The Green Card

Welcome to the Newsletter of the FBA's Immigration Law Section

Betty Stevens, Chair

Quote of the Month

Our greatest happiness does not depend on the condition of life in which chance has placed us, but is always the result of a good conscience, good health, occupation, and freedom in all just pursuits.
--- Thomas Jefferson

Welcome!

Welcome to the Federal Bar Association's Immigration Law Seminar. We are happy to have you in Memphis to join us on this BBQ Festival weekend. We are grateful for the long history of Memphis hosting the Immigration Law Seminar.

We are proud to present a diverse array of programs and speakers for your education and enjoyment. Additionally, we are pleased to offer unique social events that we hope will be memorable for you.

One of the best parts of the Immigration Law Seminar is the interaction between colleagues in private practice with their government counterparts. The Federal Bar Association offers an exceptional opportunity to learn from each other, notwithstanding all different backgrounds and perspectives.

Thank you for being a part of the Immigration Law Seminar, whether you are a speaker or a participant. Again, Welcome to Memphis, and we hope you have a wonderful conference.

Sincerely,
Barry Frager
Attorney at Law
The Frager Law Firm P.C.

In This Issue

DISCLAIMER: *The Green Card* is a journal of opinion by and for immigration professionals. All opinions expressed herein are those of the writers alone, and do not represent the official position of the Federal Bar Association, the Immigration Law Section, or any organization with which the writer is associated.

The A.G.'s Certifying of BIA Decisions

By Hon. Jeffery Chase (ret).

The recent flurry of case certifications by Attorney General Jeff Sessions (he has certified four BIA decisions to himself since January) raises the question of the continued appropriateness of the practice. Certification allows a political appointee who heads an enforcement agency, and is subject to the policy agenda of the administration he or she serves, absolute authority to overrule or completely rewrite the decisions of an ostensibly neutral and independent tribunal comprised of judges possessing greater subject matter expertise.

The issue has only become a matter of legitimate concern under the two most recent Republican administrations. In her eight years as Attorney General during the Clinton Administration, Janet Reno decided a total of three cases pursuant to certification. Under the Obama administration, AGs Eric Holder and Loretta Lynch decided a comparable number of cases (four). The number is artificially inflated by the fact that two of those consisted of Holder vacating late-term decisions by his predecessor, Michael Mukasey. In one of the vacated decisions, Mukasey's reasoning had been rejected by five separate U.S. circuit courts of appeal.

In contrast, during the eight year administration of George W. Bush, his three Attorneys General issued 16 precedent decisions through the certification process. Sessions so far seems to be on a similar pace.

One of Bush's AGs, Alberto Gonzales, co-authored an article in 2016 defending the use of certification.[1] As part of his argument, Gonzales traced the history of the practice to the BIA's origins as an advisory-only panel in the Department of Labor in the 1920s and 30s. When the Board was transferred to the Department of Justice in 1940, it was provided only limited decision-making authority, but was required to refer to the AG certain categories of cases, including those "in which a dissent has been recorded" or where "a question of difficulty is involved."

I will add that the early appointees to the BIA were career bureaucrats with no prior expertise or experience in the field of immigration law. To me, such history seems to provide no real justification for the continued practice. The BIA has for decades enjoyed the authority to independently decide a broad class of cases. It's members all come to the Board with far more expertise and experience in the field of immigration law than the AG possesses (although since the 2003 purge by then-AG John Ashcroft, its make-up is far more conservative). Furthermore, whereas in the past, it was the BIA itself, and later, the Commissioner of INS, requesting certification, at present, the AG is handpicking the cases and certifying them to himself, sometimes in order to decide an issue that wasn't part of the decision below.

Law Professor Margaret H. Taylor has noted that the practice of AG certification "might be seen as objectionable because it conflicts with a core value of our legal system: that disputes are resolved by an impartial adjudicator who has no interest in the outcome."[2] Taylor further points out that many such decisions were issued in the final days of an AG's term, meaning that the AG "refers a controversial issue to himself and renders a decision upending agency precedent on his way out the door."[3]

In an article calling for the implementation of procedural safeguards on the AG's certification power, the author accurately notes that the practice of "agency head review" is common and non-controversial.[4] However, Professor Stephen Legomsky has pointed out that the strongest arguments for agency head review - inter-decisional consistency, and agency control (by politically-accountable officials) over policy - don't translate well to the process of deciding asylum applications, for example.[5] This harks back to a point I made in an earlier article - that immigration judges (including BIA Board member) are the only judges in the otherwise enforcement-minded Department of Justice, and that the Department has never really grasped the concept of independent decision-makers existing under its jurisdiction.[6]

Legomsky pointed out in the same article that the BIA, as an appellate authority, "can yield the same consistency as agency head review" through the issuance of en banc decisions, adding that the AG could require the Board to decide certain cases en banc.[7] Interestingly, the BIA has given up the use of en banc decisions in recent years. It has not decided a precedent decision en banc even in cases of major import, or following remands from the AG or circuit courts.

