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"AN ACT OF CRUEL INJUSTICE": IF THE TRUMP ADMINISTRATION IS RELYING ON GRUDGING COURT ACCEPTANCE OF CRUEL RESULTS AS SUPPORT FOR THE NEW PUBLIC CHARGE RULE, WHAT DOES THAT SAY ABOUT THE RULE?

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The Trump Administration's new public charge rule has already been the subject of at least five different lawsuits, including one from a coalition of 13 states led by Washington, another from a California-led coalition of 4 states and the District of Columbia, and another from a coalition of 3 states led by New York, plus one from a coalition of nonprofit organizations. There is a lot to say about the rule, which spans 217 pages of the Federal Register, and the various plaintiffs as well as a number of commentators and organizations have already said a great deal of it. In this blog post, however, I want to focus on one particular thing I noticed while reading through the rule and checking some of its citations: the harsh terms in which the sorts of actions sought to be justified by the rule were described even by one of the authorities relied upon by the Administration to support it.

At page 77 of the above-linked PDF version of the rule, which is page 41,368 of Volume 84 (No. 157) of the Federal Register, the rule cites four cases in footnote 407 in defense of the proposition that considering disability in public charge determinations "is not new and has been part of public charge determinations historically." One of those cases is *United States ex rel. Canfora v. Williams*, 186 F. 354 (S.D.N.Y. 1911), which is described in the citation as "ruling that an amputated leg was sufficient to justify the exclusion of a sixty year old man even though the man had adult children who were able and willing to support him." Lest the reader think I am unfairly cherry-picking an

antique citation, the other three cases cited in the same footnote are from the years 1911, 1919, and 1922.

An imperfect copy of the *U.S. ex rel Canfora v. Williams* decision, with typographical errors possibly resulting from the use of Optical Character Recognition to convert scanned pages into text, is available from the Caselaw Access Project of Harvard Law School, although for a completely accurate copy it appears necessary to consult a paid service like Westlaw or Lexis. The only error in the portion of the ruling which I am about to quote is one minor misspelling, however, so what I am about to say can be verified from freely available public sources.

In a strictly technical sense, it is perhaps defensible for the Administration to have described *U.S. ex rel. Canfora v. Williams* as holding that the habeas petitioner's amputated leg was "sufficient" to justify his exclusion, but this only tells part of the story. The opinion in the case also says:

I consider that, if this order of deportation is carried out, it will be an act of cruel injustice. If this alien had remained in this country, he probably never would have been molested. If he had not lost his leg, he probably would not have been detained on his return. No offense is charged against him. It is proposed to deport him because he has suffered a pitiable misfortune, and notwithstanding a proposition to give a satisfactory bond, which would appear to be a complete protection to the government from his becoming a public charge. But the immigration acts confer exclusive power upon the immigration officials to determine such questions, and the courts, so long as the procedure prescribed by the immigration acts' and the rules established for their administration is substantially followed, have under the decisions of the United States Supreme Court no jurisdiction to interfere. I am therefore compelled to dismiss this writ. But I desire to express the hope that the immigration authorities will reconsider this case. I cannot believe that on a candid reconsideration of this record this man, who is charged with no offense, will e sent away, because he has suffered a grievous calamity and has been denounced by a malicious enemy, to pass his last years and to die in a distant land, far from his wife and children, and from the home in this country in which he has lived a blameless life for so many years.

Canfora, 186 F. at 356-357.

This is hardly a ringing endorsement of the decision to exclude the unfortunate

sixty-year-old man in question following his trip to Italy to visit his mother. It is, rather, a grudging acquiescence on account of a narrow view of the courts' jurisdiction to review the action of the immigration authorities. The law of judicial review of agency action has come a long way in the 108 years since *Canfora* was decided, however, and it does not appear that the Administration was relying on *Canfora* for that point. Rather, the citation in the public charge rule seems to suggest that the court in *Canfora* found the exclusion substantively justified. That is, to put it mildly, a tendentious reading of the court's opinion.

What does it say about the new public-charge rule that among the authorities relied upon in support of it is a case describing the relied-upon outcome as "an act of cruel injustice" which the author of the opinion "cannot believe" would survive a "candid reconsideration" of the record? There are a few alternatives that I can think of, but none of them reflect well on the rule.

Perhaps the authors of the rule were sloppy in their haste to get the rule published: it has been reported that White House adviser Stephen Miller was anxious for the rule to be finalized and told one official working on the rule that "I don't care what you need to do to finish it on time." Perhaps they were scraping the bottom of the proverbial barrel looking for authority which they could use to defend the indefensible. Or perhaps, as Adam Serwer wrote in an Atlantic article regarding other Trump Administration policies, the cruelty is the point. Whatever the explanation, the fact that the public charge rule would resort to citing a case like *Canfora* for support is further evidence of its deeply problematic nature.