SUPREME COURT OF THE UNITED STATES

No. 00–767

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER *v.* ENRICO ST. CYR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 25, 2001]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE O'CONNOR joins as to Parts I and III, dissenting.

The Court today finds ambiguity in the utterly clear language of a statute that forbids the district court (and all other courts) to entertain the claims of aliens such as respondent St. Cyr, who have been found deportable by reason of their criminal acts. It fabricates a superclear statement, "magic words" requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence. And as the fruit of its labors, it brings forth a version of the statute that affords *criminal* aliens *more* opportunities for delay-inducing judicial review than are afforded to non-criminal aliens, or even than were afforded to criminal aliens prior to this legislation concededly designed to *expedite* their removal. Because it is clear that the law deprives us of jurisdiction to entertain this suit, I respectfully dissent.

I

In categorical terms that admit of no exception, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–546, unambiguously repeals the application of 28 U. S. C. §2241 (the general

habeas corpus provision), and of all other provisions for judicial review, to deportation challenges brought by certain kinds of criminal aliens. This would have been readily apparent to the reader, had the Court at the outset of its opinion set forth the relevant provisions of IIRIRA and of its statutory predecessor, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. I will begin by supplying that deficiency, and explaining IIRIRA's jurisdictional scheme. It begins with what we have called a channeling or "'zipper' clause," *Reno* v. *American-Arab Anti-Discrimination Comm.,* 525 U. S. 471, 483 (1999)– namely, 8 U. S. C. §1252(b)(9) (1994 ed., Supp. V). This provision, entitled "Consolidation of questions for judicial review," provides as follows:

> "Judicial review of *all* questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from *any action taken or proceeding brought to remove an alien* from the United States under this subchapter shall be available *only* in judicial review of a final order under this section." (Emphases added.)

In other words, *if* any review is available of any "questio[n] of law . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter," it is available "only in judicial review of a final order under this section [§1252]." What kind of review does that section provide? That is set forth in §1252(a)(1), which states:

> "Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to [the expedited-removal provisions for undocumented aliens arriving at the border found in] section 1225(b)(1) of this title) is governed only by chapter 158 of title 28 [the Hobbs Act], except as provided in subsection (b) of this section [which modifies some of

> the Hobbs Act provisions] and except that the court may not order the taking of additional evidence under section 2347(c) of [Title 28]." (Emphasis added.)

In other words, *if* judicial review is available, it consists *only* of the modified Hobbs Act review specified in §1252(a)(1).

In some cases (including, as it happens, the one before us), there can be no review at all, because IIRIRA categorically and unequivocally rules out judicial review of challenges to deportation brought by certain kinds of criminal aliens. Section 1252(a)(2)(C) provides:

> "Notwithstanding *any* other provision of law, *no court* shall have jurisdiction to review *any* final order of removal against an alien who is removable by reason of having committed [one or more enumerated] criminal offense[s] [including drug-trafficking offenses of the sort of which respondent had been convicted]." (Emphases added).

Finally, the pre-IIRIRA antecedent to the foregoing provisions– AEDPA §401(e)– and the statutory background against which that was enacted, confirm that §2241 habeas review, in the district court or elsewhere, has been unequivocally repealed. In 1961, Congress amended the Immigration and Nationality Act of 1952 (INA), 66 Stat. 163, by directing that the procedure for Hobbs Act review in the courts of appeals "shall apply to, and shall be the *sole and exclusive procedure for*, the judicial review of all final orders of deportation" under the INA. 8 U. S. C. §1105a(a) (repealed Sept. 30, 1996) (emphasis added). Like 8 U. S. C. §1252(a)(2)(C) (1994 ed., Supp. V), this provision squarely prohibited §2241 district-court habeas review. At the same time that it enacted this provision, however, the 1961 Congress enacted a specific exception: "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by ha-

beas corpus proceedings," 8 U. S. C. §1105a(a)(10) (1994 ed.). (This would of course have been surplusage had §2241 habeas review not been covered by the "sole and exclusive procedure" provision.) Section 401(e) of AEDPA repealed this narrow exception, and there is no doubt what the repeal was thought to accomplish: the provision was entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS." It gave universal preclusive effect to the "sole and exclusive procedure" language of §1105a(a). And it is this regime that IIRIRA has carried forward.

