

slavery, Adams earned the enmity of the South, but he earned the approbation of the North and a level of popularity that he had never previously enjoyed. He returned to the courtroom briefly to argue successfully in the Supreme Court for the freedom of the *Amistad* slaves.

When Adams died in 1848 after having a stroke on the floor of the House, he was accorded the most extensive funeral since George Washington's and Benjamin Franklin's. Unger writes that there was "a collective outpouring of love and veneration the nation had rarely seen."

John Quincy Adams had his limitations. Albert Gallatin, the secretary of the treasury under Presidents Jefferson and Madison, found much to praise in him, but concluded that he lacked the most essential quality: "a sound and correct judgment." Andrew Jackson's biographer, Robert Remini, called Adams "a man of incredible political ineptitude." Nonetheless, Adams' diplomacy was crucial for the young republic, and, after a failed presidency, he became perhaps our greatest former President. **TFL**

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### **Show Trials: How Property Gets More Legal Protection than People in Our Failed Immigration System**

By Peter Afrasiabi

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REVIEWED BY R. MARK FREY

Wanna create a commotion? Get people's blood a-boilin' to the point where they shake their clenched fists in anger, threatening to teach you a thing or two? Then proclaim to a throng of people that our immigration system is in fine form and best left alone. Mattering little if the group is comprised of those who may be of a conservative bent or left of center, you can be sure that pandemonium will break loose. Consider, for example, a comment from Justice Scalia's heated dis-

sent in *Arizona v. United States* (2012):

The Court opinion's looming specter of inutterable horror—"if § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations," *ante*, at 10—seems to me not so horrible and even less looming. But there has come to pass, and is with us today, the specter that Arizona and the States that support it predicted: A Federal Government that does not want to enforce the immigration laws as written, and leaves the States' borders unprotected against immigrants whom those laws would exclude. So the issue is a stark one. Are the sovereign States at the mercy of the Federal Executive's refusal to enforce the Nation's immigration laws?

Why do emotions run so high when people discuss immigration? Some people, such as Justice Scalia, perceive the immigration problem as being that we give insufficient attention to securing our borders and enforcing our immigration laws, thereby failing to ensure that people not be rewarded for breaking those laws, especially in our post-Sept. 11 world. Others decry the current system's lack of humanity, as it forces many to live in the shadows, subject to various forms of exploitation or "processing" by a legal system more akin to a sausage-making factory than to one based on due process of law.

Within this swirling maelstrom, Peter Afrasiabi's *Show Trials: How Property Gets More Legal Protection than People in Our Failed Immigration System*, strives to provide some perspective. Now a lecturer at the University of California-Irvine Law School, Afrasiabi previously founded and managed an appellate law clinic at Chapman University School of Law in Orange County, Calif., where he and his students litigated many immigration cases. *Show Trials* outlines the problems of our country's immigration system and tells the stories of some of the victims of the system's inequities.

In our better moments, we Americans embrace and celebrate the diversity of our ethnicity, religion (or lack thereof), country of origin, gender, and so forth.

We recognize that we are better for being a heterogeneous nation. But, if anything tantamount to a national religion contributes to our collective identity, it is our devotion to the Constitution and its principles. Afrasiabi vigorously reminds us of that fact:

A basic premise of this book is allegiance to the principle, rooted in our Constitution, that a human's right to the protection and preservation of his or her liberty and life is at least as important as a corporation's right to the protection and preservation of its property.

If we believe in that principle, then why, Afrasiabi asks, is the immigration system so unjust? Why do "our constitutional [Article III] courts ... protect our property rights with highly developed and important legal structures," whereas our "political immigration courts ... do not afford the same basic protections to human beings who are often in life and death situations"? Afrasiabi refers to immigration court proceedings as "show trials" because they fail "to deliver justice through the promise of due process and instead often sacrifices critical human life and liberty interests in the name of efficiency or expediency to the system."

Afrasiabi writes glowingly about an immigration system in place years ago that relied on our constitutional courts to rectify the errors of immigration authorities. He cites *Yamataya v. Fisher*, 189 U.S. 80, 98-102 (1903), which involved a Japanese immigrant deemed a pauper or likely to become a public charge and ordered deported. The Supreme Court held that she could not be deprived of her liberty to live in the United States without an opportunity to be heard. Later, in *Bridges v. Wixon*, 326 U.S. 135, 152-155 (1945), Afrasiabi notes, the Supreme Court found that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. ... Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

What happened to the fundamental role of our constitutional courts and respect for due process during the intervening years? Why the erosion of these

rights? Why is the immigration system now more akin to a plunge down the rabbit hole in *Alice's Adventures in Wonderland* where, as Afrasiabi writes, "up is down and back is front, a world where you run in circles without ever getting to the heart of the issue, and a world where terrible sentences are imposed for trivial mistakes"?