Sessions' use of certification thus far is unique in his redetermination of what the case he chooses is even about. In *Matter of Castro-Tum*,[8] the DHS appealed an immigration judge's decision to administratively close proceedings in which an unaccompanied minor did not appear on the grounds that it had met its burden of establishing proper notice of the hearing on the minor respondent. The BIA actually agreed with DHS and remanded the matter. However, Sessions has now turned the case into a referendum on whether any IJ or the BIA has the legal authority to administratively close any case, an argument that was never raised below. In *Matter of A-B-*,[9] an immigration judge, in defiance of the BIA's order to grant asylum on remand, refused to calendar the case for a hearing for an excessive length of time, and then disobeyed the Board's order by denying asylum again for spurious reasons. Somehow, Sessions decided to certify this case to decide whether anyone seeking asylum based on membership in a particular social group relating to being a victim of private criminal activity merits such relief. His

ultimate decision could curtail asylum eligibility for victims of domestic violence, members of the LGBTQ community, targets of gang violence, and victims of human trafficking.

Furthermore, two of the cases certified by Sessions involve tools of docket management, i.e. administrative closure and continuances. As immigration judges are the only judges within the Department, and as the BIA has set out uniform procedures for the proper use of these tools, how can the AG justify his need to weigh in on these issues, which clearly do not involve the need for intra-department consistency (as no other component of the department employs such tools), or for control by a politically-accountable official to ensure the coherent expression of agency policy?

Once again, the solution is to create an independent, Article I immigration court, allowing IJs to continue to decide cases with fairness and neutrality free from such policy-driven interference.

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Endnotes:

[1]Alberto Gonzales and Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 Iowa L.Rev. 841 (2016).

[2]Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions,* 102 Iowa L. Rev. 18 (2016).

[3]*Id.*

[4]Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766 (2010).

[5]Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stan. L. Rev. 413, 458 (2007).

[6]See Jeffrey S. Chase, *IJs, Tiered Review, and Completion Quotas: Why IJ's Should Not Be Judged on Numbers*, The Green Card, WInter 2018, at 3.

[7]*Id.*

[8]27 I&N Dec. 187 (A.G. 2018).

[9]27 I&N Dec. 227 (A.G. 2018).

Judicial Profile Writers Wanted

The Federal Lawyer is looking to recruit current law clerks, former law clerks, and other attorneys who would be interested in writing a judicial profile of a federal judicial officer in your jurisdiction. A judicial profile is approximately 1,500–2,000 words and is usually accompanied by a formal portrait and, when possible, personal photographs of the judge. Judicial profiles do not follow a standard formula, but each profile usually addresses personal topics such as the judge's reasons for becoming a lawyer, his/her commitment to justice, how he/she has mentored lawyers and law clerks, etc. If you are interested in writing a judicial profile, we would like to hear from you. Please send an email to Zebley Foster, Publications Coordinator, at tfl@fedbar.org.

Part II: EOIR Imposes Completion Quotas on IJs

By Hon. Jeffery Chase (ret).

Ten years ago, the U.S. Court of Appeals for the Third Circuit decided *Hashmi v. Att'y Gen. of the U.S.* [1] The case involved a request to continue a removal proceeding which the Department of Homeland Security did not oppose. The respondent was married to a U.S. citizen; he would become eligible to adjust his status in immigration court once the visa petition she had filed on his behalf was approved by DHS. However, the approval was delayed for reasons beyond the respondent's control. One of those reasons was that a part of the respondent's DHS file was needed by both the office in Cherry Hill, NJ adjudicating the visa petition and the DHS attorney in Newark prosecuting the removal case.

The immigration judge decided that he could wait no longer. Noting that the pendency of the case had exceeded the agency's stated case completion goals, the judge denied the continuance and ordered the respondent deported. The U.S. Court of Appeals for the Third Circuit reversed, holding that "to reach a decision about whether to grant or deny a motion for a continuance based solely on case-completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary."

In response to *Hashmi*, the BIA issued a precedent decision stating that unopposed motions of that type should generally be granted.[2] In subsequent decisions, the BIA provided further guidance in allowing IJs to make reasonable determinations to continue such cases,[3] and to administratively close proceedings where it would further justice (as in *Hashmi*, where the need for the DHS file to be in two places at once was preventing the case from proceeding).[4]

In subjecting immigration judges to strict, metrics-based reviews last week, EOIR's director, James McHenry, may pressure immigration judges into taking the types of actions barred by *Hashmi*. Under the newly-announced metrics, individual judges may run the risk of disciplinary action for granting reasonable requests for continuance, or for other delays necessary for reaching a fair result. The combined actions of McHenry (who prior to being promoted to the position of agency director had worked for EOIR for approximately 6 months as an administrative law judge with OCAHO, the only component of EOIR that doesn't deal with immigration law or the immigration courts), and Attorney General Jeff Sessions in recently certifying four BIA decisions to himself, could erase the above positive case law developments of the past decade, and replace them with an incentive for rushed decisions that do not afford adequate safeguards to non-citizens facing deportation.

