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Immigration Reform and Judicial Review: A Constitutional Crisis

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Can Congress take away the jurisdiction of the courts? The question, as old as our republic, is one that law professors love to parade around the classroom. For noncitizens, however, it is suddenly a harsh new reality.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 — intended to streamline the removal of noncitizens — Congress tried to eliminate the jurisdiction of the federal courts to hear several types of claims. Under the Act, noncitizens can be barred from judicial review when they seek admission to the United States. Lawful permanent resident aliens can also lose the right to go to court to contest a removal order, no matter how long they have lived in the United States.

While speeding up the removal procedure is a worthwhile goal, judicial review has not been a cause of delay. Immigration and Naturalization Service (INS) statistics for the year 1995 indicated that less than 1% of all people with final deportation orders sought any judicial review. That is approximately 1,500 cases out of nearly 200,000.

The real delays occur in the administration process, or are simply a result of the failure of the INS to remove people. A recent study conducted by the Inspector General's office found that the INS actually removed less than 11% of all people who had final orders of deportation or exclusion. The low numbers may reflect a lack of resources or poor management, but they do not argue for the elimination of judicial review.

Despite the new legislation, Congress has not been successful in eliminating all judicial review. To remove a noncitizen from the U.S., the government must have physical or constructive custody over the person. This fact alone creates the necessary predicate to habeas corpus jurisdiction. In current litigation over the 1996 Act, the Department of Justice agrees that some form of habeas corpus review exists but is arguing that the court is limited to the consideration of "substantial constitutional issues." The net effect of these limitations is the "constitutionalization" of immigration law.

Ironically, constitutionalization may lead to noncitizens finally being able to establish substantive constitutional rights. Traditionally, the courts have deferred to both the Congress and the Executive by reviewing immigration laws with an extremely deferential standard. They have referred to Congress' power over immigration as a seemingly limitless or "plenary" power. In the past, courts have rejected challenges to the immigration laws asserting such traditional constitutional rights as equal protection based on sex,

national origin or race, or the exercise of First Amendment freedoms. Because immigration hearings are civil proceedings and because courts have classified deportation as a civil sanction, not criminal punishment, noncitizens cannot assert most Fourth Amendment protections in immigration proceedings. Further, noncitizens in immigration hearings have no right to appointed counsel. The Supreme Court has also upheld statutes that render noncitizens deportable for past conduct that had no previous immigration consequences. In immigration cases, the only constitutional restraint the Supreme Court placed on the political branches of government was a limited recognition of the right to procedural due process. In some situations, this has led lower courts to enjoin the operations of the INS due to abusive and mismanaged operations.

For years scholars and advocates have called for the abolition of the plenary power doctrine and a mainstreaming of immigration law into our traditional constitutional law. By forcing courts to only hear the constitutional claims, Congress may have cracked its own plenary power. Of course, the opposite result may also be true. Lower courts faced with onerous Supreme Court precedents may simply re-enshrine the plenary power doctrine. Congress should recognize that by trying to eliminate federal court jurisdiction, it has actually raised the stakes of immigration litigation to constitutional proportions.

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There are other reasons why the constitutionalization of immigration law may not be in the best interests of our country.

Most noncitizens cannot afford counsel and many are unrepresented. These measures will likely result in a new array of pro se habeas petitions in federal district courts. Some constitutional claims cannot be litigated without extensive fact investigation and evidentiary hearings and thus increase the resources needed to adjudicate the claim. Constitutionalization of litigation may continue the distortion of the dialogue among our branches of government that has often taken place in immigration cases. Congress will find it difficult to fine tune the legislation when courts throw out statutes on constitutional grounds. It may be difficult for the INS to implement the new laws if successful procedural due process or other substantive constitutional challenges enjoin their implementation or operation. Yet, if courts do not act, there will be few checks on the activities of the INS, and unchecked power can lead to tyranny.

In my view, how we treat the foreigner tells us a great deal about our nation and its principles. I hope Congress will reconsider this attack on judicial review, but if not, then it is for our judiciary to preserve its function as the protector of the rule of law and of constitutional rights.

Lenni B. Benson has been a professor at New York Law School since 1994. She is a nationally-noted authority on immigration law. Her most recent article is "Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings," *Connecticut Law Review* (Vol. 29, Issue 4).