The Court's efforts to derive ambiguity from this utmost clarity are unconvincing. First, the Court argues that §§1252(a)(2)(C) and 1252(b)(9) are not as clear as one might think— that, even though they are sufficient to repeal the jurisdiction of the courts of appeals, see *Calcano-Martinez* v. *INS*, *post*, at 3–4,[1] they do not cover habeas jurisdiction in the district court, since, "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings," *ante*, at 21, and 22, n. 35. Of course §1252(a)(2)(C) does not even *use* the term "judicial review" (it says "jurisdiction to review")— but let us make believe it does. The Court's contention that in *this* statute it does not include habeas corpus is decisively refuted by the language of §1252(e)(2), enacted along with §§1252(a)(2)(C) and 1252(b)(9): "*Judicial review* of any determination made under section 1225(b)(1) of this title [governing review of expedited removal orders against undocumented aliens arriving at the border] is available in *habeas corpus* proceedings . . . ." (Emphases added.) It is hard to imagine how Congress could have made it any clearer that, when it used the term "judicial review" in IIRIRA, it included judicial review through habeas corpus.

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[1] In the course of this opinion I shall refer to some of the Court's analysis in this companion case; the two opinions are intertwined.

Research into the "historical" usage of the term "judicial review" is thus quite beside the point.

But the Court is demonstrably wrong about that as well. Before IIRIRA was enacted, from 1961 to 1996, the governing immigration statutes unquestionably treated "judicial review" as encompassing review by habeas corpus. As discussed earlier, 8 U. S. C. §1105a (1994 ed.) made Hobbs Act review "the sole and exclusive procedure for, the *judicial review* of all final orders of deportation" (emphasis added), but created (in subsection (a)(10)) a limited exception for habeas corpus review. Section 1105a was entitled "*Judicial review* of orders of deportation and exclusion" (emphasis added), and the exception for habeas corpus stated that "any alien held in custody pursuant to an order of deportation may obtain *judicial review* thereof by *habeas corpus* proceedings," *ibid.* (emphases added). Apart from this prior statutory usage, many of our own immigration cases belie the Court's suggestion that the term "judicial review," when used in the immigration context, does not include review by habeas corpus. See, *e.g.*, *United States* v. *Mendoza-Lopez,* 481 U. S. 828, 836–837 (1987) ("[A]ny alien held in custody pursuant to an order of deportation may obtain *judicial review* of that order in a *habeas corpus* proceeding" (emphases added)); *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 52 (1955) ("Our holding is that there is a right of *judicial review* of deportation orders *other than by habeas corpus* . . ." (emphases added)); see also *id.*, at 49.

The *only* support the Court offers in support of the asserted "longstanding distinction between 'judicial review' and 'habeas,'" *ante*, at 22, n. 35, is language from a single opinion of this Court, *Heikkila* v. *Barber,* 345 U. S. 229 (1953).[2] There, we "differentiate[d]" "habeas corpus"

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[2] The recent Circuit authorities cited by the Court, which postdate IIRIRA, see *Mahadeo* v. *Reno,* 226 F. 3d 3, 12 (CA1 2000); and *Flores-*

from "judicial review *as that term is used in the Administrative Procedure Act.*" *Id.*, at 236 (emphasis added). But that simply asserts that habeas corpus review is different from ordinary APA review, which no one doubts. It does *not* assert that habeas corpus review is not judicial review *at all*. Nowhere does *Heikkila* make such an implausible contention.[3]

The Court next contends that the zipper clause, §1252(b)(9), "by its own terms, does not bar" §2241 district-court habeas review of removal orders, *ante*, at 23, because the opening sentence of subsection (b) states that "[w]ith respect to review of an order of removal *under subsection (a)(1) of this section*, the following requirements

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Miramontes v. *INS*, 212 F. 3d 1133, 1140 (CA9 2000)), cited *ante*, at 23, hardly demonstrate any historical usage upon which IIRIRA was based. Anyway, these cases rely for their analysis upon a third circuit-court decision– *Sandoval* v. *Reno*, 166 F. 3d 225, 235 (CA3 1999)– which simply relies on the passage from *Heikkila* under discussion.

