THE FACADE OF QUASI-JUDICIAL INDEPENDENCE IN IMMIGRATION APPELLATE ADJUDICATIONS

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Introduction

Recently the quasi-judicial appellate process for reviewing decisions of immigration judges in noncitizen removal proceedings changed dramatically. The Board of Immigration Appeals contracted in size from 23 authorized adjudicators to only 11 remaining Board Members amid concerns about identifying Members for removal based on their jurisprudential views. With the major expansion of an earlier streamlining initiative, single Board Members began to decide the vast majority of appeals in contrast to the historic reliance on collective decision-making. Viewed in the context of significant statutory restrictions on federal court review enacted in 1996, Attorney General Ashcroft's changes involving the Board of Immigration Appeals had particularly profound implications for the immigration appellate process.

A selective study of Board decisions and voting patterns and an examination of biographical information on retained and removed Board Members provides perspective on the significance of the reduction in the Board's size. In that regard, the paper analyzes case data relevant to the issue of whether individual Board members were removed because of their "liberal" views and examines the impact of downsizing on the smaller Board's jurisprudential balance. The paper then considers whether decisional independence is an essential attribute for an immigration appellate body and discusses the impact of Board Member removals in 2003 on the independence of the reconstituted Board. An important question the paper attempts to answer is whether the continued placement of the immigration appellate function within the Department of Justice has become untenable.

Immigration Adjudications: An Overview

Alien removal proceedings are adjudicated by quasi-judicial immigration judges with appellate administrative review available in the Board of Immigration Appeals. Over 200 immigration judges conduct hearings in the 52 immigration courts at diverse locations throughout the country. In FY 2003 these immigration courts completed 238,018 removal proceedings (Executive Office for Immigration Review 2004, C3; hereafter EOIR) and handled relatively small numbers of other cases including old exclusion and deportation cases that predated "removal". The Board of Immigration Appeals, in turn, derives most of its appellate caseload from immigration judge decisions but also reviews some decisions of officials in the Department of Homeland Security (which took over Immigration and Naturalization Service functions on March 1, 2003). Both the immigration judges and the Board of Immigration Appeals are part of the Executive Office for Immigration Review, a Department of Justice entity that also houses certain administrative law judges.

Over the course of many years, the caseload of the Board increased dramatically—and the Department of Justice responded in part by increasing the Board's size periodically during the last decade (from five members initially) and implementing single member review of some cases. Board filings jumped from less than 3,000 in 1984 to over 14,000 ten years later—and then approximately doubled in the following four years to over 28,000 in 1998. (Federal Register 1999:64, 56136; hereafter Fed. Reg.) In FY 1999 the Board received 31,087 cases and completed 23,011 (EOIR 2004, S2)—approximately.3 double the completions of seven years earlier (Fed. Reg. 2002:67, 54878). With a larger Board, output rose substantially but could not keep pace with the extent of new filings. In October 1999 the Department of Justice adopted a rule permitting a single Member

of the Board, when certain conditions are met, to affirm a decision without writing an opinion—thus obviating the necessity of review by a panel of three Members. The Department subsequently pointed out that "[o]ver 58% of all new cases in 2001 were sent to be summarily decided by single Board Member review through streamlining." (Fed. Reg. 2002:67, 54879) The FY 2003 Statistical Year Book observed that "[s]treamlining helped the BIA increase its output in FY 2001 by almost 50 percent over FY 2000" (EOIR 2004, S1)—with Board completions exceeding receipts that year (EOIR 2004, S2). The Board, in other words, began reducing its backlog before the Department of Justice proposed far-reaching changes.

On February 6, 2002, the Attorney General announced initiatives that he described as "a reorganization of the Board of Immigration Appeals." (Department of Justice 2002) In answer to a question by Congresswoman Jackson Lee at a congressional hearing that same day—"[I]s this rule making pursuant to the Attorney General's efforts generated after September 11 th ?"—the Director of the Executive Office for Immigration Review responded: "[N]o, it has nothing to do with September 11 th . We actually started talking about these types of reforms prior to that time."(U. S. Congress:House 2002, 38) With only minor modifications in the proposed rule published in February, the final rule (effective September 25, 2002) provided for substantially expanded use of single Member adjudications, stricter time limits on briefing of cases and deadlines for the issuance of decisions, greater deference to fact-finding by immigration judges given expression in a "clearly erroneous" standard for such review, and the reduction in the Board's size to 11 Member positions after a six month transition period devoted to backlog elimination.

The Department of Justice advanced several rationales for a smaller Board with expanded use of single member adjudications. After pointing to increases in Board caseloads over the years, the Department concluded that Board expansion in recent years "has not succeeded in addressing the problem of effective and efficient administrative adjudication...." (Fed. Reg. 2002:67, 54879) The Department viewed the extent of reliance on panels of three members as excessive and problematic. By allowing individual Board members to write brief opinions in appropriate cases, "the Board will be able to concentrate greater resources on the more complex cases that are appropriate for review by a three-member panel, and will also be able to focus greater attention on the issuance of precedent decisions...." (Fed. Reg. 2002:67, 54879) The Department also anticipated that "following implementation of the streamlining process and this rule, maintaining the current number of Board members will be unnecessary." (Fed. Reg. 2002:67, 54894) A smaller Board, the Department believed, "should increase the coherence of Board decisions and facilitate the en banc process" (Fed. Reg. 2002:67, 54894).

