

WELCOME TO THE BREAKFAST CLUB: IMMIGRATION POLICY AND ITS IMPACT ON EDUCATION POLICY

BY PAUL WICKHAM SCHMIDT

The following is a the keynote address delivered by Immigration Judge Paul Wickham Schmidt, in his personal capacity, at the Eighth Annual Language, Culture, and Education Institute on March 29, 2008, at the University of Wisconsin-Oshkosh Campus. The Institute was co-sponsored by UW-Oshkosh College of Education and Human Services and the Office of Continuing Education and Extension, the Wisconsin Department of Public Instruction, and the U.S. Department of Education's Office of English-Language Acquisition.

Good morning.¹ Thank you very much for inviting me. I greatly admire your role as ELL teachers or aspiring ELL teachers. I constantly "plug your product" in my courtroom, and I am delighted to have an opportunity to plug my product -- justice -- to you.

Welcome to our Breakfast Club, or "BC." Of course, every functioning organization needs a good acronym. I'm going to use quite a few acronyms this morning, so I translated them for you in the "Keys to the Keynote" included in your conference materials. Dr. Hones probably told you that automatic, involuntary membership in the BC is included in your conference registration. Similarly, most of us obtained our membership in the American community through U.S. citizenship automatically and involuntarily conferred at birth.

Now that we're all members of the BC, does everybody agree that we should meet every Saturday at 8:30 A.M.? What common purposes or values bring us together today? Should support of those values be a membership requirement? Do we want to recruit new members or just keep the membership we have? How do we recruit? What about folks who don't share our values? Can they be members? Can they attend our meetings and be our "friends," even if not members? How do we interact with them? How do we spread our

values? Do we expel those whose actions no longer support our common values and purposes? What process would we use to do that? Has anybody ever been in a club or organization where disputes over membership rules and requirements led to threats to resign, or dissolution, or a split?

If we were able to play this out -- that would be the full semester course and the university would have to pay me to give it -- when we were done we probably would have a set of rules and regulations that look somewhat like a "mini-immigration" system. In effect, all immigration and nationality systems are simply ways in which we define and regulate membership in our national community or "club." The club model originally was suggested to me by the scholarship of my good friend and former government colleague, David A. Martin, Professor at the University of Virginia Law School.²

No overstuffed leather chairs fill our clubroom, nor does the odor of stale cigar smoke linger in the air. Our club is the United States of America, a vibrant 21st Century democracy built on the promise of "liberty and justice for all."

Membership issues have always been, and remain, among life's most difficult and fundamental matters. They involve sometimes conflicting basic human needs such as belonging, control, self-determination, allegiance, loyalty, and even survival. The U.S. Supreme Court has said expulsion from our national "club" can result in the "loss of everything that makes life worth living."³ Today, I will talk about the U.S. immigration process and suggest some values that will allow us to improve the dialogue and do our jobs better.

At this point you're probably asking why your conference keynote address is being given by me, whom most of you don't know and haven't heard of, rather than by a famous educator or renowned authority in the field of ELL. I suggest several possibilities.

One, I'm a native "Badger." I admit that even after last night's unhappy outcome for all of us disappointed

¹ My comprehensive disclaimer is firmly embedded in the body of this speech. I thank my wife, Cathryn Piehl Schmidt; my daughter, Anna Patchin Schmidt; Hon. M. Christopher Grant, U.S. Immigration Judge (retired); Kelsey Condra Ciluffo, second-year student at The George Washington University Law School; and Amalia Greenberg Delgado, second-year student at Washington College of Law, American University, for their helpful comments and suggestions on earlier versions of this speech.

² See, e.g., David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983).

³Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

Badger fans. My daughter Anna teaches ELL in Menasha and is a graduate student here at UW-Oshkosh. (In fact, she's sitting in the audience, as far to the back as possible.) That's pretty powerful.

Another possibility can be found in the words of that distinguished higher educator Stephen Spurrier, currently teaching football at the University of South Carolina. During his largely unsuccessful tenure as coach of the Washington Redskins, when asked why he had signed a certain unheralded quarterback Spurrier said: "He was cheap and available." I'm sure that's also part of the equation.

But, there is a third possibility: while I'm not important, my *message* is. As a trial judge in the Arlington Immigration Court, I experience immigration, as do you, at the "retail" level.

My message should interest you as teachers and students of ELL, even here in Oshkosh, Wisconsin. For example, the January 31, 2008, edition of the *Appleton Post Crescent* described a federal "immigration sweep" that took place in Brown, Door, Kenosha, Outagamie, Sheboygan, and Winnebago counties.⁴ According to the March 4, 2008, edition of the *New Richmond News*, a recent study shows that "on 600 farms in four Wisconsin counties . . . 90 percent of the milkers . . . were Mexican immigrants."⁵

This issue no longer affects only those living in Texas, California, New York, Florida, and other states along our southern border. Your very presence today and your chosen profession as ELL teachers reflect profound changes in our society in the forty-odd years since I attended public schools in Wauwatosa, Wisconsin. If you listen this morning, you should learn at least *one* important thing that you didn't know before, and hopefully more.

