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The Need for a Specialized Immigration Court: A Practical Response

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It is a privilege to comment upon Maurice Roberts’ proposed statute for a specialized statutory immigration court with separate trial and appellate divisions. My comments will be restricted to a review of the practical problems posed by the present system and consideration of whether the proposal of Mr. Roberts would be useful in remedying these problems.

At the outset, I must admit to be prejudiced in favor of any reasonable proposal which might follow so incisive an analysis of the inherent inconsistencies in our current immigration system, particularly one which might be suggested by the distinguished former Chairman of the Board of Immigration Appeals. Mr. Roberts correctly describes the built-in schizophrenic condition of the present immigration system as the root cause of many of the basic failings of the existing system.

THE PRESENT SYSTEM—BUILT-IN SCHIZOPHRENIA

The present system invests district directors with the power

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and responsibility to take action necessary to remove illegal aliens. At the same time, it vests the same district directors with a mandate to adjudicate numerous benefit and relief provisions for the benefit of aliens. It is no wonder, given the contemporary pressures for the removal of illegal aliens as unfair competition in the work market, that the work force of the Immigration and Naturalization Service focuses on the discharge of its enforcement duties. As a result, applications and petitions for immigration benefits may languish for months and even years before they are adjudicated, resulting in a condition which has hardly enhanced the public perception of the effectiveness of the Service.

It would seem, therefore, that it is to everyone’s advantage to separate the Service’s enforcement functions from those within its benefit-adjudicative jurisdiction. My initial reaction to Mr. Roberts’ proposal is that it does not really accomplish this noble goal.

The Proposal Has Surface Appeal

There are distinct advantages to a proposal for the establishment of a United States Immigration Court and an Appellate Division. Prior to the proposal of this enticing plan, the most enlightened view which had been presented was that of the statutory formalization of the Board of Immigration Appeals. That appellate body, while very much an integral part of our present immigration system, is nevertheless still a creature of regulation and subject to abolition by mere regulatory amendment.

Under the proposed system, the District Director is clearly a prosecuting officer whose function would be to issue charges commencing exclusion, deportation and rescission proceedings. The deportation order would not be entered by an administrative official, but would bear the imprimatur of a judicial body. Presumably, the District Director’s trial attorneys would appear to represent him before the court as they now do before the immigration judge. Such a court would not only command greater public respect, but would also have greater independence from the Immigration Service than ever before in immigration history.

With appointments made by the President and confirmed with the advice and consent of the Senate for an extensive term and

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1. See § 8 of the proposed statute, *Trial Division Jurisdiction*, which would give jurisdiction to the trial court to hear exclusion, deportation and rescission hearings. There is no direct indication as to how the Immigration Service would be represented before this body, but we are assuming that the District Director, rather than the United States Attorney, will undertake the function of prosecuting matters before this court.
with compensation which would be commensurate with those of federal district judges,² the positions would attract lawyers of greater competence. No longer would these positions be held almost exclusively, as at present, by former trial attorneys, many of whom have difficulty in making the transition from prosecutor to judge.

The proposed system would also have the advantage of avoiding many of the claims of procedural improprieties which now clutter the decisions of the Board of Immigration Appeals. This would necessarily follow from the gradual adoption of the Federal Rules of Civil and Criminal Procedure which one hopes would occur. A multiplicity of applications, petitions, and appeals would be avoided if the trial division judges had the full power to adjudicate all applications for discretionary relief and also had the exercise of the full range of discretionary authority granted to the Attorney General by law.³ This would presumably free other immigration officials for the more prompt adjudication of other applications for benefits in cases which did not involve trials. One would expect the morale of Service officers to be much higher once the backlog of unadjudicated applications is cleared and applications are reached more promptly in the general course of business.

RADICAL SURGERY—BUT WILL IT CURE THE PATIENT?

One could almost be lulled, by such a positive and optimistic analysis, into a feeling of hope for the entire immigration process. Unfortunately, the practical facts of the situation do not permit so optimistic a conclusion. More sober reflection leads this writer to question the efficacy of Mr. Roberts' proposed panacea.