Implementation of Downsizing

In February 2002, when the Attorney General proposed reducing the size of the Board to ll members, 19 out of 23 authorized Board Member positions were filled. With the subsequent departures of three Board Members—Mary Dunne who retired, Lory.4 Rosenberg who accepted a position outside of government, and Kevin Ohlson who became Acting Deputy Director (and later Deputy Director) of the Executive Office for Immigration Review—the Attorney General could achieve his objective of an 11 Member Board by reassigning 5 Members. He chose Paul Schmidt and Noel Brennan, who received subordinate quasi-judicial appointments as immigration judges in Arlington, Virginia and New York City respectively, Gustavo Villageliu and Cecelia Espenoza—who joined the General Counsel's Office in the Executive Office for Immigration Review—and John Guendelsberger who took a position as senior counsel to the Board Chairman.

Biographical information about the professional backgrounds of Board Members (see EOIR 2003(a); EOIR 2003(b); EOIR 2000; EOIR 1999) does not appear to be helpful in explaining why those five were removed. Although all five began their Board service during the Clinton Administration—a period of substantial expansion in Board membership—9 out of the 11 who remained on the Board also began service when Clinton was President. Seniority on the Board did not appear to offer any protection

against removal as evidenced by the fact that three of the removed Members –Schmidt, Villageliu, and Guendelsberger--joined the Board in 1995 (with Schmidt serving as Chairman from 1995 to 2001) and 7 out of the 11 who remained began their service in subsequent years.

Most of the reassigned Members had substantial immigration experience prior to their initial Board appointments. Paul Schmidt had spent many years in the Immigration and Naturalization Service's General Counsel's Office—including service as Acting General Counsel—and practiced immigration law with prominent firms in the private sector. Gustavo Villageliu had very relevant immigration law experience as a staff attorney for the Board and as an immigration judge in Miami, Florida. John Guendelsberger and Cecelia Espenoza taught immigration law and wrote extensively on the subject. Noel Brennan's Department of Justice background as an Assistant U. S. Attorney and later as a Deputy Assistant Attorney General (Office of Justice Programs) did not appear to be immigration specific—but that presumably was not a disqualification for Attorney General Ashcroft who chose Department of Justice attorneys from the Criminal Division for the last Board of Immigration Appeals appointments before downsizing.

The rule restructuring the Board of Immigration Appeals did not limit the Attorney General's discretion relating to which Board Members would lose their positions on the Board with downsizing. When questioned during Congressional hearings about criteria to be applied, Kevin Rooney (Director of the Executive Office for Immigration Review) commented that "the obvious criteria would be the experience of the individual, the judicial temperament of the individual, whatever that might mean, the efficiency in performing the job." (U. S. Congress:House 2002, 37) The Department of Justice, in supplementary information accompanying the final rule, made reference to Rooney's earlier testimony and expressed the expectation that "the final determinations will be made on factors including, but not limited to, integrity (including past adherence to professional standards), professional competence, and adjudicatory temperament"—citing well-known writings on appellate courts (Fed. Reg. 2002:67, 54893). The supplementary information then went on to observe that "[i]n the end , however, it is not possible to establish guidelines or specific factors that will be considered, nor should the Attorney General limit his decisionmaking process." (Fed. Reg. 2002:67, 54893).5

The criteria referred to in Kevin Rooney's congressional testimony and the supplementary information accompanying the restructuring rule are not helpful in explaining how reassigned Board Members differed from colleagues who remained on the Board. Moreover, the Department of Justice—to the author's knowledge—never stated that Members were reassigned because of deficiencies in such qualifications. The fact that two of the reassigned Board Members received positions as immigration judges actually can be viewed as a positive assessment by the Department of Justice relating to all of the stated criteria.

Decisional Patterns In Closely Divided En Banc Cases

An examination of the eleven closely divided en banc precedent decisions of the Board (see Table I) during the period that the five subsequently removed Members all served and participated lends support to the hypothesis that Members inclined to favor the position of noncitizens were particularly vulnerable. For purposes of this study, closely divided decisions are defined as those with at least five members dissenting (not counting as a dissent a "concurring and dissenting" opinion)—thus affording at least the theoretical possibility that the subsequently removed Members together could join in either supporting or opposing an outcome favorable to the noncitizen. Precedent decisions are selected for this study because of their accessibility and their potential import extending beyond particular noncitizen parties. These are published decisions that are "designated to serve as precedents in all proceedings involving the same issue or issues." (Code of Federal Regulations 2003, title 8, sec. 3.1(g); hereafter CFR) Panel decisions (with three Board Members participating) are excluded from the study because of difficulties in comparing the positions of Board Members when they are considering different cases. Factors intrinsic to specific immigration cases complicate efforts to equate an adjudicator's position in favor of a noncitizen in one case with another

adjudicator's support for the noncitizen in a different case.

