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Political Asylum and the Theory of Judicial Review

Stephen H. Legomsky

Essay

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Few problems challenge the national conscience in quite the same way as asylum. Competing values clamor for recognition. Policymakers must consider conservation of finite national resources, preservation of domestic tranquility, and maintenance of friendly relations with other governments. In addition, however, they must respect international obligations and foster harmony between our laws and our shared moral commitment to fellow humans in distress.

The resolutions of these conflicts are most visible at the legislative and executive levels of government. But the courts must wrestle with many of these same concerns. They formulate policy in areas not fully occupied by other branches, and they review the administrative application of policies already in force.

Several congressional bills introduced in recent years attempted to restrict judicial review of asylum decisions in varying ways and to varying degrees. These efforts, noted below, have failed thus far. Sentiment for limiting judicial review of asylum decisions remains strong, however, and future proposals are inevitable. Like past legislative initiatives, these bills will raise both narrow issues regarding the merits of the specific restrictions they would impose and broader questions that concern judicial review as an institution.

Congressional attempts to restrict review of asylum decisions represent only one strand of the recent pattern of assaults on judicial review in controversial areas of the law. Given both the trend toward narrowing the scope of judicial review and the growing importance of asylum in the United States and other developed countries, it is worth pausing to examine the theory

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of judicial review and to take stock of its virtues and its vices. What, exactly, does judicial review of administrative action accomplish? What is its price? To what extent, if any, do asylum cases possess special attributes that skew the balance?

After a brief summary of the provisions that currently govern asylum and of the recent legislative proposals for modifying them, this Essay identifies features of asylum cases relevant to the conceptual foundations of judicial review. The Essay then examines the gains and the losses flowing from judicial review of administrative action generally and from judicial review of asylum decisions in particular.

I. CURRENT LAW AND PROPOSED CHANGES

The Immigration and Nationality Act[1] supplies two distinct routes to asylum. One provision of the Act, section 208, confers on the Attorney General of the United States the discretion to grant asylum to any "refugee" physically within American territory or at a land border or port of entry.[2] With some qualifications, the term *refugee* includes any alien unable or unwilling to return home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[3] The Attorney General has delegated the discretionary power to grant asylum under this section to district directors of the Immigration and Naturalization Service ("INS").[4] Although a district director's denial of asylum generally is neither administratively appealable[5] nor judicially reviewable,[6] the alien may renew an asylum application in any subsequent exclusion or deportation proceeding.[7]

Section 243(h) of the Act[8] paves the second route to asylum. With some exceptions, this section prohibits the Attorney General from returning an alien to any country in which the alien's life or freedom would be threatened for any of the rea-

1. Act of June 27, 1952, 66 Stat. 163 (codified at 8 U.S.C. §§ 1-1557 (1982 & Supp. V 1987)).

2. Immigration and Nationality Act [hereinafter I. & N. Act], § 208, 8 U.S.C. § 1158 (1982).

3. *Id.* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

4. 8 C.F.R. § 208.1(a) (1988).

5. *Id.* § 208.8(c).

6. Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 765 (S.D.N.Y. 1978).

7. 8 C.F.R. § 208.9 (1988).

8. 8 U.S.C. § 1253(h) (1982).

sons listed in section 208.[9] Unlike section 208, which grants a discretionary power, section 243(h) establishes a mandatory bar when the stated conditions exist. Also unlike section 208, however, section 243(h) does not always, even when successfully invoked, enable the alien to remain in the United States. Section 243(h) prohibits return to the country of persecution, but it does not prevent removal to a third country.

