THE DIMINISHING PROSPECTS FOR LEGAL IMMIGRATION:

CLINTON THROUGH BUSH

DONALD S. DOBKIN*

I. INTRODUCTION

It began at 6:00 a.m. on June 1, 1980, when 21,000 Cuban refugees confined to their barracks at the U.S. Army base in Ft. Chaffee, Arkansas, began to riot.[1] Several buildings at Ft. Chaffee were set ablaze, and 300 of the refugees escaped into the neighboring towns of Barling, Ft. Smith, and beyond.[2]

William ("Bill") J. Clinton, then-Governor of Arkansas, was awakened with the bad news. The Arkansas National Guard was ordered into action as Clinton arrived on the scene.[3] Clinton "took command of the situation immediately. 'I don't want any of our people hurt,' he said firmly. 'I'm not telling you how to do your jobs, but I want it understood that if anybody is injured, I want it to be the Cubans—not civilians and not

* LL.B. 1975, (Windsor). LL.M. 1976, (Northwestern). Admitted to the Illinois Bar 1977, Michigan 1979. The author practiced immigration law with Dobkin & Associates, the firm he founded, in Farmington Hills, Michigan, 1979 - 2004. He is past Chairperson of the Immigration Law Section of the Oakland County Michigan Bar Association and has lectured and presented seminars on immigration in the U.S., Canada and the U.K. His writings on immigration law and civil liberties have been published in law reviews and as book chapters. He is currently doing graduate work in political science at Johns Hopkins University. E-mail: xgreencard@aol.com.

1. Jeffrey D. Walker, *Bad Apples and the Rest of the Bunch—Twenty-Three Years After the Mariel Boatlift*, INTREPID MEDIA, July 21, 2003, http://www.intrepidmedia.com /column.asp?id=1298.

2. *Id.*

3. Jack Moseley, *Clinton Tested By Cubans and Politics*, ARK. NEWS BUREAU, June 3, 2003, http://www.arkansasnews.com/archive/2005/06/03/JackMoseley/322081.html.

your men.'"[4] Looking straight at his commander, he then added, "Am I making myself clear?"[5]

The events of that steamy summer morning, twenty-six years ago, left an indelible impression on the future forty-second President of the United States and would earmark the beginning of the current cycle of restricting the prospects for legal immigration for millions of potential immigration applicants. The political fallout from these events would be felt for years, especially for Bill Clinton, who blamed the riots for his defeat in the Arkansas gubernatorial race in November 1980.[6] Burned by Castro once, Clinton was determined not to be burned a second time.[7] Hence, in 1994, a little more than a year after occupying the White House, Clinton issued an Executive Order changing the Cuban Adjustment Act of 1966.[8]

Under the Cuban Adjustment Act of 1966, Cuban refugees who reached American territorial waters by any means could seek political asylum.[9] Clinton's 1994 Executive Order mandated that refugees actually had to get their feet on U.S. soil before they could file for asylum.[10] Hence, Clinton's order firmly established and legitimized the U.S. policy of interdiction of aliens on the high seas.

This article attempts to provide a thumbnail sketch of the major changes in immigration law and the political underpinnings attendant thereto in both the Clinton and Bush administrations. Having witnessed and felt these changes on a professional level, there remains little doubt in my own mind that the prospects for legal immigration since the mid 1990's have been diminished substantially.

Most articles on immigration focus on a detailed analysis of a particular statutory provision or case, or attempt to explain congressional action or non-action with a broad political brush. The problem with these approaches is two-fold. First, they give little insight into what is really happening at the Immigration and Naturalization Service ("INS") (now called U.S. Citizenship and Immigration Services "USCIS") with

4. *Id.*
5. *Id.*
6. Walker, *supra* note 1.
7. BILL CLINTON, MY LIFE 615 (2004).
8. *See* The President's News Conference on Cuban Refugees, 2 Pub. Papers 1477 (Aug. 19, 1994), *available at* 1994 WL 446481 (White House) (West).
9. Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (2006)).
10. *See* The President's News Conference on Cuban Refugees, *supra* note 8, at 1; *see also* United States-Cuba Joint Communiqué on Migration, Sept. 9, 1994, U.S.-Cuba, 5 U.S. Dep't State Dispatch 37 (1994).

adjudication of real applications. Second, they attempt to analyze immigration purely from a political policy perspective. Unfortunately, neither approach presents a clear picture of the immigration landscape.

No article or work has attempted to detail the narrowing immigration gates over the past decade by taking a comprehensive look at the legislation Congress has passed and the manner in which the INS has dealt with it. Unfortunately, examining INS statistics on numbers of applicants and numbers of approvals does little to reveal how difficult the legal immigration process has become.

To the uninitiated, a legislative change in the immigration law is the "be all and end all" of the immigration analysis and debate—yet the true "litmus test" is what regulatory interpretations INS adopts after legislation is enacted by Congress. The reality is that the record is replete with administrative action which typically defies statutory directives and congressional intent.

II. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILTY ACT OF 1996 ("IIRIRA")

Clinton's 1994 Executive Order was significant but paled in comparison with what was to come. On September 30, 1996, the "Illegal Immigration Reform and Immigrant Responsibility Act," ("IIRIRA") was signed into law.[11] Enacted in the shadow of the Oklahoma City bombing, and with the support of the Clinton administration and a Republican Congress, the Act was labeled the Illegal Immigration Reform Act ("IIRA").[12] However, the term "illegal" was a misnomer because the main thrust of the law was all about restricting legal immigration, not only about controlling it.