Decisions Preceding Downsizing Announcement

Our analysis begins with Matter of Crammond (decided March 22,2001) because Board Members Brennan and Espenoza, appointed in 2000, did not participate in earlier en banc precedent decisions—and ends with Matter of Gomez-Gomez (decided December 4, 2002), the Board's last closely divided en banc precedent decision. Four such decisions—Matter of Crammond, Matter of Torres-Varela, Matter of Artigas, and Matter of Rojas—precede the Attorney General's announcement of plans to reduce the size of the Board, and the remaining seven follow the announcement. An examination of the 11 cases in these two subgroups will facilitate consideration of whether any inferences can be drawn about the announcement's possible impact on the way individual Members decided cases.

The first two decisions interpreted important immigration law terms relating to criminal aliens--"aggravated felony" in Matter of Crammond and "crime involving moral turpitude" in Matter of Torres-Varela. In each case, the five subsequently reassigned members who joined in the opinion for the Board en banc supported an appellate outcome favorable to the noncitizen by accepting a more restrictive.6 interpretation of the particular term than their dissenting colleagues (nine dissenting in Matter of Crammond and five dissenting in Matter of Torres-Varela). According to the en banc opinions, the offense of "unlawful sexual intercourse" (when reduced to a misdemeanor under California law) did not qualify as an aggravated felony for immigration purposes—and drunk driving following prior such convictions did not qualify as a crime involving moral turpitude. The consequences of the dissenters' position on the definitional issue in each case would have been very adverse to the noncitizen. An "aggravated felony" conviction in Matter of Crammond would have rendered the alien removable from the United States and ineligible for the requested relief from removal. Conviction of a "crime involving moral turpitude" in Matter of Torres-Varela would have rendered the alien inadmissible to the United States and ineligible to adjust to permanent resident status within the country. Although the Board later vacated its original decision in Matter of Crammond on jurisdictional grounds because it learned that the alien had left the United States, the case remains significant for purposes of this study.

In the third decision, Matter of Artigas, the Board Members were divided on the jurisdictional issue of whether an immigration judge could adjudicate the alien's application for relief under the Cuban Adjustment Act. The Board concluded that the immigration judge did have jurisdiction. Once again, the five subsequently reassigned Members joined in the Board's en banc opinion favoring the alien (with seven Members dissenting).

The fourth and final closely divided en banc precedent decision before the announcement of plans to eliminate Board positions—Matter of Rojas—gave the Board the opportunity to consider the applicability of mandatory detention for an alien who was not taken into custody by immigration authorities immediately following release from incarceration for a criminal offense (in this case possession of cocaine "with intent to sell"). The Board's en banc opinion (for 11 Members) concluded that mandatory detention applied—a result also accepted by the two Members (including Villageliu, one of the five subsequently reassigned Members) subscribing to a "concurring and dissenting opinion". The seven dissenters (including the remaining four subsequently reassigned Members) favored an interpretation which "would allow for a hearing when an individual alien…has already been released into the community" and "would authorize the detention of such individuals where warranted following an individualized hearing." (Matter of Rojas 2001, 139)

In summary, the five subsequently reassigned Members supported Board decisions in all three cases where the Board favored the position of the noncitizen—and four out of the five subsequently reassigned Board Members supported the position of the noncitizen in dissent. Out of the nine Members who served on the Board when these four cases were decided and remained on the downsized Board, only Osuna and Miller took the

"liberal" position in favor of the noncitizen in all four cases and two out of the nine—Holmes and Muscato—took the liberal position in three out of the four cases. The reassigned Board Members had more "liberal" voting records in this small group of cases than most of the Members on the Board at the time who retained their Board positions. The limited data on the four cases may begin to suggest that conservative Board Members enjoyed some measure of protection when the Board was reduced in size..7

Decisions Following Downsizing Announcement

The seven remaining en banc cases out of the 11 studied, as noted earlier, were decided after the Attorney General's announcement of plans to reduce the Board's size. Board Members knew at decision times that some of them—as yet unidentified—would be losing their Board appointments. This study turns now to those seven cases decided during the period of career uncertainty for Board Members.

Two of the closely divided en banc cases during this time period, Matter of J-E- and Matter of M-B-A-, focused on the Convention Against Torture and its protection against returning people to countries where they would be tortured. In Matter of J-E-, the Board en banc concluded that an alien from Haiti who had entered the U. S. illegally and later been convicted of selling cocaine could not qualify for the protection of the Convention Against Torture because he had not established a likelihood of torture if returned. Board Member Villageliu, one of the subsequently reassigned Members, joined in the Board's en banc opinion, but the remaining four subsequently reassigned Members were among the six dissenters.

In the second Convention case, Matter of M-B-A-, the Board en banc (with one subsequently reassigned Member, Villageliu, joining) concluded that a lawful permanent resident "removable.... as an alien convicted of an aggravated felony and a controlled substance violation" (Matter of M-B-A- 2002, 475) did not qualify for relief under the Convention Against Torture because she "has not met her burden of demonstrating that it is more likely than not that she would be tortured by, or with the consent or acquiescence of, government officials acting under color of law if she is removed to Nigeria [footnote omitted]." (Matter of M-B-A- 2002, 480) A "concurring and dissenting opinion" by Board Member Rosenberg and a dissenting opinion by Board Member Schmidt—subscribed to by five Members including four subsequently reassigned Members—concluded that the alien likely would face torture in Nigeria; she, in their view, qualified for Convention relief.