As we move through my speech and workshop, please keep in mind the following very important announcement. I am here today in my *personal* capacity exclusively to provide you with information and stimulate discussion in an academic context. The views I express, if any, are mine and do *not* represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent *my* position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the future.

⁴Tony Walter, *Immigration agents arrest 20*, *Appleton Post Crescent* (online edition), Jan. 31, 2008, at www.postcrescent.com.

⁵ *Dairy farmers unhappy with immigration raids*, *New Richmond News* (online edition), Mar. 4, 2008, at www.newrichmond-news.com.

I will divide my speech into four parts. First, I will provide a general overview of the U.S. immigration system using the "club model," defining membership at three levels: full voting members; associate members; and friends. I will also discuss what happens to those who are *not* club members. Second, I will describe the role of the U.S. Immigration Court, where I work, in determining membership questions and protecting the rights to fair treatment of those who may, at least initially, appear to be outside all of the membership categories. Third, I will discuss English language as a criterion of membership, which, of course, is the main thing that brings us all together today. Fourth, I will show what we as teachers and judges have in common in dealing with membership issues.

I

If we think of our national community as a club, then the "full voting members" are U.S. citizens. There is also a very small group of people who are "nationals" of the United States, owing permanent allegiance, but who are not citizens of the United States. With due respect, I'm going to leave them out of today's discussions.

Under the 14th Amendment to the U.S. Constitution, persons born in the United States *automatically* become U.S. citizens. The exceptions are children born to certain high-ranking foreign diplomats with immunity and rare individuals born on foreign public vessels who are not subject to the jurisdiction of the United States. U.S. citizenship vests automatically *regardless* of the legal status of the mother or father in the United States. Although so-called "birthright citizenship" has become a somewhat controversial topic recently, it has been a firmly established constitutional rule for over a century.⁶ Because it is a constitutional rule, Congress *cannot* change it by statute. It would require a constitutional amendment or a *radical* reinterpretation of our Constitution by the Supreme Court.

Additionally, certain individuals born abroad whose parent or parents are U.S. citizens who lived in the United States prior to birth can automatically *acquire* U.S. citizenship at birth. For example, if two U.S. citizen ELL teachers from Oshkosh lived their lives in the United States, but were teaching English in Japan on an exchange program when their child was born there, that child would be a U.S. citizen at birth, even though not born in the United States.

So-called "citizenship by acquisition" is governed by statute, rather than the Constitution, and the rules have changed over the years. Additionally, children

⁶*See United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

born outside the United States may under certain conditions automatically *derive* U.S. citizenship upon the naturalization of at least one parent or upon being lawfully admitted to the United States to reside with a citizen parent. Again, the rules on this type of derivative citizenship are complex and often changing.

Finally, certain individuals lawfully residing in the United States may, if eligible, choose to apply to the Department of Homeland Security ("DHS") for naturalization. This is, in effect, a way in which a "prospective member" of our "club" may apply for and receive "full membership." While Article I, Section 8 of the Constitution gives Congress authority to establish "a uniform rule of naturalization," and the 14th Amendment provides that naturalized individuals shall be citizens, the Constitution does *not* specify rules for naturalization. Theoretically, Congress could decide to have *no* provision for naturalization whatsoever.

The rules for naturalization are set by statute and also have changed over the years. They largely depend on lawful permanent residence, knowledge of the English language and basic civics, and good moral character.

There is a process for de-naturalization of individuals who illegally obtained naturalization. Otherwise, however, one may lose U.S. citizenship *only* through "voluntary relinquishment."⁷ In other words, Congress may not involuntarily strip an individual of legally acquired U.S. citizenship.

An "alien" is defined by law not as an extraterrestrial being, but rather as anyone who is *not* a citizen or national of the United States. I note, however, that an "ET" *would* meet the legal definition of "alien."

A second group of individuals might be characterized as "associate members" or "prospective members" of our club. While these individuals cannot vote or participate in our political processes, they can reside here on a permanent basis, provided that they obey our laws. Generally, they can work here without much restriction and can travel relatively freely abroad. Eventually, most individuals in this category can attempt to meet the criteria to become U.S. citizens, although they are not required to do so.

Lawful permanent resident aliens are by far the largest group of "associate members." They sometimes are known as "green card" holders, although the modern card is salmon, rather than green, in color. Our permanent immigration system generally favors the admission of three basic groups: close relatives of United States citizens and lawful permanent resident aliens; those with needed job skills; and refugees. Approximately 1.26 million permanent residents were

admitted to the United States in fiscal year ("FY") 2006.⁸

Immediate relatives of U.S. citizens, that is, spouses, minor children, and parents of *adult* U.S. citizens, can immigrate without numerical limitation. Approximately 580,000 immediate relatives, 340,000 of them spouses, were admitted as immigrants in FY 2006.⁹ You should know, however, that only parents of *adult* U.S. citizens who are over age twenty-one can qualify for immediate relative status. Consequently, and perhaps contrary to some popular notions, the birth of a U.S. citizen child confers no *immediate* immigration benefits on the parents.

