AMERICAN BAR ASSOCIATION

COMMISSION ON IMMIGRATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association urges an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal.

FURTHER RESOLVED, that the American Bar Association supports the neutrality and independence of immigration judges, both at the trial and appellate levels, and of any federal agency by which they are employed, so that such judges and agencies are not subject to the control of any executive branch cabinet officer.

FURTHER RESOLVED, that the American Bar Association opposes retroactivity provisions in immigration laws that impose burdens or reduce benefits available to persons while depriving them of the ability to take such laws into account in making their decisions or shaping their conduct.

REPORT

*This is the third report in the Commission's series of seven resolutions and reports that addresses "Due Process and Judicial Review," as explained at the beginning of the first report (107A).

I. Introduction and Overview: Due Process and Immigration

The fundamental protections of the Fifth Amendment "are universal in their application, to all persons within the territorial jurisdiction" of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). As the Supreme Court has recently noted, "[o]nce an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). To hold to the contrary would be to overrule some of the deepest and best constitutional traditions of our nation. As James Madison once noted, "[even if] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them . . . ." James Madison, *Report on the Virginia Resolutions*, 4 Debates, Resolutions and Other Proceedings, in Convention on the Adoption of the Federal Constitution 556 (Jonathan Elliot, 2d ed. 1836).

The two most important limitations on the so-called "plenary power doctrine" that governs much of immigration law are, first, that procedural due process always applies *during* removal proceedings, *Zadvydas*, 533 U.S. at 693; and second, that lawful permanent residents receive heightened constitutional protection by virtue of their status and ties to the community. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Zadvydas*, 593 U.S. at 694.

Virtually since its first enunciation, the plenary power doctrine has proven controversial, generating strong dissents and significant limitations in many cases where the government has sought to apply it. As many commentators have noted, the plenary power doctrine has impeded the development of coherent principles of constitutional immigration law. *See e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990).

The doctrine has become most controversial in the context of deportation. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Court considered a statute that provided for the imprisonment at hard labor for up to a year of any Chinese citizen judged to be in the U.S. illegally. The statute provided no right to trial by jury. The Court held the provision unconstitutional, even though detention or temporary confinement was permissible "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." *Id.* at 235. When Congress pursues deportation policy by subjecting non-citizens to "infamous punishment at hard labor, or by confiscating their property," however, then "such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused." *Id*. at 237.

All persons in the United States are entitled to the protections of the Fifth and Sixth Amendments. Generalizations about plenary power and deference cannot override those basic rights. Concurring in *Wong Wing,* Justice Field, the original author of the 'plenary power doctrine,' put the matter as follows:

> The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic . . . . This has been decided so often that the point does not require argument.

163 U.S. at 242 (Field, J., concurring in part and dissenting in part).

The Supreme Court has repeatedly emphasized that there is a profound difference between Congress' authority as to *substantive* immigration policy choices, such as visa categories, and the means chosen to implement and enforce those choices. This dichotomy in constitutional immigration law, though hardly unproblematic, may be understood in light of the underlying premises that gave rise to the plenary power doctrine. The distinction preserves the power of the political branches to control entry into and lawful status within the United States, as well as substantive naturalization authority. Matters of procedure, conversely, concern questions that are traditionally recognized as within judicial competence and expertise. Thus, for example, although detention is a procedural aspect of the deportation process, it raises basic constitutional issues whenever and against whomever it is used. Though detention is a means to the end determined by substantive immigration policy, the means itself is subject to close constitutional scrutiny.

The Court stated in *Yamataya v. Fisher*, "this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" 189 U.S. at 100. Since *Yamataya*, the Court has reiterated repeatedly that non-citizens are entitled to due process during deportation proceedings. "[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Mezei,* 345 U.S. at 212.

All of the above is especially true as to lawful permanent residents. The Court has consistently differentiated the rights of non-citizens who have been admitted as permanent residents from those who have not. That differentiation reflects, among other things, the legality of the person's admission, the formality with which the nation recognizes status, mutuality of obligation, and allegiance, and, often, the length of time of residence and the likelihood of family and other social ties. *Id.*; *Plasencia*, 459 U.S. at 32.

The core idea of procedural due process in immigration and citizenship, however, is that *any* non-citizen, regardless of status, must have fair and adequate notice and an opportunity to present evidence and arguments in his/her case before the government decision-maker issues a ruling. The idea of adequate opportunity to present evidence and arguments includes, but is not limited to, assistance of legal counsel, notice of charges, and accurate translation of proceedings.

