

12-1-1977

## The Board of Immigration Appeals: A Critical Appraisal

Maurice A. Roberts

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>

 Part of the [Immigration Law Commons](#)

---

### Recommended Citation

Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

Available at: <https://digital.sandiego.edu/sdlr/vol15/iss1/5>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

# The Board of Immigration Appeals: A Critical Appraisal

MAURICE A. ROBERTS\*

*The retired Chairman of the Board of Immigration Appeals examines the Board's role and appraises its capacity to fulfill its function as the final administrative arbiter. He traces its origins and development, culminating in its present expanded role as substitute for the United States district courts in the chain of review in deportation cases. The author contends that to produce the level of decisions crucial to its mission, the Board must have additional resources which are adequate in quality as well as in number. Mr. Roberts discusses the qualification standards for Board members and concludes that the Board's needs can best be met by giving it statutory recognition.*

The Board of Immigration Appeals is a quasi-judicial tribunal attached to the office of the Attorney General which reviews on appeal specified types of decisions of the Immigration and Naturalization Service. Some people confuse the Board with the Service and think it is part of the Service. It is not. Others think the Board supervises the Service. It does not, except to the degree that Board decisions are binding on the Service. The Board and the Service are

---

\* Editor, INTERPRETER RELEASES, American Council for Nationalities Service. J.D., Rutgers University Law School, 1932. Mr. Roberts served as Chairman of the Board of Immigration Appeals, United States Department of Justice, from 1968 to 1974 and as Head of the Immigration Litigation Unit, Criminal Division, United States Department of Justice, from 1965 to 1968.

separate entities within the Department of Justice whose functions, while complementary, are distinct.

The first time I heard of the Board of Immigration Appeals was in 1941, shortly after I entered the Immigration and Naturalization Service as a naturalization examiner. One of my co-workers, an old-timer assigned to show me the ropes, referred derogatorily to "those SOB's at the Board." Years later, after I had joined the Board, a colleague there called it the "stepchild" of the Department of Justice—unloved, ill-housed, and poorly provisioned. In retrospect, it seems more accurate to describe the Board's relationship to the Department as that of an acknowledged bastard, whose presence cannot be realistically denied but whose legitimacy is rendered questionable by its lack of any statutory recognition.

The Board has existed, in one form or another and by one name or another, since the early days of effective immigration law enforcement in this country. By now, its place among the essential administrative institutions in that field has been firmly fixed and is widely acknowledged.<sup>1</sup> Yet, it has never been accorded statutory recognition, and its continued existence depends entirely on the regulations of the Attorney General who can curtail its powers or abolish it altogether by the stroke of a pen. Worse still, its precarious position undermines its capacity to compete for the resources, human and material, which it needs to carry out its mission effectively. In my view, it is high time that the Board receive statutory recognition and that its continued existence as an independent institution be endorsed by Congress.

This Article will develop briefly the origins and history of the Board, its emergence to its present posture, the problems which confront the Board as an institution, and some realistic solutions.

#### UNIQUE NATURE OF IMMIGRATION CASES

No appraisal of the Board as an institution can be valid without taking into account the unique nature of the cases which come before it. With minor exceptions, our immigration laws directly and exclusively affect human beings. In constant opposition to the Govern-

---

1. For example, in its report on the proposed "sanctions" bill, H.R. 8713, 94th Cong., 1st Sess. (1975), the House Judiciary Committee remarked that administrative penalties against employers of illegal aliens would be imposed only after a hearing before an immigration judge, "and the Committee has been assured by the Department of Justice that the Board of Immigration Appeals will be authorized to hear appeals from his decision." H.R. REP. NO. 94-506, 94th Cong., 1st Sess. 14 (1975).

ment's restrictive and selective immigration policies are the interests of the men, women, and children whose hopes for future happiness frequently depend on their ability to enter or remain in this country. The courts have recognized that when an alien has been here for a long time and has established roots, his expulsion may tear him from his home and family and deprive him "of all that makes life worth living."<sup>2</sup> When a United States citizen or a legally resident alien seeks reunion with his alien wife or children, the denial of the immigrant visas needed to bring them here presents the cruel option of choosing between his country or his loved ones.<sup>3</sup>

