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SYMPOSIUM ON IMMIGRATION APPEALS AND JUDICIAL REVIEW

IMMIGRATION LAW 2006

John T. Noonan, Jr.[+]

Ambivalence is the attitude that prevails among Americans when they think of immigration law today. Why? First, we can't decide whether we want the immigrants in or out. We cannot run our restaurants, our hotels, our taxis or even our farms and factories without them. On the other hand, we do not want them to take jobs that Americans need. Second, many of us are conscious that we are a nation of immigrants; that, at some point or other in our family history, our parents or earlier ancestors came from abroad. We don't like to close the door on people like those who preceded us or procreated us. On the other hand, we have values and democratic customs that immigrants may not understand or adopt. We resent the intrusion into our accepted ways. Third, we know that the immigrants are human beings, not likely to be very different from ourselves. We know that the humanity of each person has a claim upon us. On the other hand, we believe that citizenship makes a difference. Citizens have rights that Congress and the courts have not accorded other human beings. The ambivalence is neatly captured in the federal statute regarding counsel for immigrants. The caption reads "Right to counsel."[1] The text speaks of the privilege of having counsel.[2] Does the immigrant have the right to a lawyer or simply the privilege of paying for one?

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1. 8 U.S.C. § 162 (2000).

2. *See id.*

We cannot resolve our underlying ambivalence in an afternoon. I suggest that we recognize its influence on our law and its administration. Immigration law is designed to keep the immigrant out and to let the immigrant in. How that is done depends a good deal on the lawyers in the legal system. I focus on them as key to the working of immigration law. We have heard about the Real ID Act. My focus is on Real Lawyers.

Each month the Ninth Circuit receives an average of over 500 petitions for review from decisions of the Board of Immigration Appeals.[3] Many of these are asylum cases in which the petitioner contends that he has met the legal definition of a refugee, a person who is "unable or unwilling to return . . . because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[4] These cases are the ones that should provide the greatest pause to any judge as well as to any lawyer who is working on immigration cases. Asylum cases ask the judges and lawyers involved to determine whether the individual asking for asylum will be sent back to a country in which he or she may meet persecution, torture, or death.

Each case centers on a person. Usually each case affects the person's spouse and often that person's children. You cannot comprehend the problems presented by immigration law today by thinking only in terms of statistics or of managing caseloads or moving cases along. Quantification will miss the persons in the process. A real lawyer will not miss them.

Yet before going directly to my theme of the lawyer's role, let me recite a few statistics from the Department of Justice. We do need these statistics to put the lawyers' problems in perspective. In round numbers, 7 million persons, it is guessed, now live in the United States without documentation.

Each year,

350,000 persons enter without documentation,

163,000 are excluded or deported,

11,000 are granted asylum by immigration officers,

11,000 are granted asylum by immigration judges or the Board,

12,000 seek relief in courts of appeals,

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3. *See* John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 48 fig.2 (2005).

4. 8 U.S.C. § 1101(a)(42) (2000).

153,000 are not accounted for and join the 7 million already here.[5]

Even if the government's position prevailed in all 12,000 cases on appeal, the total would be trivial in comparison to the millions already here without documentation; the total would be less than 10% of the 153,000 persons who annually enter the country without documentation and never enter the legal system.

In the face of these figures, does it make a great deal of sense for lawyers to litigate each appeal to the bitter end? I do not know the cost of each appeal. I cannot refrain from asking if the equivalent amount spent on patrolling the border would not exclude a larger number of persons without right to be here. I cannot refrain from observing that the Internal Revenue Service, enforcing a precise and complicated statute, often compromises cases. Should it be harder, with a statute scarcely less precise and complicated, to compromise when not dollars but people's lives are at issue?

Inadequate treatment of the asylum cases by lawyers is not new. In my experience it goes back to 1986 soon after I first joined the court. It has not varied whether the administration is Republican or Democratic. To catch the flavor of what has come to courts of appeals in immigration cases, allow me to read from the transcript of the hearing accorded Ms. Jesus Escobar-Grijalva[6] when she applied for asylum:

> JUDGE TO MS. ESCOBAR
>
> Q. Who is your present attorney, because no one is with you.
>
> A. It's a new American one.
>
> Q. A new American one? What is the name of this attorney?
>
> A. I don't know.
>
> . . . .
>
> Q. Have you even met this new attorney, yet, ma'am? This new American attorney as you described him to be?
>
> A. Yes, I saw him.