Allowing reasonable continuances for the parties to obtain counsel, present evidence, and formulate legal theories, or to allow other agencies to adjudicate applications impacting eligibility, is an essential part of affording justice. Judges also need to fully understand the legal arguments presented. When an issue arises in the course of a hearing, it is not uncommon for a judge to ask the parties for briefs, and for the judge to then conduct his or her own legal research before deciding the matter. A detailed decision is also necessary to allow for meaningful review on appeal. However, all of this takes time, and the performance of individual judges will be found to be unsatisfactory or in need of improvement if they complete less than 700 cases per year, complete less than 95 percent of cases at their first merits hearing, or have 15 percent of their cases remanded on appeal.

Some recently reported actions by immigration judges in the name of expediency are troubling. Last Sunday's episode of *Last Week Tonight with John Oliver* (for which my colleague Carol King and I served as subject-matter sources) featured a credible-fear review hearing by an immigration judge that lasted one minute and 43 seconds in its entirety (and was probably doubled in length by the need for an interpreter). The judge asked the unrepresented respondent a total of two questions before reaching this decision: "Well, the government of the United States doesn't afford you protection for this type of reason. I affirm the Asylum Officer's decision." It's not clear how the judge could have been confident in such conclusion. The respondent was detained and had not yet had an opportunity to consult with counsel. Her claim was only sketched in the broadest outline; upon further development by an attorney, it may well have fallen into the "type of reason" for which asylum may be granted. Her credibility was never doubted; in fact, the program reported that she was assaulted at gunpoint by the man she fled after she was deported to her country.

In another case arising in the *Ninth Circuit, C.J.L.G. v. Sessions*,[5] an immigration judge told the mother of a child in removal proceedings who was unable to retain counsel that she could represent her son, and proceeded with the child's asylum hearing. Of course, the mother was not qualified for the task. Although the son had been threatened with death for resisting gang recruitment efforts, he was denied asylum in a hearing in which many critical questions that could have helped develop a nexus between his fear and a legally protected ground for asylum were never asked. This occurred because the judge did not feel that he could grant another continuance to provide the respondent an additional opportunity to retain counsel.

All of the above-described actions by IJs occurred prior to last week's announcement by the EOIR director. Should judges struggling to meet the benchmarks feel their job security to be at risk, will actions such as those described above become the norm?

As previously mentioned, the Attorney General certified four decisions of the BIA to himself shortly before the director's announcement of the new metrics. In one of those cases, *Matter of E-F-H-L-*,[6] Sessions vacated a 2014 BIA precedent decision requiring immigration judges to provide asylum applicants a full hearing on their claim. In another, *Matter of A-B-*,[7] Sessions chose a case in which the BIA twice reversed an immigration judge's denial of asylum to a victim of domestic violence, and on certification has made the case a referendum on whether victims of private criminal activity may constitute a particular social group for asylum purposes.

Should Sessions decide this issue in the negative, the two decisions taken together may allow for the type of quick denials of the "Government... doesn't afford you protection for this type of reason" variety discussed above. Fair-minded judges who will continue to hold full hearings and consider legal arguments in favor of granting relief may find it more difficult to meet all of the above benchmarks.

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Endnotes:

[1]531 F.3d 256 (3d Cir. 2008).

[2]*Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009).

[3]*See Matter of Rajah*, 25 I&N Dec. 127 (BIA 2009) (concerning continuances due to pending employment-based visa petitions); *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012) (requiring reasonable and realistic continuances to obtain counsel); *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015) (allowing delaying proceedings for adjudication of criminal appeals).

[4]*See Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012); *Matter of W-Y-U-*, 27 I&N Dec. 17 (BIA 2017).

[5]No. 16-73801 (9th Cir. Jan. 29, 2018); Pet. for rehearing and rehearing en banc pending.

[6]27 I&N Dec. 226 (A.G. March 5, 2018).

[7]27 I&N Dec. 227 (A.G. March 7, 2018).

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News Spotlight: DC Leadership Luncheons, Past, Present and Future

The "Leadership Luncheon" series in DC is becoming a time-honored tradition, and it now looks to be expanding to the West Coast, as well. The Green Card caught up with organizers Prakash Khatri and Kelli Duehning to discuss where things have been, and where they are headed.

GC:Prakash, what exactly is the DC "leadership luncheon" series, and how was the idea for it originally conceived?

P:*The "FBA Immigration Leadership Luncheon" series was an idea that I developed which I discussed with Barry Frager and also the DC Chapter leadership. Both thought the luncheons were a great idea and both agreed to support any losses equally.*

GC: Prakash, when, where, and how often do these luncheons take place?

P:*The first luncheon was held at Tony Cheng's Restaurant at Gallery Place in Downtown DC on February 20, 2013. The late Juan Osuna, the Director of EOIR was the first speaker. We have had a total of 43 luncheons since then. We have around nine luncheons per year, on the second Wednesday of each month, excluding May, August and December or January. Over the past five years, we have held luncheons at four different restaurants within the Gallery Place metro location. Currently, the luncheons are held at the Chinatown Garden Restaurant.*

GC: Prakash, what type of speaker is usually featured at the luncheons, and what have been some highlights over the years?

P: *We have limited the speakers to current government leaders and occasionally, recently departed government leaders. The speakers are selected primarily from the agencies that have a nexus to immigration. This includes DHS (including USCIS, ICE, CBP, CRCL), the Department of State, the Department of Justice (including EOIR and OIL) and the Department of Labor. However, we have also invited speakers from the Securities and Exchange Commission to discuss EB-5 visa investigations, and the Internal Revenue Service to discuss international and cross border tax and other issue.*

GC: Prakash, how much does it cost for FBA/ILS members, and how do they sign up?