Immigration statutes are highly technical and exceedingly complex; questions of statutory construction are frequently presented for initial determination by administrative authorities whose personal attitudes may have a crucial effect in the decision-making process. Even the officials charged with immigration law enforcement occasionally make mistakes and erroneously admit inadmissible aliens whose roots here have become well established by the time the error is later discovered.<sup>4</sup> The absence of any realistic time limit on the Service's power to start deportation proceedings against an alien alleged to be here unlawfully only aggravates the opportunities for hardship. Although Congress has provided various avenues of relief from deportation to avoid extreme hardship for aliens meeting certain eligibility requirements, these dispensations are not awarded to all those eligible<sup>5</sup> but depend on the favorable exercise of administrative discretion, which may depend on the subjective attitudes of the administrators.<sup>6</sup>

---

2. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

3. The courts have held that no constitutional limitations are violated by immigration statutes having such results. *Fiallo v. Levi*, 406 F. Supp. 162 (E.D.N.Y. 1975), *aff'd sub nom. Fiallo v. Bell*, 97 S. Ct. 1473 (1977).

[T]he burden of separation from one's kin which occurs when an alien relative is properly excludable under our immigration laws and the American citizen or resident determines not to leave this country in order to be with the alien, is not the equivalent of the statutory destruction of the marriage or family relationship. Certainly a difficult choice is involved, but it is not one which is forbidden by the Constitution. 406 F. Supp. at 168.

4. Such errors on the part of Service officials do not estop the Service from deporting innocent aliens in the absence of official "affirmative misconduct." *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

5. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957).

6. See Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975).

Legal fictions and myths, unrelated to reality, abound in immigration law. An arriving alien whose admissibility is questioned, and who is permitted physically to enter and reside in the United States on parole, is regarded by the law as if he is still at the border seeking admission, no matter how many years have elapsed since he actually entered. In the eyes of the law, he never made an "entry."<sup>7</sup> The courts have adhered to the myth that the deportation of an alien, even when based on his conduct in this country following a lawful admission for permanent residence, is not punishment in the constitutional sense. Consequently, the plenary power of Congress to legislate on immigration matters is not limited by the Constitution's *ex post facto*, bill of attainder, and cruel and unusual punishment clauses.<sup>8</sup> Statutes have been sustained which make a resident alien deportable for past conduct that was not a ground for deportation when it occurred.<sup>9</sup> For example, an alien who had entered illegally as a stowaway but who had subsequently achieved a status of nondeportability in the 1920's under a then-existing five-year statute of limitations was held to again be deportable when the statute of limitations was retroactively repealed many years later.<sup>10</sup> An alien lawfully admitted for permanent residence, no matter how long he has lived here and how secure his right to remain, places that right in jeopardy the moment he leaves the United States, however briefly.<sup>11</sup> While an alien in deportation proceedings is constitutionally entitled to procedural due process in determining whether he is within the deportable class set up by Congress, as charged by the Service, the courts have held themselves powerless to review the congressional classifications for substantive due process—even when satisfied that adherence to the reasonable relationship standard ordinarily required is lacking.<sup>12</sup>

Added to the foregoing elements is the fact that aliens in general are a disadvantaged minority in our society. Many have come to

---

7. *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Yuen Sang Low v. Attorney Gen.*, 479 F.2d 820 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973).

8. U.S. CONST. art. I, § 9, cl. 3; *id.*, § 10, cl. 1.

9. *Marcello v. Bonds*, 349 U.S. 302 (1955); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

10. *Lehmann v. Carson*, 353 U.S. 685 (1957).

11. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Volpe v. Smith*, 289 U.S. 422 (1933); Immigration and Nationality Act of 1952 [hereinafter cited as I. & N. Act] § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1970). *Cf. Shaughnessy v. Mezei*, 345 U.S. 206 (1953) (an alien who seeks to re-enter the United States after having left the United States for purposes of his own has the status of an entrant alien for constitutional purposes).

