STRIPPING JUDICIAL REVIEW DURING IMMIGRATION REFORM: THE CERTIFICATE OF REVIEWABILITY

Jill E. Family*

Congress contemplated a drastic change during the 2005-2006 immigration reform debate that sought to narrow access to the federal courts: a proposed certificate of reviewability requirement. The requirement would compel foreign nationals subject to an administrative removal order to obtain permission from a single federal court of appeals judge to access the federal courts. The U.S. House of Representatives endorsed the requirement, but the U.S. Senate dropped it from its slate of immigration reform priorities. Why did the requirement disappear from the Senate's agenda during an era of increased congressional restrictions on judicial review of immigration cases?

A definitive answer to such a question may be elusive, but this Article sheds some light by examining the fate of the certificate of reviewability from a public policy perspective. This public policy perspective leads to two observations about the legislative history. First, the proponents of the requirement advanced a characterization of the underlying policy problem that conflicted with one advanced by federal court of appeals judges who testified before the Senate Judiciary Committee. There is evidence that the judges' definition of the policy problem influenced the Committee to turn its back on the requirement. Second, the Senate's attention to other immigration reform policy problems may have distracted the Senate from the requirement. This focus on other policy conflicts meant that the Senate was not attending to the certificate of reviewability.

What can the legislative history of a failed immigration jurisdiction-stripping provision reveal? By examining the legislative history through a public policy lens, this Article enhances understanding of the legislative dynamic underlying an effort to strip immigration judicial review.

* Associate Professor of Law and Associate Director, Law & Government Institute, Widener University School of Law. Special thanks to Melissa Jacoby, Steve Legomsky, Paul Mullen, Cristi Schwarcz, and Mark Weidemaier for their comments and suggestions and to Melissa Vega for her excellent research assistance. I am also grateful for the insights shared with me at the Temple Political and Civil Rights Law Review Symposium, the Widener University School of Law Faculty Workshop, and the Law & Society International Conference.

I. INTRODUCTION

Congress contemplated a drastic change during the 2005-2006 immigration reform debate that sought to narrow access to the federal courts: a proposed certificate of reviewability requirement.[1] This requirement would compel foreign nationals subject to an administrative removal order to obtain permission from a single federal court of appeals judge to proceed with an appeal of the order.

The requirement is a part of a sustained effort to reduce the amount of process afforded to noncitizens.[2] It would implement a gatekeeping function where there is currently none and aims to ease the workload of the executive branch. The U.S. House of Representatives endorsed the requirement, but the U.S. Senate dropped it from its slate of immigration reform priorities. This Article questions why the requirement disappeared from the Senate's agenda and looks to components of the political science theory of agenda-setting to begin to decipher the legislative history.[3]

The legislative story of the certificate of reviewability requirement is fascinating because, during an era when restrictions on immigration judicial review are fairly common, the Senate quietly left the requirement behind as it moved ahead with its debate over immigration reform. The debate over the requirement did not attract a large crowd, nor was the debate loud. At most, the policy fight over the requirement was a small, quiet, and very contained battle.

[1] This Article encompasses the immigration reform debate in the 109th Congress that began in December 2005 and ended with the conclusion of the 109th Congress. The 110th Congress initiated its own immigration reform debate during the spring of 2007.

[2] *See infra* Part II.

[3] Elsewhere, the author has expressed objections to the certificate of reviewability. *See* Jill E. Family, *The Rush to Limit Judicial Review*, PERSP. ON IMMIGR., Sept. 2006, http://www.ailf.org/ipc/2006_september_perspective.shtml; *see also Immigration Litigation Reduction: Hearing on S. 2611 Before the S. Comm. on the Judiciary*, 109th Cong. 79-87 (2006), *available at* http://www.access.gpo.gov/congress/senate/pdf/109hrg/28339.pdf [hereinafter *Hearing on Judicial Review of Immigration Matters*] (Letter from Harvard Immigration and Refugee Clinical Program of Harvard Law School to Members of the Committee on the Judiciary, U.S. Senate (Mar. 21, 2006)). The author helped to draft and signed this letter signed by over sixty law professors. *See infra* note 109. This Article has a different focus. It tells the story of the legislative history and begins to decipher it from a public policy perspective.

To better understand the legislative history, this Article applies components of the work of two political scientists who have made influential contributions to the study of the legislative process: E.E. Schattschneider's theory of the displacement of conflicts and John W. Kingdon's theory of problem definition. These two theories, while certainly not the only theories regarding the legislative process, provide an interesting public policy lens to view the congressional consideration of the certificate of reviewability requirement.[4] This public policy perspective leads to two observations relevant to the question why the certificate of reviewability requirement disappeared from the Senate's agenda: (1) there is evidence the requirement's proponents did not win the battle over problem definition and (2) other immigration reform conflicts may have displaced the debate over the requirement. While a definitive answer to the question of why the Senate turned away from the requirement may be elusive and while application of these two theories leaves other questions unanswered,[5] these two theories help foster an understanding of the legislative dynamic and illustrate how a public policy perspective enhances understanding of an attempt to strip immigration judicial review.

In Part II, this Article will describe, as policy background, the status quo of administrative and judicial review of immigration removal orders at the start of the 2005-2006 immigration reform debate. Next, Part III tells the story of the legislative consideration of the certificate of reviewability requirement in both the House and the Senate. Part III also explains and applies Schattschneider's theory of the displacement of conflicts and Kingdon's theory of problem definition to the legislative history of the certificate of reviewability requirement.

II. Policy Background: Administrative and Judicial Review of Immigration Removal Orders

Beginning in December 2005, several provisions that would narrow federal court jurisdiction found their way into major immigration reform bills considered by both the U.S. House of Representatives and the U.S. Senate. But even before December of 2005, the immigration statutes contained significant and wide-ranging limits on federal court jurisdiction. These limits are a relatively recent phenomenon; the major congressional actions creating these limits

[4] As explained in Part III, these two theories are a part of a larger body of agenda-setting public policy scholarship. For examples in legal scholarship of applications of the work of these two theorists to study particular laws, see Mark Neal Aaronson, *Scapegoating the Poor: Welfare Reform All Over Again and the Undermining of Democratic Citizenship*, 7 Hastings Women's L.J. 213 (1996) (applying Schattschneider's theories to welfare reform); Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 Wis. L. Rev. 71 (applying Kingdon's theories to tort reform efforts); Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. Mem. L. Rev. 509 (2003) (applying Kingdon's work to bankruptcy reform legislation); William J. Vizzard, *The Gun Control Act of 1968*, 18 St. Louis U. Pub. L. Rev. 79, 93-94 (1999) (applying Schattschneider's work to gun control legislation); and James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683 (2001) (applying Kingdon's theories to the enactment of ERISA).

[5] *See infra* notes 226-27 and accompanying text.

occurred in 1996 and in mid-2005. This Part will explain these limits, give an overview of the immigration decision-making process governing the decision whether to remove an individual from the United States, and discuss noted problems with the administrative removal decision-making process. This information is necessary to understand the policy background relevant to the certificate of reviewability requirement.

An individual in removal proceedings faces an administrative process designed to render a final administrative decision as to whether an individual may remain in the United States. Proceedings commence when the government issues a charging document to a foreign national and that document is filed with the immigration court.[6] An immigration judge, an employee of a subunit of the Department of Justice (the Executive Office for Immigration Review), determines whether the individual is removable from the United States under the immigration statutes.[7] The immigration judge reaches this determination after a hearing where both the government and the foreign national, represented by counsel only if he or she provides his or her own, present testimony and evidence to the immigration judge.[8]

Both the government and the foreign national have an opportunity to appeal the immigration judge's decision to the Board of Immigration Appeals ("Board"), also located within the Executive Office for Immigration Review.[9] The Board renders the final administrative order. There *may* be limited judicial review of the final order by the federal judiciary.[10] An individual wishing to challenge the final administrative order accesses the federal courts by filing a petition for review in the regional court of appeals whose geographic reach encompasses the location of the immigration judge.[11] Each petition for review is assigned to a panel of three court of appeals judges. While there is a guarantee that three judges will examine the petition for review, that review may be short-lived if the panel determines it does not have jurisdiction over the final order. Federal court jurisdiction to review the final order cannot be presumed because Congress has enacted extensive limits on federal court jurisdiction over these cases.

The major legislative source for these restrictions is the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") as modified by the REAL ID Act of 2005.[12] The role of the federal courts in reviewing final administrative removal orders is quite narrow under the restrictions against judicial review Congress implemented through IIRIRA and the REAL ID Act. Congress has created categories of restrictions; there are restrictions based on the substance of the case, timing restrictions, and form restrictions.[13]

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[6] 8 C.F.R. § 1003.14(a) (2007).
[7] *Id.* §§ 1003.10, 1003.14.
[8] *Id.* § 1003.16.
[9] *Id.* §§ 1003.1(b), 1003.3.
[10] 8 U.S.C.A. § 1252 (West 2005).
[11] *Id.* § 1252(b)(2).
[12] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546; REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302.
[13] For further discussion of the restrictions on the federal courts contained in IIRIRA and REAL ID, see Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12

The major substantive restrictions include statutory provisions: (1) providing that no court has jurisdiction to review certain discretionary actions unless the challenge raises constitutional claims or questions of law; (2) narrowing access to the federal courts for those individuals deemed removable due to the commission of certain criminal acts, only allowing review of constitutional claims or questions of law related to the individual's removal order; and (3) creating an extremely limited role for the federal courts in reviewing expedited removal orders.[14]

One timing restriction IIRIRA added to the immigration statutes is 8 U.S.C.A. § 1252(b)(9), which states that all legal and factual questions "arising from any action taken" to remove a foreign national may only be heard within the confines of an appeal of a final administrative order.[15] This provision calls into question whether an individual may enlist federal court review if there is no final administrative order or if the individual wishes to bring an affirmative action against the government, such as a class action challenging a detention practice or challenging a deficiency in the administrative procedure afforded.[16]

As far as form restrictions, 8 U.S.C.A. § 1252(e)(1)(B) attacks class certifications under Federal Rule of Civil Procedure 23 in the context of expedited removal, and 8 U.S.C.A. § 1252(f)(1) provides some cryptic language that may restrict the use of class actions in a more general immigration context.[17]

After IIRIRA's jurisdiction-stripping measures took effect, litigation ensued, and the federal courts began to interpret IIRIRA's provisions. For example, in *INS v. St. Cyr*, the Supreme Court determined that the 1996 statutory language, as originally drafted, did not contain a clear statement of intent to eliminate habeas corpus jurisdiction.[18] Therefore, the Supreme Court sanctioned federal court jurisdiction over immigration cases filed under habeas corpus jurisdiction even if IIRIRA eliminated statutory jurisdiction over the same case.[19]

GEO. IMMIGR. L.J. 233 (1998); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411, 1439-65 (1997); Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11, 23-27 (2005-06); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 380-84 (2006); and Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1975-89 (2000).

[14] 8 U.S.C.A. § 1252(a)(2). Under expedited removal, certain foreign nationals may be removed from the United States without a hearing. Congress has removed federal court jurisdiction over the operation and implementation of the expedited removal program except for extremely narrow habeas corpus actions limited to determining whether the affected individual is within the class of persons to whom expedited removal applies. *See* 8 U.S.C. § 1225 (2000).

[15] 8 U.S.C.A. § 1252(b)(9).

[16] For further discussion of 8 U.S.C.A. § 1252(b)(9), see Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons from Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000).

[17] 8 U.S.C.A. §§ 1252(e)(1)(B), 1252(f)(1). For further discussion of section 1252(f)(1), see Family, *supra* note 13.

[18] INS v. St. Cyr, 533 U.S. 289 (2001).

[19] *Id.* at 312-14. For further discussion, see Family, *supra* note 13.

Congress responded to the Supreme Court's decision in *St. Cyr* through the REAL ID Act of 2005. Language in the REAL ID Act aimed to clarify that the restrictions on judicial review implemented through IIRIRA include the elimination of habeas corpus jurisdiction. Also through the REAL ID Act, Congress provided that the restrictions on review of certain discretionary decisions and of orders against certain foreign nationals with criminal convictions do not prevent the federal courts from reviewing constitutional claims or questions of law.[20]

While the courts were considering legal challenges to the jurisdictional restrictions imposed in 1996, Attorney General John Ashcroft implemented changes to the administrative adjudication process. In response to a backlog of cases awaiting administrative adjudication at the Board of Immigration Appeals, Attorney General Ashcroft implemented new regulations designed to make the Board more efficient.[21] These so-called "streamlining regulations" decreased the number of Board members from twenty-three to eleven, set single-member review as the default procedure, as opposed to three-member panel review, and expanded the use of boilerplate one-sentence decisions.[22] When Attorney General Ashcroft proposed the streamlining regulations, some argued that the changes would decrease the quality of administrative review.[23]

The number of immigration appeals filed in the federal courts has increased dramatically in recent years. One study reports that since the streamlining procedures took effect, not only has the number of final administrative immigration orders challenged in federal court increased greatly, but that there is also evidence that the percentage of decisions appealed has increased.[24] The courts' own statistics illustrate the magnitude of the change. According to the Administrative Office of the U.S. Courts, during the period from August 2002 through October 2004, the percentage of Board decisions challenged in the fed-

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[20] REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106, 119 Stat. 302, 310.

[21] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309 (proposed Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280); *see also* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

[22] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878-79. For a discussion of the history and context of these regulations, see Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 929-952 (2006) and Legomsky, *supra* note 13.

[23] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,887.

[24] John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 4 (2005); *see also* COMM. ON FED. COURTS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, THE SURGE OF IMMIGRATION APPEALS AND ITS IMPACT ON THE SECOND CIRCUIT COURT OF APPEALS (2004), *available at* http://www.abcny.org/pdf/report/AppealSurgeReport.pdf; DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT (2003), *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf.

eral courts jumped from 5% to 25%.[25] The U.S. Court of Appeals for the Ninth Circuit calculated that from 2001 to 2005, it experienced an increase of about 700% in the number of appeals of Board decisions filed in the circuit.[26] One scholar has reported that in the U.S. Court of Appeals for the Second Circuit, more immigration appeals are now filed than any other type of case.[27]

As federal court of appeals judges began to hear these increased numbers of immigration appeals, they also began to express frustration about the quality of the administrative decisions reaching their courts.[28] For example, Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit wrote that "the adjudication of [removal] cases at the administrative level has fallen below the minimum standards of legal justice."[29] Also, he referred to an immigration judge's determination of an asylum applicant's credibility as based "on grounds that, because of factual error, bootless speculation, and errors of logic, lack a rational basis," and further explained that "[t]hese have been common failings in recent decisions by immigration judges and the Board."[30] Then Chief Judge of the U.S. Court of Appeals for the Second Circuit, John M. Walker, Jr., explained that when his court is reviewing a Board decision, "[w]e don't have confidence, frankly, that the [Board] has really looked at the case."[31]

In response to concerns about the quality of work produced through the administrative process, Attorney General Alberto R. Gonzales ordered a comprehensive review of the process.[32] This review resulted in an August 9, 2006 announcement of twenty-two new administrative reforms. The suggested reforms included performance evaluations for immigration judges, the creation

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[25] U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 8 (2005), *available at* http://www.uscourts.gov/caseload2005/front/mar05JudBus.pdf.

