Curbing Judicial Review in Immigration Law

by Scott Mossman, Esq.

Harsh judicial criticism of the poor quality of administrative decision-making in removal (i.e., deportation) cases has gained media attention recently. It also forced the Attorney General earlier this year to launch an unprecedented review of the performance of immigration judges (IJ) and members of the Board of Immigration Appeals that serve under him. Congress's proposed solution? Republicans in the House of Representatives passed a bill, H.R. 4437, that would muzzle this criticism by imposing a presumption that federal court petitions challenging removal orders should be dismissed and eliminating Federal Court jurisdiction to review many types of decisions altogether. This Administration wish list is just the most recent offensive in a systematic campaign to increase Executive power at the expense of our system of checks and balances — checks and balances that are obviously necessary in light of the opinions highlighted below.

"A disturbing pattern of IJ misconduct has emerged" in removal cases. See *Wang v. Attorney General of U.S.*, 423 F.3d 260, 268 (3rd Cir. 2005). For example, the Third Circuit found that an IJ was "crude" and "cruel" and that "his tone was hostile and at times became extraordinarily abusive." *Fiadjoe v. Attorney General of U.S.*, 411 F.3d 135, 146, 154 (3rd Cir. 2005). "If not by design, in effect, he produced the very atmosphere that ... would cause memory loss, blocking, dissociating and breakdown" by the asylum applicant, whose father had used her as a sexual slave in the Trokosi cult since the age of seven. *Id.* In another case, the Ninth Circuit found a due process violation where

> *the IJ noticeably became aggressive and offered a stream of non-judicious and snide commentary.... [and the removal order] was replete with sarcastic commentary and moral attacks.* Reyes-Melendez v. INS, *342 F.3d 1001, 1007 (9th Cir. 2003).*

The Board of Immigration Appeals could remedy this disturbing pattern of IJ misconduct, but it repeatedly has failed to do so. Instead, as Circuit Judge Richard A. Posner commented,

> *the Board's analysis [is] woefully inadequate.... The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.* Galina v. INS, *213 F.3d 955, 958 (7th Cir. 2000).*

In sum,

> *[T]he adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."* Benslimane v. Gonzales, *430 F.3d 828, 830 (7th Cir. 2005).*

H.R. 4437 would silence much of this criticism by eliminating federal jurisdiction over many types of cases. It would also force the federal courts to use the same type of rubberstamp procedures that have caused the administrative adjudication of the cases to fall below the minimum standards of legal justice. Few besides judges, academics, and immigrant advocates, however, have noticed this assault on the Judiciary. Instead, the hundreds of thousands of immigrants and their supporters who took to the streets this spring focused on the other egregious parts of H.R. 4437 (and the Senate counterpart, S. 2611, to a lesser degree), which would turn millions of undocumented noncitizens into felons, criminalize charity, and militarize the border. We as concerned legal professionals, however, have a special obligation to scrutinize the parts of the new legislation that would compromise our legal system.

Presumption Against Judicial Review of Removal Orders

The proposed creation of a presumption *against* judicial review is the most controversial of the attacks on the Judiciary. Current law provides persons subject to a final order of removal with the right to one level of judicial review after they have exhausted their administrative appeals. Judicial review is obtained by filing a petition for review to the United States Court of Appeals for the

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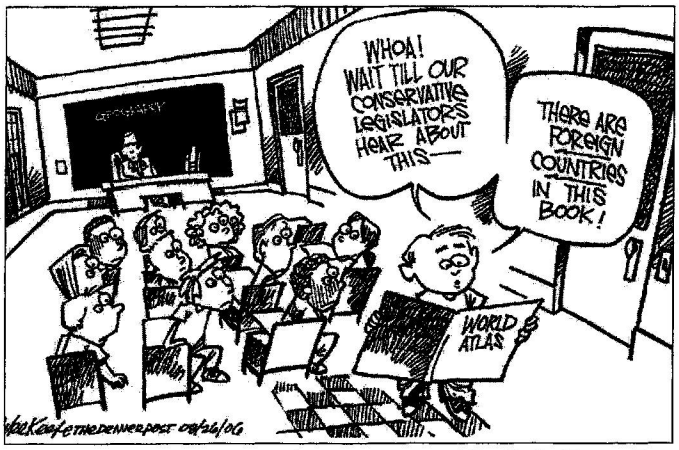

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judicial district in which the removal proceedings were completed. Three judge panels, then hear the case basically as they would any other civil appeal, except that there is extensive reliance on centralized staff attorneys.