12. *Oliver v. INS*, 517 F.2d 426 (2d Cir. 1975). The Supreme Court recently stated that the cases "reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . ." *Fiallo v. Bell*, 97 S. Ct. 1473 (1977) (dictum). No case was cited for this dictum and the Court went on to sustain the legislation involved.

escape the poverty and hopeless lack of opportunity in their native lands. Many arrive under emergency conditions as refugees from political or religious persecution. Most lack proficiency in our language and knowledge of our institutions. Economically, aliens frequently have lower incomes and are unable to afford the rapidly mounting charges for adequate professional representation. As non-voters, they lack political clout. In times of economic or political stress they present a ready and defenseless target not only for the demagogues but also for concerned citizens seeking simplistic answers to complex social and economic problems.

We have come a long way from the days when Ellis Island was the gateway and when the immigration laws and procedures were simple and summary. The accommodation of the competing interests involved in the complex issues now presented in immigration cases and the rendition of far-reaching decisions which are realistic yet consonant with our traditional concern for individuals demand qualifications of an increasingly high order on the part of the men and women entrusted with the responsibility of judging.

#### ORIGINS AND HISTORY OF THE BOARD

In the early days of federal immigration law enforcement, administrative responsibility was placed in the Treasury Department. In 1891, Congress created the post of Superintendent of Immigration in that Department. In 1903, the Bureau of Immigration was transferred to the Department of Commerce and Labor and then, in 1913, to the newly created Department of Labor. Until 1921, decisions in immigration cases were made by employees of the Bureau of Immigration in the form of memoranda presented for signature to the Commissioner-General of Immigration and the Secretary of Labor, without opportunity for oral argument. In 1921, an advisory committee known as the Board of Review was formed to assist the Secretary of Labor in these quasi-judicial functions. The five-member Board, appointed by and responsible to the Secretary of Labor, was designed to provide a continuing body before which there would be an opportunity to present oral argument and other matters for review. Although it was designated initially as the Commissioner's and Secretary's Board of Review, in practice the Board was responsible to the Secretary rather than to the Commissioner-General. The Board's operations came under increasing criticism because of its combination of enforcement and quasi-judicial responsibilities and because of its control by the Commissioner, an enforcement official. In its

1931 study of enforcement of the federal laws, the Wickersham Commission recommended the creation of an independent tribunal, completely separated from enforcement functions.<sup>13</sup>

In 1933, the Bureau of Immigration was merged with the Bureau of Naturalization to form the Immigration and Naturalization Service, headed by the Commissioner, and the Board of Review was converted into the Commissioner's Board of Review. At one point, the system was changed to make use of three five-member boards, with a chairman and four members on each. The Board's function continued to be that of recommending decisions, with the final order being signed by the Secretary of Labor. Following a study by the Secretary of Labor's Committee on Administrative Procedure in 1939, the Board was freed from all its non-quasi-judicial functions and made responsible only to the Secretary of Labor, who still made the final decisions.<sup>14</sup>

In 1940, immigration law enforcement was committed to the Attorney General, and the Immigration and Naturalization Service was transferred to the Department of Justice. It was then that the Board of Immigration Appeals was created by regulation of the Attorney General as a separate entity in the Department of Justice, responsible directly to the Attorney General and completely independent of the Service.

The Board's membership and powers are defined by the regulations. Its members are appointed by the Attorney General, have no fixed terms, and serve at his pleasure.<sup>15</sup> Although they have no tenure in office, as far as I am aware none has ever been removed. The Board's jurisdiction to review Service decisions is fixed by the regulations, which have been altered from time to time.<sup>16</sup> Unlike its predecessor—the Board of Review—which made only recommended decisions, the Board of Immigration Appeals is a decisive body; it makes binding decisions without the need for referring the case to the Attorney General for final review.<sup>17</sup>

Originally, in deportation cases, the Service's hearing officer made only a recommended decision, to which was added the Commissioner's recommendation as the record made its way through the Service's Central Office en route to the Board of Immigration Appeals. It

---

13. REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 162 (1931).

14. See *Greene v. INS*, 313 F.2d 148 (9th Cir. 1963), *cert. denied*, 374 U.S. 828 (1962); 8 C.F.R. § 3.1(a)(1) (1976); 25 Fed. Reg. 2460 (1960).