Administrative officials known as immigration judges adjudicate all requests for relief under section 243(h) during exclusion or deportation hearings.[10] If the immigration judge denies such a request, the alien can appeal the resulting exclusion or deportation order to the Justice Department's Board of Immigration Appeals ("BIA").[11] The alien can apply for habeas corpus in federal district court to obtain judicial review of a final exclusion order.[12] Judicial review of a final deportation order normally is by petition for review in a United States court of appeals.[13]

Recent legislative proposals to modify judicial review of asylum decisions have varied significantly in their reach. One bill undertook to foreclose judicial review of all asylum decisions.[14] Others would have allowed judicial review only when the asylum decision had been entered during the course of exclusion or deportation proceedings,[15] and would have narrowed the scope of review even in those cases by prohibiting reversal on the ground that substantial evidence did not support an administrative finding of fact.[16] Two of the bills sought, in addition, to eliminate all judicial review of administrative decisions that refuse to reopen exclusion or deportation proceedings.[17]

II. ASYLUM CASES

Asylum cases possess a number of attributes pertinent to judicial review. Perhaps the most obvious is the potential mag-

9. *See supra* note 3 and accompanying text (defining *refugee*).
10. 8 C.F.R. §§ 236.3, 242.17(c) (1988).
11. *Id.* § 3.1(b)(l)-(2).
12. I. & N. Act § 106(b), 8 U.S.C. § 1105a(b) (1982).
13. *Id.* § 106(a), 8 U.S.C. § 1105a(a).
14. S. 529, 98th Cong., lst Sess. § 123(a), 129 CONG. REC. 5516, 5520 (1983).
15. *See* H.R. 1510, 98th Cong., 1st Sess. §§ 123(a)(2), 123(b)(1983); H.R. 2361, 98th Cong., 1st Sess. §§ 122(a)(2), 122(b) (1983).
16. *See* H.R. 1510, 98th Cong., 1st Sess. § 123(a)(9) (1983); H.R. 2361, 98th Cong., 1st Sess. § 122(a)(9) (1983).
17. *See* S. 529, 98th Cong., 1st Sess. § 123(b), 129 CONG. REC. 5516, 5520 (1983); H.R. 1510, 98th Cong., 1st Sess. § 123(b) (1983).

nitude of the individual interests at stake. By definition, erroneous denials of applications for asylum jeopardize the applicants' freedom and sometimes their lives.

Moreover, like other classes of aliens, asylum applicants are politically powerless. Unable to vote or to hold office,[18] aliens lack the tools available to other constituencies for influencing legislative and executive policy. To be sure, aliens sometimes benefit from the lobbying activities of groups with whom they share common interests. The agricultural provisions of the Immigration Reform and Control Act of 1986[19]—the product of intensive lobbying by growers[20]—are a prime example. Such alliances can be productive in selected contexts, but are an inadequate substitute for independent lobbying strength that does not rest on the fortuities of shared interests. To a greater degree than other groups, aliens therefore must depend on the courts for the protection of important rights.

The issues presented in asylum cases tend to be legal and factual, rather than discretionary. Legal questions abound concerning the standard of proof, the content of due process, the meaning of *persecution*, the breadth of the political opinion prong, and the applicability of the asylum provisions to nongovernmental persecutors.[21] The cases also frequently turn on factual predictions as to the likelihood that specific individuals will suffer persecution.

Evidence of persecution, vital to asylum cases, can be unusually inaccessible. The most knowledgeable witnesses and the most probative documentary evidence might be overseas. In the rush of leaving, refugees often lack the time to assemble crucial documentation. For the same reason, the more orderly screening process that the consulates abroad apply to other intending immigrants can be impractical for refugees.[22] Further,

18. *See generally* Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977) (noting historical and constitutional arguments for allowing alien voting and current lack of alien voting rights).

19. Pub. L. 99-603, §§ 201-04, 301-05, 100 Stat. 3359, 3394 (1986) (codified at 8 U.S.C. §§ 1255a, 1160-1161 (Supp. V 1987)).

20. *See* Boswell, *The Immigration Reform Amendments of 1986: Reform or Rehash?*, 14 J. LEGIS. 23, 23 n.6 (1987); Yale-Loehr, *Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986*, 15 N.Y.U. REV. L. & SOC. CHANGE 333, 335, 348-49 (1986-87).