Two other cases, Matter of Ramos and Matter of Martin, focused on whether aliens committed "crimes of violence" which in turn qualified as "aggravated felonies." In Matter of Ramos, the Board (with all five subsequently reassigned Members joining) concluded that a long-term lawful permanent resident of the United States who had been sentenced in Massachusetts to two years imprisonment for a second drunk driving conviction (within a ten year period) was not removable from the country for having committed an aggravated felony. His offense, in the Board's view, did not qualify as a "crime of violence" as defined in 18 USC Sec. 16(b) and incorporated in the list of crimes that meet the aggravated felony definition. After noting that various federal circuits disagreed with the earlier ruling in Matter of Puente "that a conviction for driving under the influence, without more, is sufficient to constitute a crime of violence...," (Matter of Ramos 2002, 342) the Board withdrew from that decision and delineated requirements that would have to be met for drunk driving to qualify as a crime of violence in the absence of circuit decisional law on the subject. Eight Members dissented, favoring the continued application of Matter of Puente "to cases like the respondent's [Ramos'] where there is no controlling circuit court precedent." (Matter of Ramos 2002, 351).8

In Matter of Martin, a case addressing another subsection of the "crime of violence" definition, the Board considered whether a lawful permanent resident since 1970 was removable from the United States on "aggravated felony" grounds for a Connecticut misdemeanor conviction of third degree assault (with a sentence of one year imprisonment). The answer depended on whether the offense constituted a crime of violence as defined in 18 U.S.C. Sec. 16(a)—in contrast to Sec. 16(b) discussed in Matter

of Ramos—and incorporated into the delineation of offenses that constitute aggravated felonies for immigration purposes. The Board's en banc opinion (in which subsequently reassigned Board Members Villageliu and Guendelsberger joined) concluded that the offense was a "crime of violence" because it "had as an element the use of physical force against the person of another" (Matter of Martin 2002, 499). Since the sentence in the alien's case was for at least one year, he committed an aggravated felony. Member Rosenberg wrote in a dissent (joined by subsequently reassigned Member Espenoza) that "although the use or attempted use of physical force might be involved in a particular assault punishable under Connecticut law, it is not a necessary element of any one of the subsections defining the offense." (Matter of Martin 2002, 510) Member Pauley's dissenting opinion for four Members (including subsequently reassigned Members Schmidt and Brennan) reached a similar result but confined its conclusion to the Second Circuit: "...[W]ithin the jurisdiction of the Second Circuit, whose decisions are binding in this case, a violation [of the Connecticut statute] is not a 'crime of violence'...." (Matter of Martin 2002, 514)

In contrast to these four cases involving aliens convicted of crimes, Matter of Velarde and Matter of Andazola did not involve criminal convictions. In Matter of Velarde, the Board en banc (including four out of five subsequently reassigned Members) granted a motion to reopen filed by an alien ordered deported who was seeking adjustment to permanent resident status. In this case, the alien's U. S. citizen wife had filed a relative petition on his behalf and various requirements delineated in the en banc opinion for a discretionary grant of such a motion to reopen had been met. Three concurring opinions, including one by subsequently reassigned Member Espenoza, supported reopening the proceedings. Thus all five subsequently reassigned Members supported the alien's position. Eight Board Members dissented.

In Matter of Andazola, the Board en banc concluded that an unmarried mother who entered the United States illegally but met the ten years continuous physical presence and good moral character requirements for "cancellation of removal" could not qualify for this remedy because she could not meet the additional requirement of establishing that her two United States citizen children would sustain "exceptional and extremely unusual hardship" as a result of her removal to Mexico. The eight dissenters—including all five subsequently reassigned Members—concluded that the "exceptional and extremely unusual hardship" requirement had been met.

The last case in this group of seven involved a child. In Matter of Gomez-Gomez, the Board en banc (with one subsequently reassigned Member, Villageliu, joining) concluded that an immigration judge should have entered an "in absentia order of removal" in the case of a girl age eight (when apprehended) who did not appear and was not represented at her removal hearing. The evidence consisted exclusively of a form (I-213) prepared by a border patrol agent based on information obtained from an adult appearing to accompany the child at a bus station and claiming to be her father. That adult signed for.9 the Notice to Appear; four subsequent notices changing the appearance dates were mailed (to the address the adult furnished) and not returned. The Board found that the Form I-213 established the child's removability and also found that "she was properly notified of her hearing." (Matter of Gomez-Gomez 2002, 528) In dissent, six Board Members (including four subsequently reassigned Members) concluded that "[w]e...fail in our statutory responsibility to ensure that there is clear, unequivocal, and convincing evidence of proper notice and removability [citation omitted]." (Matter of Gomez-Gomez 2002, 531)

Comparison of Outcome-Related Positions

A tabulation of the positions of the five subsequently reassigned Board Members in these seven closely divided en banc cases shows that three subsequently reassigned Board Members—Schmidt, Brennan, and Espenoza—supported the alien's position every time, one Board Member—Guendelsberger—supported the alien's position in six out of the seven cases, and one Board Member—Villageliu—supported the alien's position in only three out of the seven cases. A comparison of these figures with figures from the four closely divided en banc cases that preceded the Attorney General's announcement of

downsizing plans shows no differences in outcome related positions for Board Members Schmidt, Brennan, and Espenoza; they supported the position of the alien in all eleven cases. Although Board Member Guendelsberger did not support the alien's position in one out of the seven post-announcement cases after having supported the alien's position in all four pre-announcement cases, this does not appear to be suggestive of any real shift. Four cases is too small a number from which to infer support for the alien's position in all seven cases by a similarly inclined adjudicator.