15. 8 C.F.R. § 3.1(a)(1) (1976).

16. The Board's present jurisdiction and powers are set forth in 8 C.F.R. § 3.1(b)(d) (1976).

17. Under 8 C.F.R. § 3.1(h) (1976), the Board may still refer a case to the Attorney General for final decision. In practice, such referrals are now rare.

was before the Board that the actual adjudication was made. For a time, to meet the exigencies of a burgeoning deportation case load following the close of hostilities in World War II, the Attorney General delegated decisive authority to the Commissioner, with an optional right of appeal to the Board from the Commissioner's decision.

The Immigration and Nationality Act of 1952 gave finality to the decisions of the hearing officers in cases of exclusion and deportation.<sup>18</sup> Under the regulations, the Board was given appellate jurisdiction to review decisions of immigration judges in exclusion and deportation cases. Thus, as matters now stand, the immigration judges, who are virtually independent of the Service, make final decisions which are theoretically free from Service control. If the Service or the alien is aggrieved by such a decision, each has a right of appeal to the Board<sup>19</sup>—and Service appeals are not at all infrequent.

#### *The Expanded Role of the Board of Immigration Appeals*

To meet the changing needs of this dynamic field of law, the regulations defining the Board's appellate jurisdiction have been expanded from time to time. In addition to its jurisdiction in deportation and exclusion cases, the Board now hears appeals from decisions in a number of areas: decisions on applications for discretionary waiver of inadmissibility under section 212(c) and 212(d)(3) of the Immigration and Nationality Act,<sup>20</sup> decisions involving administrative fines and penalties against carriers,<sup>21</sup> decisions in visa petitions based on family relationship,<sup>22</sup> determinations relating to bond, parole or detention of aliens in deportation proceedings,<sup>23</sup> and decisions in rescission proceedings under section 246 of the Act.<sup>24</sup> In addition, as incidental to its jurisdiction in exclusion and deportation cases, the Board decides issues with respect to discretionary relief and other problems arising in the course of such proceedings, including: waiver of inadmissibility,<sup>25</sup> determinations as to place of

---

18. The statute calls these hearing officers *special inquiry officers*; they are now referred to as *immigration judges*. 8 C.F.R. § 1.1(1) (1976).

19. 8 C.F.R. § 3.1(b) (1976).

20. 8 U.S.C. § 1182(c), (d)(3) (1970).

21. I. & N. Act § 271(a), 8 U.S.C. § 1321(a) (1970); 8 C.F.R. § 3.1(b)(4) (1976).

22. I. & N. Act § 201(a), (b), 8 U.S.C.A. § 1151(a), (b) (West Supp. 1977).

23. *Id.* § 242(a), 8 U.S.C. § 1252(a) (1970).

24. 8 U.S.C. § 1256 (1970).

25. I. & N. Act § 212(d)(3), 8 U.S.C. § 1182(d)(3) (1970).

deportation under section 243(a),<sup>26</sup> requests for asylum under section 243 (h),<sup>27</sup> applications for suspension under section 244(a),<sup>28</sup> voluntary departure under section 244(e),<sup>29</sup> adjustment of status under section 245,<sup>30</sup> and registry under section 249.<sup>31</sup> Many of these additional responsibilities have devolved upon the Board to meet the realities of the first statutory provision for judicial review of deportation orders enacted in 1961 as section 106(a) of the Act.<sup>32</sup>