Congress implemented harsh changes with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Antiterrorist and Effective Death Penalty Act of 1996 (AEDPA). IIRIRA replaced a form of relief known as Suspension of Deportation with Cancellation of Removal, making it significantly harder for a noncitizen to prove hardship when fighting removal (also known as deportation or exclusion) and, even more importantly, making it virtually impossible for constitutional courts to review an immigration judge's decision by removing the right to appeal under section 106a of the Immigration and Nationality Act.

AEDPA, passed after the Oklahoma City bombing of 1995, restricted access both to constitutional court review of deportation hearings involving noncitizens convicted of aggravated felonies (as defined under federal immigration law) and to *habeas* relief.

The new reality, according to Afrasiabi, is a system where "a political appointee immigration judge is allowed to decide that a deportation is perfectly acceptable notwithstanding the grave factual circumstances that such a deportation will inflict on a person's liberty and perhaps life, and that immigration judge's decision is forever insulated from the sunlight and scrutiny of a constitutional court."

All the more remarkable is the fate of family members of those facing removal, especially children, whether they are holders of U.S. citizenship or have no immigration status. In either case, Afrasiabi argues, the system subjects children to deportation for something in which they played no part. "Our elected officials have not passed any laws to protect either category of children from the harsh realities of the deportation that they suffer. Children in each group are either routinely deported by our government along with their parents, or lose a parent to deportation and suffer a broken family." (Afrasiabi is referring, of course, to the DREAM

Act that has languished in Congress, although the Obama administration, in June 2012, developed a DREAM-like program that allows children brought to the United States at a tender age to come out of the shadows and both obtain work authorization and pursue an education. Curiously, this action by President Obama was subject to the scorn of Justice Scalia as an aside in his dissent found in the aforementioned *Arizona v. United States*.

Afrasiabi does not pull his punches when taking on government attorneys. He laments a winner-take-all attitude by those working in the Department of Homeland Security's Immigration and Customs Enforcement (ICE) as well as the Department of Justice's Office of Immigration Litigation (OIL). He reminds us that, in a speech delivered to Department of Justice attorneys in April 2009, Attorney General Eric Holder emphasized that:

Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. Any policy that is at tension with that is to be questioned and brought to my attention. And I mean that.

The government now appears to be adhering to this policy, as recent months have witnessed administration directives to exercise prosecutorial discretion by prioritizing removals in order to more effectively use existing resources.

And, what of the private immigration bar? Although Afrasiabi acknowledges that its members are overworked and underpaid, he blasts their incompetence for leaving their clients in the lurch with little or nothing to show for the money they paid for their legal services. In fact, according to Afrasiabi, many immigration practitioners have been disbarred or face suspension. And why is that? The clientele simply do not have the financial resources to adequately compensate their attorneys, leaving them to take on too large of a caseload with too few hours devoted to each. But, the answer is not, according to Afrasiabi, to increase the amount of *pro bono* work by attorneys. That would be simply unrealistic given the volume of cases before immi-

gration judges. He recommends instead a system providing awards of attorneys' fees that would enable attorneys to take fewer cases, devote more time to each, and commit fewer errors. An indirect result of such a system might be that the government would exercise its prosecutorial discretion more carefully in designating people for removal.

Afrasiabi presents a list of recommendations to improve the immigration system. It includes developing an immigration judiciary comprised of constitutional judges, bringing back constitutional court review of immigration judge decisions, using mediation, providing an attorney to those who cannot afford one, and allowing awards of attorneys' fees. Although immigration proceedings are civil in nature, Afrasiabi is adamant that removal is equivalent to punishment under our criminal laws. As such, similar protections must be in place.

Afrasiabi has written a good book! It confronts and engages us to grapple with these important and timely issues. Although I empathize with his frustration, I am reluctant to condemn the immigration judges, government attorneys, and private bar as the source of the problem. The problem is systemic in nature and cries out for comprehensive immigration reform. Not radical reform, just precise and focused change. We need to return to a system that allows for nuance, exercise of discretion by immigration judges, encouragement of prosecutorial discretion by government attorneys, and more fully developed federal court review.

This nation is based on the notion that immigrants are its lifeblood, providing a constant source for renewal and revitalization through the introduction of new ideas, values, and perspectives on the world. Let us hope that our nation's leaders will finally recognize that we need comprehensive immigration reform to ensure that we have a just and orderly immigration system. **TFL**

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