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Terri L. Carver

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SURVEY ARTICLES

Administrative Law

by Terri L. Carver*

I. INTRODUCTION

In 1998 the Eleventh Circuit Court of Appeals decided a handful of cases dealing with administrative law issues. One of the cases concerned the suspension of an Immigration and Naturalization Service ("INS") deportation order.[1] The Eleventh Circuit upheld the INS Board of Immigration Appeals in denying plaintiffs the opportunity to apply for suspension of deportation.[2] The court found that plaintiffs failed to make a prima facie case for suspension of deportation and abused the immigration rules in delaying their stay in the United States.[3]

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* Terri L. Carver is an environmental attorney with the United States Air Force. This Article does not represent the views of the United States Air Force. University of Nebraska (B.A., 1980); Marquette University Law School (J.D., 1984); George Washington University Law School (LL.M., Environmental Law, with highest honors, 1996).

1. Saiyid v. INS, 132 F.3d 1380 (11th Cir. 1998).

2. *Id.* at 1381. This case did not involve the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 because the INS Board of Immigration Appeals final deportation order in plaintiffs' case was entered in December 1994. *Id.* at 1384 n.5.

3. *Id.* at 1383, 1385.

The court decided three cases involving exhaustion of administrative remedies as a prerequisite for judicial review. In the first case, the court ruled that plaintiff failed to timely object to a utility company's investment request during the Securities and Exchange Commission's ("SEC") administrative process,[4] as required by the Public Utility Holding Company Act.[5] Plaintiff was barred from raising this issue on appeal because it was not raised during the administrative process.[6]

The two remaining cases concerned recent congressional enactments designed to reduce frivolous litigation by prisoners and those challenging INS deportation proceedings. The Prison Litigation Reform Act of 1995 ("PLRA")[7] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[8] require exhaustion of administrative remedies prior to judicial review. In the PLRA case, a prisoner alleged that prison restrictions on sexually explicit material violated the First Amendment.[9] The Eleventh Circuit ruled that plaintiff's *Bivens*[10] section 1983 lawsuit was barred by the mandatory exhaustion of administrative remedies provision in the PLRA.[11] The court also held the mandatory administrative exhaustion requirement negated the judicially created futility and adequacy exceptions (allowing judicial review despite a failure to exhaust administrative remedies).[12]

In the IIRIRA case, the court strictly applied the statutory provision authorizing judicial review only upon a final agency decision and after exhaustion of administrative remedies.[13] The case concerned a deportee with a criminal conviction, triggering the most limited judicial review provisions under the IIRIRA.[14]

II. AGENCY STANDARD OF REVIEW FOR MOTION TO REMAND TO SEEK SUSPENSION OF DEPORTATION

In *Saiyid v. Immigration & Naturalization Service*,[15] the Eleventh Circuit reviewed a final INS deportation order for plaintiffs, Mr. and

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4. Campaign for a Prosperous Ga. v. SEC, 149 F.3d 1282, 1283 (11th Cir. 1998).
5. *Id.* at 1286-87 (citing 15 U.S.C. § 79(x)(a) (1994)).
6. *Id.*
7. *See* 42 U.S.C. § 1997e(a) (Supp. II 1996).
8. 8 U.S.C. § 1252(d)(1) (Supp. III 1997).
9. Alexander v. Hawk, 159 F.3d 1321, 1322 (11th Cir. 1998).
10. This is a reference to the constitutional tort action established in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).
11. 159 F.3d at 1328.
12. *Id.*
13. Richardson v. Reno, 162 F.3d 1338 (11th Cir. 1998).
14. *Id.* at 1342.
15. 132 F.3d 1380 (11th Cir. 1998)..

Mrs. Saiyid, who were illegal immigrants from Bangladesh.[16] Plaintiffs first appealed the deportation order to the INS Board of Immigration Appeals ("BIA").[17] During their appeal to the BIA, plaintiffs became eligible to apply for suspension of deportation because they had been in the United States for more than seven years.[18] Under the immigration law, suspension of a deportation order is authorized only if "extreme hardship" would result from deportation.[19]

The BIA denied plaintiffs' motion to remand because plaintiffs failed to make a prima facie case of extreme hardship.[20] Plaintiffs appealed the BIA ruling on their motion to remand and cited numerous other errors.[21]