21. *See generally* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 638-726 (1985).

22. The ordinary visa process for immigrants is described in I. & N. Act §§ 221, 222, 8 U.S.C. §§ 1201, 1202 (1982 & Supp. V 1987).

even when useful documents are available, the sensitivity of their contents might limit or even prevent disclosure.[23] Because eye-witness accounts and documentary evidence so frequently are unavailable, administrative officials often must rely largely on gut-level credibility assessments.

The unusual relevance of foreign policy is another crucial attribute of asylum cases. A finding that persecution is likely reflects official skepticism about the willingness or ability of a foreign government to guarantee a modicum of civilized behavior. Governments understandably shy away from making such statements about their allies in a public forum.[24]

Those are some of the characteristic features of asylum decisions. How do they affect the desirability of judicial review?

III. THE BENEFITS OF JUDICIAL REVIEW

Advocates of judicial review often emphasize the independence that review brings to the administrative process. Independence is especially important in asylum cases because the BIA is subordinate in every way to the Attorney General. Apart from having created the BIA, the Attorney General defines its jurisdiction, names its members, may remove individual members, may dissolve the BIA, and may reverse any of its decisions.[25]

The advantages of independence are twofold. If adjudicators are to decide cases on their merits, they must feel secure in handing down decisions that reflect their actual legal conclusions and findings of fact. Further, independence enables officials who decide cases to satisfy individual parties and the general public that the proceedings were fair.

These considerations are particularly relevant in asylum cases. Both actual justice and the appearance of justice assume paramount importance when, as is true in asylum cases, the individual interests are great. Our legal system can tolerate occasional unfairness when the stakes are trivial, but claims that affect truly significant interests demand a more meticulous brand of justice.

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23. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 21, at 686-700 (discussing difficulty of admitting evidence in asylum cases).

24. *See id.* at 701-08.

25. *See* 8 C.F.R. § 3.1 (1988); Roberts, *The Board of Immigration Appeals: A Critical Reappraisal*, 15 SAN DIEGO L. REV. 29 (1977) (recounting observation of former chair of BIA that BIA has no statutory recognition and may be abolished at will of Attorney General).

Independence is especially crucial when the aggrieved parties lack access to normal political channels. For reasons given earlier, asylum applicants generally lack such access. Their dependence on an impartial judiciary is correspondingly great.

Finally, the appearance of justice takes on special meaning in the context of asylum. The unsuccessful asylum applicant who perceives procedural unfairness will bring that message home. Our treatment of aliens can shape foreign impressions of the American justice system.

In addition to fostering independence, judicial review adds the influence of decisionmakers who possess generalist legal knowledge. Unlike immigration judges, federal judges often resolve issues in other administrative settings and in constitutional cases. They have experience in unraveling complex statutes. They often can solve problems by finding analogies in other areas of public law or even in private law. In short, federal judges generally have broader legal experience and a broader knowledge of fundamental legal doctrine than do immigration judges.[26]

Legal generalism also boasts the benefit of relative freedom from bias. The immigration authorities who handle asylum cases are bombarded, day after day, with compelling tales of human tragedy. The natural response is to begin thinking in relative terms. It would be unrealistic to expect a person to adjudicate a steady stream of asylum cases without at least unconsciously devaluing the allegations of hardship. A court of general jurisdiction, faced with few asylum cases, has less opportunity to develop either that kind of institutional callousness or undue sympathy for the agency officials whose decisions it reviews. Thus, a generalist court can approach asylum cases with a broader and less tainted perspective.

The judicial attributes discussed up to this point, independence and generalist legal knowledge, effectively improve the quality of the decisions that actually are reviewed in court. But judicial review also serves another function, one that operates even in cases that never reach court. The mere *possibility* that an alien will seek judicial review of an asylum decision encourages the various administrative authorities to study the case carefully and to state their reasoning intelligibly. The process

26. For a more expansive discussion of the advantages and disadvantages of specialist courts, see Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1388-92 (1986).

of drafting reasoned dispositions can help administrative decisionmakers expose and resolve analytical problems on their own.