> Although IIRIRA was supposed to stop "illegal immigration" into the United States, it unleashed, instead, a series of bad policy choices that have destroyed families, made it virtually impossible to permit illegal immigrants to become legal, and rendered our legal system impotent to stop the worst abuses by government officials who may now run amok without any judicial oversight.[13]

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

12. *Id.*

13. Supreme Court Examines Legacy of '96 Laws (Oct. 4, 2006), http://www.afsc.org/immigrants-rights/current-news/2006/10/supreme-court-examines-legacy-of-96.html.

The IIRIRA, for all intents and purposes, eviscerated the rights of immigrants to apply for political asylum by giving immigration officers at ports of entry "the right to summarily deport persons seeking asylum."[14]

> INS decisions about asylum used to be subject to challenge and review in federal court but the IIRIRA gave individual border patrol agents the power to make instant, unilateral life and death decisions about whether someone seeking entry is likely to be subject to death, torture or imprisonment on returning home.[15]

Coupled with the fact that aliens who somehow made it into the U.S. were now required by law to file their applications for political asylum within one year or render themselves ineligible[16], political asylum was all but rendered dead by the enactment of IIRIRA.

Another significant change in the law was the establishment of the so-called "Entitlement Bars," which became effective on April 1, 1997.[17] Section 245 of the Immigration and Nationality Act, as amended, essentially establishes the rules and requirements for those aliens who wish to adjust their status to permanent resident (the "greencard").[18] These are applicants who are in the United States on so-called "non-immigrant" or temporary visas, such as visa F-1 for students or visa H-1B for professionals.[19]

This section generally allows aliens to adjust their status only if they have maintained a lawful status while in the United States.[20] While, initially, the new law extended section 245(a)'s adjustment for out-of-status aliens until 1997, the provision expired eventually and was not renewed by Congress.[21] The eventual expiration of the adjustment law under section 245(a) did two things. First, it prohibited aliens who were out-of-status, for even a day, to lawfully adjust their status in the United States.[22] Second, it barred aliens who were out of status for more than 180 days but less than one year, from applying for a visa at a U.S. Embassy abroad for three

14. Immigration and Nationality Act of 1990, Pub. L. 101-649, § 208(a)(b)(2)(A)(i)-(iv) 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1101 (2006)).

15. *Id.*

16. Immigration and Nationality Act § 208(a)(2)(B).

17. Immigration and Nationality Act of 1990, Pub. L. 101-649, § 212, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1182 (2006)).

18. 8 U.S.C. § 1255(a).

19. 8 U.S.C. § 1184.

20. 8 U.S.C. § 1255.

21. *Id.*

22. *Id.* Prior to this, aliens who were out-of-status (many times through no fault of their own) were able to adjust status by paying an added but hefty filing fee. *See id.*

years.[23] Persons who remained out of status for a total of one year or more were barred from applying for a visa to the U.S. for 10 years.[24] There was only one exception to these harsh measures, which applied to immediate relatives of U.S. citizens, as defined by section 201(b) of the Act, such as spouses, children, and parents.[25]

The inability of an alien, who was out of status for even a day, to adjust his status in the United States, rocked the immigration world. Not only did it suddenly make thousands of potential applicants ineligible for legal immigration, but it literally forced thousands of persons to leave the United States and relegate their future immigration fate to the consular officers who staffed over 100 posts of the U.S. Embassy system abroad.

Forcing thousands of applicants out of the United States was, without doubt, a major goal of this provision. The U.S. federal courts have consistently ruled that an alien outside of the United States has no legal rights or standing to seek relief in the federal courts from arbitrary and capricious decisions of U.S. consular officers, despite the fact that they are administering, interpreting, and, in effect, adjudicating U.S. law.[26] While the U.S. State Department retains an informal inquiry process through its visa office, which purports to review decisions of consular officers, it is largely ineffective and provides no legal safeguards.[27]

Applicants who now found themselves back in their home country had a new problem. Section 214(b) of the Immigration Act requires applicants for a non-immigrant visa, such as a B-2 tourist visa or an F-1 student visa, to prove that they are bona fide non-immigrants, and not intending immigrants.[28] Because they had applied for a permanent or immigrant visa in the United States, they had, in the words of the government, "evidenced their intention to become . . . permanent resident[s]" and were hence ineligible for a non-immigrant or temporary visa, such as a B-2 visa.[29] The result, in many instances, was that a person who had waited the three or ten year bar, but had their permanent

23. 8 U.S.C. § 1182(a)(9)(B)(i).

24. *Id.*

25. 8 U.S.C. § 1255(c)(4).

26. *See* Garcia v. Baker, 765 F. Supp. 426 (N.D. Ill. 1990); United States *ex rel*. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929), *cert. denied*, 279 U.S. 868 (1929); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986).

27. 22 C.F.R. § 42.81 (2006).

28. Immigration and Nationality Act of 1990, Pub. L. 101-649, § 214(b), 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1184(b) (2006)).

29. *Id.*

application denied by a consular officer, became permanently barred from ever coming to the United States as a tourist.