On appeal, the Eleventh Circuit limited its discussion to the appropriateness of the prima facie standard with regard to plaintiffs' motion to remand to pursue suspension.[22] The Eleventh Circuit discussed the prima facie standard as a "screening mechanism"[23] to ensure "that claims for suspension of deportation are not simply attempts to buy more time in the United States."[24] The court agreed with the BIA that a prima facie standard was the correct standard to apply to plaintiffs' motion to remand to pursue a suspension claim.[25]

The court also addressed plaintiffs' petition requesting a remand to the BIA to present additional evidence in support of suspension.[26] Plaintiffs cited Mrs. Saiyid's breast cancer and Mr. Saiyid's deteriorating health associated with old age.[27] The court denied plaintiffs' petition for remand.[28] The court criticized the Saiyids for their abuse of the

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16. *Id.* at 1381.
17. *Id.* at 1382.
18. *Id.*
19. *Id.* at 1383 (citing 8 U.S.C. § 1254(a)(1) (1994 & Supp. III (1997)).
20. *Id.* at 1382-83.
21. *Id.*
22. *Id.* The court rejected the other arguments raised by plaintiffs as meritless. *Id.*
23. *Id.* at 1384.
24. *Id.* "A prima facie standard for motions to remand adequately protects the petitioner's ability to apply for suspension, while recognizing that suspension relief is reserved for true 'hardship' cases in which humanitarian concerns counsel a departure from normal deportation regulations." *Id.*
25. *Id.* "This circuit, and the Supreme Court, have historically applied a prima facie standard in assessing motions to remand to permit application for suspension relief." *Id.*
26. *Id.* at 1384.
27. *Id.* at 1385. At the time of the court's opinion, Mr. Saiyid was seventy, and his wife was sixty-nine. *Id.* at 1383.
28. *Id.* at 1385. The court noted that Mrs. Saiyid was diagnosed with breast cancer in February 1995, only two months after the BIA issued the final deportation order. *Id.* "Nothing prevented the Saiyids from filing a second motion to remand with the BIA at that time . . . . We find, therefore, that no reasonable grounds exist for the Saiyids' failure to

immigration laws, beginning in 1989 when they filed a "highly dubious"[29] application for asylum, and followed by a "series of meritless appeals."[30] Under these circumstances, the court would not allow plaintiffs to use illnesses associated with old age as a basis for suspension of the deportation order.[31]

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The case of *Campaign for a Prosperous Georgia v. Securities & Exchange Commission*[32] involved a challenge to the SEC's approval of Southern Company's investment in another utility company.[33] The Public Utility Holding Company Act ("PUHCA")[34] requires utility companies to obtain SEC approval for investments in Exempt Wholesale Generators ("EWGs")[35] or Foreign Utility Companies[36] ("FUCOs").[37] Under PUHCA, the SEC must approve the utility investment or acquisition in EWGs or FUCOs unless the proposed investment or acquisition would have a "substantial adverse impact"[38] on the applicant-utility's operations.[39]

Southern Company, a utility holding company, sought SEC approval of its plan to invest 100% of its retained earnings in EWGs and FUCOs.[40] Southern Company's application did not identify the specific

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adduce the evidence of cancer before the BIA." *Id.*

29. *Id.*

30. *Id.*

31. *Id.* "[T]he Saiyids have grown old by manipulating our immigration system." *Id.*

32. 149 F.3d 1282 (11th Cir. 1998).

33. *Id.* at 1283.

34. 15 U.S.C. § 79 (1994 & Supp. III 1997).

35. 149 F.3d at 1284. The EWGs are "companies exclusively in the business of generating electricity for sale at a wholesale price and which do not own or operate systems for transmitting electricity." *Id.*

36. *Id.* The FUCOs are "companies that generate and transmit electricity outside the United States and do not derive any income from the United States electricity market." *Id.*

37. *Id.* The PUHCA was passed in 1935 in response to fraud and mismanagement by gas and electric utility holding companies. *Id.* at 1283. The PUHCA restricted investments and acquisitions by utilities and gave the SEC regulatory authority over these utility transactions. *Id.* In the Energy Policy Act of 1992 (which amended PUHCA) Congress eased the restrictions on utility investments in Exempt Wholesale Generators and Foreign Utility Companies. *Id.*

38. *Id.* (quoting 15 U.S.C. § 79z-5a(h)(3) (1994 & Supp. III 1997)).

39. *Id.* The SEC regulations on "substantial adverse impact" (known as "Rule 53") require SEC approval for investments greater than fifty percent of the utility's retained earnings. *Id.* While Rule 53 expressly applies only to investments in EWGs, the SEC has consistently applied Rule 53 to investments in FUCOs. *Id.* at 1284 n.1.

