The complexity of immigration court proceedings can baffle—and burn out—even the judges involved

Examining Immigration

By Kathrin Mautino

ONE OF THE FIRST THINGS, visitors notice when they observe a master calendar session at the local immigration court is how few attorneys there are. In a room typically containing 20 to 30 individuals facing the risk of removal from the United States, there may be anywhere between one and five private attorneys in addition to the one government attorney. The rest of the individuals must represent themselves, trying to interpret and apply a set of laws that a congressional report once identified as among the country’s most complex.

So how and why does such a strange court system exist? The answers reflect the long and complicated history of immigration to this country, as well as the conflicted emotions immigration causes Congress and the public today.

The immigration court, formally known as the Office of the Immigration Judges, part of the Executive Office for Immigration Review, is an agency of the Department of Justice. Prior to EOIR’s formation in 1983, immigration judges were employees of the Immigration and Naturalization Service (INS), which at the time also provided the

prosecuting attorneys. Until recently, the regulations governing the immigration courts still referred to immigration judges as special inquiry officers (their title as INS employees). As civilian employees of the Department of Justice, immigration judges have neither the constitutional protections of Article III courts nor the statutory protections of administrative law courts. These judges—along with the members of the appellate body, the Board of Immigration Appeals (BIA)—can be hired, fired, promoted and demoted at the will of the attorney general.

In 2002-2003, Attorney General John Ashcroft reduced the number of BIA members from 23 to 11 while mandating that cases be adjudicated in less than 180 days.

Many commentators at the time felt this was a not-so-subtle attack on the more liberal members of the BIA and a warning to immigration judges to keep their decisions conservative. A minor scandal erupted in 2007 when it became clear that a number of immigration judges were appointed based upon ideology and ties to the Republican Party. Several of the appointees had no prior experience with immigration law, including a White House domestic policy advisor and failed candidates to the U.S. Tax Court. Notwithstanding a determination that the appointees were not in compliance with applicable procedures, all the appointees were allowed to remain immigration judges.

Despite the potential drastic consequences an individual faces in immigration court proceedings, immigration law falls in the civil, not criminal, side of federal law. As such, no individual has a right to be represented by an attorney at government expense. There is no equivalent of the public defenders office—just a few overworked not-for-profit organizations and a slightly larger pool of private attorneys willing
to represent people in removal proceedings.

The immigration court system in some ways parallels the more familiar criminal court system. The government is represented by an attorney, whose job is to prove to the judge that the person in question is not authorized to remain in the United States. That individual, called a respondent, has the job of proving either that the government is wrong or that he/she qualifies for a waiver to allow him/her to stay in the country.

There are 50 immigration courts in the country, concentrated in California, Texas, New York and Florida. Some states, such as California, have multiple courts. Other states, such as Alaska, have none; individuals facing removal proceedings in Alaska generally must travel to Seattle (the immigration court with jurisdiction) at their own cost. Most proceedings require a minimum of two trips to the court.

The immigration court in San Diego is the third largest in the nation, with 10 judges in San Diego and Imperial counties. The main court is in a high-rise building in downtown San Diego, although there are hearing rooms in the basement of the Federal Building, at the Port of Entry at Otay Mesa and at the immigration detention facility next to Donovan Prison, close to Brown Field. There are also courts in the cities of El Centro and Imperial. The vast majority of the hearings are open to the public, although an immigration judge can close the hearing if he or she believes sensitive matters may be discussed, and certain types of hearings are closed to the public by regulation.

Normally, an individual’s physical location determines which immigration court has jurisdiction. Those who live in San Diego or Imperial counties and are not in government custody will be scheduled at a facility here; people in prison or in an immigration detention facility will have their hearings at a location close by.

Individuals can be placed in an immigration detention facility for many reasons. Some who are convicted or plead guilty to certain crimes are required by statute to be detained. Those who are believed by the government to be a danger to the community or a flight risk are also subject to detention. Generally, there is no limit on the government relocating an individual. People arrested in San Diego have been sent to detention facilities in New Mexico, Texas, Louisiana and other distant locations. Often, relief from removal proceedings requires showing hardship to family members, which becomes extremely difficult to document when one is in custody at a great distance from potential witnesses.

