The Green Card

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

Hon. Robin E. Feder, Section Chair

Quote of the Month

"Change is the law of life. And those who look only to the past or present are certain to miss the future."

— John F. Kennedy

From the Chair

Dear Immigration Law Section Members:

As I sit down to write this message from the Federal Bar Association's 2014 Annual Meeting and Convention in beautiful Providence, Rhode Island, I feel fortunate to be assuming leadership of the Immigration Law Section when it is flush with success. At the Annual Awards Luncheon, I, along with four distinguished Board members (see photo), Hon. Mimi Tsankov (ILS Treasurer and Colorado Chapter President), Margaret (Peggy) McCormick (ILS Secretary, Chicago Chapter President and Rome CLE Coordinator), Prakash Khatri, (ILS DC Leadership Luncheons Chair) and Mark Shmueli (ILS Chapter/Section Liaison), accepted the Meritorious Newsletter Award for the Green Card, on behalf of Hon. Larry Burman, former ILS Section Chair, and Editor of the Green Card.

2014 FBA Awards Luncheon: From Left to Right, ILS Secretary Peggy McCormick, ILS Chair Robin E. Feder, ILS Treasurer Mimi Tsankov, ILS DC Leadership Luncheons Chair Prakash Khatri; Not Pictured: Mark Shmueli (ILS Chapter/Section Liaison).

This is my fifth FBA Annual Meeting and Convention, and even though I did not have to travel far (Providence is just one hour from Boston - give or take three hours, depending on traffic), this year's Convention is special. Providence looks great, and as a former RI Chapter President, I had the honor of being a Torchbearer in the internationally acclaimed "Waterfire" (see photos). My daughters, who have been going to Waterfire every summer since childhood, were duly impressed with my torchbearing, and they do not impress easily. I had the good fortune to meet with

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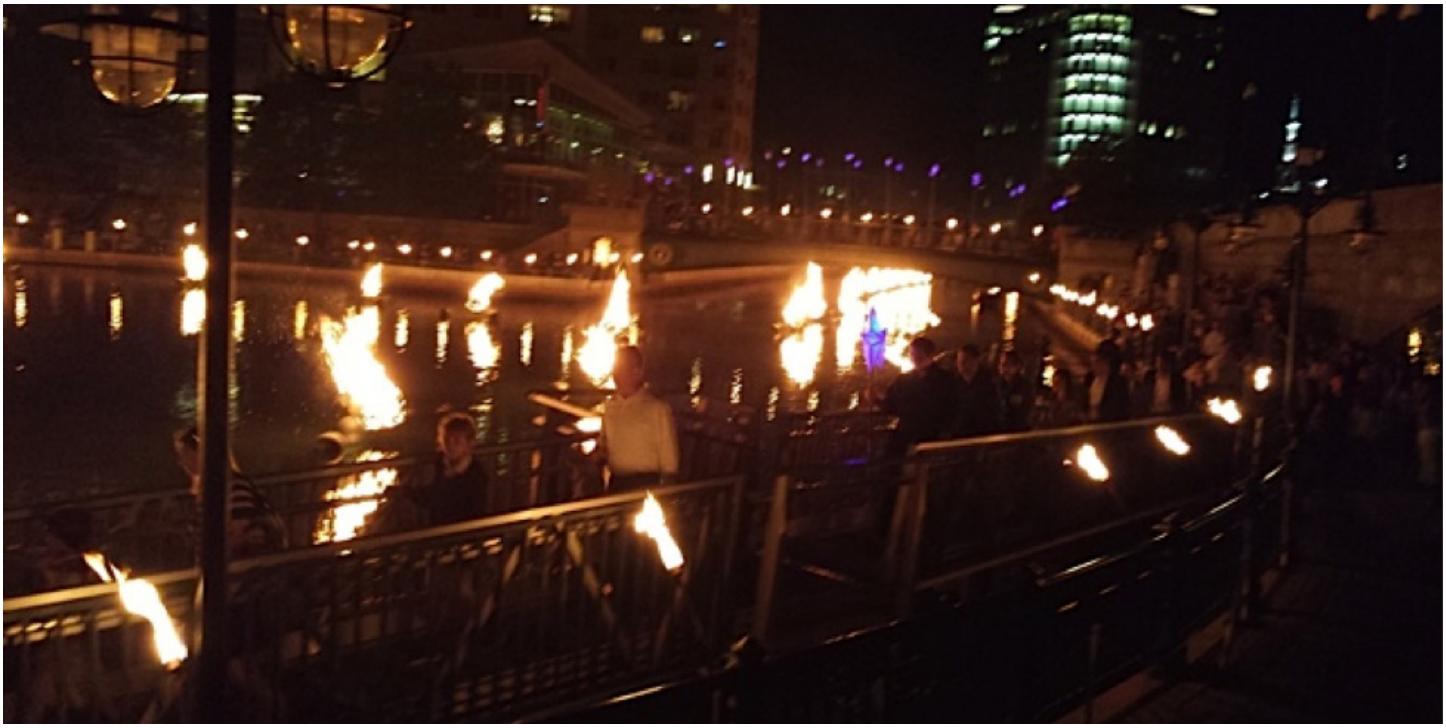

2014 FBA Convention: WaterFire

and thank three National Presidents for their unwavering support throughout my tenure with the FBA: Immediate Past National President District Judge Gustavo Gelpí, Past National President Jim Richardson and our new National President, Matthew Moreland. The Convention is also memorable as I was introduced to one of our newest Board members, Kara Van de Carr, recipient of the 2014 FBA Sarah T. Hughes Civil Rights Award, one of the Federal Bar Association's highest honors.

In addition to our award-winning newsletter, the ILS held a record number of CLE Programs and Leadership Luncheons, all of which were well received. In February, we held a full day Asylum Symposium in Washington, D.C., in conjunction with American University. It was organized and run by ILS Chapter/Section Liaison Mark Shmueli. Presentations from the UN Special Rapporteur on Torture, Juan Mendez, Dean Claudio Grossman, Chair of the United Nations Committee against Torture, and nine immigration judges were among the Program's highlights. The symposium also featured three law school immigration clinic directors, representatives from ICE, OIL, and CIS, and panelists from the private bar. It was so well attended that the ILS DC/AU Symposium will return in 2015. Stay tuned for details on dates and themes.

Our Flagship CLE Seminar and Annual Meeting in Memphis this past May, organized and run, as always, by Past ILS Chair Barry Frager, proved more popular than ever. There were 6 tracks over two days covering every conceivable topic of interest to our members and with the equivalent of rock star speakers: Deborah Anker, Charles Foster, Ira Kurzban, Karen Musalo, Charlie Oppenheim, Margaret Stock, and Paul Virtue, among others. Despite serious discussions about relocating our Annual CLE to another city, the clamor to return to Memphis has been deafening. Barry is still working out the details, but he hopes to bring you all back to "Memphis in May" in 2015.

