AMERICAN CIVIL LIBERTIES UNION

Testimony at Hearing on

"Strengthening Interior Enforcement: Deportation and Related Issues"

Before the Subcommittee on Immigration, Border Security and Citizenship

and

the Subcommittee on Terrorism, Technology and Homeland Security

of the Senate Committee on the Judiciary

Submitted by

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Chairman Cornyn and Kyl, Ranking Members Kennedy and Feinstein and Members of the Subcommittees of the Senate Judiciary Committee:

On behalf of the American Civil Liberties Union and more than 400,000 members dedicated to defending the Constitution and its promise of fair process for all persons, including immigrants, we welcome this opportunity to present the ACLU's views at this important hearing.

The hearing covers a number of critical issues. We will not attempt to address all of them in our testimony today. Instead, our testimony will focus on the role of the courts in immigration cases, and in particular, on the issues raised by the Supreme Court's decision in *St. Cyr*, which rejected the Justice Department's sweeping claim that the Writ of Habeas Corpus had been repealed in 1996 and was therefore no longer available to immigrants challenging their deportation.[1]

Our testimony makes two points. *First*, we hope to convey a sense of the complexity and far-reaching importance of the issues raised by the *St. Cyr* decision. Indeed, as we explain, the issues in *St. Cyr* transcend the immigration field and go to the very heart of who we are as a country, a country which can now count more than two centuries of unwavering commitment to the rule of law and to the Great Writ of Habeas Corpus.

In light of the complexity and historic importance of the issues, any

legislation by the Congress in this area will necessarily raise profound constitutional questions, as well as difficult issues of immigration policy and court administration. We thus respectfully urge Congress to give any new proposals in this area the most careful and deliberate consideration and to dismiss out of hand any proposals that would eliminate habeas corpus for immigrants facing detention or deportation. No Congress *in the history of this country* has ever eliminated habeas corpus for immigrants facing deportation, and this Congress should likewise reject any proposal that would take that extraordinary step.

Secondly, we will explain why the attacks that have been leveled against the *St. Cyr* decision are misplaced. Insofar as there are concerns about the increased number of immigration cases in the courts, those concerns are, in our view, more appropriately directed at the Attorney General's 2002 decision to eliminate any meaningful oversight role by the Board of Immigration Appeals (BIA), a decision which has shifted much of the burden to the courts and left the Judiciary with the task of providing the only real check on erroneous decisions made by immigration judges.

I. *St. Cyr* and The Historic Role of Habeas Corpus in Deportation Cases.

At one level, the *St. Cyr* decision was about immigrants and immigration law. But that narrow characterization would not fully capture what was at stake in *St. Cyr*. Fundamentally, *St. Cyr* was about the history of judicial review in the United States and the indispensable role played by the federal courts in safeguarding the rights of all persons, including the most vulnerable and politically powerless among us. In particular, *St. Cyr* explained the history of the Great Writ of Habeas Corpus, which has, from its English origins to modern times, guaranteed the right to go to court to test the legality of the government's actions for any individual threatened with a deprivation of his or her liberty.

The Great Writ has been described as "the most important human right in the Constitution."[2] Indeed the Framers of the Constitution included few protections in the original document that specifically protected individual rights, but they did include the right to habeas corpus.[3]

The *St. Cyr* case itself involved a longtime, lawful permanent resident who was ordered removed on the basis of a criminal conviction. It was undisputed that prior to the passage of the 1996 amendments to the Immigration Act, an immigration judge could have granted Mr. St. Cyr a waiver of deportation based on his significant ties to this country. At the urging of the Justice Department, however, the BIA took the position that the 1996 amendments should be construed

to have *retroactively* eliminated the possibility of a waiver for Mr. St. Cyr, making his removal mandatory.

According to the BIA, deportation was now mandatory in hundreds of cases like Mr. St. Cyr's — regardless of how long ago the conviction occurred or any of the immigrant's other equities. Even relatively minor crimes would trigger mandatory deportation. As a result, an immigrant with a decades-old, non-violent conviction would be subject to automatic deportation — even if, for example, the immigrant had a U.S. Citizen spouse and child, had come to this country at a very young age, and had never again had any involvement with the law.

Even more fundamentally, the Justice Department took the remarkable position that no court could review whether the BIA had properly construed the 1996 amendments to apply retroactively. In the Justice Department's view, Congress had stripped the federal courts of their power — including by Habeas Corpus — to review whether the BIA's legal rulings were consistent with the governing statutes enacted by Congress.