Two hundred and twenty-six thousand immigrant visas annually are allocated for other types of family reunification for adult children of U.S. citizens, spouses and children of lawful permanent resident aliens, and siblings of U.S. citizens. The latter category, however, has a waiting list of more than ten years.

Another 140,000 immigrant visas annually for employment based immigrants are allocated primarily to professionals and other skilled workers. "Members of the professions holding advanced degrees," and, of course, "outstanding professors and researchers," are within the preferred categories. Significantly, at present *only* 5,000 immigrant visas annually are available to unskilled workers whose services are needed by U.S. employers. Currently, there is a waiting period of more than *six years* for visas in this category.

Some refugees are selectively admitted directly from abroad. Approximately 41,000 refugees were admitted in this manner during FY 2006.¹⁰ Additionally, approximately 26,000 individuals already in the United States were granted asylum in FY 2006,¹¹ approximately 13,350 by the immigration courts,¹² and the balance by the DHS Asylum Office.

While refugees and asylees do not immediately become green-card holders, they have a right to remain in the United States indefinitely, can bring in spouses and minor children, and can work freely. In most cases, they eventually become eligible to receive green cards, which can lead to U.S. citizenship.

I'm going to mention several "special" classes of permanent immigrants that might be of particular interest to you as ELL teachers. One category, called

⁷Afroyim v. Rusk, 387 U.S. 253 (1967).

⁸DHS, Yearbook of Immigration Statistics: 2006, Table 1, available at www.DHS.gov [hereinafter 2006 YB].

⁹*Id.* Table 6.

¹⁰*Id.* Table 13.

¹¹*Id.* Table 16.

¹²USDOJ, EOIR, FY 2006 Statistical Yearbook, at J-1, available at www.usdoj.gov/eoir [hereinafter EOIR 2006].

NACARA, covers certain individuals from Nicaragua, El Salvador, Guatemala, Cuba, or former Soviet Bloc countries who entered the United States before cutoff dates in the past and meet certain criteria. Often, but not always, immediate relatives of such individuals can also obtain permanent status. Natives of Cuba who are in the United States usually are eligible to obtain green cards under a special, highly beneficial, procedure called the Cuban Adjustment Act, enacted by Congress in 1966.

Another special provision you might encounter is called Special Immigrant Juvenile ("SIJ") status and applies to certain foster children or juvenile wards of the court. There also are special green-card provisions relating to battered spouses and children passed by the Congress as part of the Violence Against Women Act ("VAWA"). Additionally, certain individuals without status who have been in the United States for at least ten years may apply for permanent residence based upon "exceptional and extremely unusual hardship" to U.S. citizen or permanent resident relatives. This is called "cancellation of removal."

A third membership category could be characterized as "friends" of the club, that is, individuals who are here with legal permission and may remain for a temporary period of time, sometimes quite lengthy, but who have no clear path to permanent residency or citizenship. The most numerous group of "friends" is "nonimmigrants." A "nonimmigrant" is distinct from an "immigrant." The term "immigrant" generally refers to those, whether legal or illegal, who seek to remain permanently in the United States. Visitors for business or pleasure, approximately thirty million in FY 2006,¹³ comprise the largest *nonimmigrant* category. An example of a business visitor might be a French national speaking at this conference and receiving no U.S. compensation other than payment of expenses. Members of a German family coming to visit Wisconsin Dells could be classified as visitors for pleasure.

A category that some of you might know is nonimmigrant academic students in so-called "F-1" status. Last year, approximately 694,000 such individuals were admitted to the United States.¹⁴ An F-1 student must maintain a residence abroad, must demonstrate an intention to return to that residence upon completion of studies, must show the resources necessary to complete the course of study, and must maintain a full course load. Moreover, F-1 students generally cannot study at public elementary or secondary schools. Because of these requirements, F-1 status is *not* an option for undocumented alien schoolchildren in the United States.

There are numerous other classifications in the "alphabet soup" world of nonimmigrants. However, because of very specific technical requirements, and the general concept that a nonimmigrant is someone who is coming to the United States *temporarily*, these categories seldom are useful to undocumented immigrant families already living, working, and/or studying in the United States.

Another group of "friends" that you might encounter on a regular basis is individuals in what is known as Temporary Protected Status, or "TPS." The Secretary of Homeland Security may make TPS designations for nationals of countries where there is an "ongoing armed conflict" or where there has been a natural disaster.¹⁵ Individuals in TPS status can temporarily reside and work in the United States. TPS generally does not lead to green card status or U.S. citizenship, although some people in TPS status eventually are able to qualify for green cards through the normal immigration system.