It is no surprise that our Third Annual "Citizenship in a Global Era" CLE Conference in Rome, Italy, organized and run by ILS Secretary Peggy McCormick, was another big hit. The sessions included a Report from the Ukraine, and Reports from the Secession movements in Scotland, Catalonia and Padania, a look at the "sale of citizenship" in Malta and another look at Citizenship for Military Service in the US. (MANVI). Also addressed were border issues in the United States (unaccompanied minors) and Italy (Lampedusa) and finally, a Report from Silicon Valley and the Rise of the "Elite" Citizen. The Rome Program culminated with a reception honoring Cecile Kyenge, former Italian Minister of Integration, with our first Global Citizen award.

The monthly DC Leadership Luncheons, conceived and organized by Board Member Prakash Khatri, are another feather in the ILS cap and a superb example of how Sections and Chapters alike benefit from collaborations. Every luncheon, co-sponsored by the FBA/DC Chapter, was memorable and ultimately drew increasing numbers of Government and private sector lawyers such that spin-offs are already being planned for Chicago and contemplated in other cities. Our speakers have included government leaders involved in the field of immigration law and related fields. The Section has partnered with the FBA's Tax Law and Securities Law Sections at some of the luncheons. Future plans include partnerships with other FBA Sections and Chapters. Last year we continued to host the most prominent leaders from DOJ, DOS, DHS, the IRS and the SEC. Our new year kicked off with Brian Hunt, DOS, Deputy Chief, Advisory Opinions, Visa Office,

Bureau of Consular Affairs in October.

We complemented this quality programming with the already-mentioned award winning Green Card, as well as outstanding articles in the Federal Lawyer, edited by ILS Publications Vice Chair, Dr. Alicia Triche. If you have not yet read the articles on the wide range of topics in the Federal Lawyer's Immigration Law Issue (October/November 2014), I encourage you to do so. You will find "Modern Surge, Historic Response: Factors to Consider in the Assessment of Mexican and Central American Refugee Claims," by Dr. Triche, "Immigration Options for Undocumented Children: Moving from Technical Solutions to Adaptive Change," by ILS Programs Chair Christine Poarch, "Antigone, Identity, Assimilation and the Salad Bowl," by ILS Board Member, Hon. Dorothy Harbeck, and "Domestic Violence and the Plight of the Unauthorized Migrant," by ILS Treasurer, Hon. Mimi Tsankov. Each of these articles is timely, thought-provoking and scholarly. You will also find great articles on the benefits of ILS membership for U.S. Government attorneys, by ILS Board Member Elizabeth (Betty) Stevens and a discussion of "crimmigration," the place where criminal law and immigration law meet, by Immediate Past Section Chair Ray Fasano. If you do not still have the print issue of the Federal Lawyer, the articles are available online: http://www.fedbar.org/Publications/The-Federal-Lawyer.aspx. On October 20, 2014, we presented our First ILS Webinar. The topic is the widely discussed Immigration Consequences of Criminal Convictions and is presented by the Hon. Mimi Tsankov.

The credit for these successes belongs to the hard work and dedication of Past Section Chairs Barry Frager, Hon. Larry Burman and Ray Fasano, as well as each and every one of our Board members, for whom the ILS is a labor of love. We have among the best and the brightest in the field on the Section's Board. I am particularly pleased to welcome the new members of our Board: Prof. Deborah Anker, Diana Vogel Arnell (CIS), Prof. Richard Boswell, Hon. Irene Feldman, Hon. Madeline Garcia, Regina Germain (DHS), Hon. Jennie Giambastiani, Derek Julius (OIL), Kristen Kimmelman (FBA Board of Directors), Prof. Karen Musalo, Lt. Col. Margaret Stock, Hon. Ashley Tabbador, Robin Trangsrud, Kara Van de Carr, Prof. Amelia Wilson, Hon. Earle Wilson, and Christine Young (CSI). They reflect the increasing diversity of the Section – and not just the Board. As our programming grows, we appeal to academia, the private sector, the public interest sector, government attorneys and judges in unprecedented numbers.

It would be easy enough to coast through the coming year by repeating our past successes. However, that is not the best that we could do for you, our members. We have so much talent, creativity and energy on the Board and in our membership, that it would be a form of "crimmigration" to not put these assets to use.** As the prescient 19th Century Quaker William Pollard stated, "learning and innovation go hand in hand. The arrogance of success is to think that what you did yesterday will be sufficient for tomorrow. " With this in mind, and in order to continue to offer affordable, high quality programming, publications and scholarship to our growing membership, most of our work will be done in our ably-led Committees this year. This will allow us to conduct the Section's business in a more efficient and transparent fashion. I will meet with the Committee Chairs on a regular basis; the Board will meet quarterly, giving Board members time to focus on programming and publishing. These changes will challenge our thinking on how we come together to resolve issues and tackle new programs and opportunities, but we will have positioned ourselves to accomplish so much more. For the first time, we have added Committees devoted to pro bono representation, law student divisions and mentoring, membership, young(er) lawyers and a Committee devoted to connecting with and supporting the FBA's Chapters and other Sections. We are also building leadership ladders for the Board and at the Committee level as well.

Following is a list of the Committees that support the Section and their Chairs: Budget (ILS Treasurer Hon. Mimi Tsankov), Bylaws (Hon. Dorothy Harbeck), Chapter and Section Liaison (Mark Shmueli), Communications (Secretary Peggy McCormick), Diversity (Tina Goel), Government Relations Liaison (Vice Chair Eileen Scofield), Law Student Division/Mentoring (Prof. Deborah Anker), Membership (Derek Julius), Publications (Hon. Larry Burman), Pro Bono Liaison (Kate Metcalf), Programming (Christine Poarch - includes the following: Chicago Worksite CLE (Peggy McCormick), Chicago Leadership Luncheons (Peggy McCormick), Memphis CLE (Past Section Chair Barry Frager), New York CLE (Amy Gell), DC Leadership Luncheons (Prakash Khatri), DC ILS/AU Symposium CLE (Mark Shmueli), Social Media (TBD), Special Projects (TBD), Substantive Law (TBD), Young Lawyers Division (Robin Trangsrud). ***

Now it is your turn. Our increasingly high-profile programming and publications call out for active membership. This need dovetails nicely with what the FBA does best, "*promoting the welfare, interests, education and professional development of attorneys involved in federal law,*" as well as the mission of our Section, to "promote and support the successful practice, constructive discussion, and continued development of immigration law." Therefore, I encourage each of the Section members to participate more directly. Volunteer for a Committee. Write an article or news item. Suggest an author or topic. This year, we are exploring a partnership with the El Paso Chapter on its Border Law Conference and

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From the Editor

Please send all news items to me at LBurman@aol.com. We really want to know what is happening in the Section, and in the professional lives of our members. We especially would appreciate photographs. Kindly send submissions in Word format.

