Enforcement of Immigration Law

New website reviews legal decisions

by Juan Mann

Congress giveth, the EOIR ignoreth, the ACLU and AILA attacketh, and the federal courts taketh away.

As illegal aliens and their smugglers trample the ranch lands of the American southwest, the laws that are supposed to detain and deport them also are being trampled in a less visible but no less unrelenting assault. The Immigration and Nationality Act is fighting for its life on a daily basis against relentless legal attacks in the federal courts and before the Immigration Court hearing system within the United States Department of Justice (DOJ).

While the Immigration and Naturalization Service (INS) gets a public flogging, the real battle for the integrity of our immigration laws as drafted by Congress is being waged behind closed doors. The Executive Office for Immigration Review (EOIR), with its Immigration Court system of perpetual hearings and appeals to federal court provides the perfect forum for a gradual chipping away of any immigration law enforcement provisions passed by Congress. The Immigration Court problem requires the creation of a completely new framework for the removal of illegal aliens and criminal alien residents from the United States. The current litigation-based model for the deportation of every single illegal alien in the country is an invitation for disaster. Besides being completely unworkable, the EOIR framework of endless litigation encourages legal assaults against the clear will expressed by our elected representatives in trying to craft a coherent immigration policy for this country. As a companion to any streamlined immigration legislation that would actually deport illegal aliens and criminal alien residents, the EOIR should be abolished, with its Immigration Court system shut down to stop the immigration litigation barrage.

If the EOIR's Immigration Court survives, the Immigration and Nationality Act will stand little chance for survival in whatever form originally intended by Congress. If the federal courts continue to craft immigration policy in reviewing EOIR appellate cases, any good work of Congress for immigration reform will be undone before the President's signature has dried on the legislation. If Congress is serious about reforming the Immigration Act, its first order of business should be to abolish the EOIR. Maybe then the INS, or whatever law enforcement agency takes its place, will finally be able to do its job of enforcing the Immigration Act.

Saving the Immigration Act

The Immigration and Nationality Act of 1952, and its various amendments, make up the spaghetti bowl of arcane language, convoluted standards and perverse incentives that pass for the law of the land in immigration law enforcement. The Congress of the United States and the many Presidents who signed this legislation must shoulder the blame and receive the faint praise for immigration laws on the books now. But there is more blame to go around for the current state of affairs. As if the massive Immigration Act doesn't have enough problems already, perhaps the greatest threat to a logical American immigration policy and its

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Juan Mann *is the proprietor of the only immigration reform web site that exposes the bureaucracy of the Executive Office of Immigration Review (EOIR) at www.geocities.com/deportaliens/index.html. He dedicates his work to the principle that one man's opinion can make a difference.*

consistent enforcement really lies in after-the-fact legal mischief through the federal government and the federal courts. The bottom line is that the best enforcement provisions of our immigration laws are being rewritten by the unelected.

The prime suspects for this erosion of immigration law enforcement are pro-alien social activists among the Department of Justice's own Immigration Court judges of the EOIR, their fellow travelers within the EOIR's appellate body known as the Board of Immigration Appeals (BIA), the U.S. Courts of Appeals (notably the Ninth Circuit Court of Appeals on the left coast), and even some recent shocking 5-4 immigration decisions by the Supreme Court of the United States. But liberal judges can't do it alone. They are, as always, aided and abetted by thousands of immigration trial lawyers from the American Immigration Lawyers Association (AILA), the American Civil Liberties Union (ACLU), and various alien "rights" groups and ethnic lobbies. With this army of attorneys arrayed against it, the poor Immigration Act doesn't stand a chance. Any enforcement provisions left in the law that manage to survive the compromises of Congress, soon will be turned into Swiss cheese by pro-alien litigators and their ideological compatriots on the bench.

1996 Anti-Terrorism Immigration Reforms

As a somewhat belated reaction to the February 26, 1993, bombing of the World Trade Center, Congress passed very enforcement-minded immigration legislation three years later called the "Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996." President Clinton signed the "anti-terrorism" immigration bill on April 24, 1996.