One difficult situation involves juveniles who have recently entered the United States illegally to join parents already here in TPS status. Usually, those juveniles cannot qualify for TPS. Therefore, if apprehended by the DHS, they eventually must return to their home countries even if their parents can remain here in TPS status.

Another group of "friends" is called "parolees," although not in the criminal-law sense of the term. Immigration parolees are individuals who apply at the border and are allowed to come into the United States for temporary emergency reasons, often while a final determination of their immigration status is pending.

Then, there are the estimated 11.6 million (6.5 million from Mexico)¹⁶ or so individuals in the United States who are outside the "club." This group consists primarily of individuals who crossed the border surreptitiously or by fraudulent means, but also includes a significant group of individuals who entered legally as nonimmigrants, but overstayed or otherwise violated the terms of their admittance. An estimated 4.2 million of the current undocumented population entered since 2000.¹⁷

In some instances, the law permits individuals in the United States to change to "green card" status through a process known as "adjustment of status." In FY 2006, approximately 819,000 individuals used this

¹³2006 YB Table 26.

¹⁴*Id.*

¹⁵Currently, there are TPS programs in effect for nationals of El Salvador (02-13-01), Honduras (12-30-98), Nicaragua (12-30-98), Somalia (09-04-01), and Sudan (10-07-04).

¹⁶Michael Hofer, Nancy Rytina, Christopher Campbell, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006, published by DHS, available at www.dhs.gov.

¹⁷*Id.*

provision.¹⁸ However, the stringent requirements for that relief make it of little practical benefit to most who are here illegally.

Also, there is a smaller, yet highly visible, group of individuals who were granted lawful permanent residence, in other words, became "associate members" of the club, but who by their subsequent criminal misconduct forfeited that right and are therefore subject to expulsion from membership and removal from the nation.

Most people would agree that the latter group, criminals, presents plausible arguments for expulsion. Nevertheless, there may be circumstances where forgiveness based on an overall assessment of the equities, particularly the effect on U.S. citizen and lawful permanent resident family members, is warranted. Indeed, a limited form of discretionary relief called "cancellation of removal" is available to individuals whose criminal record is on the less serious end of the spectrum.

With respect to the other two groups, illegal entrants and status violators, there is a lively ongoing debate. Some say that these individuals possess characteristics, such as willingness to work hard in jobs most Americans don't want, that make them strong candidates for membership in the club at some level. They also argue that mass removals of such individuals from the United States would be impractical and inhumane.

Others say such individuals are lawbreakers who are a drag on our society and should be removed, through active enforcement efforts, a strategy of "attrition," or both. The "attrition strategy" depends heavily on more aggressive and effective enforcement of federal laws, on the books since 1986, prohibiting the hiring of aliens not authorized to work in the United States. These laws also prohibit discrimination based on national origin or citizenship status against employees and job applicants authorized to work in the United States. Most of you probably have filled out the so-called I-9 employment verification form, which is part of the process for enforcing these laws. To date, however, these so-called "employer sanctions" laws have *not* effectively eliminated U.S. employment opportunities for unauthorized workers.

Groups favoring removal recently blocked two efforts at overhauling the immigration system. The first, generally referred to as "comprehensive immigration reform," was supported by President Bush and would have combined stronger border enforcement with an "earned legal status" for many individuals now residing and working in the United States without status. It also would have provided more avenues for the legal importation of temporary

workers to do low-skill jobs. A second unsuccessful proposal called the "DREAM Act" would have made it possible for certain undocumented high school graduates who had lived in the United States since a young age to ultimately regularize their status by attending college in the United States.

While there is ongoing discussion on whether comprehensive immigration reform is "dead" for the foreseeable future, and a number of immigration enforcement bills recently were introduced in Congress,¹⁹ at present there are no politically viable comprehensive immigration proposals pending. Perhaps as a consequence, a number of states and localities have enacted or are considering immigration proposals, most aimed at discouraging the presence of undocumented immigrants by denying them services, revoking the licenses of businesses who hire them, and/or requiring local law enforcement to turn suspected undocumented individuals over to the DHS for removal. According to the National Conference of State Legislatures ("NCSL"), Wisconsin was one of only four states *not* to enact immigration-related legislation during 2007.²⁰

One often misstated aspect of the current debate is the proposition that "aliens in the United States illegally have *no rights*." Although it is true that such individuals might ultimately have no right to *remain* in the United States, while here, they *do* have a number of important rights under our laws.

First and foremost is the right to fair treatment under the Due Process and Equal Protection Clauses of the 5th and 14th Amendments to our Constitution.²¹ Guaranteeing due process to individuals charged with being removable from the United States is what my "day job" is all about. More on that later.

Sometimes, the course of history can be changed by a single vote. One of the reasons we are gathered here today is because of a 5-4 decision by the Supreme Court in 1982 in a case called *Plyler v. Doe*.²² The Court found that it was a violation of the Equal Protection Clause of the 14th Amendment for the State

¹⁹David Rogers & Patrick O'Connor, *Immigration: New bills, old borders*, Politico.com, Mar. 5, 2008, available at www.politico.com/news/stories/.