Section 377 of the new law also stripped the federal courts of jurisdiction of virtually all late amnesty applications.[30] Over 400,000 persons holding Employment Authorization Documents under *Newman v. Bureau of Citizenship and Immigration Servs.* (LULAC), *Catholic Soc. Servs. v. Meese (CSS)*, *INS. v. Zambrano*, and a variety of other class action suits were affected.[31] This resulted in thousands of aliens being unable to extend their employment cards and, in many instances, being terminated from their employment.

Section 551 of the new law required that all affidavits of support filed by relatives (usually U.S. Citizens) on behalf of alien applicants be legally enforceable against the U.S. citizen sponsors.[32] Sponsorship of alien applicants is required in cases of so-called "relative" petitions, where a U.S. citizen or greencard holder seeks to petition for a relative.[33] By making the sponsors subject to enforcement, sponsors in effect became legally responsible for the financial well being of the persons they sponsored until that alien either became a U.S. citizen or accumulated forty calendar quarters of work, whichever came first.[34]

Section 306 of the Act immunized the Immigration Courts and the Board of Immigration Appeals from judicial review. The Federal Appeals Courts were stripped of jurisdiction to review denials of various types of discretionary relief including voluntary departure, adjustment of status, cancellation of removal and various waivers of inadmissibility under sections 212(c), 212(h) and 212(I).[35]

Section 601 of this Act substantially narrowed the definition of "refugee."[36] The term "refugee" was now limited to a person who had been forced to abort a pregnancy or to undergo involuntary sterilization or who had been persecuted for resistance to coercive population control programs.[37] International medical graduates were also dealt a setback by

30. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 377, 110 Stat. 3009-546 (codified as amended in 8 U.S.C. §1255a (2006)).

31. See Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993) (discussing the causes of action maintained under Newman/LULAC (formerly known as INS v. League of United Latin American Citizens) and CSS, their backgrounds, and their consolidation therein); *see also* INS v. Zambrano, 509 U.S. 918 (1993).

32. 8 U.S.C. § 1183.

33. 8 U.S.C. § 1154(a).

34. *Id.*

35. 8 U.S.C. § 1152.

36. 8 U.S.C. § 1101(a)(42).

37. *Id.*

the 1996 Act. Section 622 of the Act provided that physicians seeking waivers or exemptions from the two-year foreign residence requirement (Section 212(e)) of their J-1 visas were required to work in Health Professional Shortage Areas ("HPSA") or a Medically Underserved Area ("MUA") for a minimum of three years before becoming eligible to apply for permanent residence.[38] Prior to the enactment of this provision, most physicians obtaining J-1 waivers applied directly for permanent residence instead of having to apply for H-1B visas first and remain thereon for a minimum of three years.[39]

Lastly, the Act made it more difficult for foreign health care workers to obtain visas. Section 343 of the new law required a registered nurse ("RN") to pass the Commission on Graduates of Foreign Nursing Schools ("CGFNS") examination.[40] This was true even though the RN had obtained a license to practice in a state which did not require the CGFNS examination prior to licensure.[41]

III. GIVE US YOUR BEST AND YOUR BRIGHTEST

The Immigration Act of 1990 contained a novel and breakthrough provision which allowed aliens of exceptional ability to receive immigrant visas if doing so would serve the United States' "national interest."[42] Specifically, the law provided that persons in professions holding advanced degrees, or persons of exceptional ability in the arts, sciences or business, whose work would benefit the national economy, cultural or educational interests of the United States would be *exempted* from the requirement that they obtain a job offer from a U.S. employer, thus avoiding the long and arduous labor certification process.[43]

A major sponsor of this provision was the senior Senator from North Carolina, Senator Jesse Helms. Helms, in the Senate debate, explained the transformation of his State when he first took office, as compared to present times, as "truly remarkable."[44] Reminiscing that North Carolina had moved from a dying and stagnant tobacco economy to one led and transformed by the foreign Ph.D.'s and M.D.'s who had come to live and work in Research Triangle, N.C., he remarked: "America needs a policy

38. 8 U.S.C. § 1182.
39. 8 U.S.C. § 1182(j)(2).
40. 8 U.S.C. § 1182(a)(5)(C).
41. *Id.*
42. Immigration and Nationality Act of 1990, Pub. L. 101-649, § 121, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1153(b)(2)(B) (2006)).
43. *Id.*
44. 135 Cong. Rec. S7748, 7752 (daily ed. July 12, 1989) (statement of Sen. Helms).

that encourages skilled workers and people with exceptional abilities to come to our country. Unfortunately, our current system discourages them from immigrating . . . ."[45]

The enactment of the exceptional ability/national interest waiver provision opened a new path for applicants to obtain immigrant visas. In the early 1990's, the INS was deluged with applications in this category and approvals were plentiful. This apparently did not sit well with the INS and the Clinton administration.

In August of 1998, the Wall Street Journal ran a front page article mocking the INS for virtually approving anyone with a "pulse" under this category.[46] Citing an "acrobat from Russia who plays a horn while flying through the air," "Korean golf-course designers, Russian ballroom dancers and Ghanaian drum makers," as examples of the types of applicants that would be approved under this category.[47] The INS apparently had had enough.