Board Members Schmidt, Brennan, Espenoza, and Guendelsberger continued after the Attorney General's announcement of downsizing plans to take positions in cases that placed them in the Board's "liberal" wing. Although they knew their tenure was in potential jeopardy—and the Attorney General's conservative orientation remained well known—they supported outcomes in closely divided cases that could be viewed unfavorably from a conservative perspective. This suggests that the emphasis in our legal culture on deciding cases without reference to the adjudicator's own self-interest may be a strong enough influence on some administrative judges to enable them to reach independent judgments even when confronting a most direct threat to judicial independence—the loss of one's job.

As noted earlier, one of the five subsequently reassigned Board Members—Villageliu—supported the alien's position in only three out of the seven closely divided en banc cases following the Attorney General's downsizing announcement. This followed four closely divided pre-announcement cases in which he supported the alien's position three out of four times. Different hypotheses can be advanced in an attempt to explain Board Member Villageliu's positions post-announcement:

First, support for outcomes favorable to the noncitizens in three out of four pre-announcement cases may not be sufficient to justify drawing broader inferences about where Villageliu should be placed in the liberal-conservative continuum.

Second, Villageliu's positions may reflect—to a large extent—a reluctance to dissent. In the first group of four cases, he joined in the Board's en banc positions in.10 three cases and subscribed to an opinion in the fourth that—although denominated "concurring and dissenting"—accepted the result of the en banc opinion that mandatory detention applied. In the second group of seven cases, Villageliu subscribed to the Board's en banc opinion in six cases and dissented only once.

Third, differences in the cases themselves may explain why he sided with the alien less frequently in the second group of cases than in the first group.

Fourth, Villageliu may have embraced a somewhat more conservative approach to cases after the Attorney General's announcement.

The drop-off in Board Member Villageliu's support for the alien's position in post-announcement cases was not at all unusual when viewed in the context of Members retained on the Board. One of the two retained Board Members who supported the alien's position four times in pre-announcement cases did so only twice in seven post-announcement cases. The two retained Board Members who supported outcomes favorable to the alien in three out of four pre-announcement cases did so in one out of seven and three out of seven cases in the post-announcement group. Another two retained Board Members supported the alien's position in half of the first four cases but did so in one out of seven and two out of seven in the subsequent group of cases.

Although there is no indication from the eleven cases studied that the positions of Board Members Schmidt, Brennan, Espenoza, and Guendelsberger on cases shifted following the announcement of the planned downsizing, outcomes in the eleven cases suggest that the liberal-conservative balance on the Board as a whole did shift in a conservative direction. In the pre-announcement group of closely divided cases, the outcomes reflected the alien's position three out of four times, but in the post-announcement group of such cases the outcomes reflected the alien's position only two out of seven times. Board Members who consistently supported the alien's position dissented in only one of the first four cases but dissented in five of the seven post-announcement cases.

This examination of the outcomes individual Board Members favored in the eleven

closely divided en banc cases lends support to the hypothesis that particular adjudicators were removed from the Board because of their "liberal" views. None of the 11 Board Members retained by the Attorney General supported outcomes favorable to the alien in every case—in contrast to reassigned Members Schmidt, Brennan, and Espenoza—and only one retained Member, Osuna, supported the alien in as many cases (10) as reassigned Member Guendelsberger. Support for the alien's position then dropped to six out of 11 cases by reassigned Member Villageliu and retained Members Miller and Moscato. Although two of the eleven retained Board Members did not participate in the first four cases studied because these Board Members were appointed later than their colleagues, their limited adjudicatory records nevertheless pointed in a "conservative" direction—with Board Member Hess supporting the alien's position in zero out of seven cases and Board Member Pauley supporting the alien's position in two out of seven cases.

By looking only at the closely divided en banc cases during the period of service and participation by the five subsequently reassigned Members, an observer could predict that Board Members Schmidt, Brennan, Espenoza, Guendelsberger, and Osuna would be chosen for reassignment because they compiled the most liberal voting records. Such a prediction would have proven to be correct for the first four but not for the fifth because.11 Board Member Villageliu rather than Board Member Osuna ending up facing reassignment. Board Member Villageliu compiled a more liberal record than most—but not all—of the Board members who remained after downsizing as measured by outcomes supported in the eleven closely divided en banc cases.

Impact of a High-Profile Case

The Attorney General's choice of Villageliu for reassignment, however, was not necessarily inconsistent with an objective of removing the most liberal Board Members. Some cases undoubtedly were more important than others to the Attorney General. Since the Attorney General occasionally exercised his authority under the regulations to direct the Board to refer a particular case to him for review, he selected decisions raising very substantial concerns. He obviously attached considerable importance to Matter of Jean not only because he chose to review it and reverse the outcome but also because he criticized the Board in particularly strong language. In addition, an Attorney General decision containing stark criticism of a Board decision might provide insight into his views of the participating Board Members.