In asylum cases, the importance of the individual interests at stake strengthens the argument for requiring careful reflection. The prevalence of legal issues magnifies the need to consider the logical future implications of the decision. Further, the knowledge that a reviewing court might search the record for "substantial evidence" can encourage the administrative tribunal to consider more carefully the connection between the evidence and the tribunal's tentative findings of fact.

As a final benefit, judicial review in federal court provides a structure for the gradual development of legal doctrine. Without judicial review, a single administrative agency, the BIA, would pronounce all caselaw in the area of asylum. The independence and generalist knowledge that aid the courts in assuring justice for the litigants also aid them in articulating law for the future. Moreover, the stringent standards for selecting federal judges increase the probability of thoughtful and rigorous legal analysis as well as clear and precise opinions. Finally, the multiplicity of courts makes possible a continuing conversation among judges of differing viewpoints. This judicial dialogue fosters a heightened understanding; opinions can build on one another in a way that is not possible when a single centralized tribunal announces law unilaterally.

IV. THE COSTS OF JUDICIAL REVIEW

Judicial review has its costs. Some of them are the mirror images of some of the benefits described earlier. Thus, although proponents of judicial review stress judicial independence, opponents emphasize the judiciary's relative lack of public accountability. The more prominent the policy issues a given class of cases presents, opponents argue, the more reason to lodge the adjudicative function in a body subject to a political check.

Asylum cases can indeed raise important questions of national policy. As mentioned earlier, decisions can influence, or can be influenced by, foreign relations concerns best entrusted to the political branches of government.

These considerations are weak arguments for eliminating judicial review. First, as observed earlier, asylum cases turn frequently on factual determinations. At issue, usually, is whether the alien is likely to face persecution if sent home.

The lack of judicial accountability is no reason to eliminate the courts' traditional role of searching for substantial evidence to support the administrative finding. Nor is lack of accountability a reason to exclude judicial participation in the process of interpreting the Constitution, the statute, or the regulations.

Even when the sole question is whether an administrative tribunal should exercise its discretion favorably, judicial review is perfectly appropriate. The discretionary determinations might well entail the formulation of policy, but not all policy decisions are or should be unreviewable. A court properly may review for abuse of discretion unless the statute precludes judicial review or the "agency action is committed to agency discretion by law."[27]

That last observation has particular relevance to legislative proposals aimed at eliminating judicial review of BIA decisions that refuse to reopen deportation proceedings. At present, courts review those refusals for abuse of discretion.[28] In discharging that function, courts serve a useful oversight role. In various immigration contexts, courts have invalidated administrative decisions because the officials failed to exercise discretion,[29] because they based discretionary decisions on improper factors,[30] because they ignored relevant considerations,[31] because they failed to explain decisions,[32] and because they departed inexplicably from previous departmental policies.[33] In all of those instances, judicial review for abuse of discretion sends a socially desirable signal to the officials on whom the Attorney General has conferred discretionary powers.[34]

A second cost of judicial review mirrors the benefits of generalist knowledge. The BIA, like other administrative tribunals, has specialized expertise that is valuable in the resolution of technically complex asylum cases. Thus, an argument

27. *See* 5 U.S.C. § 701(a) (1982).

28. *See, e.g.*, INS v. Rios-Pineda, 471 U.S. 444, 445 (1985); INS v. Jong Ha Wang, 450 U.S. 139, 144-45 (1981).

29. Asimakopoulos v. INS, 445 F.2d 1362, 1365 (9th Cir. 1971).

30. Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (stating that agency abuses discretion when it bases decision on race).

31. Santana-Figueroa v. INS, 644 F.2d 1354, 1356-57 (9th Cir. 1981) (criticizing BIA for failure to consider deprivation of means of earning a living).

