Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

Court-Stripping in Relatively Plain English:
An Analysis of Section 105 of the "REAL ID Act of 2005"

Section 105 of the REAL ID Act, as passed by the House as part of H.R. 1268 (the FY 2005 supplemental appropriations bill), restricts the oversight role of the federal courts in at least two principal ways:

1. It eliminates *habeas* review to challenge the legality of a deportation order, for the first time in our country's history. Many immigrants, criminal and non-criminal, will be left with no chance to appeal a ruling in any federal court.
2. In cases where an appeal *could* be heard, it would severely limit the court's ability to keep the government from deporting an immigrant *before the appeal has been decided.*

1. Restriction of *Habeas* Review

- *Background*

"The Great Writ": The Suspension Clause of the Constitution guarantees the right of anyone who is being held by the government to seek a *writ of habeas corpus*, in which a federal court decides whether *custody* is legal in that case. It is an absolutely critical safeguard, and often a last resort, in preventing unlawful deportations. For many decades, a *habeas* petition was the only way for an immigrant to appeal a ruling in a deportation case. Even where it was not the primary route for appeal, *see* below, it has *always* been there as the ultimate safeguard for individuals who lose their opportunity to file a regular appeal through no fault of their own.

Habeas petitions are reviewed by federal district (trial) courts. Once the district court makes a ruling, either the individual or the government can appeal to a federal appellate court.

Direct Review of Immigration Decisions: In 1961, Congress moved appeals in deportation cases directly into federal appellate courts by means of a petition-for-review, or *direct review*. This bypassed the trial court level, and eliminated the need for *habeas* review as the primary route for challenging immigration decisions. *Habeas* review was still available as a critical backstop, but it was seldom used.

The 1996 Laws and the Reemergence of *Habeas* Review: In 1996, Congress eliminated *direct review* in the appeals courts for immigrants convicted of most criminal offenses. In the absence of *direct review* in the appeals court, many immigrants had no alternative but to rely once again on *habeas* as the only available route into federal court. In 2001, the U.S. Supreme Court confirmed in *INS v. St. Cyr*, that *habeas* review was still available. The Court emphasized that habeas review has always been available for immigrants and that they were constitutionally entitled to court review. Because habeas was still available, the Court was satisfied that immigrants would get their constitutionally-required review (their "one bite at the apple").

Cases brought into court under *habeas* jurisdiction have led to important court rulings that found the INS was applying the 1996 laws more harshly than Congress had intended. For example:

- The Supreme Court ruled in *St. Cyr* that the 1996 elimination of deportation relief for long-term legal residents did not apply retroactively to old cases.
- The Supreme Court ruled that immigrants who are awaiting deportation cannot simply be imprisoned indefinitely, if their home countries will not accept them.
- Courts also ruled that new mandatory, "no bond" detention rules did not apply retroactively to immigrants who had finished their sentences years ago or who had never served any time in prison.

- *Section 105 of the "REAL ID Act"*

What it Does: Sec. 105 of the REAL ID Act would eliminate, for the first time in our nation's history, any *habeas* review of removal orders for both criminal *and* non-criminal immigrants. It thus eliminates the Great Writ, as both a primary route of review, and as the ultimate safeguard in cases where *direct review* is foreclosed through no fault of the alien.

Making matters worse, not only does Sec. 105 wholly eliminate *habeas* review, but it retains almost all of the restrictions on *direct review* in the courts of appeal. Among other things, the courts of appeal cannot review "mixed questions of law" (the application of law to fact), even in cases of longtime LPRs, if virtually any crime led to the deportation. Furthermore, the restrictions on reviewing "mixed questions" would even apply to asylum and torture claims.

This means that under the REAL ID Act, many immigrants would not even receive "one bite at the apple," because constitutionally-adequate *direct review* would not be available in the appeals court, and *habeas* review would no longer be available as a safeguard.

Examples of the types of cases that would be unreviewable under REAL ID include:

- **Claims involving "mixed questions" of law and fact.** Under the Supreme Court's constitutional analysis in *St. Cyr*, these claims must be reviewable. Indeed, the Supreme Court specifically noted that habeas has historically covered all legal questions, including the application of law to fact (*i.e.*, "mixed questions of law and fact").

- **Certain claims for relief under the Convention Against Torture.** The Convention Against Torture (CAT) bars the U.S. from deporting someone to a country where he or she would be tortured. The REAL ID Act specifically bars *habeas* review in a case where the immigrant is claiming that deportation would violate the Convention, allowing review only in the courts of appeal. But because an immigrant with a criminal conviction is barred from obtaining full review of his or her CAT claim in the appeals court, he or she could be deported in violation of the convention. In addition, due to the 30-day deadline to file a petition for *direct review*, a CAT claim that emerges due to changed circumstances would be precluded from any appeal, in the absence of *habeas* relief.

- **Virtually any claim of an unlawful use of "expedited removal."** The bill eliminates virtually any *habeas* review in cases where non-citizens are subjected to *expedited*

removal, a speedy deportation process applied to non-citizens who arrive by air with allegedly improper documents, and anyone arriving by sea. In most cases (except for citizens, LPRs and refugees), people subject to expedited removal are barred from *direct review*, and *habeas* review is already extremely difficult because access to counsel is often impossible given the speed of the removal process.