H.R. 4437, however, would create a presumption against judicial review by imposing a "certificate of reviewability" requirement. Under this regime, a single judge would determine at the outset of the case whether the noncitizen petitioner has made a substantial showing that he or she is likely to prevail. The government would not even have to submit an answering brief until the judge finds that the petitioner has made this showing. Moreover, the discretionary language of the provision states that the judge "may" issue a certificate of reviewability if a substantial likelihood of success is shown, leaving open the possibility that the judge has discretion to dismiss a meritorious case. If the judge fails to grant the certificate within sixty days, then the case would be automatically dismissed. A reasoned decision is not required. Indeed, a person subject to the harsh consequences of a removal order could lose the right to judicial review even if the judge simply lets the case sit on her desk unread for sixty days. The harsh consequences of a removal order include forced separation from United States citizen family members for five or ten years, or life, and the return of asylum seekers to countries where they fear persecution.

Perhaps the certificate of reviewability requirement was inspired by the certificate of appealability requirement imposed on the appeal of *habeas* petitions challenging state court convictions. Even if one were to accept the dubious proposition that certificates of appealability serve an important gate-keeping function, there are fundamental differences between that context and the review of removal orders, as explained by Circuit Judge Jon O. Newman in testimony before Congress. *Habeas* cases already have progressed through all levels of a state's judicial system and thereafter received review by an Article Three federal district court judge before the certificate of appealability requirement is imposed. In removal cases, however, the certificate of reviewability requirement would be a bar to

the first and only level of judicial review (unless the Supreme Court grants *certiorari*). Up to that point, the only review that a noncitizen receives is by administrative officers that serve at the pleasure of the Attorney General.

An additional provision offered by Senate Judiciary Chairman Arlen Specter would magnify the likelihood that the certificate of reviewability procedure would result in gross errors and injustice. His version of the counterpart bill in the Senate would have channeled all petitions for review of removal orders to the tiny Federal Circuit in Washington, D.C. According to Chief Judge Paul R. Michel, the Federal Circuit receives 1,500 filings per year, mostly veterans' claims, government personnel cases, monetary claims against the government, and patent cases. Judge Michel testified before Congress that transferring the more than 12,000 removal cases filed each year to the Federal Circuit would result in "judicial breakdown." This judicial breakdown undoubtedly would result in heavy use of the certificate of reviewability procedure to dismiss the majority of petitions challenging removal, which in turn would result in the dismissal of many meritorious cases. Contrary to the protestations of the Department of Justice, the reversal and remand rate for its decisions is quite high. For example, the Seventh Circuit recently noted that it reversed orders of removal "in whole or part in a staggering 40 percent" of all petitions resolved on the merits. *Benslimane*, 430 F.3d at 829.