²⁰ NCSL, 2007 Enacted Legislation Related to Immigrants and Immigration (Rev. 01-31-08) at 3, available at www.ncsl.org. The other states are New Jersey, New Hampshire, and Alaska.

²¹ *Zadvydas v. Davis*, 533 U.S. 678, 692-93 (2001); *Plyler v. Doe*, 457 U.S. 202 (1982).

²² 457 U.S. 202, 221-22 (1982); see also N. Rabin, M.C. Combs & N. Gonzalez, *Understanding Plyler's Legacy: Voices From Border Schools*, 37 J. of L. & Educ. 15 (2008), available at www.bibdaily.com/pdfs/understanding%20plyler's%20legacy.pdf.

¹⁸2006 YB Table 6.

of Texas to deny undocumented school-age children the free public education that it provides to U.S. citizens and lawful permanent residents. In doing so, Justice Brennan, writing for the majority of the Court, observed:

In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

. . . Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." . . . The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.²³

The right to receive free public education does not, however, extend to *higher education*. In most states, undocumented high school graduates have a difficult time continuing their education because they are required to pay nonresident tuition and are denied access to most scholarships or other forms of financial aid. This issue could face some of your students. Occasionally, students who came with their parents at a young age might not be fully aware of their undocumented status until they fill out college application or financial aid forms and are asked to verify legal status in the United States. As I mentioned earlier, a measure called the "DREAM Act," which would have addressed this situation, at least in part, failed during the most recent session of Congress. Some studies estimate that there are two million undocumented children in the United States, thus making the issue of how to treat them a highly significant aspect of the immigration debate.²⁴ The Urban Institute reports that approximately 65,000 undocumented students annually graduate from U.S. high schools.²⁵

²³ *Id.* at 221-22 (citation omitted).

²⁴ Dawn Konet, *Unauthorized Youths and Higher Education: The Ongoing Debate*, Migration Information Source (Sept. 2007), available at www.migrationinformation.org.

²⁵ *Id.*

Not surprisingly, illegal presence does *not* relieve an individual from compliance with local civil and criminal laws. Thus, an undocumented couple from Uganda who seeks to marry in Wisconsin must comply with *Wisconsin* law, rather than with Ugandan tribal customs. This is *very* important. For example, if the wife in my Ugandan scenario is granted asylum in the United States, the law permits her husband to obtain derivative status, but only if a *legal marriage* exists on the date asylum is granted.

Another important obligation under our laws that does not depend on legal status is payment of *taxes*. Failure to do so, and to be able to prove compliance, may be a serious impediment for a foreign individual who otherwise qualifies to regularize status in the United States. Males eighteen to twenty-five years old residing in the United States must register for the Selective Service, regardless of legal status. Many states already restrict driving privileges to those lawfully present in the country. Under the federal REAL ID Act, designed to improve security following the 9-11 attacks, it may become impossible in the future for someone without legal status to obtain a driver's license in any state.

II

Now, on to my role in the system. The Department of Homeland Security, or "DHS," which I have mentioned previously, is the prosecutor under our immigration system. The enforcement arm of the DHS, known as Immigration and Customs Enforcement, or "ICE," deals primarily with aliens who are not members of the club or whom they are seeking to expel from club membership. Another branch of the DHS, known as U.S. Citizenship and Immigration Services ("USCIS"), deals with applications for citizenship and immigration benefits.

The DHS charges many individuals with being aliens who entered the United States without inspection or without valid documents. The DHS charges others with entering legally as nonimmigrants, but staying longer than permitted or otherwise violating the terms of nonimmigrant stay, perhaps by working unlawfully or, in the case of students, by failing to take a full course of study. The DHS charges still others with having entered legally as immigrants, but committing crimes or other disqualifying acts after entry. The DHS stops some individuals at the border and charges them with being "arriving aliens" who are inadmissible.

The DHS apprehended approximately 1.2 million individuals in FY 2006.²⁶ Most apprehensions take place in the vicinity of the border, and approximately

²⁶ 2006 YB Table 34.

75% of those apprehended accept "voluntary departure," thereby leaving without a hearing.²⁷ Another 6% are removed by the DHS under summary procedures.²⁸ The remaining individuals, those apprehended in the interior or who have ties or possible relief available in the United States, are referred for formal removal proceedings. At this point, my colleagues and I come into the picture.

We conduct removal proceedings to determine whether the DHS may remove the alien, now known as the "respondent," from the United States. The DHS bears the burden of proving by *clear and convincing evidence* that an individual in the United States is a removable alien. Although the DHS benefits from certain legal presumptions, doubts about removability should be resolved in favor of the *respondent*. Removal proceedings are *civil*, not criminal, in nature. I can discuss the implications of that distinction in my workshop.

Respondents may apply for various waivers and forms of relief that might overcome the grounds of removability. The most significant of these are asylum and/or withholding of removal on the basis of persecution in a foreign country and adjustment to lawful permanent resident status. We also consider claims for relief under the Convention Against Torture, popularly known as the "CAT." Additionally, we consider various forms of the waiver called "cancellation of removal," which I referenced earlier.

