to all cases arising under the INA (as amended by AEDPA and IIRIRA).[74] Justice Scalia declared that habeas jurisdiction was within the definition of judicial review as that phrase is used in IIRIRA, and, therefore, the sections precluding judicial review in cases such as this precluded all habeas jurisdiction as well.[75] To support this contention, he pointed out a

68. *Id.* at 321.
69. *See id.* at 324.
70. *See id.* at 321-24.
71. *Id.* at 323.
72. *See St. Cyr*, 533 U.S. at 326.
73. *See id.* at 326-27 (Scalia, J., dissenting).
74. *See id.* at 327 (Scalia, J., dissenting).
75. *See id.* at 330 (Scalia, J., dissenting).

section of IIRIRA which stated that under particular circumstances judicial review is available in a habeas corpus proceeding.[76] Justice Scalia also rejected the majority's contention that historically the term judicial review did not include habeas proceedings.[77] He pointed to earlier statutes as well as cases which refer to habeas corpus proceedings as being a type of judicial review.[78] Justice Scalia further stated that the majority's view was taken from a single case which only says that *in the Hobbs Act* habeas corpus review is not within the meaning of judicial review.[79]

According to Justice Scalia, section 401(e) of AEDPA likewise was abundantly clear that it was completely repealing the habeas jurisdiction that had been granted under the INA.[80] Justice Scalia took the view that the habeas provision in the INA had superseded the general habeas statute so that it no longer applied to immigration cases.[81] Therefore, when section 401(e) repealed the INA provision granting habeas jurisdiction, the courts were left without habeas jurisdiction in immigration cases under either the INA or the general habeas statute.[82]

Justice Scalia next turned his attention to the majority's use of the plain statement rule.[83] According to Justice Scalia, the majority both employed the wrong rule and applied that wrong rule the wrong way.[84] First, Justice Scalia criticized the majority's reading of *Felker* and *Yerger* and declared that those cases only stand for the proposition that repeals by implication are not favored, not for the proposition the majority cites them for which is that a clear statement from Congress is required in order to repeal habeas jurisdiction.[85] Furthermore, Justice Scalia asserted that even in areas of the law where a clear statement is required, the particular statute number does not have to be mentioned.[86] In his view, the reference to judicial review was adequate and unambiguous enough to meet the requirement of being a clear statement.[87]

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76. *See id.* (Scalia, J., dissenting); 8 U.S.C. § 1252(e)(2) (Supp. II 1996).

77. *See St. Cyr*, 533 U.S. at 330 (Scalia, J., dissenting).

78. *See id.* (Scalia, J., dissenting) (citing 8 U.S.C. § 1105a (1994); United States v. Mendoza-Lopez, 481 U.S. 828, 836-37 (1987); Shaughnessy v. Pedreiro, 349 U.S. 48, 52 (1955)).

79. *See St. Cyr*, 533 U.S. at 331 (Scalia, J., dissenting).

80. *See id.* at 329 (Scalia, J., dissenting).

81. *See id.* at 329 (Scalia, J., dissenting).

82. *Id.* (Scalia, J., dissenting).

83. *See id.* at 334 (Scalia, J., dissenting).

84. *See St. Cyr*, 533 U.S. at 333 (Scalia, J., dissenting).

85. *See id.* (Scalia, J., dissenting).

86. *See id.* at 333-34 (Scalia, J., dissenting) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34-35 (1992); Gregory v. Ashcroft, 501 U.S. 452, 467 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241, 246 (1985)).

87. *See id.* at 334 (Scalia, J., dissenting).

Justice Scalia's final argument aimed at undermining the majority decision was that the rule of constitutional construction is only supposed to be used when the text of a statute is ambiguous, and even then an alternative interpretation is mandated only if it is reasonable.[88] Justice Scalia proclaimed that the provisions of IIRIRA and AEDPA repealing habeas jurisdiction are not ambiguous at all, but "crystal clear."[89] He also asserted that the alternate interpretation embraced by the majority was not at all reasonable.[90] For all of the above reasons, Justice Scalia opined that under IIRIRA and AEDPA the district court, and indeed all other courts, lacked jurisdiction to hear St. Cyr's petition for a writ of habeas corpus.[91]

Justice Scalia next turned his attention to the task of determining whether the sections of AEDPA and IIRIRA which repealed the courts' habeas jurisdiction were constitutional.[92] Justice Scalia's examination of the suspension clause led him to conclude that it protects the writ of habeas corpus only from suspension, but not from complete abolition.[93] Justice Scalia relied on dicta written by John Marshall in *Ex parte Bollman*[94] in which Marshall commented that the suspension clause would have nothing to protect if Congress did not enact laws actually granting courts jurisdiction to hear petitions for writs of habeas corpus.[95] Justice Scalia stated that this supported his conclusion that AEDPA and IIRIRA are safe from constitutional infirmity because they permanently changed the content of the writ of habeas corpus but did not temporarily withhold the operation of the writ which is all the suspension clause prohibits.[96]