[26] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 178-80 (Letter from Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Senators Arlen Specter and Patrick J. Leahy (Mar. 31, 2006) ("Our own numbers have gone from approximately 900 immigration appeals in 2001 to more than 6500 in 2005, an increase of about 700 percent.")).

[27] John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 968-70 (2006). This article contains other eye-popping statistics that are of worthy note.

[28] *See* David A. Martin, *Major Developments in Asylum Law Over the Past Year*, 83 INTERPRETER RELEASES 1889, 1889-91 (2006) (describing opinions within which judges expressed objections to the quality of the output of the administrative adjudication process); Gerald Seipp & Sophie Feal, *Overwhelmed Circuit Courts Lashing Out at the BIA and Selected Immigration Judges: Is Streamlining to Blame?*, 82 INTERPRETER RELEASES 2005 (2005) (same); Margaret Graham Tebo, *Asylum Ordeals*, A.B.A. J., Nov. 2006, at 36. For the perspective of a member of the Board of Immigration Appeals, see Grant, *supra* note 22, at 955 (responding to the charges that immigration judges and the Board are not performing their duties and declaring as "[a]pproaching the realm of urban myth" the perception that the Board is "under an unrelenting assault" from the federal courts).

[29] Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005).

[30] Pramatarov v. Gonzales, 454 F.3d 764, 765 (7th Cir. 2006).

[31] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 22. According to then Chief Judge Walker, over 90% of the immigration appeals in the Second Circuit are asylum cases. *Id.* at 5.

[32] *See* Press Release, Department of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.

of an immigration law exam for immigration judges and Board members, increased resources, and a scaling back of the streamlining reforms.[33]

By late 2005, the status quo of judicial review of immigration removal cases consisted of skyrocketing numbers of immigration appeals filed in the federal courts despite heavy restrictions on judicial review first implemented in 1996 and reinforced in mid-2005, and a growing chorus of federal judges expressing displeasure with the quality of the administrative decision-making process.

III. Deciphering the Legislative History of the Certificate of Reviewability

A. The Legislative History of the Certificate of Reviewability

1. Immigration Reform Background

The immigration reform legislation Congress considered in 2005-2006 addressed a plethora of immigration-related policy problems, including well-publicized debates over illegal immigration but also including a lesser-known discussion of the role of the federal courts in reviewing administrative removal orders.[34] The 2005-2006 immigration reform debate first rose to prominence in December 2005 when the U.S. House of Representatives turned its attention to H.R. 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005.[35] After only ten days of considering this immigration reform legislation, the House endorsed it.[36] A few months later, the U.S. Senate responded by initiating consideration of its own immigration reform bill. After a longer period of consideration than that afforded by the House, the Senate endorsed its own bill, S. 2611, the Comprehensive Immigration Reform Act of

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[33] *Id.* On December 7, 2006, the Department of Justice issued an interim rule adding four temporary members to the Board of Immigration Appeals. Board of Immigration Appeals: Composition of Board and Temporary Board Members, 71 Fed. Reg. 70,855 (Dec. 7, 2006) (to be codified at 8 C.F.R. pt. 1003); *see also Statement of Alberto R. Gonzales, Attorney General, Concerning Oversight of the Department of Justice, Before the S. Comm. on the Judiciary*, 110th Cong. 21-23 (2007), *available at* http://www.c-span.org/pdf/gonzales_testimony.pdf (discussing implementation of reforms and the Board's reduced reliance on summary decisions); *EOIR Reports Progress in Implementing Reforms*, 84 Interpreter Releases 885, 885-86 (2007).

[34] Major policy issues addressed by this round of immigration reform legislation included what to do about the population of individuals residing unlawfully in the United States, how to prevent further undocumented immigration to the United States, and what revisions, if any, should be made to the immigration laws that establish the numbers and characteristics of foreign nationals who are admitted legally each year. These interrelated and complex issues were the focus of and structured the immigration policy debate in Congress that began in late 2005.

[35] H.R. 4437, 109th Cong. (2005).

[36] H.R. 4437 was introduced in the House on December 6, 2005 and the House passed the bill on December 16, 2005, by a vote of 239-182.

2006.[37] The House and the Senate never conferred on these two bills and the 109th Congress did not enact major immigration reform legislation.[38]

The House and the Senate bills each took a different approach to immigration reform and together they reveal how that term can mean quite different things to different constituents. The House bill was driven by a plethora of increased enforcement efforts. Under the vision of the House bill, the key to alleviating the problem of illegal immigration is to get tough to encourage those currently here without permission to leave and to discourage future migrants from entering or remaining in the United States without permission. For example, the bill included a controversial provision that would make it a criminal offense to "assist[ ], encourage[ ], direct[ ], or induce[ ]" a person to reside in or remain in the United States "knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to reside in or remain in the United States" and included another controversial provision that would make unlawful presence in the United States a criminal offense (as opposed to a civil violation).[39] As to the issue of reform of the legal migration program, the House bill is silent.[40]

Evidence of the sentiment of the House can be found in the provisions of its bill, the title of its legislation, and in the House Report accompanying H.R. 4437. In the Report accompanying the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, under the section entitled "Background and Need for the Legislation," the first sentence explains that the "illegal alien[ ]" population in the United States is estimated at eleven million and that 500,000 "illegal aliens" enter the United States each year.[41] The second sentence begins, "[t]he United States has experienced a drastic increase in crime committed by illegal aliens . . . ."[42] The House Report acknowledges that despite recent enforcement-focused immigration bills, "significant changes" are necessary "to restore accountability for those who violate immigration laws, ensure the prevention of future illegal immigration, and to combat the rising prevalence of criminal behavior by illegal aliens."[43]

The contrasting sentiment of the Senate is revealed through the substance and title of its legislation. The Comprehensive Immigration Reform Act of 2006 responded to the illegal immigration issue with new enforcement mechanisms coupled with an earned legalization program that would create a path

[37] S. 2611, 109th Cong. (2006). S. 2611 was introduced in the Senate on April 7, 2006, after the Senate Judiciary Committee marked up the bill for a month. The Senate passed S. 2611 on May 25, 2006, by a vote of 62-36.

[38] In September 2006, both the House and Senate did endorse a bill providing for the construction of border fencing. President George W. Bush signed this bill on October 26, 2006. Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2639.

[39] H.R. 4437, §§ 202-203. Many clergy members spoke out against these provisions, among others. *See* Editorial, *The Gospel vs. H.R. 4437*, N.Y. TIMES, Mar. 3, 2006, at A22.

[40] One reporter described Representative F. James Sensenbrenner, Jr., the sponsor of H.R. 4437, as the "chief promoter of the House's 'enforcement first' approach to immigration overhaul, emphasizing border security, criminal penalties for illegal immigrants and sanctions against employers who hire them." Mark Leibovich, *'Pit Bull' of the House Latches on to Immigration*, N.Y. TIMES, July 11, 2006, at A1.

[41] H.R. REP. NO. 109-345, pt. 1, at 45 (2005).

[42] *Id.*

[43] *Id.* at 46.

towards legal status for many present in the United States without documentation.[44] The Senate bill responded to the issue of what to do about future illegal migration by connecting it to the question of whether the legal migration channels need reform. The Senate bill would have implemented a temporary worker program and would have made other adjustments to the legal migration quotas.[45] To the supporters of the House bill, the Senate proposal would reward lawbreaking and would constitute "amnesty."[46] To the supporters of the Senate bill, the House bill was unduly harsh, impractical, and an ineffective means to achieve its purported policy goal.[47]

For all of their differences, both the House and the Senate bills contain provisions that would have restricted the jurisdiction of the federal courts as a part of immigration reform.[48] As the next two Sections describe, the House endorsed one of those provisions, the certificate of reviewability requirement,

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[44] Titles I-III of the bill contain increased enforcement efforts while Titles IV-VI contain provisions to reform the legal immigration system, including a legalization program in Title VI. S. 2611, 109th Cong. (2006).

[45] *See* S. 2611, tits. IV-VI.

[46] Representative Sensenbrenner stated: "What's going on now, in calling it a pathway to citizenship or earned legalization, is not honest because it is amnesty." *Sensenbrenner: Senate Bill Amounts to Amnesty*, CNN.COM, May 26, 2006, http://www.cnn.com/2006/POLITICS/05/26/immigration/index.html.

[47] *See, e.g.*, Letter from Congressional Hispanic Caucus to Individual Senators, U.S. Congress (Apr. 4, 2006), *available at* http://www.aila.org/Content/default.aspx?docid=19023 (describing H.R. 4437 as "get-tough-only legislation that is high on symbolism, but short on workable solutions").

[48] For example, other than the certificate of reviewability requirement, both the House and Senate bills would have narrowed federal court jurisdiction over naturalization determinations. H.R. 4437, 109th Cong. § 609(e) (2005); S. 2611, § 204(g). Additionally, the Senate bill would have restricted the use of prospective relief in immigration cases and would have limited the role of the federal courts in reviewing legalization determinations. S. 2611, §§ 422, 601(c). Also, there are many judicial review-related issues embedded in immigration reform even when Congress is not directly addressing the role of the federal courts. Here are three examples. One, policymaking regarding the undocumented population can implicate the federal courts in several ways. If the policy solution is to remove these individuals from the United States, that solution implicates federal court involvement in reviewing administrative determinations to remove an individual. If the policy solution to the undocumented problem is to criminalize the behavior of overstaying the period of one's legal admission, policymakers must consider how the federal courts will handle an increase in the number of federal criminal cases. If the policy solution is to legalize the status of those here without legal status, up for policy consideration is the role of the federal courts in reviewing legalization determinations. Two, the issue of how to prevent further undocumented immigration has implications for the federal courts. One often-touted deterrent of illegal immigration is expedited removal, a process that allows certain foreign nationals to be removed from the United States without a hearing. The expansion of the use of expedited removal raises due process concerns and also narrows the pool of potential cases that might find their way into the federal courts. Also, an increased penalty on employers is often discussed as a way to control illegal immigration. This policy idea opens the door to more cases in the federal courts as at least some employers undoubtedly will challenge administrative determinations issued against them. Securing the borders-type legislation also implicates the federal courts. If border security initiatives result in more apprehensions along the border, this would lead to an increase in the number of immigration cases on the dockets of the federal courts in the border states. Three, as to the question of whether to reform the legal immigration system, implicit in the creation or modification of any immigration benefit program is the question of who adjudicates applications for benefits. If an administrative

in H.R. 4437. The Senate Judiciary Committee considered this requirement but ultimately suppressed it in favor of further study, and the full Senate did not return the requirement to its agenda.

2. The Certificate of Reviewability in the House

In December of 2005, the House, as a part of immigration reform, enacted the certificate of reviewability requirement, a provision that would have reformed the entire system of judicial review of immigration removal cases. Title VIII of H.R. 4437, entitled "Immigration Litigation Abuse Reduction," contains the requirement that would implement a gatekeeping function; it would impose an additional hurdle to three-judge panel consideration of a petition for review.[49] Under this plan, once an individual files a petition for review, the petition is stalled, and the government need not respond to it until a single court of appeals judge issues a certificate of reviewability.[50] A court of appeals judge may issue a certificate of reviewability only if the foreign national makes a "substantial showing that the petition for review is likely to be granted."[51] If the court of appeals judge fails to act on the request for a certificate of reviewability within a specified period (usually sixty days), the petition for review is "deemed denied."[52] Further, the decision whether to grant the certificate of reviewability "shall be the final decision for the court of appeals and shall not be reconsidered, reviewed, or reversed by the court of appeals through any mechanism or procedure."[53]

As described in Part II, the status quo contained no such gatekeeping function. A petition for review of a final administrative order proceeds directly to a three-judge panel. Of course, the panel first would need to determine if jurisdiction remained after the enactment of previous jurisdiction-stripping legislation.[54] But at the time the House endorsed H.R. 4437, there was no need to obtain permission to access the federal courts.

H.R. 4437 moved through the House at a fast clip. The House Judiciary Committee reported out the bill two days after its referral to the Committee, and the bill passed the House eight days later under tight restrictions from the Rules Committee.[55] This ten-day period ended one week before Christmas, and, during that same period, the House considered much legislation, including

agency adjudicates the applications, policymakers must consider the shape of federal court review over those administrative determinations.

[49] H.R. 4437, § 805.

[50] *Id.* § 805(b). The Senate considered a version that gave the federal judge considering the application for a certificate the option of requesting a brief from the government on the question of whether to grant the certificate of reviewability. S. COMM. ON THE JUDICIARY, 109TH CONG., CHAIRMAN'S MARK § 707 (Comm. Print EAS06174 2006) (on file with author).

[51] H.R. 4437, § 805(b). The version the Senate considered required the applicant to make out a prima facie case. S. COMM. ON THE JUDICIARY, 109TH CONG., CHAIRMAN'S MARK § 707(b).

[52] H.R. 4437, § 805(b).

[53] *Id.*

[54] *See supra* Part II.

[55] The bill was referred to the House Judiciary Committee on December 6, 2005. The Committee considered and reported the bill on December 8, 2005. The full House passed the bill on December 16, 2005. Thomas, Bill Summary & Status for the 109th Congress, http://

a debate over the reauthorization of the PATRIOT Act, the appropriateness of the public display of symbols of Christmas, and a debate over the war in Iraq.[56]

H.R. 4437 was the product of the House Committee on the Judiciary, then chaired by Representative F. James Sensenbrenner, Jr. The origins of H.R. 4437 can be traced to a border security bill developed in the Homeland Security Committee.[57] When the Judiciary Committee took up consideration of the Homeland Security border bill, it added many provisions, including the certificate of reviewability requirement.[58] All in one day, December 8, 2005, the House Judiciary Committee marked up H.R. 4437 and voted, 23-15, to report the bill favorably as amended.[59] The Judiciary Committee held no hearings on H.R. 4437 and considered only two amendments to the bill.[60] On December 14, 2005, the bill was placed on the Union Calendar and the full house prepared to debate the bill.[61]

The full house debated the merits of H.R. 4437 for less than two days. The House adopted two resolutions governing deliberation of the bill.[62] The subsuming resolution allowed for two hours of general debate in the Committee of the Whole and waived all points of order.[63] The resolutions allowed consid-

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thomas.loc.gov/bss/109search.html (type "H.R. 4437" into "enter search," select "H.R. 4437" and follow "All Congressional Actions" link) (last visited Jan. 31, 2008).

[56] *See* H.R. Res. 579, 109th Cong. (2005) (resolution on the public display of the symbols of Christmas introduced in the House on December 6, 2005, and agreed to on December 15, 2005); H.R. Res. 612, 109th Cong. (2005) (resolution expressing the commitment of the House to achieving victory in Iraq introduced in the House on December 15, 2005, and agreed to on December 16, 2005). Also, on December 14, 2005, the House agreed to the Conference Report accompanying H.R. 3199, which became Public Law 109-177, the USA Patriot Improvement and Reauthorization Act of 2005.