But the second session of the 104th Congress was not through yet. The immigration reformers were on a roll. Later that same year Congress passed even greater changes to the Immigration Act called the "Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996." The IIRIRA, known as the 1996 Act, was signed by President Clinton on September 30, 1996. It became effective on April 1, 1997. The IIRIRA cut back on relief available for criminal aliens and known foreign terrorists, and called for the mandatory detention of more classes of convicted criminals who are foreign nationals.

The IIRIRA also created very valuable "administrative removal" proceedings under its new Section 235(b), which so far have managed to withstand the legal onslaught of the pro-alien lobby (knock on wood). These provisions allow aliens to be turned back at ports of entry, with the Immigration and Naturalization Service sending them right back to their native country without being released into the United States, and without reaching the safe legal haven (the briar patch) of the Immigration Court system. The administrative removal provisions of Section 235(b) may very well be the savior of our country's immigration law enforcement system. Hopefully, administrative removals will become the future of a new streamlined immigration system in a world without the mismanagement of the INS and the needless over-lawyered bureaucracy of the EOIR. But for now that world is just a dream.

The IIRIRA also brought cosmetic changes to the Immigration Court system by renaming the federal government's "deportation" and "exclusion" proceedings to kinder and gentler "removal" proceedings under the new Section 240 of the Act. The new name would be just about the only part of the 1996 Act left unscathed. Before President Clinton's signature dried on the 1996 AEDPA "anti-terrorism" bill and the IIRIRA immigration reforms, the legal vandals inside and outside government were already planning their campaign to "fix '96" and roll-back the immigration enforcement work of the 104th Congress.

Six Years of Slow Death

Now, on the six-year anniversary of the "anti-terrorism" immigration bill (April 24, 2002), contrary to the intent of Congress, most of the immigration law enforcement teeth of the 1996 Act have been whittled away. The campaign by liberal cause lawyers

waged in the federal courts and in the Immigration Court system within the Department of Justice, has taken its toll. Most of the enforcement gains of the AEDPA and IIRIRA, especially in the area of immigration detention, have been scaled back to a shadow of their former glory, or simply abolished by judicial fiat. The end result is that the criminal aliens have won. The attorneys of the ACLU and AILA have declared victory. More convicted foreign nationals with green cards have been released back into our communities. More permanent resident aliens have been allowed to keep their green cards in spite of committing a laundry list of crimes. More illegal aliens have been released on immigration bonds and ordered "removed" only on paper in their absence. But all of the legal dismembe-rment of the 1996 Act wouldn't have happened without the open door of the Immigration Court system and its bureaucrats at the EOIR, the BIA and the Immigration Courts. The federal courts simply carried on the carnage started by the EOIR's government lawyers in robes at the Immigration Court, granting even more relief to more classes of illegal aliens and criminal alien residents.

Other than the bright spot of streamlined Section 235(b) administrative removals, there has been little to cheer about in immigration law enforcement since the 1996 "anti-terrorism" immigration legislation. Most of the legal erosion of immigration law has been for the worse, with more criminal aliens being detained less, and avoiding "removal" more frequently for a greater variety of crimes. The detention provisions for illegal aliens and criminal alien residents are a frequent and well-worn target. So much so, that it is getting next to impossible for the United States government to deport a convicted criminal alien resident, unless the alien agrees to give up his green card and leave. The way the system is set up, with unnecessary formalism and hyper-litigation from the start in the EOIR's Immigration Court, all the way up to the Supreme Court of the United States, this country literally makes a federal case out of the deportation of every single illegal alien on our shores. The winners of these legal battles are foreign nationals with no legal status in our country and permanent resident aliens who are convicted criminals. Under the current immigration law, all aliens in Immigration Court removal proceedings have the "right" to appeal their case for as long as it takes, all the way to the Supreme Court of the United States if they can, to avoid being deported to their native countries.

"This country literally makes a federal case out of the deportation of every single illegal alien on our shores."

