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Removing the Distraction of Delay

Jill E. Family

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Cover Page Footnote

Professor of Law and Director, Law and Government Institute, Widener University School of Law. Thank you to the Queen Mary School of Law, University of London, for hosting me as a Visiting Scholar. This Article greatly benefitted from the insights of participants in a faculty colloquium at Rutgers University School of Law-Camden, the participants at the biennial Immigration Law Professors' Conference at the University of California, Irvine School of Law, and the input of participants in the Migration and Law Network Conference at Birkbeck College School of Law, University of London. Elspeth Guild, Steve Legomsky, Hiroshi Motomura, and Helena Wray provided invaluable comments on earlier versions of this Article. Brent Johnson provided first-rate library assistance and Marissa Mowery provided excellent research assistance.

REMOVING THE DISTRACTION OF DELAY

Jill E. Family⁺

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Immigration adjudication is in an awkward position in the United States.¹ Although there is an intricate system to adjudicate immigration removal (deportation) cases, the system is hindered by restrictions on judicial review and the threat of further limitations. The restrictions and the threats of further limitations reflect distaste for providing access to the courts to foreign nationals facing removal.² There is a push and pull phenomenon, with the immigration adjudication system stretched uncomfortably between two forces. On one side, there is a push to apply common notions of due process to immigration removal

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1. This Article focuses on removal adjudication and does not address applications for immigration benefits.

2. See Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1615–16 (2000) [hereinafter Legomsky, *Fear and Loathing*] (“Immigration policy and judicial review have always had a kind of oil-and-water relationship.”).

cases, driven by the notion that the same concepts of procedural justice and access to justice should apply in immigration cases as would in any other context. On the other side, there is a pull away from these common conceptions and a belief that less process and access to justice is not only acceptable, but preferable, when it comes to foreign nationals facing removal from the United States.

One oft-stated justification for cutting back access to justice in the immigration removal context is that providing access to courts allows foreign nationals means to delay their removal.³ Some argue that by pursuing legal challenges in court, foreign nationals gain more time in the United States and delay, or perhaps ultimately prevent, removal from the United States.⁴ The delay rationale places the blame on individual foreign nationals and their attorneys for accessing justice. The rationale assumes and promotes the idea that foreign nationals seek judicial review for less than honorable reasons, and therefore, curtailing access to the courts is justified.⁵

This Article concludes that the delay rationale is “window dressing” for a deeper disagreement about the role of national sovereignty in immigration law.⁶ The delay rationale rests upon, and is an expression of hope for the continued existence of, a conception of immigration sovereignty that places the will of the national government above all else. It relies on a classical conception of immigration sovereignty rooted in the plenary power doctrine.⁷ As announced by the Supreme Court in the late nineteenth century, the plenary power doctrine gives Congress and the President unfettered power over certain aspects of immigration law.⁸ This plenary power notion of immigration sovereignty contrasts with a more modern notion of sovereignty, which expressly incorporates concern for the individual and envisions a more limited role for government when it comes to the treatment of individual foreign nationals.⁹

3. See *infra* Part I.B (explaining the delay rationale in detail).

4. See, e.g., H.R. REP. NO. 87-1086, at 22–23 (1961).

5. An empirical study questioned the major assumption underlying the delay rationale—that judicial review takes a long time. Michael Kagan, Fatma Marouf & Rebecca Gill, *Buying Time? False Assumptions About Abusive Appeals*, 63 CATH. U. L. REV. 679, 681 (2014). After analyzing over 1,600 immigration petitions from eleven federal circuit courts, the authors found the “results suggest that concerns about delay are overblown . . .” *Id.* at 682. According to the study, the delay theory relies heavily on the assumption “that the federal court process takes a long time.” *Id.* at 694. Instead, the study concludes that “an appeal to a federal court may be the fastest part of the immigration adjudication system, and that federal courts often resolve weak cases quickly.” *Id.*

6. Delay is a legitimate concern in structuring an adjudication system. See, e.g., Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1330–32 (1986) [Legomsky, *Forum Choices*]. This Article reveals, however, that something other than delay is motivating efforts to restrict court access in the context of judicial review of removal cases.

7. See *infra* Part II.B.

8. See *infra* notes 115–118 and accompanying text.

9. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1–4 (1984) [hereinafter Schuck, *Transformation*].

While some aspects of the plenary power doctrine have softened and have become nuanced, this Article connects the delay rationale to the view of immigration sovereignty expressed in those foundational Supreme Court cases that established the plenary power doctrine.

Other factors besides sovereignty, varying from individual to individual, motivate objections to providing access to courts to foreign nationals facing removal. Those factors include general antipathy towards courts, political strategy, efficiency, costs, and, in some instances, xenophobia and racism.¹⁰ This Article does not discount those forces.¹¹ This Article instead focuses on the role of immigration sovereignty in motivating efforts to restrict access to courts under the banner of unjustified delay. Viewing immigration adjudication through the lens of sovereignty reveals a need to peel back the argument about delay, and to acknowledge and resolve the debate over immigration sovereignty.

By examining a similar phenomenon in the United Kingdom (U.K.), this Article demonstrates that the debate over the nature of immigration sovereignty must be resolved in the popular imagination as well as through formal legal means. The U.K.'s elaborate system for review of immigration removal cases is subject to a multitude of restrictions and faces a nearly constant threat of further restrictions.¹² Proponents of restrictions in the U.K. often cite concerns about delay as the primary justification for those restrictions.¹³ Thus, the U.K. is engaged in a similar debate, despite the fact that it has incorporated into its domestic law international obligations recognizing more modern notions of sovereignty, with a heavy emphasis on respect of individual rights.¹⁴ In the U.K., defining the role of sovereignty in the context of immigration remains a fierce battle.¹⁵ The U.K. experience does not provide a solution for the U.S. debate, but it does serve as a lesson that change in public perception is a necessary companion to formal legal change.

Until the debate over immigration sovereignty is resolved, immigration adjudication in the United States will continue its uncomfortable existence. This Article shifts the focus away from the distracting delay debate and instead focuses on fundamentally different perspectives of immigration sovereignty.¹⁶

10. See Legomsky, *Fear and Loathing*, *supra* note 2, at 1627–30. Additionally, Professor Hiroshi Motomura has described a misconception that substantive immigration law is simple, and that the misconception contributes to an idea that maintaining the “rule of law” in the immigration law realm is uncomplicated and therefore court review is superfluous. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 189-92 (2014) [hereinafter MOTOMURA, IMMIGRATION OUTSIDE].

11. In fact, these forces could influence one's preferred approach to immigration sovereignty.

12. See *infra* Part II.C.1.

13. See, e.g., *infra* notes 205–206.

14. See *infra* Part II.C.1.

15. See *infra* Part II.C.1.

16. The awkwardness of immigration adjudication in the United States is connected to a broader, ongoing struggle to balance individual rights with government control in all aspects of immigration law. See, e.g., Linda S. Bosniak, *Membership, Equality, and the Difference that*

Then, this Article contends that even if the United States achieves formal legal change, the U.K.'s experience demonstrates that a change in public perception of what sovereignty means in the context of immigration is required.

I. THE DELAY RATIONALE AND EFFORTS TO RESTRICT JUDICIAL REVIEW OF IMMIGRATION REMOVAL CASES

A. *The Role of Judicial Review in Immigration Removal Cases*

Most adjudication of removal (deportation) cases in the United States occurs within an executive branch agency, but there is the possibility of independent judicial review in the federal courts.¹⁷ Federal court review of removal decisions is subject to timing, form, and substantive restrictions.¹⁸

In most immigration removal cases, the process begins with the filing of a charging document called a Notice to Appear (NTA), which directs the foreign national to appear in Immigration Court.¹⁹ The Department of Homeland Security (DHS) issues the charging document, listing the reasons why the government believes the foreign national is removable.²⁰ Additionally, DHS will assign one of its lawyers to represent the government in the immigration proceeding.²¹ As the first step in the proceeding, an Immigration Court acts as the trial-level for removal adjudication.²² An immigration judge holds a hearing and ultimately decides whether to order the foreign national's removal.²³ Immigration judges are not members of the judicial branch; instead, immigration judges are attorneys employed by the Department of Justice (DOJ).²⁴ Scholars,

Alienage Makes, 69 N.Y.U. L. REV. 1047, 1055 (1994) (comparing the Supreme Court's characterization of alienage as a "legal status [that] . . . is a presumptively illegitimate basis for discriminatory treatment" with the idea that national sovereignty authorizes a nation to secure its borders from "outsiders").

17. See Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499, 502 (2008) [hereinafter Family, *Stripping Judicial Review*] (discussing the U.S. immigration adjudication process).

18. See *id.* at 502–03.

19. 8 C.F.R. § 1003.14(a) (2014).

20. *Id.* at § 1003.15.

21. See *Office of the Principal Legal Advisor (OPLA)*, ICE, <http://www.ice.gov/about/offices/leadership/opla/> (last visited Dec. 19, 2014) (describing the Immigration and Customs Enforcement's Office of the Principal Legal Advisor as DHS' largest legal program and the "exclusive legal representative for the U.S. government" in removal proceedings before the Executive Office for Immigration Review).

22. Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 600 (2008) [hereinafter Family, *A Broader View*].

23. 8 C.F.R. § 1003.10(b).

24. *Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge*, 72 Fed. Reg. 53,673 (Sept. 20, 2007) (explaining that immigration judges are "Department of Justice attorneys who are designated by the Attorney General to conduct such proceedings, and they are subject to the Attorney General's direction and control.").

including the author, have debated whether these judges have sufficient decisional independence from their employer, the DOJ.²⁵ A DOJ employee presides over the hearing, while an employee of DHS, another executive branch agency, represents the government during that hearing. Nearly half of the individuals in Immigration Court, however, appear unrepresented.²⁶ The Immigration and Nationality Act of 1965 (INA) does not provide for government-funded counsel in Immigration Court.²⁷

After the immigration judge issues her order, both the foreign national and the government have an opportunity to appeal the decision to the second level of agency adjudication, the Board of Immigration Appeals (BIA).²⁸ As part of DOJ, the BIA hears appeals from immigration judge decisions.²⁹ Members of the BIA are also not a part of the judicial branch, nor do they receive the statutory protections afforded to administrative law judges.³⁰ Instead, the BIA members are attorneys employed by DOJ.³¹ Appeals to the BIA are almost always decided solely on paper submissions.³² The BIA reviews an immigration judge's findings of fact under a clearly erroneous standard.³³ The Board has *de novo* review authority over questions of law, challenges to the application of law to facts, and questions of discretion in appeals from immigration judge decisions.³⁴

25. See, e.g., Family, *A Broader View*, *supra* note 22, at 600.

26. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, U.S. DEPARTMENT OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK G1 fig. 9 (2013), available at <http://www.justice.gov/eoir/statspub/fy12syb.pdf> (finding that in Fiscal Year 2012, fifty-six percent of respondents appearing in immigration court were represented, which was an increase over Fiscal Year 2009, in which only forty-five percent were represented).