We take evidence, hear witnesses, consider briefs and oral arguments, decide pre- and post-hearing motions, and issue decisions. We create a record by recording the testimony and marking the evidence. An Assistant Chief Counsel, who is like an Assistant District Attorney, prosecutes each case on behalf of the DHS. The respondent may be represented by counsel of his or her own choosing, but we have no authority to appoint counsel for indigent respondents. Nevertheless, we have a very active voluntary pro bono program providing free or nominal-cost legal services in Immigration Court. Approximately 92% of the respondents appearing in asylum merits hearings, generally our most difficult cases, are represented by counsel.

In most cases, we issue a contemporaneous oral decision upon conclusion of the hearing. However, in other cases, we may reserve our decision and issue a written opinion at a later date. We have a limited number of law clerks and interns who provide

substantial assistance with research and drafting opinions.

The DHS can arrest and detain respondents during removal hearings. Sometimes, we review those custody decisions and set bonds for release.

Either party may appeal our decisions, whether oral or written, to the Board of Immigration Appeals ("BIA"), which I once headed. Respondents generally can seek further review in federal court. A small number of decisions by the BIA and the Attorney General are published as precedents.

As an immigration judge, I am *not* an Article III judge, like U.S. District Judge Griesbach in Green Bay. Nor am I an Article I judge like a judge of the U.S. Tax Court. Immigration judges are authorized by the Immigration and Nationality Act. We are employees of the Attorney General, that is, the U.S. Department of Justice, and we exercise certain authority assigned to us by the Act and delegated to us by the Attorney General. Our positions are *not* subject to Senate confirmation. Our branch of the Department of Justice is called the Executive Office for Immigration Review, affectionately known as "EOIR" for you *Winnie the Pooh* fans.

Our jurisdiction, therefore, is limited both by statute and by the Attorney General's regulations. We cannot, for example, issue injunctions, nor can we hold that a statute or regulation is unconstitutional. We do, however, apply constitutional principles of due process and fairness in our hearings.

Our decisions often have potential life-or-death consequences for the respondents. In the vast majority of our cases, both parties accept our decision as final and waive their right to appeal.

Perhaps ironically, one of the best descriptions of the "essence of immigration judging" was given by someone who is not one of us, but reviews our work on a regular basis. Judge Terence T. Evans of the Seventh Circuit's Court of Appeals states:

Because 100 percent of asylum petitioners want to stay in this country, but less than 100 percent are entitled to asylum, an immigration judge must be alert to the fact that some petitioners will embellish their claims to increase their chances of success. On the other hand, an immigration judge must be sensitive to the suffering and fears of petitioners who are genuinely entitled to asylum in this country. A healthy balance of sympathy and skepticism is a job requirement for a good immigration judge. Attaining that balance is what makes the job of an immigration judge, in my view, excruciatingly difficult.²⁹

²⁷ Mary Dougherty, Denise Wilson, Amy Wu, Immigration Enforcement Actions: 2005, at 1 (DHS 2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf.

²⁸*Id.*

²⁹ Guchshenkov v. Ashcroft, 366 F.3d 554, 561-62 (7th Cir. 2004) (Evans, C.J., concurring).

Judge Evans offers an erudite description of the job. At a somewhat "pithier" level, it's like trying death penalty cases in traffic court. In fact, a recent study commissioned by the National Association of Immigration Judges, of which I am a member, found that immigration judges had *amazingly* high stress and burnout levels that exceeded even those for emergency room physicians and prison wardens.³⁰

The nation's approximately 230 immigration judges annually complete more than 365,000 matters, including case decisions, motions, and administrative orders such as changes of a venue.³¹ There are six of us at the Arlington Immigration Court, and each of us has a docket of more than 1,000 pending cases. We use televideo hearings for certain types of cases.

For various reasons, our decisions are under the public microscope in unprecedented ways. Some U.S. Courts of Appeals, and in particular the Seventh Circuit, have been very critical of both the conduct and quality of decision making by certain immigration judges, particularly in the area of asylum.

A group of researchers at Syracuse University recently released a study of immigration judge asylum statistics covering a six-year period.³² according to the study, during that period, asylum applicants won approximately 40% of the time in Immigration Court. Perhaps not surprisingly, however, individual immigration judges granted asylum at widely varying rates, from a high of approximately 90% grants to a low of less than 10% grants. During FY 2006, approximately 45% of the asylum applications presented in Immigration Court were granted.³³

In our system, while there will be some cases where everybody agrees or accepts the result, there inevitably will be many cases with "winners" and "losers." I strive to create a climate where even those who do not prevail will feel that I listened to them with courtesy and respect and that I tried, to the best of my ability, to render a fair and timely decision.