[3]The older, pre-1961 judicial interpretations relied upon by the Court, see *ante*, at 21–22, are similarly unavailing. *Ekiu* v. *United States*, 142 U. S. 651 (1892), never purported to distinguish "judicial review" from habeas, and the Court's attempt to extract such a distinction from the opinion is unpersuasive. *Ekiu* did state that the statute "prevent[ed] the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being *impeached or reviewed*," *id.*, at 663 (emphasis added), italicized words quoted *ante*, at 22; but the clear implication was that the question whether the inspector was "acting within the jurisdiction conferred upon him" *was* reviewable. The distinction pertained, in short, to the *scope* of judicial review on habeas– not to whether judicial review was available. *Terlinden* v. *Ames*, 184 U. S. 270, 278 (1902), likewise drew no distinction between "judicial review" and habeas; it simply stated that the extradition statute "gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly [under the extradition statute] cannot be done indirectly through the writ of *habeas corpus*." Far from saying that habeas is *not* a form of judicial review, it says that habeas *is* an *indirect* means of review.

apply . . . ." (Emphasis added.) But in the broad sense, §1252(b)(9) *does* "apply" "to review of an order of removal under subsection (a)(1)," because it mandates that "review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter" must take place *in connection with* such review. This is "application" enough – and to insist that subsection (b)(9) be given effect only *within* the review of removal orders that takes place under subsection (a)(1), is to render it meaningless. Moreover, other of the numbered subparagraphs of subsection (b) make clear that the introductory sentence does not at all operate as a limitation upon what follows. Subsection (b)(7) specifies the procedure by which "a defendant in a criminal proceeding" charged with failing to depart after being ordered to do so may contest "the validity of [a removal] order" before trial; and subsection (b)(8) prescribes some of the prerogatives and responsibilities of the Attorney General and the alien after entry of a final removal order. These provisions have no effect if they must apply (even in the broad sense that subsection (b)(9) can be said to apply) "to review of an order of removal under subsection (a)(1)."

Unquestionably, unambiguously, and unmistakably, IIRIRA expressly supersedes §2241's general provision for habeas jurisdiction. The Court asserts that *Felker* v. *Turpin,* 518 U. S. 651 (1996), and *Ex parte Yerger,* 8 Wall. 85 (1869), reflect a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," *ante,* at 7. They do no such thing. Those cases simply applied the general principle– not unique to habeas– that "[r]epeals by implication are not favored." *Felker*, *supra,* at 660; *Yerger*, *supra,* at 105. *Felker* held that a statute which by its terms prohibited only further review by this Court (or by an en banc court of appeals) of a court-of-appeals panel's "'grant or denial of . . . authorization . . . to file a second or

successive [habeas] application,'" 518 U. S., at 657 (quoting 28 U. S. C. §2244(b)(3)(E) (1994 ed., Supp. II)), should not be read to imply the repeal of this Court's separate and distinct "authority [under 28 U. S. C. §2241 and 28 U. S. C. §2254 (1994 ed. and Supp. V)] to hear habeas petitions filed as original matters in this Court," 518 U. S., at 661. *Yerger* held that an 1868 Act that by its terms "repeal[ed] only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court," should be read to "reach no [further than] the act of 1867," and did not repeal by implication the appellate jurisdiction conferred by the Judiciary Act of 1789 and other pre-1867 enactments. 8 Wall., at 105. In the present case, unlike in *Felker* and *Yerger*, none of the statutory provisions relied upon– §1252(a)(2)(C), §1252(b)(9), or 8 U. S. C. §1105a(a) (1994 ed.)– requires us to imply from one statutory provision the repeal of another. All *by their terms* prohibit the judicial review at issue in this case.

The Court insists, however, that since "[n]either [§1252(a)(1) nor §1252(a)(2)(C)] explicitly mentions habeas, or 28 U. S. C. §2241," "neither provision speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." *Ante*, at 22–23. Even in those areas of our jurisprudence where we *have* adopted a "clear statement" rule (notably, the sovereign immunity cases to which the Court adverts, *ante*, at 8, n. 10), clear statement has never meant the kind of magic words demanded by the Court today– explicit reference to habeas or to §2241– rather than reference to "judicial review" in a statute that explicitly calls habeas corpus a form of judicial review. In *Gregory* v. *Ashcroft*, 501 U. S. 452, 467 (1991), we said:

> "This [the Court's clear-statement requirement] does not mean that the [Age Discrimination in Employment] Act must mention [state] judges explicitly,

> though it does not. Cf. *Dellmuth* v. *Muth*, 491 U. S. 223, 233 (1989) (SCALIA, J., concurring). Rather, it must be plain to anyone reading the Act that it covers judges."