In very general terms, existing ABA policies on due process reflect two basic sets of propositions. First, due process applies in immigration and citizenship cases. This, as noted above, is hardly a radical idea. The fact that due process *applies*, however, does not mean that the non-citizen will succeed in a claim that any current practice violates procedural due process. That outcome generally turns on application of the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The three parts are (1) the private interest, (2) the government interest (including the cost of additional procedures); and (3) the gain in accuracy from any additional procedures.

The second set of propositions apparent in existing ABA policies is that, with regard to the *Eldridge* factors, (1) non-citizens, especially permanent residents and asylum seekers, have a strong private interest in the accuracy of immigration law decisions; (2) the government often overestimates its interest in minimizing procedural protections; and (3) additional procedures would bring about significant gains in the accuracy of outcomes.

This resolution focuses on three basic areas in which due process is implicated by current laws and policies: retroactivity, administrative efficiency and fairness, and the availability of judicial review.

A. Retroactivity

Much of the current problem of retroactivity in U.S. immigration law derives from two laws passed in 1996—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[1] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[2] Among other features, the laws:

- eliminated judicial review of certain types of deportation (removal) orders[3]
- dramatically changed many grounds of exclusion and deportation, [4]
- retroactively expanded criminal grounds of deportation,[5] and

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[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40, 42 U.S.C.) (1999).

[2] Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8, 18 U.S.C.) (1999).

[3] Immigration and Nationality Act [hereinafter INA] § 242, 8 U.S.C. § 1252 (1999). See generally Kathleen M. Sullivan, "Commentary on Reno v. American-Arab Anti-Discrimination Committee", 4 Bender's Immigration Bull. 249 (1999); Lenni Benson, "Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings", 29 Conn. L. Rev. 1411 (1997); Lenni Benson, "The New World of Judicial Review of Removal Orders", 12 Geo. Immigr. L. J. 233 (1998); David Cole, "Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction", 86 Geo. L. J. 2481 (1998); Richard H. Fallon, "Applying the Suspension Clause to Immigration Cases", 98 Colum. L. Rev. 1068 (1998); M. Isabel Medina, "Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996", Conn. L. Rev. 1525 (1997); Gerald L. Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens", 98 *Colum. L. Rev.* 961 (1998).

[4] INA § 212, 8 U.S.C. § 1182 (1999); INA § 237, 8 U.S.C. § 1227 (1999).

- eliminated and limited discretionary waivers of deportability.[6]

The result of these changes is that many people have faced removal from the United States because of conduct that occurred many years—even decades—before the laws were passed, even if the conduct was not a basis for deportation at the time it occurred. Also, many legal permanent residents who leave the United States for brief, permitted trips are detained and denied readmission because of old offenses. Indeed, this may even be true of offenses that are so minor that they would not be grounds for removal had the person remained in the United States. The government has also applied the changes to detention laws and judicial review provisions retroactively, and has applied the limitations on various forms of discretionary relief from deportation to individuals who had already applied for relief under the former system as well as to those who would have been eligible had the government instituted proceedings against them sooner.

The basic unfairness of retroactivity in removal laws has long been apparent to many objective observers. Our legal system generally rejects retroactive, punitive laws—a principle with the deepest roots, as represented by the constitution's *ex post facto* clause and legal decisions going back hundreds of years. This Resolution expresses a very strong position against retroactive lawmaking in the immigration context.

The Supreme Court similarly has noted the harshness of retroactivity in the civil context. "The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[7] In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court applied a "clear statement" rule against retroactivity in removal proceeding, holding that deportation laws—indeed, even discretionary "relief from deportation" laws—could not be applied retroactively absent meticulous clarity on the point by the legislature. "Requiring clear intent assures that the Congress itself has considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[8]

Although the *St. Cyr* Court did not address the ultimate constitutional validity of retroactive deportation laws, it did recognize certain similarities between the constitutional protections afforded in criminal cases and in deportation hearings. Even if the Court continues to "reject the argument that deportation is punishment for past behavior and that deportation proceedings are therefore subject to the 'various protections that apply in the context of a

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[5] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (adding retroactive aggravated felony grounds). See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 *N.Y.U. L. Rev.* 97 (1998).