27. 8 U.S.C. § 1362 (2012). In April 2013, DOJ and DHS announced a policy to provide greater procedural protections for unrepresented respondents with serious mental disorders who appear in immigration court. Press Release, Exec. Office for Immigration Review, Dep't of Justice & the Dep't of Homeland Sec. Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), available at <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>. Further, in April 2013, a federal district court judge held that immigration detainees with mental disorders have a right to government-funded counsel. See *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG, 2013 WL 3674492, at *19 (C.D. Cal. Apr. 23, 2013).

28. 8 C.F.R. §§ 1003.10(c), 1003.3(a)(1).

29. 8 C.F.R. § 1003.10(c).

30. 8 C.F.R. § 1003.1(a)(1); see, e.g., 5 U.S.C. § 7521(a) (2012) (providing administrative law judges procedural protections in adverse employment actions through the Merit Systems Protection Board).

31. 8 C.F.R. § 1003.1(a)(1).

32. BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 8.2(a) (2014), available at <http://www.justice.gov/eoir/vll/qapracmanual/BIAPracticeManual.pdf#page=103> ("Oral argument is held at the discretion of the Board and is rarely granted.").

33. 8 C.F.R. § 1003.1(d)(3)(i).

34. *Id.* at § 1003.1(d)(3)(ii). See also *In re A-S-B-*, 24 I&N Dec. 493, 496 (BIA 2008) (explaining that the BIA retains independent review authority over "pure questions of law and the application of a particular standard of law to [the] facts" of the case).

The BIA's decision represents the final agency action.³⁵ If the final agency action is an order to remove the foreign national, the foreign national may seek judicial review of the agency's order.³⁶ At this point, the process shifts from adjudication within the executive branch to a hearing in an independent, constitutionally authorized Article III court.³⁷ It is not until this moment of judicial review that a non-agency employee would have authority over the decision to remove. In seeking judicial review, the foreign national could challenge mistakes of fact, law, or abuses of discretion, and could raise constitutional challenges, including any alleged violations of the Due Process Clause of the U.S. Constitution.

A foreign national seeking judicial review in an Article III court will discover, however, that Congress has curtailed the availability of judicial review in immigration removal cases.³⁸ The statutory authorization for judicial review over removal cases begins by authorizing judicial review directly in a federal court of appeals, but also chips away at that grant by listing "[m]atters not subject to judicial review[.]"³⁹ Congress insulated many discretionary decisions from review, including whether to grant relief from removal.⁴⁰ However, judicial review remains over discretionary decisions related to the denial of an application for asylum.⁴¹ Removal decisions based on convictions for a variety of crimes are also not subject to judicial review, unless the individual challenging removal raises constitutional claims or questions of law.⁴² Additionally, there are timing and form of action restrictions.⁴³

B. Efforts to Limit Immigration Judicial Review and the Delay Justification

From the advantage of hindsight, the United States has been on a trajectory of narrowing and channeling the availability of judicial review over removal cases

35. 8 C.F.R. § 1003.1(d)(7).

36. *See* 8 U.S.C. § 1252(d) (2012).

37. *See id.* at § 1252(a).

38. *See, e.g., id.* at § 1252(a)(2) (limiting matters subject to judicial review). *See also* Family, *A Broader View*, *supra* note 22, at 608–09. The availability of judicial review over removal cases implicates several thorny constitutional issues, such as the immigration plenary power doctrine (discussed in Part II), congressional control over the jurisdiction of the federal courts generally, and the availability of habeas corpus jurisdiction. *See generally* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) [hereinafter Benson, *Back to the Future*].

39. 8 U.S.C. § 1252(a)(2).

40. *See id.* at § 1252(a)(2)(B).

41. *Id.* at § 1252(a)(2)(C). *See also* *Kucana v. Holder*, 558 U.S. 233, 237 (2010) (holding that § 1252(a)(2) does not bar judicial review of determinations made discretionary by regulation).

42. *Id.* at § 1252(a)(2)(C)-(D).

43. *See, e.g., id.* at § 1252(b)(1) (establishing that a petition for review must be filed within thirty days after the final administrative decision to remove); *id.* at § 1252(b)(9) (consolidating all questions of law and fact for review into the statutory review scheme and prohibiting habeas corpus petitions unless otherwise provided by statute); *id.* at § 1252(f)(1)(B) (limiting the use of class actions).

since at least 1961.⁴⁴ In 1961, Congress eliminated the role of the federal district courts in reviewing removal orders. Congress directed all those seeking judicial review to file a petition for review directly with a U.S. Court of Appeals.⁴⁵ Before 1961, immigration statutes did not specifically address judicial review of removal orders.⁴⁶ Filing a habeas corpus petition in a federal district court was the main method of obtaining judicial review.⁴⁷ A federal court of appeals could review a district court's rejection of a habeas petition.⁴⁸ However, in 1961, Congress added a statutorily mandated procedure for obtaining review that eliminated the role of the federal district courts, as well as instituted a six-month time limit on when challenges could be brought and a requirement to exhaust administrative remedies.⁴⁹ Congress enacted the 1961 legislation after the Supreme Court recognized review of immigration cases under the Administrative Procedure Act (APA).⁵⁰ The 1961 statute was intended to limit the possibilities for review opened up by the Supreme Court's recognition of review under the APA.⁵¹

Legislative reports explained that concerns about delay motivated the 1961 narrowing of judicial review.⁵² One report stated:

The Committee on the Judiciary has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country. . . . The alien whose sole immigration offense is, perhaps, a defect in his visa, or an overextended stay as a visitor, usually accepts the order of deportation and departs. Other aliens, mostly subversives, gangsters, immoral, or narcotic peddlers, manage to protract their stay here indefinitely only

44. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 752 (5th ed. 2003); see also Hirsohi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461–66 (2006) [hereinafter Motomura, *Lens of Habeas Corpus*].

45. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651.

46. See Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233, 256 (1998).

47. Benson, *Back to the Future*, *supra* note 38, at 1431.

48. *Id.*

49. § 5(a), 75 Stat. at 651; H.R. REP. NO. 87-565, at 1 (1961) (“The purpose of [section 5] is to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States, by adding a new section 106 to the Immigration and Nationality Act.”).

50. See Motomura, *Lens of Habeas Corpus*, *supra* note 44, at 462–63 (discussing Congress' reaction to *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955) and *Brownell v. We Shung*, 352 U.S. 180 (1956)).

51. ALEINIKOFF ET AL., *supra* note 44, at 752.

52. See H.R. REP. NO. 87-565, at 6-7; H.R. REP. NO. 87-1086, at 22–23 (1961). See also Daniel Kanstroom, *The Long, Complex, and Futile Deportation Saga of Carlos Marcello*, in IMMIGRATION STORIES 134, 136–37 (David A. Martin & Peter H. Schuck eds., 2005).

because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process. Without any reflection upon the courts, it is undoubtedly now the fact that such tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act by repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings.⁵³

President Dwight D. Eisenhower also expressed the delay rationale when he stated to Congress, "I have previously called the attention of the Congress to the necessity for a strengthening of our laws in respect to the aliens who resort to repeated judicial reviews and appeals for the sole purpose of delaying their justified expulsion from this country."⁵⁴

Congress further enacted major restrictions on judicial review in 1996.⁵⁵ These restrictions maintained the 1961 statutory framework requiring filing of petitions for review in the courts of appeals, but severely narrowed the ability of the courts of appeals to review removal decisions.⁵⁶ Congress enacted restrictions affecting the timing and form of challenges, as well as restrictions on judicial review based on the substance of the case.⁵⁷ As described above, the substantive restrictions include provisions that eliminate review over many executive discretionary decisions in removal cases and that limit review of removal orders based on the commission of various criminal acts.⁵⁸

Congress accepted the 1996 restrictions with little debate prior to enactment.⁵⁹ While legislative history is scarce, there is evidence that proponents of the 1996 restrictions advanced the delay rationale.⁶⁰ For example, the *New York Times* reported that "[l]awmakers who supported the bill said it was necessary to unclog an immigration system swamped with lawsuits by people without

53. H.R. REP. NO. 87-1086, at 22-23.

54. *Id.* at 23 (internal quotation marks omitted).

55. In 1988, Congress shortened the time limit for filing a petition for review from six months to sixty days for those whose removal orders were based on an aggravated felony conviction. National Narcotics Leadership Act of 1988, Pub. L. No. 100-690, § 7347(b)(1), 102 Stat. 4181, 4472 (1988). In 1990, Congress shortened the time limit to thirty days. Immigration Act of 1990, Pub. L. No. 100-649, § 502(a), 104 Stat. 4978, 5048. Before 1996, Congress enacted other restrictions aimed at individuals with aggravated felony convictions, but 1996 marked a major restructuring of immigration judicial review. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130004, 108 Stat. 1796, 2026. This section discusses changes implemented by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which superseded earlier changes brought by the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996. *See* Motomura, *Lens of Habeas Corpus*, *supra* note 44, at 463-64 (discussing the sequence of IIRIRA superseding AEDPA).

56. *Id.*

57. *See supra* notes 42-43 and accompanying text.

58. *See supra* notes 38-40 and accompanying text.

