

Making Policy in the Margins: The Federal Judiciary's Role in Immigration Policy

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I want to thank Juniata College for inviting me to give a talk today and for the classes and student groups that have hosted my visit. This is the first talk that is related to my book, *The Immigration Battle in American Courts*, so I'm quite honored. Now regardless of whether the book does really well or craptastically bombs, you can all say, "Her book tour started at Juniata."

The topic of today's talk is the federal courts and immigration policy and law. The large immigrant-rights demonstrations in the streets during these last two years spotlight the powerful role of the elected branches of government in immigration policy. Often overlooked is the federal judiciary, the non-elected branch. In this talk I make clear why immigrant advocates (and opponents) need to understand the role the federal courts play in immigration policy. Specifically, it is important to understand how the Supreme Court and the U.S. Courts of Appeals (the second highest ranking federal courts, right below the Supreme Court) make immigration policy.

Congress and the president may write, pass, and sign immigration legislation, but the courts interpret what these laws really mean. What legal and political scholars have long realized is that the power to interpret law is actually the power to make the law.

"Well, what does she mean?" you might ask. Remember when you were in high school and you lived with your parents? You tell your parents you're going out on a Friday night with your friends. Your mom tells you, "Get home at a reasonable hour." You decide that reasonable means 4:30 a.m.—after all, the sun hasn't come up yet, right? You go home and your parents immediately ground you. Your dad says, "A reasonable hour was midnight." Did your parents just interpret policy or did they make policy in the course of interpreting it?

A word about terminology: I am going to use the word *alien* in tonight's talk. I realize many people feel this term is offensive and even racist. I use the term tonight not to intentionally offend, but because the word is a term of art. It is a distinctive group of people living in the United States who are not citizens by birth or by naturalization.

My talk today focuses on the deportation or removal cases: the entry/exit decisions where the courts have to decide whether aliens have a right to enter and/or remain in U.S. territory. I'm not looking

at immigrant rights cases, such as those involving whether immigrants can attend public school, obtain a drivers' licenses, etc. So think of the old Clash song, "Should They Stay or Should They Go?" These are the entry/exit cases I'm talking about.

It might be helpful to start with the question, "Why would immigrants go to the federal courts instead of trying to lobby the president and Congress?"

Many other immigrant groups, beginning with the Chinese in the late 1880s who went to the federal courts to challenge the Chinese Exclusion Act, won victories in the federal courts because these courts are not governed by the same imperatives and incentives as the elected branches of government. Federal judges must abide by the rule of law and the rules of the court; they must pay attention to precedent and the idea of due process. And by constitutional design, all federal judges—not just the justices of the Supreme Court—are appointed for life.

Federal judges are not beholden to the elected branches of government, nor are they subject to worries of about being voted out of office or political retaliation by another branch of government. Because federal judges are not worried about political and electoral retaliation, and because they are bound by legal norms, they have often ruled in favor of aliens' claims.

By law, aliens cannot vote and are often a politically unpopular minority group. Therefore, since the days of the Chinese going to the federal courts in the 1880s, aliens have discovered that they have met with more success in the federal courts than with their efforts to lobby the elected branches of government.

The dataset from which I derived the findings for this talk include over 1,700 Courts of Appeals cases and 200 Supreme Court cases—which I read nearly to the point of collapse. The cases span from 1881 to 2002. The qualitative data consist of a set of interviews with eight current Ninth Circuit judges and three central staff members of that Court. The expansive Ninth Circuit is located out West and currently handles about 50% of all immigration cases filed nationwide.

Let me first trace very quickly the path of litigation for immigration cases. Most of the cases I am talking about today are deportation cases or asylum cases (a kind of deportation case). The numbers, of course, vary year to year; the *proportion* of cases at each level of the courts and bureaucracy has stayed the same since the 1980s.

Litigation of Immigration Cases, 2008

Court	Number of Cases ¹
U.S. Supreme Court	2
U.S. Courts of Appeals	Approx. 4,500
U.S. District Courts	Over 100,000
Executive Office for Immigration Review (i.e., Immigration Judges)	228,481
Asylum Officer Corps	383,000

SOURCES OF POLICYMAKING OPPORTUNITIES

Given that the Courts of Appeals adjudicate about 4,500 immigration cases each year (compared with only a couple by the Supreme Court), there are a lot of opportunities for the Courts of Appeals to make policy.