P: *For the first 50 FBA members who are either Immigration Law Section members or DC Chapter members, the luncheon is free. All others pay between $12 and $40. The sign up is currently through a DC Chapter Eventbrite site. The luncheon invitations are circulated to all ILS and DC Chapter members and the FBA weekly news Bulletin.*

GC: Prakash, how many people typically attend these luncheons?

P:*We generally have between forty five and seventy registered attendees each month. However, we have had as many as 100+ attendees.*

GC: Kelli, when was the decision made to expand the luncheons to the Bay area, and when can we expect to see them?

K: *As the west coast continues to be a "hot bed" for immigration issues, we thought it would be a great time to expand the speaker series to the bay area. Furthermore, the bay area has a very strong network of federal government leaders. Therefore, a wonderful place for high level department heads outside of the DC area to speak about what is happening in their agencies. We are hoping to get the speaker series started this summer – June or July 2018.*

GC: Kelli, what type of speakers will you be featuring in San Francisco?

K: *We would like top officials from various DHS agencies (USCIS, ICE, CBP) as well as DOS (Passport office), DOL (Wage and Hour division), and even top officials from the state of CA (perhaps AG Becerra or head of CA Consumer protection bureau). Those are just some of the ideas.*

GC: Kelli, will the San Francisco/Bay area luncheons also be free for ILS members?

K: *We are doing our best to keep the price very low. But prices in the bay area are a bit of a challenge and therefore, we are doing our best to keep the cost reasonable. If any law firms or organizations are interested in providing sponsorship to keep the prices low, we are happy to work with them.*

GC: Kelli, where can ILS members watch to see more information about the West Coast luncheons?

K: *For sure through the FBA ILS and the FBA ND CA chapter announcement. The FBA ND CA chapter sends out an email each month to its members. So, we would email through those channels Also we will be sending direct email to potential sponsors and to our government contacts in the area who might want to speak and attend.*

GC: Prakash, is any ILS member invited to a luncheon, or does the attendee have to be a member of the requisite local chapter?

P: *All ILS members are invited to attend the luncheon. The speakers are generally from the headquarters offices of the respective agencies.*

GC: Prakash, in your opinion, what are some of the biggest benefits these luncheons have afforded to ILS members?

P: *All of our luncheons are billed as "not for attribution" (off the record) which has allowed for more candid discussions of current immigration issues with speakers and among attendees. Also, over 30% of the attendees are government lawyers and some current and former immigration judges. I believe that the interactions of the private bar with government lawyers and judges on a monthly basis on the topic of immigration helps each to understand and resolve complex issues. Everyone benefits from the sharing of experiences.*

ILS members benefit from the unique opportunity that FBA members have to interact with fellow members that belong to all three branches of government and the private bar.

Many of the speakers are renowned experts or decision makers on major immigration policies and it benefits the members when they can share their expertise in an informal non-publicized event.

Chair Report on the FBA's Annual Mid-Year Meeting
By Elizabeth (Betty) Stevens

On Saturday,March 24, the FBA held its annual mid-year meeting, During this full-day meeting in Pentagon City, FBA members got a chance to renew old acquaintances in other sections, divisions, and chapters, and in general meet those who will be guiding the FBA through the upcoming year. It is an excellent introduction to the way the FBA works - and to those who make it work. In the morning, after a very interesting keynote presentation by Nora Riva Bergman (Author of "Real Life Practice") on 50 steps to improve your time management, marketing, and leadership skills, Betty Stevens and Mark Shmueli headed off to the Sections and Divisions meeting. During that session, almost all of the Section and Division leaders expressed dissatisfaction with one part or another upon learning of the finalization of National policy 9-3 (limiting terms and future voting rights of officers), but were also provided with the newly-approved form and process to request a waiver of that policy where such a waiver is necessary to the continued health of the section or division.

After the Sections and Divisions meeting, all headed back to the main ballroom, where we were present for a live podcast recording on the State of Federal Judicial Nominations, a conversation about the judicial nominations and process during the first year of the Trump presidency. The two speakers were John Malcolm (Vice President, Institute for Constitutional Government, Director of the Meese Center for Legal & Judicial Studies; Senior Fellow, Heritage Foundation) and Elizabeth Wydra (President, Constitutional Accountability Center). The podcast was moderated by Jeffrey Rosen of the National Constitution Center. During the luncheon, Ira Shapiro,, author of "Broken: Can the Senate Save Itself and the Country", provided his views of Senate functionality and dysfunction.

In the afternoon, the National Council was called to order. This is a formal business meeting, with reports from the leadership, the Foundation, and the much-looked forward to and always entertaining reports from Stacy King, Executive Director, and Jonathan Hafen, Chair of the Membership Committee. One person from each Section, Division, or Chapter has voting authority for the meeting. The Council engaged in significant discussion on a motion to reconsider the yearly six-dollar-per-member administrative fee charged to each section and division; that motion was ultimately denied. The meeting ended with a rousing video put together by the New York City chapters to encourage all to come to New York for the FBA National Conference and Meeting in September.