The court process begins with a charging document, called a notice to appear (NTA), issued by one of the agencies of the Department of Homeland Security that deals with immigration laws. Often, the agency is the office of Immigration and Customs Enforcement, which has agents reviewing
arrest, court and prison records at various locations. Individuals who apply for a benefit, such as naturalization, may end up with an NTA issued by the Citizenship and Immigration Service if a defect in their previous immigration history or an overlooked arrest comes to light. Besides listing the charges, the NTA normally tells the individual where and when the hearing will be.

Proceedings before the immigration judge are called removal proceedings. The first hearing is a master calendar, at which the immigration judge investigates the positions of the parties and schedules future hearings. Those who appear without an attorney are given at least one opportunity to try to find representation if they wish (in any further hearing). Individuals who miss either a master calendar hearing or their later individual hearing without an exceptional reason also face an in absentia deportation order. Generally, an individual ordered deported is barred from seeking any type of immigration benefit for at least 10 years. Some individuals convicted of certain crimes are barred for life from returning legally to the United States.

Because of the civil nature of immigration law, an immigration judge has a much more active role than that of a state or federal judge in a criminal proceeding. He or she has a duty to explain to unrepresented individuals the nature of the proceedings and the right of the individual, must evaluate what forms of relief (if any) the individual may qualify for and provide blank application forms and instructions as needed. Even if an individual has an attorney, the judge has authority to question witnesses and the respondent directly. If a respondent has not located an attorney to represent him/her, the judge is supposed to act as both judge and defense counsel, bringing out the positive factors in the respondent's case, and can consider evidence of criminal attorneys would consider heretical, such as hearsay, in making a determination whether a respondent is subject to removal or merits relief. An immigration judge can take a negative inference if an individual declines to testify on Fifth Amendment grounds.

Such a job can be very stressful. Respondents typically are desperate to remain in the United States and sometimes are not above stretching the truth. Many get themselves into trouble by hiring an unlicensed immigration practitioner to do their paperwork. Some of these so-called notaries are simply not careful in filling out required forms; others file false applications for relief using facts that have nothing to do with the individual.
in question. An immigration judge must make numerous credibility determinations and often relies on inconsistencies in testimony and written statements to make a determination. Asylum applications are particularly hard on immigration judges, causing high levels of stress and job-related burnout. A 2009 survey of immigration judges raised concerns they could be suffering from compassion fatigue, either becoming particularly lenient in granting asylum or becoming desensitized to the histories presented by the respondents.

The authority of an immigration judge is limited by statute and often depends on what may appear to be nonexistent differences. For example, such a judge can consider a detained individual’s request for a bond if the person was arrested in downtown San Diego but not if the person was arrested at Lindbergh Field arriving on an international flight. Similarly, individuals who were turned away at the U.S.-Mexico border might have been summarily deported (and therefore ineligible for most forms of relief), or they might have been allowed to withdraw their application for admission, which generally does not bar relief. An individual married to a U.S. citizen who entered the United States illegally is treated very differently by the law than the person who entered legally but overstayed a visa and worked without permission. The first generally cannot apply for permanent resident (green card) status; the second can. An individual who lies and says he/she has a green card in order to get a job can apply for a waiver; a person who lies about being a U.S. citizen is almost always barred from relief.

Once the immigration judge makes a decision, either the respondent or the government may appeal to the BIA. In the past, decisions were generally made by a panel of three board members after reviewing a written transcript of court proceedings and the judge’s decision. Because of the streamlining begun by then—Attorney General Ashcroft, now most cases are reviewed by one BIA board member and affirmed without discussion. Appeal from the BIA is to the federal circuit court that had jurisdiction over the residence of the respondent. So circuit courts end up reviewing the decisions of the immigration judge.

In San Diego, a unique project has been organized by Judge Margaret McKeown of the Ninth Circuit and Miko Tokuhama-Olsen of the Legal Aid Society of San Diego, among others, with start-up funding provided by a grant from the American Bar Association. The goal of the Immigration Justice Project is to provide attorney representation for 100 percent of individuals in removal proceedings by pairing a pro bono attorney with an experienced immigration attorney acting as a mentor. It is hoped that attorney representation will improve the quality of decisions reaching the Ninth Circuit Court while decreasing the number of appeals. Those interested in donating time should contact director Elizabeth Sweet at sweet@staff.abanet.org.

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