No. 00-2599

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RAMON GAVILAN-CUATE,

Petitioner-Appellee,

v.

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MISCELLANEOUS

. . . . . .

of Appellate Jurisdiction. This wholly ignores the fact that

there have been because the law restricts the subject matter for consideration.

By analogy it is as if Mr. Gavilan's freedom were a three lock box. One court, the court of Appeals, on Appellate review, has only the authority to determine its jurisdiction and as such holds only one or two keys at best, but is certainly at least missing the keys to the facts. See *Yang*, 109 F.3d at 1192. Another court, the District Court through a habeas petition, holds all three keys. The first, is the jurisdictional key, the second is the key to determine facts, and the third is the key to determine the law. Two courts, but only one real choiktDox.bes405 0 TD wi hos alinnly att througr2Belo

grant the Constitutionally privileged power of the people to seek Habeas Corpus Relief?

2. Has Congress made the Executive branch the sole interpreter of the deportation laws such that the Judiciary is powerless to review, via a Habeas Corpus

Appellee, on May 4, 1999, was found to be ineligible for bond and release from civil detention pending the outcome of his appeals. This determination was based solely upon the Immigration Judge's finding of deportability and the "Mandatory Detention" requirements of INA 236(c)(1)(B).

On June 28, 1999, Appellee filed with this Court a habeas corpus petition and on August 2, 1999, the INS moved this Court to dismiss the habeas corpus action and accompanying motions as moot.

On September 2, 1999, Appellee filed with the Board of Immigration Appeal (BIA) an appeal from the Immigration Judge's decision to deny bond and on September 14, 1999, Appellee filed with the BIA an appeal from the Immigration Judge's case decision on removal.

On October 18, 1999, the BIA dismissed Appellee's appeal of his removal order and did not address Appellee's request for bond. As was anticipated in Appellee's Memorandum, the BIA simply dismissed the appeal by reaffirming its prior decision in *Matter of Ruiz-Romero*, Interim Decision 3376.

On November 17, 1999, Appellee submitted the standard one page petition for appellate review from the BIA Decision of October 18, 2000.

On November 24, 1999, the BIA dismissed the Appellee's Bond appeal as moot considering its decision on October 18, 1999.

On December 15, 1999, Appellee presented an oral argument before Magistrate Lebidoff in the habeas petition.

On December 17, 1999, Appellant submitted a motion to dismiss the direct appeal based on lack of jurisdiction.

On January 24, 2000, Appellant's motion was granted with a three line order stating that it was an Appeal from the District Court. The same order of the court was then amended at the request of the Appellant to read that it was a dismissal of a petition for review.

BACKGROUND

Mr. Gavilan has been a lawful permanent resident of the United States for more than ten years. His five children, ranging in age from 11 years to two years, are citizens of the United States, and most of the rest of his extended family are

3376. In it, the BIA held that all offenses described in "paragraph (1)(A) or (2) of section 274(a)" were Aggravated Felonies and not just those that were "relating to alien smuggling".

The IJ then quickly conducted a bond hearing for Mr. Gavilan and concluded that because he had been found deportable as an Aggravated Felon, he was subject to the

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covered by section 237(a)(2)(A)(i).

Accordingly, Appellee is explicitly precluded by INA §§

including aggravated felonies. The court concluded that this

circuits, as this court did in ***Shaw***, are once again determining that something so vital as Habeas Corpus jurisdiction can not be swept away by the inferred collateral consequences of the “zipper clause”. In short, they are stating that to be removed, in the least it must be stated clearly and it must be justified. These circuits are concluding this because judicial precedence requires it.

The cause of the division among the circuits lies in the fact that Congress in passing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) repealed the prior judicial-review scheme of INA section 106, and replaced it with the new provisions of INA section 242. As could be expected, this has caused a certain degree of confusion which the circuits are now in debate over and which has only marginally been addressed by the Supreme Court.

With regard to subject matter jurisdiction in a habeas corpus petition, under prior INA section 106, habeas corpus jurisdiction was specifically and explicitly provided for. Former INA 106(a)(10) read "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." Note that former INA 106 (a)(10) in fact expanded the scope of Habeas Jurisdiction in that it applied to any alien including illegal aliens and non-

permanent residents as well as permanent residents. The current tension lies in the fact that the INA no longer contains such a provision. Today the INA only addresses habeas corpus petitions when discussing **restrictions** on it in the context of three different types of proceedings. They are 1) Expedited Removahi (he IN235, sethe INsericti 242(e); 2)es) Tj T*s ir

transitional rule case) the Second Circuit Court of Appeals provided an extremely thorough historical analysis of habeas corpus jurisdiction in the context of immigration law in order to determine the scope of the review available under the general habeas statute, 28 U.S.C.§§ 2241.