No one who has practiced extensively in the field of immigration law can argue with the basic premise motivating Mr. Roberts' proposal, namely, that the existing administrative and judicial

². See proposed statute §§ 1, 2.
³. Note, however, that the proposal as it stands does not provide for this authority and does not as yet address the problem of the limited jurisdiction of immigration judges in deportation proceedings. For example, there is no authority within the course of the deportation proceeding before an immigration judge to adjudicate a petition for preference status pursuant to the terms of § 204 of the Immigration and Nationality Act as amended, 8 U.S.C. § 1154 (1976 & Supp. III 1979) or applications for nonimmigrant standing pursuant to § 214 of the Immigration and Nationality Act, 8 U.S.C. § 1184 (1976). See also 8 C.F.R. §§ 204, 214 (1980).
mechanisms for adjudicating immigration-related matters such as excludability and deportability are vastly in need of streamlining and overhaul. However, on a practical level, there is clearly some question as to whether the radical surgery which he has proposed is required in order to effect the necessary changes.

It would seem that if, in actuality, the creation of a statutory immigration court does not eliminate all areas of both administrative and judicial concurrent jurisdiction, the practical effect of the proposal will be to further duplicate the legal process. Alternatively, if such a proposal is successful in eliminating concurrent jurisdiction and insulates the adjudicative and appeal procedures within a single specialized statutory court dealing only with immigration matters, the restrictions and self-insulation of this single system will result in great prejudice to aliens.

The present system calls for decision-making processes and adjudications taking place at all levels of the Immigration Service in a variety of jurisdictions. Sections 236 and 242 lay out the jurisdiction of immigration judges in exclusion and deportation proceedings and section 106(a) provides for direct appeal to the United States circuit courts.4

Concurrently, petitions for certain exemptions, waivers and preferences5 are decided at the district office level, subject to appeal to the Regional Commissioner, or the Board of Immigration Appeals and ultimately to the Attorney General.

Applications for waivers and relief can in certain circumstances be made or must be made to the Immigration Service,6 while in other circumstances immigration judges have been granted jurisdiction. Similarly, claims for asylum and refugee status are sometimes required to be presented to the District Director and on other occasions in the course of a proceeding before an immigration judge.

All denials of applications and/or petitions are subject to motions to reopen and/or reconsider in accordance with procedures prescribed by regulation.7 In addition to the supposed “exclusive” remedy of appeal to the courts of appeals in exclusion and

4. There is no statutory provision nor any mention in the statute whatsoever of the Board of Immigration Appeals, which is an administratively created board. See 8 C.F.R. § 3 (1980).
5. With regard to exemptions and waivers, see 8 C.F.R. §§ 212.2(c), (d), 212.3, 212.7 (1980). With regard to preferences, see 8 C.F.R. § 204.1(a) (1980).
7. See 8 C.F.R. §§ 3.2, 3.8, 103.5 (1980).
deportation proceedings there exist numerous collateral actions which can be brought to secure mandamus, declaratory relief, injunctive relief or habeas corpus. These, and other forms of relief at the district court level, have evolved to protect other aspects of the alien's status in the United States against prejudicial action by immigration and labor department officials.

The question must be asked: Does this proposal of establishing an article I court improve the situation? Perhaps, if the rights of the alien would be strengthened by the implementation of Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure. The proposal does not address this very difficult question and probably cannot due to the unique character of an immigration proceeding.

What is proposed, rather than a broadening of the alien's rights, is a mere upgrading of the stature of immigration judges, with no assurance whatsoever that the alien will receive any tangible benefit from the fact that he has appeared before an article I court. Moreover, there is no appeal to a non-immigration court where the principles of general law may be brought to bear upon this special area of the law and a broader perspective achieved.