[6] INA § 240(A), 8 U.S.C. § 1229(b) (replacing § 212(c) and former suspension of deportation with more restricted forms of relief known as "cancellation of removal").

[7] *Landgraf*, 511 U.S. at 265 (citing *Dash v. Van Kleeck*, 7 Johns. *477, *503 (N.Y. 1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.") (Kent, C.J.)); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

[8] *Id.*, 511 U.S. at 272-73.

criminal trial,'"[9] the opinion offers a model for a constitutional middle-way that is supported by this resolution. The resolution urges that courts should continue to import the basic norms of *ex post facto* analysis more fully and directly. Our legal system should recognize that, especially in the high-stakes context of a removal proceeding, "retroactive statutes raise special concerns" [10] and should generally be rejected.

B. Discretion and Judicial Review

1. Discretion

The 1996 laws, as noted above, removed certain long-standing discretionary waivers to removal and substantially limited the discretion of immigration judges to recognize compelling circumstances in particular cases. As a result, a person who has lived in the United States since early childhood as a lawful permanent resident, whose entire family is here, whose spouse and children are U.S. citizens, who speaks only English and knows no other culture but ours, may now be arrested by armed government agents, and will have no right to appointed counsel, may be subjected to mandatory detention with no right even to apply for release on bail, and may be deported and banished from the United States forever. All this may be due to a minor criminal offense committed years ago, which may not even have been a ground for deportation when it was committed and may not have been considered a conviction under the law of the state where it occurred.

Our current laws fail to provide an immigration judge with any discretion to provide humanitarian relief in such a situation. Length of residence is irrelevant. Family ties here are meaningless. Hardship is immaterial. Indeed, the deportee may well have no right to have an independent federal judge review the case. This resolution urges the restoration of discretion to immigration judges in the interest of fairness, proportionality, family unification, and justice.

2. Judicial Review

Among other features of the 1996 laws were severe limitations on judicial review. The laws seem designed to stifle the dialogue between the judiciary and immigration authorities and to create a largely unregulated administrative environment. They were, in effect, a direct test of the proposition that deportation was properly outside the mainstream of the U.S. rule of law. As the ABA Report, *American Justice Through Immigrants' Eyes* has noted, "[t]he 1996 restrictions on judicial review are exceptional in scope and incompatible with the basic principles on which this nation's legal system was founded. They establish a dangerous precedent for unreviewable government actions and . . . threaten the rights of all Americans." [11]

In the *St. Cyr* and *Zadvydas* cases, the Supreme Court limited the reach of some of these jurisdictional preclusions and confirmed that the writ of *habeas corpus* remained available to

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[9] *St. Cyr*, 121 S. Ct. at 2292 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)).

[10] *St. Cyr*, 121 S. Ct. at 2287.

[11] American Justice Through Immigrants' Eyes at 74.

challenge a range of immigration law questions. The newly passed "REAL ID Act,"[12] in turn, has incorporated aspects of these rulings and has established a system of judicial review that seeks to insulate discretionary determinations from all judicial oversight. Administrative discretion surely is a valuable attribute of a mature legal system and should generally be respected. As Justice Felix Frankfurter once wrote, however, discretion is "only to be respected when it is conscious of the traditions which surround it and of the limits which an informed conscience sets to its exercise." [13] This Resolution concludes that the REAL ID Act, if it is construed to completely prevent all judicial review of all discretionary matters, has gone much too far.

The new law amended 8 USC § 1252(a)(2)(B), which now states, in relevant part:

> (B) **Denials of discretionary relief.** Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code [28 USCS § 2241], or any other habeas corpus provision, and sections 1361 and 1651 of such title [28 USCS §§ 1361 and 1651], and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—
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> > (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [8 USCS §§ 1182(h), 1182(i), 1229b, 1229c, or 1255], or
> >
> > (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title [8 USCS §§ 1151 et seq.] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a) [8 USCS § 1158(a)].

The major changes in this section were the clarification of congressional intent to preclude district court *habeas* jurisdiction in such cases, the parenthetical overriding of both "statutory [and] nonstatutory" sources of law, and the expansion of its scope beyond removal proceedings.[14] The REAL ID Act also added a new sub-section (D) to 8 USC § 1252:

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[12] P.L. 109-13, Div B, Title I, 119 Stat. 305. The REAL ID Act is part of the much broader Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005).