I want to spotlight today three ways the Courts of Appeals make policy by providing you with three concrete examples in which judges, when deciding a case, have discretion and leeway to make a choice that leads to one legal outcome over another. In so doing, they are actually making policy.

Vague Text

Law is based on text, like the constitution and statutes passed by Congress and state legislatures. But written text has its limitations. For one thing, there is no way for members of a legislature to write laws that cover every permutation of human experience.

Think of my home state of Illinois, the capital of government corruption—only in Chicago can you have a former Senator going to the White House and a former governor probably going to the big house. The Illinois state constitution says the governor will serve a four-year term. There is no asterisk or special clause in our constitution stating, “The governor shall serve a four-year term unless he or she conspires to sell an open Senate seat to the highest bidder.” But it is ultimately up to the courts to decide on a case-by-case basis what the law and the constitution mean.

By the same token, the federal courts have to decide in thousands of deportation cases what constitutes good moral character and extreme hardship because the immigration code says that aliens can avoid deportation if they demonstrate that they have “good moral character” and can show that their deportation would result in an “extreme hardship” to themselves or (more importantly) to their U.S. citizen or lawful permanent resident spouse, child, or other close relative.

But are the terms *good moral character* and *extreme hardship* self-explanatory? Of course not. So the judges have discretion to make policy by infusing their preferred meaning into these vague terms. Even if judges don't do this intentionally, you can see how different judges might have different understandings of what these terms mean.

Tolling Single Incidence versus Cumulative Events

There is legal doctrine saying that the appellate courts cannot overturn the decision of an administrative decision maker unless there is an abuse of discretion, and not because the appellate judge simply disagrees with the previous adjudicator.

But like extreme hardship, what constitutes abuse of discretion is sometimes in the eye of the beholder. In a deportation case, *Hernandez-Cordero v. U.S. Immigration and Naturalization Service*, 783 F.2d 1266 (1986), the Fifth Circuit Court of Appeals ruled that the Board of Immigration Appeals had abused its discretion in how they construed extreme hardship.

The Fifth Circuit recounted that the immigration judge and Board of Immigration Appeals had dismissed one by one the following factors that the Hernandez-Corderos had presented in their petition for suspension of deportation: 1) Mr. Hernandez-Cordero's argument that he would not be able to provide for his family in Mexico because he would not be able to find comparable work as a carpenter; 2) even if he could find comparable work, the family would suffer a drastic reduction in their standard of living in Mexico; 3) forcing the family to leave behind friends and family would be emotionally distressing; and 4) the children who could speak but not read or write Spanish would have difficulty adjusting to life in Mexico, where their education would also be at a lower standard.

The Fifth Circuit panel did not disagree with each of the single determinations and indicated in fact that many of the conclusions were supported by case law. The court noted that the Board of Immigration Appeals had "Approv[ed] and endors[ed] the careful ticking off of the factors" that the immigration judge had presented. What the Fifth Circuit objected to was that neither the immigration judge nor the Board of Immigration Appeals has considered the factors in cumulative fashion.

So, federal judges have the discretion in these types of cases to toll the hardships that would befall immigrants discretely and one by one (in which case they don't sound so bad) or to toll them cumulatively (which definitely paints a different and more serious picture of hardship). How they count the hardships can affect the legal outcome in a case.

Discretion in Judging Credibility

U.S. Courts of Appeals judges do not only have an opportunity to exercise discretion when engaging in statutory interpretation or interpreting text. Some types of immigration cases require the judges to do intensive factual review, such as the historical challenges to the Chinese Exclusion Act and contemporary asylum cases. As the following historical example shows, a judge may also exercise

discretion by determining how many discrepancies are too many in judging the credibility of oral testimony given by a witness or appellant.

Through the 1950s, the Chinese Exclusion Act and its amendments generated many legal challenges. Many of these cases resulted from Chinese aliens' claiming right of entry based on one of the exempt categories (merchants, students, and teachers) or based on a familial relation to an alien who belonged to one of the exempt categories or who was a native-born citizen.

Many ethnic Chinese also sued for the right to enter based on their status as a U.S.-born citizen or their relationship to a native-born citizen. These cases took place in an era when procedures and tools to establish the validity of such official documents as birth certificates were extremely limited or non-existent. In these cases, a reliable paper trail of evidence was not always available to establish the alleged relationship between the principal alien qualified for admission and the immediate family members of the principal alien who were seeking entry to the United States.