40. *Id.* at 1284.

EWGs or FUCOs in which it planned to invest.[41] The SEC sought public comment on Southern Company's application.[42] In November 1995 the Campaign for a Prosperous Georgia ("CPG") submitted comments in opposition to Southern Company's application.[43] In its comments, the CPG did not object to Southern Company's failure to identify the specific EWG or FUCO investments in its SEC application. Also, at this stage in the process, the CPG did not assert that the SEC had a duty to review Southern Company's specific investments in EWGs or FUCOs.[44]

In April 1996 the SEC approved Southern Company's application.[45] The CPG filed a motion for rehearing before the SEC in May 1996, but merely repeated the same arguments made during the public comment period.[46] The SEC denied the CPG's motion for rehearing.[47] Later in 1996, Southern Company announced its intention to invest 100% of its earnings in Consolidated Electric Power of Asia, a FUCO.[48] In October 1996 the CPG filed a supplemental motion for rehearing before the SEC and, for the first time, objected to the SEC's failure to conduct a review of Southern Company's specific investments.[49] The SEC denied the CPG's supplemental motion for rehearing, and the CPG appealed.[50]

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41. *Id.*

42. *Id.*

43. *Id.*

> The CPG raised three objections: (1) Southern's investments would result in an unavailability of capital that Southern might need to fund future operating costs, thereby resulting in higher rates; (2) profits from these investments would allow Southern to subsidize rates for its domestic consumers, thereby inhibiting competition in the electricity market; and (3) approval of the application would reward Southern even though it has a poor pollution record.

Id. at 1284-85.

44. *Id.*

45. *Id.* at 1285.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

> The arguments CPG makes to this Court are that the SEC: 1) misapplied its own Rule 53 by failing to consider each of Southern's proposed investments on an individual basis; 2) acted in an arbitrary and capricious manner by failing to examine individually Southern's proposed EWG and FUCO investments; 3) lacked a substantial evidentiary basis for approving Southern's application because it did not consider each investment individually; and 4) lacked a substantial evidentiary basis for finding that Southern's investments would not have a "substantial adverse impact" on the utilities Southern operates because those investments would result in an unavailability of capital for Southern's operations.

Id.

50. *Id.*

The court framed the issue as follows: "[Whether] the SEC should have considered each of Southern's EWG and FUCO investments on an individual basis instead of determining in advance that Southern could invest in any EWGs and FUCOs it chose."[51] The SEC argued the court did not have jurisdiction under section 24 of the PUHCA, the judicial review provision.[52]

Section 24 provides that "'[n]o objection to the order of the Commission shall be considered by [a Court of Appeals] unless such objection shall have been urged *before* the Commission or unless there were reasonable grounds for failure so to do.'"[53] The court found section 24 was ambiguous as to when an objection must be made in the administrative process to preserve judicial review.[54] The court looked to congressional intent behind section 24.[55] "The manifest congressional intent . . . [wa]s to give the SEC a meaningful opportunity to rule on, make factfindings about, and apply its expertise to, any objections parties may have to a proposed administrative action."[56]

The court rejected CPG's argument that section 24 only required an objection or issue "be raised before the SEC at some point, at any point, in the administrative process."[57] The court held that CPG's arguments, made six months after the SEC's approval and more than a year after the public comment period, did not meet the requirements of section 24.[58] "Given the realities of the administrative process, in order for the SEC's opportunity to consider the objections to be meaningful, the objections must be made while the SEC has the application under consideration."[59] The court found no reasonable grounds for the delay because the CPG could have made its "individual review" arguments during the public comment period.[60]

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51. *Id.*

52. *Id.* at 1286.

53. *Id.* (citing 15 U.S.C. § 79(x)(a) (1994) (alteration in original)).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1285-86. The court "decline[d] to adopt that interpretation, because it would lead to lack of finality in the administrative process and to judicial review of objections that the SEC never had a meaningful opportunity to consider." *Id.* at 1287.

58. *Id.* at 1286.