[57] Representatives Sensenbrenner and King introduced the legislation that the Homeland Security Committee marked up first. 151 CONG. REC. H11657, H11801 (daily ed. Dec. 15, 2005). The Homeland Security bill was H.R. 4312, the "Border Security and Terrorism Prevention Act of 2005." Titles I, III, IV, and V of H.R. 4437 are taken directly from H.R. 4312. H.R. REP. NO. 109-345, pt. 1, at 461 (2005).

[58] H.R. REP. NO. 109-345, pt. 1, at 1-2, 459.

[59] *Id.* at 46. After the bill left the Judiciary Committee, it traveled back to the Homeland Security Committee, which favorably acted upon the Judiciary Committee's revisions on December 13, 2005. Thomas, Bill Summary & Status for the 109th Congress, *supra* note 55. The Education and the Workforce and the Ways and Means Committees were each given one day to consider the Judiciary Committee's revised bill. *Id.*

[60] H.R. REP. NO. 109-345, pt. 1, at 46-47. Both amendments were voted down. One would have removed the mandatory minimum sentences contained in the bill and the other contained a proposal to create a temporary worker visa program. *Id.* Representative Sensenbrenner ruled as nongermane amendments offered to those portions of H.R. 4437 that were lifted from H.R. 4312. *Id.* at 461.

[61] Thomas, Bill Summary & Status for the 109th Congress, *supra* note 55. The Union Calendar applies when the House is sitting as a Committee of the Whole. When the House meets as a Committee of the Whole, the entire House meets as a committee. This allows for expedited action. *See* CSPAN Congressional Glossary, http://www.c-span.org/guide/congress/glossary/comwhole.htm (last visited Jan. 31, 2008). Additional information can be found at the Library of Congress, Thomas, http://thomas.loc.gov/home/votes/whole.html (last visited Jan. 31, 2008).

[62] H.R. Res. 610, 109th Cong. (2005); H.R. Res. 621, 109th Cong. (2005); *see also* H.R. REP. NO. 109-347, at 1 (2005); H.R. REP. NO. 109-350, at 1 (2005).

[63] H.R. Res. 610.

eration of only those amendments attached to the Rules Committee Report.[64] Additionally, those amendments approved for consideration were not themselves subject to amendment.[65] In the Rules Committee, a proposal to broaden the scope of the bill to include reform of immigration benefit programs and a proposal to not report the rule were defeated.[66] The House floor debate began on December 15, 2005, in the late afternoon.[67] The debate suspended that night.[68] The House resumed consideration of the bill on December 16, 2005; amendment debate resumed in the mid-afternoon.[69] That night, the bill passed 239-182.[70] The amendments debated on the House floor did not focus on the certificate of reviewability requirement.[71]

This legislative history reveals that the House quickly considered H.R. 4437 during a busy period and paid little attention to the certificate of reviewability. This Article enhances the legislative history in both the House and the Senate by incorporating interviews with individuals ("policy insiders") who either participated in or have personal knowledge of the congressional debate. These individuals do not compose the universe of those who played a part in the legislative history; nor are they a representative sample. Their insights are simply that—insights of individuals who were close to the action and are reported here to augment the legislative history. These insights are valuable because they breathe life into the legislative history; they animate the legislative history, and they help to view the legislative history from a public policy perspective.[72]

For example, interviews with policy insiders provide further perspective on the origins of the certificate of reviewability requirement and on its consideration in the House. Some policy insiders stated they would not be surprised if the idea originated within the executive branch in the Department of Jus-

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[64] *Id.*

[65] *Id.*

[66] H.R. REP. NO. 109-347, at 4; H.R. REP. NO. 109-350, at 2. The proposal to broaden the scope of the bill was defeated once five to seven and a second time five to eight.

[67] 151 CONG. REC. H11657, H11800 (daily ed. Dec. 15, 2005).

[68] *Id.* at H11845.

[69] 151 CONG. REC. H11883, H11940 (daily ed. Dec. 16, 2005).

[70] *Id.* at H12013. A motion to recommit failed. *Id.*

[71] The record does contain some passing references to provisions of the bill as eroding due process rights. *See, e.g.*, *id.* at H11898 (statement of Rep. Jackson-Lee) ("And it is important to recognize that they have amendments that would take away the very essence of the Constitution, which abides and believes in due process and the right to access the courts."); 151 CONG. REC. H11657, H11838 (daily ed. Dec. 15, 2005) (statement of Rep. Green) ("[T]his bill closes the door to the courthouse for many immigrants."). There was some discussion of the expansion of the expedited removal program and the burden on the federal courts envisioned as a result of making unlawful presence in the United States a criminal act. *See, e.g.*, 151 CONG. REC. H11883, H11994 (daily ed. Dec. 16, 2005) (statement of Rep. Stark); *id.* at H11958-59 (statement of Rep. Nadler); *id.* at H11952 (statement of Rep. Sensenbrenner). Also, some mentioned the need for more judges. *See, e.g.*, 151 CONG. REC. H11657, 11838 (daily ed. Dec. 15, 2005) (statement of Rep. Lofgren).

[72] During the period from October 18, 2006 to December 6, 2006, the author spoke with eight policy insiders. The author generated the list of those contacted by conducting interviews and asking for referrals. Some declined to be interviewed. To preserve anonymity, the identity of each policy insider is represented by a letter. Interview notes are on file with the author. Interviews with A, B, C, D, E, F, G & I (Oct. 18 - Dec. 6, 2006).

tice.[73] There is at least one piece of evidence to support this speculation. In a hearing before the Senate Judiciary Committee, Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, Department of Justice, said, "And one way to reduce the rate of appeal, of course, is the c*ertificate of reviewability idea I had*."[74]

A common explanation among the insiders for the lack of debate about the certificate of reviewability requirement in the House is the institutional structure of the House. Policy insiders described the very limited ability of the minority to influence or amend legislation in the House and the ability of committee chairs in the House to get what they want without compromising.[75] One policy insider described the House process as "closed."[76] Another explained that in the House, "Sensenbrenner and his staff controlled what stayed and what went,"[77] while another described Senator Specter, then Chairman of the Senate Judiciary Committee, as open to discussion.[78]

House members themselves expressed concern about speed and a lack of deliberation in the House. Representative Jeff Flake told the *Washington Post*, "I think in the end we would have been better off had we been more deliberative."[79] The *Washington Post* reported that "[w]ith so little debate, media coverage was minimal, and what coverage there was got little notice in the holiday bustle, Republicans say."[80] Several members voiced complaints during the House floor debate that the bill was being forced through the chamber without necessary discussion or opportunity to consider amendments or alternative proposals.[81] Additionally, members of the Homeland Security Committee com-

[73] Interviews with A, B, D, E, F & I, *supra* note 72.

[74] U.S. Senate Judiciary Committee Holds a Hearing on Judicial Review of Immigration Matters, eMediaMillWorks Political Transcript (Apr. 3, 2006) (on file with author) (emphasis added). The Government Printing Office Committee hearing document records this statement as "and one way to reduce the rate of appeal, of course, is this Certificate of Reviewability I have." *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 38. Another possible source comes from across the northern border. Professor David A. Martin has discussed a Canadian procedural model for asylum cases where applicants for asylum in Canada must obtain "leave to appeal" as a gatekeeping measure. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1363 (1990); *see also* Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1057 (2006).

[75] Interviews with A, C, D, E, F, G & I, *supra* note 72.

[76] Interview with D, *supra* note 72. D reported that even members of the House Judiciary Committee did not see the bill until the mark-up session.

[77] Interview with G, *supra* note 72.

[78] Interview with A, *supra* note 72. D similarly commented that Senator Specter allowed issues to be vetted and debated. Interview with D, *supra* note 72.

[79] Jonathan Weisman, *Immigrant Bill Fallout May Hurt House GOP*, WASH. POST, Apr. 12, 2006, at A1.

[80] *Id.*

[81] 151 CONG. REC. H11657, H11671 (daily ed. Dec. 15, 2005) (statement of Rep. Thompson) ("[T]his rule demonstrates that this legislation is simply not ready for consideration by the House. . . . [W]e need to go slow and think this thing through."); *id.* at H11673 (statement of Rep. Hastings) ("Even worse is the manner by which this legislation is being brought to the floor today."); *id.* at H11675 (statement of Rep. Hayworth) ("Here we are rushing toward the Christmas holiday break and at the last nanosecond of the 11th hour, we are going to debate this important question."); *id.* at H11675-76 (statement of Rep. Upton)

plained that the Judiciary Committee turned a deliberate, bi-partisan effort into a divisive and controversial bill.[82]

While the legislative history in the House does not include much discussion about the certificate of reviewability requirement, it does contain some information about how opposing forces viewed the policy problem underlying the requirement. The Judiciary Committee issued a Report to accompany H.R. 4437, which contains the majority's description of the problem that instigated the certificate of reviewability requirement. The majority explained that the requirement is needed to temper the dramatic increase in the number of petitions for review of immigration removal decisions filed in the federal courts.[83] The Judiciary Committee concluded that the "vast majority" of the petitions for review are denied and that, therefore, the increase in the number of petitions filed is due to an increase in the filing of meritless appeals.[84] According to the Report, the certificate of reviewability requirement creates a screening mechanism that "focuses limited judicial resources on those petitions for review with the greatest likelihood of proving meritorious."[85] According to the majority, the certificate of reviewability provides the policy solution to the policy problem of the substantial increase in the number of petitions for review filed in the federal courts.

("Amendments were . . . rejected by the Rules Committee. That means if this rule passes, there will be no debate, let alone a vote on whether these provisions should be included."); *id.* at H11677 (statement of Rep. Hastings) ("[T]he House rule essentially forecloses any meaningful debate on these important areas."); *id.* at H11803 (statement of Rep. Jackson-Lee) ("But, frankly, I think it is overwhelming to expect that, in this short period of time, that we can answer all of the concerns of the American people . . . ."); *id.* at H11805 (statement of Rep. Sanchez) ("We should not be debating a bill thrown together at the 11th hour before we adjourn for recess . . . ."); *id.* at H11818 (statement of Rep. Markey) ("Shutting out more than 100 amendments certainly represents serious 'sins of omission' by this Republican Congress."); *id.* at H11853 (statement of Rep. Farr) ("I wish this debate had been held in committee and that something more than just the last-minute long list of amendments could be debated right here tonight."); 151 CONG. REC. H11883, H11894 (daily ed. Dec. 16, 2005) (statement of Rep. Hastings) ("I rise to express my strong opposition to this restrictive rule . . . . Republicans are again allowing important and critical debates to happen behind the closed doors of the Republican Conference rather than on the House floor in the eye of the public.").

[82] 151 CONG. REC. H11657, H11671 (daily ed. Dec. 15, 2005) (statement of Rep. Thompson) ("The Committee on the Judiciary has so loaded up our bill with controversial immigration proposals that now it is opposed by every reasonable business, immigration or human rights group in America."); *id.* at H11809-10 (statement of Rep. Sanchez) ("[W]e worked on this bill in a very bipartisan way, at least the initial King-Sanchez bill that came to the Homeland Committee. We did it over a period of 2 months. . . . [W]e had a real debate, and we took our time, and we understood what we were talking about. And then this bill was taken over by the Judiciary Committee, usurped, with many, many more pieces put on, pieces that do not make any sense and really are not about border security."); *id.* at H11811 (statement of Rep. Pascrell) ("We didn't pass this out of the Homeland Security Committee.").

[83] H.R. REP. NO. 109-345, pt. 1, at 77 (2005); *see supra* notes 24-27 and accompanying text.

[84] H.R. REP. NO. 109-345, pt. 1, at 77.

[85] *Id.* at 77-78. Interestingly, here the Report does not discuss the administrative adjudication troubles explained in Part II.

The dissenting view of the Judiciary Committee offers a different perspective on the problem underlying the certificate of reviewability requirement. The dissenting view cites to "scathing criticisms emanating even from conservative federal courts" of the administrative adjudication process.[86] The dissenting view questions the wisdom of further restricting federal court review at a time when federal courts are pointing out serious deficiencies in the administrative review process.[87] Specifically, the dissenting view alleges that the certificate of reviewability requirement "initiates an unprecedented certiorari process for Article III court appeals, at a time when the circuit courts have become increasingly critical of the quality of agency decision making."[88] Thus, the dissenting view challenges the majority's perception of the underlying problem.

Expressing another perspective on the nature of the policy problem, one policy insider explained that the policy problem addressed by the certificate of reviewability requirement has "nothing to do with immigration reform."[89] According to this policy insider, immigration reform addresses the problem of mass undocumented immigration while problems with the adjudication system have "zero to do with immigration reform policy-wise."[90] This insider stated that the inclusion of the certificate of reviewability requirement within an immigration reform bill had "much more to do with a broader philosophical issue than immigration reform."[91]

3. The Certificate of Reviewability in the Senate

The Senate Judiciary Committee considered the certificate of reviewability requirement, but ultimately turned away from it. The full Senate did not disturb this decision. The enacted Senate immigration reform bill, S. 2611, did not include the certificate of reviewability requirement.[92] Instead, the Senate approved provisions that would bolster and change the administrative adjudication process and called for study of the role of the federal courts in reviewing removal orders.[93]

With regard to the study of the role of the federal courts, the endorsed Senate bill would have required the Comptroller General to study the immigra-

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[86] *Id.* at 474.

[87] *Id.*

[88] *Id.* at 476.

[89] Interview with D, *supra* note 72.

[90] *Id.*

[91] *Id.*

[92] S. 2611, 109th Cong. § 707 (2006).

[93] *Id.* §§ 701-704, 707. As far as the administrative review process is concerned, the Senate bill would have added to the number of attorneys working for the government at all levels of the administrative adjudication process. *Id.* § 701(a)-(c). It also would have set formal qualifications for Board of Immigration Appeals members and immigration judges in addition to changing some of the internal functioning of the Board implemented through the streamlining regulations. *Id.* §§ 702(b), 703(a). It would have set three-member panel review as the default procedure and would have restricted the use of the affirmance without opinion procedure. *Id.* § 702(e)-(i).

tion appeals process.[94] Specifically, the bill would have required the Comptroller General to consider whether all immigration appeals should be consolidated into one existing court of appeals, or consolidated into a centralized appellate court consisting of temporarily assigned judges, or whether a panel should be created to reassign immigration appeals among circuits.[95] In studying the immigration appeals process, according to the bill, the Comptroller General would have had to consider resource costs, the impact on the circuit courts of appeals, the effect on litigants, whether any case management techniques should be implemented (including a certificate of reviewability requirement or a summary dismissal procedure), and other possible reforms.[96]

The Senate demoted the certificate of reviewability requirement to a subunit of a topic for further study. The remainder of this Section describes the legislative processes behind the Senate's conclusion to omit the certificate of reviewability, which would have reformed the role of the federal courts, in favor of administrative reform. This Section includes a discussion of the Senate Judiciary Committee's treatment of the provision, a description of a special hearing the Committee held on the issue of judicial review over immigration cases, and a narrative describing the role of the provision during the Senate floor debate over immigration reform. Also, this Section continues to incorporate the insights of policy insiders.

a. Senate Judiciary Committee Mark-Up

After the passage of H.R. 4437, immigration reform focus turned to the Senate. In late February 2006, a "Chairman's Mark" of a Senate immigration reform bill surfaced.[97] This "Chairman's Mark," proposed by the then Chairman of the Senate Judiciary Committee, Senator Arlen Specter, became the foundation of negotiations in the Senate Judiciary Committee.[98] Title VII of the Chairman's Mark contained a version of the certificate of reviewability requirement.[99] Differing from H.R. 4437, Title VII of the Chairman's Mark also contained a provision that would consolidate immigration cases presently filed in the regional courts of appeals in the U.S. Court of Appeals for the Federal Circuit and contained reforms to the administrative adjudication process.[100]

The certificate of reviewability requirement contained in the Chairman's Mark differed from that in the House bill in only slight ways. The slight differences perhaps reveal that Senate drafters thought the House version too harsh, but nevertheless the Chairman's Mark incorporated the concept of creating a

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[94] *Id.* § 707. Lenni Benson has discussed the need for further study of the immigration appeals process. Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405.