Almost simultaneously, in the same month of August 1998, the INS issued the precedent decision in *N.Y. State Dep't. of Transp*.,[48] which, for the first time, translated "national interest" into a defined set of conceptual guidelines:

1. The applicant must be seeking employment in an area of "substantial intrinsic merit."

2. The proposed benefit had to be national in scope.

3. The applicant seeking exemption from the labor certification requirement must present a national benefit so great as to outweigh the national interest seeking a labor certification.[49]

The impact of the third prong of *N.Y. State Dep't of Transp*. was the most significant one. It allowed the INS to subjectively assess and evaluate any applicant and determine by its own standards which aliens' achievements must "greatly exceed the achievements and significant contributions" of U.S. workers and "exhibit some degree of influence on the field as a whole."[50]

Quite curiously, since the exceptional ability/national interest waiver provision was enacted in 1990 there have been no statutory changes to the

45. *See id.*

46. Barry Newman, *Alien Notions: The 'National Interest' Causes INS to Wander Down Peculiar Paths*, WALL ST. J., Aug. 20, 1998. at A1.

47. *Id.*

48. *In re* N.Y. State Dep't of Transp., No. 3363, 22 I. & N. Dec. 215 (B.I.A. 1998).

49. *Id.*

50. *See id.* at 219.

category whatsoever. Indeed, *N.Y. State Dep't of Transp*. itself conflicts with and runs afoul of the INS's own regulations, which state in pertinent part the requirements for the qualifications under this category.[51] This regulation lists six criteria for determining eligibility under this category. "To show that the alien is an alien of exceptional ability in the sciences, arts or business, the petition must be accompanied by at least 3 of the following . . . ."[52]

Hence, INS's own regulations require that the alien possesses only three of the six criteria to meet eligibility.[53] The regulation states:

> (ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:
>
> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.[54]

Since Congress in its imminent wisdom failed to define "national interest" in its legislation, the door was left open for the INS to step in and do so. Consequently, the INS did just that, when it issued its decision in *N.Y. State Dep't of Transp*.

Quite remarkably, *N.Y. State Dep't of Transp*. has no basis in the statute Congress passed in 1990, nor is it consistent with that statute. While few would dispute INS's inherent authority to promulgate regulations as provided for in the Immigration and Nationality Act, as

51. *See* 8 C.F.R § 204.5(k)(1)(ii) (2006).
52. *Id.*
53. *Id.*
54. *Id.*

amended, those regulations must be consistent with the statute it is mandated to administer.

It is generally settled law that agencies can establish binding rules through case adjudication, rather than through a notice-and-comment or an informal rulemaking process.[55] In the first case following the enactment of the Administrative Procedures Act, the Supreme Court in *NLRB v. Wyman-Gordon Co.* held that agencies could use adjudications as a means to formulate agency policies and could choose between rulemaking and adjudication.[56] *Wyman-Gordon Co.* was followed in the 1974 Supreme Court decision in *NLRB v. Bell Aerospace Co.*[57], holding that an agency "is not precluded from announcing new principles in an adjudicative proceeding . . . ."[58]

When an agency suddenly changes direction without any apparent statutory or rulemaking change, such as it appears to have done in the "exceptional ability/national interest waiver" provision, how have the courts responded? Courts have generally stressed the importance of consistency in administrative agency adjudications. The Supreme Court, in *Allentown Mack Sales & Service, Inc. v. NLRB*, held that an agency utilized "reasoned decision-making" and consistency in adjudication.[59]

The most recent Supreme Court case in this context of the immigration arena came before the Court in 1997, in *INS v. Yang*.[60] The central issue in *Yang* was whether the sudden change in INS policy of disregarding entry fraud in determining eligibility for waivers of deportation was permissible.[61] The Court stated:

> Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary, capricious, or an abuse of discretion" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).[62]

Despite paying great lip service to the principle that a sudden change in agency practice could be arbitrary if not properly explained or justified,

55. SEC v. Chenery Corp., 332 U.S. 194, 202 (1947).
56. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 781 (1969).
57. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).
58. *Id.*
59. Allentown Mack Sales & Services, Inc. v. NLRB, 522 U.S. 359, 374 (1998).
60. INS v. Yang, 519 U.S. 26, 30 (1997).
61. *Id.*
62. *Id.* at 32.

Justice Scalia, writing for the Court in a unanimous decision, held that "the INS had not, however, disregarded its general policy here; it had merely taken a narrow view of what constitutes 'entry fraud' under that policy," and promptly reversed the Ninth Circuit decision which had held for Yang.[63]

The modern genesis of administrative agency interpretation and implementation of statutes was laid out in the 1984 Supreme Court decision of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[64] *Chevron* involved the interpretation of the words "statutory source" in the 1977 Amendments to the Clean Air Act.[65] Justice Stevens, delivering the opinion of the Court said:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . .
>
> 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' (citation omitted) If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[66]

Some authors have suggested that if *Chevron's* basic holding is that ambiguous statutory provisions should be interpreted by agencies rather than the courts, then *Chevron* may be seen as a "kind of counter- *Marbury* for the administrative state."[67] Indeed, the principles of judicial deference

63. *Id.*

64. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

65. *Id.* at 840.

66. *Id.* at 842-44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

67. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 290 (5th ed. 2002).

to agency interpretations laid out by the Supreme Court in *Chevron* raises profound issues in the balance between executive agency power and Congress' law making power.

The importance of *Chevron* in the area of judicial review and administrative agencies cannot be understated.