In lieu of physical evidence, immigration examiners and judges often had only the word of the applicants themselves from which to verify an alleged familial relationship. The immigration examiners and judges engaged in detailed questioning about the alleged relationship between the two parties. These questions included knowledge about the village or town the applicants were from, common relationships, events from the persons' pasts, and so on.

Often these cases required judges to determine the degree and extent of discrepancies that were acceptable and the degree and extent that was most likely caused by fraud. For example, in *Young Len Gee v. Nagle*, 53 F.2d 448 (9th Cir. 1931), the appellant, a teenaged boy, tried to establish his relationship to a U.S.-born father in order to gain entry into the United States. The two were questioned at length about numerous aspects of their alleged relationship, including their family life, their home village in China, the age at which the applicant began going to school, and the location of the nearest river to the village.

After questioning the son and father separately, the Board of Special Inquiries and district court both denied the appeal, based on three discrepancies in the testimony of the two. One of the discrepancies was over the description of the skylight in the home of the appellant. Although both father and son agreed on the size of the skylight, the son said the skylight was covered with glass, although he was not asked whether he could see through the glass. Meanwhile, the father had stated that the skylights were covered with porcelain, which he apparently said was translucent rather than transparent.

Is this a discrepancy? Is this a large enough discrepancy in your mind to cause you to conclude the two are lying? Is this the kind of discrepancy that would indicate fraud? How many discrepancies would it take? The fact of the matter is that judges are left to decide the credibility of witnesses on a case-by-case basis.

Each person, including each judge, has a different threshold of belief. You can see how a judge who is sympathetic to the alien or who simply has a higher innate level of belief and trust will tolerate more discrepancies in testimony and evidence while a sceptical judge might be less tolerant.

Contemporary asylum cases are often similarly fact driven and judges often have to determine credibility based on oral testimony without much physical evidence.

THE SIGNIFICANCE OF STRUCTURE

The examples I have given in this talk show that the judges and justices of the federal judiciary have a bit of discretion to reach a legal outcome they wish to reach. They can do this by infusing meaning into vague text, tolling extreme hardship individually or cumulatively, and by adjusting their threshold of belief when evaluating witnesses and evidence.

These discretionary opportunities are essentially wiggle room and are available to justices of the Supreme Court and judges of the Courts of Appeals. But given the number of opportunities for purposive behavior that arises, the fact that the appellate process is a hierarchical one becomes very significant to federal litigants, not just in immigration cases but in all types of federal appeals.

In light of the interpretative and discretionary opportunities that arise in immigration cases, the vertical structure of the appellate process takes on added importance, very much as in the childhood game of King of the Hill, where children try to push each other off a hill with the goal of being the last one standing. In a hierarchical appeals system, in effect, the last decision maker's interpretative and discretionary preferences stand. Given the numbers presented above, the last decision maker is most likely to be the Courts of Appeals.²

Judges of the contemporary U.S. Courts of Appeals are aware that the chances of reversal are low—less than three percent, in fact. Regardless of the motivations, when judges of the U.S. Courts of Appeals render an elucidation of text or statute, it is their determination that trumps the interpretation of other decision-making bodies below them, and in almost all instances, the decision of the Courts of Appeals is final.

I would like to finish my talk today by emphasizing one of the central arguments I make in my book. The Supreme Court and the Courts of Appeals make immigration policy in different ways. The Supreme Court makes policy by taking one case that binds all other similarly situated cases. But increasingly, the operative doctrine is made by the Courts of Appeals, which—by the sheer number of cases they adjudicate—affect more people. The Courts of Appeals have become the courts of last resort for most federal litigants, not just for immigrants.

NOTES

¹ Federal courts statistics obtained using a Lexis/Nexis search for the keywords *immigration* and either *exclusion* or *deportation*. Immigration court statistics from Transactional Records Access Clearinghouse, “Immigration Court Caseload Tool,” Syracuse University, http://trac.syr.edu/phptools/immigration/court_backlog/. Asylum corps numbers from Caroline Brothers, “Refugees Increased in 2008, UN Agency Says,” *The New York Times*, March 25, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9B0DE6DE173EF936A15750C0A96F9C8B63>.

² Anna O. Law, *The Immigration Battle in American Courts* (New York: Cambridge University Press, 2010), 216.