[95] S. 2611, § 707(b).

[96] *Id.* § 707(c).

[97] Apparently, Senator Specter distributed to the Committee an earlier version of an immigration reform bill in November of 2005. Interviews with C & I, *supra* note 72. It is unclear whether this draft contained the certificate of reviewability requirement.

[98] S. COMM. ON THE JUDICIARY, 109TH CONG., CHAIRMAN'S MARK (Comm. Print EAS06090 2006) (on file with author).

[99] *Id.* § 707(b).

[100] *Id.* §§ 701, 702, 711-714.

gatekeeping mechanism to limit access to judicial review.[101] The certificate of reviewability provision in the Chairman's Mark differed from that in the House bill in terms of the standard of proof. Under the Chairman's Mark, the standard for issuance of a certificate of reviewability would be establishment of a prima facie case as opposed to the substantial showing required by H.R. 4437.[102] Also, a revised version of the Chairman's Mark, dated March 6, 2006, would have provided federal courts the option of requesting, before a certificate of reviewability issues, a government brief in response to the petition for review.[103]

The Senate Judiciary Committee formally began debate on the Chairman's Mark on March 2, 2006. The Committee worked its way through the titles of the Chairman's Mark under intense pressure to report out a bill before March 27, 2006. Former Majority Leader William H. Frist announced that the Senate would proceed with consideration of his immigration reform bill, S. 2454, if the Judiciary Committee did not report out a bill by March 27.[104] In fact, Senator Frist introduced his bill on March 16, 2006, as the Committee continued its work through the Chairman's Mark.[105] Members of the Judiciary Committee were displeased with this deadline and expressed frustration with the majority leader for creating an artificial time pressure on the Committee.[106] The time

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[101] Also, the added consolidation provision in the Senate draft is further evidence of a general desire to restrict judicial review.

[102] S. COMM. ON THE JUDICIARY, 109TH CONG., CHAIRMAN'S MARK § 707(b). Also, because the Chairman's Mark envisioned consolidation of all immigration appeals in the Federal Circuit, the Mark would assign all petitions for review to one judge of the Federal Circuit. *Id.*

[103] S. COMM. ON THE JUDICIARY, 109TH CONG., CHAIRMAN'S MARK § 707(a) (Comm. Print EAS06174 2006) (on file with author).

[104] There were reports that Senator Frist announced in February his attention to take up immigration reform on the Senate floor on March 27, 2006. Suzanne Gamboa, *Immigration Debate Divides Republicans*, ASSOCIATED PRESS, Mar. 2, 2006, *available at* Westlaw, 3/2/06 APWIRES 18:53:03.

[105] Securing America's Borders Act, S. 2454, 109th Cong. (2006).

[106] *See* Letter from Senators Patrick Leahy, Edward M. Kennedy, and Dianne Feinstein to Majority Leader William H. Frist (Mar. 15, 2006), *available at* http://leahy.senate.gov/press/200603/031506a.html ("We are concerned, however, that an immigration bill could be debated on the floor even if that legislation is not a complete product of the thoughtful deliberations of the Senate Judiciary Committee. . . . Arbitrary deadlines and half-finished proposals serve neither the Senate nor the country well."). Senator Specter, on the floor of the Senate, said on March 29, 2006: "While the leader is still on the floor, I say in his presence, his bill is up about noon tomorrow. The committee bill will be a replacement bill which will form the substance of the Senate deliberation." 152 CONG. REC. S2483, S2513 (daily ed. Mar. 29, 2006) (statement of Sen. Specter). Senator Sessions also expressed frustration with the speed with which the Judiciary Committee debated substantial alterations to the Chairman's Mark. 152 CONG. REC. S4847, S4918 (daily ed. May 22, 2006) (statements of Sen. Sessions). Also, Minority Leader Harry Reid, referring to the "tight timeframe" imposed upon the Senate Judiciary Committee, stated that "[t]here probably should have been more hearings" and called the act of meeting Senator Frist's deadline a "miracle." 152 CONG. REC. S4529, S4530, S4533 (daily ed. May 15, 2006) (statement of Sen. Reid). Senator Specter also explained, "My preference would have been to have approached the entire subject of immigration review with a more thorough analysis . . . ." *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 1.

pressure was intensified by the fact that there was a scheduled Senate recess the week of March 20, 2006.[107]

The Senate Judiciary Committee met six times to debate the bill, including a rare Monday post-recess session to beat Majority Leader Frist's deadline.[108] For the most part, the Committee worked through the Chairman's Mark title by title in order. The certificate of reviewability provision was located in Title VII, the last title of the bill, and the Committee did not reach debate of Title VII before Senator Frist's deadline. While the Committee was engrossed in other titles of the bill, it received letters from judges, law deans, law professors, legal associations, and others expressing concerns with the Chairman's Mark, including the certificate of reviewability provision in Title VII.[109] Senator Specter

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[107] *See* U.S. Senate, Tentative 2006 Legislative Schedule: 109th Congress, 2nd Session, http://www.senate.gov/pagelayout/legislative/two_column_table/2006_Schedule.htm (last visited Jan. 31, 2008).

[108] Senator Specter stated: "We were given an impossible deadline, but we met it. We met it by having a marathon markup on a Monday, which is unheard of around here . . . ." 152 CONG. REC. S3347, S3350 (daily ed. Apr. 7, 2006) (statement of Sen. Specter).

[109] *See Hearing on Judicial Review of Immigration Matters*, *supra* note 3 (Letter from the Judicial Conference of the United States to Senator Arlen Specter (Mar. 31, 2006); Letter from Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Senators Arlen Specter and Patrick J. Leahy (Mar. 31, 2006); Letter from Sidney R. Thomas, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Senators Arlen Specter and Patrick J. Leahy (Mar. 31, 2006); Letter from Alex Kozinski, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, to Senator Arlen Specter (Mar. 30, 2006); Letter from John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, to Senators Arlen Specter and Patrick J. Leahy (Mar. 28, 2006); Letter from the Judicial Conference of the United States to Senator Arlen Specter (Mar. 23, 2006); Letter from John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit to Senators Arlen Specter and Patrick J. Leahy (Mar. 23, 2006); Letter from Center for Gender & Refugee Studies to Senator Arlen Specter (Mar. 21, 2006); Letter from Harvard Immigration and Refugee Clinical Program of Harvard Law School to Members of the Committee on the Judiciary, U.S. Senate (Mar. 21, 2006); Letter from John T. Noonan, Jr. and Kim McLane Wardlaw, U.S. Circuit Judges, to Senator Arlen Specter (Mar. 21, 2006); Letter from Lenni B. Benson, Professor of Law, N.Y. Law Sch., and Steven Yale-Loehr, Adjunct Professor, Cornell Law Sch., to Senator Arlen Specter (Mar. 16, 2006); Letter from Human Rights First to Senator Arlen Specter (Mar. 16, 2006); Letter from People for the American Way to the United States Senate (Mar. 15, 2006); Letter from Richard A. Posner, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, to Senator Richard J. Durbin (Mar. 15, 2006); Letter from Retired Courts of Appeals Judges to Senator Arlen Specter (Mar. 15, 2006); Letter from Law School Deans and Legal Scholars to Senator Arlen Specter (Mar. 14, 2006)); *see also* Letter from the American Bar Association to Senator William H. Frist (Mar. 27, 2006), *available at* http://www.abanet.org/poladv/letters/immigration/060327letter_firstletter.pdf (addressing a "one-judge certification process" in Senator Frist's immigration reform bill); Letter from Los Angeles County Bar Association and Public Counsel Law Center to the United States Senate Committee on the Judiciary (Mar. 23, 2006) (on file with author); Letter from organizations and individuals to the United States Senate (Mar. 6, 2006) (sign-on letter signed by 84 organizations and 117 individuals) (on file with author); Letter from Brennan Center for Justice to Senators Arlen Specter and Patrick J. Leahy (Mar. 1, 2006) (on file with author); Letter from American Bar Association to Senator Orrin Hatch (Feb. 28, 2006), *available at* http://www.abanet.org/publicserv/immigration/senate_jud_ltr_22806.pdf.

declared at the end of the Committee's last mark-up session that the Committee would send the bill to the floor without Title VII and would call a hearing on issues related to Title VII. Senator Specter stated:

> On Title VII . . . There have been a number of objections to consolidating the appeals in the Federal Circuit and we have not had a chance to really hear a number of people. Senator Durbin solicited the opinion of the distinguished Seventh Circuit judge, I heard from the Chief Judge of the Second Circuit and what I am thinking about, unless there is major objection, is to report the bill without Title VII and to have a hearing on Title VII a week from today. . . . To hear the Chief Judge of the Federal Circuit and the others to try to learn a little bit more about what we are doing.[110]

b. Hearing on Judicial Review of Immigration Matters

As the Judiciary Committee bill moved onto the floor without Title VII, Senator Specter held his hearing on judicial review of immigration cases. Opening his April 3, 2006 hearing, Senator Specter explained that the Committee considered immigration reform under "an expedited schedule" and had set aside action on Title VII of the Chairman's Mark "until we could make further inquiries to find out what we ought to be doing on judicial review and to hear from experts."[111] At the hearing, three Senators (Senators Cornyn, Sessions, and Specter) are recorded as speaking for a few hours with five federal judges, one law professor, and one representative of the Department of Justice.[112] This hearing added to the trail of letters mentioned above, which addressed provisions of Title VII. The scope of the hearing was broader than the certificate of reviewability requirement. The Committee and the witnesses also discussed the proposal to consolidate all immigration cases in the Federal Circuit and to reform the administrative system.

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[110] Videotape: Senate Judiciary Committee Mark-Up Hearing, CSPAN recording (Mar. 27, 2006) (on file with author). Senator Specter also described the contents of Title VII:

> We are making a fundamental change and taking, in making a number of changes on immigration judges and on the Board of Immigration Appeals. We are going to increase the number back to 23, the original number on the Chairman's Mark. And we are going to seek to have the Board of Immigration Appeal write opinions so that the appeals to the circuits will not bog down the circuits as they are now.

Id.

[111] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 1.

[112] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3. Senator Leahy issued an opening statement dated April 3, 2006. *Id.* at 91-93. The witnesses were Chief Judge Paul R. Michel, U.S. Court of Appeals for the Federal Circuit, Chief Judge John M. Walker, Jr., U.S. Court of Appeals for the Second Circuit, Judge Carlos T. Bea, U.S. Court of Appeals for the Ninth Circuit, Senior Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit, Judge John McCarthy Roll, U.S. District Court for the District of Arizona, Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, Department of Justice, and Professor David Martin, University of Virginia School of Law. *Id.* at III. At the time, Judges Michel and Walker were members of the Executive Committee of the Judicial Conference. *Id.* at 3.

Both at the hearing and in the letters addressed to the Judiciary Committee, the certificate of reviewability requirement met with concern. The objections fell into two major categories: fairness and fit. These objections reveal a fundamental disagreement between the requirement's proponents and opponents as to the nature of the policy problem underlying the certificate of reviewability requirement.

Judges expressed a concern that the certificate of reviewability requirement is unfair because it would not provide for meaningful review of immigration cases.[113] If a case reaches the court of appeals without a reasoned final administrative opinion (due to the changes instituted at the administrative review level) and the government is not required to file a brief, not only would the workload of federal judges increase, but the requirement would also promote judicial decision-making based on undeveloped records and legal arguments. Either the single gatekeeper judge would be required to spend large amounts of time developing the record and arguments (and thus negating any efficiency benefits) or the single gatekeeper judge would be cornered into engaging in a cursory review to keep up with the pace of petitions.[114]

If the decision whether to issue a certificate of reviewability is not based on a complete review and no certificate issues, no Article III judge will ever engage in a full review of the case. Thus, the certificate of reviewability requirement is different from the certificate of appealability required in certain habeas corpus cases.[115] As explained by Judge Newman of the U.S. Court of Appeals for the Second Circuit in response to the claim that the certificate of reviewability requirement simply would put immigration cases on par with habeas corpus cases:

> It would be an extraordinary step to authorize one federal circuit judge to cut off all appellate review of a case involving individual liberty that has not been given the consideration to be expected from the two- and usually three-tiered system of a state judicial system, followed by the decision of a federal district judge.[116]

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[113] *See id.* at 112-14 (Letter from the Judicial Conference of the United States to Senator Arlen Specter (Mar. 31, 2006)); *id.* at 108-11 (Letter from the Judicial Conference of the United States to Senator Arlen Specter (Mar. 23, 2006)); *id.* at 167-69 (Letter from Richard A. Posner, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, to Senator Richard J. Durbin (Mar. 15, 2006)).

[114] *See id.* at 137-38 (statement of C.J. Paul R. Michel, United States Court of Appeals for the Federal Circuit); *id.* at 191 (statement of C.J. John M. Walker, Jr., United States Court of Appeals for the Second Circuit); *id.* at 17 (Then Chief Judge Walker testified: "But the problem is, as Judge Newman has pointed out, that these cases really don't—really turn on credibility issues, so they're fact intensive, and a prima facie case could be made out by the alien, but then you would have to assess credibility, and whether the IJ has really focused on credibility in reaching that determination, that there was no merit to the case. So that is going to require essentially the same investigation by the judge in reviewing the case as currently occurs."); *id.* at 26 (Chief Judge Michel testified that for cases hinging on credibility determinations, "there are no shortcuts.").

[115] 28 U.S.C. § 2253(c)(1) (2000).