32. Sida v. I.N.S., 665 F.2d 851, 854-55 (9th Cir. 1981).

33. Factora v. District Director, 292 F. Supp. 518, 522 (C.D. Cal. 1968).

34. For a thoughtful discussion of judicial control of INS discretion, see Developments in the Law, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1395-1400 (1983).

against judicial review is that it subjects an expert decision to non-expert review.

Precisely what relevant expertise does the BIA have? First, from its experience in past cases, the BIA has acquired a familiarity with the specific statutory provisions, regulations, and caselaw that govern asylum. Second, through its handling of immigration cases other than those in which an alien claims asylum,[35] the BIA has developed a broad understanding of the immigration process. The BIA members and staff do not become legal generalists, but neither are they asylum specialists. For present purposes, it is useful to view BIA personnel as immigration generalists. Seen in that light, their knowledge of subject matter broader than asylum enables them to perform a function analogous to that of generalist courts. The BIA can rely on its knowledge to assure that its asylum decisions comport with more general immigration principles and create a coherent body of law.

Despite its impressive knowledge of immigration law, there is one relevant area of specialized knowledge to which the BIA has no greater claim than the courts: foreign affairs. Except possibly when factual disputes concern the conditions in a country from which an asylum claimant in a recent previous case was fleeing, the BIA will have no advantage over a court in assessing the legitimacy of the alien's fear.

More importantly, even in cases in which past experience gives the BIA an edge over a court, the limited nature of the judicial role diminishes the significance of that disparity. The function of the court is to review the stated reasons for the BIA's decision. In searching for rationality or for substantial evidence, the court is aided less by specialized expertise than by judgment.[36] Further, to the extent that specialized expertise helps the reviewing court discharge even those limited responsibilities, the BIA's reasoned opinion can convey any considerations that the BIA, with its expertise, found relevant.

A third cost of judicial review is the loss of uniformity. Without judicial review, the decisions of the BIA would apply nationwide. Splits of authority among courts mean different law for different geographic regions of the United States. Nationally uniform rules assume particular importance when, as in asylum cases, outcomes can affect international relations. In

35. *See* 8 C.F.R. § 3.1(b) (1986) (defining jurisdiction of BIA).

36. This point is well made, in another context, by Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996, 999-1000 (1971).

foreign policy matters, opponents of judicial review would argue, the nation should speak with a single voice.

Centralization has other benefits as well. It ensures equal treatment of similarly situated asylum applicants. Asylum should not hinge on an accident of geography. Nor should the law reward forum shopping. In addition, it might appear inefficient for several different courts to till the same soil when a single tribunal could perform the task alone.

Those concerns are valid, but they do not outweigh the benefits of judicial review. Conflicts among the federal circuits are not unique to asylum cases or even to immigration law generally. They are an accepted feature of our federal judicial system. Although the foreign affairs implications of asylum decisions might appear to aggravate the usual problems associated with judicial conflicts, the cases most likely to affect foreign relations rest on *factual* findings that the named aliens will face persecution if forced to return home. Those findings relate only to the evidence in particular cases, do not have the effect of precedent, and thus create no judicial conflicts.

Moreover, generally accepted notions of proper judicial deference limit the likelihood of unequal treatment. When the BIA decides an asylum case, it makes all the factual findings; the reviewing court, in keeping with general principles of administrative law, merely searches the record for substantial evidence.[37] Even on questions of law, the usual judicial deference to an agency's statutory interpretations can be a unifying force. Further, if an exceptional case does raise a sensitive question affecting international relations, a reviewing court can invoke the political question doctrine.[38]

Finally, as discussed earlier, conflicts among circuits are not wholly negative; they yield benefits as well. A multiplicity of judicial views contributes to the thoughtful evolution of the law. If the occasional split between circuits raises a sufficiently important issue for which consistency is desirable, the Supreme Court can restore the needed uniformity. In discharging that function, the Court may evaluate the diverging viewpoints of the lower courts. Access to differing views is unusually valuable in an area as politically charged as asylum. Such debate is

37. *See* 5 U.S.C. § 706(2)(E) (1982) (permitting the reviewing court to set aside action lacking substantial evidence to support it); *see also* I. & N. Act § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1982) (stating that deportation decisions require "reasonable, substantial, and probative evidence").