The primary question before the *Henderson* court was “the extent of the federal courts' subject matter jurisdiction to review removal orders issued by the INS against criminal aliens under the 1996 amendments to the immigration laws”, *Henderson* [illegible]

1. Judicial Review of Executive Deportation Decisions, 1885-1952

Before 1952, judicial review of immigration decisions proceeded solely by way of the writ of habeas corpus. The scope of the courts' authority to review Executive officials' decisions in immigration matters in this manner was first litigated in 1885. In the case of In re Jung Ah Lung, 25 F. 141 (D. Cal. 1885), aff'd sub nom. United States v. Jung Ah Lung, 124 U.S. 621 (1888), the government challenged the jurisdiction of the federal district courts to review habeas petitions filed by Chinese immigrants. The government contended that the collector of customs at the port of entry, an Executive official, had final authority to determine whether aliens were excludable under the Chinese Exclusion Act and that his decisions were not reviewable by the courts. The district court rejected the government's argument that the Chinese Exclusion Act had removed its authority to grant habeas relief, stating:

> Such an abrogation of the writ of habeas corpus, which has always been considered among English-speaking peoples the most sacred muniment of [illegible]

to pass that the 1891 law included a provision stating that "[a]ll decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." Act of March 3, 1891, ch. 551, §§ 8, 26 Stat. 1084, 1085.

The finality provision was carried forward, with only minor changes, in subsequent immigration acts. See Heikkila v. Barber, 345 U.S. 229, 234 (1953) (citing statutes from 1903, 1907, and 1917). And as the Supreme Court later explained, "[d]uring these years," (i.e., from 1891 to 1952), "the cases continued to recognize that Congress had intended to make these adTD 2igravizenoturing t 0352)y tht Coure inrtplainanthabTreepeeatisirrrr[(la]n,) Tj 0 -13

judicial review of statutory claims in Gegiow v. Uhl, 239 U.S. 3 (1915), ... See, e.g., Delgadillo v. Carmichael, 332 U.S. 388, 390-91 (1947) (granting habeas and rejecting the immigration service's interpretation of the statutory term "entry"); Bridges v. Wixon, 326 U.S. 135, 149 (1945) (rejecting the government's interpretation of the term "affiliation" with the Communist party and holding that habeas is appropriate "where an alien is ordered deported fi 6.m's notategrderty aof tr 1945,prutaxon07332 holdingsuit,and rejecting theauthotheyati"lng

that the 1996 amendments "repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of [certain criminal offenses]." Hincapie-Nieto, 92 F.3d at 28. And we have joined our sister circuits in concluding that this repeal of jurisdiction suffers from no Constitutional infirmity because the courts retain habeas jurisdiction under 28 U.S.C. §§ 2241. See Jean-Baptistei8 U. F.3d at 220;.... see generally Battaglia v. General Motors Corp.i8 69 F. 2d 254, 257 (2d Cir. 1957) ("[W]hile Congress has the undoubted power to givei8withhold, and restrict the jurisdiction of the courts . . . , it must not so exercise that power as to deprive any person of lifei8liberty, or property8without due process of law . . . ."); ....

...And we [in Jean-Baptiste] further stated that "in the absence of language affirmatively and clearly eliminating habeas review, we presume Congress did not aim to bar federal courts' habeas jurisdiction pursuant to §§ 2241." Id. at 219 (citing Felker, 518 U.S. at 661, and Ex parte Yerger, 75 U.S. (8 Wall.) 85i8 05 (1868)).

[This] reflects the well-accepted rule of statutory construction that repeals by implication of jurisdictional statutes (and particularly of the habeas statutes) are disfavored. In addition, it acknowledges the presumption in favor of judicial review. See, e.g., Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action."); see also Webster v. Doe, 486 U.S. 592, 603 (1988) (same); Johnson v. Robison, 415 U.S. 361, 373-74 (1974) (same)....

The primary historical use of the writ of habeas corpus was precisely against Executive detention. See Felker, 518 U.S. at 663 (noting that the writ originally only extended to prisoners in federal custody8who were not "detained in prison by virtue of the judgment of a court" (citation and internal quotation marks omitted)); Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977);.... Brown v. Allen, 3U. U.S. 443, 533 (1953) (Jackson, J., concurring in the result) ("[T]he historic purpose of the writ has been to relieve detention by Executive authorities without judicial trial.").....

Accordingly, we hold that the federal courts have jurisdiction under §§ 2241 to grant writs of habeas corpus to aliens when those aliens are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241. This is not to say that every statutory claim that an alien might raise is cognizable on habeas. But those affecting the substantial rights of aliens of the sort that the courts

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S.Ct 2333 (1996) which had ruled that the statutory limitation on the Supreme Court's certiorari jurisdiction does not infringe on the courts Constitutional power to grant habeas corpus relief.