59. David Johnston, *Government is Quickly Using Power of New Immigration Law*, N.Y. TIMES, Oct. 22, 1996, at A20.

60. *See id.*

citizenship or residency rights who used the Federal courts to prolong their stays in the United States or even gain a foothold on American citizenship.”⁶¹ Following the bill’s passage, Dan Stein (executive director of the Federation for American Immigration Reform), expressed support for the restrictions, specifically a limit on class actions, asserting that allowing class actions would have allowed “illegal aliens, aliens without right to be here[,] the right to stay here for years on end”⁶² Additionally, then-Senate Immigration Subcommittee Chairman Spencer Abraham explained that the restrictions were aimed to address abuses of the system committed by “criminal immigrants.”⁶³ He wrote, “Criminal immigrants demonstrated time and again an ability to delay deportations through administrative appeals, judicial review and habeas corpus petitions.”⁶⁴ He expressed a need “to crack down on those who come to the United States and abuse our legal system”⁶⁵

Through the Real ID Act of 2005, Congress again narrowed judicial review.⁶⁶ The House Conference Report accompanying the Act highlighted delay as a motivating factor.⁶⁷ With the REAL ID Act, Congress counteracted the Supreme Court decision *INS v. St. Cyr*,⁶⁸ in which the Court held that Congress had not spoken clearly enough to eliminate habeas corpus jurisdiction.⁶⁹ In the REAL ID Act, Congress expressly stated its intent to repeal habeas corpus jurisdiction and to establish the petition for review procedure as the sole mechanism for reviewing a removal order.⁷⁰

The delay rationale appears in the legislative history. The conference report accompanying the Act stated, “Among the many problems caused by *St. Cyr*, the most significant is that this decision allows criminal aliens to delay their expulsion from the United States for years.”⁷¹ Additionally, the report asserted that “criminal aliens will have fewer opportunities to delay their removal” after the enactment of the legislation.⁷²

61. *Id.*

62. Interview by Richard Gonzalez with Dan Stein, Exec. Dir., Fed of Am. Immigration Reform, in S.F., Cal. (Oct. 26, 1996).

63. Spencer Abraham, Letter to the Editor, *Law Addressed Abuses of Criminal Immigrants*, N.Y. TIMES, Mar. 24, 1997, at A14.

64. *Id.*

65. *Id.*

66. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 106(a)(1), 119 Stat. 231, 310–11 (codified at 8 U.S.C. § 1252 (2012)) (eliminating other forms of jurisdiction for review of removal orders).

67. See H.R. REP. NO. 109-72, at 171 (2005) (Conf. Rep.).

68. 533 U.S. 289 (2001).

69. *C.f. Motomura, Lens of Habeas Corpus*, *supra* note 44, at 486–87 (explaining that the enactment of the REAL ID Act was Congress’ direct response to the Supreme Court’s holding in *St. Cyr*).

70. *Id.* at 487.

71. H.R. REP. NO. 109-72, at 173.

72. *Id.* at 174.

Within the last ten years, Congress has debated major immigration reform bills, but none have passed both houses.⁷³ Examining proposed immigration reform bills reveals further instances of proponents asserting the delay justification to support a decrease in the availability of judicial review.⁷⁴ First, there was a failed attempt to further limit judicial review of removal cases during a 2005–2006 effort to overhaul U.S. immigration law.⁷⁵ Second, in 2013, there was another futile attempt to restrict review over legalization decisions as a part of immigration reform efforts.⁷⁶

With respect to the first example, during 2005–2006, proponents of narrowed judicial review proposed adding a certificate of reviewability requirement.⁷⁷ The requirement would have added a substantial hurdle to filing a petition for review of a removal order.⁷⁸ Under this proposal, a filed petition for review would be stalled until a court of appeals judge issued a certificate of reviewability.⁷⁹ The judge could issue a certificate if the foreign national seeking review made a “substantial showing that the petition for review is likely to be granted.”⁸⁰ A judge’s decision to refuse to issue a certificate would be unreviewable by the rest of the members of the court of appeals.⁸¹ If a judge failed to act on the request for a certificate, the legislation envisioned that the petition for review would be denied.⁸² The proposal to add the certificate of reviewability requirement took place against a backdrop of a dramatic increase in the number of removal petitions for review filed in U.S. Courts of Appeals.⁸³

The certificate of reviewability requirement appeared as part of a U.S. House of Representatives bill called “Immigration Litigation Abuse Reduction.”⁸⁴ The legislative history reveals that concerns about delay and frivolous filings motivated proponents to push for the certificate of reviewability requirement.⁸⁵ The House Republican majority’s report on the bill concluded that the “vast majority” of petitions for review filed were ultimately denied.⁸⁶ Therefore, the

73. Family, *Stripping Judicial Review*, *supra* note 17, at 506–07.

74. *See id.* at 513, 521.

75. *See id.* at 500 (discussing introduction of the certificate of reviewability as an attempt to limit frivolous suits).

76. Senator Patrick J. Leahy Holds a Markup on Border Security, Economic Opportunity, Immigration: Hearing on S. 744 Before the S. Comm. on the Judiciary, 113th Cong. 9-10 (2013) (statement of Sen. Charles Grassley).

77. *See* Family, *Stripping Judicial Review*, *supra* note 17, at 506–28.

78. *See id.*

79. *Id.* at 509.

80. H.R. 4437, 109th Cong. § 805(b)(D)(iii) (2005). *See also* Family, *Stripping Judicial Review*, *supra* note 17, at 509.

81. Family, *Stripping Judicial Review*, *supra* note 17, at 509.

82. *Id.*

83. *Id.* at 506.

84. H.R. 4437, at § 805(b).

85. H.R. REP. NO. 109-345, at 77–78 (2005).

86. *Id.* at 77.

report concludes that the increase in the number of filed petitions for review must be due to an increase in the filing of meritless appeals.⁸⁷

When the U.S. Senate Committee on the Judiciary considered the certificate of reviewability gatekeeping requirement, two supporters of the measure mentioned frivolous filings and delay objections as justifications for the procedure. One federal court of appeals judge testified: “Even if the appeal lacks all merit, the backlog of cases in the circuit courts provides an incentive to appeal by almost guaranteeing a significant delay in deportation.”⁸⁸ Similarly, a DOJ representative argued that the certificate of reviewability would remove the incentive to file a petition for review as a means to delay removal.⁸⁹

With respect to the second example, the delay justification surfaced as part of the 2013 debate over immigration reform. While not directly addressing judicial review of *removal* cases, proponents of providing limited judicial review over agency decisions to legalize the immigration status of foreign nationals raised the delay rationale as a justification for providing less process.⁹⁰ During the Senate Committee on the Judiciary’s discussions, Senator Charles Grassley proposed an amendment that would have severely limited access to the federal courts to review an agency legalization decision.⁹¹ The Committee rejected the amendment.⁹² In explaining his desire to cabin judicial review, Senator Grassley stated, “you can have people forever delaying deportation because of the ability to appeal[,]” and he expressed a concern that an “immigrant who has filed a . . . meritless application under the [legalization] program[,] could hold up his removal for many years”⁹³

II. DELAY AND A DISPUTE OVER IMMIGRATION SOVEREIGNTY

As previously described, proponents of narrowed judicial review consistently float one justification that blames foreign nationals and their attorneys for the need for decreased access. This argument for decreased access characterizes foreign nationals as acting under improper motivations. According to this narrative, foreign nationals file frivolous lawsuits to delay removal. Therefore, the need to narrow court access is the fault of foreign nationals who allegedly seek to abuse the system.

87. *See id.* at 77–78.

88. *Immigration Litigation Reduction: Hearing on S. 2611 Before the S. Comm. on the Judiciary*, 109th Cong. 50 (2006) (statement of J. Carlos T. Bea, C.J., U.S. Court of Appeals for the Ninth Circuit).

89. *See id.* at 27 (statement of Jonathan Cohn, Deputy Assistant Att’y Gen., Dep’t of Justice).

90. *See Senator Patrick J. Leahy Holds a Markup on Border Security, Economic Opportunity, Immigration: Hearing on S. 744 Before the S. Comm. on the Judiciary*, 113th Cong. 9–11 (2013) (statement of Sen. Charles Grassley).

91. *See id.*

92. *See id.* at 14–15 (demonstrating that twelve out of eighteen committee members rejected Senator Grassley’s amendment to limit access to federal courts).

93. *Id.* at 9, 10 (statement of Sen. Charles Grassley).

However, the argument about delay is not simply about delay. Digging deeper, this Article exposes that the chances for delay are scarce and that proponents of the delay rationale actually are expressing a preference for the strongest form of plenary power. The delay rationale is an unsupported and convenient diversion from the underlying conflict about how to balance individual rights with government control in immigration law. Further debate in the context of that underlying conflict, rather than placing the blame on foreign nationals seeking access to courts, is needed.

A. *Delay or Something Else?*

Six observations lend support to the conclusion that the delay rationale is not solely about delay. First, anecdotal evidence usually is the only support for the assertion that there is prevalent abuse of court access. The empirical and administrative design questions of whether, and to what extent, foreign nationals seek judicial review as a tactic to delay deportation and what constitutes an acceptable amount of delay in any adjudication are beyond the scope of this Article. The failure of supporters of decreased judicial review to justify empirically the claim of delay, however, signals a need to examine the justification more deeply. In fact, one study has determined claims of delay through federal court action are overstated, and federal courts usually resolve these cases in a matter of months.⁹⁴ The study further notes that most non-citizens do not pursue judicial review at all.⁹⁵ Instead of delay during the federal court stage, the study points to greater delay at the administrative level, particularly with respect to waits for a hearing before an immigration judge.⁹⁶ These delays are the result of increased enforcement efforts and a lack of concomitant resources devoted to immigration courts.⁹⁷ Failure to account for this information leads to overemphasis on anecdotal evidence.

Second, mandatory detention provisions dictate the detention of many foreign nationals during their removal proceedings, including during judicial review.⁹⁸ To a detained foreign national, seeking judicial review would mean additional time in custody, not additional time to live freely in the United States.

Third, as Professor Stephen H. Legomsky has recognized, Congress has already prevented judicial review from delaying removal by not providing an

94. See Kagan, Marouf & Gill, *supra* note 5, at 696–97.

95. *Id.* at 689–90.

96. *Id.* at 721–22 (noting immigration judicial review in the federal courts of appeals usually takes less than a year, while the average duration of a case in the administrative immigration court is 550 days).

97. Ellen Frankman, *Immigration Judge: Courts Overwhelmed & Under-Resourced*, TAKE AWAY (Mar. 10, 2014), <http://www.thetakeaway.org/story/immigration-judge-says-courts-need-reform/>. See also *Average Time Pending Cases Have Been Waiting in Immigration Courts as of November 2014*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php (last visited Dec. 21, 2014).

98. See 8 U.S.C. §§ 1225(b)(2)(A), 1226(a), 1226(c) (2012).

automatic stay of removal pending judicial review.⁹⁹ The reviewing federal court must now affirmatively grant a stay, which means the foreign national could be removed from the United States while a petition for judicial review is pending if no stay is granted.¹⁰⁰ Consequently, judicial review alone does not guarantee a delay in removal.

