Comments on "A Specialized Statutory Immigration Court"

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Maurice Roberts has, again, provided a unique and rare public service by proposing reforms of the Immigration Judge/Board of Immigration Appeals system and by making his proposals available for instant public debate and critique. This is characteristic of his leadership, scholarship, energy and integrity. I am honored to have been asked to comment.

In criticizing the present system Mr. Roberts notes certain salient features which produce weaknesses. These include:

(1) The governing law is overly technical. It is the result of ad hoc legislation and political compromise. Regulations interpreting the law emanate from the Commissioner of the Immigration and Naturalization Service and the INS central office. These sources are not noted for their creative approach toward the Immigration Judge/Board of Immigration Appeals process. Perhaps this is inevitable insofar as the Service is a party-litigant in the process.

(2) Regulations divide the appellate process between the enforcement authority of the District Director (and Regional Commissioner, for certain applications) and the Immigration Judge/Board of Immigration Appeals process for others. Mr. Wildes, in his comment, has characterized this division as "schizophrenic." The process for decision and review is unduly delayed, and the

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delays are not due to extraordinary concern for the rights of the parties nor for the quality of the decisions.

(3) Immigration practice has become isolated in its technicality and isolated from general law including the Administrative Procedure Act.[1]

(4) The Immigration Service and the Board occupy subordinated and unfavored positions within the Department of Justice.

(5) Adjudicators at the trial level sense a real limitation on their independence arising from their lack of clear authority, their inability to enforce orders, their lack of financial security and the absence of administrative support facilities necessary to conduct orderly and expeditious business.[2]

Mr. Roberts has not dealt with certain implications of these problems, nor has he considered equally pressing issues bearing on the same parts of the system. These include:

(1) No less schizophrenic than the division of power within the INS is the division of immigration law authority among the Service and other agencies, notably the Visa Office of the Department of State.[3]

(2) Mr. Roberts assumes that a more secure professional staff would produce better decisions. This is accurate only to a limited point. The statute itself is a compromise. Without authority to deal with informed discretion in specific cases, there can be no meaningful bridge between a prospective legal code and its application to the life situation complexities of real people. Moreover, there is a significant time lag even in the ad hoc amendatory process for the solution of the inadequacy of prospective legal codes.

(3) The system properly may be viewed as fundamentally and irretrievably unfair, irrespective of the "niceness" of future procedural and substantive dispositions of adjudicated cases. It would be inane to discuss "fair adjudication" of difficult cases in a field littered with uninvited refugees admitted ad hoc, undocumented workers, Presidential proposals for unspecified amnesty, and the appearance of political intervention for the favored few.

(4) Where so many respondents are unrepresented by competent counsel, a real need exists, not only for adjudication but for active counseling to ensure that the remedies available are granted. Substantive results are too often achieved only by a

1. *See* Marcello v. Bonds, 349 U.S. 302 (1955); Giambanco v. INS, 531 F.2d 141 (3d Cir. 1976). *See also* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

2. Presentation of Immigration Judge Joseph Monsanto before the Select Commission on Immigration and Refugee Policy (April 24, 1980).

3. *See In re* Ascher, 14 I. & N. Dec. 271 (1973).

hypertechnical procedural system in which respondents are unfairly deprived of relief and only expert counsel can litigate cases at length to avoid an unwelcome result. Such problems are fostered by the adversary process. A different role for adjudicators might avoid both extremes.

(5) Resolving difficult cases requires energy, ingenuity and integrity. Judges are no more than human. There is a limit to their competence and compassion. Reliance on goodwill cannot substitute for an adequate reworking of the basic system.

Mr. Roberts' proposal is inappropriate except to the extent that the adjudicative process can be separated from the enforcement agency and given independence. An article I court would produce an overjudicialized, formal process attendant to the to-be-created agency's status as "court." Speed is not inherent in such a process; rather, there is potential for further, albeit different, sorts of delay. Neither need the judges *qua* judges feel any responsibility to assist in the development of a record or remedy; rather, cases may be decided solely by adopting the work product of one of the adversaries.

An article I court need not have any more authority than is granted by its enabling legislation. The holding in *Glidden Co. v. Zdanok*[4] relates primarily to a converse set of problems but is significant because of the extent of the Supreme Court's consideration of the nature of article III judicial power and how that varies from article I authority. Mr. Roberts specifically proposes an article I court.

It may therefore be suggested that such a "court" is not invested with the "judicial Power of the United States"[5] recognized in article III. While nothing that requires immigration cases to be decided or reviewed by a court, the question at issue is the desirability of a reform which may be more cosmetic than real. An article I court is no more than a fancy independent tribunal in judicial garb. It has less than full article III judicial power and none of the flexibility or informality of an administrative body.

Can an article I court rule on constitutional questions inherent in issues before it, insofar as authority to do so rests on the judi-

4. 370 U.S. 530 (1962).
5. U.S. CONST. art. III, § 1.

cial powers of constitutionally enpowered courts?[6] Surely, constitutional issues will arise which warrant consideration before reaching the Supreme Court by Petition for Certiorari. The practice of the Board of Immigration Appeals of refusing to consider and rule on constitutional issues was moderated by *Matter of Sandoval*.[7] If there is validity to the analysis that there is a constitutional limit on an article I court's authority, then the proposed format does not advance the required judicial independence. I cannot agree that *Palmore v. United States*[8] resolved the issue favorably. If anything, that case underlines the powerlessness of an article I court to rule on constitutional issues.[9]

A more obvious defect of the proposal is the elimination of court of appeals review. Judges of the courts of appeals have regularly decided to include deportation adjudication within the fabric of law and due process rather than to relegate it to hypertechnical exile from general integration within the American legal process. The result in *Francis v. INS*[10] could scarcely be expected from a specialized base. A number of circuits have developed admirable ways to clear the dockets of unwarranted cases without further burden to the courts. I fear that in isolating immigration appeals from the general jurisprudence, the process will grow even less flexible, less humane and less functional.[11]

Having criticized the thoughtful assessment of an established scholar, let me brashly and briefly propose an alternative: an independent administrative tribunal with authority to manage its own affairs, both at trial and on appeal. Hearings would be held before immigration judges who would be employees of the Board. Appeals would be to the Board. The Board would be an independent agency. In addition to trial and appellate divisions, it would contain a clemency division which could certify cases to the Attorney General or to Congress for ameliorative action or non-enforcement. This would make private bill and non-priority remedies available generally where deserved. Such clemency would not be subject to judicial review; other decisions, however, could be reviewed.

Trial jurisdiction would be extended to exclusion, deportation and rescission proceedings as well as to questions of bail and custody. Appellate jurisdiction would extend, in addition to review of

6. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828). *Compare id. with* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
7. I.D. No. 2725 (1979).
8. 411 U.S. 389 (1973).
9. *Id.* at 400-09.
10. 532 F.2d 268 (2d Cir. 1976).
11. *See* Tovar v. INS, 612 F.2d 794 (3d Cir. 1980).

trial court proceedings, to review of visa petitions for the admission of immediate relatives and for immigration and refugee classifications. Review of deportation and exclusion proceedings would be by petition for review, but exclusion proceedings would warrant expedited hearings and short arguments unless a court of appeal mandated other treatment. All other proceedings would be reviewed in district court. Annually, the Board would report to Congress and the Attorney General with recommendations for amendments to the statute and regulations.

I hope that these articles will provide a basis to renew the needed debate on the subject, a debate quiescent since the 1961 amendments introduced the Petition for Review.[12]

12. Immigration and Nationality Act § 106, 8 U.S.C. § 1105a(a)(1976).