Larry Burman, editor

Section news

ROME, ITALY: The Immigration Law Section and the Chicago Chapter of the Federal Bar Association, together with the Arthur and Toni Rembe Rock Center for Corporate Governance, Stanford Law School and the John Felice Rome Center and PROLAW, sponsored the third annual Citizenship in a Global Era Conference in Rome, Italy on Sept. 23, 2014. See article.

SAN FRANCISCO, CA: The National Association of Immigration Judges (NAIJ) has established an informative website. Check it out at www.NAIJ-USA.org.

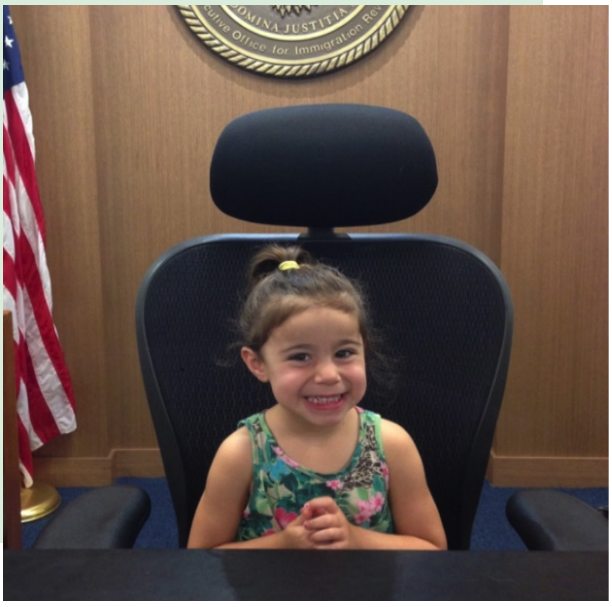
RICHMOND, VA: On Sept. 12, 2014, Virginia Governor Hon. Terry McAuliffe appointed Section Board Member Christine Lockhart Poarch to Virginia's Latino Advisory Board. The Board is tasked with advising the Governor regarding the development of economic, professional, cultural and educational links between the Commonwealth of Virginia and the Latino Community and Latin America. Comprised of 21 members, the Board will undertake studies, symposiums, research, and factual reports to gather information to formulate and present recommendations to the Governor relative to issues of concern and importance to the Latino community. It will also advise the Governor as needed regarding statutory, regulatory, or policy issues that are of importance to the Latino community in the Commonwealth. ILS congratulates Ms. Poarch on this prestigious appointment.

WASHINGTON, DC: The ILS welcomes Regina Germain as one of our newest Board Members. Ms. Germain has been recognized as one of the "25 Top Legal Minds in the Country" regarding immigration and asylum law. She is the original author of AILA's "Asylum Primer: A Practical Guide to US Asylum Law and Procedure," and she holds a wide range of legal experience, including former advisory counsel to the UNHCR in Washington, DC, and visitng adjunct immigration law professor at the University of Denver Sturm College of Law. Currently, Gina serves in the headquarters of the Asylum Division of the Department of Homeland Security.

LOS ANGELES, CA: The AP reported that Immigration Judge A. Ashley Tabaddor of Los Angeles "has sued the Justice Department, alleging that an order recusing her from hearing the cases of Iranian immigrants because of her involvement in the Iranian-American community is discriminatory." Judge Tabaddor "filed the lawsuit, claiming she was targeted in the 2012 recusal order after she attended the Roundtable with Iranian-American Community Leaders organized by the White House Office of Public Engagement." The lawsuit argues that other immigration judges "who were active in their religious and ethnic communities had not been subject to a blanket recusal order when Tabaddor, who was born in Iran and participated in dozens of public speaking engagements, was recused." Judge Tabaddor spoke at our Immigration Seminar in Memphis last May, and has now joined the ILS Board. ◆

NOTE FROM THE EDITOR: If you have news items of interest to the Section members, or wish to contribute an article of nearly any type to The Green Card, please contact me at LBurman@aol.com. If you would like to contribute an article to The Federal Lawyer, contact Dr. Alicia Triche at aliciatricheclc@gmail.com. Don't be bashful; we want to hear from you!

Larry Burman, editor



Juvenile Judges

EOIR has designated certain "juvenile judges" to handle specialized dockets for juveniles and unaccompanied minors.

In (Attempted) Defense of Banning Iranian-American Immigration Judges

By Jason Dzubow

If you follow the news from the Executive Office for Immigration Review or EOIR–the office that oversees the Immigration Courts–you are aware of the recent lawsuit filed by Judge Afsaneh Ashley Tabaddor. Judge Tabaddor is an IJ in Los Angeles. She was appointed in 2005 and has been serving ever since. Judge Tabaddor also happens to be Iranian-American.

According to Judge Tabaddor's complaint against EOIR, trouble began for her in the summer of 2012 when the White House–considered by some a radical Muslim organization–invited her to attend a "Round Table with Iranian-American Community Leaders." After some hemming and hawing over the nature of the event, EOIR granted the Judge leave to attend. But afterward, EOIR banned Judge Tabaddor from adjudicating cases involving nationals from Iran. So in other words, an Iranian American Judge who is active in her community is not permitted to hear cases where the alien is from Iran.

On its face, EOIR's decision seems completely ridiculous and indefensible. It would be like forcing members of the National Association of Women Judges to recuse themselves in cases involving women, or stopping members of a Jewish judges association from hearing cases involving Jews, etc., etc. But can EOIR's decision somehow be justified? Does it make sense to ban an Iranian-American who is involved in her community from hearing cases form Iran? Permit me to try to make that argument (as an asylum lawyer, tilting at windmills is my specialty).

Perhaps EOIR is concerned about the Judge because Iran is considered our enemy (or–on a good day–our rival). Allowing Judge Tabaddor to hear Iranian cases would be like allowing an American originally from the Eastern Block to serve in the White House during the Cold War (Zbigniew Brzezinski) or like allowing a German-American to lead the fight against Germany in WWI (John J. "Black Jack" Pershing) or against the Nazis in WWII (Major General Carl Spaatz). Hmm, maybe that argument doesn't work so well after all. Let me put it another way. If you are at war with Japan, you'd better imprison all Japanese-Americans. Wait. Maybe that is not such a good argument either. Let's try this a little differently.

It could be that EOIR is worried about the *appearance* of bias. Appearance is very important for judges. If an IJ is perceived as biased, it reduces our confidence in her decisions. It would be as if five Republican-appointed judges voted to end an election recount, giving the victory to the Republican presidential candidate. Oy. Let me give you a better example. Maybe it would be like allowing a Russian figure skating judge who is married to the director of the Russian Figure Skating Association to serve as a judge at the Sochi Olympics. And then the Russian skater miraculously wins. Harrumph. I guess that one doesn't work too well either. Maybe we should look at the problem another way.