Fourth, Professor Lenni B. Benson has explained how previous restrictions on judicial review in the United States have led to protracted litigation over the meaning of those restrictions and their validity, including increased litigation over constitutional claims.¹⁰¹ From an efficiency perspective, simply allowing the courts to review a removal decision would be more efficient than risking the possibility of extra litigation over whether the court may hear the claim. Furthermore, this suggests that changing the judicial review process, rather than blocking access, may increase efficiency.¹⁰² Ultimately, the pursuit of cuts to judicial review, which result in additional litigation, suggests efforts to narrow court access are not based solely on efficiency concerns.

Fifth, other existing mechanisms divert foreign nationals from entering the civil immigration adjudication system and promote quick removal with little process.¹⁰³ Implementation of such “nonjudicial removals” has increased exponentially, comprising seventy-five percent of all removals in 2012.¹⁰⁴ For example, the expedited removal program diverts certain foreign nationals from a hearing before an immigration judge and instead grants border patrol officers the authority to remove the foreign national.¹⁰⁵ Congress did not provide for robust judicial review of individual expedited removal orders.¹⁰⁶ Another example is Operation Streamline, which allows for removal through criminal prosecution of foreign nationals for certain immigration violations.¹⁰⁷ Foreign nationals are sentenced *en masse*, with judges spending as little as twenty-five

99. See 8 U.S.C. § 1252(b)(3)(B); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1649–50 (2010) [hereinafter Legomsky, *Restructuring Immigration Adjudication*].

100. See 8 U.S.C. § 1252(b)(3)(B); Legomsky, *Restructuring Immigration Adjudication*, *supra* note 99, at 1649–50.

101. Benson, *Back to the Future*, *supra* note 38, at 1483–85; Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 52–53 (2006) [hereinafter Benson, *Making Paper Dolls*].

102. See, e.g., Legomsky, *Restructuring Immigration Adjudication*, *supra* note 99, at 1720 (recommending a re-design of judicial review).

103. See Family, *A Broader View*, *supra* note 22, at 611, 624 (categorizing the mechanisms by which to divert foreign nationals from immigration adjudication, such as government-imposed waivers of access and expedited removals).

104. MARC R. ROSENBLUM & DORIS MEISSNER, THE DEPORTATION DILEMMA: RECONCILING TOUGH AND HUMANE ENFORCEMENT 24 (2014), available at <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>.

105. *Id.* at 25–26.

106. See 8 U.S.C. § 1252(a)(2)(A) (2012); 8 U.S.C. § 1252(e) (2012).

107. Family, *A Broader View*, *supra* note 22, at 627–28.

seconds per matter.¹⁰⁸ An individual diverted from the civil immigration adjudication system into one of these channels has no opportunity to delay removal by seeking access to court.

Sixth, the argument about delay is raised regardless of whether review has already been narrowed. Proponents of restricted access to courts have no clear concept of what level of judicial review is ideal. The logical extension of constant, unfocused narrowing of judicial review is the continual elimination of access to courts, perhaps to the point of no access. This suggests that those claiming delay contemplate a deeper question of whether the foreign national should have court access at all.

Close examination of claims of delay and abuse of court access reveal a lack of depth in the argument. Further claims of delay reflect something else. They reflect a desire to hang on to a classical plenary power notion of the government's role in immigration law.

B. The Dispute over Immigration Sovereignty

Immigration law invokes substantial questions about the nature and strength of government power. Because the U.S. Supreme Court has linked immigration law to national sovereignty, the rights of individual foreign nationals often conflict with the strong force of sovereign will. The proper balance between individual rights and national will is unresolved, with some preferring to adhere to a classical version of plenary power while others promote a more progressive approach that allows room for individual rights. There is a link between immigration law and sovereignty, and the delay rationale is “window dressing” for a debate over the ideal balance between these competing interests.

1. What is Immigration Sovereignty?

Immigration law implicates sovereignty.¹⁰⁹ In the late nineteenth century Chinese Exclusion Case, *Chae Chan Ping v. United States*,¹¹⁰ the U.S. Supreme Court linked immigration law with notions of national sovereignty. The Supreme Court held that the federal government's power to regulate immigration was founded in the fundamental sovereignty of the country.¹¹¹ The Court stated:

108. See, e.g., Fernanda Santos, *Detainees Sentenced in Seconds in 'Streamline' Justice on Border*, N.Y. TIMES, Feb. 11, 2014, at A12.

109. Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489, 559 (“The link between immigration and national sovereignty has a long history in the United States.”).

110. 130 U.S. 581 (1889).

111. See *id.* at 609. See also Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 129–31 (2002). For a more thorough discussion of other theories justifying the use of the plenary power doctrine in immigration law, see Stephen H. Legomsky, *Immigration Law and*

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.¹¹²

Because the decision whether to admit a foreign national into the country was characterized as a decision that cuts at the heart of the identity, size, and shape of the nation, the Supreme Court described a plenary power available to the political branches in the realm of immigration law.¹¹³

This decision established an unusual trajectory for immigration law in the United States. While constitutional principles evolved in other contexts, the Supreme Court continued to hold that those advancements did not apply to immigration law.¹¹⁴ For example, Congress has almost unfettered discretion to set the conditions of admission into the United States¹¹⁵ and to establish reasons for deporting a foreign national.¹¹⁶ Additionally, procedural due process protections do not extend to those applying for initial entry or to those with long absences from the United States.¹¹⁷ The status quo is rooted in the plenary power doctrine, which in turn is at least partially rooted in a notion of sovereignty dating back to the nineteenth century. As described by Professor Kevin Johnson,

the Principle of Plenary Power, 1984 SUP. CT. REV. 255, 261, 269–71, 275–77 (1984) [hereinafter Legomsky, *Immigration Law and Plenary Power*].

112. *Chae Chan Ping*, 130 U.S. at 609.

113. STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 184–85* (1987) [hereinafter LEGOMSKY, *IMMIGRATION AND THE JUDICIARY*] (“[The sovereignty theory] has served as a pedestal on which the plenary power doctrine has been based.”); Legomsky, *Immigration Law and Plenary Power*, *supra* note 111, at 273–74 (describing and criticizing the Supreme Court’s reliance on sovereignty as a justification for the plenary power doctrine).

114. Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 925–26 (1995) [hereinafter Legomsky, *Ten More Years*] (citations omitted) (“For more than a hundred years, the Supreme Court of the United States has been telling us that immigration law is just plain different.”).

115. In a 1977 decision, the Supreme Court discussed courts’ “limited judicial responsibility” in reviewing Congress’ choices with respect to admission categories. *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). The Court described congressional power as “largely immune from judicial control.” *Id.* at 792. While this language may signal a movement away from absolute power, the *Fiallo* Court held Congress to a very mild standard of scrutiny. The Court looked only for a “facially legitimate and bona fide reason” for the congressional action. *Id.* at 794.

116. *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952).

117. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543–44 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

the plenary power doctrine is “[f]ounded on notions of the raw sovereignty of the nation-state”¹¹⁸

Admittedly, immigration law has evolved in some contexts, with courts asserting a more involved role in reviewing certain types of immigration decision-making, particularly in the areas of removal procedures and post-removal detention. For example, individuals within U.S. borders are entitled to due process protections during removal proceedings.¹¹⁹ Additionally, the Supreme Court has developed a doctrine under which certain returning lawful permanent residents do not lose due process protection upon physically exiting the boundaries of the United States.¹²⁰

In some respects, immigration law is lurching towards mainstream constitutional law, but in many respects, it is still stuck in its nineteenth century roots.¹²¹ Scholars have discussed this transformation, documenting plenary power doctrine trends and predicting what the future may hold for that concept.¹²²

For example, Professor Peter Schuck has argued that immigration law is slowly progressing from its classical roots towards “communitarian” ideals.¹²³ Schuck described the development of classical immigration law in the late nineteenth century as a rejection of the liberal values that epitomized the first period of U.S. immigration.¹²⁴ During that first period, from the nation’s founding to the 1880s, the country’s outlook on immigration was driven by a focus on the individual.¹²⁵ According to Schuck, “[t]he liberalism of America’s first century conceived of persons as autonomous, self-defining individuals

118. Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 197–98 (2003) [hereinafter Johnson, *Open Borders?*] (“Under a strict plenary power regime, the U.S. government may act as if it is in a state of nature without legal constraints in a modern ‘survival of the fittest’ world.”).

119. *The Japanese Immigrant Case*, 189 U.S. 86 (1903); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

120. *See Chew v. Colding*, 344 U.S. 590, 596–98 (1953); *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982).

121. Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 810 (2013) (discussing the history and continuing role of sovereignty as a justification for extra-constitutional authority over immigration law).

122. *See, e.g.*, Legomsky, *Immigration Law and Plenary Power*, *supra* note 111, at 303–05 (predicting the continuing expansion of judicial review); Legomsky, *Ten More Years*, *supra* note 114, at 936–37 (predicting the weakening, but not complete abolition of judicial deference to Congress in immigration cases); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 610–11 (1990) [hereinafter Motomura, *Phantom Constitutional Norms*] (predicting the courts will avoid directly addressing constitutional issues and will continue to apply “phantom constitutional norms much more favorable to aliens”); Schuck, *Transformation*, *supra* note 9, at 73–75 (expressing uncertainty of the future of immigration law but identifying three characteristics of the development of that body of law).

123. *See* Schuck, *Transformation*, *supra* note 9, at 4.

124. *Id.* at 2–3.

125. *Id.* at 2.

possessing equal moral worth and dignity and equally entitled to society's consideration and respect."¹²⁶ The individual enjoyed "maximum liberty," and this outlook "was reflected in a policy of essentially open borders[.]"¹²⁷

The outlook shifted in the late nineteenth century as "[l]iberal values were challenged by an array of exclusionary impulses[.]" including racial prejudice and xenophobia.¹²⁸ As Schuck describes, this shift resulted in a sea of change in immigration policy, with the focus shifting from individual liberty to national sovereignty concerns.¹²⁹ Under this new order, the nation holds all of the cards and the power to issue its consent to enter as it sees fit.¹³⁰

Classical immigration law envisions a small role for courts in reviewing the immigration actions of the political branches.¹³¹ Schuck observed a link between "the powerful conception of national sovereignty" that is so tied to classical immigration law and the reticence of federal judges to interject the courts into review of immigration law.¹³² Under a regime with federal immigration law rooted in a concept of sovereignty (with the nation always triumphing over the individual), there is little to no role for federal judges to advance the interests of the individual.