59. *Id.*

60. *Id.* at 1286 n.3. The court also addressed the CPG argument that Southern Company's FUCO investment would result in an unavailability of capital for Southern's operations. *Id.* at 1287. The CPG had raised this issue during the public comment period. *Id.* The court interpreted this objection as an attack on the substantiality of the evidence in support of the SEC's decision. *Id.* The court found the SEC had substantial evidence to find the proposed investments would not result in the unavailability of capital for other

In *Alexander v. Hawk*,[61] a federal prisoner challenged Federal Bureau of Prisons ("BOP") regulations restricting possession of sexually explicit materials.[62] The Prison Litigation Reform Act of 1995 ("PLRA")[63] directs prisons to restrict the delivery of sexually explicit materials to prisoners, a rule the BOP implemented in its regulations.[64] Alleging a violation of his First Amendment rights, plaintiff bypassed the prison grievance process and filed a *Bivens* section 1983 lawsuit in district court.[65] Plaintiff sought monetary damages and injunctive relief.[66] The district court dismissed the lawsuit because plaintiff failed to exhaust administrative remedies as required by PLRA section 1997e(a).[67] Plaintiff appealed the district court's decision to the Eleventh Circuit.[68]

Section 1997e(a) of the PLRA states that "'No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies *as are available* are exhausted.'"[69] On appeal, plaintiff argued the prison administrative remedies were not "available" under PLRA section 1997e(a).[70] The basis for plaintiff's argument was prison administrative remedies were "futile and inadequate" because the prison had no authority to either find the restrictions on sexually explicit materials unconstitutional or to award him monetary damages.[71]

The court ruled the PLRA's mandatory exhaustion provision barred the court from waiving the exhaustion requirement under the judicially created futility and inadequacy doctrines.[72] The court also rejected plaintiff's argument that a prison administrative process is only "available" if it can provide effective relief.[73] The court found that "Congress no longer wanted courts to examine the effectiveness of [prison] administrative remedies but rather to focus solely on whether

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operations. *Id.* at 1287-88.

61. 159 F.3d 1321 (11th Cir. 1998).
62. *Id.* at 1322.
63. 42 U.S.C. § 1997e(a) (1994 & Supp. II 1996).
64. 159 F.3d at 1322.
65. *Id.*
66. *Id.* at 1322-23.
67. *Id.* at 1323. The district court dismissed plaintiff's lawsuit without prejudice. *Id.*
68. *Id.*
69. *Id.* at 1323-24 (quoting 42 U.S.C. § 1997e(a)) (emphasis added).
70. *Id.* at 1325.
71. *Id.*
72. *Id.* at 1325-26.
73. *Id.*

an administrative remedy program is 'available' in the prison involved .... [T]he term 'available' in section 1997e(a) is used to acknowledge that not all prisons actually have administrative remedy programs."[74] The Eleventh Circuit affirmed the district court's dismissal of plaintiff's suit for failure to exhaust administrative remedies as required by PLRA section 1997e(a).[75]

The court concluded with a discussion of the important functions served by the exhaustion of administrative remedies in prison litigation.[76] The court noted that the D.C. Circuit was divided in deciding a PLRA case relating to restrictions on sexually explicit materials.[77] The Eleventh Circuit opined that "the need for a more fully developed record is mainly what divided the court .... [T]he [D.C. Circuit] panel did not agree about how broadly the prohibition of materials would extend ...."[78]

In *Richardson v. Reno*,[79] the Eleventh Circuit confronted a multifaceted challenge to the limited judicial review provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[80] which required exhaustion of all administrative remedies. Plaintiff was a lawful resident alien in the United States who had been

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74. *Id.*

75. *Id.* at 1328.

76. *Id.*

> In this case, the Ensign Amendment [in the PLRA] does not define the term "sexually explicit," and the BOP adopted regulations ... defining that term and applying it to various publications. During the administrative grievance process, the BOP could review its interpretation and correct any mistakes it might find before the federal judiciary became involved. Even if the BOP decided not to revise its interpretation and plan for implementing the Ensign Amendment, the BOP at least would be able to explain why it believed its interpretation properly construed the Ensign Amendment and satisfied constitutional standards.
>
> Secondly, even if the complaining prisoner seeks only money damages, the prisoner may be successful in having the BOP halt the infringing practice, which at least freezes the time frame for the prisoner's damages.
>
> Thirdly, in constitutional challenges, the BOP could create a record explaining its legitimate penological justifications for the new restrictions and for the BOP's implementing regulations. Even if the BOP did not grant relief, a prisoner's resort to the administrative process is not futile, but allows grievances to be heard and a record to be created for review in any subsequent proceedings. Courts not only conserve time and effort as a result of any factfinding during the ... [prison] proceedings, but also benefit from the BOP's expertise in interpreting its own regulations and applying them to the facts before it.

Id. at 1327-28 (footnote omitted).

