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Introduction (Symposium: Seeking Review: Immigration Law and Federal Court Jurisdiction)

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Introduction

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On September 26, 2006, New York Law School's Justice Action Center and the *New York Law School Law Review* hosted a symposium to explore the current terrain of judicial review of immigration proceedings. The symposium was in the planning stages for more than a year and the panelists agreed to participate in the early spring of 2005.[1] At that point in time, our ambition was to reflect on the past decade of judicial review. It had been a decade shaped by the dramatic restrictions on judicial review adopted by Congress in the spring of 1996.[2] After ten years of litigation, the confusion about where and when to seek judicial review of an immigration removal proceeding had begun to solidify in a landscape with a few clear paths and several murky bogs. The symposium speakers were ready to share their first-hand knowledge to help chart the territory. Then, suddenly, in May of 2005, Congress passed The REAL ID Act.[3] This statute contained significant amendments to the jurisdictional provisions and once again the territory of judicial review was clouded and difficult to map.

All of the participants realized that their preparation and papers for the conference would be altered and immediately agreed to accept the challenge of adapting to the new statutory provisions. After several of the speakers quickly finished papers in the summer of 2005, we posted these drafts on the Justice Action Center website to aid attorneys and the courts in understanding the complex jurisdictional changes.[4] The symposium expanded its focus from reviewing the past decade's experience to discussing the implications of the new statute and other rapidly emerging trends in the field. The most significant of these was the enormous increase in the rate of individuals seeking judicial review of final orders of removal.

In the ten-year period before the symposium, there was a 970% increase in the total number of cases seeking judicial review of immigration orders.[5] The increases were felt across the federal court system, but most significantly in the

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1. Several members of the *New York Law School Law Review* were very important to the planning and organization of this symposium. In particular, Sarah Kroll-Rosenbaum, New York Law School Class of 2005, and Leslie Spitalnik, New York Law School Class of 2006, were invaluable in selecting conference participants and shaping the scope of the panels. In addition, five student members of the *Law Review,* in connection with the Justice Action Center Honors program, completed year-long research projects on diverse topics touching on the themes of the conference. These research projects, known as "capstones," contributed to the preparation of the conference and several of the speakers benefitted from the research prepared by these students. A number of the capstones were distributed to the symposium attendees. Pamela Goldberg, a Visiting Scholar at New York Law School during the 2005 school year, also made a significant contribution to the development of the student papers and the symposium.

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

3. Pub. L. No. 109-13, 119 Stat. 231, Division B (2005).

4. *See* New York Law School Justice Action Center, Seeking Review Symposium Website, http://www.nyls.edu/seekingreview (last visited Oct. 16, 2006). Chris Kendall, Program Director of the Justice Action Center, established and supported this website. His contribution to the planning and organization of the event were essential to its success.

5. Sarah Kroll-Rosenbaum, Noncitizens Access the Federal Courts: How Demand for Review Exceeds Statutory Restriction, Master Trends in the Law 12 (Jan. 28, 2005) (unpublished paper) (on file with the New York Law School Law Review). For more information on this study, see Lenni B. Benson, *Making*

Second and Ninth Circuit Courts of Appeals.[6] We invited the chief judges of both of these circuit courts to address the symposium and, happily, Chief Judge John M. Walker, Jr. of the Second Circuit agreed to become our keynote speaker.[7] Chief Judge Walker not only discussed the rapid increase in the court's immigration docket, but also used the symposium to discuss new rules of appellate practice adopted by the Second Circuit in an effort to make the adjudication of these cases more efficient. While Chief Judge Walker did not prepare a paper for this issue, the full record of his remarks are preserved in a digital audio file available on the symposium website.[8] Chief Judge Walker noted that nearly thirty-eight percent of the entire civil docket of the Second Circuit Court of Appeals concerned judicial review of immigration removal orders. Of these, the vast majority involved petitioners seeking review of the agency's denial of a request for political asylum. The new appellate procedural rules moved this subset of cases to a special non-oral argument calendar.[9] Moreover, the Second Circuit had expanded its ranks of specialist staff attorneys and established a set of calendaring and sequential review panels to improve the rate of adjudication. Between October 2005 and March 2006, the Second Circuit issued nearly one thousand final decisions under the new adjudication procedures.[10] This reflects a rate of nearly fifty decisions a week, which exceeds Chief Judge Walker's stated goal of twenty-eight cases a week. Even after these procedural reforms, the Second Circuit continues to experience a high rate of new filings and immigration law continues to be a major focus of the Circuit's caseload.

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, 47 & n.32 (2006).

6. *See* OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 8 (2004), *available at* http://www.uscourts.gov/caseload2004/front/judbus04.pdf; John R.B. Palmer, et al., *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, 53–54 (2005).

