A Critique of the Establishment of a Specialized Immigration Court

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Maurice Roberts' article accurately describes the current state of the immigration courts and the Board of Immigration Appeals. His portrayal of the system as one plagued by delays and tainted by the lack of independence from the enforcement branch of the Immigration and Naturalization Service reflects the common perception amongst practioners before the immigration courts and the Board. Like Mr. Roberts, such practitioners, as well as the immigration judges themselves, feel there is a pressing need to change the current structure of the immigration courts and the Board. There is disagreement, though, on what the nature of the change should be.

The debate over the structure of the future immigration court system involves the question of whether a specialized immigration court and appellate division should be established under article I of the Constitution or whether the existing system should be removed from the Immigration and Naturalization Service (INS) and established as an independent agency within the Department of Justice. Mr. Roberts advocates the creation of an article I specialized court. I respectfully disagree and contend that independent agency status within the Department of Justice is the optimum solution. My disagreement is basically directed toward the elimination of judicial review by the courts of appeals which would result if a specialized immigration court system were established.

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The arguments generally advanced for the creation of a specialized court to handle a particular area of administrative law are: (1) it provides caseload relief for the courts of general jurisdiction; (2) it creates uniformity and certainty of law by eliminating decisions by the various district courts and circuit courts of appeals; and (3) the highly technical nature of administrative decisions are better understood by the specialist as opposed to the generalist judge.[1] Application of these considerations to the current immigration court system, however, fails to offer a persuasive argument for the creation of the new specialized court.

First, the caseload relief to the courts of appeals would be inconsequential. In 1979 only 194 petitions for review were filed in all the various circuits.[2] This represents a continuing decline in the number of petitions for review being filed each year.[3] Second, the problem of conflicting decisions between the courts of appeals[4] is in no way unique to administrative agencies in general, or to the immigration courts in particular. Conflicts result from the nature of the federal judicial system and it is the function of the Supreme Court to resolve the varying positions. Due to the exigencies of the Supreme Court's caseload the resolution of conflicts is taking substantially longer than in the past. Regardless, the nature of the conflicting decisions facing the immigration courts is far from the crisis proportions necessary to justify the creation of a specialized court to resolve the problem.[5] Finally,

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1. *See* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62-68 (1975).

2. [1979] DIRECTOR AD. OFF. OF U.S. COURTS REP. A6.

3. In 1978 there were 257 petitions filed, compared to 295 in 1977 and 387 in 1976. The reason for the decline may be partly attributed to sanctions being imposed upon attorneys who file petitions for review for the purposes of delay. *See, e.g.,* Chour v. INS, 578 F.2d 464 (2d Cir. 1978) ($1000 fine and double costs imposed); Acevedo v. INS, 538 F.2d 918 (2d Cir. 1976) (double costs imposed); *In re* Bithoney, 486 F.2d 319 (1st Cir. 1973) (one year suspension and $500 fine).

4. The major example of this type of conflict arose between the Second and Ninth Circuits over the availability of relief under 8 U.S.C. § 1182(c) (1976) in deportation proceedings. *Compare*, Francis v. INS, 532 F.2d 286 (2d Cir. 1976) *with* Bowe v. INS, 597 F.2d 1158 (9th Cir. 1979). This conflict was recently resolved with the Ninth Circuit accepting the *Francis* position. Tapia-Acuna v. INS, — F.2d — (9th Cir. 1981). Another example of this type of conflict arose concerning the eligibility of children for immigration through their stepparent. The BIA required evidence of "active parental interest" in the stepchild's support and general instruction. *In re* Moreira, I.D. No. 2792 (1980). The Ninth Circuit rejected this position and held the stepchild eligible for immigration merely on the basis of a valid marriage between the parents. Palmer v. Reddy, 622 F.2d 463 (9th Cir. 1980). This conflict has also been resolved with the recent BIA decision to apply the Ninth Circuit's position nationwide. *In re* McMillian, I.D. No. 2844 (1981).

5. It is questionable whether the Board has to follow the ruling of a court of appeals in other cases arising within the court's jurisdiction. In Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979), the court indicated that the Board was not so bound. Similar problems have been experienced by the Tax Court. It was not un-

the nature of the issues raised in deportation proceedings, although somewhat technical in nature, is in no way beyond the intellectual grasp of an appellate court judge. Unlike the issues raised in the customs, patent, or bankruptcy areas, deportation cases mainly involve simple factual situations, due process considerations and discretionary determinations. Appellate judges experienced in handling criminal, civil and administrative cases from a host of different agencies are well suited to handle these issues.

The argument for a new specialized immigration court is even weaker when the disadvantages are considered. The specialized court would eliminate review by the courts of appeals. In practical terms this would mean an almost total loss of review by courts of general jurisdiction since the Supreme Court's caseload would basically preclude review in all but the most exceptional cases. The loss of the contribution made by the courts of appeals to the administration and development of justice in the immigration and deportation area would be devastating. The courts of appeals, with their generalist perspective and diverse views gained through extensive experience in the whole spectrum of substantive and procedural areas, make a great contribution to the creative development of administrative law in general and immigration law in particular.[6] The judges of the courts of appeals provide an essential counterbalance to the inevitable prejudices and limited perspectives which develop within an agency solely concerned with its operation in one limited area of law. Additionally, the development of varying positions by different circuits is beneficial to the illumination and analysis of issues before final resolution by the Supreme Court. These dynamics would be lost if a specialized immigration court were to be established.

The resolution of the problems now being experienced by the immigration courts and the Board can be solved without the crea-

til 1970 that the Tax Court decided to consider itself bound by courts of appeals decisions. *See* Golsen v. Commissioner, 54 T.C. 742 (1970).

6. *See, e.g.*, Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977) (involuntary statements inadmissible in deportation proceedings on fifth amendment grounds); Mendez v. INS, 563 F.2d 956 (9th Cir. 1977) (failure to give attorney 72 hours notice of execution of deportation order voids removal of alien and Service ordered to readmit him to the country); Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (relief under 8 U.S.C. § 1182(c) (1976) granted to all otherwise eligible permanent residents in deportation hearings on equal protection grounds).

tion of a specialized court. The problem of delay is one of economics and the solution is merely one of affording the immigration courts and the Board adequate resources to handle their caseloads. In all probability the amount of funding necessary for the establishment of the specialized court would far exceed the cost of upgrading the present system. The problem of independence can be remedied by separating the immigration courts and the Board from the INS and establishing them as another agency within the Department of Justice similar to the Parole Commission. The authority to control budgetary allocations and the administration of the courts could rest with the Board. The supervision of the immigration judges would no longer rest within the enforcement branch of the INS. The immigration courts and the Board would then become self-sufficient, with their independence firmly established.