What if we assume that Judge Tabaddor is, in fact, biased in favor (or against) Iranian respondents. If that is the case, why should the recusal order be limited to cases from Iran? Iran and Iraq fought a war recently, so probably the IJ is biased against Iraq and should not hear cases from that country either. Iran also fought a war with Greece back in the day, and if I were Iranian, I'd still be bitter about the Battle of Thermopylae. So the Judge should also be banned from hearing cases involving Greeks, or at least Spartans. Iran has endured invasions by Mongols and Arabs, so Judge Tabaddor obviously should not hear Mongolian or Arab cases, and since Mongolians were mixed in pretty good with the Chinese, we'd better also ban her from Chinese cases–just to be safe. And of course, Iran doesn't much like Christians, Baha'is or Jews, so the Judge should probably be kept away from cases involving those faiths. In addition, Iran has disputes with Russia, Azerbaijan, Turkmenistan, and Saudi Arabia. The Judge would have to be banned from hearing cases involving those nationals as well. And don't even get me started about cases involving Israelis. So basically, if Judge Tabaddor is biased, as EOIR seems to assume, the only cases she should decide involve people from Guyana or New Zealand. And maybe São Tomé, but I'm not even sure that's a country.

In the end, I really don't know whether Judge Tabaddor's lawsuit will succeed. IJs exist to implement the authority of the Attorney General. If the AG chooses to prevent certain IJs from reviewing cases from certain countries, that may be within his discretion. While the law may not be clear (at least to me), I have no doubt about which side is right. If an IJ behaves in an inappropriately biased manner, she should be removed from her job. But where–as here–there seems to be no question as to the Judge's integrity, her docket should not be restricted in this insulting and discriminatory way.

* * * * *

One Giant Leap for a Woman; One Small Step for Womankind

In a recent decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the BIA held that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group ("PSG") for

purposes of asylum. The decision is significant because it marks the first time that the Board has published a decision essentially endorsing asylum for victims of domestic violence. Applicants who seek asylum under this standard will still need to prove that the level of harm they face constitutes persecution, that they cannot relocate somewhere else within their country, and that their government is unable or unwilling to protect them.

This decision on PSG has been a long time coming, but–at least in my opinion–it does not go far enough.

In 2004, in a case called *Matter of R-A-*, DHS acknowledged that domestic violence could form the basis for an asylum claim. In that case, DHS argued in a brief that R-A- should receive asylum based on domestic violence. In its brief, DHS defined the PSG as "married women in Guatemala who are unable to leave their relationship." Sound familiar? And that was 10 years ago.

Matter of R-A- never resulted in a published BIA decision (though R-A- herself received asylum in 2009). Since the brief was made public in 2004, asylum attorneys have relied on it to advocate for their clients, presumably with some success (since there is no data on the number of cases granted based on domestic violence, it is impossible to know for sure).

To me, the PSG "married women in Guatemala who are unable to leave their relationship" is awkward and contrived. Moreover, to receive asylum based on a PSG, the applicant must show that she was persecuted "on account of" her membership in the PSG. In other words, the persecutor harmed the applicant *because* she is a member of the PSG. I am not convinced that the husband was harming A-R-C-G- *because* she was a married woman who was unable to leave the relationship. He would have harmed her whether or not she was married and whether or not she was able to leave the relationship. The husband may have had access to A-R-C-G- because he was married to her and because she was unable to leave, but he was not motivated to harm her for those reasons.

It seems to me that there is a simpler, more elegant PSG that would have been appropriate for this case: "Women." I suspect that I am not alone in this opinion. In *amici curiae* briefs, counsels for the American Immigration Lawyers Association, the UN High Commissioner for Refugees, and the Center for Gender & Refugee Studies argued that gender alone should be enough to constitute a PSG. Also, at least one federal circuit court (you guessed it – the Ninth) has held that "women in Guatemala" might constitute a particular social group.

"Women" makes sense as the PSG in this case. The evidence in the case suggests that the husband would have persecuted any woman who he was with–whether or not she was married or able to leave him. Further, country condition evidence from Guatemala makes clear that women in that country live in dire circumstances. In its decision, the Board notes that Guatemala "has a culture of 'machismo and family violence,'" including sexual offenses and spousal rape. The victims of this violence are, for the most part, women. And, by the way, they are not just "Guatemalan women." I imagine that if a Salvadoran woman, or a Nicaraguan woman, or a Japanese woman lived in Guatemala and integrated into the society, she would face the same problems as a Guatemalan woman. For this reason, the PSG should be "women," as opposed to "Guatemalan women."

But the BIA was not willing to go that far. After noting that counsel for Amici argued in favor of gender alone as the PSG, the Board held, "Since the respondent's membership in a particular social group is established under the aforementioned group, we need not reach this issue."

Perhaps that is the way of things. It's best not to push the law too far, even if it makes logical sense, and even where it would protect additional people. A decision granting asylum to women (or men) who face persecution solely because of their gender would likely open the door to many more asylum seekers. Given the current state of affairs in the asylum world–the border crisis, partisan scrutiny from Congress, the backlog–maybe it's best not to open the door too far. Maybe a relatively limited decision like *Matter of A-R-C-G-* is the best we could have hoped for.

I don't mean to minimize the importance of *A-R-C-G-*. It is obviously a great win for the alien in that case (though the decision does not finally grant her asylum, it seems very likely that that will be the end result), and it will certainly help many women who face harm from domestic abusers. However, the decision codifies a landscape where women–many without the resources available to people like A-R-C-G- and R-A—will be forced to articulate complicated PSGs and demonstrate that they are members of those PSGs. I am not sure how many poor refugee women will actually be able to do all that.

A-R-C-G- was persecuted because she was a woman. Not because she was a Guatemalan woman, not because she was married, and not because she was unable to leave her husband. *Matter of A-R-C-G-* is an important step towards protecting women victims of domestic violence. Maybe next time, the BIA will take a giant leap. ◆

Jason Dzubow is one of the founders of Dzubow & Pilcher, PLLC. His practice focuses on immigration law, asylum, and appellate litigation. In 2011 and 2013, Washingtonian magazine recognized him as one of the best immigration lawyers in Washington, DC. He is an adjunct professor at George Washington University Law School in Washington, DC. His blog, the Asylumist, is the only blog in the U.S devoted exclusively to asylum law.

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Hon. Robin E. Feder, wielding the torch

programming in New York. If you want to see immigration programming in your neighborhood, let me know. We can explore a partnership with the FBA Chapter where you are. If you are interested in leadership opportunities within ILS, let me know that too. The Section belongs to and is run for the benefit of our members. Reach out to me at any time and let me know how we can do things better. I have asked our Editor to create a "wish list" for the Green Card. It has two columns – "Needed" and "Completed." It is not my wish list, but yours. Let me know what you need – and we will try to get it done. You can reach me at rfeder fedbar@aim.com – I look forward to hearing from you. ◆

Very respectfully,
Robin

Robin E. Feder
Chair, Immigration Law Section

The Honorable Robin E. Feder is an Imigration Judge with the U.S. Department of Justice Executive Office for Immigration Review (USDOJ-EOIR) in Boston, Massachusetts. She is writing in her personal capacity and her viewpoint does not necessarily reflect the view of USDOJ-EOIR.