[116] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 154 (statement of J. Jon O. Newman, United States Court of Appeals for the Second Circuit). Professor David Martin described that "screening mechanisms of this kind ordinarily presuppose the availability of robust review of the initial decision elsewhere. With the 2002 changes at the [Board], unfortunately, this is not the case in many of the cases in immigration law." *Id.* at 30 (statement of Professor David A. Martin, University of Virginia Law School). On the

Beyond fairness, many federal judges questioned whether the proposed policy solution of the certificate of reviewability requirement would meet the purported goal of the policy change—to lower the number of immigration cases in the federal courts. This is the "fit" objection. There was a consensus among those judges who testified before the Senate Judiciary Committee that reform of the administrative adjudication process is necessary to achieve this goal.[117] As described in letters and at the hearing, the administrative status quo consisted of understaffed and overburdened immigration judges hurrying to render oral decisions to pass the case on as quickly as possible to an equally understaffed and overburdened Board of Immigration Appeals, which would probably issue a one-line boilerplate decision. The federal courts are left as the only reviewing body with the resources to engage in a careful and thoughtful review of the case. According to the Judicial Conference of the United States, "[J]udges on the regional courts of appeals report that the problems with immigration appeals stem . . . from the need to conduct a thorough review of the factual basis for the decision, a situation created when an agency record fails to fully develop all of the issues for appellate review."[118] As then Chief Judge Walker explained, "We don't have confidence, frankly, that the [Board] has really looked at the case."[119] Judge Walker referred to "the performance and productivity of the [immigration judges] and the [Board]" as the "core problem in immigration adjudications."[120] Judge Newman echoed the sentiments of Judge Walker when he testified:

> You need more [immigration judges]. You need more [Board] members. You need to go back to the so-called streamline proposal, which proved to be a disaster and

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other hand, Judge Bea testified that the certificate of reviewability requirement would not be unusual as "[w]e presently have reviews of habeas cases by a one-judge court, the district judge, and if he does not grant it, we have a two-judge court in the Ninth Circuit take a look for certificate of appealability. It is not a new function." *Id.* at 8 (statement of J. Carlos T. Bea, United States Court of Appeals for the Ninth Circuit). Similarly, Jonathan Cohn described the requirement as "precisely the same mechanism that exists in the habeas context . . . ." *Id.* at 27 (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, Department of Justice).

[117] *Id.* at 137-38, 154-56, 186-89 (statements of C.J. Paul R. Michel, United States Court of Appeals for the Federal Circuit, J. John O. Newman, United States Court of Appeals for the Second Circuit, and C.J. John M. Walker, Jr., United States Court of Appeals for the Second Circuit). Judge Bea also expressed support for administrative reforms even though he testified in support of the certificate of reviewability provision. *Id.* at 8, 17. Chief Judge Schroeder, Judge Richard A. Posner, and the group of retired court of appeals judges in their letters to the Judiciary Committee also mentioned the need for administrative reform. *Id.* at 167-71, 178-80.

[118] *Id.* at 109-10 (Letter from the Judicial Conference of the United States to Senator Arlen Specter (Mar. 23, 2006)).

[119] *Id.* at 22 (statement of C.J. John M. Walker, Jr., United States Court of Appeals for the Second Circuit).

[120] *Id.* at 6. Judge Walker also stated:

> [T]he most single effective way to improve the functioning of judicial review of immigration proceedings is to give the Department of Justice the adequate resources to handle its caseload. I think the present structure of immigration review is really not the problem, and that the solution does not rely in changing it.

Id. at 7.

> burdened all of us with these thousands of cases, many with one-line affirmance opinions which are not the way to handle an administrative process.[121]

For these judges, the certificate of reviewability does not fit the policy problem as they see it: a substantial increase in the number of immigration cases in the federal courts caused by a dysfunctional administrative adjudication system that needs reform.

One court of appeals judge and a representative of the Department of Justice testified on behalf of the certificate of reviewability requirement.[122] These two witnesses advocated for the certificate of reviewability as suitable to address the underlying policy problem as they see it: dramatically heightened numbers of immigration cases in the federal courts caused by foreign nationals filing frivolous lawsuits. These witnesses agreed that the certificate of reviewability should be endorsed to prevent the filing of frivolous appeals to delay deportation. One of these witnesses, Judge Carlos T. Bea of the U.S. Court of Appeals for the Ninth Circuit, acknowledged the need for reform of the administrative adjudication process but referred to "two clear reasons" for the increase in the number of immigration appeals in the federal courts:

> First, petitioners and their attorneys do not think the one-judge [Board] review and adoption procedure has adequately dealt with the claimed errors on appeal. They think they have received "rubber stamp" treatment. Second, as petitioners and attorney[s] see appeals piling up in the circuit courts, they realize that their appeals will be delayed. . . . Even if the appeal lacks all merit, the backlog of cases in the circuit courts provides an incentive to appeal by almost guaranteeing a significant delay in deportation.[123]

Jonathan Cohn, Deputy Assistant Attorney General, testified in favor of the certificate of reviewability provision on behalf of the Department of Justice and elaborated on the frivolous lawsuit/delay line of reasoning. Cohn cited the requirement's promise of reducing the number of immigration cases in federal courts, therefore creating a disincentive for using the appeals process as a

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[121] *Id.* at 11 (statement of J. Jon O. Newman, United States Court of Appeals for the Second Circuit). Professor David Martin agreed that "[t]he remedies should focus . . . on restoring sound functioning by the Board of Immigration Appeals and the immigration judges." *Id.* at 29 (statement of Professor David A. Martin, University of Virginia Law School).

[122] Judge John Roll of the U.S. District Court for the District of Arizona testified in favor of the proposal to consolidate all immigration appeals in one circuit. He linked the issue to the size and caseload of the Ninth Circuit. *Id.* at 175-77 (statement of J. John M. Roll).

[123] *Id.* at 50 (statement of J. Carlos T. Bea, United States Court of Appeals for the Ninth Circuit). Judge Bea stated, "I agree with everything that Judge Walker said about the necessity to beef up the [Board] process and the [Board] opinions . . . ." *Id.* at 9.

delay tactic.[124] Cohn contested the characterization of the administrative adjudication process as deficient.[125]

After the hearing, the Judiciary Committee abandoned the certificate of reviewability requirement. A policy insider reported that staff level meetings took place after the judicial review hearing to discuss what to do with Title VII but did not recall any significant push to resurrect the certificate of reviewability requirement after the hearing.[126] This insider described that, after the hearing, the certificate of reviewability disappeared and that Senator Specter heard the message from the judges.[127] As another policy insider explained, the more the certificate of reviewability requirement was discussed, and those opposed explained their objections, support for the certificate of reviewability diminished.[128] Yet another explained that the Committee "had to get [the bill] done" and that once it became obvious that the requirement "would be a serious bone of contention" it would be better to leave the requirement out of the Committee's bill.[129]

c. Senate Floor Debate

This Section generally describes the legislative history of the Senate Judiciary Committee's bill as debated on the Senate floor and focuses on the lack of a targeted effort to resurrect the certificate of reviewability requirement on the

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[124] *Id.* at 27 (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, Department of Justice). Cohn stated:

> [A]nd one way to reduce the rate of appeal, of course, is this Certificate of Reviewability I have because that would allow the courts to eliminate the frivolous appeals expeditiously, thereby reducing the incentive that aliens have to file the frivolous appeals. And some judges have suggested that particular cases are difficult to decide, and they have to look at the entire record. And some might be, and in those cases they can grant the Certificate of Reviewability. But many cases are not very difficult to decide. In some cases, the alien makes no argument at all in his brief and just files a brief to get delay. Sometimes he files the brief out of time. It is untimely, there is no jurisdiction, but there is still a delay. It does not require three judges to see that a brief has no argument or is filed out of time.
>
> And in some cases, even when there is a timely brief with an argument, it is clear the argument is meritless. For instance, in one recent case, an alien claimed he was going to face persecution back in Mexico because he hurt his elbow and could not work a manual labor job. Well, of course, he admitted that he is currently in the United States working a manual labor job as a fence builder, so that claim is facially frivolous. Nonetheless, it does take time. It delays his proceedings. He can remain in the country longer.

Id. at 38. See *supra* note 74 for a conflicting transcription of Cohn's remarks. *Contra* Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 2-3 (2006) (challenging the argument that the increase in the number of appeals is due to the filing of frivolous appeals).

[125] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 64-65 (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, Department of Justice). Logically, then, Cohn testified against the administrative reforms proposed in the Chairman's Mark. *Id.* at 27-28. The Department of Justice objected that the proposed reforms to the administrative system would eliminate executive branch control over an executive branch function. *Id.*

[126] Interview with I, *supra* note 72.

[127] *Id.*

[128] Interview with A, *supra* note 72.

[129] Interview with D, *supra* note 72.

Senate floor. In fact, there was little discussion about the requirement in any form.

Full Senate consideration of the Senate Judiciary Committee bill as a substitute to Senator Frist's bill began on March 30, 2006. Consideration of the Committee bill continued through April 7, 2006.[130] The Judiciary Committee's work product met with opposition over its comprehensive legalization provisions that were designed to address the policy issue presented by the existence of the large undocumented population.[131] On April 6, 2006, Senate leaders announced a compromise on the legalization question, known as the Hagel-Martinez compromise. Majority Leader Frist called the compromise "a huge breakthrough."[132]

The promise surrounding the compromise was short lived, however. No final Senate vote on the compromise occurred; it appears that the Senate leadership could not agree on the procedural elements that would have governed debate of the compromise.[133] The Senate left for its two-week spring recess without voting on an immigration reform bill. Minority Leader Reid explained that the bill did not move forward on the Senate floor "for a number of reasons," including a failure to reach an agreement as to the procedure that would govern further consideration of the bill.[134] According to Senator Reid, "We tried."[135] As Congress entered the spring recess, Senator Specter stated his intention to revisit immigration reform upon the Senate's return.[136]

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[130] A motion to invoke cloture on the substitute failed on April 7, 2006. Thomas, Bill Summary & Status for the 109th Congress, http://thomas.loc.gov/bss/109search.html (type "S. 2454" into "enter search" and follow "All Congressional Actions" link) (last visited Jan. 31, 2008). On April 7, 2006, Minority Leader Harry Reid explained: "The committee bill that was reported from the Judiciary Committee on a bipartisan vote is a bill that virtually all Democrats support. We now are past that piece of legislation and on what we call the Martinez substitute." 152 CONG. REC. S3347, S3348 (daily ed. Apr. 7, 2006) (statement of Sen. Reid).

[131] Rachel L. Swarns, *Senate Republicans Strike Immigration Deal*, N.Y. TIMES, Apr. 6, 2006, at A21. The Judiciary Committee bill created one broad category of undocumented foreign nationals eligible to be placed on a path to legalization. This legalization plan proved unacceptable to some Senators. *Id.*

[132] Rachel L. Swarns, *Senate Deal Set for Immigration, but Then Falters*, N.Y. TIMES, Apr. 7, 2006, at A1. Under the compromise plan, the undocumented population would be split into three groups. Swarns, *supra* note 131. Those residing in the United States for at least five years would be placed on a path to legalization that would not require the individual to leave the United States. *Id.* Those residing for between two and five years could be placed on a path to legalization but must leave the United States, at least temporarily, as a part of the process. *Id.* Those residing for less than two years would be required to leave the United States and apply for reentry under an avenue of legal immigration. *Id.*

[133] Carl Hulse & Rachel L. Swarns, *Blame and Uncertainty as Immigration Deal Fails*, N.Y. TIMES, Apr. 8, 2006, at A1; Swarns, *supra* note 132. Reports on the failure of the compromise explain that Minority Leader Harry Reid wanted to limit the number of amendments allowed to be offered on the Senate floor and that he wanted an assurance that the entire Senate Judiciary Committee would be named as Senate Conferees, but that Majority Leader Frist would not accede to those requests. Hulse & Swarns, *supra*; Swarns, *supra* note 131.

[134] 152 CONG. REC. S4529, S4530 (daily ed. May 15, 2006) (statement of Sen. Reid).

[135] *Id.*

[136] Hulse & Swarns, *supra* note 133.

From mid-April until early May, a series of large pro-immigrant marches and demonstrations occurred throughout the United States that brought hundreds of thousands to the streets and included a call for an economic boycott by immigrants.[137] These marches followed other demonstrations that had occurred in March.[138] As these public protests continued, Senators Frist and Reid attempted to negotiate a solution to the procedural stalemate that doomed immigration reform in the Senate before the spring recess. The debate between Senators Frist and Reid centered on whether and how many amendments could be offered on the Senate floor and who would be appointed to confer with the House.[139]

President George W. Bush met with Republican and Democratic senators on April 25, 2006 and urged those lawmakers to move forward with an immigration reform bill.[140] Senators Frist and Reid, at this point still in disagreement on how the bill should proceed on the Senate floor, expressed their commitment to revisit the immigration issue before the Memorial Day recess at the end of May.[141]

At the end of the second week in May, Senators Frist and Reid announced they had reached a procedural deal that would allow the Senate to restart its consideration of immigration reform. The Senators agreed that unlimited amendments could be considered on the Senate floor but also agreed on a prearranged structure for the composition of the Senate panel of conferees.[142] On

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[137] *See* Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); *see also* Dan Balz & Darryl Fears, *Thousands Attend Immigration Rallies*, WASH. POST, Apr. 16, 2006, at A3; Darryl Fears & N.C. Aizenman, *Immigrant Groups Split on Boycott: Walkouts May Do More Harm than Good, Some Say*, WASH. POST, Apr. 14, 2006, at A3; Anna Gorman et at., *Marchers Fill L.A.'s Streets: Immigrants Demonstrate Peaceful Power*, L.A. TIMES, May 2, 2006, at A1; Robert D. McFadden, *Across the U.S., Protests for Immigrants Draw Thousands*, N.Y. TIMES, Apr. 10, 2006, at A14; Antonio Olivo & Oscar Avila, *United They March: Hundreds of Thousands Rally for Immigration Rights: 'We Have to Change the World,'* CHI. TRIB., May 2, 2006, § 1, at 1; Sue Anne Pressley et al., *Marchers Flood Mall with Passion, Pride: Many Take Their First Political Step*, WASH. POST, Apr. 11, 2006, at A1.

[138] Sheryl Gay Stolberg, *After Immigration Protests, Goal Is Still Elusive*, N.Y. TIMES, May 3, 2006, at A1.

[139] Nicole Gaouette, *The Immigration Debate: Frist Sees 'Progress' on Senate Overhaul Bill*, L.A. TIMES, May 3, 2006, at A20. Senator Reid was concerned that the Senate representatives would not strongly defend the Senate bill against the House negotiators. *Id.* Reid said: "The Republicans have basically stiffed us on all conferences . . . . So what I need to have is an agreement on amendments and who is going to be on the conference." *Id.*

[140] Frank James & Jeff Zeleny, *Bush Pushes Immigration Bill: Bipartisan Senate Delegation Backs Him*, CHI. TRIB., Apr. 26, 2006, § 1, at 16; Jim Rutenberg & Rachel L. Swarns, *Senate Leaders Work to Resuscitate Immigration Bill*, N.Y. TIMES, Apr. 26, 2006, at A16; Jim VandeHei & Jonathan Weisman, *Bush Begins Push for Immigration Deal with Congress*, WASH. POST, Apr. 25, 2006, at A4.