With three million, eight million or twelve million illegal aliens in the United States now (no one knows exactly), and countless more removable criminal alien residents, it is absolute folly to believe that the current over- lawyered framework of Immigration Court could handle even a fraction of the workload of deporting aliens. The Immigration Court system, with its endless menu of hearings and appeals all the way up to the Supreme Court of the United States, would utterly crash of its own weight if all of the removable aliens in the country were actually apprehended by the beleaguered Immigration and Naturalization Service. The EOIR's Immigration Court in the Department of Justice is a system designed for failure. It is not designed to enforce the Immigration Act by efficient and expeditious removal of illegal aliens and criminal alien residents from the United States. It is a system designed for the benefit of the aliens in it, the trial lawyers profiting from it, and the army of pro-alien litigators using the federal courts to smash any enforcement provisions left in the Immigration Act.

Stench from the Bench

I have compiled a brief survey of recent legal mischief by the federal courts and the Immigration Court system. Unfortunately, this list is just a brief snapshot of some of the more damaging pro-alien rulings that litter the landscape, making immigration law enforcement tougher and tougher every day for the federal government. The legal assault against the 1996 "anti- terrorism" immigration legislation has rendered

Congress' original work largely unrecognizable, as criminal aliens and their lawyers have scored victory after victory. Here are their triumphs:

THE U.S. SUPREME COURT

Zadvydasv v. Davis

The Supreme Court allows criminal aliens who have already been ordered deported to be released back into America if the aliens' home countries will not accept them. Someone please ask Justice Stephen G. Breyer if he would like them living in his neighborhood.

INS v. St. Cyr and Calcano-Martinez v. INS

The Supreme Court allows more criminal aliens the chance to keep their green cards, against the will of Congress. With an assist to the Immigration and Naturalization Service, this criminal alien amnesty creates relief from deportation where there was none before. The Court resurrected Section 212(c) of the Immigration Act by creating their own form of relief – Section 212(C)yr, despite the clear language of Section 440(d) of the AEDPA and Section 304 of the 1996 IIRIRA. The INS rushed to expand the ruling even more through policy, making more criminal aliens eligible to stay in the country. Shame on you, Justice Anthony Kennedy! You should know better.

COURTS OF APPEALS:

THE NINTH CIRCUIT

Kim v. Ziglar

Convicted criminal resident aliens can be released back into society, contrary to the clear will of Congress who wanted the INS to keep them locked up for safe-keeping until being deported.

Hernandez-Montiel v. INS

Gay Mexican transvestite granted political asylum in the United States by your friendly neighborhood appellate judges of the Ninth Circuit.

Rivera-Sanchez

Conviction for transporting or selling drugs is not a "drug trafficking" offense.

Richards-Diaz

The first judicial expansion of Section 212(c) relief, that is until *INS v. St. Cyr* came along.

USA v. Robles-Rodriguez

State drug convictions are not drug convictions.

Trinidad-Aquino

Repeat drunk driving convictions with a sentence of over one year are not "crimes of violence."

THE SEVENTH CIRCUIT

Parra v. Perryman

Alien convicted of aggravated sexual assault prevails.

THE FIFTH CIRCUIT

Hernandez-Avalos

Repeat drunk driving convictions with a sentence of over one year are not "crimes of violence."

THE THIRD CIRCUIT

Patel v. Zemski and *Sabrija Radoncic v. Zemski*

Convicted criminal resident aliens can be released back into society, contrary to the clear will of Congress who wanted the INS to keep them locked up for safe-keeping until being deported.

THE BOARD OF IMMIGRATION APPEALS

The problem with tracking the movements of the BIA "members" and their decisions is that the majority of BIA decisions are designated as "unpublished." No one really knows exactly how much damage the BIA has caused by granting relief to aliens who should have been deported under the law. Their "unpublished" cases never see the light of day and are not regarded as precedent decisions. But even though the BIA is on its best behavior trying to look judicial in the published cases, called Interim Decisions, their true colors come shining through occasionally. They just can't help it.

Interim Decision #3455

The Min Song case opens the floodgates for "aggravated felon" criminal alien residents to keep their green cards.

Interim Decision # 3432

BIA logic: "burglary of a vehicle" is not a "burglary offense."

Interim Decision #3309

The BIA tries to figure out which crimes aliens commit are "particularly serious" crimes. But aren't they all?

Interim Decision #3428

Alien's conviction for unlawful use of a firearm is no obstacle to keeping his green card. •