Correction:

Correction: the Fall 2017 Green Card featured an article by Raquel L. Muscioni. It is correctly spelled "Musconi."

New York Law School Hosts Successful ILS Asylum Conference

On February 23, 2018, the New York Immigration and Asylum Conference was held at New York Law School (NYLS). This was the third consecutive year for this conference, and the second time it was presented in partnership with NYLS. Though other topics were discussed, the main focus of this wonderful educational event was asylum law. This year's conference had more than 350 attendees, and was the most successful so far.

The conference was organized concurrently by NYLS professors Lenni Benson and Claire Thomas, and Judges Amiena Khan and Dorothy Harbeck, acting in their outreach capacity for the National Association of Immigration Judges.

Conference organizers and participants celebrate after a great success. From left to right: Professor Claire Thomas, Judge Amiena Khan, Judge Dorothy Harbeck, Professor Lenni Benson, and ILS Chair Betty Stevens

The day long program was organized into three separate tracks: Basic/Diversity/Ethics, Special Issues, and Advanced Asylum. The speakers included scholars from the NGO world— Alice Farmer from UNHCR, Elizabeth Frankel from The Young Center, Kerry Neal from UNICEF, Anwen Hughes firm Human Rights First, Desiree Hernandez from Safe Passage Project, Raquiba Huq from New Jersey Legal Services, Heather Axford from Central American Legal Assistance, Jodi Ziesemer from Catholic Charities and Hasan Shafiqullah from Legal Aid Society. Many professors (full time and adjunct), in addition to Professors Benson and Thomas, presented or moderated panels—Sabi Ardalan, Lori Nessel, Rebecca Feldman, Dree Collopy, and Steven Shulman.

FBA-ILS Chair Betty Stevens was in attendance and gave closing remarks. Board member Mark Shmueli also moderated a panel regarding the intersection between temporary permissions such as DACA and TPS with US employment law. Best practices for interviewing clients who have experienced trauma was discussed by Andy Izenson and Geoff Kagan-Trenchard. The wonderful retired immigration judge, professor and past president of NAIJ, John Gossart, spoke on the panel with Helen Parsonage and Raymond Lahoud regarding statutory Bars to Asylum.

There was a very strong presence from the New Jersey bar with Lauren Anselowitz, Melinda Basaran and former immigration judge Susan Roy all presenting on panels. New York lawyers Linda Kenepaske, Usman Ahmad, Venus Bermudez and Lewis Tessler all returned from prior years to present on timely topics. There was also a strong presence from both the New York and Newark Asylum Offices, with officers Brooke Kelly, Marcia Lopes, Mia Psorn and Jennifer Kim all on a panel on best practices before the Asylum office.

Newcomers Sam Chow, Neha Kala gave excellent presentations. Noted immigration law columnists Dr. Alicia Triche and Jeffrey Chase also lent their knowledge, wit and wisdom. The ubiquitous law professor, former immigration judge, former BIA chair and blog writer Paul Schmidt was also ubiquitous at the conference. He presented a plenary session, contributed on a panel about Motions to Reopen. Finally, Judge Schmidt did a wonderful role play in a demonstration on direct and cross of expert witnesses with the always brilliant and entertaining Helen Parsonage, Murat Berdeyev and Michele Gonzalez. Retired Assistant Immigration Judge Robert Weisel also appeared as a moderator. The conference partnership between ILS and NYLS has been symbiotic and just terrific. We are already planning the fourth annual conference!!!

NYLS Asylum 2018: A Photo Album


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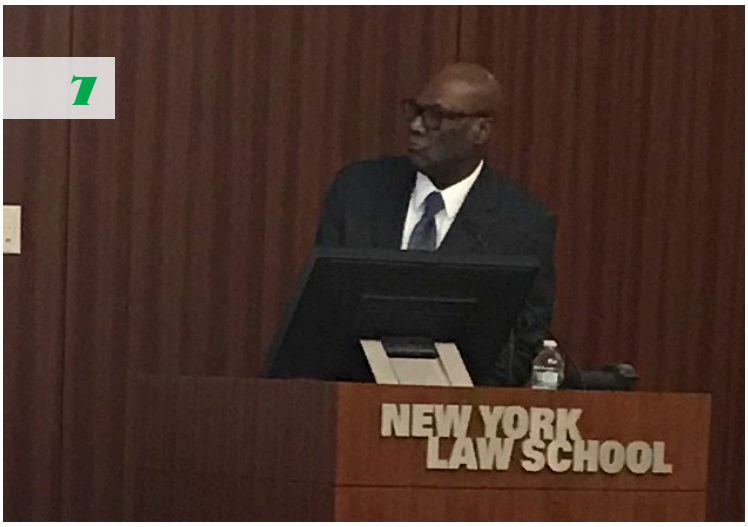