* Crimmigration" as used here refers to the "crime" that might be committed by failing to use the many and varied talents of members of the Immigration Law Section.

**All government attorneys and judges participate in their personal capacity.

The Federal Bar Association is dedicated to the advancement of the science of jurisprudence and to promoting the welfare, interests, education and professional development of attorneys involved in federal law. Our members are attorneys practicing federal law in small and large law firms, corporations, public interest firms, government agencies and members of the judiciary. The FBA facilitates communication between the bar and the bench and public and private sector.

Article

Analysis of the Immigration Consequences of Criminal Convictions after *Descamps v. United States*

By Sarah Pixler and Nicole Wells

This article outlines the development of the categorical approach, as it relates to Federal sentencing and immigration law, and the implications of the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), on the analysis of the immigration consequences of criminal convictions. The categorical framework was first outlined by the Supreme Court in *Taylor v. United States*, 495 U.S. 575, 599-600 (1990), and later modified by the Court in *Shepard v. United States*, 544 U.S. 13, 26 (2005). The Supreme Court has noted that this framework applies in criminal sentencing proceedings and in the immigration context. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007); *see also Young v. Holder*, 697 F.3d 976, 982 (9th Cir. 2012) (en banc). For decades, adjudicators have relied on the *Taylor/Shepard* framework of the categorical approach to evaluate the immigration consequences of criminal convictions, although something similar to the categorical approach has been used in immigration proceedings for close to a century. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013). *But see Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008) (holding that after an Immigration Judge has applied the categorical approach and determined that the record of conviction is inconclusive, recourse to documents outside the formal conviction record is permitted to discern whether an alien was convicted of removable conduct). However, courts have not uniformly applied the categorical approach—and its variant the "modified categorical approach." *Descamps*, 133 S. Ct. at 2282.

In *Descamps*, the Supreme Court addressed the circuit courts' diverging interpretations and applications of the *Taylor/Shepard* framework. 133 S. Ct. at 2282-83 & n.1 (comparing *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 940 (9th Cir. 2011) (en banc) (per curiam) (applying the modified categorical approach to a categorically overbroad, indivisible statute), and *United States v. Armstead*, 467 F.3d 943, 947-50 (6th Cir. 2006) (same), with *United States v. Beardsley*, 691 F.3d 252, 268-74 (2d Cir. 2012) (holding that the modified categorical approach applies only to divisible statutes), and *United States v. Giggey*, 551 F.3d 27, 40 (1st Cir. 2008) (en banc) (same)). The Court ultimately held "that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282.

It remains to be seen whether the Supreme Court's holding in *Descamps* is limited to the criminal arena, or whether it applies with equal force to immigration proceedings. *See Matter of Lanferman*, 25 I&N Dec. 721, 727-30 (BIA 2012) (holding that a criminal statute is divisible, regardless of its structure, if, based on the elements of the offense, some but not all violations of the statute give rise to grounds for removal or ineligibility for relief); *see also* Brief for Respondent at 16-17 n.3 *Descamps v. United States*, 133 S. Ct. 2276 (2013) (No. 11-9540) (arguing that *Taylor* is not necessarily controlling on the Board of Immigration Appeals, and that the Board is entitled to "select a *Taylor*-like approach or a more flexible approach to analysis of prior convictions").

However, as of this writing, no circuit court has deferred to the Board's broader interpretation of the categorical approach in *Matter of Lanferman*. In fact, the Third Circuit has expressly rejected *Matter of Lanferman*'s version of the categorical approach in light of the Supreme Court's decision in *Descamps*, and the First, Eleventh, and Ninth Circuits have held that the Supreme Court's decisions do not distinguish between the criminal and immigration application of the categorical approach. *See Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1280 n.3 (11th Cir. 2013); *Rojas v. Att'y Gen. of U.S.*, 728 F.3d 203, 216 n.12 (3d Cir. 2013) (en banc); *Campbell v. Holder*, 698 F.3d 29, 33-34 (1st Cir. 2012); *Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1033 (9th Cir. 2012), *withdrawn and superseded by* 740 F.3d 1294 (9th Cir. 2014). Nevertheless, the Supreme Court's decision in *Descamps*, if applied in the immigration context, may have far-reaching consequences, especially with regard to the administration of the provisions of the Immigration and Nationality Act related to criminal convictions. As a result, it is critical for immigration adjudicators to carefully consider the Court's decision in *Descamps* and decide how it may impact the immigration consequences of a particular criminal conviction. This is especially true for adjudicators who sit in circuits that have already held that the categorical approach applies in the same manner in immigration and criminal sentencing proceedings.

Background

In *Taylor*, 495 U.S. 575, the Supreme Court outlined the categorical approach as a mechanism for evaluating whether a prior criminal conviction is within a particular category of convictions. At issue in *Taylor* was a sentencing enhancement under the Armed Career Criminal Act ("ACCA"), which increases the sentences of certain Federal defendants who have three prior convictions for a "violent felony." Whether a past offense constitutes a violent felony depends on the elements of the statute of conviction. The Court noted that Congress' intention in

creating the ACCA was to impart greater consequences to those convicted of crimes involving certain violent elements, not just for crimes with certain labels. According to the Court, the framework more commonly known as the categorical approach "capture[s] all offenses of a certain level of seriousness that involve violence and an inherent risk thereof, regardless of technical definitions and labels under state law." *Id.* at 588-90. As a result, the Court applied a categorical analysis to determine whether the defendant's prior convictions qualified as violent felonies.

The first step in the categorical approach is to look, not to the particular facts underlying the prior conviction, but rather to whether the statute of conviction defining the crime of conviction categorically fits within the "generic" Federal definition of a corresponding offense. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Duenas-Alvares*, 549 U.S. at 186); *Taylor*, 495 U.S. at 599-600. A generic offense is defined in the abstract, and the purpose of the categorical approach is to determine whether the statute of conviction "shares the same nature" as the generic offense which serves as the point of comparison. *Moncrieffe*, 133 S. Ct. at 1684. A statute of conviction will only be a categorical match for the generic offense if a conviction under the statute "necessarily involved" conduct that fits within the definition of the generic offense. *Id.* (quoting *Shepard*, 544 U.S. at 24). Because the focus is on what conduct the conviction necessarily involved, rather than the facts underlying the conviction, courts must presume that the conviction rested on nothing more than "the least of the acts criminalized" by the statute of conviction and then determine whether such acts are encompassed within the definition of the generic offense. *Id.* (internal quotation marks and alterations omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). However, the focus on the least of the acts criminalized by the statute of conviction is not an invitation to apply "legal imagination." *Id.* at 1684-85 (quoting *Duenas-Alvarez*, 549 U.S. at 193). Instead, the inquiry is whether there is a "realistic probability, not a theoretical possibility" that the conduct criminalized by the statute falls outside the definition of the generic offense. *See id.* at 1685 (quoting same).