This classical immigration law scheme, rooted in racial prejudice and bigotry, is still a major influence in immigration law.¹³³ The new "communitarian" approach (as described by Schuck)¹³⁴ is driven by a principle that "the government owes legal duties to all individuals who manage to reach America's shores[.]"¹³⁵ Schuck observed that this new outlook was building momentum, but that it had not yet displaced classical immigration law.¹³⁶

Other scholars have also persuasively presented diminishing aspects of the plenary power doctrine. For example, Professors Stephen H. Legomsky and Hiroshi Motomura have discussed that although certain court practices have weakened the plenary power doctrine, it still exists.¹³⁷ Legomsky recognized techniques of avoidance, including the Supreme Court's occasional practice of

126. *Id.*

127. *Id.*

128. *Id.* at 3.

129. *See id.* at 3.

130. *Id.* at 47–48 (tying classical immigration law to the rights-privilege distinction once prevalent in mainstream constitutional law).

131. *Id.* at 14–15.

132. *Id.* at 17.

133. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998); Cleveland, *supra* note 111, at 14 (describing the origins of the plenary power doctrine as rooted "in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power").

134. *See supra* note 123 and accompanying text.

135. Schuck, *Transformation*, *supra* note 9, at 4.

136. *Id.*

137. Legomsky, *Immigration Law and Plenary Power*, *supra* note 111, at 296–99, 302–03; Motomura, *Phantom Constitutional Norms*, *supra* note 122, at 600.

turning a blind eye to the doctrine.¹³⁸ Legomsky also recognized, and Motomura further discussed, courts' use of statutory interpretation techniques to soften the blow of the plenary power doctrine.¹³⁹ This phenomenon allows a court to avoid the harsh effects of the plenary power doctrine through the use of "phantom constitutional norms," created through heavy reliance on statutory interpretation tools.¹⁴⁰ These "phantom norms" exist in immigration law, as opposed to an actual, coherent constitutional structure.¹⁴¹ The "articulated constitutional norm—unreviewable plenary power[.]" is effectively weakened if courts decide cases through statutory interpretation, in which constitutional concerns may be considered.¹⁴² Additionally, the willingness of courts to develop procedural due process concepts in immigration law has weakened the plenary power doctrine.¹⁴³

While the plenary power doctrine has not remained static, and its weaknesses are well-documented, the Supreme Court has never formally disowned the doctrine. At best, there has been a shift from it, but scholars still debate how far courts have moved away from the doctrine.¹⁴⁴

The Supreme Court's failure to confront the doctrine directly has allowed the classical notion of immigration sovereignty to remain the default; weaknesses in the doctrine are exceptions rather than the rule. This allows the classical notion of immigration sovereignty to pervade immigration law discourse, including policy debates about judicial review. Those promoting the delay rationale actually are arguing for the classical form of plenary power; they are arguing that the will of the sovereign trumps any individual interests.

2. *Immigration Sovereignty and the Delay Rationale*

The classical notion of immigration sovereignty is in conflict with judicial review, which by its nature focuses on individual rights and tests the government's use of power. Under the classical notion of immigration sovereignty, a nation is unrestrained to set its immigration policy, free to set the conditions of entry, and free to revoke permission to be within the sovereign borders on whatever substantive criteria it deems necessary. A more modern notion of sovereignty places greater restraint on the power of the nation towards individuals and integrates human rights considerations, such as the effects the

138. Legomsky, *Immigration Law and Plenary Power*, *supra* note 111, at 299.

139. Legomsky, *IMMIGRATION AND THE JUDICIARY*, *supra* note 113, at 156; Motomura, *Phantom Constitutional Norms*, *supra* note 122, at 549.

140. Motomura, *Phantom Constitutional Norms*, *supra* note 122, at 564–65.

141. *Id.* at 549.

142. *Id.* at 564.

143. See Legomsky, *Immigration Law and Plenary Power*, *supra* note 111, at 298–99; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627–28 (1992).

144. See *supra* note 122 and accompanying text.

nation's actions may have on the individual.¹⁴⁵ As Professor Elizabeth Bruch has explained, the international law approach to sovereignty has evolved since the late nineteenth century, now incorporating concerns about human rights.¹⁴⁶

Immigration law is stuck between the classical and more modern approaches,¹⁴⁷ as evidenced by the debate over efforts to restrict foreign nationals' access to the courts to challenge removal decisions. Those who want to limit access to the courts are motivated, at least in part, by a desire to maintain the classical notion of immigration sovereignty epitomized by the plenary power doctrine. The House Report supporting the 1961 restrictions on review stated: "it is undoubtedly now the fact that such [delay] tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act."¹⁴⁸ This language reveals an underlying position that effectuating deportations is of paramount importance, while individual considerations are superfluous.

Other efforts to restrict judicial review have also dismissed the value of individual rights, raising the need to get the particular individual out of the country to enforce the national will.¹⁴⁹ Proponents of the 1996 restrictions referred to "illegal aliens [who do not have] the right to be here"¹⁵⁰ This suggests "a nation versus individual" outlook that downplays individual concerns. Similarly, supporters of the REAL ID Act of 2005 emphasized the bill's ability to isolate "criminal aliens" and to prevent them from delaying removal by narrowing their access to courts.¹⁵¹

Professor Frank Wu has explained that under a more modern conception of immigration sovereignty, the nation is defined not only by border lines and the ability to dictate who may cross those lines under what circumstances, but also

145. Elizabeth M. Bruch, *Open or Closed: Balancing Border Policy with Human Rights*, 96 KY. L.J. 197, 221 (2007–2008). See also Banks, *supra* note 109, at 527–28; Kitty Calavita, *U.S. Immigration Policy: Contradictions and Projections for the Future*, 2 IND. J. GLOBAL LEGAL STUD. 143, 147 (1994) (acknowledging a "contradiction between the concepts of inalienable human rights and national sovereignty").

146. Bruch, *supra* note 145, at 221 ("While still far from displacing the dominance of sovereignty, the principles of self-determination, freedom of movement and nondiscrimination have started to constrain unfettered notions of sovereignty as a matter of international human rights law.").

147. See Johnson, *Open Borders?*, *supra* note 118, at 207–08 (describing the difficulty of incorporating notions of individual rights into a an immigration system so focused on national sovereignty); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1398–1402 (2006) (describing the competing perspectives of immigration monism, in which "the protection of national sovereignty [is] the primary goal of immigration law[.]" and immigration pluralism, which recognizes that immigration law must serve other goals as well).

148. See *supra* note 53 and accompanying text.

149. See *supra* Part I.B.

150. Interview by Richard Gonzalez with Dan Stein, *supra* note 62.

151. H.R. REP. NO. 109-72, at 174 (2005) (Conf. Rep.).

by how the nation treats those under its power.¹⁵² While not completely dismissing national sovereignty, Wu argued that “[n]ational sovereignty, by itself, does not establish that the nation can regulate its borders by standards that a consensus would hold absurd applied everywhere else.”¹⁵³

Similarly, judicial review, which by its nature focuses on an individual and considers how the nation treats an individual foreign national, must seem foreign to someone who adheres to the purest form of plenary power, in which national power is unfettered. As Schuck described, when a more “communitarian” notion of immigration law takes hold and the role of individual concerns increases, there is a phenomenon where accessing courts necessarily delays removal and allows for consideration of individual circumstances.¹⁵⁴

The notion that foreign nationals frivolously seek review to achieve delay oversimplifies the true underlying debate. The dynamic is an evolving sense of immigration sovereignty, with room to consider individual interests, as well as the interests of the nation. The move away from an extreme vision of classical immigration law would be upsetting to those who prefer the absolutist view. As Professor Kevin R. Johnson has observed, “One’s views on plenary power deeply affect how one views immigration.”¹⁵⁵ The debate is between an approach that raises the prominence of concerns about individuals versus an approach where the nation has “complete authority to define the rights of noncitizens.”¹⁵⁶

During the Senate Committee on the Judiciary’s 2013 debate on immigration reform (previously mentioned above), Senators Charles Grassley, Richard Durbin, and Charles Schumer illustrated competing ideals of judicial review. Senator Grassley took a classical view of immigration sovereignty, arguing that the nation has the absolute power to draw borderlines, and that the nation owes no obligation to foreigners.¹⁵⁷ In response, Senators Durbin and Schumer argued that other constitutional considerations have a role in the process, including individual rights to access the courts.¹⁵⁸ Senator Grassley stated: “[T]he bill treats [these legalization] program[s] as a legal right rather than

152. Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL’Y REV. 35, 39 (1995). See also Lindsay, *supra* note 121, at 811 (“Yet even if one concedes that the principle of territorial sovereignty implies an authority to govern the right of non-citizens to enter into and remain within territory, it is unclear why the exercise of such authority also requires that immigrants be denied important constitutional rights.”).

153. *Id.*

154. Schuck, *Transformation*, *supra* note 9, at 4, 66–67, 76.

155. Johnson, *Open Borders?*, *supra* note 118, at 212.

156. *Id.*

157. See Senator Patrick J. Leahy Holds a Markup on Border Security, Economic Opportunity, Immigration: Hearing on S. 744 Before the S. Comm. on the Judiciary, 113th Cong. 10 (2013) (statement of Sen. Charles Grassley).

158. See, e.g., *id.* at 11 (statement of Sen. Dick Durbin) (commenting that Senator Grassley’s proposal would disrupt the balance of power by limiting judicial review).

discretionary benefit just like you have a civil right to come to this country. . . . And where is it in the constitution?”¹⁵⁹ Senator Durbin countered:

[T]his amendment by Senator Grassley really gets at a basic element in our government that we learned in the first civics class, and that is checks and balances so that there is a balance of power in our government. What the senator from Iowa wants to do is to reduce judicial review of decisions made by the executive branch of government. That’s an extraordinary position to take, particularly for the Senator [sic] Judiciary Committee to take. We acknowledge that the balance in our government between the three branches is what’s kept it democratic and moving in the right direction. . . . What we say in this bill is there ought to be somebody reviewing to make sure that this decision is consistent with the underlying law.¹⁶⁰

Senator Leahy contributed: “It is amazing in the history that a country [sic] can become as powerful, as diverse as [sic] wealthy as United States but [sic] remain a democracy. And I think that’s because of our checks and balances.”¹⁶¹ This exchange demonstrates the push and pull between conceptions of immigration sovereignty.