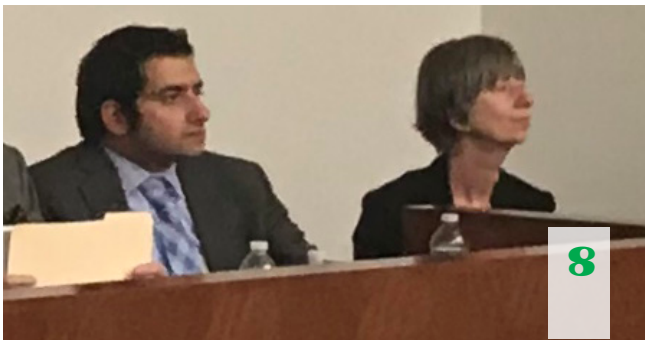

1. Dr. Alicia Triche and Hon. Jeff Chase (ret.), kickin' it after the morning plenary.
2. Dree Collopy (AILA) and Prof. Sabi Ardalan (Harvard) presenting a panel
3. Murat Berdyev of Berdyev Law (NJ) presents at a panel on nexus.
4. Long-time FBA Governing Board member Amy Gell enjoys the conference in her native habitat.
5. Judge Harbeck and Raquiba Huq (NJ Legal Services) enjoying the conference.
6. Dr. Alicia Triche and Judge Paul Schmidt (ret.), in late afternoon and looking ready for dinner.
7. Prof. Jojo Annobil (NYU, Immigrant Justice Corps) speaks to a packed audience.
8. Helen Parsonage and Raymond Lahoud present a panel.
9. Joyce Phipps and a collague enjoy the panels

(Re)Learn "Divisibility" in Five Easy Steps
By Alicia J. Triche

In the past few months, it has become apparent to me that, despite recurring guidance from the Supremes, the "Categorical Approach" remains an enigma to many of those who are inflicted with its application. This column is meant to de-mystify the process once and for all. Take comfort: it's NOT as hard as it seems; the problem is mostly that the methodology has been steadily evolving over time, creating a convoluted past, on the way to the present.

PRELUDE: Read This to Get Started.

If you're looking for introductions, after reading this column, I suggest (in this order):

Descamps v. United States, 570 U.S. 254 (2013);

Mathis v. United States, 136 S.Ct. 2243 (2016);

Kathy Brady, *How to Use the Categorical Approach Now* (April 2017) .[1]

Finally, if you find yourself reading *Chairez-Castrejon*, keep in mind that there are FIVE of them, and the first two are largely outdated.[2] Now—let's get to the steps.

STEP ONE. Understand--TRULY Understand-- "Element" Versus Means.

Perhaps the biggest challenge remaining with the implementation of the categorical approach is that some still apply that old "Step 3" of *Silva-Trevino I*, where the Judge looks to determine the facts underlying a state criminal conviction. Outside of the CIMT context, this was approach was personified in *Matter of Lanferman*,[3] which is also now defunct. Let me be crystal clear. SILVA-TREVINO I HAS BEEN VACATED IN ITS ENTIRETY.[4] At current law, within the categorical approach, there is no instance where the "means" or "brute facts" can be considered.[5] Every time, the elements must be utilized instead. But do this, one must truly understand what an "element" is.

In *Mathis v. United States*, Justice Kagan issued instructions on how to find the "elements" in a statute. 136 S.Ct. 2243 (2016). ""Elements" are the "constituent parts of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." *Id.* at 2248. "At a trial, they are what a jury must find beyond a reasonable doubt to convict the defendant." *Id.*. By contrast, facts, also called "brute facts" or "means", are the various theoretical ways in which a required element can be satisfied. *See id.*.

Here are two easy examples. If someone is convicted of simple assault, and the statute is silent as to who must be the victim, an IJ cannot "look beyond" the statutory definition to determine that a domestic violence CIMT occurred. In that example, domestic violence was the means, the "facts" of the case.[6] As a second easy example—if a law outlaws possession of a "gun", phrased that way, (like Texas)--then the "element" is "gun". Even it the indictment charges a specific firearm, the law merely requires "gun" to be proved. And, for that specific statute, an IJ cannot consider whether that "gun" was actually a "firearm" under the INA. The *type* of gun used was a means, not an element.

STEP TWO: Use the Judgment to Find Your Starting Statutory Language.

When faced with the Categorical Approach, the task at hand is always going to be to find the part of the statute that applies to the respondent's conviction, find the elements that language creates, and then compare with the federal definition. And your starting point is the Judgement itself. Before thinking about confusing terms such as "divisibility" and "overbroad", first take a look at which statutory violation the judgment necessarily proves, numerically speaking, and start from there. For Step One, you need the actual Judgment, or at least the minutes of said judgment, reflecting the statutory provision under which the state court actually recorded the conviction.

Let's make a hypothetical example, using Tennessee burglary. Here is the full definition under the statute:

T. C. A. § 39-14-402
§ 39-14-402. Burglary

(a) A person commits burglary who, without the effective consent of the property owner:

(1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;

(2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;

(3) Enters a building and commits or attempts to commit a felony, theft or assault; or

(4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault. (Westlaw 2018).

Your starting point is however much the Judgement pares it down. The easiest scenario here is that the Judgment will reference a specific subsection—such as (a)(1). If that is the case, then you use (a)(1) alone for the next step. In that case, the Judgement has TOLD you that the statute is, as it appears to be, "divisible" into four offenses. But you now must look into whether those sub-offenses are *further* divisible, and also whether they are overbroad. Keep reading.