[13] *Carlson v. Landon*, 342 U.S. 524, 562 (1951) (Frankfurter, J., dissenting) (quoting Mark De Wolfe Howe, The Nation, Jan. 12, 1952, at 30).

[14] This last change was evidently a response to cases that had determined that § 1252(a)(2)(B)(ii) only applied to decisions made in the context of removal proceedings. *See e.g., Talwar v. INS*, 2001 U.S. Dist. LEXIS 9248 at *12 (S.D.N.Y. July 9, 2001); *Mart v. Beebe*, 94 F. Supp. 2d 1120, 1123-24 (D. Or. 2000); *Burger v. McElroy*, 1999 U.S. Dist. LEXIS 4854 at *4 (S.D.N.Y. Apr. 12, 1999); *Shanti v. Reno*, 36 F. Supp. 2d 1151, 1157-60 (D. Minn. 1999). But see, *CDI Information Services, Inc. v. Reno*, 278 F.3d 616, 618-20 (6th Cir. 2002) (§ 1252(a)(2)(B)(ii) applies to all decisions made under §§ 1151-1378); *Samirah v. O'Connell*, 335 F.3d 545, 549 (7th Cir. 2003) (revocation of parole); *Van Dinh v. Reno*, 197 F.3d 427, 434 (10th Cir. 1999) (transfer of detainees from one facility to another). *Urena-Tavarez v. Ashcroft*, 367 F.3d 154, 159 (3d Cir. 2004).

(D) **Judicial review of certain legal claims.** Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of *constitutional claims or questions of law* raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." (Emphasis added.)

The drafters of the REAL ID Act seem to have settled upon a formula similar to the one contained in the Administrative Procedure Act.[15] Discretion is not defined in the APA, and it often appears to be little more than a conclusory label derived from an anterior decision by a court about the desired scope of review of a particular decision.[16] APA Section 701(a)(2) precludes judicial review of agency action if "agency action is committed to agency discretion by law." In general, however, the APA clearly envisions review of all sorts of discretionary decisions. Thus, APA Section 706(2)(A) mandates that a reviewing court "hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This complex compromise relies upon a designation by "law" of a particular practice as committed to agency discretion. The APA then, however, permits a reviewing court to determine not only what an abuse of discretion might be, but also what sorts of agency decisions are discretionary.

Courts have generally been quite reluctant to hold agency action unreviewable under section 701(a)(2) as "committed to agency discretion."[17] This Report urges a similar construction of the REAL ID Act. As Bernard Schwartz once wrote, "there is no place for unreviewable discretion in a system such as ours."[18] The Supreme Court has adopted a useful presumption of reviewability derived from the structure of the APA: "The [APA] . . . embodies the basic presumption of judicial review . . . . Only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."[19]

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15 *See* Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion*," 82 Harv. L. Rev. 367, 367-68 (1968).

16 As Martin Shapiro has noted, "[C]ourts will typically label informal actions discretionary because the standard by which the actions are reviewed uses that label." Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1489 (1983).

17 *See Sierra Club v. Yeutter*, 911 F.2d 1405, 1414 (10th Cir. 1990) (U.S. Forest Service decision to use or to not use federal reserved water rights is "committed to agency discretion by law" except where agency conduct cannot be reconciled with general mandate of governing statute); *cf., Lincoln v. Vigil*, 508 U.S. 182, 192-95 (1993) (holding that allocation of funds from lump-sum allocation is committed to agency discretion).

18 Bernard Schwartz, *Administrative Law Cases during 1985*, 38 Admin. L. Rev. 392, 310 (1986); see also Kenneth Culp Davis, *"No Law to Apply,"* 25 San Diego L. Rev. 1, 2, 10 (1988) (noting that the Court always has a standard of reasonableness to apply); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 734-35 (1990) (suggesting that review of questions such as whether agency misunderstood facts, departed from precedent, or acted unconscionably, among others, is virtually always possible).

