

## Court Stripping and Limitations on Judicial Review of Immigration Cases

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Congressional “court stripping,” or the attempt to take jurisdiction away from courts to review matters of all types, is not new. Jurisdiction-stripping proposals were advanced in Congress as early as 1830. Between 1953 and 1968, over sixty bills were introduced into Congress to restrict federal court jurisdiction over particular topics. The 1970s and 1980s saw efforts to strip the courts of jurisdiction in busing, abortion, and school-prayer cases. Sen. Jesse Helms once proposed a bill to strip the federal courts of jurisdiction to review school-prayer cases. Barry Goldwater, upon learning of the Helms bill, dismissed the proposal as the equivalent of “outlawing the Supreme Court.”

Congress has for years attempted to strip courts of their jurisdiction to review actions of federal law-enforcement agencies and state courts in order to reverse decisions they do not like, punish judges, or even avoid future rulings they may not like. Federal courts, which have been essential in expanding and preserving individual rights, are now being barraged by congressional attempts to strip the courts of their power to review.

Congress’s decisions about the courts’ jurisdiction, including appellate jurisdiction, have considerable effects on their caseloads, although not always in ways that might have been anticipated. Nowhere has this trend been more apparent than in Congress’s legislation in the immigration area. With the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), a Republican Congress and the Clinton administration fundamentally altered judicial review of immigration matters. Despite this legislation restricting judicial review, the caseload at the U.S. Court of Appeals has risen markedly, so much so that immigration cases now comprise 18 percent of the federal appellate civil docket.

**The Legislation.** The Supreme Court has suggested that “protecting the Executive’s discretion from the courts. . . . can fairly be said to be the theme of the legislation.” *Reno v. Arab-American Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1997). The AEDPA eliminated judicial review for criminal aliens. It stated that “Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against any alien who is removable by reason of having committed a criminal offense.” In addition, the act deleted the prior provision in federal law that permitted habeas corpus review of claims by aliens who were held in custody pursuant to deportation orders.

The IIRIRA was an attempt by Congress to eliminate judicial review of non-final orders or rulings primarily involving aliens in removal proceedings. It also con-

tained provisions to deport summarily aliens seeking political asylum, often at border entry points, with no hope of judicial review. The IIRIRA further restricted judicial review by providing that only “final” removal orders directed at aliens were reviewable. In addition, Sec. 1252(a)(2)(B)(ii), titled “Judicial Review of Orders of Removal,” provided:

Notwithstanding any other provision of law, no court shall have jurisdiction to review . . . (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

A pivotal question posed by the Sec. 1252 is whether the elimination of judicial review of discretionary matters applies only to Judicial Orders of Removal, as the heading or title of the section would suggest, or whether it applies to all discretionary decisions of the attorney general. Put another way, does the elimination of review of “discretionary matters” apply only to the removal context or does it apply generally to all matters of discretion of the attorney general?

The history recounted in the House Conference Report (S. 306) never referred to visa petitions or any other procedures outside the removal, exclusion, and deportation contexts. In fact, specific references to the removal of jurisdiction from the courts at all times in the report are to the removal, exclusion, and deportation contexts only.

There is a long line of precedent for the proposition that if Congress had intended to strip the federal courts of power to review all discretionary decisions of the attorney general in immigration matters, Congress must necessarily have made its intent plain. In addition, another long line of precedent establishes the strong presumption in favor of judicial review of administrative action. In short, statutory language presumed to strip the courts of judicial review must be clear and unambiguous, or the matter is reviewable.

When the law was first enacted in 1996, the consensus among practitioners in the field was that the section was limited to matters of removal or deportation. However, the Justice Department began to take the position that this section precluding judicial review applied to general immigration matters, such as appeals of denied immigrant visa and nonimmigrant visa applications. And for the most part, the courts agreed with the government that the act applied to all “matters of discretion.” In doing so, those courts have generally taken the position that since the language is unambiguous, they need not examine its underlying legislative history. Only a minority of courts have construed this section to apply only in the context of final orders of removal. The majority rule in six circuits to date is that the decision of the attorney general only has to be “discretionary in nature” to be jurisdictionally precluded from review.

The first major test of the IIRIRA came in 1997, when the Supreme Court decided *Reno v. American-Arab Anti-Discrimination Committee*. Petitioners, who were

resident aliens, filed suit. They claimed that they had been targeted for deportation because of their affiliation with a politically unpopular group and alleged violations of their First and Fifth Amendment rights. Justice Scalia, speaking for the Court, had little difficulty in upholding Sec. 1252(g), an IIRIRA provision that prohibited federal courts from reviewing the “decision or action” of the attorney general to “commence proceedings, adjudicate cases, or execute removal orders against aliens under this Act.” While upholding the IIRIRA, the *American-Arab* case can be construed as a narrow decision, inasmuch as it is limited to “decisions or actions” of the attorney general, “the commencement of proceedings, adjudication of cases,” or “execution of removal orders.” The decision contained little discussion of the broad act in general and no discussion of constitutional issues.