In Matter of Jean, the Attorney General reversed a Board of Immigration Appeals decision waiving inadmissibility and granting permanent resident status to a refugee from Haiti who had been convicted of second degree manslaughter in the death of a young child in her care in Rochester, New York. The Attorney General's May 2002 decision was scathing in its criticism of the Board's decision:

"The Board's analysis, which makes no attempt to balance claims of hardship to the respondent's family against the gravity of her criminal offense, is grossly deficient. The opinion marginalizes the depravity of her crime, stating simply that the panel had 'weighed the equities in this case against the respondent's criminal conviction' and concluded that discretionary relief was warranted. [footnote omitted] Little or no significance appears to have been attached to the fact that the respondent confessed to beating and shaking a nineteen-month-old child to death, or that her confession was corroborated by a coroner's report documenting a wide-ranging collection of extraordinarily severe injuries." (Matter of Jean 2002, 383)

Board Member Espenoza signed the March 1, 2001 decision for the Board that the Attorney General quoted in the passage above. A separate one sentence statement at the end of the decision pointed out that "Board Member Gustavo D. Villageliu concurs in the finding that the respondent is eligible for relief..., and does not disagree with the favorable exercise of discretion in granting relief from removal to the mother of five young lawful permanent resident children." (Matter of [redacted name] 2001, 3)

Although the Board did not publish this decision—and a redacted copy did not identify the third member of the panel—an on-line article for ABC News reported that

the panel consisted of Board Members Espenoza, Rosenberg, and Villageliu and asked, "[D]oes John Ashcroft know these folks are on his payroll?" (Lumpkin 2001) The considerable media attention may not have been lost on the Attorney General. In fact, none of the panel's members remained on the Board. Board Member Rosenberg, a very liberal adjudicator, chose to leave in 2002 without awaiting the outcome of downsizing—and Board Members Espenoza and Villageliu received reassignments in 2003. Board.12 Member Villageliu's participation in Matter of Jean--perhaps including his involvement when the case originally came before the Board in 1999--might have been a decisive factor in the Attorney General's decision to reassign him.

A Homogeneous Reconstituted Board

The Attorney General succeeded in moving the Board of Immigration Appeals in a conservative direction just by announcing his downsizing plans—and the result of downsizing was to remake the Board into a largely homogeneous body without significant dissent. Individual Members of the Board, under the new blueprint, were disposing of the overwhelming percentage of cases. Out of 48,060 case completions in FY 2003, 44,704 were handled by single Board Members and only 3,356 by three Member panels. The figures were even more striking for "post-legacy" cases—those "ready for adjudication" after the September 25, 2002 effective date of the reorganization regulation: 28,050 such cases out of 29,173 were decided by individual Board Members with 1,123 completions by three Member panels (EOIR 2004, U1). Since the 29 legacy cases held over from FY 2003 were completed in the current fiscal year, the post-legacy figure of completions by individual Board Members appeared to be most revealing for the future.

Although one rationale for emphasizing review by individual Members rather than panels was to afford enhanced opportunities for Members to work on precedent decisions—and facilitate more such decisions—the result was that such decisions were few and far between. During a recent one year period (ending with Matter of K-A- on June 23, 2004), the Board issued only six precedent decisions—all by three Member panels (without dissent). En banc precedent decisions disappeared as the reconstituted Board more than carried out the admonition in the revised regulations that "[e]n banc proceedings are not favored...." (CFR 2003, title 8, sec. 3.1(a)(5)) The commentary accompanying the September 25, 2002 rule, however, had contemplated a continuing role for en banc proceedings: "Both the three-member panel and the en banc Board should be used to develop concise interpretive guidance on the meaning of the Act and regulations." (Fed. Reg.2002:67, 54880) Perhaps en banc decisions became superfluous because of the level of consensus on the reconstituted Board.

A Need for Independent Adjudicators

Members of the Board of Immigration Appeals should be treated as independent adjudicators rather than as subordinate Department of Justice employees. Until recently, the regulations relating to the Board clearly affirmed the decisional independence of Board Members in the very first paragraph by stating unequivocally that "Board Members shall exercise their independent judgment and discretion in the cases coming before the Board." (CFR 2002, title 8, sec. 3.1(a)(1)) With the promulgation of the new rule, however, the Board regulations gave top billing to a sentence with a very different emphasis: "The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them." (CFR 2003, title 8, sec. 3.1(a)(1)) A somewhat diluted version of decisional independence language came much later (see CFR 2003, title 8, sec. 3.1(d)(ii)). In addition, the newer.13 regulations appeared to omit entirely the affirmation that "Board Members shall perform the quasi-judicial function of adjudicating cases coming before the Board." (CFR 2002, title 8, sec.3.1(a)(3)) Nevertheless, the Director of the Executive Office for Immigration Review gave expression to the judicial nature of Board Members' work by referring to "judicial temperament" as a criteria for retention when downsizing would be implemented (U. S. Congress:House 2002, 37). The commentary to the final rule conveyed the Department of Justice's agreement "with the principle of independence of

adjudicators within the individual adjudications…" while noting "that freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review." (Fed. Reg. 2002:67, 54883)