Before that enactment, deportation orders were subject to judicial review in the United States district courts, either by habeas corpus or suit for declaratory and injunctive relief. To preclude opportunities for piecemeal and dilatory litigation, Congress enacted section 106(a) to provide a one-package review of all issues raised in the proceedings leading to a final deportation order. Expeditious review was provided by eliminating the district courts entirely. The final order of deportation—that is, the Board’s decision—was made reviewable directly in the United States courts of appeals. Thus, the Board has been substituted for the district court in the chain of review.<sup>33</sup>

#### THE IMPORTANCE OF GOOD BOARD DECISIONS

To the alien whose destiny is at stake, it is obviously essential that the Board have the competence, the interest, the resources, and the time needed to do justice to his appeal and to arrive at the correct decision. This, of course, should be the overriding interest of everyone involved in the deportation process. But there are certain additional considerations, over and beyond an interest in seeing that justice is done, that make it imperative that the Board not only arrive at the correct decision, but also set forth its reasoned views in a lucid opinion.

The importance of good Board opinions cannot be overemphasized. For instance, the Board is often innovative. It is frequently the first tribunal called upon to construe and apply new immigration statutes and regulations. It establishes uniform standards for the exercise of administrative discretion. It interprets and applies new court decisions. The Board must make its position as clear as possible so that the alien and the Service alike may be better able to appraise the

---

26. 8 U.S.C. § 1253(a) (1970).

27. *Id.* § 1253(h).

28. *Id.* § 1254(a).

29. *Id.* § 1254(e).

30. 8 U.S.C.A. § 1255 (West Supp. 1977).

31. 8 U.S.C. § 1259 (1970).

32. Immigration and Nationality Act of 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 65 (codified at 8 U.S.C. § 1105(a) (1962)).

33. See *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1967); *Foti v. INS*, 375 U.S. 217 (1963).

need for further review. If there is judicial review of the Board's decision, it is important to the court of appeals that the Board's rationale be clearly articulated, for there is no longer an intervening opinion from the district court. In recent years, there has been an increasing tendency on the part of the courts of appeals to dispose of petitions for review of Board orders by brief, unpublished per curiam dismissals. Thus the Board's opinions are increasingly the last exposition of the law in any forum. As a result, and in view of its enlarged role, there is greater need than ever for publication of more Board opinions, not only in defining immigration law and procedure, but in rationalizing its holdings. Unless the Board can produce opinions of high quality, its effectiveness will be impaired.

Although most Board decisions are neither published nor subjected to judicial review, this does not dispense with the need for an opinion adequate to the needs of the case. Within the Department of Justice itself, the Board's work is affected by, and in turn affects, the work of other divisions. The Board does not generate its own cases and has no control over the inflow of appeals. Accelerated enforcement activities on the part of the Service inevitably result in an increase in the number of appeals to the Board. The quality and clarity of Board opinions, which are binding on and carefully scrutinized by Service officers, directly affect Service operations. To the extent that they critically examine and rectify errors in Service proceedings, Board opinions serve as a valuable training mechanism for Service personnel.

In recent years, about twenty percent of the Board's decisions in deportation cases have been subjected to judicial review. The cases are defended in the courts by United States Attorneys under the supervision of the Criminal Division of the Department of Justice. When Supreme Court review is sought, the Solicitor General's office is involved. In the rare instances in which review by the Attorney General is sought while a case is still in the administrative stage, the Office of Legal Counsel participates. If the Board has done its work well, if it comes to the correct legal conclusion and sets forth its views in a carefully reasoned opinion, the burden of all those in the Department who are later called upon to resolve the case is lightened. Upgrading the quality of the Board's opinions leads to increased confidence in the Board's decisions. This, in turn, cuts down on review litigation, lessens the burdens on the courts, and encourages summary dismissals in brief, per curiam orders.

The expertise concentrated in the Board, with its relatively small staff, makes it the ideal place for the formulation of what is now the definitive decision in this highly complex field of law. In terms of actual cost to the Government, good Board decisions are a bargain. More opinions can be ground out, of course, in less time and with an even more inadequate staff; but the resulting dilution in quality, while not only unfair to the parties involved, would also cost much more in the long run. Economies of this sort can only result in passing the buck to others with less expertise. The slack would have to be taken up elsewhere in the Department; if not, the already overburdened courts will have to confront the task, for dilution in the quality of Board decisions can only cause greater recourse to the courts for redress. If Service errors are to be screened out and corrected, it is more efficient in the long run that this be done by the Board.