In *Gregory*, as in *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34–35 (1992), and *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 241, 246 (1985), we held that the clear-statement requirement was not met, not because there was no explicit reference to the Eleventh Amendment, but because the statutory intent to eliminate state sovereign immunity *was not clear*. For the reasons discussed above, the intent to eliminate habeas jurisdiction in the present case is entirely clear, and that is all that is required.

It has happened before— too frequently, alas— that courts have distorted plain statutory text in order to produce a "more sensible" result. The unique accomplishment of today's opinion is that the result it produces is as far removed from what is sensible as its statutory construction is from the language of the text. One would have to study our statute books for a long time to come up with a more unlikely disposition. By authorizing §2241 habeas review in the district court but foreclosing review in the court of appeals, see *Calcano-Martinez*, *post*, at 3–4, the Court's interpretation routes all legal challenges to removal orders brought by criminal aliens to the district court, to be adjudicated under that court's §2241 habeas authority, which specifies no time limits. After review by that court, criminal aliens will presumably have an appeal as of right to the court of appeals, and can then petition this Court for a writ of certiorari. In contrast, noncriminal aliens seeking to challenge their removal orders— for example, those charged with having been inadmissible at the time of entry, with having failed to maintain their nonimmigrant status, with having procured a visa

through a marriage that was not bona fide, or with having become, within five years after the date of entry, a public charge, see 8 U. S. C. §§1227(a)(1)(A), (a)(1)(C), (a)(1)(G), (a)(5) (1994 ed., Supp. V)– will still presumably be required to proceed directly to the court of appeals by way of petition for review, under the restrictive modified Hobbs Act review provisions set forth in §1252(a)(1), including the 30-day filing deadline, see §1252(b)(1). In fact, prior to the enactment of IIRIRA, criminal aliens also had to follow this procedure for immediate modified Hobbs Act review in the court of appeals. See 8 U. S. C. §1105a(a) (1994 ed.). The Court has therefore succeeded in perverting a statutory scheme designed to *expedite* the removal of criminal aliens into one that now affords them *more* opportunities for (and layers of) judicial review (and hence more opportunities for delay) than are afforded *non*-criminal aliens– and more than were afforded criminal aliens prior to the enactment of IIRIRA.[4] This outcome speaks for itself; no Congress ever imagined it.

To excuse the violence it does to the statutory text, the Court invokes the doctrine of constitutional doubt, which it asserts is raised by the Suspension Clause, U. S. Const., Art. I, §9, cl. 2. This uses one distortion to justify another, transmogrifying a doctrine designed to maintain "a just respect for the legislature," *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, on circuit), into a means of thwarting the clearly expressed intent of

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[4] The Court disputes this conclusion by observing that "the scope of review on habeas is considerably more limited than on APA-style review," *ante*, at 24, n. 38 (a statement, by the way, that confirms our contention that habeas is, along with the APA, one form of judicial review). It is more limited, to be sure– but not "considerably more limited" in any respect that would disprove the fact that criminal aliens are much better off than others. In all the many cases that (like the present one) involve "question[s] of law," *ibid.*, the Court's statutory misconstruction gives criminal aliens a preferred position.

the legislature. The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional intent, by giving *ambiguous* provisions a meaning that will avoid constitutional peril, and that will conform with Congress's presumed intent not to enact measures of dubious validity. The condition precedent for application of the doctrine is that the statute can *reasonably be construed* to avoid the constitutional difficulty. See, *e.g.*, *Miller* v. *French,* 530 U. S. 327, 341 (2000) ("'We cannot press statutory construction "to the point of disingenuous evasion" even to avoid a constitutional question'" (quoting *United States* v. *Locke,* 471 U. S. 84, 96 (1985), in turn quoting *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (1933))); *Salinas* v. *United States,* 522 U. S. 52, 60 (1997) (quoting *Seminole Tribe of Fla.* v. *Florida,* 517 U. S. 44, 57, n. 9 (1996)). It is a device for interpreting what the statute says– not for *ignoring* what the statute says in order to avoid the trouble of determining whether what it says is unconstitutional. For the reasons I have set forth above, it is crystal clear that the statute before us here bars criminal aliens from obtaining judicial review, including §2241 district-court review, of their removal orders. It is therefore also crystal clear that the doctrine of constitutional doubt has no application.

