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How Immigration Courts Contaminate American Justice



By Bennett L. Gershman

Imagine a legal proceeding where the judge is hired by the chief prosecutor, the defendant is charged with an unintelligible offense, he has no lawyer to defend him, the proceedings are conducted in a language he does not understand, and the punishment is banishment from his home, his livelihood, and his family for the rest of his life. This might be a scene in a courtroom operated by some totalitarian regime, or by a Taliban or Ayatollah fanatic. Actually, the above description represents “justice” in America’s immigration courts. It’s a bizarre world invisible to most Americans in which government power is used abusively and arbitrarily, constitutional rights are non-existent, lives are destroyed, and there is virtually no chance of correction.

Immigration courts determine whether a non-citizen may remain in the United States or be removed. Some 260 judges throughout the U.S. make that decision. These judges are lawyers in the Department of Justice assigned by the Attorney General for indefinite tenure, and can be terminated at will. The Bush Administration [packed the immigration courts](#) with “good Republicans” who were “completely on the team,” and screened for their political and ideological affiliations. In contrast to all other judges in U.S. courts and agencies, immigration judges are neither independent nor impartial, and are not subject to codes of judicial ethics. They can interrogate immigrants and bully witnesses as if they were conducting an inquisition. These judges are partisans in the nation’s “War on Immigrants.”

Moreover, under rules of jurisdiction and appeal, their decisions are almost totally insulated from review by real federal judges. Indeed, in the handful of cases where federal review has occurred, appellate judges frequently condemned the conduct of immigration judges as “hostile,” “intimidating,” “insulting,” “intemperate,” “sarcastic,” “mocking,” and “contemptuous,” and their decisions as “irrational,” “arbitrary,” “incomprehensible,” “incoherent,” and “indecipherable.” One immigration judge for laughs referred to himself as “Me Tarzan” to a Ugandan defendant named Jane. Another immigration judge’s contempt and disparagement of the defendant, according to the federal court of appeals, “seemed more appropriate to a court television show than a federal court proceeding.” Richard Posner, one of the country’s most respected federal circuit judges, observed that adjudication by immigration judges “has fallen below the minimum standards of legal justice.”

To be sure, immigration judges operate under extraordinarily difficult conditions that most likely overwhelm, exhaust, and embitter them, and maybe provoke some of the excesses noted above. Their caseloads are enormous — around 270,000 cases are being handled by the 260 immigration judges — and they have virtually no staff or administrative support. Although law enforcement agencies continue to round up more and more immigrants to add to the courts’ docket, a hiring freeze prevents hiring more immigration judges. To get a sense of the workload, consider that some immigration judges decide up to 2,400 removal cases a year. If the judge worked 5 days a week for 52 weeks, he or she would be responsible for adjudicating 10 cases a day. Assuming that most of these cases involve the fate of a person who seeks to remain in this country with his family and friends, and wants a judicial hearing to prove that he should not be deported, it’s impossible for even the most well-meaning, professional, and conscientious immigration judge to dispense justice to all the defendants in his courtroom fairly and even-handedly. In such an environment — described by one immigration judge as “like trying death-penalty cases in a traffic court setting,” the outcomes are almost certain to be arbitrary, irrational, careless, and unfair.

But focusing on the judge is only a part of this mean-spirited and despairing picture. Immigrants about to be deported have no right to the assistance of counsel, and despite strenuous efforts by defender services, pro bono bar groups, and law school clinics, the vast majority of detained immigrants lack counsel to assist them. It’s so ironic. A person charged with larceny for stealing a can of beans from a supermarket has a constitutional right to a lawyer, to a jury trial where guilt must be proved beyond a reasonable doubt, to call and cross-examine witnesses, to examine the prosecutor’s files, and to appeal a guilty verdict.

But in a proceeding to decide whether a person will be banished and exiled from his country and his family, he enjoys none of these rights.

But even in cases where a lawyer does appear for the immigrant, the lawyer's performance has been harshly criticized in numerous [reports](#) and [studies](#) as lazy, incompetent, and unprepared. Many of these lawyers have been expelled or suspended. Some of them pretend to be lawyers to defraud vulnerable immigrant families in desperate need of legal assistance. And even when competent lawyers are hired, their representation often is obstructed by the government's transferring the immigrant to a detention facility thousands of miles from his home. Indeed, two-thirds of all immigrants taken into custody in New York are sent to far away detention centers like Texas or Louisiana. And 80 percent of these immigrants do not have lawyers. And one should not ignore the practical reality that even the best lawyer to effectively defend his client may have to temper his zeal when dealing with a bullying and browbeating immigration judge.

Moreover, it's bad enough for an immigrant before a bad judge without the aid of a lawyer, or with a bad lawyer, to protect himself. It's even worse — an almost impossible task — for the immigrant to fully comprehend the legal rules of removal and asylum proceedings. Immigration law, according to judges, professional groups, and academics may be the most challenging of legal specialties, rivaled only by tax law. To be deported, a legal immigrant typically must have committed an “aggravated felony,” or a “crime involving moral turpitude.” But since there are dozens and dozens of potentially deportable crimes in federal and state criminal codes, deciding which ones qualify involves an interpretive process that Justice Alito in the landmark case of [Padilla v. Kentucky](#) characterized as “dizzying confusion.” Indeed, his 14-page concurring opinion was devoted exclusively to demonstrating the complexity, ambiguity, and incoherent features of immigration law. Even determining what constitutes “persecution” is unclear, as Judge Posner [recently noted](#) when he eviscerated for its “warped logic” an opinion of an immigration judge. Immigration judges and immigration lawyers undoubtedly have difficulty trying to decipher the nuances of immigration law; it's an even greater perversion of justice to expect that a deportable and lawyerless immigrant facing a harsh and impatient judge would be able to comprehend and apply laws and rules that even Supreme Court Justices find confusing.

And, finally, adding to the grotesqueness of the process is the added burden for immigrants who do not understand English of trying to comprehend the court proceedings. Court translators often translate only selected portions of the proceedings. They typically translate when the judge speaks to the lawyers or the defendant himself, but too often do not

translate the testimony of witnesses, which is crucial to making credibility and other factual determinations which will be the basis for the removal decision.

The picture is bleak and dire. Is there a path to reforming the immigration justice system to ensure fairness? A recent report by the American Bar Association makes several important recommendations. Separating the immigration judge from the Department of Justice and making the judge independent would be a good start. Improving the professionalism and training of judges is another. Obviously increasing the availability of qualified immigration lawyers and improving their training and performance are critical. Providing more resources to this resource-starved system also is critical. However, given the deportation crackdowns and implementation of the Obama administration's Secure Communities initiative, it's unclear whether additional resources will make any significant improvement. For now, continuing to expose this contamination in our justice system may be all that can be expected. As Justice Louis Brandeis once remarked, "Sunlight is the best disinfectant."

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Bennett L. Gershman
Professor of Law, Pace

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