[141] Gaouette, *supra* note 139; James & Zeleny, *supra* note 140; Rutenberg & Swarns, *supra* note 140; Stolberg, *supra* note 138.

[142] Associated Press, *Immigration Deal Reached in Senate Provides Citizenship Opportunity*, WASH. POST, May 12, 2006, at A7; Nicole Gaouette, *Immigration Debate is Revived in Senate*, L.A. TIMES, May 12, 2006, at A4; David Stout, *Senate Leaders Break a Stalemate Over an Immigration Bill*, N.Y. TIMES, May 12, 2006, at A23. Under the deal, twenty-six Senators would serve as conferees, made up of fourteen Republicans and twelve Democrats.

May 15, 2006, President Bush spoke to the nation through a live televised address. He announced his support for comprehensive immigration reform and asked that the immigration debate be conducted "in a reasoned and respectful tone."[143]

After the President's address, the Senate restarted consideration of immigration reform, now represented through bill number S. 2611. The Senate debate on S. 2611 lasted until May 25, 2006, when the bill, as amended, met the approval of the Senate with a vote of sixty-two yeas to thirty-six nays. Immediately after passage of the Senate bill, Representative Sensenbrenner stated that the House would never support the legalization provisions of the Senate bill.[144]

Through this extended consideration of immigration reform on the floor of the Senate, there was little to no attention paid to the certificate of reviewability requirement. Before the spring recess, during the first round of floor debate, Senator Sessions did submit an amendment that the Senate did not consider, which sought to resurrect the certificate of reviewability requirement.[145] During the second round of Senate floor debate, the Senate did not consider an amendment seeking to resurrect the certificate of reviewability provision.[146]

As far as debate on the floor of the Senate was concerned, it is fair to say that the certificate of reviewability requirement was not a hot topic.[147] Refer-

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Seven of the Republicans and five Democrats would come from the Senate Judiciary Committee and the remaining Republican and Democratic Senators would be chosen by Frist and Reid, respectively. Associated Press, *supra*.

[143] *See* Press Release, Office of the Press Sec'y, President Bush Addresses the Nation on Immigration Reform (May 15, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/05/print/20060515-8.html. President Bush announced his support for comprehensive immigration reform that would accomplish five objectives: (1) "the United States must secure its borders"; (2) "we must create a temporary worker program"; (3) "we need to hold employers to account for the workers they hire"; (4) "we must face the reality that millions of illegal immigrants are here already"; and (5) "we must honor the great American tradition of the melting pot, which has made us one nation out of many peoples." *Id.*

[144] Rachel L. Swarns, *House Negotiator Calls Senate Immigration Bill 'Amnesty' and Rejects It*, N.Y. TIMES, May 27, 2006, at A9.

[145] 152 CONG. REC. S2849, S2953 (daily ed. Apr. 5, 2006) (senate amendment 3358, text of amendment). Senator Sessions also submitted an amendment during the first round that would have replaced most, if not all, of the terms of the Judiciary Committee bill. Senator Sessions' vision of immigration reform included the certificate of reviewability requirement. The Senate did consider this amendment but apparently did not vote on the amendment. *Id.* at S3029 (senate amendment 3420, text of amendment).

[146] The Senate considered over forty amendments. Thomas, Bill Summary & Status for the 109th Congress, http://thomas.loc.gov/bss/109search.html (last visited Jan. 31, 2008) (type "S. 2611" into "enter search" and follow "All Congressional Actions" link). The absence of such an amendment does not appear to be because amendments were limited. Apparently Senator Reid ceased his efforts to limit the number of amendments allowed during the floor debate to secure an agreement on the composition of the Senate conferees. *See* Gaouette, *supra* note 142.

[147] In fact, relatively little time was spent discussing any of the judicial review provisions of the bill. One major exception was a back and forth discussion between Senators Feingold, Specter, Brownback, Coburn, Sessions, and Kyl debating Senator Feingold's amendment (Senate Amendment 4083) to strike a portion of S. 2611, which would have raised the standard of proof to obtain a stay of removal pending federal court consideration of an appeal. 152 CONG. REC. S5135, S5146-53 (daily ed. May 25, 2006) (statements of Sen. Brownback,

ences in the *Congressional Record* to the certificate of reviewability provision are minimal and are confined to explanations as to why this part of Title VII of the Chairman's Mark was left out of the Judiciary Committee's bill or to reports on the judicial review hearing.[148] For example, Senator Durbin discussed the provision on the floor of the Senate in order to express his pleasure that the Judiciary Committee stripped the provision out of the bill.[149] When

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Sen. Coburn, Sen. Feingold, Sen. Kyl, Sen. Sessions & Sen. Specter). Senator Feingold's amendment passed, 52-45. *Id.* at S5188. Other than that debate, at best, judicial review considerations received passing comment. See, for example, Senator Feingold's comment expressing his pleasure that the Senate Judiciary Committee accepted his amendment restoring some review of naturalization provisions. 152 CONG. REC. S3167, S3175 (daily ed. Apr. 6, 2006) (statement of Sen. Feingold). See also Senator Reid's and Senator Feinstein's disfavorable references to the judicial review waiver requirements in the legalization provisions. 152 CONG. REC. S4529, S4532 (daily ed. May 15, 2006) (statement of Sen. Reid); 152 CONG. REC. S4847, S4854 (daily ed. May 22, 2006) (statement of Sen. Feinstein). Also, Senator Domenici discussed on the Senate floor his support for an amendment that would add more federal judges due to an expected increase in federal criminal immigration cases. *Id.* at S4850 (statement of Sen. Domenici); *see also* 152 CONG. REC. S5135, S5167 (daily ed. May 25, 2006) (statement of Sen. Domenici).

[148] For example, Senator Specter stated on March 27, 2006:

> We did not take up Title VII, which is judicial reform, because there is considerable controversy about the chairman's mark on those provisions. . . . We are noticing a hearing for next Monday morning where we will have an opportunity to hear from the judges, who have already written us: the chief judge of the Second Circuit, and a judge from the Seventh Circuit. We will hear from the chief judge of the Federal Circuit, and consider further the viewpoints of the Department of Justice and others on the issue of the independence of the immigration judges on the Board of Immigration Appeals.

152 CONG. REC. S2397, S2408-09 (daily ed. Mar. 27, 2006) (statement of Sen. Specter). Similarly, Senator Specter explained on March 29, 2006:

> One line which we have not yet finished is the issue of judicial reform, judicial review. . . . The chairman's mark has a provision that will consolidate appeals in the Federal circuit. We have had a good bit of objection to that from the Judicial Conference and from very prominent judges. Before moving ahead, we did not include that in the bill which we reported out of committee. Instead, we are going to have a hearing next Monday.

152 CONG. REC. S2483, S2514 (daily ed. Mar. 29, 2006) (statement of Sen. Specter). Later, Senator Specter reported on the Senate floor that the Judiciary Committee "had a very productive hearing this morning on issues relating to immigration judicial review." 152 CONG. REC. S2699, S2700 (daily ed. Apr. 3, 2006) (statement of Sen. Specter).

[149] 152 CONG. REC. S5135, S5175 (daily ed. May 25, 2006) (statement of Sen. Durbin). On May 25, 2006, Senator Durbin explained that judges, law school deans, and professors expressed serious concern with the certificate of reviewability. *Id.* According to Senator Durbin:

> After considering the input of Judge Posner and other judges and scholars, I decided to offer an amendment to strike the provisions that would consolidate immigration appeals to the Federal Circuit Court and give a single judge the power to deny an immigration appeal. In response, Chairman Specter decided to remove these provisions from the original bill and they are not in the bill that we are considering today.

Id. Senator Durbin also referenced the recommendation of judges and scholars that the administrative review system should be reformed first. *Id.* "As judges and scholars advised us, the bill does include provisions that would bolster the capacity of the immigration courts by, among other things, increasing the number of immigration judges and members of the Board of Immigration Appeals. I hope that the conference committee retains these improvements." *Id.*

Senator Specter reported to the Senate floor about his judicial review hearing, he did not even mention the certificate of reviewability requirement.[150]

Consistent with the low visibility of the certificate of reviewability requirement, there was a paucity of coverage of the requirement in major newspapers. Extensive Westlaw and Lexis searching revealed only three articles in major, non-legal United States newspapers discussing the certificate of reviewability requirement.[151] These three articles briefly mentioned the requirement, but the focus was on the consolidation provision in Title VII of the Chairman's Mark.[152]

Several policy insiders acknowledged the relative lack of media attention to the certificate of reviewability requirement.[153] Interestingly, one policy insider observed that even though the certificate of reviewability requirement received minimal media coverage, it received more media coverage than other due process issues contained under the umbrella of immigration reform.[154]

Policy insiders also recognized the relative invisibility of the certificate of reviewability during the Senate floor debate. Some insiders concurred that the certificate of reviewability issue was subservient to other more high profile immigration reform issues.[155] One policy insider described the certificate of reviewability as under the radar and explained that the "battle never really joined on judicial review issues."[156] Further evidence of the low priority status

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[150] 152 CONG. REC. S2699, S2700 (daily ed. Apr. 3, 2006) (statement of Sen. Specter). Senator Specter did mention the consolidation provision, however. *Id.*

[151] Bob Egelko, *Plan to Unify Immigrant Appeals: Sen. Specter's Provision to Centralize Jurisdiction Draws Fire*, S.F. CHRON., Mar. 13, 2006, at A1; Maura Reynolds, *Plan to Reroute Immigration Appeals Hits Some Red Lights*, L.A. TIMES, Apr. 2, 2006, at A23; Rachel L. Swarns, *In Bills' Small Print, Critics See a Threat to Immigration*, N.Y. TIMES, Mar. 25, 2006, at A11. The Westlaw and Lexis searches are current through August 4, 2006.

[152] One article mentions, over half way through the article:

> Another provision would assign each incoming case to a single judge, who would decide whether the appeal contained an issue that was serious enough to warrant a hearing before a three-judge panel. If not, the judge would dismiss the case, and the immigrant would have no right of further appeal, said Marshall Fitz, director of advocacy for the 10,000-member American Immigration Lawyers Association.

Egelko, *supra* note 151. Another, discussing the consolidation proposal, states: "The judges also raised concerns about a proposal that would appoint a single judge to decide whether immigration cases were worthy of consideration for appeal. If the judge declined the case, no further review would be available." Swarns, *supra* note 151. A third similarly mentions the certificate of reviewability requirement as an aside, stating, "[Specter's] proposal also would give a single judge from the court the power to decide whether an appeal would proceed; currently, a three-judge panel must make such decisions." Reynolds, *supra* note 151. That short reference to the certificate of reviewability requirement is not accurate because under the status quo, no permission was or is necessary for an appeal to proceed; a three-judge panel simply considers the appeal.

[153] Interviews with C, D, F & G, *supra* note 72.

[154] Interview with C, *supra* note 72.

[155] One commented that judicial review issues are visible to lawyers, judges, and immigrants but not to the public. Interview with E, *supra* note 72. Another suspects that the certificate of reviewability was not the subject of major debate because proponents did not view it as core language of high priority to protect. Interview with G, *supra* note 72; *see also* Interview with I, *supra* note 72.

[156] Interview with E, *supra* note 72.

of the provision is the fact that two of the policy insiders interviewed for this article needed to be reminded of the substance of the provision.[157]

One policy insider linked the provision's relative invisibility to the absence of an effort to add the certificate of reviewability to the bill on the Senate floor. According to this policy insider, there was no effort to add the provision because there were other issues to negotiate.[158] Another similarly stated, "Once on the floor, debate turned to what people thought the issue really [was] about."[159] Another stated that the lack of floor debate might be attributable to a reluctance to create an opportunity to read the judges' letters on the Senate floor.[160] Another policy insider agreed with these sentiments and suggested that the requirement might resurface during a House-Senate conference.[161]

B. The Displacement of Conflicts and Problem Definition

The Senate Judiciary Committee's abandonment of the certificate of reviewability requirement and the absence of a sustained effort to resuscitate the requirement during the full Senate debate is curious given the restrictions on judicial review Congress endorsed through IIRIRA and REAL ID. To begin to decipher the legislative history, this Section describes two theories important to agenda-setting scholarship, E.E. Schattschneider's theory of the displacement of conflicts and John W. Kingdon's theory of problem definition, and the next Section applies these two theories to the legislative history.

These are two prominent ideas in agenda-setting theory.[162] Scholars who study public policy agenda-setting are a part of a larger effort to comprehend the entire legislative process.[163] Agenda-setting refers to legislative priorities and studies how and why certain policy issues command legislative attention

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[157] Interviews with B & F, *supra* note 72.
[158] Interview with A, *supra* note 72.
[159] Interview with D, *supra* note 72.
[160] Interview with I, *supra* note 72.
[161] Interview with E, *supra* note 72.
[162] The Policy Agendas Project lists Schattschneider's and Kingdon's works that are discussed here under the heading "Classics and General Works." *See* Center for American Politics and Public Policy, Policy Agendas Project, Agenda Setting Works, http://www.policyagendas.org/resources/bibliography.html (last visited Feb. 2, 2008). Also see this list for other major agenda-setting works, including other works that address the concept of problem definition. *Id.*
[163] Kingdon has explained, "What I want to understand, and what all of us want to understand, is why things happen the way they do in entities like the federal government, or a university, that people have called organized anarchies." John W. Kingdon, *A Model of Agenda-Setting, with Applications*, 2001 L. REV. MICH. ST. U. DETROIT C. L. 331, 331. According to Schattschneider:

> As political scientists we are committed to the quest for meaning in politics . . . . Let no man boast that he has discovered chaos because chaos is the easiest thing in the world to find! It takes intelligence to make sense of politics, but it takes intelligence to make sense of anything.

E.E. Schattschneider, *Intensity, Visibility, Direction and Scope*, 51 AM. POL. SCI. REV. 933, 935 (1957). Of course, legal scholars have developed theories of the legislative process as well. For a discussion of some of these theories in the context of an immigration reform proposal, see Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 452-475 (2005).

and the consequences of that attention.[164] There are other theories and theorists that are important to agenda-setting scholars and not all agree on one theory of agenda-setting. Nor is Kingdon the only scholar to address the concept of problem definition. This Article is not intended to review all of the political science literature on agenda-setting. Instead, this Article focuses on Schattschneider's and Kingdon's theories as a means to exhibit the usefulness of thinking about immigration jurisdiction-stripping from a public policy perspective.