19 *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (citations omitted). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the Court further elaborated on its reading of APA section 701(a)(2) by concluding that judicial review would only be precluded where "statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410 (quoting S. Rep. No. 79-752, at 26 (1945)). See generally Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. Rev. 1251, 1263 (1992) (discussing the events and politics involved in Overton Park). *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988)(statute-based challenge to the decision of the Director of the CIA to

This Resolution urges an expansive interpretation of REAL ID or, if necessary, a legislative clarification. Immigration—especially deportation—cases often have uniquely poignant humanitarian implications. The appropriate model for discretion should be one of mercy and fairness. However difficult it may be in close cases to define the line between law and policy, the agency decisions in individual deportation cases presumptively fall on the law side of that divide. Such cases typically present questions that are far less obviously policy-based than how to spend a lump-sum appropriation and far less resistant to meaningful standards than whether to initiate an enforcement action—each of which matters have previously been considered discretionary in the hard, unreviewable sense.

C. Expedited removal and shifting of judicial authority to immigration officers

The 1996 laws set out quite strict rules for judicial review of expedited removal cases. Challenges must be filed within 60 days of the passage of a regulation or the implementation of a policy and must be filed in the District Court for the District of Columbia. Strict limits are also placed on federal courts' power to review individual expedited removal orders. Review is essentially limited to claims that an individual should not have been placed in expedited removal, for example, because the person is in fact a U.S. citizen or lawful permanent resident. This resolution, noting the recent expansion of expedited removal, urges re-consideration of these limits to permit courts to review more fully due process claims that may arise in this context.

The resolution is also concerned about the fact that low-level immigration officers have been granted unprecedented authority to determine admission and removal cases. This occurs in the context of "expedited removal" applying to non-citizens who arrive at a port of entry or who have been unlawfully present in the U.S. for up to two years. It may also apply in case of "expedited administrative removal," a system used for certain individuals with criminal convictions; and "reinstatement of removal," which is the application of previous removal orders to those who return to the United States without permission.

All of these systems, although they address serious problems in the immigration enforcement system, implicate due process concerns. They expressly exclude the oversight of an impartial adjudicator; they are radically accelerated; they are largely insulated from public scrutiny and judicial review. We should be deeply concerned about the continuation and expansion of such hidden systems of administrative process because they violate many of the most fundamental norms of due process. Thus, the resolution urges that all authority to conduct removal proceedings should be restored to immigration judges, who in turn should be

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terminate a homosexual employee was unreviewable because it was "committed to agency discretion by law" and there was no law to apply.) Chief Justice Rehnquist noted that, beyond the national security concerns raised by the case, the explicit way in which the statute was worded ("in his discretion" and "whenever he shall deem such termination ... advisable"), and the breadth of the statutory standard (whether termination was "advisable") Id. at 594, 600 (quoting National Security Act of 1947, 102(c), 50 U.S.C. 403(c) (1994)). *But see Franklin v. Massachusetts*, 505 U.S. 788, 817-18 (1992) (Stevens, J., concurring) (suggesting that *Webster* should be read narrowly).

independent from prosecutorial supervision. All removal hearings, however named, should conform to accepted norms of due process, including the rights to be notified of charges, to examine and rebut evidence, to be present, to defend oneself with legal assistance, and to have a decision that is based on a record that is subject to meaningful administrative and judicial review. In addition, qualified interpreters should be provided, especially in the asylum context.

D. BIA "Streamlining" [20]

One might have assumed that the 1996 limits on judicial review would have inspired greater administrative attention to the rule of law, fairness, and due process. Unfortunately, the opposite has been the case. On August 23, 2002, the Attorney General issued a final regulation, effective September 26, 2002, that restructured the organization and procedures of the Board of Immigration Appeals (BIA). The reported goal of this streamlining was to improve timeliness while continuing to ensure the quality of adjudications. The regulation was most specifically designed to address extensive backlogs and lengthy delays. These were undoubtedly a serious problem in need of serious attention and resource allocation. The new procedures were described as being designed to enable the BIA to reduce delays in the administrative review process, eliminate the existing backlog of cases, and focus more attention and resources on those cases presenting significant issues for resolution.

The regulation, which expanded upon certain earlier streamlining procedures, allowed the BIA to make greater use of single Board member adjudications. All cases are now adjudicated by a single Board member unless they fall into one of six specified categories. Those categories are handled by a panel of three Board Members. The 2002 restructuring regulation also called for the use of "summary affirmances," authorizing a single Board Member to affirm the result of an immigration judge's decision without writing an opinion. These orders also are referred to as "affirmances without opinion" (AWOs). The language in such orders is established by regulation and may not be changed. The expanded streamlining procedures have allowed the BIA to reduce its pending caseload from 56,000 in August 2002 to approximately 33,000 by October 2004.