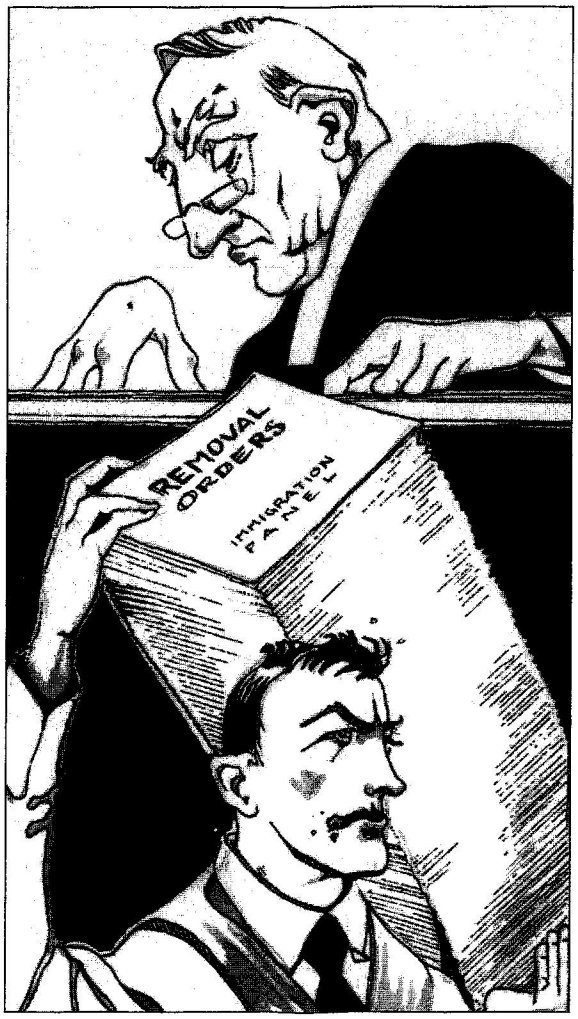

Illustration by Dang Saler

While neither Specter's proposal nor H.R. 4437's certificate of reviewability procedure ended up in the version of the bill passed by the Senate, they could well end up in the final version if the House and Senate conference the bills, given that Specter and Majority Leader Frist both have supported the proposals.

The Tyranny of Discretion

Although the certificate of reviewability "innovation" is of recent origin, the most successful method devised to shield immigration decisions from judicial review is to label the decision "discretionary." Since most immigration decisions have an element of discretion, an inability to review the exercise of discretion allows the Department of Justice (DOJ) and Department of Homeland Security (DHS) to arbitrarily deny applications where they do not have legal grounds to do so — without being held accountable.[1]

Discretionary decisions have always benefited from the extremely deferential "arbitrary, capricious, or contrary to law" standard. Nonetheless, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress decided that even that most deferential level of review was too much. It proscribed review of any decision to grant certain forms of discretionary relief and of any other decision "the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than [asylum]." See 8 U.S.C. § 1252(a)(2)(B).

The courts, however, have construed the discretionary bar narrowly in accordance with the strong presumption of judicial review. For example, virtually every court has held that decisions to deny discretionary forms of relief are unreviewable only if actually based upon the exercise of discretion, not if based on underlying determinations of statutory eligibility. *See, e.g., Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140-1144 (9th Cir. 2002); *Gonzalez-Torres v. INS*, 213 F.3d 899, 901 (5th Cir. 2000). Some courts have even exercised jurisdiction to review decisions labeled "discretionary" where the exercise of discretion violates clearly established legal precedent. *See Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006); *Hernandez v. Ashcroft*, 345 F.3d 824, 846 (9th Cir. 2003).

H.R. 4437 "clarifies" the discretionary bar by amending the language to get around the aforementioned court decisions. It would prohibit any review of a discretionary determination, even if it constitutes an arbitrary departure from statutes, regulations, or precedential opinions that channel the discretion. The changes created by H.R. 4437 also could be construed so far as to prevent review of questions of statutory eligibility that precede a discretionary determination — although the language in that respect is not airtight. The result would be disastrous because virtually every benefit provided for under the Immigration and Nationality Act (INA) has a discretionary element, including adjustment

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of status for spouses and children of United States citizens, cancellation of removal for long-term residents whose citizen family members face "exceptional and extremely unusual hardship," and even relief for victims of domestic violence.

However, *even without these changes, the current law still goes too far*. The Administrative Procedures Act, which is the default rule for administrative decisions, does not tolerate willy-nilly, unreasoned departures from regulations and precedential opinions. Why should such arbitrary decision-making be tolerated in immigration cases? Undoubtedly, it is tolerated because noncitizens — so called aliens — have no right to remain in the United States except by the grace of Congress. That does not mean, however, that serious interests are not at stake. Arbitrary decisions can send refugees back to their persecutors. Arbitrary decisions can also tear American families apart.

Undermining Court Oversight of Naturalization in the Post-Real ID Era

Both H.R. 4437 and S. 2611 would substantially erode judicial review of denied applications for naturalization to United States citizenship. H.R. 4437 also explicitly states that DHS can base its unreviewable conclusion upon secret evidence. These proposals to limit judicial review are particularly troublesome given the broad, ill-defined new definition of "engaging in terrorist activities" created by the Real ID Act of 2005. This new definition covers speech and association that would be constitutionally protected activity for citizens.