Because the delay rationale is consistently raised, no matter how much judicial review has already narrowed, the end game for proponents of decreased judicial review appears to be preventing court access. This goal correlates with a classical notion of immigration sovereignty, where the power of the nation over immigration law is absolute. Judicial review clearly frustrates this goal.

Viewed in this context, the debate concerning foreign national access to courts in challenging removal decisions shifts from a caricature of a foreign national filing a frivolous petition for review motivated solely by delay to a debate over the nature of immigration sovereignty in the twenty-first century.¹⁶² Peering behind the delay rationale reveals this more fundamental debate. The question runs deeper than “delay,” and addresses the balance of power between the individual and the nation in immigration law.

C. Resolving the Dispute: A Lesson from the United Kingdom

The battle over immigration sovereignty must be *acknowledged* to discredit the narrative that foreign nationals are doing something unseemly by seeking access to judicial review. In addition to being acknowledged, the battle must be *resolved* for there to be any hope of alleviating the constant push and pull in immigration adjudication. Resolving the tension will require more than formal legal adoption of a more modern approach to immigration sovereignty; it will

159. *Id.* at 10 (statement of Sen. Charles Grassley).

160. *Id.* at 11 (statement of Sen. Dick Durbin).

161. *Id.* at 12 (statement of Sen. Patrick Leahy).

162. There are undoubtedly other deeper divisions as well, such as a general distaste for the courts (a more general separation of powers battle). *See supra* Part II.A.

require a cultural shift in our understanding of what it means to be a sovereign nation in the context of immigration law. The experience of the U.K. helps to explain why more than formal legal recognition is necessary.

1. Efforts to Restrict Immigration Judicial Review in the United Kingdom

In the U.K., there is a similar push and pull in immigration adjudication.¹⁶³ There is a push to fulfill democratic principles and obligations to individuals, accompanied by efforts to limit court access to foreign nationals.¹⁶⁴ The existence of this phenomenon in the U.K. is interesting because the nation has integrated a more modern version of sovereignty into its legal principles.¹⁶⁵ Yet, there is still ambivalence, and even outright resistance, to providing process to foreign nationals facing removal.¹⁶⁶ Thus, while a modern conception of sovereignty has been integrated formally, the U.K. has yet to fully infiltrate the public conception of immigration sovereignty.

The U.K. has acceded to international agreements that expressly elevate concern for individual rights and reject the notion that sovereign will is unlimited. For example, under the European Convention on Human Rights (ECHR), there is an explicit right to family and private life.¹⁶⁷ While this right is conditional, the ECHR demands that a foreign national's situation be a substantial consideration in an immigration decision.¹⁶⁸ In the context of immigration, the ECHR asks if an immigration decision would interfere with an individual's right to family and private life to the extent that the interference is

163. As with the United States, immigration issues in the U.K. are complex and influenced by various motivations. Comparisons across the two systems should not be overstated, as U.S. and U.K. immigration policy rest on different systems of government and different social and political histories. *See supra* Part I.

164. *See, e.g.*, Alan Travis, *Conservatives Promise to Scrap Human Rights Act After Next Election*, *GUARDIAN* (Sept. 30, 2013, 2:15 PM), <http://www.theguardian.com/law/2013/sep/30/conservatives-scrap-human-rights-act> (noting that British Home Secretary Theresa May indicated that avenues of appeal for those facing deportation would be narrowed).

165. *See infra* notes 167–170 and accompanying text.

166. *See, e.g.*, Travis, *supra* note 164.

167. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221. Per the ECHR, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” *Id.* Additionally, the ECHR mandates [t]here shall be no interference by a public authority with the exercise of th[at] right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

168. Huang & Kashmiri v. Sec’y of State, [2007] UKHL 11, [2007] 2 A.C. 167. *See also* Stephen H. Legomsky, *Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations*, 25 *GEO. IMMIGR. L.J.* 807, 837–38 (2011).

disproportionate to the nation's legitimate immigration goals.¹⁶⁹ This explicit acknowledgement of individual interests rejects the classical plenary power notion of sovereignty.

Through the Human Rights Act, the U.K. Parliament made the ECHR enforceable in its courts.¹⁷⁰ Individuals need not rely solely on European courts to adjudicate whether ECHR rights have been violated. Because the Human Rights Act is primary legislation, the full force of parliamentary sovereignty shields it. Under the doctrine of parliamentary sovereignty, Parliament's laws are not subject to challenge in court; Parliament's power is plenary.¹⁷¹ Therefore, through the Human Rights Act, Parliament expressed an unreviewable desire to allow individuals to enforce ECHR rights within the U.K.

The Human Rights Act creates an interesting dynamic for immigration law in the U.K. Although primary legislation is not subject to court review, courts in the U.K. may review the executive's exercise of power under that legislation, including both the formulation of rules under power delegated from Parliament, as well as the executive's application of those rules to an individual.¹⁷² The Prime Minister and the Cabinet functionally exercise the executive power in the U.K.¹⁷³ Courts in the U.K. can and do review executive action in immigration cases, and they may consider whether executive action is in compliance with the ECHR.¹⁷⁴ Therefore, even if the executive's decision on a particular immigration application is justified under the U.K.'s immigration rules, a court may consider whether the decision otherwise violates ECHR rights.¹⁷⁵ Also, the Supreme Court of the United Kingdom has held that the power to control immigration rests on statutory authority, and not on the vestiges of royal (Executive) prerogative.¹⁷⁶

While Parliament itself generally wields plenary power, Parliament has advanced beyond the U.S. in terms of formal legal recognition of a more modern

169. *Huang & Kashmiri*, [2007] UKHL 11. *Huang & Kashmiri* states: the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8.

Id.

170. *Id.*

171. See John McGarry, *Parliamentary Sovereignty, Judges and the Asylum and Immigration (Treatment of Claimants etc.) Bill*, 26 LIVERPOOL L. REV. 1, 3 (2005).

172. Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 550–54 (2013).

173. *Id.* at 550–51.

174. *Huang & Kashmiri*, [2007] UKHL 11.

175. See *id.*

176. *R. v. Sec'y of State*, [2012] UKSC 32.

notion of sovereignty, which applies in the context of immigration law.¹⁷⁷ Through the enforcement of the ECHR, the baseline perspective in immigration cases is that the will of the sovereign is not absolute.¹⁷⁸

Despite this formal incorporation of individual rights, the U.K. is experiencing similar efforts to narrow court access for foreign nationals. As in the United States, supporters of restricting court access for foreign nationals often cite delay as a reason to curtail access. The existence of this similar phenomenon, despite a default position that individual rights matter, suggests that formal legal recognition of a more modern view of immigration sovereignty alone will not resolve the uncomfortable position of immigration adjudication in the United States.

To better understand the efforts to limit review of immigration removal decisions in the U.K., background on the immigration adjudication system itself is necessary.¹⁷⁹ The system to hear challenges of Home Office (Executive) decisions to remove an individual involves both tribunals and courts, and the differing roles of tribunals and courts are founded in an approach to court review that distinguishes between an appeal and a judicial review.¹⁸⁰ In the United States, an appeal on the merits and any judicial review for *ultra vires* activity may occur simultaneously as a case works its way from an administrative, or executive branch, adjudication into the constitutionally independent Article III federal courts. For example, a federal court of appeals in the United States may simultaneously (although subject to scope of review restrictions) review whether lower-level agency adjudicators committed errors of fact or law in a particular case and determine whether the government acted unlawfully or whether any implicated congressional legislation is unconstitutional.

In contrast, the U.K. distinguishes between an appeal on the merits and a judicial review.¹⁸¹ In fact, they are wholly separate procedures.¹⁸² During a statutory appeal, the reviewing body considers the merits of the case, subject to scope of review restrictions, looking for errors of law or fact as applied in the particular case.¹⁸³ Generally, a judicial review is brought in the Administrative

177. Even if the effects of the Human Rights Act were not fully anticipated, the formal legal conception of sovereignty changed. *See supra* notes 172–76 and accompanying text.

178. Some in the U.K. view this modified notion of sovereignty as an unacceptable diminishment of that ideal. Immigration law is a factor in efforts to disentangle the U.K. from European obligations. *See, e.g.,* Travis, *supra* note 164 (detailing efforts in the U.K. to curb foreign nationals' court access by "scrap[ping] the Human Rights Act" and to withdraw from the ECHR).

179. For a broader comparative discussion of the courts' role in both U.S. and U.K. immigration law, see LEGOMSKY, IMMIGRATION AND THE JUDICIARY, *supra* note 113, at 253–57.

180. GINA CLAYTON, TEXTBOOK ON IMMIGRATION AND ASYLUM LAW, 254, 271–72 (Oxford Univ. Press, 4th ed. 2010).

181. *See id.*

182. *See id.*

183. *Id.* at 254.

Court, a part of the High Court.¹⁸⁴ It is not a continuation of an appeal begun in an administrative system.¹⁸⁵

During a judicial review, the reviewing court looks to whether the Executive has acted unlawfully or whether any implicated Executive rule is unlawful (the lawfulness of primary legislation is off limits).¹⁸⁶ The focus is not whether a decision is wrong on the merits, but rather whether the public body exceeded its jurisdiction by acting unlawfully.¹⁸⁷

There are a variety of restrictions on individuals seeking to challenge a removal decision through a statutory appeal.¹⁸⁸ These restrictions often leave seeking a judicial review as the only chance to challenge an immigration decision.¹⁸⁹ Thus, while judicial review is always important as the mechanism to challenge *ultra vires* activity, it has added significance in immigration cases.

The number of immigration judicial reviews has led the U.K. government to attempt to restrict access to immigration judicial reviews. According to the government, applicants use judicial review as a means of delay to gain more time in the U.K. Three efforts to restrict judicial review of immigration cases in the U.K. illustrate the use of the delay rationale: (1) a 2003–2004 effort to

184. See LEGOMSKY, IMMIGRATION AND THE JUDICIARY, *supra* note 113, at 12.

185. See *id.*

186. See HARRY WOOLF ET AL., DE SMITH'S JUDICIAL REVIEW 9 (Sweet & Maxwell, 7th ed. 2013). In the U.K., the concept of judicial review is a much newer phenomenon than in the United States; U.K. scholars still debate whether that nation's practice is constitutionally justified. See *id.*

187. *Id.* at 200. The U.K. Supreme Court previously explained:

[T]he scope of judicial review is an artefact of the common law whose object is to maintain the rule of law—that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise.