In the remainder of this opinion I address the question the Court *should* have addressed: Whether these provisions of IIRIRA are unconstitutional.

II

A

The Suspension Clause of the Constitution, Art. I, §9, cl. 2, provides as follows:

> "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."

A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 1369 (4th ed. 1996) ("[T]he text [of the Suspension Clause] does not confer a right to habeas relief, but merely sets forth when the 'Privilege of the Writ' may be suspended"). Indeed, that was precisely the objection expressed by four of the state ratifying conventions– that the Constitution failed affirmatively to guarantee a right to habeas corpus. See Collings, Habeas Corpus for Convicts– Constitutional Right or Legislative Grace?, 40 Calif. L. Rev. 335, 340, and nn. 39–41 (1952) (citing 1 J. Elliott, Debates on the Federal Constitution 328 (2d ed. 1836) (New York); 3 *id.*, at 658 (Virginia); 4 *id.*, at 243 (North Carolina); 1 *id.*, at 334 (Rhode Island)).

To "suspend" the writ was not to fail to enact it, much less to refuse to accord it particular content. Noah Webster, in his American Dictionary of the English Language, defined it– with patriotic allusion to the constitutional text– as "[t]o cause to cease for a time from operation or effect; as, to *suspend* the habeas corpus act." Vol. 2, p. 86 (1828 ed.). See also N. Bailey, An Universal Etymological English Dictionary (1789) ("To Suspend [in *Law*] signifies a temporal stop of a man's right"); 2 S. Johnson, A Dictionary of the English Language 1958 (1773) ("to make to stop for a time"). This was a distinct abuse of majority power, and one that had manifested itself often in the Framers' experience: temporarily but entirely eliminating the "Privilege of the Writ" for a certain geographic area or areas, or for a certain class or classes of individuals. Suspension Acts had been adopted (and many more proposed) both in this country and in England during the late 18th century, see B. Mian, American Habeas Corpus: Law,

History, and Politics 109–127 (1984)– including a 7-month suspension by the Massachusetts Assembly during Shay's Rebellion in 1787, *id.*, at 117. Typical of the genre was the prescription by the Statute of 1794, 34 Geo. 3, c. 54, §2, that "'. . . [An Act for preventing wrongous imprisonment, and against undue delays in trials], insofar as the same may be construed to relate to the cases of Treason and suspicion of Treason, be suspended [for one year] . . . .'" Mian, *supra,* at 110. See also 16 Annals of Congress 44, 402–425 (1852) (recording the debate on a bill, reported to the House of Representatives from the Senate on January 26, 1807, and ultimately rejected, to "suspen[d], for and during the term of three months," "the privilege of the writ of *habeas corpus*" for "any person or persons, charged on oath with treason, misprision of treason," and other specified offenses arising out of the Aaron Burr conspiracy).

In the present case, of course, Congress has not temporarily withheld operation of the writ, but has permanently altered its content. That is, to be sure, an act subject to majoritarian abuse, as is Congress's framing (or its determination not to frame) a habeas statute in the first place. But that is not the majoritarian abuse against which the Suspension Clause was directed. It is no more irrational to guard against the common and well known "suspension" abuse, without guaranteeing any particular habeas right that enjoys immunity from suspension, than it is, in the Equal Protection Clause, to guard against unequal application of the laws, without guaranteeing any particular law which enjoys *that* protection. And it is no more acceptable for this Court to write a habeas law, in order that the Suspension Clause might have some effect, than it would be for this Court to write other laws, in order that the Equal Protection Clause might have some effect.