Much of the agency's former backlog appears now to have shifted to the federal courts.[21] Following implementation of the restructuring regulation, more non-citizens are appealing BIA decisions to the federal circuit courts than ever before. The rate of new petitions (the number of BIA decisions appealed to the Federal courts compared to the total number of BIA decisions) has increased from five percent (about 125 cases per month) to 25 percent (1,000 to 1,200 cases per month).

The most recent jurisdiction-stripping provisions of the REAL ID Act were, as noted, a specific a reaction to the Supreme Court's decision in *INS v. St. Cyr,* which held that review of

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[20] *See* http://www.usdoj.gov/eoir/press/04/BIAStreamlining120804.htm.

[21] Pursuant to the REAL ID Act, a non-citizen may file a petition for review of a BIA decision to the appropriate Federal circuit court.

"legal" questions must remain available.[22] As the Congressional Conference Committee Report saw it, however, *St. Cyr* simply allowed "criminal aliens to delay their expulsion from the United States for years." Under *St. Cyr*, "criminal aliens [were] able to begin the judicial review process in the district court, and then appeal to the circuit court of appeals." They were able to appeal to two judicial levels, whereas "non-criminal aliens" were generally limited to the courts of appeals. "Not only is this result unfair and illogical," the report said, "but it also wastes scarce judicial and executive resources." "Finally," the report complained, "the result in *St. Cyr* has created confusion in the federal courts as to what immigration issues can be reviewed, and which courts can review them." Thus, the committee concluded, Section 106 of the REAL ID Act "address[ed] the anomalies created by *St. Cyr* and its progeny by restoring uniformity and order to the law."[23]

Massachusetts Chief District Court Judge William Young has recently offered a less sanguine view of this new "uniformity and order:" "While Congress represents that 'abbreviating the process of judicial review' leaves room for an 'adequate and effective alternative to habeas' review . . . the REAL ID Act is actually intended to, and has the practical effect of, 'rights stripping.'"[24] Judge Young reports that there were some 68 pending *habeas corpus* petitions in Massachusetts District Courts, many of which were challenges to removal. "These petitioners," notes Judge Young, "are now without the benefit of the district courts' experience in conducting searching evidentiary hearings and listening to their first-hand narrative . . . . Instead, they will each now be afforded their 'one day in the court[s] of appeals' …judicial bodies more accustomed to reviewing 'cold record[s]' for legal error than hearing testimony and evaluating evidence."

Congress is constitutionally permitted to limit the district courts' jurisdiction, too restrictive an interpretation of discretion might result in an arguably impermissible restriction on the constitutionally protected writ of *habeas corpus*.[25] As Judge Young piquantly (and presciently) put it, the issue may arise as the courts of appeal, "see the practical effect of this wholesale dumping of these cases onto their already overburdened dockets."

II. Summary and Conclusion

In sum, the problems with such a system are quite deep:

- The jurisdictional preclusions of the 1996 laws and the REAL ID Act may insulate many compelling legal questions from any meaningful judicial review.

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22 *See* H.R. Conf. Rep. No. 109-72, 151 Cong. Rec. H2813-01 (May 3, 2005) available at 2005 WL 102581 ("Committee Report") at H2872-H2873.

23 Id. at H2873.

24 *Enwonwu v. Chertoff*, 376 F. Supp. 2d 42 (D. Mass. 2005).

25 *See e.g., Brackett v. United States*, 206 F. Supp. 2d 183, 184 n.3 (D. Mass. 2002) ("Congress and the courts are limited . . . in how they may restrict [the] availability of the writ of habeas corpus.")

- The federal courts of appeals simply lack the capacity to handle a case-load of this magnitude.

- The courts of appeals are also ill-equipped to conduct factual inquiries or close scrutiny of the actual workings of the multi-faceted immigration system in the way that district courts can and must do.

- The quality of administrative adjudication has deteriorated both at the BIA level and, as importantly, by the Immigration Judges who diverge widely in their interpretation of many crucial procedural and substantive matters.

In light of these issues, the resolution supports basic due process protections for immigrants including the timely adjudication of applications, notice and an opportunity to be heard, decisions that contain findings of fact and conclusions of law, subject to meaningful judicial review, and neutrality and independence of immigration courts.

Respectfully Submitted,

Richard Peña
Chair
Commission on Immigration
February 2006