### *The Board's Role as Adjudicator*

At this late date, no one could seriously argue that the Board's function is prosecutorial or mainly supportive of the Service in its enforcement of the immigration laws. While it is an important part of the administration of these laws, the Board's role is strictly quasi-judicial. Indeed, so is the Attorney General's role when he reviews Board decisions.<sup>34</sup>

In carrying out its responsibilities, the Board has received a generous charter from the Attorney General: "Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case."<sup>35</sup> In addressing its responsibilities, the Board has attempted to avoid rigidity and has been innovative in fashioning reasonable solutions within the statutory framework. Certainly, in a field fraught with so many possibilities of human tragedy, a niggardly and wooden approach to adjudication would be out of place. Considerations of equity and fairness are the concern of administrative adjudicators no less than courts:

The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice.

---

34. "As you know, the Board is a non-statutory body established by the Attorney General to hear and decide appeals from certain decisions of the Service. In that respect the Board acts in a quasi-judicial capacity. So does the Attorney General in deciding Board decisions certified to him." Ulman, *There Is Justice*, 52 INTERPRETER RELEASES 315 (1975).

35. 8 C.F.R. § 3.1(d)(1) (1976).

Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice.

The Commission's actions were rooted in a reasonable effort to combine a sense of justice with practical common sense. Courts are loath to say that good sense is not good law.<sup>36</sup>

A narrow and literal reading of the statutes would make the Board's task much easier. The temptation to reach for simplistic solutions always exists, leaving to the reviewing courts the option to take corrective action where more sophisticated or daring techniques may be appropriate. To its credit, the Board traditionally has not taken the easy path but has invested the time and effort needed to work out reasonable answers to vexing and complex problems.

#### *Backlogs—Quality or Quantity?*

One of the persistent problems confronting the Board has been that of case backlogs. The problem is not new. In December, 1952, a management study for the Department of Justice prepared by an outside management consultant reflected that there were then 4,421 cases before the Board.<sup>37</sup> The problem at that time was resolved by temporarily augmenting the Board's professional staff.

Large backlogs at the Board are not only unfair but wasteful. They are unfair to the subjects of the proceedings, who should not have the adjudication of their rights unduly delayed. They are unfair to the Service, which should not be hampered in its already difficult tasks by further delay. Backlogs waste already strained resources. They engender inquiries and follow-ups, cause unnecessary traffic in files, and disrupt the normal work flow. Backlogs can and should be decreased to manageable proportions. The question is how?

The Board has no control over the number of cases that come before it on appeal. The Service's enforcement operations have increased in recent years, both through augmented manpower and shifting work priorities. As a result, more aliens alleged to be here illegally have been apprehended, more deportation hearings have been held, and more appeals to the Board have been taken. In fiscal year 1962, when the Board had thirty authorized full-time positions, it received 1194 new cases. As of April 30, 1977, when the staff

---

36. *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 160 (D.C. Cir. 1967).

37. Report on a Management Study of the Board of Immigration Appeals (Griffenhagen & Associates, management consultants, 1952).

numbered thirty-six, the number of new cases received had risen to 2,651.<sup>38</sup>

One easy solution to the management of backlogs is for the Board to decrease the time invested in each case. Heretofore, the Board members themselves have reviewed the cases coming before the Board and have made their decisions on the record, which was then referred to a staff attorney to draft a Board opinion in accordance with its directive. However, much time and effort on the part of the individual Board members can be saved by referring the case, in the first instance, directly to a staff attorney for initial review and formulation of the Board's decision. Similarly, by concentrating on the use of one-line dismissal orders in place of the usual fully developed Board opinion, much time and effort can be saved on the part of the clerical staff, the staff attorneys, and individual Board members. These practices and devices can readily lead to both a marked upswing in the number of cases disposed of and to a dramatic reduction in the Board's backlog. Whether this result is justified by the price that must be paid in terms of dilution of quality is a question on which there may be differences of opinion.