In 2005 the Congress enacted The REAL ID Act, which contained a number of provisions affecting immigration. First, it clarified congressional intent to preclude federal district court jurisdiction over habeas claims, leaving such claims as the sole province of the courts of appeals. Second, it reemphasized that “discretionary” claims were not reviewable by the courts. Third, it added language that preserved the right of judicial review “of constitutional claims or questions of law raised upon a petition for review” filed with an appropriate court of appeals. Fourth, it restored the right of criminal aliens to judicial review.

**The Impact.** With the enactment of the 1996 acts and the REAL ID Act, many commentators predicted that far fewer immigration cases would wind up in the courts. In fact, quite the opposite result has occurred. In the past four years, “the U.S. Courts of Appeals have seen a dramatic increase in immigration cases. More people than ever are petitioning the Courts to review decisions of the Board of Immigration Appeals (BIA), and these petitions now account for a substantial portion of the caseload in the courts of appeals” (Palmer, Yale-Loehr, and Cronin, 2005). This so-called immigration surge has placed a significant strain on judicial resources, requiring courts to hire additional staff, recruit visiting judges, and schedule extra sessions for hearing cases. Immigration cases now represent 18 percent of the federal appellate civil docket, and the total number of federal court cases reviewing orders of the BIA has increased 970 percent in the last ten years.

This may appear inconsistent with the prior discussion of Congress’s attempts to limit judicial review of immigration decisions, but there are specific reasons for the surge in cases brought to the courts of appeals. This increase in cases has resulted from a variety of factors. These include a higher volume of cases and a higher percentage of final orders of removal before immigration judges in removal proceedings; limiting of administrative appeals in the INS so that more aliens are being subjected to removal proceedings; a shift in strategy by lawyers, who file federal court actions as they view the administrative proceedings as offering little hope for a fair hearing for their clients; and legal strategies aimed at prolonging the stay of aliens, given the Justice Department’s attempts to expedite the removal of aliens.

As the total number of federal court cases has surged, it would be easy for some to conclude that access to the courts and, hence, judicial review has not been restricted, despite the 1996 and 2005 acts. Not so, when one views this in the context that virtually all immigration cases that wind up in the courts of appeals are a result of appeals from final orders of deportation at the administrative level and habeas cases. Therefore, while the total volume of cases has increased significantly, much of the volume is a result of cases that are no longer reviewable in the district courts but now must be filed in the courts of appeals. And the chances of success in the courts of appeals are not high, as on average there is only a 2 to 3 percent reversal rate of administrative orders of removal or deportation. Combine this with the fact that non-final orders involving administrative removal proceedings are no longer reviewable, and that discretionary decisions of the attorney general over the millions of visa petitions filed each year are not reviewable in most circuits, and judicial review has been severely restricted.

**Issues Raised by the Legislation.** This ongoing congressional assault on the jurisdiction of the courts raises a plethora of constitutional issues. First and foremost is whether an administrative proceeding is an adequate substitute for a federal judicial proceeding. Or, put in a constitutional context, may Congress substitute an Article I tribunal for an Article III federal court? In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Supreme Court made it clear that Congress cannot create Article I courts in a manner that offends separation of powers and due process. Speaking for the Court, Justice O'Connor declared, "In determining the extent to which a given Congressional decision to authorize the adjudication of Article III business in a non-Article tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules" (at 851). While acknowledging the benefits of an administrative proceeding to federal court litigation in terms of efficiency and expertise, the Court at the same time held that these interests must be balanced against the "purposes underlying the requirements of Article III."

In its legislation, Congress has been careful, for the most part, not to preclude judicial review entirely, as to do so would raise serious concerns about the legislation's constitutionality. Complete preclusion of jurisdiction to review immigration matters would most likely be deemed unconstitutional. However, there has never been a Supreme Court case involving complete preclusion.

Yet what about "de facto" elimination of jurisdiction by the Congress? Can it not be argued that the preclusion of reviewability of millions of petitions for immigration—which is the heart and soul of the daily immigration process—is tantamount to a de facto elimination of judicial review? Until 1996, virtually all visa-petition applications decided by the attorney general were reviewable in the courts. This is not now the case in a majority of circuits. It would seem that this question is one which is certain to be answered by the Supreme Court at some juncture. **jsj**

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