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## Perspective of an Immigration Judge



## *perspective of an immigration judge*

**James P. Vandello<sup>†</sup>**

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**In writing about my experiences** as an immigration judge, I recall an incident reported in a book about former Governor Huey Long of Louisiana, one of the most colorful politicians in American history. The attorney general of Louisiana was driving around with Governor Long in the state limousine. Governor Long decided to stop at a super market to take advantage of a sale on potatoes. The trunk of the

limousine was full, so the attorney general got down on his knees and helped to tie several large sacks of potatoes to the bumpers of the limousine. The attorney general later stated that as he was on his knees, he wondered what the other attorney generals around the country were doing at that precise moment.

My duties sometimes vary considerably from those of other administrative judges and

from civil and criminal court judges. I too sometimes wonder what other judges are doing at that precise moment. I have cases where there are hours of testimony concerning torture in Algerian prisons. I listen to the testimony of medical personnel who are torture experts. I have people appear in front of me with no attorney, all-alone, and they do not speak English. Not only that, they speak a rare language where

there are no interpreters available in this area, and only one or two in the United States. I see cases such as that of a young man who has been in the United States since he was six months old and is now facing deportation to the Philippines, a country he knows virtually nothing about. And there is absolutely no possibility of his remaining in the United States. I have many cases where the respondent has dealt with an "attorney" for many months (and at a great cost), only to find out later that the person was a notary public and not an attorney, and could not represent him in court.

I graduated from the University

and prosecuted the cases. As a result, in January 1983, a new agency was created within the Department of Justice called the Executive Office for Immigration Review.

Immigration judges were originally called "special inquiry officers." They presided over informal hearings that dealt with the right of aliens to enter the United States or to remain here after entry. In 1956, special inquiry officers were given independence from the local district director of the Immigration and Naturalization Service. In 1973, the title was changed to Immigration Judge and judges were authorized to

time ago, its budget and staff was probably 10 fold from what it was three decades ago. The caseload of the Immigration Court has increased commensurately.

The authority to determine matters relating to aliens falls under the Immigration and Nationality Act of 1952, as amended. Until recently, that authority was executed exclusively by the Attorney General. The Immigration Courts and Board of Immigration Appeals are within the Justice Department. The Immigration and Naturalization Service is now under the Department of Homeland Security. Decisions of immigration judges may

**FAST FACT**

**In the past 10 years, filings in the District Courts of Colorado have grown by 18.8%. The growth has occurred primarily in criminal and juvenile matters, including delinquency and dependency and neglect matters. In this same period, filings in the Colorado Court of Appeals have risen by 21.4%.**

*Colorado Judicial Branch Website, Court Facts,*

*<http://www.courts.state.co.us/exec/pubed/courtfactspage.htm> (last visited Apr. 20, 2003).*

of Denver College of Law in 1973. I received a joint degree in law and international studies. I was appointed general attorney (nationality) by the Immigration and Naturalization Service that year, and was assigned to the district office in Denver, Colorado. After ten years in that position, I was appointed to be an immigration judge in 1982. At that time, immigration judges were part of the former Immigration and Naturalization Service (now part of the Department of Homeland Security). Over the years, many had questioned the propriety of judges being paid by the same agency that prepared

wear robes in the courtroom. In 1983, the separate agency was created, resulting in a more independent court.

When I was hired by the Department of Justice in 1973, Title VIII of the Code of Federal Regulations (dealing with immigration law) was about 200 pages. Today it is quadruple that. There were two or three practicing private immigration lawyers in Denver and two government attorneys. Now there are more than 100 attorneys handling immigration cases in Denver, and 10 government attorneys. When the Immigration and Naturalization Service ceased to exist a short

be appealed to the Board of Immigration Appeals. If the alien appellant does not succeed on that level, he may take his case to the United States District Court or the United States Court of Appeals, depending on the type of case.

Immigration Courts are considered "high volume." I complete more than 1000 cases per year, as do most other immigration judges. Although the numbers may seem high, Denver has a Department of Homeland Security detention center, where each judge hears cases two days per week. Detention centers generate high case completions,

in that many such cases are routine matters (e.g., bond hearings).

Immigration judges have the authority to conduct formal proceedings to determine whether a foreign national shall be allowed to remain in the United States under color of law, or whether he shall be deported ("removed"). As such, judges are authorized to conduct hearings, rule on admissibility of evidence, examine witnesses, and issue findings, decisions, and orders.

Immigration judges are authorized to consider aliens for relief in removal proceedings, including adjustment of status

situations they are allowed to remain in the United States if their equities outweigh the adverse factors of record. These applications are for cancellation of removal and former section 212(c) of the Immigration and Nationality Act.