> In a remarkably short period, *Chevron* has become one of the most cited cases in all of American law. As of December 2001, *Chevron* had been cited in federal courts over 7000 times—far more than *Brown v. Board of Education*, *Roe v. Wade*, and *Marbury v. Madison.* In terms of sheer number of citations, *Chevron* may well qualify as the most influential case in the history of American public law.[68]

To date, the Supreme Court has never invalidated an agency decision under step two of *Chevron*, although several courts of appeals have.[69] In general, however, the courts have not been proactive in overseeing agency interpretations of statutory provisions à la step two of *Chevron*. Several scholars have argued that agencies should have substantial room to interpret statutes so as to adapt them to particular situations.[70] Justice Scalia argues that judicial deference to agency interpretations is a necessity,[71] which seems odd, given his predisposition to the "originalist" school of jurisprudence.[72]

To this author, the adoption of *Chevron*, coupled with the courts' general lack of interest in meaningfully intervening in agency "overreach" has to be seen first and foremost as a desperate attempt by the courts to control the docket and discourage plaintiffs from challenging every agency provision which they deem unfair and unlawful. Or, perhaps, we should just characterize this as just plain old abdication of judicial responsibility. I will have more to say about this later.

IV. IMMIGRATION IN THE POST 9/11 ERA

When George Bush ascended to the presidency in January of 2001, he could not have anticipated the degree to which immigration policy would take center stage later that year. The events of September 11, 2001,

68. *Id*. at 289-90.

69. *Id*.

70. *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 566-67 (1997) (book review).

71. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, Address at the Duke Law Journal Administrative Law Lecture (Jan. 24, 1989) *in* 1989 DUKE L.J. 511, 517-18, 521 (1989).

72. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

changed the immigration world dramatically and possibly forever. The nineteen alleged conspirators of that attack were all aliens (mostly Saudis) who entered the United States on either student or tourist visas.[73] This was an irrefutable fact.

While George Bush had some considerable experience with the problems of illegal immigration as Governor of Texas, it was by no means one of his dominant interests. In fact, Bush was generally seen to be relatively tolerant on the subject of immigration as a result of his ties to a substantial base of Hispanic constituents in Texas.[74]

All of this would change after 9/11. As if the attacks on the World Trade Center were not bad enough, for them to have been orchestrated and conducted by aliens living on U.S. soil was the ultimate indignity. Then came word shortly after 9/11 that one of the ringleaders, Mohammed Atta, (who perished in the attacks of 9/11) had applied for and received a renewal of his student visa some months *after* 9/11.[75] Bush's own INS had approved a dead man's visa! Bush was apparently furious and demanded action from the INS.[76]

On October 29, 2001, a mere six weeks after 9/11, Bush announced "a [c]rackdown on [v]isa [v]iolators."[77] "The President announced the creation of a new group of officials who [would] work to find and deport *foreigners* who [had] overstayed [their] visas or [who were] otherwise in the country illegally."[78] He assured that "his administration would work to make sure that foreign students who obtained visas to study in the United States actually enrolled in class, or left the country," noting that one of the terrorists in the September 11 attacks obtained a student visa to study at a "Berlitz language course in California but never showed up for class."[79] "We're going to start asking a lot of questions that heretofore have not been asked," proclaimed the President.[80]

73. *A Nation Challenged; Legal Status for 16 in Attack*, N.Y. TIMES, Nov. 23, 2001 at B5.

74. Jim Yardley, *The 2000 Campaign: The Texas Governor; Hispanics Give Attentive Bush Mixed Reviews*, N.Y. TIMES, Aug. 27, 2000, § 1, at 11.

75. David Johnston, *A Nation Challenged: The Hijackers, 6 Months Late, I. N. S. Notifies Flight School of Hijackers' Visas*, N.Y. TIMES, Mar. 13, 2002, at A16.

76. *See* Christopher Thomas, *The Changing World of Immigration*, 1 BLUE – AN E-ZINE OF HOLLAND & HART 1 (Holland & Hart LLP, Denver, Colo.) http://www.hollandhart.com/blue/immigration.pdf.

77. Elisabeth Bumiller, *A Nation Challenged: The President; Bush Announces a Crackdown on Visa Violators*, N.Y. TIMES, Oct. 30, 2001, at A1 (emphasis added).

78. *Id.*

79. *Id.*

80. *Id.*

The SEVIS system for tracking the enrollment and whereabouts of foreign students studying in the United States had been on the drawing boards for years; but, apparently, Congress and the INS were apparently never serious about its implementation. The attacks on 9/11 changed all of that, particularly when it became known that several of the 9/11 participants and conspirators had attended flight training schools here in the United States on F-1 student visas.[81]

In April 2002, shortly after four Pakistani crewman had unlawfully obtained visa waivers from an immigration officer at the U.S. border and subsequently disappeared, the Commissioner of the INS "testified before Congress that he had instituted a 'zero tolerance policy with regard to INS employees who failed to abide by headquarters issued policy and field guidance.'"[82] The immediate result of this new "zero-tolerance" policy was that it apparently made many immigration officers extremely anxious. Accordingly, officers began to send Requests for Evidence ("RFEs"), which are INS requests for further documentation and proof that the assertions made in the immigration application are truthful, accurate and can be independently documented.[83] This explosion in the volume of RFEs issued not only dramatically slowed down processing times and exacerbated the already unconscionable backlogs, but wreaked havoc with applicants and their representatives in dealing with these voluminous and often unreasonable requests.

