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ADMINISTRATIVE APPEALS AND JUDICIAL REVIEW IN IMMIGRATION LAW: WHERE MATTERS STAND AT THE BEGINNING OF THE 21ST CENTURY

Carlos Ortiz Miranda⁺

Immigration issues have received considerable media attention in recent years, most notably because of the debate between those advocates seeking comprehensive immigration reform and those who want enforcement actions only.¹ In fact, immigration casts a long shadow over the history of the United States; it has affected the country broadly in social, political, and economic terms.²

The federal government preempts state law in the field of immigration, with the issue dominating all three branches of the federal government. Congress has plenary power over the nation's immigration laws, while

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1. See *President Readdresses Immigration Issues; Pushes for Comprehensive Immigration Reform*, 82 INTERPRETER RELEASES 1953, 1954 (2005). For an extensive listing of editorials and op-eds on immigration reform, see generally National Immigration Forum, News Clips, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=53> (last visited Aug. 8, 2006). Further, the Independent Task Force on Immigration and America's Future has been convened by the Migration Policy Institute in partnership with the Manhattan Institute and the Woodrow Wilson International Center for Scholars. Independent Task Force on Immigration and America's Future, <http://www.migrationpolicy.org/ITIAF/index.php> (last visited Aug. 8, 2006). The task force consists of a bipartisan panel of prominent leaders and intends to generate strong information and workable policy ideas in the area of immigration reform because "immigration policy debates are often poorly informed, polarized and narrow." *Id.* The task force focuses on the unauthorized population, immigration enforcement and security, labor markets, and immigrant integration. *Id.*

2. For a general overview of the broad impact that immigration has made on the United States, see STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 34-102 (4th ed. 2005). See generally MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (tracing the history of "illegal aliens" in the United States and how irregular migration, and the policy debate that it generated, shaped ideas and practices about citizenship, race, and state authority in the twentieth century).

the executive branch administers and enforces those laws, and increasingly, the judiciary has been drawn into immigration law issues.³

This paper focuses on the dimension of immigration legal policy bearing on administrative appeals and judicial review of persons ordered removed from the United States for having violated some aspect of immigration law.⁴

When an individual has been prosecuted by federal authorities for removal based on an immigration violation, that person is put in removal proceedings before an immigration court.⁵ At the conclusion of the removal proceeding, conducted by an immigration judge, the person is either granted relief from removal or is issued a final order of removal.⁶ Adverse decisions may be appealed to the Board of Immigration Appeals (BIA), an administrative appellate body.⁷ Both the immigration court and the BIA are located within the Executive Office for Immigration Review, which is a part of the Department of Justice (DOJ).⁸

Prior to significant immigration reform in the 1990s, an individual ordered removed from the United States and held in custody pending removal had access to federal district courts through the writ of habeas corpus to challenge the legality of the detention.⁹ Asylum cases, however, are appealed directly from the BIA to courts of appeals in the appropriate federal circuit. Judicial review is often deferential and limited in scope by common law jurisprudence and statute.¹⁰

3. 1 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* § 1.02 (rev. ed. 2005) (explaining the general scheme over immigration law relating to the branches of the federal government).

4. LEGOMSKY, *supra* note 2, at 632-45 (describing the removal process).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. The laws restricting judicial review during the 1990s affected lawful permanent residents, who had been convicted of certain criminal offenses and faced deportation based on the criminal conviction. One of these cases, *INS v. St. Cyr*, 533 U.S. 289 (2001), made its way to the Supreme Court. For an insightful discussion of the 1990 laws and *St. Cyr*, see Nancy Morawetz, *INS v. St. Cyr: The Campaign to Preserve Court Review and Stop Retroactive Application of Deportation Laws*, in *IMMIGRATION STORIES* 278-309 (David A. Martin & Peter H. Schuck eds., 2005).