Thus, even if the BIA had incorrectly concluded that Congress never intended to retroactively institute a mandatory deportation scheme, no court had the power to enforce the law and stop Mr. St. Cyr's deportation or any of the hundreds of other illegal mandatory deportations. The only review that would be

available was by administrative judges — immigration judges and the BIA. Yet a process confined to the Executive Branch has never satisfied the fundamental tenets of judicial review and plainly cannot displace the guarantee of habeas corpus.

The issues before the Supreme Court in *St. Cyr* were thus grave, with far-reaching practical and symbolic importance. Had the Justice Department's jurisdictional position prevailed, it would have been the first time in which an immigrant could be deported without any court reviewing the legal validity of the deportation order, even by habeas corpus.

The Supreme Court ultimately held in June 2001 that (1) the courts retained their historic habeas jurisdiction to review deportation orders, and (2) the Justice Department and BIA were wrong in interpreting the 1996 amendments to apply retroactively.

There are at least three overarching points about the Supreme Court's decision that are worth emphasizing. *First*, the Court left no doubt that review of deportation orders is *constitutionally* required, and in particular, that the Suspension Clause of the Constitution guarantees the right to habeas corpus review. Thus, the Court put to rest any notion that immigrants in general, or immigrants with criminal convictions in particular, had no right to habeas corpus.[4]

Second, the Court emphasized that the right to habeas corpus was grounded in hundreds of years of unbroken practice and tradition in the United States and England, and that this practice and tradition applied equally to citizens and non-citizens. In particular, the Court traced the history of immigration law in this country and showed that there has never been a time when an immigrant could be deported based solely on the say-so of an administrative official. As the Court made clear, habeas corpus has always been available for immigrants as the ultimate safeguard against an unlawful deprivation of liberty.[5]

Indeed, the Court stressed that the use of habeas corpus to test the legality of a deportation order fell within the original "core" purpose of the Writ because it involved a challenge to *Executive* detention. In contrast, the Court noted that the use of habeas corpus in post-conviction criminal cases involves detention ordered by a court after a full trial, where habeas would not be the *only* review a defendant received.[6]

Finally, *St. Cyr* illustrates a more general point about judicial review and the role played by courts in the immigration system, namely that oversight is critical to the proper functioning of a fair system. Judicial review may seem at times like a technical, abstract concept. But, in practice, the courts play an indispensable role in enforcing the rule of law and preventing grave instances of injustice that would

otherwise profoundly and inalterably change the lives of countless immigrant families.

Indeed, but for the Court's decision to review Mr. St. Cyr's case, he and hundreds of other longtime residents would have been deported pursuant to unlawful deportation orders, banishing them and their families from the United States, where they may have lived since they were small children. At the end of the day, it is critical that the lives of these individuals not be lost in a blur of aggregate statistics and policy arguments.

Jerry Arias-Agramonte is one of the people who would have been erroneously deported in the absence of habeas. He came to this country as a teenager in 1967, as a lawful permanent resident. He has United States citizen parents and siblings, and six United States citizen children, one of whom served in the military. In 1977, Mr. Arias-Agramonte pled guilty to a New York State controlled substance offense in the fifth degree, for which he received a sentence of probation. On the basis of this nearly 20-year old conviction he was placed into removal proceedings and subject to mandatory deportation under the BIA's retroactivity ruling. The district court reversed the retroactivity ruling and granted him the right to seek a waiver of deportation before an immigration judge based on his family ties, long residence and gainful employment. An Immigration Judge

subsequently granted the waiver. In the absence of habeas, Mr. Arias-Agramonte would have been mandatorily and unlawfully deported from a country in which he had lived since 1967.[7]

Ironically, it is often immigrants who most appreciate the true meaning of judicial review. For many immigrants, it is the very right to go before a neutral judge that, in their minds, differentiates the United States from other countries that lack the same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago--that "[t]he history of American freedom is, in no small measure, the history of procedure."[8] And no procedure has been more integral to preserving freedom in this country over the past two hundred years than the Great Writ of Habeas Corpus.

In short, *St. Cyr* makes clear that immigrants may not be deported without access to the courts, based solely on the word of an administrative judge. At a minimum, habeas corpus must be available to test the legal validity of the deportation order — a right that no Congress has ever taken away.

II. The Attacks on *St. Cyr* and Habeas Corpus Are Misplaced.

Some have suggested that the current judicial review scheme must be revised. Two particular objections are commonly heard.