STEP THREE: USE the Language of the Statute FROM THE JUDGMENT, and Compare it to the Federal standard. Is it Easily Resolved, or is it "Overbroad"?

How to Start.

Let's assume you've got a Tennessee judgment under § 39-14-402(a)(1):

(a) A person commits burglary who, without the effective consent of the property owner:

(1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault; …

The allegation on the NTA is that the conviction is a CIMT, and DHS seeks to provide the "Affidavit of Complaint" (not the same as the Indictment), to prove a theft occurred in this case. What happens next? This is the part of the assessment where you apply the steps that are commonly discussed in divisibility jurisprudence. In the midst of a major decision on burden of proof, the Sixth Circuit just overviewed this methodology, in a lucid approach. *Guiterrez v. Sessions*, ____ F.3d ____ (6th Cir. 2018), *slip op.*, http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0073p-06.pdf at 5–6.[7] In the vernacular, those three common analysis points are: is the statute overbroad? Is the statute divisible? If the statute is divisible, was the respondent convicted under a "bad" section?

Is it Always a Removable Offense, Is it Never a Removable Offense, or is it (Gasp) Overbroad?

This is the part where you compare section (a)(1) to existing federal immigration law. You will see that section (a)(1) references a theft, an assault, and "a felony". Before you worry about whether or not these are divisible elements, can you successfully argue that ALL of these are CIMTs? Can you successfully argue that NONE of them are? If so, the question is resolved, and no one has to worry about going into state law or divisibility. But, more often, you will find the statute is overbroad. "Overbroad" means that the state offense is bigger—some elements match the federal definition or standard, and others do not.

We are dealing here with an underlying theft, assault or felony. In this case, if a Judge determines (quite reasonably, in my opinion), that, of those three, only the "theft" would be a CIMT, then you are on to the next question. Because then, you have some violations of the statute that are CIMTs (theft) and some that are not (assault, any "felony"). That is "overbroad".

Note well—to make this determination, the comparison is not the "theft" committed by the respondent, but the theft as defined by Tennessee law. So, even though you might not be going into "divisibility" per se, you are going to be looking at Tennessee case law, and some of that is also going to be relevant to divisibility—your next step.

STEP FOUR: If the Applicable Statutory Language is Overbroad, Should it be Deemed "Divisible" and Broken Down Further?

At this point, remember your "elements". If real estate is "location, location, location," categorical approach is "elements, elements, elements". Where this gets complicated is that, sometimes, state law provides a jury doesn't have to choose among two or more alternatives, and so an "element" itself is overbroad. For example, in *Chairez V*, 12 members of a jury could convict if all of them agreed on the "intentional, knowing or reckless" discharge of a firearm. *Matter of Chairez-Castrejon*, 27 I&N Dec. 21, 22 (BIA 2017). That means the jury did not have to pick. 3 could think intentional; 9 could think knowing; or any combination of these, so long as all 12 agree that ONE of the three mental states occurred. In our hypothetical, the question is, for Tennessee burglary to occur under section (a)(1), do all 12 jury members have to agree on what the perpetrator meant to do inside? Or can some think theft, some assault, etc?

Remember, also that "divisible" is a mutli-faceted concept. We already know from the Judgement alone that section (a) was easily divisible into (4) enumerated alternatives. Now, we have to learn if (a)(1) is *further* divisible. In the case law, "divisible" means that what might look like one section (here, (a)(1)), could actually be charged as several different crimes. A prosecutor might well have to pick theft, assault or felony, and charge the crime that way, even though in the statute it looks like just one phrase. Here is how the BIA describes it in *Chairez I*, interpreting *Descamps*:

The Supreme Court explained … that a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discreet offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements", more than one combination of which could support a conviction, and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard.

Chairez I, 26 I&N Dec. at 353.

In our theoretical case, OPLA has presented an Affidavit of Complaint that alleges in this particular case, the respondent entered a commercial site with the intent to steal copper pipes. Is that enough to prove the statute is "divisible"? The answer is NO. This is a complicated concept in the case law—what authority can be used to show what the elements are?? In *Mathis* and *Chairez IV*, the BIA and Justice Kagan gave some finality to this methodology. Be careful with *Chairez I and II*, and any pre-Mathis case, because there was a time when some courts did not allow consideration of documents outside of the record of conviction to determine whether a statute is "divisible". That is no longer the case. Now, the following authority can (and SHOULD) be consulted to determine the "elements" of a state statute:

- State pattern jury instructions;
- State case law;
- The indictment and other *Shepherd* documents, to the extent they answer the question of what elements are part of the statute.

Be careful with using indictments in this context. An indictment will often charge a specific fact in order to satisfy an element. For example, had there been an indictment in our theoretical case, it might have alleged that respondent stole cocaine from a dwelling. That would NOT mean he was convicted of a drug offense. The "element" is "theft"—which is assessed under the minimum conduct for a theft in Tennessee law, and not by what the respondent actually did in this

particular instance.