If there is no realistic probability that the statute of conviction would be applied to nongeneric conduct, determining whether a conviction under the statute fits within the generic Federal definition is straightforward. There is a categorical match "if the elements set out in the . . . statute are the same or narrower than the elements of" the generic offense. *Descamps*, 133 S. Ct. at 2295-96 (Alito, J., dissenting) (citing *Taylor*, 495 U.S. at 599). But "what if the statute is broader?" *Id.* at 2296. In other words, what happens when the statute of conviction criminalizes conduct falling outside the generic definition?

In such an event, courts may find it appropriate to apply the second step of the categorical approach, which is commonly referred to as the "modified categorical approach." The modified categorical approach may only be used when a prior conviction was for violating a "divisible statute." *Id.* at 2281 (majority opinion). Such a statute "sets out one or more elements of the offense in the alternative . . . . If one alternative . . . matches an element in the generic offense, but the other . . . does not, the modified categorical approach" permits recourse to the record of conviction to determine whether the defendant was convicted of the statutory alternative matching the generic offense. *Id.* The record of conviction includes the "statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. In essence, the modified categorical approach allows a court to determine which element(s) the defendant was *convicted of* so that the court can apply the categorical approach to those elements. *Descamps*, 133 S. Ct. at 2281; *see also id.* at 2285 ("[T]he modified approach merely helps implement the categorical approach . . . . It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime."). However, prior to *Descamps*, circuit courts varied as to when and how they applied the modified categorical approach. *See id.* at 2282-83 & n.1.

Diverging Interpretations

Overview

Prior to *Descamps*, the circuit courts applied the categorical approach in different ways, and, as noted, the Board suggested that the categorical approach "need not be applied with the same rigor in the immigration context as in the criminal arena." *Matter of Lanferman*, 25 I&N Dec. at 727-28. Before *Descamps*, the First, Fourth, Fifth, Seventh, and Eighth Circuits agreed that only divisible statutes may be examined under the modified categorical approach. *See United States v. Fife*, 624 F.3d 441 (7th Cir. 2010); *United States v. Lipscomb*, 619 F.3d 474, 491-92 (5th Cir. 2010); *United States v. Rivers*, 595 F.3d 558, 562-63 (4th Cir. 2010); *United States v. Boaz*, 558 F.3d 800, 807-08 (8th Cir. 2009); *United States v. Giggey*, 551 F.3d 27, 40 (1st Cir. 2008). The Ninth Circuit, on the other hand, held that the use of the modified categorical approach was appropriate even if the statute of conviction was not necessarily divisible (that is, even where the statute was categorically overbroad because it lacked an element of the generic offense), although it did so in a sharply divided en banc decision. *Aguila-Montes de Oca*, 655 F.3d at 927-40. It is less than clear where the Sixth and Tenth Circuits stood on this issue pre-*Descamps*, but their prior case law suggests that these circuits applied the modified categorical approach to categorically overbroad statutes as well. *United States v. Townley*, 472 F.3d 1267, 1277 (10th Cir. 2007); *Armstead*, 467 F.3d at 947-48. The Second, Third, and Eleventh Circuits were ambiguous about their approaches. *See United States v. Beardsley*, 691 F.3d 252, 264 (2d Cir. 2012); *Jean-Louis v. Att'y Gen. of the U.S.*, 582 F.3d 462, 471-72, 474 (3d Cir. 2009); *Lanferman v. Bd. of Immigration Appeals*, 576 F.3d 84, 91-92 (2d Cir. 2009); *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785, 788 (11th Cir. 2007); *Knapik v. Ashcroft*, 384 F.3d 84, 92 n.8 (3d Cir.

2004). It was the Ninth Circuit's broad version of the modified categorical approach that was squarely before the Supreme Court in *Descamps*.

The Aguila-Montes de Oca Approach

In *Aguila-Montes de Oca*, 655 F.3d at 917, the Ninth Circuit overruled its previous decision in *Navarro-Lopez v. Holder*, 503 F.3d 1063 (9th Cir. 2007) (en banc). In *Navarro-Lopez*, the Ninth Circuit distinguished divisible statutes of conviction from those "missing an element of the generic crime altogether," and determined that, with such statutes, the "crime of conviction can never be narrowed to conform to the generic crime because the jury *is not required*—as *Taylor* mandates—to find all the elements of the generic crime." 503 F.3d at 1073 (emphasis added). Even a defendant's admission to committing the elements of the generic crime would not render a conviction under an overbroad statute a match for the generic offense because such admissions "were not necessary for a conviction." *Id.* (citing *Shepard*, 544 U.S. at 24 (holding that the Government must show that "a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to generic burglary")). In such a case, at least pursuant to *Navarro-Lopez*, "[t]he modified categorical approach . . . cannot be used to conform [an alien's] conviction to the generic definition" of a removable offense. *Id.*

According to *Aguila-Montes de Oca*, however, a modified categorical approach is appropriate in any case where the statute of conviction is broader than the elements of the generic crime, regardless of whether the statute is considered to be divisible or missing an element. 655 F.3d at 940. In other words, under *Aguila-Montes de Oca*, recourse to the conviction record is always appropriate to determine if the finder of fact "*necessarily found* (for example, through a plea colloquy) a fact or facts that generically satisfy the elements of a . . . ground of removability or inadmissibility." *Matter of Lanferman*, 25 I&N Dec. at 729.

The en banc panel in *Aguila-Montes de Oca* reasoned that "[t]he modified categorical approach simply asks, in the course of finding that the defendant violated the statute of conviction, was the factfinder *actually required to find the facts satisfying* the elements of the generic offense?" *Aguila-Montes de Oca*, 655 F.3d at 936. Viewed this way, the purpose of the modified categorical approach is to determine "(1) what facts the state conviction *necessarily rested on* and (2) whether these facts satisfy the elements of the generic offense." *Id.* (emphasis added) (citing *Shepard*, 544 U.S. at 21 (noting that the modified categorical approach indicates "whether the plea had necessarily rested on the *fact identifying* the burglary as generic" (emphasis added) (internal quotation marks omitted)).

For example, according to the panel in *Aguila-Montes de Oca*, if a defendant is convicted under an overbroad aggravated assault statute, requiring (1) harmful contact, and (2) the use of a *gun or axe*, a court can be confident that the defendant was convicted of committing aggravated assault with a gun rather than an axe "if the indictment alleges only that the defendant used a gun, and the only prosecutorial theory of the case (as ascertained exclusively through the relevant *Shepard* documents) is that the defendant used a gun." *Id.* at 936. Using the *Aguila-Montes de Oca* approach, a court could find that "given the facts put forward by the government, the jury was 'required' to find that the defendant used a gun," even if the statute of conviction itself does not require proof that the defendant used such a weapon. *Id.* at 936. Likewise, in the plea context, "if the only weapon the defendant admitted to using was a gun, then [a court] can be confident that the trier of fact was 'required' to find that the defendant used a gun in the course of assaulting the victim." *Id.* at 936-37.