Although asserting that the suspension clause did not guarantee any content of the writ of habeas corpus, Justice Scalia went on to contend that even if it did, the sections of AEDPA and IIRIRA at issue were still constitutional.[97] Justice Scalia maintained that the suspension clause either protects every grant of habeas jurisdiction Congress has ever granted or only protects the writ as it existed at the time of the ratification of the Constitution.[98] He rejected the first option as preposterous and proceeded to

88. *See id.* at 336 (Scalia, J., dissenting) (citing Miller v. French, 530 U.S. 327, 341 (2000); Salinas v. United States, 522 U.S. 52, 60 (1997)).
89. *St. Cyr*, 533 U.S. at 336 (Scalia, J., dissenting).
90. *See id.* (Scalia, J., dissenting).
91. *See id.* (Scalia, J., dissenting).
92. *See id.* (Scalia, J., dissenting).
93. *See id.* at 336-37 (Scalia, J., dissenting).
94. 8 U.S. (4 Cranch) 75 (U.S. Dist. Col. 1807).
95. *See St. Cyr*, 533 U.S. at 339-40 (Scalia, J., dissenting).
96. *See id.* (Scalia, J., dissenting).
97. *See id.* at 340 (Scalia, J., dissenting).
98. *See id.* (Scalia, J., dissenting).

set forth why the habeas jurisdiction repealed by AEDPA and IIRIRA was not protected under the second option.[99]

Justice Scalia framed the question as whether the writ at common law in 1789 included a right to force a member of the executive branch to grant a discretionary release, or, as in this case, waiver.[100] Curiously, he completely ignored that St. Cyr was protesting only the Attorney General's declaration as a matter of law that St. Cyr was ineligible for a discretionary waiver and was not asking the Court to force the Attorney General to exercise his discretion to St. Cyr's benefit.[101] Justice Scalia contended that the cases cited by the majority are not on point,[102] which makes sense because the majority addressed a different point, namely, whether a court could review an executive decision, not an exercise of discretion, as a matter of law.[103] Given the way Justice Scalia framed the issue, he came to the unsurprising result that habeas jurisdiction granted to review executive discretionary decisions is not protected by the suspension clause.[104]

The final challenges to the constitutionality of the AEDPA and IIRIRA sections which Justice Scalia defeated are arguments put forth by St. Cyr which the majority did not address.[105] The first of these was that the Due Process Clause gave St. Cyr the right to have the executive decision regarding his eligibility for discretionary relief judicially reviewed.[106] Justice Scalia dispatched with this argument on the basis that St. Cyr was deportable under law and had no right to a discretionary waiver.[107] The second argument was that since Article III of the Constitution gives judicial power to the federal courts, Congress is prevented from denying those courts the chance to review a determination by an executive adjudicative body.[108] According to Justice Scalia, this argument failed for lack of any support whatsoever in our jurisprudence.[109] Since Justice Scalia discarded these as well as the other arguments that AEDPA and IIRIRA's repeal of courts' habeas jurisdiction was unconstitutional, he concluded that the repeal was constitutional, and,

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99. *See id.* at 341 (Scalia, J., dissenting).
100. *See St. Cyr*, 533 U.S. at 342 (Scalia, J., dissenting).
101. *See id.* at 298.
102. *See id.* at 343 (Scalia, J., dissenting).
103. *See id.* at 298.
104. *See id.* at 344 (Scalia, J., dissenting).
105. *See St. Cyr*, 533 U.S. at 345 (Scalia, J., dissenting).
106. *Id.* at 345-46 (Scalia, J., dissenting).
107. *See id.* at 345 (Scalia, J., dissenting) (citing INS v. Yueh-Shaio Yang, 519 U.S. 26, 30 (1996); Jay v. Boyd, 351 U.S. 345, 354 (1956)).
108. *St. Cyr*, 533 U.S. at 346 (Scalia, J., dissenting).
109. *See id.* (Scalia, J., dissenting).

therefore, the case should have been remanded to the district court with instructions to dismiss for lack of jurisdiction.[110]

D. Dissenting opinion by Justice O'Connor

In a brief dissent, Justice O'Connor stated that while she joined with most of Justice Scalia's dissent, she did not join in his in depth discussion of the constitutionality of the AEDPA and IIRIRA provision which were at issue.[111] She declared that even if the suspension clause protects some minimum level of habeas review, St. Cyr's use of the writ was outside that protected by the Constitution and, therefore, no other discussion was necessary or appropriate in this case.[112]

