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Administrative Appeals and Judicial Review in Immigration Law: Where Matters Stand at the Beginning of the 21st Century

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

The federal government preempts state law in the field of immigration, with the issue dominating all three branches of the federal government. Congress has plenary power over the nation’s immigration laws, while...
the executive branch administers and enforces those laws, and increasingly, the judiciary has been drawn into immigration law issues.³

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

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

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

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

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

⁵. Id.

⁶. Id.

⁷. Id.

⁸. Id.

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

¹⁰. See 8 GORDON, MAILMAN & YALE-LOEHR, supra note 3, §§ 104.01-.13.
Since 2002, there has been an increase in immigration appeals to the circuit courts, most of which are asylum cases.\textsuperscript{11} The increased caseload has caused tension between judicial and administrative adjudicators.\textsuperscript{12}

As one judge from the Seventh Circuit opined in a case decided on November 30, 2005, this tension is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice . . . . All that is clear is that it cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation’s immigration laws for removal orders to be routinely nullified by the courts, and that the power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.\textsuperscript{13}

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

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


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

\textsuperscript{14} See Adam Liptak, \textit{Courts Criticize Judges' Handling of Asylum Cases}, N.Y. TIMES, Dec. 26, 2005, at A1 (quoting Jonathan Cohn, Deputy Assistant Attorney General, speaking on behalf of DOJ, regarding the handling of cases by immigration judges).
On January 9, 2006, Attorney General Alberto Gonzales ordered a comprehensive review of the immigration courts to address the treatment that some individuals have received from judges in removal proceedings. Recognizing these problems, the most effective method to address them is on a prospective basis.

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

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

Judge John Noonan, a senior judge on the Court of Appeals for the Ninth Circuit, appears to empathize with the human plight of the individuals whose cases are under review. For example, in a 1991 dissenting opinion involving a case in which a naturalization application was denied, and the denial was challenged by a person who had lived in the United States for 30 years, Judge Noonan wrote, "[t]he Immigration
Service's answer is that aliens are different. They are second class people. No doubt for some purposes this characterization is the harsh truth. Since the abolition of slavery aliens are the only adults subject to treatment as second class people in the United States.50

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

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

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