Each of these theories is a part of a larger work. Schattschneider's theory of the displacement of conflicts is a part of a larger work to address "the great problem in American politics," which Schattschneider perceives as "[w]hat makes things happen?"[165] Kingdon's theory of problem definition is one component of his theory of "why things happen the way they do" in politics.[166]

To Schattschneider, there are many conflicts co-existing and competing with each other for the chance to become significant, for the chance to rise to the top of the public policy agenda.[167] A conflict competes with other conflicts by trying to out muscle its competition in the battle to attract attention.[168] Schattschneider explained that "[t]he outcome of the game of politics depends on which of a multitude of possible conflicts gains the dominant position."[169]

This competition among conflicts leads to what Schattschneider called the "displacement of conflicts."[170] Schattschneider wrote that "[t]he most powerful instrument for the control of conflict is conflict itself."[171] When one con-

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[164] MICHAEL C. LEMAY, ANATOMY OF A PUBLIC POLICY: THE REFORM OF CONTEMPORARY AMERICAN IMMIGRATION LAW 2 (1994). The life cycle of a public policy has been described as consisting of several stages: problem formation; agenda-setting; policy formulation; policy adoption; policy implementation; and policy evaluation. *Id.* at 1. LeMay applied policy process theories to the Immigration Reform and Control Act of 1986 ("IRCA") and the Immigration Act of 1990. *Id.* at 2.

[165] E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA vii (1960).

[166] Kingdon, *supra* note 163, at 331. Kingdon's theory of agenda-setting focuses on three streams of activity that make up the agenda-setting process: problems, policy, and politics. In the problems stream, a policy problem is identified (such as through problem definition or in other ways). *Id.* at 331-32. In the policy stream, alternative policy solutions are generated in policy communities about various policy problems. *Id.* at 331. The politics stream is composed of factors such as the public mood, interest group activity, changes in personnel, and election results. *Id.* at 332. According to Kingdon, these three streams operate independently but can be coupled together by a policy entrepreneur taking advantage of a key opportunity. *Id.* When all three streams converge, an issue has the greatest chance of rising on to the decisional agenda. *Id.*

[167] SCHATTSCHNEIDER, *supra* note 165, at 65-66 ("There are billions of potential conflicts in any modern society, but *only a few become significant*."); *see also* Schattschneider, *supra* note 163, at 935 ("All politics begins with billions of conflicts.").

[168] Schattschneider, *supra* note 163, at 935 ("One of the most conclusive ways of checking the rise of conflict is simply to provide no arena for it . . . ."); *see* SCHATTSCHNEIDER, *supra* note 165, at 68 (discussing how conflicts compete for the "attention and loyalty of the public").

[169] SCHATTSCHNEIDER, *supra* note 165, at 62; *see also* Schattschneider, *supra* note 163, at 935 ("The dynamics of politics has its origin in strife. Political strategy deals therefore with the exploitation, use, and suppression of conflict.").

[170] SCHATTSCHNEIDER, *supra* note 165, at 62.

[171] *Id.* at 67.

flict muscles out another, the losing conflict is suppressed and attention is distracted from the losing conflict to the attention-grabbing conflict.[172] As an example from the perspective of 1960, Schattschneider argued that certain forces in the South used racial antagonism to keep poor southern whites from rising up against their wealthy neighbors.[173] In this example, one conflict (racial antagonism) out muscles other existing conflicts to grab the spotlight. If individuals or legislators are paying attention to issues of race, they are doing so at the expense of paying attention to other issues, such as wealth distribution. Also, when one conflict grabs the spotlight at the expense of others, political alignments form in response to the conflict in the spotlight and not in response to any displaced conflicts. Thus, when a conflict is displaced, or pushed out of the spotlight, and attention turns to a new conflict, there is inevitably a shift in positions and alliances.[174]

To Schattschneider, politics is the management of conflict.[175] Which conflicts win the battle among conflicts?[176] To Schattschneider, all conflicts are not equal.[177] Schattschneider attributes dominance to intensity and visibility, or "the capacity to blot out other issues."[178] One blots out other issues by manipulating to one's advantage the crowd paying attention to the fight. The ability to control the scope of the crowd or to convince the crowd to divide along the cleavages that advantage one conflict over the other "is a prime instrument of power."[179] To seek or maintain power, a party will favor certain issues over others. Those conflicts that will be favored are those that allow lines to be drawn in the most beneficial manner for the party seeking to maintain or obtain power.[180]

The displacement of conflicts may not be the only factor affecting governmental priorities. According to Kingdon, how a policy issue is defined or framed influences whether that policy issue receives attention.[181] Kingdon's

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[172] *Id.* at 67-68. "Commanders who are not agile when this happens are likely to be left in possession of deserted battlefields." *Id.* at 74.

[173] *Id.* at 73-74. Other examples cited by Schattschneider include sectionalism, national divisions replacing older local divisions as a result of the nationalization of politics, urban-rural conflict displacing labor-employer conflict, and religion "used to confuse a great variety of other causes." *Id.* at 71, 73.

[174] *Id.* at 74.

[175] *Id.* at 71 ("The crucial problem in politics is the management of conflict.").

[176] *Id.* at 74.

[177] *Id.* at 67.

[178] *Id.* at 74.

[179] *Id.* at 76.

[180] *Id.* at 65. For example, "the development of one conflict may inhibit the development of another because a radical shift of alignment becomes possible only at the cost of a change in the relations and priorities of all of the contestants." *Id.* "In this process friends become enemies and enemies become friends . . . ." *Id.* The displacement of conflicts is all about strategic alignments. Those participating in politics use conflict among conflicts to maintain alignments and therefore maintain power. Schattschneider's perspective illuminates that raising an issue to prominence on the legislative agenda carries great risk if that issue threatens to disrupt favored alignments. Schattschneider also argues that there are some conflicts that will be wholly unattractive to those in search of maintaining or gaining power "because they are inconsistent with the dominant conflicts." *Id.* at 76.

[181] JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 109-13 (2d ed. 1995). There are also other influences, but the focus here is on the influence of problem

theory addresses how conditions rise to the level of problems deserving legislative attention through problem definition.[182] The way the policy problem is described can affect its attractiveness to lawmakers and can also anticipate a preferred policy solution.[183]

Kingdon posited that one method of translating a condition into a problem deserving of attention is categorization.[184] To Kingdon, categorization matters; in fact it is "critical."[185] Placing a policy issue in one category over another is important because the category "structures people's perceptions of the problem."[186] Because categories influence how individuals perceive a problem, "[t]he emergence of a new category is a signal public policy event."[187] One of Kingdon's examples is the re-categorization of the issue of disabled access to public transportation. Categorized as a transportation issue, acceptable solutions included unequal access to public transportation. In contrast, categorized as a civil rights issue, policies incorporating unequal access no longer fit as an acceptable solution to the problem as defined.[188]

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definition. For Kingdon, other influences include focusing events or crises, indicators, and feedback. *Id.* at 113. In fact, Kingdon argues that simply defining a problem is not a guarantee of official attention to that problem. *Id.* at 114.

[182] *Id.* at 109-110.

[183] *Id.* at 110. Kingdon cited as an example the definitional posturing of the American automobile companies during the 1970s. That industry defined the problem of their shrinking market share as the product of unfair competition and heavy governmental regulation. By defining the problem as such, the auto industry projected responsibility for the problem elsewhere and influenced the set of policy alternatives available to address the problem. If the problem is unfair competition, the set of applicable solutions will look very different than the set of applicable solutions to the problem of poor management of the U.S. auto industry. *Id.*

[184] *Id.* at 110-13. Kingdon further observed that whether a policy issue is defined as requiring the attention of policymakers also depends on values and comparisons. One's values influence whether one will see a condition as one requiring action. Kingdon explained that "[a] mismatch between the observed conditions and one's conception of an ideal state becomes a problem" requiring action. *Id.* at 110. Comparisons also play a role in identifying a situation as one requiring policy action. This can tie into values. If one believes that two circumstances should be equal, then a comparison between two unequal circumstances can be powerful evidence of the need for policy action. *Id.* at 110-11.

[185] *Id.* at 111; Kingdon, *supra* note 163, at 333.

[186] KINGDON, *supra* note 181, at 111. Kingdon observed that "[p]eople will see a problem quite differently if it is put into one category rather than another." *Id.* Further, Kingdon has explained that "problems are not simply objective conditions"; that a condition becomes a problem because someone has interpreted it as such. Kingdon, *supra* note 163, at 333.

[187] KINGDON, *supra* note 181, at 113.

[188] *Id.* at 112. This concept of problem definition certainly is not exclusive to the realm of politics or political scientists. Lawyers constantly engage in problem definition. For example, a legal brief will include a description of the law or the facts in such a way as to point toward a desired outcome or solution to the legal problem. *See* MYRON MOSKOVITZ, WINNING AN APPEAL 50 (1985) (explaining the concept of "mak[ing] the court want to decide the case your way" and describing that a lawyer's explanation of the facts should "convince most people to rule in [the lawyer's] favor"); LOUIS J. SCIRICO, JR. & NANCY L. SCHULTZ, PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION 76-77 (2d ed. 2001) (describing a legal writing strategy of describing the facts of a case objectively but persuasively by stressing favorable facts). Political and legal issue framing share the same core idea: how the issue is framed can influence how the issue is debated and can point that debate towards a desired result.

The effectiveness of a particular categorization may depend on what Kingdon calls the "national mood."[189] For example, categorizing the issue of congressional restrictions on immigration judicial review as a human rights or fairness issue may not be effective in the face of a national mood unsympathetic to such concerns. There may be, however, alternative categorizations that could be more effective. If the national mood is wary of the executive branch and suspicious of the consolidation of executive power, shrinking judicial review could be categorized more effectively as an executive power grab.

Kingdon's theory of problem definition can co-exist with Schattschneider's theory of the displacement of conflicts. In fact, Schattschneider embraced the notion of problem definition as a tool to control the scope of and cleavages among the crowd paying attention to a given conflict. As Schattschneider explained:

> The definition of alternatives is the supreme instrument of power; the antagonists can rarely agree on what the issues are because power is involved in the definition. He who determines what politics is about runs the country because the definition of the alternatives is the choice of conflicts, and the choice of conflicts allocates power.[190]

C. The Displacement of Conflicts, Problem Definition, and Deciphering the Legislative History of the Certificate of Reviewability

Application of Schattschneider's theory of the displacement of conflicts and Kingdon's theory of problem definition to the legislative history of the certificate of reviewability requirement helps to analyze why the Senate turned away from the requirement. While this application does not purport to provide the complete explanation, two observations put us on the path toward greater understanding.[191] One, there is evidence the requirement's proponents did not win the battle over problem definition. Two, other immigration reform conflicts may have displaced the conflict over the certificate of reviewability requirement.

Struggles over problem definition are apparent throughout the legislative history of the certificate of reviewability requirement.[192] First, the dueling perceptions of immigration reform as a whole that arose in the House and the Senate are an example of a struggle over problem definition. Second, the policy arguments surrounding the certificate of reviewability requirement exposed

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[189] KINGDON, *supra* note 181, at 146-49.

[190] Schattschneider, *supra* note 163, at 937.

[191] *See infra* notes 226-27 and accompanying text. Also, this application focuses on the legislative history as a whole and does not analyze or canvass individual legislators as to the influence of problem definition or of conflict displacement on that particular legislator. The effect of these two forces could vary legislator by legislator, depending on many factors, including the legislator's prioritization of political outcomes and policy outcomes. Thank you to Steve Legomsky for sharing this observation.

[192] Professor Legomsky has asserted that the broad immigration policy debate revolves around the illegal immigration issue. "[W]e should be devoting as much attention to deciding whom we want to welcome and how best to facilitate their admission and their subsequent integration as we do to deciding whom we want to exclude or deport and how best to enforce their removal." Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 523 (2007).

a foundational difference in problem definition between opponents and proponents.

The dispute between the House and the Senate over the nature of immigration reform is an example of Kingdon's theory of categorization within problem definition. As Kingdon explained, "People will see a problem quite differently if it is put into one category rather than another."[193] As one policy insider put it, "[A] lot depends on how debate is framed."[194] The House approach categorized immigration reform as a security issue with an emphasis on crime. The House Judiciary Committee Report that accompanied H.R. 4437 explained that "[t]he United States has experienced a drastic increase in crime committed by illegal aliens."[195] If the problem is defined as hundreds of thousands of "illegal aliens" entering the United States each year to commit crimes, the enforcement focus of the House bill logically follows.

On the other hand, if the problem of immigration reform is categorized as an economic issue, or as a human rights issue, the rational solution becomes something different than a big stick. For example, if the problem is categorized as an economic issue, the favored policy solution may more likely be a temporary worker program. If the problem is categorized as a human rights issue, making illegal presence a felony does not resemble a commonsense solution to the problem.

The definition of the overall problem that underlies immigration reform has consequences for judicial review issues within immigration reform. If the underlying problem is hundreds of thousands of "illegal aliens" crossing into the United States to commit crimes, arguments in support of access to the federal courts face an uphill climb. If the problem is a need for a workable immigration system that promotes economic growth and promotes human rights, it becomes easier to argue that restrictions on judicial review either have no place within the debate or should not be enacted.

The debate over the nature of the problem creating the need for immigration reform holds the possibility of sweeping court-related issues off the agenda. For example, if immigration reform is defined to exclude questions of the health of the immigration adjudication system (as proposed by one policy insider), then Congress would not consider such issues during a debate over immigration reform and the status quo would be preserved.[196] Even for those who are dissatisfied with the current system and favor increased access to the federal courts, taking the issue off of the table could be advantageous if the national mood points to a probable outcome that would decrease access to the federal courts if the issue were on the table.[197]

The immigration reform debate of 2005-2006 did include consideration of the role of the federal courts. The discussion about the certificate of reviewability requirement revealed differing conceptions or categorizations of the

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[193] KINGDON, *supra* note 181, at 111.

[194] Interview with E, *supra* note 72.

[195] H.R. REP. NO. 109-345, pt. 1, at 45 (2005); *see supra* notes 41-43 and accompanying text.

[196] *See supra* notes 89-91 and accompanying text.

[197] *See supra* note 186 and accompanying text.

problem underlying it.[198] The proponents of the certificate of reviewability requirement defined the underlying problem as one of increased numbers of immigration cases in the federal courts caused by the filing of frivolous lawsuits.[199] Opponents pointed to deficiencies in the administrative adjudication process as the underlying problem.[200]

Both the House Judiciary Committee Report and the Senate Judiciary Committee testimony of the two witnesses in favor of the requirement described the policy problem as one of frivolous lawsuits filed by foreign nationals seeking delay in removal. If this is the nature of the problem, a gatekeeping mechanism like the certificate of reviewability may fit as a solution. The "frivolous lawsuits" rationale places the onus on the litigants filing lawsuits. This rationale insists that something is wrong with the way those filing lawsuits are behaving and that the product of their behavior, the filing of a petition for review in federal court, must be filtered by a mechanism like the certificate of reviewability requirement, which will allow only meritorious suits to proceed. This definition of the problem also deflects attention from complaints about the administrative adjudication system.[201]

For opponents, the issue of an increase in the number of immigration cases in the federal courts is a question of governmental responsibility. For example, the dissenting view in the House Judiciary Committee Report alleges that the certificate of reviewability requirement "initiates an unprecedented certiorari process for Article III court appeals, at a time when the circuit courts have become increasingly critical of the quality of agency decision making."[202] Citing deficiencies in the way the administrative agency adjudicates immigration cases, judges opposed to the requirement argued that the circumstance of increased numbers of immigration cases in the federal courts was the result of deficiencies in the administrative process.[203] If the problem is one of governmental failure and neglect, then the logical policy solution is not to restrain individuals from seeking redress for these governmental shortcomings in the federal courts but rather to reform the administrative process.