At present, the alien appears before an administrative judge who is, without doubt, unduly fettered by the supervisory and other powers of the United States Department of Justice over the facilities and activities of the immigration judge. The judge is beholden to the government for all his physical facilities as well as his administrative amenities. This is doubtless a condition which must be changed. The alien now appears before the immigration judge with the benefit of a clear statutory right to have re-

10. Although the federal courts have acknowledged for years that deportation and banishment can deprive an individual of "all that makes his life worth living," Ng Fung Ho v. White, 259 U.S. 276, 284 (1922), protection of the alien has never been allowed to parallel completely that provided for an individual accused of a criminal offense based upon the established principle that deportation proceedings and immigration matters are civil rather than criminal in nature. See, e.g., Bufalino v. INS, 473 F.2d 728 (3d Cir.), cert. denied, 412 U.S. 928 (1973); Marcello v. Kennedy, 194 F. Supp. 750, 753 (D.C. Cir. 1961) (maintaining that deportation statutes are not penal in nature and deportation is not punishment).
tained counsel present and to certain other aspects of a fair hearing assured to him by his fifth amendment right to procedural due process. However, he continues to be frustrated in achieving his rights in such crucial aspects of a fair hearing as, for example, his ability to compel the attendance of witnesses necessary for his own defense. For this vital right, which is clearly encompassed in the procedural due process to which he should be entitled, he must necessarily present his request for the issuance of a subpoena to the immigration judge. The proposed article I court procedure makes no change in this unfortunate situation. Although it might be implied that an article I court would accord the alien compulsory process, there can be no assurance that this type of problem would be solved without the formal acceptance of the federal procedural rules by statutory fiat.

The Power to Adjudicate

Nor is the proposed legislation likely to solve most of the problems inherent in the present litigative process before administrative immigration judges. The essence of the practitioner's primary objection to the current procedures is the bifurcation of jurisdiction to grant the alien needed relief. The immigration judge does not have the full panoply of jurisdictional authority that he requires to truly dispose of all the issues involved in the litigation before him. Petitions for preference status, for example, must be transmitted to the District Director for his adjudication.11

Independence of the Immigration Judge

The practitioner's second basic objection to the present system lies in the lack of independence of the immigration judge. In the overwhelming majority of cases the government still relies upon interrogating the alien himself to establish not only the elements of deportability, excludability or rescission, but also the alien's eligibility for those few discretionary benefits which the judge has jurisdiction to determine as well. The alien often cannot distinguish which is the government's prosecuting trial attorney and

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12. Immigration judges have no authority to grant temporary waivers of inadmissibility, waivers of the foreign residence requirement on J visas, extensions of temporary stay, change of status from one immigrant status to another, reinstatement of student or other temporary status or certain waivers of inadmissibility for immigrants. They cannot even terminate proceedings pending before them for humanitarian reasons or because they were improvidently begun. Nor can they hold a recalcitrant alien in contempt. See C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.7(g) (1973).
which is the government’s impartial adjudicator.\textsuperscript{13} The alien often faces, in the trial attorney and the immigration judge, what he perceives to be two representatives of the interests of the government. This gives the impression of unfairness.

While the advent of an article I immigration court would be welcomed by the bar, such an innovative institution is not necessary to cure the present ills of the system. Indeed, unless sweeping revisions of substantive and procedural law are a part of such legislation, it may cause more problems than it cures. The problems perceived by the alien and his counsel as to the immigration judge’s impartiality could be cured, in large part, by according immigration judges broad jurisdiction to adjudicate petitions and applications for immigration benefits and waivers. In addition, the incorporation into present procedures of more of the Federal Rules of Civil Procedure would cure many of the procedural ills of the present system and result in a fairer hearing. A rule, for example, permitting compulsory process by the respondent in a deportation proceeding without having to request the issuance of a subpoena from the immigration judge, is sorely needed. Likewise, a closer adherence to the evidentiary rules of federal courts would avoid the admission in evidence of many questionable documents, whose sources are not subject to cross-examination. Since the right to cross-examine is a present statutory right of an alien in such proceedings,\textsuperscript{14} there should be no difficulty in securing this right without a major statutory overhaul. A revision of the current regulation would suffice. Some protection against the admissibility, for example, of a report of an investigation by a consular staff member who is not available for cross-examination is needed to assure a fair due process hearing in behalf of the alien respondent. This might be secured by a regulation authorizing an alien to depose the Consul or his staff member in writing. It is to be noted that none of this necessarily requires an article I court. Nor, under the proposed plan, would the advent of an article I court necessarily cure this type of problem which occurs continuously in contested proceedings before immigration judges.