The two bills both "reform" naturalization by abandoning the *de novo* standard of review currently employed by the courts in reviewing naturalization applications. H.R. 4437 would eliminate the *de novo* standard entirely and instead would require the applicant to affirmatively prove that the denial was not supported by facially legitimate and *bona fide* reasons. S. 2611 would retain the *de novo* standard for some aspects of a naturalization claim, but would impose the highly deferential substantial evidence standard on review of whether the applicant has good moral character and is attached to the Constitution. In stark contrast, up until 1990, the federal courts made the final decision on whether to approve or deny every application for naturalization, in recognition of the importance of the interests at stake.

Both H.R. 4437 and S. 2611 would also permit the indefinite delay of decisions on naturalization applications. Under current law, an applicant can petition the federal court to assume jurisdiction of a naturalization application that has languished for 120 days after examination. This is an extremely useful tool, as DHS often sits on applications that it does not want to grant. In my own practice, I have had people come to me after DHS has refused to decide their naturalization applications for as long as four to six years. The Senate and House bills would gut this protective mechanism by allowing DHS to define "examination" as an ongoing process that could continue indefinitely.

H.R. 4437 would also eliminate jurisdiction to review a denial of naturalization based upon suspicion that the applicant has ever, at any time, been a threat to national security or has engaged in terrorist activities, as broadly defined by the immigration laws. The INA defines terrorism to include any use of a weapon not motivated solely by economic gain to endanger individuals or to substantially damage property. "Engaged in terrorist activity" pre-Real ID included material support, solicitation of funds or members, using a position of prominence to incite terrorism, serving as the representative of a terrorist organization, as well as planning or executing terrorist attacks. Additionally, noncitizens were held responsible for the actions of their spouse or parent.

The Real ID Act enlarged the definition of a "terrorist organization" to include any organization that has a subgroup of two or more individuals who have engaged in terrorist activities. Thus, a legitimate group that does not engage in terrorism and that provides no support for terrorism would be a "terrorist organization" if any two of its members together planned or carried out any of the activities that meet the definition of terrorism. Thus, a lawful permanent resident of twenty years could be denied naturalization and deported for donating money to a legitimate Sri Lankan tsunami relief fund if two of the board members of the fund had supported the Tamil insurgency in Sri Lanka. This would be the case even if not a single cent of her money supported terrorism.

Real ID also expanded the grounds of inadmissibility and deportability to encompass pure speech. Now, a noncitizen may be denied naturalization and deported for "endorsing or espousing" terrorist activity or a terrorist group. Since the INA already covered persons who actually "incited" terrorist activity, endorse and espouse must carry their normal meaning: to express public approval or

support of something. Thus, a noncitizen who utters a single word of sympathy for Hezbollah's goals to a neighbor could be denied naturalization and placed in deportation proceedings if her neighbor snitches on her. Moreover, all of the changes retroactively apply to past conduct that may have been lawful at the time.

Although the courts probably would find jurisdiction nonetheless to address naturalization denials that violate the Constitution, the deferential standards of review proposed by H.R. 4437 and S. 2611 seem designed to minimize court interference to the maximum extent possible. Moreover, the proposal to allow an examination to continue indefinitely might prevent a court from ever having a decision to review.

And the List Goes On

H.R. 4437 continues its attack on judicial review on several other fronts. It would require recipients of nonimmigrant (temporary visitor) visas to waive their current right to a removal proceeding before an impartial immigration judge. They would also have to waive any right to apply for relief from removal, apparently even if they later become permanent residents. These nonimmigrants include not only tourists, but also persons who have been admitted for several years or even indefinitely, such as students, treaty traders and investors, high-level executives of foreign companies assigned to the United States, professors and researchers, and skilled temporary workers. The consequences of this waiver are bizarre in that it would result in more rights for persons who entered the United States unlawfully than those who entered lawfully on a visa.

