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Behind closed doors at the 9th Circuit

By Josh Stein

Jorge Garcia was only 10 years old when his family brought him to the United States. On Martin Luther King Day 30 years later, the United States deported him. In video images shared widely, the 39-year-old hugged his sobbing wife and two children at the Detroit airport before Immigration and Customs Enforcement agents led him onto a plane headed for Mexico.

Scenes like this play out again and again these days, and they have been playing for a long time now. But under the Trump administration, immigrants convicted of a crime are no longer the priority. Instead, ICE agents appear eager to lay their hands on anyone they can. Many deportees don't even get the chance to say goodbye to their families. Snatched up at work, on a street or near their children's schools, they are whisked away to detention centers.

Far away from the news cameras, however, is where many life-changing decisions about families like the Garcia's are being made. In courtrooms across the United States hundreds, if not thousands, of deportation orders are affirmed by judges behind closed doors, with assembly-line speed. There are no cameras; the public sees nothing. Even the immigrant whose case is being heard is not allowed to bear witness.

The struggle for immigrants facing deportation usually begins before an immigration judge. If that judge orders their removal, they can appeal to the Board of Immigration Appeals. And since the U.S. Supreme Court hears immigration cases so rarely (hearing only a few dozen cases of any kind a year), for practical purposes, the last chance immigrants slated for deportation have to challenge a removal order is before the U.S. Court of Appeals.

Daily Journal Photo

Judge Harry Pregerson

How about one change — a change that I imagine would have pleased Judge Pregerson. The court should not allow immigration cases resulting in removal to enter the OSP program.

As a law clerk to a judge who sat on the 9th U.S. Court of Appeals, I first learned how the court sets aside many, if not most, immigration appeals for a program meant to streamline how the court handled its caseload. That program is called the Oral Screening Panel, OSP for short.

Here's how it works. Staff attorneys working for the 9th Circuit screen every appeal that comes up from the lower courts. They assign numerical weights based on the complexity of the appeal, with 1 ranking the lowest and 24 the highest. A 1 ranking suggests the lower court got it right, and in theory, a 1-point case will require the least review. Pro se cases, those involving individuals without lawyers, often get such a rating. These are the appeals slotted for the OSP program.

The staff attorney assigned to a number of these cases stands in a conference room before the three judges, who can opt to appear by videoconference. After a few minutes, the judges can reach a decision that accepts the staff attorney's recommendation and adopt a pre-drafted disposition, too. Though I have little doubt that the attorneys and the judges do their best to apply the law, the reality is that OSP necessitates the rendering of quick-hitting, essentially pre-packaged justice. Here's how ex-Judge Alex Kozinski described the process: "[the staff attorneys] read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges ... [T]he judges don't see the briefs in advance, and ... they generally rely on the staff attorney's oral description of the case in deciding whether to sign on to the proposed disposition." Candidly, Kozinski admitted that, "[a]fter you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible." Kozinski, "The Real Issues of Judicial Ethics," Hofstra Law Review (2004).

Over the course of a day or two, the panel can hear a couple hundred cases. As recently as 2014, the court resolved 2,431 appeals in OSPs, and 486 more in their close cousin "Written Screening Panels." That, put together, represents almost a quarter of the 12,493 cases the court "terminated" that year. See Sidney R. Thomas, "Judge James R. Browning: His Legacy for Montana and the Future of the Federal Judiciary," Montana Law Review (2015). The attorneys and judges involved no doubt take their roles seriously and recognize how important it is to avoid errors. But even the court's most ardent supporters would admit that these cases get nowhere near the attention of those outside the program, with formal memoranda drafted by law clerks typically shared between chambers, and vigorously debated during judicial conferences.

A 1 rating then means that an appeal's destiny was all but preordained for defeat. And if the appeal was terminally ill, then OSP is more like a hospice than a hospital. It's where appeals go to die.

So for immigrants whose appeal is slated for the OSP program, immigrants who often have no legal counsel, their last hope is really no hope at all. Of course, they cannot even watch as the court puts the final stamp on deportation orders after mere minutes of discussion.

Even under the most generous scrutiny, the optics alone are terrible. The court itself likely recognizes this. Try looking at its thousands of opinions put out in the two-plus decades the OSP has been around. (It had been in piloted in the 80s and written about by 1991. See John B. Oakley, "The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties," BYU Law Review (1991).) You'll find only two cases that even mention the program by name.

As it happens, the importance of a hearing was central in one of them, a case in which the court sided with the EPA in allowing the use of a pesticide that farmworkers argued caused effects such as tremors, vomiting and diarrhea.

To the two judges in the majority, the OSP, which helped it decide "literally thousands of cases each year where there is no oral argument," was evidence that a "hearing" was only a metaphor. *See United Farm Workers of Am., AFL-CIO v. Adm'r*, E.P.A., 592 F.3d 1080, 1082 (9th Cir. 2010).

One judge dissented. He felt that the court had shortchanged farm workers and the environment. The EPA, he argued, issued its order after reviewing written comments instead of conducting the "public hearing" the law appeared to require. To that judge, bypassing a hearing in that context was wrong.

That judge, Harry Pregerson, died late last year. He was famous for his stone-cold opposition to splitting families apart in immigration cases. To many in Los Angeles and beyond, he was a hero.

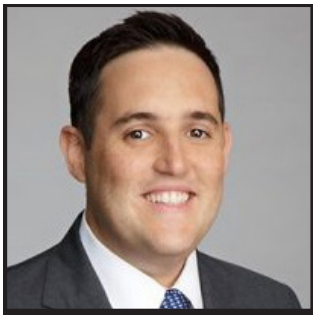
On the importance of a hearing, I agree with Judge Pregerson. That case may have been different; it involved a law that spoke to a public hearing. Here, the law does not even require a hearing, much less a public one. But if the court is going to continue the OSP program, it should consider all manners of reforms given the stakes, perhaps even broadcasting its proceedings live, just as it livestreams its "public" hearings.

And while in an ideal world abolishing the OSP program would probably better suit a court of last resort, that might make the court's work impossible, as its resources are so strained.

But how about one change — a change that I imagine would have pleased Judge Pregerson. The court should not allow immigration cases resulting in removal to enter the OSP program. If that would too seriously deplete the court's resources, it could consider limiting such cases only to those who were convicted of a violent crime.

As it stands, an appeal to the 9th Circuit is the last chance for people like Jorge to stay in the country they see as home. These are our neighbors, our friends, and our family. They deserve more than a few minutes' worth of deliberation in a video chat. They deserve better, and so does the nation.

Josh Stein *is a lawyer at Hueston Hennigan LLP. The views in this article are his own and do not necessarily reflect the views of his employer.*



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