The question then is whether the habeas jurisdiction of the Supreme Court as defined by commonlaw and the Constitution continues to be delegated under §2241. Felker addressed this issue. The court in Goncalves found the following:

> Felker makes clear that if Congress intends to repeal or restrict habeas jurisdiction under §§ 2241, it must say so explicitly. Thus, we will not find a repeal of §§ 2241 merely by implication, but only by express congressional command.....[T]he Felker court applied the model of decision the Supreme Court had used more than a century earlier in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869)....Felker regarded Ex parte Yerger as adopting a general rule of construction that any repeal of theamencthep(defpli
> 162 F.3d 1338

the courts on this important issue leaves the definitive

protect certain underlying judicial notions of fairness and equity. The first accepted construct is that "the court must assume that tlegislative purposeuct exprirneptbyhat ust

or (2) of section 274 and it clarifies that not all of the crimes need to be committed. The phrase "described in" also can have purpose in both readings. In the inclusive reading it serves the purpose of introducing the relevant statute and identifying its purpose (which is that paragraph (1)(A) or (2) of section 274 describes offenses). In the restrictive reading, "described in" begins the process of narrowing the identification of the Aggravated Felonies by identifying that the relevant offenses are described in the statute (as opposed to identified by the statute as a whole) it thus prepares the reader for a subset. Finally, the phrase "relating to alien smuggling" also can have purpose in both readings. In the inclusive reading it identifies the nature of paragraph (1)(A) or (2) of section 274 (the statute is related to alien smuggling). And in the restrictive reading the phrase "relating to alien smuggling" serves the purpose begun by the phrase "described in" by identifying the subset within paragraph (1)(A) or (2) of section 274 that constitutes the Aggravated Felonies.

The problem with this analysis and the inclusive reading

Contrast this with the restrictive reading where each

smuggling” was to identify the statute why wasn’t its broader title “Bringing in and Harboring Certain Aliens” used instead of the more restrictive “relating to alien smuggling”?

INA §274 is a divisible statute which encompasses violations that relate to alien smuggling and those that do not. *Cf.*

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[1] 274(a)(1)(A)(i) and (a)(2)

[2] 274(a)(1)(A)(iv), (v)(I), and (v)(II)

Since the BIA decision and its subsequent appeal, see Ruiz-Romero v. Reno 205 F.3rd 837 (5th Cir 2000), the only other relevant development in the law involves another Fifth Circuit case *United States v. Monjaras-Castaneda*,190 F.3d 326 (App. Sept 16, 1999). This case involved the sentencing of an individual who had transported illegal aliens in continuance of an alien smuggling operation. The questioned framed was again whether or not the phrase "related to alien smuggling" was descriptive or restrictive. The majority opinion reasoned similarly to the majority BIA decision in *Matter of Ruiz-Romero*, and the dissenting opinion's analysis was also similar to the dissenting opinion in *Matter of Ruiz-Romero*.

2.
Basic Terminology

[3] See also *United States v. Merkt*, 764 F.2d 266, 269 (5th

amend the Immigration and Nationality Act to expand the definition of "aggravated felony", to eliminate the administrative deportation hearing and review process for aliens convicted of aggravated felonies who are not permanent residents, and for other purposes." Its short title as introduced was "Criminal Aliens Deportation Act of 1993." It proposed expanding the definition of an Aggravated Felony to include "(P) any offense described in section 274(a)(1) of

> property use in the smuggling or harboring of illegal aliens....
>
> Mr. President, these provisions are tough but fair. [I]t will deter illegal alien smuggling by greatly increasing the penalties for criminal smuggling. ....

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS (Senate July 1, 1993) (S8469).

It should be pointed out that Senator Simpson and those supporting his efforts are not novices to immigration law. In his introduction, he even stated who he would be working with and what their qualifications were:

> [I] look forward to working with the President ...the Attorney General, who I think is going to be a superb--superb--linchpin in immigration reform activity because of her knowledge of the issue from serving in Florida, a State severely impacted by legal immigration and refugees and illegal immigration, and Doris Meisser, who has been appointed by the President as the Commissioner of the Immigration and Naturalization Service. I do not know how he could have made a more appropriate appointment--she knows the issue back and forth and is able to deal fairly and honestly and with great clarity with the extremes on both sides.....[Senator] Kennedy...and I have been deeply involved in it, Senator Kennedy for nearly 30 years, I, a lighter tenure--or sentence would be the word--of 14 years. Id.

Later that month, President Clinton responded to Senator Simpson’s Subcommittee to the Committee on the Judiciary with a legislative proposal of his own and stated the following:

> This legislative proposal is designed to address the growing abuse of our legal immigration and political asylum systems...by alien smugglers.... The proposal is

4.

The Rule of Lenity

Mr. Gavilan posits that the language of §§101(a)(43)(N) is clear. However, even if this were not the case, the long standing tenet of statutory construction that deportation

[4] According to the 8th circuit Pattern Jury Instruction 1.01, an indictment is not evidence of anthing. See also Devitt and Blackmar 13.04 and

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Respectfully submitted,

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PATRICK J. PAGE, Attorney
325 West 7th Street
St. Paul, MN 55102
(651) 310-0396

ATTORNEY FOR Appellee