First, some have suggested that the federal courts are being overloaded with immigration cases and that *St. Cyr* and habeas review are to blame. But habeas cases challenging removal orders are not the problem.

The real increase in immigration cases is due to the greatly increased number of "petitions for review" filed directly in the courts of appeals.[9] And, critically, that increase has coincided with the BIA "streamlining" reforms put into place by the Attorney General in 2002 — reforms that have resulted in a manifold increase in the number of orders issued by the BIA by effectively gutting the administrative review process and thereby shifting the burden to the circuit courts to undertake the only meaningful appellate review of immigration judge decisions.[10]

Among other things, the Attorney General's reforms (1) cut by almost one-half the total number of Board members; (2) expanded the number of cases that will now be reviewed by a single Board member, rather than a three-judge panel; and (3) expanded the number of cases that will be decided on the basis of one-line "AWO" orders, which state only that the immigration judge's decision has been Affirmed Without Opinion. As a result, there is no longer meaningful administrative appellate review, with reasoned decisions from appellate panels.

Rather, the BIA now simply churns out unexplained, one-line decisions at an unprecedented rate, with the circuit courts getting thousands of new cases each year.[11]

Thus, insofar as the aggregate number of immigration cases is perceived as a problem, the solution is not to attack the *St. Cyr* decision. Congress should mandate, among other things, that the Attorney General re-institute a meaningful administrative appellate process before the BIA. Doing so will prevent the BIA from simply shifting the responsibility to the courts to provide the only meaningful review of immigration judge decisions.

The s*econd* commonly heard objection to *St. Cyr* is that immigrants with criminal convictions are now getting "two bites at the apple," while non-criminals receive only one bite. By this, detractors apparently mean that non-criminals must begin the review process in the court of appeals, but immigrants with criminal convictions get two bites because they start in the district court in habeas and can then appeal an adverse habeas decision to the circuit (the so-called extra bite at the apple, which, incidentally, the government gets as well).

But it is misleading to suggest that immigrants with criminal convictions get more review than non-criminals. In fact, they get *less* review. The reason is that the 1996 court-stripping provisions significantly restrict the types of claims that

they can bring to the courts – in habeas or otherwise. Thus, the review they receive in federal court, from both the district and circuit courts, is not as searching as that received by non-criminals.[12]

In any event, Congress is free to return to the pre-1996 scheme and make the courts of appeals the primary forum for review for all immigrants, criminal and non-criminal. *But* if Congress chooses to return to the pre-1996 scheme and make the circuits the primary forum for review, it *must* also do *both* of the following:

(I) ensure that all immigrants, including those with criminal convictions, receive *the constitutionally-required* one bite at the apple in the circuit court, which cannot happen under the current system due to the 1996 court-stripping amendments. This means that the circuit courts must be able to meaningful review the *legal validity* of the deportation order for consistency with the Constitution and governing statutes and regulations. In other words, the circuit courts must be able to review constitutional claims and *all* questions of law, including the application of law to fact (so-called "mixed" questions of law).[13]

(ii) *retain habeas corpus* review as the ultimate safeguard for cases where the immigrant cannot obtain review in the circuit court and manifest injustice would occur in the absence of habeas review, such as in cases where an unscrupulous or negligent lawyer fails to file a petition for review in the circuit

court within the required 30 days, or the immigrant does not receive proper notice of the BIA's decision. In other words, habeas corpus in the district courts need not be the *primary* avenue of review to challenge a deportation order, but it must remain as a backstop to prevent miscarriages of justice — as it has always done at every point in our Nation's history.

Insofar as there are proposals to respond to *St. Cyr* that do not contain *both* of these features, they are deficient. Habeas review must be retained and all immigrants must receive one full bite at the apple (*i.e.*, review of constitutional claims and all other legal claims, not just "pure" questions of law).[14]

In short, Congress has options. We stand ready to work with Congress on preserving full court review while accommodating the government's interest in channeling more immigration appeals directly to the circuit courts of appeals, if that is thought desirable. But one option that is not available is the repeal of habeas corpus and no option should be considered without careful and deliberate review in light of the enormous stakes.

Of course, the ACLU recognizes the authority of Congress to regulate immigration and entry into the United States. That is not the issue. Our point today is that the process for determining who is subject to removal must be fair and efficient to ensure that immigrants who have a right to remain are not deported

erroneously and that the removal system is subject to judicial scrutiny.