\textsuperscript{13} See 8 C.F.R. § 242 (1980), particularly § 242.8 designating the powers of the special inquiry officers in § 242.9 which does not provide for the mandatory assignment of a trial attorney.

\textsuperscript{14} Immigration and Nationality Act § 242(b)(3), 8 U.S.C. § 1252 (b)(3) (1976). There is no statutory authority for the right of cross-examination in exclusion proceedings, but this is provided for in the regulations. 8 C.F.R. § 236.2(a) (1980).
THE AVOIDANCE OF DUPLICATION

The proposal implies that the creation of a statutory court will have the effect of streamlining the procedure for administrative and judicial review. However, this apparent result is quite deceptive when one focuses upon the problem of initial administrative review. Here there is a dilemma. If all decisions of the District Director are subject to review in the statutory court, an onerous burden is placed upon an applicant who requires reconsideration of a decision based upon incomplete information or blatant error.15

A typical example would be the review of a denial of an application for change of nonimmigrant status from visitor to student where the denial was based on a failure to file a timely application for such benefit. The present procedure, which permits the filing of a motion to reconsider, explaining the excusable circumstances or the submission of proof of timely filing, is much more appropriate than the onerous burden of filing a formal appeal in a formal judicial tribunal, particularly for an unrepresented alien. Similar examples abound, e.g., appeals of denials of petitions or applications for alleged failure to prosecute such applications in cases where, because of changes of the applicant’s address, notification by the Service did not reach the alien or, in recent years the common occurrence, where notices given by the alien did not reach his file at the Immigration Service. A full court appeal in such a case would be tantamount to using a cannon to hit a fly.

If one is precluded from administrative review in such circumstances he is severely prejudiced. On the other hand, if such opportunity for administrative review is still allowed under the proposed system, there will be a burgeoning new area of conflict and litigation as to the scope of this administrative review which, as past history has shown, will develop into an entire administrative-judicial system interplaying with such established issues and problems of administrative law as exhaustion of administrative remedies. This would hardly simplify the present procedures.

JUDICIAL REVIEW BY GENERALIST JUDGES—IS IT DESIRABLE?

Perhaps more significant than the futility of attempting to streamline a system by adding a new layer to it is the general policy question of whether we in fact do wish to insulate all immigration procedure and review within one specialized body. Given the

15. Parenthetically, an enormous burden would be placed upon this new statutory court requiring them to adjudicate an enormous volume of work which is basically trivial in nature.
potential for delay and occasional conflicting or inconsistent decisions which may result from allowing general federal jurisdiction in appeals and collateral actions, the desirability for analysis by generalists should never be underestimated. It is one extremely valuable ingredient which is added when courts of general jurisdiction review immigration matters. Much of the innovation, progress and forward-looking law which has been developed and created in the immigration field is a direct result of the opportunity given to courts of general jurisdiction to take a fresh look at a policy, procedure or ruling which has been developed and taken for granted by the Service, immigration judges and even by the Board of Immigration Appeals.

Numerous examples abound. The decision in *Lennon v. INS*\(^{16}\) established that use of the term “illicit possession” in section 212(a)(23) of the Immigration and Nationality Act implied a mens rea requirement before a conviction for possession of marijuana might be used to exclude the alien from the United States. This holding goes against the mainstream of administrative law in the immigration field with regard to the treatment of foreign convictions. The result would probably have been different had the argument and issue been presented before a specialized immigration court—a court perhaps overly enamored with the administrative and judicial history regarding the treatment of foreign convictions.

The evolution, at least in some circuits,\(^{17}\) of a right or benefit available pursuant to prescribed criteria of “deferred action”\(^{18}\) status also probably could not occur if cases were not presented before a “generalist” court.\(^ {19}\) When a matter involving an issue as important as a person’s liberty is at stake, particularly in a deportation or exclusion context, that person should rightfully have an opportunity to raise such issue before a court which has broad general experience and familiarity with how valuable rights in

\(^{16}\) 527 F.2d 187 (2d Cir. 1975).