In response to the slowdown in processing times and backlogs, William Yates, Associate Director for the INS, issued yet another policy memorandum.[84] This time he instituted the policy of allowing officers to deny applications outright, without any requirement to issue Requests for Evidence.[85] This memorandum was a major setback for the legal rights of all aliens and clearly marked a new beginning in INS adjudication and policy. Applications could now be summarily denied for even the most immaterial deficiencies, denying applicants the opportunity to respond, and leaving them in most cases with no recourse. Hence, even the most rudimentary traits of procedural due process were being eradicated.

The "denial without RFE" policy was met with angry criticism, outrage and a plethora of appeals.[86] Most assuredly, it likely marked the

81. Diana Jean Schemo, *A Nation Challenged: Foreign Students; Access to U.S. Courses Is Under Scrutiny in Aftermath of Attacks*, N.Y. TIMES, Sept. 21, 2001, at B7.

82. Thomas, *supra* note 76, at 1.

83. *Id.*

84. *Id.*

85. *Id.* at 1-2.

86. *Id.* at 2.

watershed point in the negative, almost hostile culture witnessed at INS service centers, at least for this era. As months passed, complaints mounted and appeals surged from visa applicants whose applications had been summarily denied.[87] It became clear the "zero tolerance" policy was not working.[88] In September 2003, the INS announced the rescission of the "zero tolerance" policy.[89] Associate Director William Yates, in a policy memorandum, rescinded his earlier memorandum of "zero tolerance" and directed officers that the standard to be met in immigration petitions is "preponderance of the evidence" and not the standard of "beyond a reasonable doubt" (usually reserved for criminal cases).[90]

V. LEGISLATION POST 9/11

One key regulatory change took effect when the Department of Labor published its long-awaited regulations overhauling the Labor Certification process.[91] Labor Certification is the process whereby employers test the U.S. job market to ensure that there are no qualified U.S. workers for the position being sought by the alien. Section 212(a)(14) requires that in immigrant visa job offer cases, in order for the alien to receive an approved visa, he must first obtain certification from the U.S. Department of Labor that the position to be filled by the alien cannot be filled be a qualified U.S. worker.[92]

On December 29, 2004, the Department of Labor finally published the new labor certification regulations known as Program Electronic Review Management ("PERM") with the effective date March 27, 2005.[93] The ostensible purposes of the change in regulations were to a) simplify the process and b) reduce the horrendous backlogs in processing at the various regional offices of the Department of Labor which in some instances were as much as three years.[94] The new system effectively allowed employers to do the required recruitment of U.S. workers, i.e. newspaper and journal ads,

87. *Id.* at 1-2.

88. *Id.*

89. *See id.* at 2.

90. *Id.* at 2.

91. Program Electronic Review Management, 69 Fed. Reg. 77326 (Dec. 27, 2004) (codified at 20 C.F.R. §§ 655-56).

92. Immigration and Nationality Act, Pub. L. 101-649, §212, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1182(a)(5)(A) (2006)).

93. Program Electronic Review Management, 69 Fed. Reg. 77326 (Dec. 27, 2004) (codified at 20 C.F.R. §§ 655-56).

94. *See* Francis E. Chin, *U.S. Fast Tracks Employment-Based Immigration: Proceed With Caution*, 49 B.B.J. 14 (2005).

in advance of filing the actual Labor Certification application.[95] The new system was similar to the RIR or Reduction in Recruitment system, which had existed under the old regulations.[96]

While the PERM system is too new to provide any hard numbers on the approval rates of labor certifications thus far, anecdotal evidence from practitioners in the field indicate significantly reduced rates of approval. The new regulations also appear to have been crafted with enforcement in mind. For example, PERM requires extensive attestations from employers on their attempts to recruit U.S. workers.[97] In addition, Certifying Officers of the Department of Labor may revoke approved certifications at any time within 5 years of approval.[98] Lastly, the regulations call for random audits of employers and the statements made in connection with their applications.[99]

The Bush presidency has yielded little in the way of new immigration legislation *with two exceptions*. In response to heated debate in the Congress, President Bush signed into law The Homeland Security Act of 2002 (PL 107-296) which created the Department of Homeland Security ("DHS").[100] The INS was replaced and its duties merged into three new divisions with DHS: the United States Immigration and Customs Enforcement ("ICE"), the United States Customs and Border Protection ("CBP") and the United States Citizenship and Immigration Services ("CIS").[101] This reorganization has appeared thus far to be largely cosmetic, with little or no impact on the substantive body of immigration law.

On May 11, 2005, the REAL ID Act became law.[102] While the law is too new to reach broad conclusions on its effect, the Act appeared to do several things. First, it reemphasized that "discretionary" claims are not reviewable by the courts.[103] Second, 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.[104] Third, it added

95. Program Electronic Review Management, 69 Fed. Reg. at 77327.

96. Program Electronic Review Management, 69 Fed. Reg. at 77329.

97. 20 C.F.R. § 656.17 2005.

98. Department of Labor, Frequently Asked Questions, http://www.ows.doleta.gov/foreign /faqsanswers.asp (last visited Nov. 1, 2006).

99. 20 C.F.R. § 656.17.

100. Homeland Security Act, 6 U.S.C. § 101 (2002).

101. *Id.* §§ 251, 271, 275, 291.

102. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) (codified as amended in scattered titles of U.S.C.).