38. *See* Baker v. Carr, 369 U.S. 186, 211 (1962).

essential in cases whose outcomes often depend on deeply-held personal notions of social obligation, foreign policy, national community, and our nation's place within, and obligations to, the world community.

Critics of judicial review of asylum decisions also contend that such review adds one more step to the already lengthy process. The resulting delay impedes one of the very purposes of administrative tribunals—speedy adjudication. In addition, because asylum claimants ordinarily arrive without entry documents, and because the INS normally detains excluded aliens who lack entry documents pending the admission decisions,[39] the state must maintain excluded asylum claimants at public expense while judicial review is pending. Moreover, to the extent that aliens have an incentive to postpone deportation, this delay feeds on itself; the longer the potential delay, the greater is the incentive to seek judicial review. The greater the incentive, the greater the number of aliens likely to act on that incentive, and thus the longer the delay.

These concerns should not be dismissed casually, but their practical significance is much less than one might first assume. The advantage of delay is not unique to asylum cases, or even to immigration cases generally. Delay can benefit the appellant in many administrative contexts. In theory, incentives to prolong litigation can arise whenever the government wishes to terminate existing benefits. In any event, the volume of asylum cases reviewed in federal courts is low, partly because the INS detention policy dampens any incentive to delay through appeal. In fiscal year 1984 aliens sought judicial review in only 100 deportation cases and seventeen exclusion cases that presented asylum claims, including challenges to administrative decisions refusing to reopen deportation or exclusion proceedings in which asylum was claimed.[40]

The delay argument has slightly greater force when the challenged decision was a refusal to reopen or reconsider a previous deportation order. As noted earlier, two of the congressional proposals to restrict judicial review contained provisions that specifically targeted motions to reopen. The concern has

39. 8 C.F.R. § 235.3(b) (1986).

40. *See* Legomsky, *supra* note 26, at 1402. Of the 100 deportation cases, 85 were petitions for review filed directly in the courts of appeals pursuant to I. & N. Act § 106(a), 8 U.S.C. § 1105a(a), which permits judicial review of deportation orders. The remaining 15 were habeas corpus applications filed in the district courts pursuant to I. & N. Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9). Legomsky, *supra* note 26, at 1402.

been that motions to reopen permit an endless string of procedural maneuvers calculated only to stall removal. Although cases of abuse occasionally occur, even the total number of asylum cases, both genuine and frivolous, is far too small to justify current alarm.

The final objections to judicial review of asylum decisions are fiscal and administrative. Eliminating judicial review of any class of cases saves money and eases the workload of an overburdened judiciary. Appointing more judges might solve the workload problem, but it would increase public expense and create other problems. Increasing the sizes of existing courts might strain collegial decisionmaking; creating new federal circuits would increase the potential for intercircuit conflicts.[41]

Again, however, so few asylum cases actually reach federal court that the administrative benefits of eliminating them would scarcely be felt. Further, as the foregoing discussion illustrates, there is no principled reason to single out asylum cases for special restrictions on judicial review.

CONCLUSION

This is a time of sustained and vocal resistance to judicial participation in a wide range of modern controversies. It is precisely in times like these that acknowledging the vital role of judicial review in our constitutional democracy is imperative. Judicial review brings both actual and perceived independence from the executive branch of government. It adds a generalist, and a less calloused, perspective. And its availability gives administrative authorities an incentive to approach these important decisions fairly and carefully.

Judicial review is peculiarly important to asylum applicants. An erroneous asylum denial can threaten life, and the affected individuals cannot count on the political process for protection. For them, the benefits of judicial review are compelling. As this Essay has shown, the countervailing costs are not onerous.

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41. *See* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 7-16 (1975) (comparing advantages of district court and court of appeals review of administrative action).