10. See 8 GORDON, MAILMAN & YALE-LOEHR, *supra* note 3, §§ 104.01-13.

Since 2002, there has been an increase in immigration appeals to the circuit courts, most of which are asylum cases.¹¹ The increased caseload has caused tension between judicial and administrative adjudicators.¹²

As one judge from the Seventh Circuit opined in a case decided on November 30, 2005, this tension

is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.¹³

Some DOJ officials disagree with this assessment, pointing out that the quality of immigration court decisions is generally good; the government wins approximately ninety percent of its cases on appeal; the circuit courts handle only a fraction of the cases that go through the system and of those cases, only a small fraction are criticized.¹⁴

11. See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 1, 71-73 (2005). The increase has been tied to the streamlining regulation implemented by the DOJ. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 1003). Under the new procedures, the BIA permits a single Board member to enter a summary affirmance, without an opinion, of an immigration judge's decision. 8 C.F.R. § 1003.1(e)(4) (2006). If the BIA's summary affirmance is appealed to the court of appeals, it is the circuit court that is confronted with the onerous task of analyzing the immigration judge's rationale. See generally *BIA Procedural Reform Regulation: A Topical Summary*, 79 INTERPRETER RELEASES 1457 (2002) (providing a generally summary of the BIA regulation). Moreover, other factors have contributed to the increased caseload such as restrictive changes in the law, a hybrid jurisdictional scheme, more cases on account of increased enforcement, and increased legal issues in the law and enforcement practices. See Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, 10 BENDER'S IMMIGR. BULL. 45, 46 (2005).

12. Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamling to Blame?*, 82 INTERPRETER RELEASES 2005, 2005-12 (2005).

13. *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005).

14. See Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (quoting Jonathan Cohn, Deputy Assistant Attorney General, speaking on behalf of DOJ, regarding the handling of cases by immigration judges).

On January 9, 2006, Attorney General Alberto Gonzales ordered a comprehensive review of the immigration courts to address the treatment that some individuals have received from judges in removal proceedings.¹⁵ Recognizing these problems, the most effective method to address them is on a prospective basis.

Recent legislative developments under the REAL ID Act also merit consideration.¹⁶ Most of the media coverage over the REAL ID Act focused on standards for issuing driver's licenses and identification cards.¹⁷ This legislation, however, also contains provisions on asylum, removal, limitation on the use of the writ of the habeas corpus to challenge removal orders in federal district courts, the transfer of these cases to the appropriate court of appeals, and the role of the appellate courts in reviewing removal orders.¹⁸

Some scholars consider this a major change in the jurisdictional structure for reviewing proceedings aimed at the removal of noncitizens from the United States, and question how this new jurisdictional structure will conform to the Habeas Corpus Suspension Clause of the United States Constitution.¹⁹ The change may also add to the immigration caseload of the circuit courts.

Judge John Noonan, a senior judge on the Court of Appeals for the Ninth Circuit, appears to empathize with the human plight of the individuals whose cases are under review. For example, in a 1991 dissenting opinion involving a case in which a naturalization application was denied, and the denial was challenged by a person who had lived in the United States for 30 years, Judge Noonan wrote, “[t]he Immigration

15. The review and attendant recommendations for improvement will encompass both the immigration courts and the Board of Immigration Appeals. Attorney General Alberto Gonzales observed:

To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department [of Justice] in which you serve.

Memorandum from Alberto R. Gonzales, U.S. Att’y Gen., to Immigration Judges (Jan. 9, 2006) (on file with author).

16. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (to be codified in scattered sections of 8 U.S.C.).

17. See, e.g., T.R. Reid & Darryl Fears, *Driver’s License Curtailed as Identification: Critics Call ‘Real ID’ Issue Forcefully Anti-Immigrant*, WASH. POST, Apr. 17, 2005, at A3.

18. See *REAL ID Now the Law*, 82 INTERPRETER RELEASES 813, 813-14 (2005) (analyzing the legislation); see also Gregory H. Siskind, *REAL ID Act Becomes Law*, 10 BENDER’S IMMIGR. BULL. 1057, 1057-58 (2005).