77. *Id.* at 1328 n.12.

78. *Id.*

79. 162 F.3d 1338 (11th Cir. 1998).

80. 8 U.S.C. § 1101 (1994 & Supp. III 1997).

convicted of cocaine trafficking in 1990.[81] After a trip to Haiti, plaintiff attempted to re-enter the United States.[82] The INS determined he was ineligible to re-enter the United States because of his drug conviction.[83] Plaintiff's ineligibility was based on an IIRIRA provision[84] designed to deport those aliens convicted of certain aggravated felonies.[85] The INS immediately began deportation proceedings against plaintiff and denied his request for release from custody.[86]

On November 26, 1997, plaintiff filed a writ of habeas corpus in the district court under 28 U.S.C. § 2241.[87] The INS asserted the district court did not have subject matter jurisdiction to hear plaintiff's writ of habeas corpus.[88] On January 8, 1998, the INS immigration judge ordered plaintiff to be "removed" from the United States.[89] Plaintiff appealed the INS order to the Board of Immigration Appeals ("BIA").[90] While the BIA appeal was pending, the district court granted plaintiff's writ of habeas corpus and ordered an "individualized hearing" by the INS within eleven days.[91] The INS appealed the district court's order to the Eleventh Circuit, staying the district court's order.[92]

The IIRIRA section 242(b)(9) provides for judicial review only after a final removal order has been issued by the INS.[93] In addition, section 242(d)(1) states that "a court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available."[94] On appeal, plaintiff argued that exhaustion of administrative remedies was "futile" because the IIRIRA eliminated judicial review in the courts of appeals of any BIA final order removing him as a criminal alien.[95] Plaintiff also made numerous constitutional challenges to the IIRIRA's judicial review provisions.[96]

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81. 162 F.3d at 1342.
82. *Id.* at 1343.
83. *Id.*
84. 8 U.S.C. § 1229b(a) (Supp. III 1997).
85. 162 F.3d at 1344.
86. *Id.* at 1343.
87. *Id.*
88. *Id.*
89. *Id.* at 1344.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1354.
94. *Id.*
95. *Id.* at 1345.
96. *Id.* at 1359. Plaintiff argued the IIRIRA judicial review provisions violated the Due Process Clause, Article III, and the Suspension Clause, under the U.S. Constitution. *Id.*

The Eleventh Circuit ruled that deportees with criminal convictions were entitled to judicial review regarding both statutory and constitutional issues.[97] However, "Congress has abbreviated judicial review to one place and one time: only in the court of appeal[s] and only after a final removal order and exhaustion of all administrative remedies."[98] The court could not utilize the judicial "futility" exception contrary to a statutory exhaustion requirement.[99] After extensive discussion of the numerous constitutional challenges to the limited judicial review provisions, the Eleventh Circuit held the district court did not have jurisdiction to hear plaintiff's suit due to plaintiff's failure to exhaust administrative remedies and the lack of a final removal order.[100]

IV. CONCLUSION

While the number of administrative law cases before the Eleventh Circuit in 1998 was limited, the court clearly established the importance of strict compliance with statutory exhaustion requirements. Prisoners and deportees must be scrupulous in pursuing all available administrative remedies to preserve judicial review of their cases.

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97. *Id.* at 1375.

> [W]e disagree with Richardson's contention that this [IIRIRA] provision [barring judicial review of removal orders against those with criminal convictions] leaves him without any judicial review in violation of the Suspension Clause. Courts of appeal[s] retain jurisdiction under [the IIRIRA] to determine whether the jurisdictional bar . . . applies . . . . [I]n order to decide whether the jurisdictional bar applies, courts must determine that the removal order: (1) "is against an alien" (2) "who is removable" (3) "by reason of having committed a criminal offense covered" in certain enumerated sections.
>
> In addition to these three jurisdictional facts, a court of appeal[s] retains jurisdiction to entertain a constitutional attack on this [IIRIRA] statute as part of an alien's petition for review of a final order . . . . This approach is consistent with the admonition in *Heikkila v. Barber*, 345 U.S. 229, 234 (1953), that "Congress . . . intended to make these administrative decisions non-reviewable to the fullest extent possible under the Constitution."
>
> Thus, we find that the [IIRIRA] still assures Richardson a significant degree of judicial review in the court of appeals after a final removal order . . . .

Id. at 1375-76 (footnotes omitted).

98. *Id.* at 1354.

99. *Id.* at 1355-58.

100. *Id.* at 1379.