The Board's adjudicatory role is judicial in nature. It reviews the decisions of immigration judges to determine whether they correctly applied law and regulations to the facts of individual cases. When it engages in such review, it functions like an appellate court reviewing the decisions of trial courts. The judicial analogy is all the more compelling today because of the new rule's "clearly erroneous" standard for Board review of factual determinations by immigration judges. The Department of Justice itself pointed to the judicial model in justifying the new standard:

"Just as the Supreme Court has concluded that on balance the 'clearly erroneous' standard is an effective, reasonable, and efficient standard of appellate review of factual determinations by federal district courts, [citations omitted] the Department has concluded that the 'clearly erroneous' standard is an effective, reasonable, and efficient standard for appellate administrative review of factual determinations by immigration judges." (Fed. Reg. 2002:67, 54889-54890)

Decisions by the Board also may require interpreting ambiguous provisions of law and reviewing appellate court opinions to determine whether they are controlling of a pending case in that circuit or sufficiently persuasive to be followed by the Board in deciding a case from another circuit.

The fact that the Board considers relief from removal more often than issues involving removability itself does not undercut the need for independent appellate adjudications. The availability of relief may determine whether a long-term resident—perhaps even someone who came to the United States at an early age—can remain here or must return to another country. The welfare of an alien's U. S. citizen relatives—including a spouse and minor children—may be affected profoundly by the decision on eligibility for relief. In many cases, aliens claim they will face persecution or torture if returned to their countries of origin. Issues involving the availability of relief clearly are of potentially great importance in such cases.

Although certain forms of relief are discretionary in nature, the immigration adjudicator must address the threshold question of whether the particular relief is authorized by law before considering whether relief should be granted in the exercise of discretion. Even where a decision comes down to the exercise of discretion, immigration adjudicators perform functions analogous to a court by weighing equitable factors (Levinson 1981, 652). The Board's role in correcting errors of subordinate adjudicators and issuing precedent-setting decisions that provide guidance to immigration judges in other cases is similar to that of an appellate judicial tribunal..14

Legislation enacted in 1996—the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act--restricted judicial review of final administrative decisions in immigration cases. The results included curtailing federal court jurisdiction over (1) orders of removal predicated on different types of criminal conduct and (2) various decisions involving discretionary relief. Although the details of the statutory restrictions, the status of related federal litigation, and the remaining opportunities for federal court involvement (including possible habeas review) go beyond the scope of this paper, the fact that many administrative adjudications no longer could be reviewed in federal courts meant that Board of Immigration Appeals consideration often became the last step available to an alien seeking to remain in the United States. The Department of Justice acknowledged this when it pointed out in supplementary information accompanying the 1999 final rule on streamlining that immigration law changes "heighten the need for the Board's authoritative guidance in the immigration area, particularly in view of the fact that the 1996 legislation drastically reduced aliens' rights to judicial review." (Fed. Reg. 1999:64, 56136) The 1996 legislation also made it more important than ever that the administrative appellate process afford an independent, disinterested review.

The recent Executive Branch reorganization that resulted in moving Immigration and

Naturalization Service functions from the Department of Justice to the new Department of Homeland Security left the Executive Office for Immigration Review in the Department of Justice. Professor David Martin, a former Immigration and Naturalization Service general counsel, had recommended "transferring EOIR [the Executive Office for Immigration Review], like other immigration components, to the Department of Homeland Security."(Martin 2002, 9) Although Martin also stated that adjudicators "would retain all current guarantees of [decisional] independence" and "Congress might also profitably consider additional measures to bolster that independence," (Martin 2002, 9) the very move to the Department of Homeland Security would have been antithetical to adjudicatory independence because of the new Department's role as an adversary to noncitizens in removal proceedings. The adjudicators that weigh Department of Homeland Security arguments need institutional separation—and transferring them to the same Department would constitute a move in the opposite direction.

Recommendations of Federal Commissions

In 1981 the Select Commission on Immigration and Refugee Policy-- a joint Presidential-Congressional Commission chaired by University of Notre Dame President Theodore Hesburgh with Brandeis University Professor Lawrence Fuchs serving as Staff Director-- recommended the creation, under Article I of the United States Constitution, of an immigration court with both hearing and appellate divisions (Select Commission on Immigration and Refugee Policy 1981, 248-250). Such a court would replace immigration judges and the Board of Immigration Appeals with an independent specialized judicial structure that also would supersede most Article III court involvement in immigration adjudications. At the time, immigration judges were located in the Immigration and Naturalization Service where they confronted serious problems. They "occupy positions of unhealthy dependence…, lack adequate support services, and frequently face debilitating conflicts with agency [enforcement] personnel." (Levinson.15 1981, 644). Two years later the Department of Justice transferred the immigration judges from the Immigration and Naturalization Service to the Executive Office for Immigration Review, a new entity within the Department that also embraced the Board of Immigration Appeals. Although the creation of the Executive Office for Immigration Review may have deflated efforts to remove immigration adjudications from the Department of Justice—primarily because it ended the dependence of immigration judges on the Immigration and Naturalization Service—it did not answer concerns that immigration hearing and appellate functions should not be housed in a department headed by the Attorney General, the nation's chief law enforcement official.