103. 8 U.S.C. § 1252(a)(2)(B) (2005).

104. 8 U.S.C. § 1252(a)(2)(C).

language that preserves 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 . . . ."[105] Fourth, it restored the right of aliens convicted of criminal offenses to seek judicial review of removal orders.[106] The REAL ID Act will, without any doubt, prove to be a fertile ground for litigation in the years to come. The most obvious starting point for future battles will be the meaning and/or construction of "discretionary" matters. The history of immigration law suggests multiple, varied and inconsistent definitions of the word discretionary. Its distinction from "questions of law" in many instances is murky at best. The likely result will be that most courts will decline judicial review, characterizing most matters as discretionary.

VI. THE VANISHING FEDERAL COURTS

The role of the federal courts as the final reviewer of agency decisions of the INS has undergone substantial change since the passage of the IIRIRA in 1996.[107] A combination of the long-standing policy in administrative law of judicial deference to administrative agencies, coupled with an aggressive anti-immigration Justice Department, and the legislation enacted by the Congress, has severely restricted judicial review of immigration decisions in some respects. Congressional Court-stripping or the attempt to take jurisdiction away from courts to review immigration matters has been unprecedented in the past decade.

Extraordinary changes brought about by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA") attempted to remove much of the jurisdiction of the federal courts to review immigration matters.[108] In fact, 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."[109] INA Section 242(g) states:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and

105. 8 U.S.C. § 1252(a)(2)(D).

106. 8 U.S.C. § 1252(a)(5).

107. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

108. 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.

109. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 486 (1999).

> sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this [chapter].[110]

When first enacted in 1996, the consensus among practitioners in the field was that the section was limited to matters of removal or deportation. However, as a result of an aggressive Justice Department, the Attorney General ("AG") began to take the position that this section precluding judicial review applied to general immigration matters such as appeals of denied immigrant and non-immigrant visas.[111] The AG began to file motions for dismissal and summary judgment in virtually every case, and, to the amazement of the Bar, the federal courts overwhelmingly agreed with the Government.[112] Winning in federal court against the INS was never an easy task, but few could have ever imagined that judicial review could have been precluded in immigration cases.

The legislative history as described in the House Conference Report (S. 306) in reference to Section 1252(a)(2)(B), never referred to visa petitions or any other procedures outside the removal, exclusion or deportation contexts.[113] In fact, specific references to the removal of jurisdiction from the courts at all times in the report makes specific reference to the removal, exclusion and deportation contexts only.[114]

The crux of the problem centers around Section 1252(a)(2)(B)(ii),[115] which reads as follows:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law . . . no court shall have jurisdiction to review—
>
> . . .
>
> (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.[116]

110. *Id.* at 477-78 (quoting 8 U.S.C. 1252(g) (2006)).
111. Thomas v. Jenifer, 33 Fed.Appx. 212, 212 (2002).
112. *Id.*
113. H.R. Rep. No. 104-828 (1996).
114. *Jenifer*, 33 Fed. Appx. at 219, 221.
115. 8 U.S.C. § 1252(A)(2)(B)(ii) (2006).
116. *Id.*

The central question posed by the above provision is whether the elimination of judicial review of discretionary matters applies only to Judicial Review of 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. The majority rule in effect today in six circuits is that the decision of the Attorney General only has to be "discretionary in nature" in order to be jurisdictionally precluded from review. In doing so, those courts have generally taken the position that since the language of section 1252(a)(2)(B)(ii) is unambiguous, they need not examine its underlying legislative history.[117] Only a handful of courts have construed this section to apply only in the context of final orders of removal, and have held that it does not preclude review of otherwise discretionary decisions, provided such decisions are challenged outside of the removal context.[118]

With the enactment of the 1996 Acts and the REAL ID Act, it would have seemed logical that far fewer immigration cases would have wound up in the courts. In fact, quite the opposite has occurred. In the past four years:

> the U.S. Courts of Appeals have seen 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 . . . . 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.[119]

Immigration cases now represent eighteen 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.[120]

This may appear inconsistent with the prior discussion of Congress' attempts to limit judicial review of immigration decisions, but there are specific reasons for the surge in cases to the Court of Appeals. This increase in cases has resulted from a variety of factors such as 1) a higher volume and percentage of final orders of removal before immigration judges in administrative proceedings, 2) administrative appeals in the INS

117. D.S. Dobkin, *Court-Stripping and Limitations on Judicial Review of Immigration Cases*, JUST. SYS. J. (forthcoming 2007).

118. CDI Information Services, Inc. v. Reno, 278 F. 3d 616, 619-20 (6th Cir. 2002); United States v. Brown, 988 F.2d 658, 662 n. 1 (6th Cir. 1993).

119. *Id.*

120. John R. B. Palmer et al., *Why are so Many People Challenging Board of Immigration Appeals Decisions in the Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. L.J. 1,3 (2005).

have been limited resulting in more aliens being subjected to removal proceedings, 3) a shift in strategy by lawyers to file federal court actions as they view the administrative proceedings as offering little hope for a fair hearing for their clients and 4) legal strategies aimed at prolonging the stay of aliens given the Justice Department's attempts to expedite the removal of aliens.