7. Chief Judge Mary M. Schroeder sent her regrets as the symposium date conflicted with en banc arguments, scheduled in the Ninth Circuit Court of Appeals. Chief Judge Schroeder has addressed the rate and content of the immigration petitions in a number of fora, including several major newspaper stories. *See, e.g.*, Howard Mintz, *Bill Addresses Deportation Appeals*, SAN JOSE MERCURY NEWS, May 20, 2006, at A4; Howard Mintz, *Tougher Procedures for Appeals Proposed*, SAN JOSE MERCURY NEWS, Mar. 25, 2006, at A; Howard Mintz, *U.S. Attorney General: Court Must Stop Mistreating Immigrants*, SAN JOSE MERCURY NEWS, Jan. 11, 2006, at A1; Solomon Moore & Ann M. Simmons, *Immigration Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at 1.

8. Chief Judge John M. Walker, Jr., Keynote Presentation, Seeking Review: Immigration Law and Federal Court Jurisdiction Symposium, http://www.nyls.edu/docs/walker%20keynote.mp3 (last visited Sept. 3, 2006).

9. 2D CIR. R. 0.29(a).

10. *See Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit) (testifying that the court is adjudicating forty-eight cases per week).

Two of the papers in this issue directly address the increasing volume of cases. The first speaker of the day, John R.B. Palmer, submitted the first paper addressing these issues. Palmer has worked in the Second Circuit Court of Appeals as an Associate Supervisory Staff Attorney, and in that capacity, he conducted a detailed and expansive empirical assessment of the immigration cases. His empirical research and analytical frame helped shape the discussion in the symposium. In his detailed and excellent paper, Palmer describes the types of cases and issues presented by petitioners, and he suggests some of the causes of the "immigration surge." His thoughtful paper, aptly titled, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, should be required reading for every member of Congress and the supporting staff as they attempt to address the workload of the federal courts and the scope and variety of judicial review. Palmer explores three main theories for the increase in the number of immigration cases: (1) changes within the Board of Immigration Appeals, the highest administrative authority, that produced many more decisions, and more of these decisions denied relief to the petitioning immigrant; (2) increases in the number of decisions affecting non-detained individuals who have access to legal counsel and seek judicial review at significantly higher rates; and (3) changes in the behavior and strategy of the individual immigrants and legal counsel.

In my paper, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, I join John R.B. Palmer in trying to understand the patterns of immigration litigation, specifically the reasons for the increase in judicial review. The title alludes to the main allegorical theme of the article which describes how Congress, by cutting and restricting judicial review, inadvertently produced a multitude of fora and legal issues that, combined with the executive branch's increase in streamlined adjudication, created more out of less. In that paper, I review the history of the court-stripping provisions, identify some of the unintended consequences of the restrictions that perversely increase the involvement of the federal courts, and suggest, most importantly, that unless Congress and the Executive carefully study the dynamics of the removal litigation and the interaction of agency adjudication with jurisdictional boundaries, the quandary of confusing and perhaps wasteful judicial adjudication will continue. I also join Palmer in suggesting that attorneys for the immigrants are much more likely to seek judicial review. I argue that they do this not solely or even primarily to gain time or delay removal, but because the attorneys have found that the judicial forum is, at times, the only forum where their clients obtain careful and searching legal analysis of the claims presented. Even following the elimination of oral argument in the asylum-related cases in the Second Circuit, one of my students reported a

seventeen percent reversal or remand rate in these cases.[11] The overall remand rate for immigration cases appealed to the Second Circuit is twenty percent,[12] and in the Seventh Circuit the rate of reversal has reached as high as forty percent for petitions of review decided on the merits.[13] While these rates do indicate that more often than not the government's administrative victory before the Board of Immigration Appeals is approved, to the motivated immigrant whose entire future may hang in the balance, a rate of reversal of seventeen percent, and certainly forty percent, justifies a petition for review as a hope worth pursuing. Further, those knowledgeable about the great deference given in judicial review of administrative matters and the doctrines which restrict the ability of the reviewing court to deviate from the record created before the administrative agency may find that this rate of remand or reversal actually suggests that the judges on the courts of appeals are seriously concerned with the quality and content of the administrative process.

Several of the speakers at the symposium shared their personal observations about the litigation surrounding the 1996 restrictions on federal court jurisdiction to review immigration cases. The goal of this panel was to share the lessons of the past litigation to expand our analysis of the current trends in limits on judicial review. This panel, moderated by Margaret Taylor, Professor at Wake Forest University School of Law, included three nationally known litigators. Lucas Guttentag, the founding national director of the American Civil Liberties Union Immigrants' Rights Project, commented on the road leading to the recognition of immigrants' habeas corpus rights in *INS v. St. Cyr.*[14] His remarks explored the shifting government strategy about the scope of the bars to judicial review and some of the current issues facing the courts after the changes made by the REAL ID Act. The panel also included Peter Schey, President and Executive Director of the Center for Human Rights and Constitutional Law, Inc., who was lead counsel in a number of the suits challenging the government's management and administration of the legalization programs established in 1986.[15] To some degree, the success of these class actions led Congress to provide for statutory restric-

11. Riki King, Ten Things I Wish I Knew before Filing a Petition for Review in the Second Circuit (May 14, 2006) (unpublished paper) (on file with author).

12. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of John M. Walker, Jr., Chief Judge, United States Court of Appeals for the Second Circuit).

13. Letter from Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit, to Richard J. Durbin, United States Senator (Mar. 15, 2006) (on file with author) (citing Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005)).

14. 533 U.S. 289 (2001).

15. *See, e.g.* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995); Catholic Social Services, Inc. v. Thornburgh, 956 F.2d 914 (9th Cir. 1992), *vacated sub nom.* Reno v. Catholic Social Services, Inc, 509 U.S. 914 (1993).

tions in the 1996 legislation that aimed at preventing similar impact litigation.[16] The panel was rounded out with the inclusion of David McConnell, Deputy Director of the Office of Immigration Litigation within the Department of Justice. McConnell provided a detailed discussion of the government's perspective, and we are very pleased to include his article in this symposium issue. His article, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996-2005)*, traces the government's litigation strategy from the 1996 legislation through the most recent 2005 changes. This article will be valuable to everyone who is analyzing the array of judicial responses to interpreting the scope of the jurisdictional provisions. Moreover, the article provides McConnell's analysis of how courts should approach the interpretation of the REAL ID Act modifications to habeas and the scope of petitions for review.

The next panel of the symposium presented two scholars who also dissected the provisions of the REAL ID Act and who analyzed the resulting impact on both habeas corpus petitions and petitions for review. Moderated by David Martin of the University of Virginia, this panel included a former Member of the Board of Immigration Appeals, Lory Rosenberg. She presented a detailed analysis of the standards of review as modified in the new legislation.

This panel also produced excellent articles by Gerald Neuman of Harvard Law School[17] and Nancy Morawetz of New York University Law School.[18] These articles provide carefully reasoned statutory analysis that should be consulted by scholars, advocates, and members of the judiciary. Moreover, the insights of these authors present cogent arguments for legislative reform to both clarify the jurisdictional terrain and ensure adequate protection for the individuals in removal proceedings. Gerald Neuman explains the origins of the REAL ID Act and its significance for judicial review of immigration proceedings. He explains, through his detailed, critical examination of the statute and the history of judicial interpretation in this area, that Congress may not have designed a judicial proceeding that will meet the standards for an "adequate substitute" for habeas corpus as guaranteed under the Constitution. Thus, his article outlines key arguments that the judiciary will have to address as litigation over the scope of judicial review under the REAL ID Act continues.

In her article, Nancy Morawetz covers much of the same litigation history as David McConnell, yet her coverage leads the reader to many different conclu-

16. *See* Immigration and Nationality Act § 242(f), (g), 8 U.S.C. § 1252(f), (g) (2000). For a recent article on this topic, see Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11 (2005).

17. *On the Adequacy of Direct Review After the Real ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2006).

18. *Back to Back to the Future? Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113 (2006).

sions. She suggests that due to the confusion over the scope and availability of habeas corpus review, the REAL ID Act may not clarify or narrow the issues before the courts, but will have the perverse effect of constitutionalizing the issues and requiring courts to "delve once again into the difficult constitutional terrain of due process, the standards for suspending of the great writ of habeas corpus, and the inherent powers of the courts."[19]

The last panel of the day, moderated by Pamela Goldberg, explored the value of judicial review in immigration proceedings and some of the ways that the recent legislation is shaping the administration of the immigration laws and directly impacting the claims of immigrants. Professor Margaret Stock, who teaches in the Law Department of the U.S. Military Academy,[20] described the ways in which Congress has provided statutory exemptions to the Department of Homeland Security in an effort to facilitate that agency's construction of a border wall. Her exploration of the scope and breadth of the statute revealed the ironic potential of such authority. Beyond environmental and labor law concerns, she noted that the Department of Homeland Security could exempt itself from compliance with the statute requiring U.S. employers to employ only people authorized to work in the United States. This hypothetical action would, indeed, produce an ironic result: a wall to keep out illegal workers built by the people it means to preclude.

One of the most important papers of the symposium was presented during this session. Professor Daniel Kanstroom includes in this issue his work on how the REAL ID Act might continue to erode the ability of individuals to seek judicial review of a wide range of agency decisions that are based, even in part, on the exercise of agency discretion. His paper, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, builds on several of his prior articles to continue to articulate a theoretical and doctrinal basis for requiring review of discretionary decisions as essential to the rule of law. Further, in addition to the insightful analysis, he has also provided readers with empirical data about the patterns of litigation and approaches that the courts have used to dissect legal problems woven around discretionary relief.