It seems to me that the only satisfactory way to confront the backlog problem is to give the Board the needed additional resources—adequate in quality as well as in number—to cope with its mounting caseload. To reduce the quality of the Board's work, even as a temporary expedient, is to me an impermissible approach. What about the persons whose rights have been prejudiced by less than standard Board consideration during the temporary period of short-cuts?

It is true that some of the appeals that come to the Board are frivolous and filed solely for delay. These can be readily detected on initial screening and assigned directly to a staff attorney for prompt preparation of a brief dismissal order without impairing the alien's rights.<sup>39</sup> Similarly, initial screening can detect appeals which, while not frivolous, present simple issues clearly governed by recognized Board precedents. These, too, can be referred directly to a staff attorney to draft an appropriate and brief dismissal order. I have considerable doubt, however, whether the same direct referral is appropriate in the more difficult cases that make their way to the Board.

A good many appeals, for example, involve the exercise of administrative discretion—an area in which realistic standards are sadly

---

38. Milhollan, *The Work of the Board*, 54 INTERPRETER RELEASES 322, 323 (1977).

39. The regulations authorize the denial of oral argument and summary dismissal of such appeals. 8 C.F.R. § 3.1(d)(1-a) (1976).

lacking.<sup>40</sup> The Board rather than staff attorneys, most of whom are likely to be relatively new and inexperienced, should first review and decide such cases. Where the initial Board review discloses the need for additional legal research, the case should, of course, be assigned to a staff attorney for that purpose.

While it may be true that other federal administrative tribunals, such as the Federal Trade Commission and the Securities and Exchange Commission, have difficult cases which receive original review by their professional staffs, it is erroneous to equate the Board's cases with those of the other agencies. Because of the financial interests involved, the parties to the proceedings before those agencies are invariably represented by counsel. Large agency staffs are available to brief and argue cases before the agency. In the cases that come before the Board, many of the aliens are unrepresented or were unrepresented at the hearing before the immigration judge. Even when the alien before the Board has counsel, the quality of representation may still be inadequate. Not all attorneys or other representatives who appear in immigration cases have the necessary expertise.

#### STAFFING THE BOARD

The quality of the Board's decisions must rest essentially on the number and capability of its personnel—that is, the Board members, the professional staff, and the supporting administrative and clerical personnel. Serious inadequacy in any one of these areas undermines the Board's capacity to perform adequately. Unfortunately, there have been times when departmental failure to fill existing vacancies, or to recognize the need for increased staffing, has left the Board handicapped with inadequate resources.

More serious are the handicaps which result from the appointment of personnel who lack the professional aptitudes or personal qualities needed to do the Board's work effectively. Unfortunately, from time to time, political or other considerations have led to appointments such as these, and the work of the Board has suffered.

To cope with the highly complicated and extremely technical immigration and nationality laws takes professional competence of the highest order. The additional qualities that enter into the making of a sound judge go beyond mere competence as a lawyer. Because the

---

40. See Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144 (1975).

production of formal opinions plays such a large and important role in the Board's mission, the art of communication—expressing ideas clearly and grammatically—is an essential requisite not only for the Board's staff attorneys but also for Board members. To attract candidates with these qualifications, the compensation should be commensurate with the expertise and responsibility required. This is far from the case at the Board.

The Board was last reclassified in pay grade in 1960: the Board members were placed in grade GS-15, and the Chairman was classified GS-16. Since then, the work and the responsibility of the Board have increased tremendously. The Service attorneys who appear before the Board have long since been upgraded and are now classified as GS-15. The Service's immigration judges and District Directors, whose decisions the Board reviews, are now in grades GS-15 and upward. Yet all efforts to raise the Board's grades from the classification fixed in 1960 have thus far been unsuccessful. To maintain the pay scale at such an unrealistically low level is not only unfair to the Board members who have the necessary qualifications, but it can only discourage qualified candidates from seeking places on the Board when vacancies occur while at the same time tending to attract political hacks who cannot aspire to the better paying jobs in Government. It is time that the Board as an institution was upgraded, even if it takes legislation to do what should long since have been done administratively.