The Court cites many cases which it says establish that it is a "serious and difficult constitutional issue," *ante,* at 14, whether the Suspension Clause prohibits the elimina-

tion of habeas jurisdiction effected by IIRIRA. Every one of those cases, however, pertains not to the meaning of the Suspension Clause, but to the content of the habeas corpus provision of the United States Code, which is quite a different matter. The closest the Court can come is a statement in one of those cases to the effect that the Immigration Act of 1917 "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution," *Heikkila,* 345 U. S., at 234–235. That statement (1) was pure dictum, since the Court went on to hold that the judicial review of petitioner's deportation order was unavailable; (2) does not specify to *what* extent judicial review *was* "required by the Constitution," which could (as far as the Court's holding was concerned) be zero; and, most important of all, (3) does not refer to the Suspension Clause, so could well have had in mind the due process limitations upon the procedures for determining deportability that our later cases establish, see Part III, *infra.*

There is, however, another Supreme Court dictum that is unquestionably in point– an unusually authoritative one at that, since it was written by Chief Justice Marshall in 1807. It supports precisely the interpretation of the Suspension Clause I have set forth above. In *Ex parte Bollman,* 4 Cranch 75, one of the cases arising out of the Burr conspiracy, the issue presented was whether the Supreme Court had the power to issue a writ of habeas corpus for the release of two prisoners held for trial under warrant of the Circuit Court of the District of Columbia. Counsel for the detainees asserted not only statutory authority for issuance of the writ, but inherent power. See *id.*, at 77–93. The Court would have nothing to do with that, whether under Article III or any other provision. While acknowledging an inherent power of the courts "over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their

functions," Marshall says that "the power of taking cognizance of any question between individuals, or between the government and individuals,"

> "must be given by written law.
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> "The inquiry, therefore, on this motion will be, whether by any statute compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erik Bollman and Samuel Swartwout, has been given to this court." *Id.*, at 94.

In the ensuing discussion of the Judiciary Act of 1789, the opinion specifically addresses the Suspension Clause– not invoking it as a source of habeas jurisdiction, but to the contrary pointing out that without *legislated* habeas jurisdiction the Suspension Clause would have no effect.

> "It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.'
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> "Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*." *Id.*, at 95.[5]

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[5] The Court claims that I "rea[d] into Chief Justice Marshall's opinion

There is no more reason for us to believe, than there was for the Marshall Court to believe, that the Suspension Clause means anything other than what it says.

B

Even if one were to assume that the Suspension Clause, despite its text and the Marshall Court's understanding, guarantees some constitutional minimum of habeas relief, that minimum would assuredly not embrace the rarified right asserted here: the right to judicial compulsion of the exercise of Executive *discretion* (which may be exercised favorably or unfavorably) regarding a prisoner's release. If one reads the Suspension Clause as a guarantee of habeas relief, the obvious question presented is: *What* habeas relief? There are only two alternatives, the first of which is too absurd to be seriously entertained. It could be contended that Congress "suspends" the writ whenever it eliminates *any* prior ground for the writ that it adopted. Thus, if Congress should ever (in the view of this Court) have authorized immediate habeas corpus— without the

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in *Ex parte Bollman* . . . support for a proposition that the Chief Justice did not endorse, either explicitly or implicitly," *ante*, at 13, n. 24. Its support for this claim is a highly selective quotation from the opinion, see *ibid.* There is nothing "implici[t]" whatsoever about Chief Justice Marshall's categorical statement that "the power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law," 4 Cranch, at 94. See also *ibid.*, quoted *supra,* at 15 ("[T]he power of taking cognizance of any question between individuals, or between the government and individuals . . . must be given by written law"). If, as the Court concedes, "the writ could not be suspended," *ante,* at 13, n. 24, within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet, see *supra*, at __. The Court's position that a permanent repeal of habeas jurisdiction is unthinkable (and hence a violation of the Suspension Clause) is simply incompatible with its (and Marshall's) belief that a failure to confer habeas jurisdiction is *not* unthinkable.

need to exhaust administrative remedies– for a person arrested as an illegal alien, Congress would *never* be able (in the light of sad experience) to revise that disposition. The Suspension Clause, in other words, would be a one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction. This is, as I say, too absurd to be contemplated, and I shall contemplate it no further.