All of this, however, has to be viewed in the context that virtually all immigration cases which wind up in the Court of Appeals are appeals from final orders of deportation (excepting habeas cases) at the administrative level. Therefore, while the total volume of cases has surged, this does not present a true picture of whether justice is being done in view of the fact that the law in most Circuits is that the hundreds of thousands of decisions on visa applications filed each year before the agency are not reviewable by the courts, since they are "discretionary" decisions. Combine this with the empirical data which confirms that the reversal rate in the Court of Appeals is, on average, only two to three percent.[121] The net result is that judicial review of immigration decisions has been relegated to a single digit percentage chance of reversal on final orders of deportation in the court of appeals and virtually no review of "discretionary" decisions of INS decisions.

VII. WHAT NOW?

The legislative and policy changes implemented in the last decade have dramatically diminished the prospects for legal immigration; and in doing so, have exacerbated the illegal immigration situation. The common perception is that this dramatic tightening was initiated by the Bush administration, but in reality, the Bush administration and the events of 9/11 only crystallized a process that was initiated and implemented by the Clinton administration.

It is estimated that there are as many as twelve million illegal immigrants living in the United States, with an additional 800,000 joining that number each year.[122] Of that total number of illegal aliens, 450,000 are estimated to be alien absconders: illegal aliens that are the subject of final orders of deportation but have yet to be physically removed.[123] In addition,

121. U.S. Courts of Appeals - Source of Appeals and Original Proceedings Commenced, Federal Judicial Caseload Statistics, Administrative Office of the U.S. Courts (September 30, 2004).

122. 151 CONG. REC. S7852 (daily ed. June 30, 2005) (statement of Sen. Sessions).

123. *Id.*

an estimated 86,000 of these illegal aliens have been convicted of deportable crimes, yet remain in the United States.[124]

By making the legal immigration system that much more difficult, illegal aliens have few, if any legalization options, so large numbers of aliens remain underground, not even bothering to apply for legal immigration. The hot political debate currently ongoing in Washington and in the media fails miserably in two respects. First, the debate clearly lacks any understanding of why immigration policy is a failure. Second, there are hundreds of thousands of applicants for visas whose petitions have already been approved, but whose visas cannot currently be issued because no visa "number" is available. Many of these applicants have been waiting as long as ten years for their visas to be issued (Congress, by statute, authorizes the numbers of visas that can be issued in any one category on an annual basis). The political debate often centers on the question of whether illegal aliens should be legalized at the expense of those applicants who have already been approved for a visa and are waiting in line for their visas to be issued.

A combination of politics and a total absence of any real experience or understanding by the legislators in Washington does not bode well for those hoping for a solution to our immigration mess. As of the date of this writing, although both the House and the Senate have passed markedly differing immigration bills, conferees have yet to be appointed to hash out a bill, underscoring the scant prospects for comprehensive immigration reform.[125]

The main thrust of the legislation passed recently by the Senate is a legalization program that would provide a mechanism for illegals to be legalized by making applications accompanied by filing of past tax returns and the payment of past taxes.[126] The problem with this approach is two-fold. First, the majority of illegals do not have the financial wherewithal to file past returns and pay back taxes. Second, the process will, to be sure, be far more complex than the mere filing of tax returns and paying back taxes, once the INS issues regulations specifying the additional required criteria for qualifying for this visa. Even if a bill passes which provides for a path to legalization, it would not be a surprise to see only a few hundred thousand, out of the estimated twelve million, illegals actually become legalized. There is no doubt that Congress will revisit this issue ten years

124. *Id.*

125. Carl Hulse, *Congress is Winding Down, but Much is Left Undone*, N.Y. TIMES, Sep. 25, 2006, at A20.

126. Comprehensive Immigration Reform Act of 2006, S. Res. 2611, 109th Cong. (2006).

from now, only to find twenty million illegals to deal with, and will confront the same political debate.

The House bill, on the other hand, does not include a path to legalization, but is heavy on enforcement and would criminalize the employment of illegal aliens.[127] This is a reflection of the political agenda of the Republican right and the anti-immigrant sentiment in the country at large. This approach, however, would also seem to make little sense. Each year we increase the budget of the Department of Homeland Security by billions of dollars, most of which is aimed at bolstering enforcement. Despite this mass infusion of capital, the number of illegals continues to increase at a far faster pace than the numbers of persons removed from the United States. In many aspects, this is similar to the war on drugs, which has demonstrated that massive increases in the law enforcement apparatus have done little to solve the problem. The Center for Trade Policy Studies noted:

> The record of the past two decades demonstrates that merely enforcing current U.S. immigration law is bound to fail. Current law is fundamentally at odds with the reality of the North American economy and labor market. As long as that remains true, enforcement alone will fail to stem the flow and growth of illegal immigration to the United States.[128]

It is high time that we recognize that enforcement without legalization will not stop illegal immigration.

The principal reason the United States has twelve million illegal aliens (the border problem notwithstanding) is that the current legal immigration system is simply too difficult. The common perception is that millions of illegals merely cross the border and remain underground without making any attempt to legalize their status. To some extent, this is true, but the greater truth is that most illegal aliens remain illegal because there is no effective category or mechanism to qualify them for legal immigration.

127. 10k Run for the Border Act, H.R. 3806, 109th Cong. (2006) (to amend the Immigration and Nationality Act to increase penalties for employing illegal aliens).

128. DOUGLAS S. MASSEY, CTR FOR TRADE POL'Y STUDIES, BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGISLATION CANNOT STOP ILLEGAL IMMIGRATION, 12 (2005).