The bill would mandate the expanded use of expedited removal, whereby law enforcement officers can summarily remove persons who entered without inspection. It also would prevent, as a practical matter, any *habeas corpus* challenge to the expedited removal order. H.R. 4437 would do so by shortening the already short deadline for filing a *habeas* petition from fourteen days to seven. Most detained persons have a hard time finding a lawyer to meet with them within seven days, much less a lawyer able to research their case and file a *habeas* petition within seven days.

The Equal Access to Justice Act is another target of H.R. 4437. The bill would eliminate attorney fee awards where the government's position was not substantially justified, except where the court finds that the person is not removable. To understand the impact of this change, one has to appreciate that most persons in removal proceedings have conceded that they are removable. They simply seek relief from removal in the form of asylum, cancellation of removal, etc. In other words, the government can take an unreasonable position on the denial of relief without having to pay for it. This discourages attorneys from taking important cases where the noncitizen does not have the funds to fight the federal government.

The Larger Campaign to Eliminate Checks and Balances

Congress' attempt to erode judicial review of immigration decisions is nothing new. During the mid-1990's, Newt Gingrich and company passed (and President Clinton signed) IIRIRA, which did more to eliminate judicial review of immigration decisions than any law in the history of the United States. IIRIRA stripped the courts of jurisdiction to review: discretionary decisions, bond decisions, petitions by most noncitizens who have been convicted of a removable crime, and decisions to commence proceedings, adjudicate cases, or execute

removal orders. The impact of IIRIRA would have been even greater if the Supreme Court had not found that *habeas* jurisdiction remained to review constitutional claims and questions of law.

Moreover, this particular Administration has demonstrated that it would relish the changes brought about by H.R. 4437, which in all likelihood it drafted. Not only does the DOJ regularly invoke and seek to expand the jurisdiction-stripping provisions, but the other actions of the Administration also show a contempt for the coequal branches of our government. The abuses under the PATRIOT Act, of course, are exhibit number one, including wiretapping and monitoring emails without warrants. The other prime example, of course, is the insistence on denying so-called enemy combatants a recognized judicial process to challenge their indefinite detention. These are the actions of an Administration that would dismantle our system of government if it could.

A Solution That Does Not Sacrifice Our System of Government

The recent justifications for stripping the courts of jurisdiction or imposing a presumption against review have focused on the staggering increase in immigration filings in the federal courts over the last few years. If that is the problem, then the solution is clear. Every independent review of the increase in filings has attributed the increase in filings to the rapid surge in Board of Immigration Appeals decisions that followed the implementation of streamlining procedures.[2] Moreover, the studies have attributed the increase in filings not merely to the number of Board decisions, but to the marked decline in quality of the decisions — the same decline that has resulted in blunt criticism from the Courts of Appeal. The decrease in quality is unsurprising since those procedures encourage the use of one-line summary affirmances that do not necessarily endorse the reasoning of the immigration judge, but rather agree with the result. These summary affirmances are issued by a single board member instead of the three-judge panels that were used previously.

Therefore, the solution to the surge in the number of petitions to the federal courts is to increase the resources of the administrative agency and to force it to employ a better decision-making process. The Senate has recognized as much in S. 2611. S. 2611 includes substantial appropriations for more immigration judges, government attorneys, and support staff. It also increases the size of the Board of Immigration Appeals from eleven members to twenty-three. Most importantly, S. 2611 mandates that the Board use these increased resources to provide meaningful appellate review. It specifically prohibits the use of summary affirmance procedures except in extremely narrow circumstances.

Improving the quality of administrative decision-making achieves more than just reducing the pressure on the Courts of Appeal, though, it also increases the authority of the agency without compromising our system of checks and balances.

1 Immigration judges and the Board of Immigration Appeals, which hear removal cases, are located within the Department of Justice, while the agencies that prosecute removal cases and adjudicate applications by persons not in removal proceedings are located within the Department of Homeland Security.

2 See, e.g., ABA Commission on Immigration Policy, Practice & Pro Bono, Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms, Oct. 2003, available at http://www.abanet.org/immigration/bia.pdf; Asylum Seekers Deserve a Chance at a Fair Hearing, San Jose Mercury News, Sept. 20, 2005; Immigrant Pleas Crushing Federal Appellate Courts, L.A. Times, May 2, 2005.