R v. Upper Tribunal, [2011] UKSC 28. The three primary bases for judicial review are procedural propriety (were fair procedures used?), rationality (is the decision arbitrary?) and legality (was the law applied correctly?). WOOLF ET AL., *supra* note 186, at 12. The distinction between a statutory appeal and a judicial review has become blurred as the permitted considerations under judicial review have expanded. *Id.* at 220. For example, a court, acting upon an application for judicial review, may find that a public body acted unlawfully by applying the wrong legal principles (and thus exceeded its jurisdiction). *Id.* But the historical foundation is that a judicial review is not the proper forum in which to argue that a public body did everything correctly, but reached the wrong conclusion. *Id.*

188. CLAYTON, *supra* note 180, at 271; see, e.g., *Immigration Act 2014*, LEGISLATION.GOV.UK, <http://www.legislation.gov.uk/ukpga/2014/22/section/15/enacted> (last visited Dec. 22, 2014). See also *Immigration Bill Becomes Law*, GOV.UK, <https://www.gov.uk/government/news/immigration-bill-becomes-law> (last updated May 14, 2014) (noting that the bill reduced the number of appeal grounds from seventeen to four). In support of the changes to the appeal system, the Immigration Minister said, “The appeals system is like a never-ending game of snakes and ladders, with almost 70,000 appeals heard every year. The winners are foreign criminals and immigration lawyers-while the losers are the victims of these crimes and the public.” Home Office, *Immigration Bill, Factsheet: Overview of the Bill*, GOV.UK 1 (Oct. 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249251/Overview_Immigration_Bill_Factsheet.pdf [hereinafter Home Office, *Overview*].

189. CLAYTON, *supra* note 180, at 271.

eliminate entirely judicial review in immigration cases; (2) an ongoing effort to move immigration judicial review cases from the general courts to the immigration tribunals; and (3) a 2012–2013 effort to narrow immigration judicial review. Also, the government has sought to cabin the discretion of judges with respect to Article 8 of the ECHR. These actions further illustrate the “anti-access to justice” mood prevalent in the U.K.

From 2003 to 2004, the U.K. government proposed to entirely oust, or eliminate, judicial review in immigration cases.¹⁹⁰ Under the proposed ouster clause, there would be no judicial review whatsoever.¹⁹¹ The clause specifically mentioned abolishing judicial review for lack of jurisdiction, irregularity, error of law, and breach of natural justice.¹⁹² The proposal caused quite a stir, with the controversy spilling out of immigration law circles into broader legal circles and the mainstream press.¹⁹³

Prominent members of the legal community spoke out against the ouster clause. Lord Woolf, then-Lord Chief Justice (head of the judiciary), warned that the ouster clause threatened the rule of law and could lead to calls for a written constitution.¹⁹⁴ He said, “I am not over-dramatising [sic] the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution.”¹⁹⁵ He asked, “What areas of government decision-making would be next to be removed from the scrutiny of the courts?”¹⁹⁶ A former Lord Chancellor, Lord Mackay of Clashfern, said that the Government’s proposal “struck ‘right at the heart of the

190. JOINT COMM. ON HUMAN RIGHTS, HOUSE OF LORDS, ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) BILL: FIFTH REPORT OF SESSION 2003-04 22–23 (2004).

191. *Id.*

192. *See id.* According to Lord Woolf, the-then Lord Chief Justice, he and other members of the judiciary met with the government to discuss an earlier version of the ouster clause. Lord Woolf, Lord Chief Justice of Eng. & Wales, Squire Centenary Lecture: The Rule of Law and a Change in the Constitution (Mar. 3, 2004). The judiciary explained that the clause was in conflict with the rule of law, and that it was futile to pursue because there were loopholes in the clause that would allow the judiciary to exercise jurisdiction anyway. *Id.* Rather than heeding the judiciary’s warnings that the clause violated the rule of law, the government redrafted the clause to try to close the loopholes the judiciary identified. *Id.*

193. *See, e.g.,* Joshua Rozenberg, *The ‘Unthinkable’ is Coming True MPs Have Agreed to Abolish the Courts’ Entire Power of Judicial Review Over Decisions to be Taken by a New Tribunal*, DAILY TELEGRAPH, Mar. 4, 2004, at 19 [hereinafter Rozenberg, *The ‘Unthinkable’ is Coming True*] (“The House of Commons agreed this week to abolish the courts’ entire power of judicial review over [immigration] decisions There will be no independent judicial oversight over decisions to deport immigration applicants and remove asylum-seekers from Britain.”).

194. Joshua Rozenberg, *Woolf Fury at Asylum Curb on the Courts Blunkett Bill ‘a Threat to Rule of Law’*, DAILY TELEGRAPH, Mar. 4, 2004, at 1.

195. Lord Woolf, *supra* note 192.

196. *Id.*

rule of law.”¹⁹⁷ If the clause were adopted, judges threatened to exercise a “nuclear option” by refusing to enforce the clause.¹⁹⁸ This action would have sparked a constitutional crisis, as the judges would be challenging directly the principle of parliamentary sovereignty.¹⁹⁹ The Bar Council of England and Wales described the ouster clause as “a startling proposition,” and found it “incredible that it [was] proposed in the United Kingdom[.]”²⁰⁰ Professor Richard Rawlings described the effort as part of a “revenge package” aimed “to pre-empt or drastically reduce a whole activity of formal legal challenge and by necessary implication to neuter the judicial role in the constitution.”²⁰¹

After the uproar, the government agreed to withdraw the ouster clause, but did not abandon its perceived need to restrict immigration judicial review.²⁰² The Constitution Secretary at the time of the proposal’s withdrawal said, “I believe that we can have the necessary judicial oversight in the system by the higher courts and obtain the aims of speed and reduction of abuse.”²⁰³

The Constitution Secretary’s statement reveals that one justification for the ouster clause was concern about delay.²⁰⁴ The Home Secretary placed the need for the ouster clause at the feet of lawyers, whom he characterized as “dragging out cases for months and, in some instances, years.”²⁰⁵ He further described the system as “abused.”²⁰⁶ Rawlings characterized the abuse and delay justifications as a “familiar refrain” in British politics.²⁰⁷ Government officials described how “people [were] playing the system” and referred to “unnecessary, vexatious and useless judicial reviews[.]”²⁰⁸

While the ouster clause was withdrawn, judicial review has been effectively curtailed by Parliament’s creation of the Upper Tribunal, the immigration appellate tribunal (part of the Judiciary, but not the High Court), with the power

197. Joshua Rozenberg, *Labour U-Turn on Asylum Bill*, DAILY TELEGRAPH, Mar. 16, 2004, at 2 [hereinafter Rozenberg, *Labour U-Turn*].

198. Clare Dyer, *The Guardian Profile: Lord Woolf*, GUARDIAN, Mar. 5, 2004, at 13.

199. Under the doctrine of parliamentary sovereignty, Parliament has the final word on legality. See McGarry, *supra* note 171, at 1–2. The courts exercise judicial review under the principle of parliamentary sovereignty by reasoning that the courts are carrying out Parliament’s intention against *ultra vires* actions. *Id.* at 5–6.

200. Andrew Le Sueur, Comment, *Three Strikes and It’s Out? The UK Government’s Strategy to Oust Judicial Review from Immigration and Asylum Decision-Making*, 2004 PUB. L. 225, 233 (2004).

201. Richard Rawlings, *Review, Revenge and Retreat*, 68 MOD. L. REV. 378, 378 (2005).

202. Rozenberg, *Labour U-Turn*, *supra* note 197.

203. *Id.* (internal quotation marks omitted).

204. *See id.*

205. Rozenberg, *The ‘Unthinkable’ is Coming True*, *supra* note 193 (internal quotation marks omitted).

206. *Id.* (internal quotation marks omitted).

207. Rawlings, *supra* note 201, at 393.

208. *Id.* (internal quotation marks omitted).

to act as the High Court when exercising judicial review.²⁰⁹ So, even without an ouster clause, immigration judicial review is undergoing a transition out of the general courts and into the specialized immigration tribunal. For example, many types of judicial reviews are heard in the Upper Tribunal, not in the Administrative Court.²¹⁰ While not an elimination of judicial review *per se*, the change of venue raises questions about whether judicial review will be of the same quality in the Upper Tribunal.²¹¹ The effort to transfer cases stems from the perception that there were too many immigration judicial reviews clogging up the Administrative Court.²¹²

In December 2012, the Ministry of Justice announced its intent to reform judicial review generally, including immigration judicial review.²¹³ Among other things, the reforms would tighten the availability of judicial review by increasing fees.²¹⁴ While these reforms would affect more than just immigration cases, the government mentioned that immigration cases were one of the motivations for seeking reform.²¹⁵ The Minister of Justice's Consultation Paper announcing the proposed reforms acknowledged that the main area of growth in applications for judicial review had been immigration and asylum matters, comprising seventy-five percent of applications for judicial review.²¹⁶

As support for its proposal to limit judicial review, the government not only cited the increase in total applications for judicial review across all subject matter areas (160 in 1974 and over 11,000 in 2011), but also emphasized the "small number of applications per year [that] proceed to a final hearing[.]"²¹⁷ The Consultation Paper stated that in 2011, only one in six applications for permission to seek judicial review were granted.²¹⁸ The proposal was based on the assumption that because so few applications are granted, the increase in numbers of applications must be comprised of "weak or hopeless cases."²¹⁹ That

209. R v. Upper Tribunal, [2011] UKSC 28.

210. See Lord Chief Justice of Eng. & Wales, *Direction Given in Accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and Section 18 of the Tribunals, Courts and Enforcement Act 2007*, CTS. & TRIBUNALS JUDICIARY 1 (Aug. 21, 2013), <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/lcj-direction-jr-iac-21-08-2013.pdf>. See also Constitutional Law Grp., *Robert Thomas: Immigration Judicial Reviews*, UK CONST. L. ASS'N (Sept. 12, 2013, 11:40 AM), <http://ukconstitutionallaw.org/2013/09/12/robert-thomas-immigration-judicial-reviews/> [hereinafter Constitutional Law Grp., *Immigration Judicial Reviews*].

211. See Constitutional Law Grp., *Immigration Judicial Reviews*, *supra* note 210.

212. *Id.*

213. MINISTRY OF JUSTICE, JUDICIAL REVIEW: PROPOSALS FOR REFORM CP25-2012, at 4, 8–9 (U.K.) [hereinafter MINISTRY OF JUSTICE, PROPOSALS FOR REFORM].