The other alternative is that the Suspension Clause guarantees the common-law right of habeas corpus, as it was understood when the Constitution was ratified. There is no doubt whatever that this did not include the right to obtain discretionary release. The Court notes with apparent credulity respondent's contention "that there is historical evidence of the writ issuing to redress the improper exercise of official discretion," *ante*, at 13. The only Framing-era or earlier cases it alludes to in support of that contention, see *ante*, at 12, n. 23, referred to *ante*, at 13, establish no such thing. In *Ex parte Boggin*, 104 Eng. Rep. 484 (K. B. 1811), the court did not even bother calling for a response from the custodian, where the applicant failed to show that he was statutorily exempt from impressment under any statute then in force. In *Chalacombe's Case,* reported in a footnote in *Ex parte Boggin*, the court did "let the writ go"– *i.e.*, called for a response from the Admiralty to Chalacombe's petition– even though counsel for the Admiralty had argued that the Admiralty's general policy of not impressing "seafaring persons of [Chalacombe's] description" was "a matter of grace and favour, [and not] of right." But the court never decided that it had authority to grant the relief requested (since the Admiralty promptly discharged Chalacombe of its own accord); in fact, it expressed doubt whether it had that authority. See 104 Eng. Rep., at 484, n.(a)[2] (Lord Ellenborough, C. J.) ("Considering it merely as a question of discretion, is it not more fit that this should stand over for the consideration of the Admiralty, to whom the matter

ought to be disclosed?"). And in *Hollingshead's Case*, 91 Eng. Rep. 307 (K. B. 1702), the "warrant of commitment" issued by the "commissioners of bankrupt" was "held naught," since it authorized the bankrupt's continued detention by the commissioners until "otherwise discharged by due course of law," whereas the statute authorized commitment only "till [the bankrupt] submit himself to be examined by the commissioners." (Emphasis deleted.) There is nothing pertaining to executive discretion here.

All the other Framing-era or earlier cases cited in the Court's opinion– indeed, *all the later Supreme Court cases until United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260, *in 1954*– provide habeas relief from executive detention only when the custodian had no legal authority to detain. See 3 J. Story, Commentaries on the Constitution of the United States §1333, p. 206 (1833) (the writ lies to ascertain whether a "sufficient ground of detention appears"). The fact is that, far from forming a traditional basis for issuance of the writ of habeas corpus, the whole "concept of 'discretion' was not well developed at common law," Hafetz, The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts, 107 Yale L. J. 2509, 2534 (1998), quoted in Brief for Respondent in *Calcano-Martinez* v. *INS*, O. T. 2000, No. 00–1011, p. 37. An exhaustive search of cases antedating the Suspension Clause discloses few instances in which courts even discussed the concept of executive discretion; and on the rare occasions when they did, they simply confirmed what seems obvious from the paucity of such discussions– namely, that courts understood executive discretion as lying entirely beyond the judicial ken. See, *e.g., Chalacombe's Case, supra,* at ___. That is precisely what one would expect, since even the executive's evaluation of the *facts*– a duty that was a good deal *more* than discretionary– was not subject to review on habeas. Both in this country, until passage of the Habeas Corpus Act of 1867,

until passage of the Habeas Corpus Act of 1867, and in England, the longstanding rule had been that the truth of the custodian's return *could not be controverted*. See, *e.g.*, *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 43 (H. L. 1758); Note, Developments in the Law– Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1113–1114, and nn. 9–11 (1970) (quoting Act of Feb. 5, 1867, ch. 28, §1, 14 Stat. 385); Oaks, Legal History in the High Court– Habeas Corpus, 64 Mich. L. Rev. 451, 453 (1966). And, of course, going beyond inquiry into the legal authority of the executive to detain would have been utterly incompatible with the well-established limitation upon habeas relief for a convicted prisoner: "[O]nce a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." *Id.*, at 468, quoted in *Swain* v. *Pressley*, 430 U. S. 372, 384–385 (1977) (Burger, C. J., concurring in part and concurring in judgment).