Immigration Judges are also authorized to make findings concerning claims to United States citizenship. In rare cases, they are authorized to hear cases concerning attorney discipline. There are also procedures to prohibit aliens from leaving the country, where national security might be compromised. These cases, however, are quite rare.

not apply to proceedings before immigration judges. Rather, the Attorney General has the statutory authority to issue regulations dealing with aliens, and immigration judges are given authority pursuant to the Attorney General regulations. Presently there are more than 200 judges nationwide. They are supervised by the Chief Immigration Judge, Michael J. Creppy. Although the Immigration and Naturalization Service is now under the authority of the Department of Homeland Security, immigration judges will remain under the Department of Justice.

Immigration judges operate

**User fees for access to all Colorado courts were increased by 50% on March 18, 2003. According to the Colorado Judicial Branch, the increase is due to falling State revenues and increasing pressures on the State's court and probation systems. The increase comes on the heels of a \$9 million dollar cut in the Judicial Branch's general fund budget for 2003. The last revision of users fees in Colorado was in 1995. Prior to this legislation, Colorado had the fourth lowest level of fees overall in the nation.**

*Press Release, Chief Justice Mary J. Mullarkey, User Fees Increasing March 18 in Colorado Courts, available at <http://www.courts.state.co.us/exec/media/pressrelease/fees3-03.doc> (Mar. 17, 2003).*

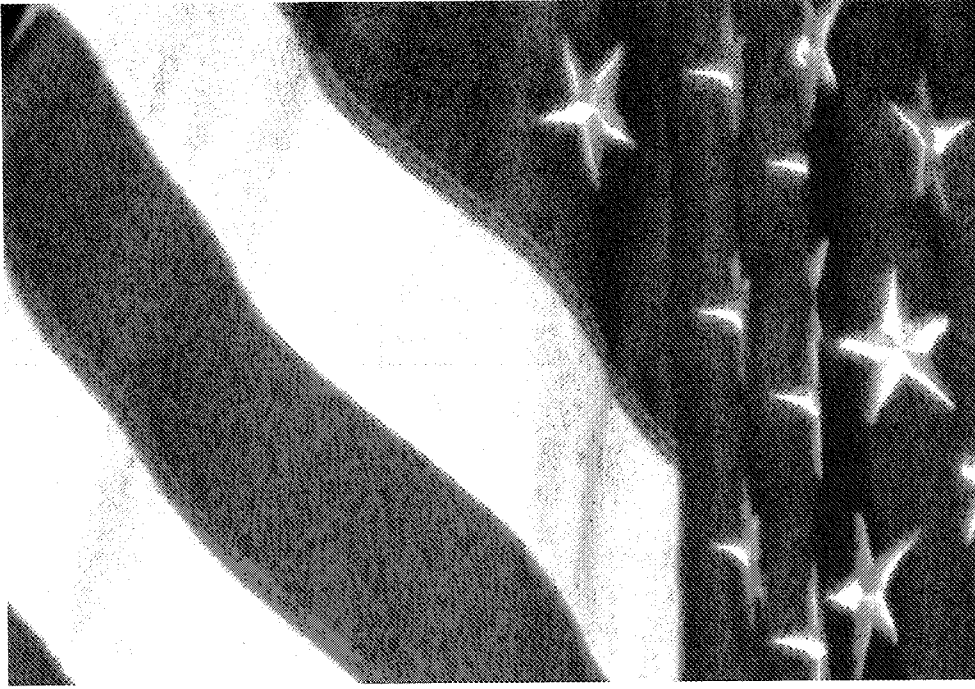
to lawful permanent residency, asylum, and withholding of removal. We hear two types of cases dealing with long term, undocumented residents who seek to have their status legalized because of the hardship that their United States citizen children might suffer. These applications are for cancellation of removal and, formerly, for suspension of deportation. We also hear cases dealing with long-term permanent residents who have become deportable on account of a criminal record. In certain

The caseload for immigration judges was, by today's standards, quite low in 1983. However, after the passage of the Refugee Act of 1980, a huge caseload was created when immigration judges were allowed to review claims for asylum, both those denied by the Immigration Service and those filed "defensively" in Immigration Court.

Immigration judges do not fall within the auspices of the Administrative Law Judge system. The Administrative Procedure Act of 1946 does

in detained and non-detained settings. A typical morning in a detained setting consists of handling a master calendar of 25 cases or more. Of those, several also involve bond hearings. Considerations for bond are the same as in criminal cases: the likelihood of absconding and whether one is a danger to the community. A respondent may be released on his own recognizance; however, if bail is imposed, it cannot be less than \$1500.

The Immigration and Nationality Act states that an alien who has



been convicted of a crime may not be released on bail; however, the United States Court of Appeals for the Tenth Circuit has held that this law is unconstitutional as applied to permanent resident aliens. As a result, bond hearings are routinely held for respondents in that category.