5. EXECUTIVE OFFICE FOR IMMIGR. REVIEW, U.S. DEP'T OF JUSTICE, FY 2005 STATISTICAL YEARBOOK K2 (2006), *available at* http://www.usdoj.gov/eoir/statspub/fy05syb.pdf; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2005, at 114 tbl.B-3 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html; OFFICE OF IMMIGR. STATISTICS, DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 6 (2005), *available at* http://www.uscis.gov/graphics/shared/statistics/publications/AnnualReportEnforcement2004.pdf.

6. Escobar-Grijalva v. INS, 206 F.3d 1331 (9th Cir. 2001).

Q. What is the name of this attorney? It looks like Jeremy Frost is his name. Is that his name?

A. (Indiscernible).

Q. A man, according to the writing in here, at least. He is still part of the same law office of McGuire and company. But, my question to you, ma'am, is where is [sic] any of your attorneys? Where are they?

A. I don't know, it—can you allow me to go out and see.

Q. Well, ma'am, have you seen them today at all? Any of your attorneys?

A. Yes, I did see him.

Q. You saw Mr. Frost?

A. Yes.

Q. Or was this gentleman his assistant that you saw, ma'am? Don't get the two confused.

A. No, it (indiscernible).

Q. Okay, and he said he would be representing you? When did you last see him? When did you last see him ma'am?

A. I just saw him before I got in here. Would you please allow me to go out one moment.

Q. We'll have the court interpreter go out there and call his name.

. . . .

[A break occurs; the session then resumes.]

JUDGE TO MR. FROST

Q. Counsel, I understand you're Jeremy Frost, is that right?

A. That's correct, Your Honor.

JUDGE TO MS. ESCOBAR

Q. Now, ma'am, is this your attorney, Mr. Frost?

A. No.

Q. No?

A. It's another one.

JUDGE TO MR. FROST

Q. Okay, well, counsel, have you ever met your client?

A. No, I haven't , Your Honor. But I'm—I'm from—

[MS. ESCOBAR TO JUDGE]

A. He hasn't seen me.

JUDGE TO THE INTERPRETER

Q. Wait, wait. Let—let her finish. What—what's that?

A. He—it's another gentleman.

Q. Okay, well, Mr. Frost is from the law offices of Terance McGuire. He is one—apparently one of the new attorneys.

A. Actually—

Q. This is not the person you—you met outside? The new attorney you said—the new American attorney?

A. With a black jacket.

JUDGE TO MR. FROST

Q. Counsel, do you have any idea who that is?

A. No, I don't, Your Honor.

Q. Is that one of your assistants maybe? One of your clerks or something?

A. I'm—I'm not even with McGuire's office. I'm with Jim Valinoti.

Q. You're with Valinoti? Well—

A. Yeah.

Q. (indiscernible) really confusing me, because your—your notice comes in—in McGuire's office's name, not Valinoti's. And is there some reason why you submitted a notice with another law firm? I mean, I'm really confused now. If you're with Mr. Valinoti's office, why are you submitting a notice under Mr. Terance McGuire's offices?

A. Your Honor, I'm a little confused too. And if I could call a recess for five minutes to just get it clarified. I—I really don't have the answer.

Q. Have you met you [sic] client before today, counsel[?] I mean, right now, because she said she never saw you before until you walked in right now.

A. That's true, Your Honor. I've never met her.

Q. And you're going to be presenting her case?

A. Actually, I was hoping to have time, you know, before, but I just ran from this hearing to this hearing.

MR. YOUTSLER [COUNSEL FOR THE GOVERNMENT] TO JUDGE

Q. I don't think he can represent her. He hasn't ever met her before. He has no idea what her case [is] about.[7]

Such was the record in this case where at issue was Jesus Escobar's asylum in the United States—a series of false starts, of non sequiturs, of unanswered questions, of misunderstood answers, culminating, despite government counsel's intelligent intervention, in the immigrant being saddled by the judge with a lawyer who had never seen her before. It's

7. *Id.* at 1332-33.

hard to pin all the fault here on any single person. Was it the interpreter who didn't get everything said? Was it the stenographer, who probably wasn't there but sometime later listened to the taped recording of the proceeding and did her best to render it intelligible? Was it the immigration judge, who so often seems to follow his own train of thought without paying much attention to government counsel, to Jeremy Frost, or to Ms. Escobar herself?