The Ninth Circuit's expansive approach allowed an adjudicator to use the conviction record to determine whether particular facts alleged by the prosecution or admitted by the defendant were necessarily found as fact by the jury or judge. Thus, rather than relying on the conviction record merely to determine under which provision of a divisible statute the defendant was convicted, the court could compare the underlying facts necessary for conviction in the specific case to the elements of the generic definition. *Id.* at 936. *See also Matter Lanferman*, 25 I&N Dec. at 729.[1]

In *Descamps*, the Supreme Court expressly rejected *Aguila-Montes de Oca*'s broad application of the modified categorical approach in favor of an approach that strictly focused on the *elements* of the crime of conviction, rather than its facts.

The Supreme Court's Approach: *Descamps v. United States*

Background

In *Descamps*, the Supreme Court revisited the *Taylor/Shepard* framework in the criminal sentencing context. Like *Taylor*, *Descamps* involved an ACCA sentencing enhancement. Descamps was convicted of burglary, in violation of section 459 of the California Penal Code. At sentencing, Descamps argued that the section 459 was overly-broad and could not serve as an ACCA predicate because the statute does not require an unlawful entry as generic burglary does. For example, a shoplifter can be convicted of burglary under section 459 for entering a store during normal business hours. Thus, section 459 punishes a wider range of conduct than generic burglary. Based on this "asymmetry of offense elements" Descamps argued that his conviction under section 459 could not serve as a predicate for sentencing purposes, "whether or not his own burglary involved an unlawful entry that could have satisfied the requirements of the generic crime." *Descamps*, 133 S. Ct. at 2282.

The District Court disagreed, stating that the modified categorical approach permitted it to examine the conviction record "to discover whether Descamps had 'admitted the elements of a generic burglary' when entering his

plea." *Id.* (citation omitted). A transcript of Descamps' plea colloquy indicated that his conviction had involved the "breaking and entering" into a grocery store, a statement to which Descamps had not objected. *Id.* Based on this admission, the District Court found that Descamps' burglary conviction involved an unlawful entry and applied the ACCA penalty enhancement.

The Ninth Circuit affirmed, relying on its decision in *Aguila-Montes de Oca*, and held that when a sentencing court considers a conviction under "[section] 459—or any other statute that is 'categorically broader than the generic offense'—the court may scrutinize certain documents to determine the factual basis of the conviction." *Id.* at 2282-83 (quoting *Aguila-Montes*, 655 F.3d at 940). Applying that approach, the Ninth Circuit found that Descamps' plea, as revealed in his colloquy, "rested on facts that satisfy the elements of the generic definition of burglary." *Id.* at 2283 (quoting *United States v. Descamps*, 466 F. App'x 563, 565 (9th Cir. 2012)).

The Supreme Court granted certiorari to resolve the split between the circuits, detailed above, regarding whether the modified categorical approach applies to statutes that are overly broad, but not divisible. In an 8 to 1 decision the Court ruled in favor of Descamps and reversed, holding that the modified categorical approach may *not* be applied to a statute containing "a single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense." *Id.*

The Supreme Court's Reasoning

The Court began its analysis in *Descamps* by noting that its prior case law explaining the scope and application of the categorical approach "all but resolves this case." *Id.* The Court explained that *Taylor*, 495 U.S. 575, and *Shepard*, 544 U.S. 13, recognized a "narrow range of cases" in which "a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2283-84. Insofar as an adjudicator cannot tell, simply by looking at a divisible statute, under which alternative element a defendant was convicted, the modified categorical approach permitted him or her to consult documents beyond the statutory text. But the Court held that an adjudicator may do so *only* to "discover 'which statutory phrase,' contained within a statute listing 'several different' crimes, 'covered a prior conviction.'" *Id.* at 2285 (citing *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)); *Johnson*, 559 U.S. at 144 (noting that "the 'modified categorical approach' . . . permits a court to determine which statutory phrase was the basis for the conviction").

Turning to the case at hand, the Court concluded that the modified approach was inapplicable because section 459 of the California Penal Code defines burglary more broadly than generic burglary, namely, by not requiring proof of an unlawful entry. *Descamps*, 133 S. Ct. at 2286. The statute, moreover, does not define burglary "alternatively, with one statutory phrase corresponding to the generic definition and another not." *Id.* In other words, the elements of section 459 are "indivisible." *Id.* at 2281 (defining an indivisible statute as "one not containing alternative elements"). Significantly, the Court noted that "whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." *Id*. Because Descamps was convicted of burglary under an overbroad statute composed of indivisible elements, his conviction did not correspond to the generic definition of burglary and did not qualify as an ACCA predicate.

The Court flatly rejected the Ninth Circuit's approach in *Aguila-Montes de Oca*, observing that "it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents . . . . *Aguila-Montes* subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits." *Id.* at 2287. The Court characterized the Ninth Circuit's approach as turning "an elements-based inquiry into an evidence-based one," raising several key concerns. For instance, the Court first noted that Congress intended sentencing courts to look only to the fact that the defendant had been *convicted* of certain crimes falling within certain categories.[2] In contrast, an evidence or facts-based approach would authorize examination of the *facts* underlying the conviction. Accordingly, the Court held that the Ninth Circuit's approach "runs headlong into [a] congressional choice." *Id.*

The Court also held that an elements-based approach is superior to the Ninth Circuit's fact-based approach because it "avoids Sixth Amendment concerns that would arise from sentencing courts' making factual findings that properly belong to juries." *Id.*[3] The Court noted that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2288 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). A finding of a predicate offense under the ACCA increases the maximum penalty of a crime. Thus, "it would raise serious Sixth Amendment concerns" if the Ninth Circuit used the modified categorical approach to make a finding that went "beyond merely finding the prior conviction." *Id.*

Finally, the Court observed that the Ninth Circuit's approach in *Aguila-Montes de Oca* would create several inequities. For example, "[i]n case after case, sentencing courts following *Aguila-Montes* would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Id.* at 2289. The Court noted that such documents may often contain inaccurate information because a defendant has little incentive to contest facts that are not elements of the charged offense. In addition, according to the Court, the Ninth Circuit's approach would deprive some defendants of the benefit of their plea deal, especially if the defendant was arrested for *commit-*

ting an ACCA predicate but ultimately *pleaded guilty to* a less serious crime whose elements do not fit the ACCA generic offense. An elements-based approach would avoid these inequities because, as noted, the primary focus of such an approach is the *elements of conviction*, not the facts underlying that conviction.

Outstanding Issues

What is an Element?

Now that *Descamps* makes the *elements* of a conviction central to determining whether or not a predicate offense categorically matches the generic offense, adjudicators are faced with an important question: what is an "element"?[4] Although not expressly defining the term, the Court's decision suggests that a statutory element for purposes of the categorical approach is any part of the defendant's crime that a finder of fact (either a judge or a jury) would be "*required* to find" to sustain a conviction. *Id.* at 2293 (emphasis added). In the case of a jury, a particular fact must be found "unanimously and beyond a reasonable doubt" for it to constitute a statutory element. *Id.* at 2288, 2290. Put another way, a fact is an element if the jury would be hung as a result of not being able to agree on it. *See id.*; *see also id.* at 2298 (Alito, J., dissenting).