Non-detained dockets are as follows. Immigration judges hold master calendar hearings weekly, where as many as 30 cases are scheduled in a session. These are routine settings in the nature of criminal arraignments. Attorneys enter their pleadings to the Notice to Appear (formerly the Order to Show Cause), state what relief they are seeking, and what country (if any) their client would choose to be removed to, if that should occur.

Respondents have the right to be represented by counsel in proceedings before immigration judges; however, they do not have the right to court appointed counsel. The statute declares that counsel must be "at no

expense to the government." The Department of Homeland Security is represented by counsel in every case. Thus, immigration judges must meet the challenge of handling pro se cases and, to the extent possible, ensuring that the respondent has an opportunity to fully prepare and present his case.

Clients appearing without counsel are told the purpose of the hearing, the allegations are explained in non-technical language, and their rights are read. They are given a list of free legal services and are told how to contact them. Additionally, they are given one or more continuances for counsel.

In the detained setting in Denver, the majority of respondents are nationals of Mexico and the majority of them wish to return to Mexico as expeditiously as possible, either through an order of removal or an order of voluntary departure. With voluntary departure, the respondent pays for his own

ticket and thus is not subject to a 10-year bar to his legal return to the United States. The remaining cases on a detained docket involve persons who have been released from federal or state prison, persons who have arrived at an airport and are considered to be inadmissible, and persons arrested by the government for other immigration violations.

The afternoon calendar at the detention center is for individual cases. These are merit applications for asylum, protection under the Convention Against Torture, and for cancellation of removal. At times, the respondent asserts a claim to United States citizenship either through birth in the United States, birth abroad to United States citizen parents, or derived citizenship through his parents' naturalization. Such determinations are sometimes difficult where the claimant states that he is a United States citizen, but where he has consented to deportation one or more times in the past.

In my career I have handled many memorable cases. In 2000, a Chinese ship containing hundreds of smuggled Chinese nationals was caught in Hurricane Iniki off of the Hawaiian Islands. Most of the Chinese applied for asylum. Approximately 20 were flown to Denver because of space available at the Immigration and Naturalization Service Detention Center. Their cases were handled there. Similarly, when the ship *Golden Venture* ran aground in New York City and more than one hundred Chinese nationals applied for asylum, I was detailed to hear some of the cases.

When President Carter was embroiled with Fidel Castro over the "Marielitos" leaving Cuba, thousands of new cases were created in our system and years of litigation resulted. Several such cases were placed on my docket when I was serving as an immigration judge in San Francisco. Some of the respondents had been born in institutions in Cuba, and had spent virtually their entire lives in social service and penal institutions. Some had spent many years of their lives in mental institutions in Cuba. Their cases presented serious challenges to all the parties involved.

I served as an immigration judge in New Orleans for two years. In 1983, I was assigned several Haitian asylum cases. At the time, boatloads of Haitian asylum seekers arrived on Miami Beach, and Key Biscayne, Florida. The Haitians streamed ashore and some made their way into the community. Most were apprehended. They were put in "exclusion" proceedings and their cases adjudicated by immigration judges. Exclusion proceedings were held to determine the admissibility of arriving aliens. Congress later passed ameliorative legislation that granted permanent residency to a great number of Haitians.

In 1987, I was appointed to hear a case in Los Angeles involving an alleged Nazi collaborator. The 1978 Holtzman Amendment (now at section 212(a)(3)(E) of the Immigration and Nationality Act) had stated that all persons who had aided and abetted in the persecution of Jews and other minorities in World War II were

subject to deportation. They were deportable even if they had entered lawfully and fully disclosed their wartime activities. The amendment was proposed in order to cure perceived defects in the Immigration and Nationality Act. The Act previously had no provisions that would provide for the deportation of Nazi persecutors and abettors.

This particular case involved a man who had enlisted in the Waffen SS. He was a prison guard and "dog handler" at a concentration camp. The Office of Special Investigations ("OSI") was set up in the Department of Justice to investigate these cases. The OSI located witnesses in the United States, Canada, and Europe who identified the respondent from a photo lineup. Witnesses testified that they observed him shooting an old man who was unable to make the "Death March" from Dachau to Wiener Neudorf concentration camp. The OSI presented documentary evidence as to the respondent's military records, as well as volumes of material concerning the conditions in concentration camps, gruesome medical experimentation, and the horrors of day-to-day lives of the inmates.

The respondent was ordered deported and an appeal was filed. During the pendency of the appeal, Germany filed papers to extradite him for murder committed during World War II. He was extradited and thus, upon leaving the United States, he became a self deport.