However the blame is to be assigned for a jumble that comes close to a skit on *Saturday Night Live*, imagine coming to a court of law with this transcript! A panel of the Board made its decision based on this record. Lawyers in the Justice Department then chose to defend the Board's decision in the court of appeals. The government did not concede error and ask for a remand. Speaking now from my point of view, it was mulish persistence in defending a decision based on this record that constituted the capital mistake made in this asylum case.

Any lawyer who has had any experience, any lawyer who has thought about her work at all, knows that lawyers are not fungible. To determine that a given person has gone to law school, has passed the bar exam, and is admitted to the bar is only the first step in determining whether the lawyer functioned as counsel in the case under consideration.

Like many phrases used in law, the phrase "represented by counsel" has a breadth of meaning and evokes a history beyond the three words employed. Here what is evoked is what it means to have as an advocate one professionally skilled in the subject. Does it mean being represented by someone you have just met, who is familiar with the pattern of questions in immigration cases but knows nothing of the particular strengths and weaknesses of your case? Such a person, who has gone to law school and been admitted to the bar and knows how to ask routine questions, is certainly a lawyer. No one familiar with the history and standards of the legal profession would think of him as an advocate. No one immersed in the ethos of our profession would credit such a scarecrow with being counsel representing a client.

Aleksandr Solzhenitsyn in his account of life in the Soviet Union has a passage on the precious value of counsel, of having, at a moment of great trial in one's life, "a clear-minded ally who knows the law."[8] Was Jeremy Frost such a clear-minded ally for Jesus Escobar-Grijalva because Frost knew the law and could articulate questions in terms of it? By no means, for nothing suggests that Frost was her ally. He had wandered, for some unexplained purpose, into the hearing. He was not connected with the McGuire firm that the immigration judge believed he belonged to. He

8. ALEKSANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO: 1918-1956, at 56 (HarperCollins 2002) (1973).

was, as it were, press-ganged into appearing for this woman he had never met. Is it necessary to say that even in a totalitarian dictatorship Jeremy Frost would not have appeared as the ally of the person facing expulsion from the country?

It seems to me reading at leisure the transcript I have read to you today that the IJ might have recognized that, when he accepted Frost as Escobar's counsel, he was taking a simulacrum for the real thing. It seems to me that Frost himself, familiar as he seems to have been with routine in immigration cases, could have successfully objected that he was not qualified to represent a woman he had just met. The government's lawyer, Alan Youtsler, raised the question pointedly. He acted as government counsel should act, seeking due process for his adversary. But both the IJ and Frost were under pressure to act instantly. I assume that the attorneys who defended the IJ's decision before the Board and those who defended the Board's decision before us had a little more time before they acted. How could they have supposed that Jesus Escobar had been represented by counsel?

The lawyers for the Justice Department had time to consider this question. I am not sure that they thought they could consider it. Their client was the Justice Department and its employees, the members of the Board and the IJ. The attorneys had not chosen the case, they were assigned it by a supervisor. Their job, they assumed, was to defend what had been decided.

I am not privy to the internal workings of the Justice Department. I reach the conclusion as to what the lawyers assigned to the case probably thought from the way that lawyers from the Justice Department have responded in open court when I have asked them about the soundness of the position they have been defending. I can recall only one or two instances in which such a lawyer has replied, "Now that you put it that way, we're wrong. We'd like to go to mediation and see if we could work out a solution."

When your client has made a major mistake, it's a major mistake not to concede it. In the case of lawyers for the government it's a major mistake for the government not to grant them the power to admit error. They should not be treated as automatons, compelled to defend the Department, right or wrong.

Immigration judges, informally held to decide a quota of cases, have to get through crowded calendars. They are understandably disturbed by immigration lawyers shuffling cases. Their problems could be dealt with by appointing more immigration judges. A fair start has been made in

that direction with the number increasing from 75 in 1987 to 225 this year.[9]

The immigration judges' problems could also be lessened by purging the immigration bar of lawyers who merely batten on hapless immigrants. The Ninth Circuit, for example, keeps a watch list of lawyers identified by the panels of the court on account of their unprofessional conduct of an immigrant's case. Identification of three professional failures or one gross failure leads to a procedure by the court resulting in the imposition of sanctions. Over 100 lawyers have been disciplined in this way.

