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PERSPECTIVES ON IMMIGRATION

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The Rush to Limit Judicial Review

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Access to an independent judiciary with the power to hold the government accountable in its dealings with individuals is a founding principle of the United States. In contrast, imagine a system where there is no access to independent judgment; where, instead, the referee works for the opposing team. The House of Representatives took a step away from this founding principle by passing the Border Protection, Antiterrorism, and Illegal Immigration Control Act (H.R. 4437) on December 16, 2005. A provision of the bill would erode access to independent judgment by severely restricting access to the federal courts for individuals in removal (deportation) proceedings. This provision is part of a long string of efforts by proponents of restrictive immigration policies to limit the jurisdiction of the federal courts over immigration cases.

H.R. 4437 would impose a "certificate of reviewability" requirement[1] for people challenging their orders of removal in federal court. The requirement would add to the already extensive limits on what kinds of removal cases the federal judiciary may review and when the federal courts may hear those cases. Under the certificate-of-reviewability regime, the federal courts are accessible to individuals fighting removal only if a federal court judge, acting as a gatekeeper, first grants permission. The judge may grant that permission only if the individual seeking independent judgment can prove worthy of independent judgment by making a substantial showing of likely success. If this single gatekeeper judge fails to act on the request within a short timeframe, the request is denied automatically. In addition, the government is not required to defend its actions to the independent court unless the certificate of reviewability is granted. This amounts to a system in which an individual can ask for independent judgment, but there is no right to actual judgment on the challenged executive (administrative) action.

The House of Representatives promoted the certificate-of-reviewability requirement as a means to reduce the number of immigration cases in the federal courts, which has increased dramatically in recent years. But there is a less extreme policy option: reform the executive adjudication process. Surely, a troubled executive process creates more work for the federal courts. Federal judges, Attorney General Alberto Gonzales, and the immigration reform bill passed by the Senate on May 25, 2006—the Comprehensive Immigration Reform Act (S. 2611)—all recognize the need for reform of the way the executive branch adjudicates immigration cases. Proponents of the certificate-of-reviewability requirement, however, do not.

Under the present system, an immigration judge (an executive branch employee) determines whether an individual is removable from the United States under the immigration statutes. The immigration judge's decision can be appealed to the Board of Immigration Appeals (BIA), the

executive branch body which then renders the final administrative order. There may be limited judicial review of this final order by a federal court of appeals (the intermediate-level federal courts). Current law already contains extensive limits on the federal judiciary's power over removal cases. The certificate-of-reviewability requirement further reduces that power.

Immigration judges and BIA members are being asked to more quickly adjudicate complicated cases with life-altering implications, leaving insufficient time for legal analysis. According to Dana Leigh Marks, a San Francisco immigration judge and Vice President of the National Association of Immigration Judges, immigration judges "do not have the luxury of rendering written decisions," do not have "the legal niceties of moving papers and in depth memos and motions to support the decisions that [they] render," and must share staff heavily (Marks reports that she can lay claim to only one-sixth of a law clerk).[2] As immigration enforcement efforts increase, Marks foresees greater strain on an administrative process that is already "going too fast."[3] Chief Judge John M. Walker, Jr. of the U.S. Court of Appeals for the Second Circuit calculated that immigration judges must dispose of more than five cases per business day to stay current and that eleven BIA members are expected to dispose of 43,000 cases per year.[4]

A major impetus to adjudicate more cases more quickly can be traced back to "streamlining" procedures implemented at the BIA in 2002. These regulatory changes decreased the number of BIA members from 23 to 11; set single-member review of cases as the default procedure (as opposed to three-member panel review) and expanded the use of boilerplate one-sentence decisions. A recent study reports that since the streamlining procedures took effect, the number of BIA orders challenged in federal court has increased about five-fold.[5] Not only has the federal judiciary been asked to review the BIA's orders more often—which is to be expected as the BIA seeks to decrease its backlog—but there is evidence that the percentage of decisions appealed also has increased.[6]

Federal judges have expressed frustration about the quality of the executive decisions reaching their courts. For example, Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit recently referred to an immigration judge's determination of an asylum applicant's credibility as based "on grounds that, because of factual error, bootless speculation, and errors of logic, lack a rational basis" and stated that "[t]hese have been common failings in recent decisions by immigration judges and the [BIA]."[7] He also has concluded that "the adjudication of [removal] cases at the administrative level has fallen below the minimum standards of legal justice."[8] In response to concerns about the quality of work produced through the executive adjudication process, Attorney General Gonzales ordered a comprehensive review of the process and recently announced 22 administrative reforms.

Rather than reforming the troubled administrative adjudication process, the certificate-of-reviewability requirement heightens the barriers to independent judgment for individuals challenging their orders of removal. A version of this provision also surfaced in the Senate Judiciary Committee, along with a proposal to consolidate all petitions for review in the U.S. Court of Appeals for the Federal Circuit. The bill reported out of the Senate Judiciary Committee did not contain those provisions and they are absent from S. 2611 as endorsed by the Senate. The Senate bill does contain provisions to reform the administrative review process by, among other things, reversing some of the 2002 BIA streamlining changes.

During a recent Senate hearing on the role of the federal courts in reviewing immigration matters, federal judges expressed opposition to the certificate-of-reviewability requirement.[9] The

judges explained that reform of the *executive* adjudication process is necessary and voiced concern that the requirement does not provide for meaningful review of executive decisions. As explained by Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit—in response to the claim that the certificate-of-reviewability requirement simply would put immigration cases on par with *habeas corpus* cases—"[i]t would be an extraordinary step to authorize one federal circuit judge to cut off all appellate review of a case involving individual liberty that has not been given the consideration to be expected from the two- and usually three-tiered system of a state judicial system, followed by the decision of a federal district judge."[10]

The certificate-of-reviewability requirement is a rush to limit judicial review at the expense of a less drastic alternative. The requirement creates new hurdles to addressing the problems of the executive adjudication system through the independent federal courts. Instead of burying these problems by restricting federal court review, Congress should invigorate the executive process by providing immigration judges and BIA members with the resources they need to dispense fair and meaningful administrative review.

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[1] H.R. 4437, 109th Cong. § 805 (2005).
[2] Sandra Hernandez, "Growing Problem, Broken System," *Daily Journal*, July 24, 2006.
[3] *ibid*.
[4] Statement of Chief Judge John M. Walker before the Senate Judiciary Committee on "Immigration Litigation Reduction," April 3, 2006.
[5] John R. B. Palmer, Stephen W. Yale-Loehr, & Elizabeth Cronin, "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," *Georgetown Immigration Law Journal* 20(1), Fall 2005, p. 4.
[6] *ibid.*
[7] *Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006).
[8] *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).
[9] Statements of Chief Judge John M. Walker, Jr., Chief Judge Paul R. Michel, and Judge Jon O. Newman before the Senate Judiciary Committee on "Immigration Litigation Reduction," April 3, 2006.
[10] Statement of Judge Jon O. Newman before the Senate Judiciary Committee on "Immigration Litigation Reduction," April 3, 2006.