Richard D. Steel — Federal Litigation

Two Decades After INA Sec. 106, the Confusion Goes On

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More than 20 years ago, Congress added sec. 106 to the Immigration and Nationality Act, declaring that the new statute's provision for direct review by the courts of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation." Twenty years later, the federal judiciary is still confronted with puzzling jurisdictional issues in immigration cases.

As Charles Gordon notes in a preceding article, two courts have recently reached curious conclusions limiting review by *habeas corpus* despite the language of sec. 106 (a) (9) which plainly provides for *habeas corpus* review when a respondent is in INS custody. See *Marcello v. District Director,* 634 F.2 964, 967 (5th Cir. 1981), and *Daneshvar v. Chauvin,* 644 F.2d 1248 (8th Cir. 1981). The Ninth Circuit, on the other hand, saw no problem with *habeas corpus* review in light of 106 (a) (9). *Sotelo-Mondragon v. Ilchert,* 653 F.2d 1254 (9th Cir. 1980).

Now comes the Third Circuit with a decision that Alice in Wonderland would find even "curiouser" and which might result in judicial review, in some cases at least, back at the district court level. The case is *Dastmalchi v. INS,* ____ F.2d _____, (3d Cir. 1981) No. 80-2432, and it involved a constitutional challenge to the "Iranian regulations," the violation of which triggered the start of deportation proceedings.

The court held that a challenge to the regulations was not the proper subject for a sec. 106 petition. Relying on *Cheng Fan Kwok v. INS,* 392 U.S. 206 (1968), the court reasoned that a sec. 106 petition could challenge only those orders made as a part of a sec. 242 deportation proceeding. The Board of Immigration Appeals, it noted, had no authority as administrator of the regulation to declare the regulation invalid. Hence, the challenge did not arise out of the deportation proceeding as such, and, accordingly, was not reviewable under sec. 106.

The decision of the INS to take this position and persuade the Court of its merits is questionable, since the result will require District Court review of certain aspects of the deportation proceedings. This can only have the effect of expanding the availability of District Court review either instead of a petition for review, or even, as in the *Dastmalchi* case, in addition to the petition for review. This, of course, was exactly the state of affairs which Congress sought to remedy in 1961.

Thus, in various situations, counsel will have to consider whether *habeas corpus* review of the deportation order should or even must be sought. Of course, it must be realized that by doing so, the issue of the availability of *habeas corpus* review may have to be litigated, in addition to the merits of the case itself, and if it is held that *habeas corpus* does not lie the issue will then arise as to whether a petition for review could then be filed. Presumably, if it were more than six months after the final order of deportation, a petition for review could not be filed. Perhaps a protective petition for review could be filed, but this would require a ruling that it be filed but held in abeyance pending consideration of *habeas corpus* issue. An additional disadvantage of *habeas corpus* is that it does not carry an automatic stay, although it would seem likely that a court would preclude deportation pending consideration of a possibly meritorious *habeas corpus* challenge.

Habeas corpus has the advantage of giving a respondent a chance to win at two levels of federal court, rather than the one normally available in a petition for review. Further, in another case in which *habeas corpus* review of a deportation order was allowed, *Johns v. Department of Justice,* 653 F. 2d 884 (5th Cir. 1981), the court of appeals stated that if illegal actions not reflected in the record were alleged, the Court could hold a hearing. Such a factual hearing normally is not available in a petition for review. (But see 8 USC §1105 (a) (5) and 28 USC §2347 (c)).

President Charles Foster, San Bernsen and Leon Wildes, left, testifying before the Senate Immigration Subcommittee on proposed immigration law amendments last month. At right, President Foster chats with Senator Alan Simpson of Wyoming, chairman of the subcommittee. A full report on AILA testimony appears in the president's newsletter.

Immigration Journal's Bulletin Board

Beginning with the next issue, the Immigration Journal plans to publish a "bulletin board" in the nature of a classified section, for the exchange of information among the membership. Copy should be short enough to fit within the space of one column, one inch in depth, and should be mailed to the editor. There will be no charge for this service to AILA members.