III

This brings me to my third topic, one that intimately involves all of us: *language*. English

language issues are hardly new. My grandmother was born in 1881 just east of here on Highway 10 in Brillion, Wisconsin. She grew up and went to school speaking German as a "first" language. Yet, by the time I knew her, she spoke and wrote perfect English, and I never had any doubt that she was a "true American."

Earlier, I quoted what our Supreme Court said about the importance of education in our society. Most of the same things can be said about the *English language*. Paraphrasing the Court's words, the *English language* plays a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage. The inability to *communicate in English* takes a great toll on the social, economic, intellectual, and psychological well-being of the individual and poses an obstacle to individual achievement.

An ability to read, write, and speak English in ordinary usage is a basic requirement for naturalization.³⁴ In other words, with some exceptions, basic English language skill is a requirement for acquired membership in our "club." The overwhelming importance of English language fluency is one point of *agreement* in our club's immigration debate, although the debaters differ sharply about the implications.

Truly, as I can see from my work, and as I advise those who receive from me the right to remain in this country, mastery of English binds families closer together, and promotes healthy, positive interaction with the greater American community, that is, the rest of the "club members." It also leads to upward economic mobility within society.

Conversely, failure to master English divides and alienates generations, creates great resentment within the rest of our society, and leads to people being stuck in lower-paying dead-end jobs with all the economic and social uncertainty that brings. In family groups where the children are fluent, but the parents are not, I often suggest that the children take over some household responsibilities so that their parents can find the time to attend adult English classes. Individuals who master English and are multilingual almost certainly will have some advantages over those of us who are fluent in only one language.

Even those who are not able to remain here permanently can benefit greatly from learning English, which is fast becoming the international vehicle of politics and commerce, and we can benefit from teaching it to them. While certainly an educated, cosmopolitan society is not a guarantee of democracy, witness Nazi Germany, there are few examples of democracy succeeding where the people generally lack literacy and are isolated from the rest of the world.

³⁰ Stuart Lustig, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Marks & Denise Slavin, *Burnout and Stress Among United States Immigration Judges*, 13 Bender's Immigr. Bull. 22 (Jan. 1, 2008).

³¹ EOIR 2006, at B-5.

³² <http://trac.syr.edu/immigration/reports/183/>.

³³ EOIR 2006 Table K-2.

³⁴ INA § 312(a)(1), 8 U.S.C. § 1423(a)(1).

Language is a *huge* issue in Immigration Court. Through our staff of professional interpreters, we work in 252 different languages, with Spanish, English, Portuguese, Mandarin, and Creole accounting for 90% of the hearings. Spanish led the way with 70%.³⁵

Needless to say, hearings conducted in English take approximately one-half the time of those in another language. Having the hearing in English also reduces the chances of misinterpretation or misunderstanding, a constant issue in my cases. If "Lost in Translation" hadn't already been used as a movie title, it certainly could be a description of a bad day in Immigration Court. Please note that I said English language *reduces* chances for misunderstanding, but, of course, does not *eliminate* that possibility. As we know, all human communication is fraught with the possibility for misunderstanding.

English fluency also makes it easier for an individual to obtain and communicate with a lawyer, and to complete accurately the many forms and documents that must be filed in court in English. Forms have a *tremendous* significance in immigration proceedings. I also find that individuals who lack English language skills are more likely to be unaware of the serious potential immigration implications of pleading guilty to even seemingly minor crimes in U.S. criminal courts.

For all of these reasons, as I said earlier, I greatly admire and deeply respect the wonderful work all of you are doing. This leads to my fourth topic: what ELL teachers and immigration judges have in common.

IV

First, we encounter immigrant populations on a daily basis. Second, we have to deal with the system "as is." While we could hope for an eventual national consensus on immigration, or improved policies in the future, we face the daily reality of solving problems and carrying out our respective missions under today's imperfect conditions.

Third, we constantly must overcome serious cultural barriers to understanding to succeed. In many instances, we must project ourselves into an unfamiliar culture and its values to fairly evaluate the individuals in front of us. For example, distinctions that appear to be religious in the U.S. context would be considered nationality or racial groupings in other cultures.

Fourth, we are faced with situations of almost unimaginable dislocation and family stress that affect the performance of individuals before us. Take a possible example. Mom lives in a rural village in El

Salvador. By the time she is sixteen, she has two children, no husband, no job, and no hope. So, she leaves the babies with grandma, walks to the United States, wades the Rio Grande, and works two jobs while sleeping on floors and sending a few hundred dollars a month back to grandma. Eventually, mom marries another undocumented worker. They get TPS status, which, as we have learned, does not extend to family abroad, but gives the TPS holders temporary authorization to stay and work in the United States. They buy a small home and start raising a family of U.S. citizen children.