A fortiori, the problem could be diminished by reducing the number of nonlaywers who gum up the legal system. In Mexico and other Latin countries a *notario* is a member of a learned and honorable profession. A person holding himself out as a *notario* in the United States and offering legal advice to a noncitizen is engaged in the unlawful practice of law. These nonlawyers doing lawyers' work prey on helpless folk. The state bar and the Department of Justice should seek their elimination by prosecution or injunction. But neither problem—neither that of the impatient judge nor that of incompetent or unqualified counsel—would loom as large as it presently does if the lawyers of the Justice Department took to heart what it means to be a lawyer.

Attorney General Alberto R. Gonzales has stated with eloquent succinctness that the immigration judges "are the face of American justice" to the persons before their courts.[10] Analogously, the lawyers in the system are the face of American law to these arrivals from elsewhere. It is critical that the lawyers on each side of an immigration case understand their responsibilities.

It is a major mistake for any client to insist that his counsel defend a major mistake in court. For the government, the mistake is magnified. The government, of course, has governmental interests to protect, including the interest of enforcing the immigration law. The government also has the interest of assuring compliance with the law in the process of enforcing immigration law. Spotty and uneven that enforcement is, with millions of undocumented aliens at home here; but where legal process is used, the law should be faithfully observed. To enforce immigration law by violating the law set up to govern the process is to subvert immigration law. Lawyers for the Department of Justice, part of the face of the law, must have the authority not to defend the mistaken decision

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9. Executive Office for Immigration Review, United States Department of Justice, EOIR Immigration Court Listing, http://www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Sept. 20, 2006).

10. Memorandum from Alberto R. Gonzales, U.S. Att'y Gen., to Immigration Judges (Jan. 9, 2006) (on file with *Catholic University Law Review*).

of an IJ or the Board and to admit error if such a case has gone on to a court of appeals.

Different from the authority to acknowledge mistake is the exercise of discretion as to what decisions to appeal or defend. Eighteen years ago, one of my senior colleagues remarked to me, "The INS is the only agency in Washington that doesn't exercise discretion." I have found the comment in general to hold true. It doesn't make a difference what the political character of the administration is. The INS (now the DHS) has its own character. Once it hops upon one immigrant out of the millions it leaves undisturbed, the agency is determined not to let him go. It seems often enough, at least in the cases that reach a court of appeals, that the agency is bound not to compromise, not to consider equities, and to vindicate, at whatever cost to other values, the letter of the law. Something of the spirit of Inspector Javert seems to infect the agency. Playing the part of Jean Valjean's nemesis in *Les Miserables*, it seems to see itself as enforcing the inexorable march of heavenly constellations.

Can a prosecutor not prosecute Jean Valjean for theft when he steals a loaf of bread? Of course an American prosecutor will take into account all the circumstances and the penalty. Can the DHS not deport Valjean if he got here on a phony visitor's visa to care for his sick mother, married an American woman, and has a two-year-old citizen son? Once he's been cited to appear before an immigration court Valjean is in the vise of remorseless, discretionless prosecutors.

Real lawyers not only can tell their clients that the clients are wrong. They can tell their clients that they are asses to insist on their rights, that the cost of what is their due is not worth getting their due, and that, while perfectly authorized by statute, the course of conduct wanted by the client will do harm to his own reputation or to his relationship with his family or to the welfare of his community. Not every legal right requires a lawyer to press for a legal remedy. Discretion is not only the better part of valor. Discretion is at the heart of the lawyer's counseling skills. Freed to exercise discretion, the lawyers of the Department of Justice could transform the litigation and mediation of immigration cases.

The truth is that the INS does not deport all those whom it seeks to deport. As the Inspector General of the Department of Justice found in two examinations, one made in 1996, the other in 2003, the INS removed 90% of detained aliens and 13% or less of nondetained aliens and only 3% of nondetained asylum seekers, for all of whom a final order of deportation had been issued and all appeals exhausted.[11] The Inspector General does not say how many of these cases ended in voluntary

11. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REPORT NO. I-2003-004, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS 11-12 (2003).

departure rather than deportation, nor does he say how many deportation orders had been affirmed by the Board of Immigration Appeals or by a court of appeals. In the report for 2003, 55% of the total involved the detained, 45%, the nondetained.[12] Today in the Ninth Circuit, the percentage of cases involving detained versus nondetained aliens is much more dramatic. At this window in time, we have over 3665 cases pending before the court. Just 52 of these cases, about 1.4%, involve a detained alien.[13] So, if past practice is a guide, 516 deportations may actually occur after our decisions are issued.