\(^{17}\) See Nicholas v. INS, 590 F.2d 802, 807 (9th Cir. 1979), where the Ninth Circuit concluded that Operations Instruction § 103.1(a)(1) confers a “substantial benefit upon the alien rather than setting up an administrative convenience.”


other areas of civil and criminal practice are litigated and determined.\textsuperscript{20}

\textbf{Conclusion}

It is therefore this author's opinion that a less radical proposal would have the greatest potential to overcome the many inadequacies of the present system, while at the same time creating a minimum of new problems.

Clearly, it is necessary to deal with the major objection to the present system, namely, the lack of independence of the immigration judges. This would require the transfer, by statute, of hearings presently before such judges either to administrative law judges under the Administrative Procedure Act, or to a newly formed independent statutory agency, separate and apart from the Immigration Service. Enabling legislation must provide for adequate staffing and separate facilities. At the same time, the Board of Immigration Appeals necessarily must be given statutory authority, preferably within the same separate statutory body. Under such an arrangement, there would be no need to change the present direct appeal to the United States circuit courts of appeals prescribed under section 106(a). The alien would thus have his matter heard before an independent body of immigration judges with a direct appeal to a statutory Board of Immigration Appeals and a right to judicial review, as at present, in a court of general jurisdiction.

The limited authority of immigration judges under the present system to dispose of a matter completely because they lack jurisdiction to adjudicate many necessary related petitions and applications must likewise be remedied. This would require that authority to adjudicate many additional types of applications for benefits be granted to immigration judges in cases which are properly before them, perhaps on a concurrent basis with the immigration officers who presently enjoy such authority. The adoption of the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure either in toto or selectively, to provide for a fair hearing is also necessary to assure compliance with procedural due process rights under the fifth amendment.

\textsuperscript{20} Interestingly enough, the evolution of the Immigration Service's administrative position with regard to "out of wedlock children as stepchildren" under the statutory definition as described in Mr. Roberts' footnote 14, where the Service was required to respond to decisions in Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y. 1965), Andrade v. Esperdy, 270 F. Supp. 516 (S.D.N.Y. 1967), and Hypolite v. Sweeny, Civ. No. 77-1865 (S.D. Fla. Jan. 6, 1979), digested in 56 INTERPRETER RELEASES 62 (1979) highlights how courts of general jurisdiction can prod the Immigration Service to take a more liberal and compassionate view in interpreting the Immigration and Nationality Act.

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The adequate funding of such a separate agency is essential to its independence and to assure that it will attract attorneys of the highest calibre to hold positions as immigration judges and members of the Board of Immigration Appeals. The enabling legislation should set minimal standards for judges, prescribe their terms of office, and assure the availability of support services so that decisions might be issued promptly. With the additional duties and broader jurisdiction, a larger number of immigration judges and a larger Board of Immigration Appeals may be required, permitting the Board to send roving panels to hear argument in various geographic locations throughout the United States, as needed.

The existence of different holdings in various circuits of the federal system in all areas of the law is simply a characteristic of the federal judiciary system. There is nothing which warrants addressing this situation separately within the field of immigration law. The present practice of the Board of Immigration Appeals of following the mandate of the local circuit court of appeals is appropriate and, in the opinion of this author, requires no change. Indeed, there is less conflict among circuits in the immigration field than in other fields of the law.

We must exercise caution that, in our efforts to achieve an acknowledged, desirable goal, our proposed solution does not create more problems than it solves. The prospect of requiring an unrepresented alien to present a request for the reconsideration of an application denied on some minor technicality in the austere atmosphere of an article I court is not at all enticing. Nor does it give the impression that one is being cost-conscious in problem solving. Likewise, the elimination of an appeal to a court of general jurisdiction is a change not lightly to be undertaken. While the proposal has many desirable aspects and would likely be a great boon to the legal profession, it appears to this writer to resemble radical surgery, not to be undertaken until all other alternative remedies have proved unavailing.