At this stage of the analysis, all available information must be considered to determine whether "theft, felony or assault" is describing one big "element" that can be presented to the jury that way, without them having to pick one of the three. (Another full disclosure: I have argued that Tennessee case law does tend to indicate this, citing *State v. Ralph*, 6 S.W.3d 251, 255 (Tenn. 1999).) This is a difficult part of the path, because sometimes you will not have more than what state law "tends to indicate" at any given time. In some cases, I have gone so far as to interview prosecutors and ask them how they would charge a given crime. If, in our hypothetical case, an indictment *did* exist, and it charged "felony, theft, or assault", in those words—then, combined with case law tending to indicate the element was one big thing, you would have a very sound argument that the element is NOT "divisible", and so the statute is not a removable offense.

At this stage, your authority might not give a perfect answer. There have been instances where I looked at literally every Texas case citing the statute at hand, and still found nothing. In those instances, you take everything relevant, and make your best argument. (Or, judgment, if you're a judge.)

STEP FIVE: If the Statute is Divisible, Use All Reasonably Available Shepherd Documents to See Which Part of it Applies to the Respondent's Conviction.

If you get to Step Five, congratulations---you are now using the "modified categorical approach." This is the part where "Shepherd documents" come in. In *Shepard v. United State*s, 544 U.S. 13 (2, 20005), the Supreme Court enumerated the documentation of guilty plea that may be used in a categorical analysis: "[T]he statement of factual basis for the charge, Fed. Rule Crim. Proc. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or …a record of comparable findings of fact adopted by the defendant upon entering the plea." *Id.*.

In our hypothetical, say the Judge is NOT convinced that "theft, felony or assault" is all one element, but that they are instead three alternative crimes that must be charged specifically. In other words—she has found the offense is divisible. In that case, you would look to the Tennessee *Shepherd* documents to determine whether the respondent was convicted of burglary with theft, burglary with felony, or burglary with assault. A shrewd lawyer would argue that an "Affidavit of Complaint" is NOT a Shepherd document unless it is specifically incorporated into a plea agreement or a transcript of a guilty plea as the basis for a charge. Only documents that meet the Shepherd standard can be used in the modified categorical approach.

Again and again, the question is NOT what the respondent actually did. It is which section of Tennessee law was violated. If the Respondent had, for example, intended to commit an "assault", and the Shepherd documents revealed the intended victim was a wife, that would NOT make respondent guilty of a CIMT. It would only be presumed that respondent committed "assault" as defined by Tennessee law in the burglary statute—and the minimum conduct, at that. Using the modified categorical approach does not mean that the underlying facts of the crime can be considered.

POSTLUDE: Get to the End, Then Rest.

In our hypothetical case, say the only two documents in the record were a Tennessee affidavit of complaint and the Judgement referencing (a)(1). If the Judge ruled the statute was non-divisible (because a jury did not have to pick theft, assault or felony), then the respondent would not be deportable or inadmissible for a CIMT. And, also, if the Judge ruled the statute WAS divisible, then, since the Affidavit of Complaint is not a *Shepherd* document, the Respondent would not be deportable/inadmissible, because the burden of proof would not be met.

A side note—in our hypothetical, according to the *Gutierrez* decision, the respondent would still be ineligible for relief. *Gutierrez* ruled that, when the Shepherd record of conviction is inconclusive, an alien has not met their burden of proof for relief--even though they might not be removable on the opposite side of the coin. *Gutierrez v. Sessions*, *supra., slip op*. at 12. This question is technically under a Circuit split—the First Circuit cuts for the alien with an ambiguous record, most other circuits say no relief, and the Ninth has just taken the issue under reconsideration. That, however, is a discussion for another day. In general, at the conclusion of a lengthy analysis under the categorical approach, the right thing to do is take a break.

Endnotes:

[1]https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_april_2017.pdf (accessed Apr. 18, 2018).

[2]The first is Matter of *Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014) [*Chairez I*]; the last is *Matter of Chairez-Castrejon*, 27 I&N Dec. 21 (BIA 2017) [*Chairez* V].

[3]25 I&N Dec. 721 (BIA 2012), *withdrawn, Chairez I* at 356.

[4]*Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *see also Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014).

[5]I do not here address instances where the facts of the criminal case are part of the removal grounds, such as the $10,000 loss requirement at INA § 101(a)(43)(M). *See Nijhawan v. Holder*, 557 U.S. 29 (2009).

[6]The categorical approach fully applies in a CIMT analysis. *Matter of Wu*, 27 I&N Dec. 8, 9 (BIA 2017). But note that this example applies only to a state "simple assault" statute that is being examined for moral turpitude. If your statute is being analyzed as a crime of "domestic violence" under INA § 237(a)(2)(E)(i), the BIA and some circuits will still apply a factual, Nijhawan style enquiry as to whether the victim was in a protected class. See *Matter of Estrada,* 26 I&N Dec. 749 (BIA 2016); *Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010). Thanks to Maria Baldini-Poterman for this important distinction.

[7](Full disclosure: I litigated this case in the Sixth, and the litigation on the main issue, burden of proof for relief on an ambiguous criminal record, remains ongoing—which we will reference at the end of this column. This commentary does not purport to delve into ongoing contested issues in this litigation.)

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