Even if we assume the conservative 55/45 breakdown of the Inspector General and apply it to all of the courts of appeals today, it would mean that of the 12,000 cases, 5400 involve the nondetained. Then if the government won all the cases, 4698 would not result in deportation. If the cases all involved asylum, only 162 deportations would result. Voluntary departures might swell this number slightly. Exactness here is impossible. The overall picture is clear. The government litigates a large part of the time without a practical prospect of actually deporting the alien.

The Inspector General also reports that in a small number of these cases there is no deportation because, for "political or humanitarian reasons," the government decides not to deport. Here, at last, the kind of discretion a humane government should be exercising is exercised. Consider the cost of not exercising it sooner. First, and most obviously, the federal courts have been burdened with thousands of cases that led nowhere, as has the Board of Immigration Appeals. Second, the lawyers who should have shaped the system by discretionary decisions not to prosecute have been shut out. Thirdly, the power to exercise humanity has been effectively delegated to immigration officers beyond judicial scrutiny and lawyers' insights. "They want us to come to them on our knees," an experienced litigator observed to me. That posture may suit an imperial official. It is not congruent with American democracy.

In the prosecution of major malefactors, who are sometimes defended by highly competent counsel, the Department of Justice does an excellent job. American justice is exemplary. Why should the Department's treatment of those seeking shelter here fall below this standard?

In fact, on November 17, 2000, Doris Meissner, Commissioner of the INS, issued a memorandum entitled "Exercising Prosecutorial Discretion" and directed to regional directors, district directors, chief

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12. *Id.* at 5.

13. Cathy A. Catterson, Clerk of the Court, United States Court of Appeals, Ninth Circuit, San Francisco, CA.

patrol agents, and regional and district counsel.[14] The memorandum declared in italics:

> Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In exercising this discretion, officers must take into account the principles described below in order to promote the efficient and effective enforcement of the immigration laws and the interests of justice.[15]

Thirteen pages of detail followed this excellent statement. Among factors that could trigger the exercise of discretion the following facts ("whether proven or alleged") were listed:

> Lawful permanent residents;
>
> Aliens with a serious health condition;
>
> Juveniles;
>
> Elderly aliens;
>
> Adopted children to U.S. citizens;
>
> U.S. military veterans;
>
> Aliens with lengthy presence in United States (*i.e.*, 10 years or more); or
>
> Aliens present in the United States since childhood.[16]

Although this memorandum was issued after the presidential election of 2000 by a lame duck administration, counsel for the government have represented to our court that it is still in effect. It seems scarcely too much to say that it presents a reform of major significance. Like most reforms, vigilance is necessary to prevent the return of old ways. The existence of this directive establishes that there is no conflict between the policy of the agency and what the judges who must deal with its work desire.

Lawyers—real lawyers, lawyers exercising discretion, candid with their departmental client—are the key. The Department has such lawyers. The Department can recruit more of them for this important work. The solution is not to assign a tax lawyer or an EPA lawyer to argue an immigration case. The U.S. Attorney's office for the Southern District of New York may be an exception. But, generally speaking, the solution is not to ask an assistant U.S. attorney in Alaska to write a brief for the

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14. Memorandum from Doris Meissner, Comm'r, Immigr. & Naturalization Serv., to Regional Dirs., et al. (Nov. 17, 2000) (on file with *Catholic University Law Review*).

15. *Id.* at 1.

16. *Id.* at 11.

Eleventh Circuit in Atlanta. Lawyers are dexterous in turning their hand to new fields of law. But important specialities require discretion greater than dexterity. Immigration law is too important work to farm out around the country to assistant U.S. attorneys not sensitive to the requirements of discretion in the context of asylum cases whose center is the life of a person.

To conclude: Attorney General Gonzales is right to want the immigration judges to show true justice in the conduct of their cases and in their decisions. Conscientious, fair-minded as many of these judges are, they are capable of fulfilling this requirement. Purging the sleaze from the immigration bar will hasten achievement of this objective. So will resources devoted to good interpreters and live court reporters. So will increasing the number of good immigration judges and giving each one of them a law clerk (the ratio now in San Francisco is lopsided, 6 judges to 1 clerk). So will intelligently enlarging the Board. Above all, immigration law in this new century will benefit by being put in the hands of a Department of Justice that empowers its immigration counsel with the responsibility that each lawyer should possess to interpret the law fairly, equitably, and humanely, candidly telling his or her governmental client when the client has made a mistake or is being unduly obstinate, inequitable or inhumane. The Department of Justice should have a human face because, after all, we are humans dealing with each other.