IV. ANALYSIS

In order to determine what impact the Court's decision has had and will have, the first step is to ascertain that the method the Court used in achieving its result was not outside the scope of its authority. The Court is certainly not entitled to step outside its constitutionally-assigned role in order to curb the arguably ill-advised actions of Congress. If this is indeed what the majority did, as the four dissenting justices claimed, this case would have the detrimental and vastly undesirable effect of eroding the limitations on judicial power. Fortunately, a critical examination of the Court's opinion reveals that it is soundly based in established principles of statutory construction and does not represent the wild inventions of law and blatant inattention to pivotal facts that Justice Scalia described in his dissent.[113]

The Court's refusal to accept that Congress intended to completely abolish habeas jurisdiction in immigration cases on the basis that a clear statement is necessary to repeal habeas jurisdiction and such a clear statement was not present in either AEDPA or IIRIRA was proper. Both the statement of the rule and its application were sound. *Ex parte Yerger*[114] and *Felker v. Turpin*[115] both clearly lay out this rule. Justice Scalia stated that he couldn't think of a clearer way the statutes could have been written,[116] but if Congress truly intended to repeal 28 U.S.C.§ 2241 habeas jurisdiction they could have

110. *See id.* (Scalia, J., dissenting).

111. *See id.* at 326 (O'Connor, J., dissenting).

112. *See id.* (O'Connor, J., dissenting).

113. *See St. Cyr*, 533 U.S. at 326-27 (Scalia, J., dissenting).

114. 75 U.S. (8 Wall.) 85, 102 (1869) ("[W]e are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law . . . .").

115. 518 U.S. 651, 660-61 (1996) (refusing to find that a statute repealed 28 U.S.C. § 2241 by implication).

116. *See St. Cyr*, 533 U.S. at 329 (Scalia, J., dissenting).

written a statute that said, "[W]e hereby repeal courts' habeas jurisdiction granted under 28 U.S.C. § 2241." This is the level of clarity which is required by the plain statement rule.[117] Congress did not write the statutory sections in question with anywhere near that level of clarity. Therefore, the Court's holding on this issue was correct.

The Court was also correct to apply the doctrine favoring a constitutional construction of a statute. The cases cited by the Court show that at the time the Constitution was ratified, courts did review executive determinations of questions of law.[118] Since the Attorney General's ruling that *as a matter of law* St. Cyr was not eligible for a discretionary waiver was at issue,[119] interpreting AEDPA and IIRIRA as abolishing habeas jurisdiction certainly would at least pose a serious question of constitutionality. The alternative interpretation is reasonable, particularly in light of the plain statement rule. The interpretation that AEDPA and IIRIRA did not preclude all habeas jurisdiction is reasonable because of the lack of the required plain statement repealing the habeas jurisdiction granted by 28 U.S.C. § 2241. Because both of these rules were properly applied, the Court's conclusion that the district court did have jurisdiction to hear the petition was certainly not an abuse of its power.

Likewise, the Court's decision regarding the retroactive application of AEDPA and IIRIRA gives no cause for concern because once again it was based on established principles of statutory construction. The Court simply applied the time-honored tradition of protecting individuals' rights by refusing to apply a statute retroactively if there was any doubt about Congress' intent to require that result.[120] Justice Scalia's silence on this point can most likely be interpreted as agreement since he is not particularly inclined to keep any

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117. *See Felker*, 518 U.S. at 660-61; *Yerger*, 75 U.S. (8 Wall.) at 102.

118. *See, e.g.*, Respublica v. Keppele, 2 U.S. (2 Dall.) 197 (Pa. 1793) (releasing fourteen-year-old runaway on basis that executive detention was based on incorrect ruling as matter of law that minors could be made indentured servants); *In re* Randolph, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J., on circuit) (releasing Navy purser picked up after audit on account from years ago on basis that as a matter of law the account was settled and auditor did not have jurisdiction to open it back up).

119. *St. Cyr*, 533 U.S. at 298.

120. "[This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal."

Id. at 316 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

disagreements he has with other Justices to himself, even if his analysis does not require addressing the point.

Because the principles used by the Court are well-established and widely used, this decision will not have a drastic effect on the law of statutory construction. Yet as the Court employed various rules it further developed them and elaborated on their proper use and function, which will assist future courts which employ these rules. The area that is truly affected by the Court's decision is, of course, the way AEDPA and IIRIRA are applied. The Court's habeas jurisdiction granted under 28 U.S.C. § 2241 remains in effect in cases arising under immigration laws and aliens who pled guilty in an arrangement that would have made them eligible for a discretionary waiver of deportation before AEDPA and IIRIRA were enacted are still eligible for such a waiver. Since the decision was handed down, many cases have already cited the decision in regards to these points.