In 1997, the U. S. Commission on Immigration Reform gave renewed expression to the utility of separating immigration adjudications from the Department of Justice. That bipartisan Commission-- chaired by Barbara Jordan and Shirley Hufstedler successively with Susan Martin serving as Executive Director—recommended that "administrative review of all immigration-related decisions be consolidated and be considered by a newly-created independent agency, the Agency for Immigration Review, within the Executive Branch." (U. S. Commission on Immigration Reform 1997, 175) Emphasizing the importance of independence, the Commission wrote: "Not only is independence in decisionmaking the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review." (U. S. Commission on Immigration Reform 1997, 175)

In spite of that recommendation for an independent agency, many believed that the decisional independence of Board Members could be safeguarded without structural independence—and the informal job security Board Members enjoyed over the course of many years lent some credence to that position. Although the Attorney General's authority to review and reverse Board decisions often had been viewed as problematic (see, e. g., Levinson 1981, 650 and U. S. Commission on Immigration Reform 1997, p. 179) such review did not directly threaten the Board Members themselves. Stephen Legomsky, one of the great American authorities on immigration law and administrative law, could refer in 1998 to "an administrative tribunal called the Board of Immigration Appeals, [footnote omitted] whose members enjoy a degree of independence that no one

seriously questions." (Legomsky 1998, 247) In contrast, he wrote five years later that "[t]he independence issue is a serious one." After noting that historically "no attorney general had ever dismissed a member of the BIA", he observed, "[T]he assumption had always been that [Board Members] were free to render the decisions they felt were required by the evidence presented and their interpretations of the applicable law, without fear of losing their jobs if they displeased the Attorney General." He then concluded: "Obviously that can no longer be safely assumed." (Legomsky 2003, 79)

Conclusion

The Board of Immigration Appeals' experience under Attorney General Ashcroft should give new impetus to efforts to separate review of immigration judge decisions from an agency with law enforcement responsibilities. The fact that Board of Immigration Appeals members, as recently as last year, faced termination because of decisions they rendered underscores the reality that appellate adjudicators--subject to removal by the Attorney General—are far from independent. This recent history.16 underscores the precariousness of their situation. Although members of the Board of Immigration Appeals ostensibly exercise independent judgment in deciding cases, immigration appellate adjudications provide only the facade of quasi-judicial independence. The alternatives recommended by Federal commissions—a specialized court or an independent Executive Branch adjudicatory agency—continue to provide potential solutions.

□ The author worked on immigration legislation at various times during his service on the professional staff of the House of Representatives Committee on the Judiciary from 1981 until his retirement in early 2001. As a full committee counsel during the later years (1995-2001), immigration was one of the Committee subjects within his area of responsibility. During an earlier period (1980-1981), he served on the staff of the Select Commission on Immigration and Refugee Policy where he participated in the development of its independent immigration court proposal.

The views expressed in this paper, of course, are the author's own opinions..17

Table I

Member's Name 1 2 3 4 5 6 7 8 9 10 11 *

Schmidt B* B* B* D* B* D* D* B* D* D* D* 11
Brennan B* B* B* D* B* D* D* B* D* D* D* 11
Villageliu B* B* B* cd B* B D* B* B B B 6
Espenoza B* B* B* D* C* D* D* B* D* D* D* 11
Guendelsberger B* B* B* D* B* D* D* B* D* B D* 10
Ohlson D NP NP B D B B D B B 0
Dunne D B* B* B D B B D B B B 2
Rosenberg C* C* B* D* C* D* D* B* cd* D* 10
Scialabba D D D B D B B C* B B B 1
Holmes B* B* C* B C* B B D B B B 4
Cole D D D B D B B D B B B 0
Filppu C* B* D B D B B C* B D* B 4
Grant D D D B D B B D B B B 0
Hess D B B D B B B 0
Hurwitz D B* B* B C* B B D B B B 3
Miller C* B* B* D* B* B B B* B B B 6
Moscato B* B* B* cd B* B D* D B B D* 6
Osuna B* B* B* D* B* D* D* B* D* B D* 10
Pauley D B B C* B D* B 2
Heilman D D D B
Mathon D B* D B
Jones D D D B

Code

Board of Immigration Appeals Decisions (column headings):

1 = Matter of Crammond

2 = Matter of Torres-Varela
3 = Matter of Artigas
4 = Matter of Rojas
5 = Matter of Velarde
6 = Matter of J-E-
7 = Matter of Andazola
8 = Matter of Ramos
9 = Matter of M-B-A-
10 =Matter of Martin
11 =Matter of Gomez-Gomez
B = Board en banc opinion
C = concurring opinion
D = dissenting opinion
cd = concurring and dissenting opinion
NP = not participating in decision
* = supporting outcome favorable to alien in the particular case
Figures in far right column are totals of *s for various Board members.18

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Matter of J-E-. 23 I&N Dec. 291 (BIA 2002).
Matter of Jean. 23 I&N Dec. 373 (A. G. 2002)
Matter of Martin. 23 I&N Dec. 491 (BIA 2002)..19
Matter of M-B-A-. 23 I&N Dec. 474 (BIA 2002).
Matter of Ramos. 23 I&N Dec. 336 (BIA 2002).
Matter of Rojas. 23 I&N Dec. 117 (BIA 2001).
Matter of Torres-Varela. 23 I&N Dec. 78 (BIA 2001).
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