19. See Gerald L. Neuman, *The REAL ID Act and the Suspension Clause*, 9 BENDER’S IMMIGR. BULL. 1555, 1555 (2005). The Suspension Clause reads: “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.” U.S. CONST. art. I, § 9, cl. 2.

Service's answer is that aliens are different. They are second class people. No doubt for some purposes this characterization is the harsh truth. Since the abolition of slavery aliens are the only adults subject to treatment as second class people in the United States."²⁰

Participants in this Symposium include a broad range of experts: academics, clinicians, policy advocates, executive branch litigators, judicial branch administrators, and judges. Special gratitude is in order for the *Catholic University Law Review* staff who worked patiently and diligently to make this Symposium a reality.²¹

20. *Price v. INS*, 941 F.2d 878, 885 (9th Cir. 1991) (Noonan, J., dissenting), *withdrawn, opinion replaced*, 962 F.2d 836 (9th Cir. 1992). Judge Noonan's dissent concerning the human plight of persons subject to the removal process echoes aspects of Catholic social teaching on migration. See *id.*; CONFERENCIA DEL EPISCOPADO MEXICANO & U.S. CONFERENCE OF CATHOLIC BISHOPS, STRANGERS NO LONGER: TOGETHER ON THE JOURNEY OF HOPE 13 (2003) [hereinafter STRANGERS NO LONGER]. More specifically, Catholic social teaching on migration is based on five principal tenets, one of which is that "[r]egardless of their legal status, migrants, like all persons, possess inherent human dignity that should be respected." STRANGERS NO LONGER, *supra*, at 15-16. The other tenets of this teaching include the right of persons to find opportunities in their home country, the right of persons to migrate in order to sustain themselves and their families, the need for the global community to protect refugees, and the right of sovereign states to protect their borders. *Id.* Catholic social teaching recognizes the right of sovereign states to control their borders for the purpose of advancing the common good. *Id.* at 15. Thus, while reasonable limitations may be imposed on immigration by the sovereign state, the common good is not served when basic human rights are violated, and while the right to migrate under certain circumstances is recognized, Catholic teaching also emphasizes that the root causes of migration, such as poverty, injustice, religious intolerance, and armed conflicts, should be addressed. *Id.* at 13. Catholic social teaching on migration originates in biblical scripture. *Id.* at 11-12. Moreover, in the modern era and as response to the global phenomenon of migration, it has been a topic in numerous papal encyclicals. See, e.g., JOHN XXIII, PACEM IN TERRIS 8 (Nat'l Catholic Welfare Conference 1963); JOHN PAUL II, ECCLESIA IN AMERICA 108 (U.S. Catholic Conference 1999) [hereinafter ECCLESIA IN AMERICA]; JOHN PAUL II, SOLLICITUDO REI SOCIALIS 40 (U.S. Catholic Conference 1988); PIUS XII, EXSUL FAMILIA 25 (Giulivo Tessarolo ed., St. Charles Seminary 1962). *Ecclesia in America* focuses on the Catholic Church in the Americas and reiterates the rights of migrants, their families, and respect for human dignity (even in cases of irregular immigration). ECCLESIA IN AMERICA, *supra*, at 108-09. For an extensive discussion of Catholic social teaching on migration, see STRANGERS NO LONGER, *supra*, at 13-16; see also Kathryn A. Lee, *The Religious Imagination and Hearing the "Other": Judge John T. Noonan, Catholic Social Teaching, and Immigration*, Paper Presented at the Fourth Annual Lilly Fellows Conference: Christianity and Human Rights (Nov. 11-13, 2004) (on file with author).

21. It is also important to recognize that issues involving immigration are very poignant today and are receiving national attention. See Pamela A. Maclean, *Immigration Bench Plagued by Flaws*, NAT'L L.J., Feb. 6, 2006, at 1, 18 (discussing the systemwide problems with immigration cases, including the fact that "[t]he alleged misconduct, systemic problems handling caseloads and lack of resources have drawn the attention of academics and Congress").