Though this decision was met by immigration advocates with cheers[121] and by conservative elements with laments,[122] neither the former's hopes, nor the latter's fears were entirely justified.

Warnings regarding the "harsh" nature of retroactive provisions and provisions curtailing and eliminating judicial review of administrative immigration determinations were voiced before AEDPA and IIRIRA were even passed[123] and in recent years have grown into a substantial concern.[124] As more and more examples of the injustice these acts are causing have surfaced, public sentiment in favor of amending or repealing AEDPA and IIRIRA has steadily grown.[125] In this atmosphere, news of the Court's decision was greeted by many with celebration and jubilation.[126] However, as more astute observers noticed, though this decision alleviates some of the harsh results dictated by AEDPA and IIRIRA, it is fairly narrow.[127] The number of aliens it will help is small in relation to the many aliens who will

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121. *See, e.g.*, Henry Weinstein, *Deportations Ruled Subject to Review*, L.A. TIMES, June 26, 2001, at A1; *Immigrants Can Argue to Stay, Ruling Aids Puyallup Woman Facing Deportation*, SEATTLE TIMES, June 26, 2001, at B1.

122. *See, e.g.*, Raju Chebium, *Deportation Fears Eased by Recent Court Ruling*, CHI. SUN-TIMES, July 9, 2001, at News p. 24.

123. Jason H. Ehrenberg, Note, *A Call for Reform of Recent Immigration Legislation*, 32 U. MICH. J.L. 195, 211 (1998).

124. Anthony Lewis, *Abroad at Home: At the Heart of Liberty*, N.Y. TIMES, June 30, 2001, at A15.

125. *Id.*

126. *E.g.*, Henry Weinstein, *Deportations Ruled Subject to Review*, L.A. TIMES, June 26, 2001, at A1; *Immigrants Can Argue to Stay, Ruling Aids Puyallup Woman Facing Deportation*, SEATTLE TIMES, June 26, 2001, at B1.

127. David G. Savage, *Keeping the Doors Open: Court Upholds Rights for Aliens with Criminal Records*, 87 A.B.A. 34 (Aug. 2001).

continue to suffer from the much attacked stricter immigration laws.[128] Though many aliens will be able to file habeas petitions who would not be able to under a different interpretation of AEDPA and IIRIRA, the courts who review those petitions will still be applying the strict provisions of those acts.[129] The retroactivity aspect of this decision, while it does affect the cases of thousands of deportable aliens, does not affect the majority of aliens and over time will apply to nobody at all.[130]

Predictably, the public reaction to the Court's decision was not all positive. Those who approved of AEDPA and IIRIRA in the first place and who are in favor of restricting immigration were upset by the Court's opinion.[131] For example, one critic stated, "[t]he reason for the removals was ... to protect the American public against any possible harm from aliens who were deportable. We see this as complicating an already overburdened immigration court system."[132] Once again, this reaction was not entirely founded in reality. The decision was not as bad as conservative elements seemed to think for the same reasons that it was not a stunning victory for opponents of AEDPA and IIRIRA. Yet another reason neither of these polarized reactions were justified is that the Court left Congress the option of amending the pertinent provisions of AEDPA and IIRIRA.

V. CONCLUSION

The practical effect of the Court's decision was neither of the drastic results proclaimed by the polarized public. It was simply to slowly start immigration law back in the direction of the more lenient pre-1996 immigration laws. However, in light of the September 11 terrorist attacks even the modest protections afforded by this decision may very well be the only beacon of light deportable aliens will have to look to for quite some time. Hopes for re-election aside, no legislator who wants to make it through the day without getting pulled into an alley and beaten up would dare suggest repealing or even diminishing the harsh effects of any statute with the word "Anti-terrorism" in its title. Though hopes for legislative mitigation of the severe effects of current immigration laws crumbled with the walls of the World Trade Center, aliens facing deportation have the right to seek writs of habeas corpus in federal courts and some are protected from harsh retroactive application of laws governing discretionary waiver of deportation. Most

128. *Id.*
129. *Id.*
130. *Id.*
131. Raju Chebium, *Deportation Fears Eased by Recent Court Ruling*, CHI. SUN-TIMES, July 9, 2001, at News p. 24.
132. *Id.*

importantly, the Court did not achieve this result by disregarding its boundaries to the long-term detriment of the entire court structure in order to achieve the desired short-term result.

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