Such an artificially depressed pay classification at the Board level must necessarily depress the classifications available to the staff attorneys because no more than a GS-14 can be permitted them—no matter how great their expertise or how long their service at the Board. Bright, young, and inexperienced attorneys, fresh from law school, can be recruited at the lower grade levels and induced to remain for a while as they gain expertise and qualify for promotion. But in the long run they will inevitably turn elsewhere, for the Board cannot effectively compete with other Government agencies offering higher pay for legal work of no higher order. The Board's staffing problems can only be aggravated while such an unfair disparity continues to exist.

#### *Qualification Standards for Board Members*

In the final analysis, the effectiveness of the Board as a quasi-judicial tribunal depends largely on the calibre of the Board members. Each member, by his vote in a given case, not only affects the alien who is the subject of the proceedings but shapes the course of the law to be applied in all cases. To the degree that any member may lack legal acumen, capacity for clear thinking and expression, famil-

ilarity with immigration and nationality law, judicial temperament, willingness to work hard and accept responsibility, or a feeling for people, he fails to carry his share of the load and casts a further burden on the remaining members.

Every Board member should be not merely a member of the Bar but an excellent lawyer. Beyond that, he must have the qualities of an astute judge. He should have intellectual integrity and the capacity to appraise critically new notions and arguments which at first blush may appear unacceptable. He should be sufficiently secure emotionally that he can recede from previously held positions, when presented with convincing reasons, without damage to his self-esteem.

Especially in the field of immigration law enforcement, where so much power is wielded over the destiny of human beings, judicial temperament encompasses many more qualities than may be needed in other contexts. An alien's whole future may depend on the way a Board member exercises administrative discretion. A Board member who lacks compassion or who is hostile and uses his power to vent his spleen on the object of his hostility can do much harm. A Board member should be free of the obvious prejudices, such as those based on race, religion or national origin. He must also be tolerant and capable of exercising discretion favorably, even to persons whose cultural patterns or life style may be alien to his own.

It takes a long time for even a good lawyer to become proficient in the intricacies of immigration and nationality law. To expect a new Board member without adequate background in this field to cast a meaningful vote in each case that comes before him for decision is wholly unrealistic. Candidates for a Board membership should not only have specific knowledge of the law but should have demonstrated some concrete interest in the Board's work and some evidence that they have thought critically about the problems involved. Many qualified candidates can be found among the attorneys who specialize in this field, both within and outside Government service, and among the law school faculties. Partisan political considerations should not be the dominant factors in selecting Board members. When they are, and when competence and experience are considered as secondary, the work of the Board inevitably suffers.

#### CONCLUSION: A STATUTORY BOARD

The foregoing analysis of the origins of the Board, its expanded role as an adjudicative body, and the ever-present problem of adequate

staffing, necessarily lead to the following conclusion. It is time to give the Board statutory standing. Its existence as a quasi-judicial tribunal within the Department of Justice should be recognized by Congress. The Chairman and Board members should be given a more realistic salary classification, one more in keeping with their positions and responsibilities. Like the assistant attorneys general who supervise the various departmental divisions and other officials, the Chairman and Board members should be Presidential appointees confirmed by the Senate. Although it may be asserted that this would throw the Board into the political arena, the fact remains that, realistically speaking, the Board is already there. Some attorneys general, in making appointments to the Board, have been careful to screen the applicants for ability and experience. Others have not. Presidential appointees, at least, go through the screening process in the course of Senate confirmation. Judging by recent experience, the Senate is taking its responsibilities in this regard very seriously and has been rejecting nominees it considers lacking in the needed qualifications. Screening cannot help but enhance the calibre of the appointees and with it the capacity of the Board to perform its important function.