- **Manifest injustices caused by fraudulent or incompetent legal assistance, or the government's failure to notify the immigrant of the deportation proceeding.** Immigrants are often victimized by unscrupulous persons, lawyers or otherwise, who charge high fees but are not qualified to represent them. Others never learn of deportation proceedings due to government mistakes. As a result, many lose their right to court review of their cases due to missed filing deadlines, or other actions outside their control. Under current law, when the action or inaction of counsel would result in a serious injustice, or if the immigrant never received notice, a federal court may be able to provide a safety valve by way of *habeas* review, even if *direct review* is barred. Under Sec. 105, this important safeguard would be eliminated for the first time ever.

A "Second Bite at the Apple"?: Proponents of the REAL ID Act argue that Sec. 105 is necessary because the 1996 laws, as interpreted in *St. Cyr*, have resulted in a situation where most immigration appeals go straight to federal appellate courts by *direct review*, but that immigrants with criminal convictions now obtain *habeas* review in district court. As a result, they argue, *habeas* cases provide a chance to be heard by two courts, or "more" appeals, because an immigrant with a criminal conviction can take a negative *habeas* district court ruling to an appellate court.

However, the immigration agency can also appeal unfavorable district court *habeas* decisions to the courts of appeal. More importantly, immigrants with criminal convictions do not get "more review," because they cannot raise many types of claims that can be raised by other immigrants. For this reason, immigrants with criminal convictions actually receive *less* meaningful review.

Congress can, if it chooses, make the courts of appeal the primary route of review for all immigrants, *provided* that (1) the petition-for-review process allows all immigrants to fully test the legality of their deportation order and (2) *habeas* review remains available as a safeguard for cases in which the *direct review* process fails through no fault of the alien.

In short, there is nothing wrong, in and of itself, with ensuring that all immigrants have only "one bite at the apple" when appealing an immigration judge's ruling. Nor is there anything wrong with making the federal appellate courts the primary route for that one bite at the apple, as was done for everyone prior to the 1996 reforms. But it is wrong to suggest that Sec. 105 of the REAL ID Act would merely provide uniformity in the immigration appeals process. **Sec. 105 of the REAL ID Act will *not* give everyone at least "one bite at the apple."**

Proponents of the "REAL ID Act" also claim that Sec. 105 is necessary to relieve federal courts of a growing immigration caseload. The growth in immigration appeals in the federal courts, however, is a crisis of the government's own creation. From 1999 to 2002, a series of BIA "streamlining" reforms, instead of resolving the backlog, simply shifted it to the federal courts. Several agencies and organizations, including the DOJ Office of Immigration Litigation, the

American Bar Association, and independent research bodies, have concluded that BIA streamlining has led to an increase in immigration caseloads in the federal courts.

2. Restriction on "Stay of Deportation"

What is a "Stay"?: A "stay of deportation" is an order by a federal court that prohibits the government from deporting an immigrant while an appeal is pending. A *stay* is an important mechanism in the immigration appeals process because immigration authorities frequently attempt to deport an immigrant *before* a court can fully review an immigration judge's decision.

A *stay of deportation* can be especially vital in a case where an immigrant is raising a claim under asylum law or the Convention Against Torture. In such instances, an erroneous deportation can have drastic and even deadly consequences. It is also crucial in the case of long-term legal permanent residents, who often have strong family ties in America that can be destroyed due to an unjust or erroneous deportation. A stay can also be crucial to obtain relief at the end of the case. In many cases, the government has argued that once it succeeds in deporting an immigrant, that person cannot come back – even if he or she ultimately wins in court.

Under current law, in order for any federal court to issue a *stay of deportation*, an immigrant must show that he or she is likely to win on the merits of the appeal. This tough standard ensures that immigrants do not needlessly delay an otherwise inevitable deportation, in order to pursue an obviously frivolous appeal.

What Section 105 Would Do: Sec. 105 of the REAL ID Act would make it significantly more difficult for a court to issue a *stay of deportation*. Specifically, a court would have to find, by "clear and convincing evidence," that an immigrant is likely to prevail on the merits in an appeal. This heightened standard would, in effect, require an immigrant to effectively prove his or her case before the appeals process actually begins. Even worse, this proof would have to be based only on the scant administrative record that is already before the court when the *stay* request is filed – meaning that few, if any, *stay* requests would ever be granted under Sec. 105.

Of the 7 federal circuit courts that have looked at this issue, 6 have agreed that "clear and convincing evidence" is simply not an appropriate standard for ruling on a *stay* request:

- Judge Bruce Selya has noted that extending the "clear and convincing evidence" standard to *stay* requests "would result in a peculiar situation in which adjudicating a stay request would necessitate full deliberation on the merits of the underlying case and, in the bargain, require the alien to carry a burden of proof higher than she would have to carry on the merits. This Kafkaesque design is counterintuitive." *Arevalo v. Ashcroft*, 344 F.3d 1, 8 (1st Cir. 2003).

- Judge Frank H. Easterbrook points out that "limits on injunctive relief are more sensible when an alien has had an opportunity for effectual judicial review before removal…. [Stays] remain vital when the alien seeks asylum or contends that he would be subject to torture if returned. The ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim." *Hor v. Gonzales*, No. 04-1964, 2005 U.S. App. LEXIS 3493 (7th Cir. 2005).