As this introduction is being prepared, Congress is considering additional reforms to the jurisdictional provisions. In March and April of 2006, the U.S. Senate held hearings on major immigration reform legislation. Among the many topics considered in the reform legislation was Senator Arlen Specter's proposal to move all judicial review of immigration proceedings to the United States Court of Appeals for the Federal Circuit.[21] Many of the speakers at this symposium

19. *Id.* at 116.

20. Professor Stock is also a Lieutenant Colonel, Military Police Corps, U.S. Army Reserve.

21. This seems like a particularly odd choice of a forum for this litigation, as this is one of the only circuit courts without experience reviewing immigration decisions. Moreover, this is a circuit with only twelve judges and an annual caseload of about 1500. *Immigration Litigation Reduction: Hearing Before the*

prepared written opposition to those proposals and others testified before the Senate Judiciary Committee.[22] Members of the federal judiciary also testified or sent comments to the Senate.[23] The bill that passed the Senate and awaits consideration in a congressional conference committee provides for a study to be conducted by the Comptroller General of the Government Accountability Office.[24] The Senate bill directs that the study evaluate the possibility of consolidating all appeals from the Board of Immigration Appeals and habeas corpus petitions into a single circuit court. The report also directs the study to consider (1) consolidating all such appeals into an existing court of appeals, such as the Federal Circuit; (2) consolidating all such appeals into an appellate court consisting of active circuit court judges assigned temporarily; and (3) creating a panel of active circuit court judges whose job it would be to reassign such appeals from circuits with relatively high caseloads to circuits with relatively low caseloads. The bill goes on to specify specific criteria for evaluating the alternatives. These factors include the necessary resources for each alternative, the impact of each plan on the various circuits, the possibility of using case management techniques, such as requiring certificates of reviewability, to lessen the impact of any consolidation option, the effect on the ability of the circuit courts to adjudicate such appeals, the impact, if any, on litigants, and other reforms to improve adjudication of immigration matters. In my view, this call for a study is a step in the right direction. In a forthcoming paper, I directly address the need for greater study before attempting to once again revise or "limit" judicial review.[25]

Congress needs to more carefully consider the past lessons of restrictions on judicial review of immigration matters. While greater efficiency in the adjudica-

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S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Chief Judge Paul R. Michel, United States Court of Appeals for the Federal Circuit). The immigration docket would likely increase the current rate of one hundred appeals per month to approximately 1100. *Id.* The chief judge of the Federal Circuit testified that with additional personnel, his court could handle the new workload. *Id.*

22. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary, 109th Cong.* (2006) (statement of David A. Martin, Warner-Booker Distinguished Professor of International Law, Class of 1963 Research Professor, University of Virginia School of Law); *Immigration Litigation Reduction: Hearing before the S. Comm. on the Judiciary, 109th Cong.* (2006) (statement of Margaret D. Stock, American Immigration Lawyers Association; Associate Professor of Law, Department of Law, U.S. Military Academy, West Point, N.Y.); Letter from Lenni B. Benson, Professor of Law, New York Law School, and Stephen W. Yale-Loehr, Adjunct Professor, Cornell Law School, to Arlen Specter, United States Senator (Mar. 16, 2006) (on file with author).

23. Letter from Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit, to Richard J. Durbin, United States Senator (Mar. 15, 2006) (on file with author); *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Jon O. Newman, Circuit Judge, United States Court of Appeals for the Second Circuit); *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of John M. Walker, Jr., Chief Judge, United States Court of Appeals for the Second Circuit).

24. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 707 (as passed by Senate, May 25, 2006).

25. Lenni B. Benson, *You Can't Get There From Here*, U. CHI. LEGAL F. (forthcoming October 2007).

tion and review of immigration removal orders is a valuable goal, rushing to find solutions or moving the caseload around doesn't address the fundamentals of why so many are seeking judicial relief and why the administrative system is inadequate to the protection of individual rights. As I conclude in my article in this issue, "[t]he hard work for the legislative branch should be the designing of a system of incentives and tailored justice — justice that is designed to ensure individual treatment rather than a system which is so rigid that inequities abound."[26] As long as these inequities are present, people will fight. Perhaps we should have greater patience for the fight and let efficiency bow to the pursuit of justice. After all, many people in the United States cherish access to judicial review as a check against the arbitrary assertion of governmental power against individuals. When administrative agencies are charged with making thousands of individual decisions that require complex legal reasoning, all of the participants in the process benefit from the dialogue about the application of the law as it develops through judicial review.

26. 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 (2006).

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