The German prosecution had instituted proceedings in part because of evidence brought out at the deportation hearing in Los

Angeles. However, after trial, the respondent was acquitted. The German court discounted the evidence from the hearing in Los Angeles because they thought it was improper for United States government attorneys to meet with their witnesses prior to deportation hearings in the United States. Under German procedure, witnesses cannot be prepared before a criminal trial. The testimony of a witness must be spontaneous. The German court found that the evidence in the deportation case was tainted by this conduct. Apparently, there was no independent evidence of sufficient competence to convict the respondent.

Immigration judges are also given authority to issue the oath of allegiance to new citizens of the United States. Formerly, this was the exclusive function of the federal or state judicial branches. However, with the advent of administrative naturalizations, the Executive Office for Immigration Review was given the authority to issue the oath. I recently participated in a swearing in ceremony at Ft. Carson, Colorado, where 60 new citizens were sworn in. Almost all were in the active duty in the United States Army or United States Air Force. This duty is particularly satisfying for me since I started my career as a nationality attorney with the Immigration and Naturalization Service.

My life on the bench changes with the vagaries of Congress. One expects changes in immigration law every few years, but since 1983, Congress has produced at least four comprehensive immigration bills that have

changed the substantive law, the procedures, and even the basic terminology used in the practice. It takes several months to get used to such wholesale changes, and then another comprehensive statute is passed to replace it.

Congress passes immigration legislation that is far reaching and, sometimes, quite unexpected. It results in a radical change in the types of cases judges hear. For example, Congress passed legislation stating that population control (i.e., forced sterilization or abortion in China) constitutes persecution and is grounds for asylum. There are special pieces of legislation that benefit only certain nationalities, such as Central Americans, Cubans, Haitians, and nationals from former Soviet republics. Congress has enacted legislation that lowers the threshold requirements for refugee status for certain religions and certain geographical regions. Congress provided the authority to legalize more than one million undocumented aliens, thus creating a huge new category of case that immigration judges might eventually hear.

Immigration regulations too are quite variable. Many regulations are considerably longer than the enabling statute.

An immigration judge must also be familiar with precedent decisions of the Board of Immigration Appeals, the appellate administrative authority within the Executive Office for Immigration Review. One precedent decision held that ritual mutilation of girls in African tribes is a form of persecution on account of social group. Therefore, such cases can

be entitled to asylum. Additionally, case law has held that persons are entitled to asylum even if they enter the United States through fraudulent documents under a false identity.

I would estimate that in a given year, I hear cases emanating from at least 50 different countries. The Immigration Court is required to provide an interpreter for all non-English speaking clients. We sometimes have cases where the respondent speaks a dialect that is spoken by only a few thousand people in the world. I have a case pending now where the nationwide contract interpreter service has no qualified interpreter in that language, and, thus, the case cannot proceed until such an interpreter is located and properly trained.

We have asylum cases where weeks ago an individual was living a nomadic existence herding livestock in Africa, and today he is thrust into 21st century America. Some respondents claim when they boarded a ship to be smuggled out of their own country, they had no idea where the ship would take them. At times they are unfamiliar not only with our language, but with basic amenities of modern life. Some respondents appear in court and have never been in a courtroom before, have never been in a high-rise building, nor even been in an elevator. The cultural gap that we sometimes see calls for sensitivity on the part of the judge. Immigration judges have an annual conference where we receive lectures on cross-cultural issues.

A regional crisis will (sooner

or later) result in changed duties for immigration judges. When the Iranian hostage crisis took place in 1979, Iranian students were required to register with the Immigration and Naturalization Service. Eventually, several thousand were placed in deportation proceedings and several thousand applied for asylum. Likewise, the breakup of the former Soviet Union resulted in travel freedom for its citizens. This resulted in many new cases for immigration judges, where visitors overstay their visas and then apply for asylum. After the Gulf War, the United States allowed visas for several hundred Iraqi deserters. A few of these cases eventually made it to Immigration Court. Congress has permitted Vietnamese of Amerasian descent to immigrate to the United States. A small percentage eventually end up in deportation proceedings for various grounds of deportability.

My 30-year career with the Department of Justice has been exciting and stimulating. Each case I hear is a life story. I have been able to grant refuge to persons who have a genuine fear of persecution. I have been able to unite or re-unite families. On the other hand, in many cases I have had to deal with the frustration of not being able to grant relief to someone because of the precise requirements of the statute, even though on a personal level he appears to be worthy of some immigration benefit.

In those rare times when cases start to become routine, Congress changes the laws and new challenges emerge. I feel I



am fortunate to hold this position, and am honored to be serving the Department of Justice in this capacity.

#### Endnotes

† This article reflects the personal views of the author. It does not purport to

reflect the position of the Office of the Chief Immigration Judge, the Executive Office for Immigration Review, or the United States Department of Justice.