214. *Id.* at 25–27.

215. *Id.* at 9–10.

216. *Id.* at 9.

217. *Id.* at 10.

218. *Id.* at 10.

219. *Id.* at 11.

assumption influenced the government's concern "that the Judicial Review process may in some cases be subject to abuses, for example, used as a delaying tactic, given the significant growth in its use but the small proportion of cases that stand any reasonable prospect of success."²²⁰ Again citing the limited success rate of cases seeking judicial review, the government stated, "Whilst Judicial Review plays a vital role in upholding the rule of law and holding the Executive to account, we do not believe it should be allowed to be used as a tactical device simply to delay decisions and the consequences flowing from them."²²¹

In the Impact Assessment accompanying the Consultation Paper, the Government commented, "Businesses/individuals may lose out from cases being finalised [sic] more quickly if they would benefit indirectly from delays in the [judicial review] process."²²² However, the Impact Assessment uncovered little data supporting the proposal and revealed that the proposal addressed areas where either data was unavailable or that the proposal was based on assumptions.²²³

Concern about using judicial review as a delay tactic to gain some sort of advantage permeates the proposal.²²⁴ The U.K. Immigration Law Practitioners' Association (ILPA) rejected the proposal's delay justification, explaining other forces at work behind increased attempts to access judicial review.²²⁵ These other forces included attempts to redress poor decision-making by the Home Office.²²⁶ Others objected to the delay justification because the proposal reached that justification on a "very dubious basis," emphasizing the major limitations of the government's data.²²⁷ For example, in calculating a low success rate for those seeking judicial review, and thus leading the government to infer that there were too many meritless claims, one analysis concluded that the government excluded cases that dropped out of the system soon after

220. *Id.* at 4.

221. *Id.* at 20.

222. MINISTRY OF JUSTICE, JUDICIAL REVIEW: ENGAGEMENT EXERCISE 2012, at 3 (U.K.).

223. *See id.* at 1–22.

224. *See, e.g.*, MINISTRY OF JUSTICE, PROPOSALS FOR REFORM, *supra* note 213, at 4 (noting that "the [g]overnment [was] concerned that the Judicial Review process may in some cases be subject to abuses").

225. Immigration Law Practitioners' Ass'n, *ILPA's Response to the Ministry of Justice Consultation: Judicial Review – Proposals for Further Reform*, ILPA 1 (2013), <http://www.ilpa.org.uk/data/resources/21180/13.11.01-ILPA-response-to-Ministry-of-Justice-consultation-Judicial-Review-Proposals-for-Further-Reform.pdf>.

226. *See id.* at 20–28.

227. Constitutional Law Grp., *Varda Bondy and Maurice Sunkin: Judicial Review Reform: Who is Afraid of Judicial Review? Debunking the Myths of Growth and Abuse*, UK CONST. L. ASS'N (Jan. 10, 2013, 2:23 PM), <http://ukconstitutionallaw.org/2013/01/10/var-da-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/>.

filing.²²⁸ Another study found that “over a third of claims are likely to be settled [early on], usually in the claimant’s favour [sic].”²²⁹ Without including these settlements as “successes,” the government artificially depressed the number of cases with a successful outcome.²³⁰

Finally, while not solely targeted at judicial review, a related effort to severely restrict the role of judges generally in immigration cases further illustrates the anti-process tenor of the discussion surrounding immigration adjudication in the U.K.²³¹ As described above, under Article 8 of the ECHR, there is a right to respect for private and family life, and this right is enforceable in U.K. courts.²³² This right is qualified, meaning that the government may interfere with the right under certain circumstances.²³³ A right to private and family life may be curtailed if it is

in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²³⁴

Therefore, the question of whether Article 8 protections may be curtailed becomes one of balancing facts and applying those facts to existing law: a classic adjudicatory exercise.

This Article 8 right implicates immigration cases because, for example, a foreign national in deportation proceedings may argue that deportation, and the accompanying consequence of separation from family with permission to remain in the U.K., would violate the foreign national’s Article 8 rights.²³⁵ In such a case, the judge deciding whether to order deportation would consider whether the government’s desired deportation would unlawfully interfere with the foreign national’s Article 8 rights, or whether deportation is justified under existing standards.²³⁶

The Home Office has been acting to diminish judges’ roles in balancing Article 8 rights.²³⁷ Through primary legislation, the Home Office has pushed

228. *Id.*

229. *Id.*

230. *Id.*

231. Constitutional Law Grp., *Robert Thomas: The New Immigration Rules and the Right to Family Life*, UK CONST. L. ASS’N (Oct. 4, 2013, 8:41 AM), <http://ukconstitutionallaw.org/2012/10/04/robert-thomas-the-new-immigration-rules-and-the-right-to-family-life/> [hereinafter Constitutional Law Grp., *The New Immigration Rules*].

232. *See supra* note 167 and accompanying text.

233. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8(2), Nov. 4, 1950, 213 U.N.T.S. 221.

234. *Id.*

235. *See supra* note 168 and accompanying text.

236. *See* Constitutional Law Grp., *The New Immigration Rules*, *supra* note 231.

237. *Id.*

for changes in the law to dictate how adjudicators determine when there is an improper interference with Article 8 rights.²³⁸ As one commentator described, “The Home Secretary’s view on Article 8, and where the balance lies, will be forced on judges.”²³⁹ This ongoing controversy raises serious constitutional questions about the balance of powers in the U.K., and whether the U.K. is complying with its obligations under European law.²⁴⁰

Similar to events in the United States, court access in immigration cases has been a consistent target in the U.K. Immigration adjudication occupies a similar uncomfortable position in the U.K.: it exists, but it is restricted and is the subject of efforts to restrict access further. One major difference is that the U.K. Parliament, through primary legislation, has set a default position that individual interests are on a more level playing field in immigration law. Yet, efforts to curtail immigrant access to courts continue under the banner of delay.

2. A Lesson for the United States

While the function of and challenges facing immigration adjudication in the United States and the U.K. are not identical, they are characterized by a similar tension. Both nations have elaborate systems by which to adjudicate removal cases, but those systems are each subject to current restrictions and the near constant threat of further restrictions. In both nations, delay, including blame on individual foreign nationals and their attorneys for seeking review, is often mentioned as a justification for curtailing access to justice.

The existence of a similar phenomenon in the U.K. is a discouraging sign; it suggests that formally adopting a more modern approach to immigration sovereignty is not a guaranteed protection against efforts to narrow court access in immigration cases. It further suggests that underlying conflicts remain, even in a nation that has permitted enforcement of the ECHR in its domestic courts.

What would motivate a government to push its nation to the brink of a constitutional crisis, as was accomplished by the proposed ouster clause in the U.K.? Surely not just a concern, based solely on anecdotal evidence, that foreign nationals may seek court review to delay action in an immigration case. There are less nuclear options available to screen for frivolous cases, including a study to confirm whether there really is a problem at all. There must be something more fundamental at stake, and we must peel back the layers to uncover the true nature of the argument.

238. *Immigration Act 2014*, LEGISLATION.GOV.UK, <http://www.legislation.gov.uk/ukpga/2014/22/section/19/enacted> (last visited Dec. 22, 2014); *Immigration Bill Becomes Law*, *supra* note 188.

239. Adam Wagner, *We Shouldn't Let the Home Secretary Load the Dice over Human Rights*, NEW STATESMAN, May 8, 2013, <http://www.newstatesman.com/politics/2013/05/we-shouldnt-let-home-secretary-load-dice-over-human-rights>.

240. Mark Elliott, *The Queen's Speech, the Immigration Bill and Article 8 ECHR*, PUB. L. FOR EVERYONE (May 9, 2013), <http://publiclawforeveryone.com/2013/05/09/the-queens-speech-the-immigration-bill-and-article-8-echr/>.

Analyzing the underlying issues in the United States reveals a debate about immigration sovereignty; conflicting notions of the role of individual rights in immigration law are at the core of the debate over the scope of judicial review in immigration removal cases. The U.S. Supreme Court could update its explanation of sovereignty in immigration cases. What are now considered exceptions to the plenary power doctrine could become the norm. The Supreme Court could clarify to admirers of the purest form of plenary power that such power is not recognized under U.S. law. Modern notions of sovereignty do not require the grant of raw, unrestricted power to the government to do what it likes with respect to immigration law. The Court has already chipped away at the plenary power notion of sovereignty through its decisions in cases that scrutinize detention practices and that insist on procedural protections during the removal hearing process.²⁴¹ The Court could abandon the plenary power doctrine and reframe the legal discourse. However, the U.K. experience suggests that such a formal legal shift is not enough. Because U.S. immigration law has been steeped in classical notions of immigration sovereignty for so long, a cultural shift is also required.²⁴²

III. CONCLUSION

Immigration adjudication occupies an uncomfortable space in the realm of U.S. law. A system to review a removal decision exists, but it is subject to major restrictions and lives under threat of further restrictions. Since 1961, there have been consistent efforts in the United States to restrict judicial review of immigration removal decisions. Proponents frequently justify the need to restrict judicial review with the claim that foreign nationals seek access to the courts as a means to delay removal. This narrative implies that foreign nationals engage in questionable behavior when seeking review of a decision to remove the individual from the United States.

This Article finds the claims about delay to disguise a fundamental disagreement about immigration sovereignty. The delay rationale lacks depth and support. Instead, arguments to limit judicial review coincide with support for a nineteenth century, pure plenary power notion of immigration sovereignty that prescribes elevating the will of the nation above all else. A disagreement about the proper meaning of immigration sovereignty is at the root of the uncomfortable position of immigration adjudication in the United States. The debate is about the place of individual rights in immigration law, and the debate should proceed on those terms.

It would be a significant advancement if the U.S. Supreme Court were to abandon completely the plenary power notion of sovereignty in immigration

241. See *supra* notes 137–39 and accompanying text.

242. See Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 92 (2013) (arguing that immigration reformers in the U.S. should engage and shape the democratic will of citizens).

law. But it is doubtful that such a decision would move immigration adjudication from its uncomfortable tension. While the U.K. has formally integrated a more modern notion of sovereignty into its domestic law, efforts to restrict review of removal decisions continue. This experience suggests that a more fundamental cultural shift is needed. Formal legal change is an important step, but on its own, it is not a guarantee that immigration adjudication will find peace.