The federal judges who wrote letters to the Senate Judiciary Committee and who testified against the requirement before the Committee played a part in this debate over problem definition, even if unconsciously. The judges explained that, to them, the requirement did not fit their categorization of the problem; it did not present a workable solution because it did not fit their view of the problem. The judges presented a definition that competed with the frivolous lawsuit/delay categorization pushed by proponents of the requirement.

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[198] One policy insider stated that this was not a circumstance where opposing sides were "talking across each other"; that both sides agreed that the increased number of cases in the federal courts is a problem but disagreed why the problem exists. Interview with D, *supra* note 72.

[199] *See supra* notes 83-85, 122-25 and accompanying text.

[200] *See supra* notes 86-88, 117-21 and accompanying text.

[201] In some ways, by enacting immigration reform legislation first, the House set the framing for the debate that would follow in the Senate. Once the certificate of reviewability appeared in the Chairman's Mark and there was an opportunity for debate, opponents questioned the House Judiciary Committee's framing of the issue.

[202] H.R. REP. NO. 109-345, pt. 1, at 476 (2005).

[203] *See supra* notes 117-21 and accompanying text.

Instead, there was a consensus of opinion among the judges that reform of the administrative adjudication system is at the heart of the policy problem.[204]

The legislative history supports the argument that neither the Senate Judiciary Committee nor the full Senate adopted the proponents' categorization of the policy problem, or at least that Congress viewed the struggle over categorization as unfinished and difficult to continue.[205] The Senate Judiciary Committee included in its bill provisions that would have reformed the administrative adjudication system but did not include the certificate of reviewability requirement. Instead, the Committee ordered further study of the judicial review process. The Committee's decision to seek further study rather than enact a certificate of reviewability requirement while adopting administrative reforms is evidence that the requirement's proponents did not convince the Committee of their definition of the policy problem. The frivolous lawsuits/delay definition is linked to the certificate of reviewability and not to administrative reform. The following interaction between then Chief Judge Walker and Senator Cornyn during the hearing illustrates the judges' influence over the categorization of the issue:

> Judge Walker: So that if we go back, just to answer your question again, if we can go back to basics and see that the [Board of Immigration Appeals] and the [Immigration Judges] have sufficient resources, then the issue will basically be litigated at the agency level which is where it should be litigated.
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> Senator Cornyn: That sounds to me like that would be a valuable thing to push the cases down to be decided at the lowest level of the administrative process they could be without the necessity of getting circuit court judges involved.[206]

This exchange can be interpreted as Judge Walker persuading Senator Cornyn that reform of the administrative system will push the cases down from the federal courts to the administrative level.

Senators themselves expressed that the influence of the judges was important. Senator Specter said that the Judiciary Committee deferred action on Title VII to hold a hearing to learn more about the concerns of "very prominent judges."[207] Similarly, Senator Durbin acknowledged the concerns of judges and their advice to reform the administrative adjudication system.[208] Also,

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[204] Even Judge Bea, who testified to the need for the requirement to discourage frivolous lawsuits and delay tactics, testified that reform of the administrative adjudication system is necessary. *See supra* note 123 and accompanying text.

[205] This categorization dilemma is linked to the displacement of conflicts. The struggle over categorization may have been difficult to continue because it would disrupt debate over more visible conflicts.

[206] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 16. Senator Sessions stated at the hearing, "I do think that a good case has been made that we need more immigration judges that when the cases hit the Federal courts, they are more and better prepared and more thoughtfully put out." *Id.* at 21. Also, Senator Specter stated during the mark-up hearing that the Committee's bill would "seek to have the Board of Immigration Appeal write opinions so that the appeals to the circuits will not bog down the circuits as they are now." *See supra* note 110.

[207] *Supra* notes 110, 148 and accompanying text.

[208] *Supra* note 149.

Senator Leahy cited judicial opposition to the certificate of reviewability in explaining his objections.[209]

Comments from the policy insiders support the idea that the judges helped to define the problem. As one policy insider explained, Senator Specter heard the message from the judges.[210] Another expressed that the federal judges "helped to turn the tide" against the certificate of reviewability requirement.[211] The judges' role in problem definition is also implicated by one policy insider's observation that the lack of a Senate floor debate might be attributable to a fear of floor recitations of the judges' letters.[212] Those letters contained description, or categorization, of the policy problem as one of governmental neglect via a dysfunctional administrative adjudication system.

As explained in Part III(A), after the hearing on judicial review, there was no push, either within the Committee or the full Senate, to restore the certificate of reviewability to prominence. One potential explanation is that the Committee simply concluded the certificate of reviewability was a bad idea or an unworkable policy solution. But this explanation begs the question how the Committee reached that conclusion. Through which categorization did the Committee view the policy problem? While it is possible that the Committee could have adopted the frivolous lawsuit/delay categorization, yet still rejected the certificate of reviewability as a means to address that problem, it seems more likely that proponents did not convince the Committee to adopt the frivolous lawsuit/delay categorization. Another potential explanation is that the Committee's order for further study was a compromise. But embedded in that explanation is the idea that the Committee sought further study because proponents did not convince the Committee that the certificate of reviewability fit the underlying problem. Insiders described perceptions of the requirement as unworkable and stated that there were no key supporters of the provision, that no senator really defended the certificate of reviewability at the hearing.[213]

Applying Schattschneider's theory of the displacement of conflicts to the legislative history reveals that there were many conflicts within immigration reform fighting for congressional attention.[214] Once immigration reform took the spotlight, the conflict battle became internal within the topic of immigration reform. Which immigration policies will be reformed? Within the concept of immigration reform, the subtopic of judicial review could either drown out or be drowned out by consideration of other immigration reform subtopics. Furthermore, within the subtopic of judicial review, there are a variety of potential proposals affecting judicial review and some could attract more attention than others.[215]

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[209] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 91-93 (statement of Sen. Patrick Leahy, Member, S. Comm. on Judiciary).

[210] Interview with I, *supra* note 72; *see supra* note 127 and accompanying text.

[211] Interview with E, *supra* note 72.

[212] Interview with I, *supra* note 72; *see supra* note 160 and accompanying text.

[213] Interviews with E, G & I, *supra* note 72.

[214] Congress took up the broad issue of immigration reform. That broad issue muscled out other policy issues seeking congressional attention. That conflict battle, however, is not the focus here.

[215] For example, one policy insider mentioned that the certificate of reviewability and consolidation proposals appeared to attract more attention than other review restriction provi-

It seems the conflict over the certificate of reviewability requirement is a displaced conflict; it lost out to other immigration reform battles. There was a lack of debate about the certificate of reviewability in the House. In the Senate, the Senate Judiciary Committee did not even reach the title containing the certificate of reviewability requirement during its mark-up; it had other priorities. The certificate of reviewability was not a focus of either the Senate floor debate or of any amendment the Senate considered; the Senate had other priorities. The little attention paid to the certificate of reviewability requirement in the Senate Judiciary Committee could have been deliberate or the result of unintended consequences, such as the confluence of Senator Frist's deadline, the placement of the requirement in the last title of the Chairman's Mark, and the decision to proceed through the Chairman's Mark in numerical order of the titles. What is clear is that the certificate of reviewability issue did not receive as much attention as other issues during mark-up or on the floor of the Senate.[216] As described above, one policy insider explained that the provision was under the radar and that the "battle never really joined on judicial review issues."[217]

The Judiciary Committee did pay some attention to the certificate of reviewability requirement during the judicial review hearing. But that hearing took place on a Monday after the Senate Judiciary Committee had sent its immigration reform bill to the floor. Only three Senators are recorded as speaking during the hearing (Senators Cornyn, Sessions, and Specter).[218] Also, the hearing addressed other policy proposals in addition to the certificate of reviewability requirement, such as the consolidation of appeals in one circuit and reforms to the administrative adjudication process.

During the hearing, the testifying judges played a role in the displacement of conflicts by showing the Committee that the conflict over the certificate of reviewability requirement was not one worth raising to prominence. The judges' arguments about fairness and fit could easily lead a legislator to believe that the battle was not worth fighting, or, at the very least, that it was best to keep the scope of the particular conflict small.[219]

The low visibility of the certificate of reviewability requirement had interesting implications. As is at least partially indicated by the almost non-existent major newspaper coverage of the certificate of reviewability requirement, the public never became a part of the debate over the requirement. The crowd drawn to this fight was relatively small. This could be an advantage or a disadvantage depending on one's point of view. For those opposed to the certificate

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sions embedded in the Senate's proposed legalization program. Interview with C, *supra* note 72. The consolidation provision, however, attracted more newspaper attention than the certificate of reviewability requirement. *See supra* note 151 and accompanying text. Also, two policy insiders mentioned that the consolidation provision received more attention than the certificate of reviewability. Interviews with D & I, *supra* note 72.

[216] Policy insiders commented on the certificate of reviewability's status as not highly visible. Interviews with A, C & G, *supra* note 72.

[217] Interview with E, *supra* note 72; *supra* note 156 and accompanying text.

[218] *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 1. Senator Leahy did issue an opening statement. *See supra* note 112.

[219] This is especially so if elevating the dispute over the certificate of reviewability requirement would disrupt other existing immigration reform alliances.

of reviewability requirement, the low visibility could have been a positive result if the mood of the potentially larger audience was not supportive of that position on the issue. As explained by one policy insider, the issue is hard to explain, even to members of Congress, who are not all lawyers.[220]

In other words, if opponents believed that they would lose the conflict over the certificate of reviewability requirement if there were a larger audience (e.g., Congress as a whole or the general public) to that conflict, it might have been preferable to restrain the size of the audience.[221] One policy insider described the activity surrounding the certificate of reviewability requirement as "quiet lobbying" that was focused mainly on conversations at the congressional staff level.[222] Another explained that once it became clear that Senator Specter was taking note of the concerns of the judges, there was no need for opponents to implement a press strategy.[223]

While its status as a displaced conflict may have contributed to the Senate's failure to enact the certificate of reviewability requirement, there is a potentially dangerous risk that accompanies such low visibility. The risk is that the certificate of reviewability requirement or a similar provision could be used as a bargaining chip to resolve more visible conflicts. For example, the House and the Senate bills fundamentally disagreed on the policy solution to the problem of illegal immigration. If the House and the Senate were to confer in an attempt to reconcile the two approaches, there is a risk that judicial review issues, which may be visible to select policymakers but not to a more general audience, could be used as a bargaining chip to achieve consensus. In Schattschneider's terms, opponents of the certificate of reviewability may be reluctant to raise the issue to prominence due to fear of disrupting alliances formed to enact overall immigration reform. In fact, one policy insider explained the lack of an effort to add the certificate of reviewability requirement to the Senate bill during the floor debate both by referring to other issues as priorities and by pointing out that the issue could resurface in an eventual conference report.[224] Another policy insider opined, however, that there would have been strong opposition from the Senate conferees on this issue.[225]

Both Schattschneider's theory of the displacement of conflicts and Kingdon's theory of problem definition illustrate the utility of thinking about the legislative history from a public policy perspective by helping to order thoughts about why the Senate turned away from the certificate of reviewability

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[220] Interview with B, *supra* note 72. Similarly, another insider referred to the certificate of reviewability as a difficult subject to understand unless one is a lawyer. Interview with F, *supra* note 72. During the judicial review hearing, even the Chairman of the Senate Judiciary Committee expressed confusion about the structure of immigration judicial review. *Hearing on Judicial Review of Immigration Matters*, *supra* note 3, at 31. The complexity and technicality of the subject makes the battle over problem definition even more important.

[221] On the other hand, one policy insider described that if the Senate Judiciary Committee had included the requirement in the reported bill, perspectives on the sufficiency of the amount of media coverage might change. Interview with D, *supra* note 72.

[222] Interview with A, *supra* note 72. Another insider commented that the certificate of reviewability requirement received a lot of staff attention. Interview with I, *supra* note 72.

[223] Interview with I, *supra* note 72.

[224] Interview with E, *supra* note 72; *see supra* note 161 and accompanying text.

[225] Interview with D, *supra* note 72.

requirement. Application of these two theories, however, leaves unanswered questions worthy of further study. For example, this application only scratches the surface when it comes to the role of the media in influencing congressional attention to immigration jurisdiction-stripping. Also, this application does not significantly take into account the nuances of personalities and relationships of and among legislators, the administration, agencies, the judiciary, staff, and interest groups.[226] What difference, if any, did it make that Senator Specter served as Chairman of the Judiciary Committee at the time the Senate considered the requirement?[227] What role does congressional staff play in shifting congressional attention? Who selected the witnesses that testified at the Senate Judiciary Committee's hearing? What was the role of the Department of Justice and of the Department of Homeland Security in placing this issue on the congressional agenda in the first place? Did executive action affect the Senate Judiciary Committee's decision to drop the requirement? Related to the concern about the role of personalities and relationships is the fact that under Congressman Sensenbrenner's leadership, the certificate of reviewability received little attention yet sailed through the House, while under Senator Specter's leadership, the requirement received some, but relatively little attention, and then stalled and disappeared. Also, application of other public policy scholarship would enhance understanding of the fate of the certificate of reviewability, especially in the context of other provisions that similarly fell from a legislative agenda. Finally, it would be helpful to apply these theories to other efforts to restrict judicial review of immigration cases to test their reliability in deciphering the politics of immigration jurisdiction-stripping.

IV. Conclusion

The legislative history of the certificate of reviewability requirement reveals a small, quiet, and contained debate. Debate over the requirement was confined to the U.S. Senate, and even in the Senate the discussion was not highly visible in comparison to other immigration reform topics. The Senate's attention to the issue diminished and that action had implications—it helped to preserve the status quo of an absence of a gatekeeping requirement.

Application of Schattschneider's theory of the displacement of conflicts and Kingdon's theory of problem definition provides an interesting lens to decipher the legislative history; to begin to analyze why the Senate turned its attention away from the requirement during an era when restrictions on judicial review of immigration cases are relatively common. This application reveals that the proponents' definition of the underlying problem conflicted with a definition advanced by federal court of appeals judges, and there is evidence that the judges' categorization influenced the Senate Judiciary Committee to turn its

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[226] For example, more than one policy insider cited the Senate Judiciary Committee members' respect for the judiciary as a factor in the decision to eliminate the certificate of reviewability requirement from the bill. Interviews with A, C, D & E, *supra* note 72.

[227] Senator Specter sought out the judges' counsel. In calling for the judicial review hearing, Senator Specter said he wanted "[t]o hear the Chief Judge of the Federal Circuit and the others to try to learn a little bit more about what we are doing." *See* Videotape, *supra* note 110.

back on the requirement. This application also reveals evidence that other immigration reform conflicts displaced the conflict over the certificate of reviewability requirement, which diminished the amount of attention the Senate paid to the requirement. While application of these two theories does not explain all, it does help to understand the legislative dynamic, and it draws attention to the usefulness of thinking about immigration jurisdiction-stripping from a public policy perspective.