Meanwhile, the older children grow up in El Salvador with no parents. They become targets for harassment by local gang members who know they are getting money from their mother in the United States. They wonder why their mother abandoned them for a better life in the United States. At ages fourteen and twelve, they save some of the money mom sends, hire a human smuggler, and make their way across the border. One morning, mom opens the door and there they are. Soon, they will be in *your* ELL class and, perhaps, *my* courtroom. How should we expect them to perform? What in most of *our* lives prepares us to deal with these children? What kind of support can we expect them to get from their family members in the United States who hardly know them and may well be disrupted by their presence? A situation where some family members are "in the club" while others face expulsion is bound to create great stress and dislocation.

Fifth, ELL teachers and immigration judges must be prepared to face and deal with some of the darker sides of the immigrant experience. I find the vast majority of people coming before me in Immigration Court to be decent, hard-working individuals, who just want a better life for themselves and their family. Many have very compelling stories to tell.

But, I do get a relatively small number of individuals who have engaged in antisocial behavior, some of it quite extreme. Indeed, my docket has included hearing cases of respondents incarcerated in maximum security prisons in Virginia and Ohio. Most of what brings immigrants who once achieved membership status, but now face expulsion, before me can be traced to four things: alcohol, drugs, domestic violence, and, in the case of young people, particularly young men, gangs. I know that you also face all of these challenges in your daily work. I view gangs as directly related to some of the dislocation and breakdown of family values and sense of belonging that I have alluded to earlier.

Sixth, much of our success, ability to perform well, and to help others depends on listening skills. We must learn to eliminate the barriers to understanding and to hear what others are telling us, sometimes working around some very difficult cultural roadblocks. For

³⁵ EOIR 2006, at F-1.

me, this was a particularly challenging part of becoming a trial judge. As my daughter Anna will tell you, I am sometimes better at asking the questions than at listening carefully to the answers.

Seventh, we both serve as role models sending a powerful message about our country and its values. Some of the people we deal with come from cultures where everyone assumes that those in authority or who work for government entities are biased and corrupt, interested solely in promoting their own interests. For at least a certain number of individuals, a teacher or a judge will form the lasting "face" of our nation embodying our sense of justice and our fundamental values.

Eighth, and finally, we both have an opportunity, whether through providing education or serving justice, to affect the lives of others, in a fundamental, and hopefully positive, way. Just as all students cannot be equally successful, all parties cannot win their cases. But, making sure that everyone achieves the degree of success or the result that they are entitled to is critically important. Everybody in this room changes lives at a very important and basic level.

V

In summary, we have seen how our nation can be viewed as a "club" with the immigration system forming the basic rules of membership. I have described how the rules governing permanent club membership favor three groups, family, skilled workers, and refugees, while providing only limited opportunities for those who seek membership based on unskilled labor. We have learned that even those who are not members of the club have certain well recognized rights, including the right to receive public primary and secondary education and the right to fair treatment with respect to expulsion from the club and/or removal from the premises. I have also described the critical role of the immigration courts in guaranteeing that fair treatment. I have told you about the important role of English language as a unifying and progressive attribute of club membership and as a factor in Immigration Court. Further, I have pointed out the many similarities in the issues facing ELL teachers and immigration judges in dealing successfully with immigrant populations.

In closing, today's conference will provide us with a wealth of information about how to deal effectively with a vulnerable but especially important group of students. We also will learn techniques for building respect, promoting teamwork, and encouraging productive dialogue. If each of uses what we learn today to make at least *one* positive change in how we do our jobs in the coming week, we will achieve *progress*. Perhaps, in the process we also will improve

the tone and raise the level of our national debate on immigration policy.

Thank you very much for listening, enjoy the conference, do great things, and I look forward to seeing you at our next BC meeting.

Paul Wickham Schmidt was appointed as an immigration judge in April 2003. Prior to that, he served as a Member of the Board of Immigration Appeals, from February 12, 1995. Judge Schmidt served as Board Chairman from February 12, 1995, until April 9, 2001, when he chose to step down to adjudicate cases full-time. Judge Schmidt served as acting General Counsel of the former Immigration and Naturalization Service (1986-1987; 1979-1981), where he was instrumental in developing the rules and procedures to implement the Immigration Reform and Control Act of 1986. He also served as the Deputy General Counsel of INS (1978-1987). He was the managing partner of the Washington, DC, office of Fragomen, Del Rey & Bernsen (1993-95), and also practiced business immigration law with the Washington, DC, office of Jones, Day, Reavis and Pogue (1987-92; 1990-92). Judge Schmidt has also served as an adjunct professor of law at George Mason University School of Law. He has authored numerous articles on immigration law, and has written extensively for the American Immigration Lawyers Association. Judge Schmidt is a member of the American Bar Association, the Federal Bar Association (including its Immigration Committee), and the Wisconsin and District of Columbia Bars. Judge Schmidt was one of the founding members of the International Association of Refugee Law Judges. He received a Bachelor of Arts degree from Lawrence University in 1970 (cum laude), and a Juris Doctor degree from the University of Wisconsin School of Law in 1973 (cum laude; Order of the Coif). While at the University of Wisconsin, he served as an editor of the *Wisconsin Law Review*.

BENDER'S IMMIGRATION BULLETIN:

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