CONCLUSION

The history of immigration in the United States is a long and complicated one. What is striking is that at no time did any Congress ever take the extraordinary step of repealing habeas corpus for immigrants facing deportation. This unbroken tradition must be preserved. It is a tradition that powerfully demonstrates our Nation's historic and unwavering commitment to the rule of law.

1. *INS v. St. Cyr*, 533 U.S. 289 (2001).

2. Zechariah Chafee, Jr., The Most Important Human Right in the Constitution, 32 B.U. L. Rev. 143 (1952).

3. *See* U.S. CONST., Art. I, § 9, cl. 2 (the "Suspension Clause").

4. *See, e.g., St. Cyr,* 533 U.S. at 300 (noting that review in deportation cases "is unquestionably required by the Constitution" because of the Suspension Clause) (internal quotes and citations omitted). The Court concluded that Congress had not repealed habeas corpus and that there was therefore no need for it to address the grave and far-reaching constitutional problems that would have been triggered by the elimination of all review, including habeas review. *Id.* at 304-05.

5. *St. Cyr,* 533 U.S. at 305-07 (noting that if habeas is no longer available it "would represent a departure from historical practice in immigration law").

6. *St. Cyr*, 533 U.S. at 300-02.

7. *Arias-Agramonte v. INS*, 2000 WL 1059678 (S.D.N.Y. 2000).

8. *Malinski v. New York*, 324 U.S. 401, 414 (1945).

9. Prior to the implementation of the streamlining regulations, federal appeals courts were receiving approximately 1,500 BIA appeals per year. U.S. Department of Justice, Fact Sheet, "BIA Restructuring and Streamlining Procedures," (Dec. 8, 2004). *See also* Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals," at 4 (noting that there were more than 8,500 BIA appeals filed in the circuit courts in 2003, up from approximately 1,600 in 2001, before the BIA reforms went into place).

10. A number of detailed reports on the BIA reforms have documented that the increase in appeals to the circuits has coincided with the BIA reforms, a point even the government has acknowledged. *See, supra*, U.S. Department of Justice, Fact Sheet; Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals"; *see also* Dorsey & Whitney LLP, Study Conducted for The American Bar Association, "Board of Immigration Appeals: Procedural Reforms to Improve Case Management," July 22, 2003.

11. The reforms have resulted in the BIA deciding thousands more cases each year, meaning that there are that many more cases each year that can be appealed to the circuits. *See, e.g.,* U.S. Department of Justice, Executive Office for Immigration Review, FY 2004 Statistical Yearbook at S2 (showing that in 2001 the BIA decided approximately 27,000 cases on appeal from Immigration Judges, but more than 46,000 cases in 2003, after the 2002 BIA reforms went into place). Moreover, not only did the aggregate number of BIA decisions increase dramatically in light of the 2002 reforms, but the rate at which immigrants appeal BIA decisions to the circuit courts has increased, *see, e.g.,* DOJ Fact Sheet, *supra*, suggesting that the increased number of appeals to the circuits is likely also due to dissatisfaction by immigrants with the lack of a reasoned, considered decision by the BIA. *See also* Dorsey & Whitney ABA Report, *supra* n. 9, at 39 ("because the BIA backlog reduction is achieved by depriving aliens of meaningful agency review, aliens are seeking meaningful review in the federal circuit courts"); *see also id.* at 40.

12. *St. Cyr*, 533 U.S. at 314 n.38 (noting limitations on "scope" of habeas review for immigrants with criminal convictions).

13. *St. Cyr*, 533 U.S. at 302 (noting that historically habeas covered all questions of law including the "erroneous *application* or interpretation of statutes") (emphasis added). There is no basis in the Constitution or in historical habeas practice for limiting review to "pure" questions of law. Moreover, any attempt to differentiate between types of legal questions (*i.e*., "pure" as opposed to "mixed" legal questions) will inevitably create years of unnecessary litigation over the elusive line separating the various categories.

14. There are many ways in which Congress can restore meaningful direct review in the courts of appeals for all immigrants, including by repealing the jurisdictional bar added to the Immigration Act in INA § 242 (a)(2)©), 8 U.S.C. § 1252 (a)(2)©). Insofar as there are proposals to amend INA § 242 (a)(2)©) to restore review of only "constitutional" claims and "pure" questions of law, those proposals are deficient because they fail to restore review of mixed questions of law and fact (*i.e.*, the application of law to fact); they are also deficient if they fail to protect habeas as a safety net. *See*, *supra*, n.12.