In sum, there is no authority whatever for the proposition that, at the time the Suspension Clause was ratified– or, for that matter, even for a century and a half thereafter– habeas corpus relief was available to compel the Executive's allegedly wrongful refusal to exercise discretion. The striking proof of that proposition is that when, in 1954, the Warren Court held that the Attorney General's alleged refusal to exercise his discretion under the Immigration Act of 1917 could be reviewed on habeas, see *United States ex rel. Accardi* v. *Shaughnessy, supra,* it did so without citation of *any* supporting authority, and over the dissent of Justice Jackson, joined by three other Justices, who wrote:

> "Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court

> seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by over-issue quite as certainly as by too niggardly use. We would . . . leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it." *Id.*, at 271.

III

Given the insubstantiality of the due process and Article III arguments against barring judicial review of respondent's claim (the Court does not even bother to mention them, and the Court of Appeals barely acknowledges them), I will address them only briefly.

The Due Process Clause does not "[r]equir[e] [j]udicial [d]etermination [o]f" respondent's claim, Brief for Petitioners in *Calcano-Martinez*, v. *INS,* O. T. 2000, No. 00–1011, p. 34. Respondent has no legal entitlement to suspension of deportation, no matter how appealing his case. "[T]he Attorney General's suspension of deportation [is] 'an act of grace' which is accorded pursuant to her 'unfettered discretion,' *Jay* v. *Boyd,* 351 U. S. 345, 354 (1956) . . . , and [can be likened, as Judge Learned Hand observed,] to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict,' 351 U. S., at 354, n. 16 . . . ." *INS* v. *Yueh-Shaio Yang,* 519 U. S. 26, 30 (1996). The furthest our cases have gone in imposing due process requirements upon analogous exercises of executive discretion is the following. (1) We have required "*minimal* procedural safeguards" for death-penalty clemency proceedings, to prevent them from becoming so capricious as to involve "a state official flipp[ing] a coin to determine whether to grant clemency," *Ohio Adult Parole Authority* v. *Woodard,* 523 U. S. 272, 289 (1998) (O'CONNOR, J., concurring in part and con-

curring in judgment). Even assuming that this holding is not part of our "death-is-different" jurisprudence, *Shafer* v. *South Carolina,* 532 U. S. ___, ___ (2001) (slip op., at 1) (SCALIA, J., dissenting) (citation omitted), respondent here is not complaining about the absence of procedural safeguards; he disagrees with the Attorney General's judgment on a point of law. (2) We have recognized the existence of a due process liberty interest when a State's statutory parole procedures prescribe that a prisoner "shall" be paroled if certain conditions are satisfied, see *Board of Pardons* v. *Allen,* 482 U. S. 369, 370–371, 381 (1987); *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex,* 442 U. S. 1, 12 (1979). There is no such statutory *entitlement* to suspension of deportation, no matter what the facts. Moreover, in neither *Woodard,* nor *Allen,* nor *Greenholtz* did we intimate that the Due Process Clause conferred jurisdiction of its own force, without benefit of statutory authorization. All three cases were brought under 42 U. S. C. §1983.

Article III, §1's investment of the "judicial Power of the United States" in the federal courts does not prevent Congress from committing the adjudication of respondent's legal claim wholly to "non-Article III federal adjudicative bodies," Brief for Petitioners in *Calcano-Martinez* v. *INS,* O. T. 2000, No. 00–1011, p. 38. The notion that Article III requires every Executive determination, on a question of law or of fact, to be subject to judicial review has no support in our jurisprudence. Were it correct, the doctrine of sovereign immunity would not exist, and the APA's general permission of suits challenging administrative action, see 5 U. S. C. §702, would have been superfluous. Of its own force, Article III does no more than commit to the courts matters that are "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.,* 458 U. S. 50, 90 (1982) (REHNQUIST, J., concurring in judgment)– which (as I have

discussed earlier) did not include supervision of discretionary executive action.

* * *

The Court has created a version of IIRIRA that is not only unrecognizable to its framers (or to anyone who can read) but gives the statutory scheme precisely the *opposite* of its intended effect, affording criminal aliens *more* opportunities for delay-inducing judicial review than others have, or even than criminal aliens had prior to the enactment of this legislation. Because §2241's exclusion of judicial review is unmistakably clear, and unquestionably constitutional, both this Court and the courts below were without power to entertain respondent's claims. I would set aside the judgment of the court below and remand with instructions to have the District Court dismiss for want of jurisdiction. I respectfully dissent from the judgment of the Court.