The elements of a crime may not always be readily apparent, particularly when the crime is defined by common law. The *Descamps* Court explicitly "reserve[d] the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but [also] judicial rulings interpreting it." *Id.* at 2291 (majority opinion). Most of the States with "common law crimes," or crimes with elements wholly defined by the judiciary, are located in the Fourth Circuit (e.g., Virginia and South Carolina). In two post-*Descamps* decisions, the Fourth Circuit has treated common law crimes and statutory crimes as functionally equivalent for purposes of determining divisibility. *United States v. Aparicio-Soria*, 740 F.3d 152, 155 n.2 (4th Cir. 2014) (en banc); *United States v. Montes-Flores*, 736 F.3d 357, 367 (4th Cir. 2013).

Statutory Elements versus Alternative Statutory Means

In his dissent in *Descamps*, Justice Alito distinguishes alternative statutory elements from "alternative means of satisfying an element" and observes that distinguishing "elements" from "means" is crucial to determining whether the modified categorical approach is permissible. *Descamps*, 133 S. Ct. at 2296-98, 2301 (Alito, J., dissenting). Justice Alito contends that under the majority's articulation of the categorical approach, an indivisible statute is not susceptible to the modified categorical approach because it is defined by elements that can be satisfied by alternative means, some of which fall outside the definition of the generic offense. A divisible statute, on the other hand, is susceptible to a modified categorical analysis because it is defined by separate or *alternative elements*, some combination of which defines the generic offense. In Justice Alito's view, "[t]he feature that distinguishes elements and means is the need for juror agreement . . . and therefore in determining whether [certain facts] are elements or means, the critical question is whether *a jury would have to agree on*" facts corresponding to elements of the generic offense. *Id.* at 2298 (emphasis added) (citation omitted). Justice Alito concludes that for some crimes, the only way to distinguish means from elements may be to find cases concerning the correctness of jury instructions, which may be unavailable.

The majority responds to Justice Alito's concerns by stating that the record of conviction itself "would reflect [a] crime's elements." *Id.* at 2285 n.2 (majority opinion). "So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense." *Id.* But Justice Alito counters that an examination of the conviction record may not readily reveal a statute's elements or distinguish elements from alternative statutory means. "Charging documents must generally include factual allegations that go beyond the bare elements of the crime—specifically, at least enough detail to permit the defendant to mount a defense." *Id.* at 2301 (Alito, J., dissenting).

The Ninth Circuit confronted the issue of distinguishing alternative elements from alternative means in *Coronado v. Holder*, 747 F.3d 662 (9th Cir. 2014). In *Coronado*, the alien had two prior convictions for possessing methamphetamine in violation of section 11377(a) of the California Health and Safety Code. Based on these convictions, the alien was placed into removal proceedings and found to be inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of an offense related to a substance controlled by Federal law. A conviction under section 11377(a) did not categorically fit within the generic definition of an offense related to a controlled substance because, although prohibitng almost all of the same substances, the California statute criminalized the possession of one substance not controlled by the Federal Controlled Substances Act ("CSA"). *Id.* at 667 (noting that "[t]his one difference is sufficient because the 'full range of conduct' covered by California Health & Safety Code § 11377(a) does not fall within the CSA schedules, and as such, Coronado's conviction is not a categorically removable offense").

Coronado argued that recourse to the conviction record under a modified categorical approach was inappropriate in his case because section 11377(a) lists "alternative means" of satisfying an indivisible set of elements. *Id.* at 668. The Ninth Circuit rejected this argument and held that section 11377(a) was divisible because it "identifies a number of California drug schedules and statutes and organizes them into five separate groups, which are listed in the disjunctive." *Id.* at 668-69 (citing Cal. Health & Safety Code § 11377(a)). Thus, "by its very terms, § 11377(a) 'list[s] potential offense *elements* in the alternative,' . . . some of which are contained in the CSA and

some of which are not." *Id.* at 668 (emphasis added) (quoting *Descamps*, 133 S. Ct. at 2284, 2293). Viewed this way, the Ninth Circuit found that section 11377(a) "effectively creates 'several different . . . crimes,' . . . and not separate means of commission." *Id.* at 669 (quoting *Descamps*, 133 S. Ct. at 2285, 2291).

It is notable, however, that the Ninth Circuit did not discuss whether a jury was required to agree (unanimously or otherwise) on the specific controlled substance underlying Coronado's conviction. Recall that *Descamps* suggests that unanimous juror agreement is the feature that distinguishes alternative elements from alternative means. *See Descamps*, 133 S. Ct. at 2288, 2290, 2293; *see also id.* at 2296 (Alito, J., dissenting). In fact, the court in *Coronado* buttressed its conclusion that section 11377(a) is divisible by citing to a California criminal jury instruction indicating that a jury need *not* agree on the specific controlled substance at issue. 747 F.3d at 669 n.4 (citing Cal. Jury Instr. - Crim. 2304 (Feb. 2014) (providing that a defendant is guilty of violating section 11377(a) if: (1) the defendant unlawfully possessed a controlled substance; (2) he or she knew of its presence; and (3) he or she "knew of the substance's nature or character as a controlled substance"). *But see* Cal. Jury Instr. - Crim. 12.00 (providing a blank space where the controlled substance is to be identified and directing that the State must prove the defendant exercised control over the specified substance).

Thus, it remains less than clear whether *Coronado* is consistent with *Descamps*. Nevertheless, some State controlled substance statutes *do* require a jury to identify the specific substance supporting a controlled substance conviction, and such statutes are divisible pursuant to *Descamps*. *See United States v. Abbott*, 748 F.3d 154, 159 n.5 (3d Cir. 2014) (noting that a fact finder must find the specific substance involved in a violation of section 780-113(a)(30) of the Pennsylvania Statutes Annotated). However, other State statutes may not require a jury to agree on the specific substance at issue, and, in circuits that have yet to decide the issue, it is not clear whether *Descamps* applies. It is important for immigration adjudicators to keep this issue in mind because it may potentially render a State controlled substance statute indivisible and unsusceptible to a modified categorical analysis.

Descamps, *Crimes of Violence, and the Ordinary Case Standard*

A number of circuits have also held that the Court's decisions in *Descamps* and *Moncrieffe* affect its prior holding in *James v. United States*, 550 U.S. 192 (2007). In *James*, the Court held that in determining whether an offense involves a serious potential risk of injury to another under the ACCA, the categorical approach does not require that "every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury." *Id.* at 208. "Rather, the proper inquiry is whether the *conduct encompassed by the elements of the offense*, in the *ordinary case*, presents a serious potential risk of injury to another." *Id.* (emphases added).

The circuits and the Board have applied *James*' "ordinary case" standard in the immigration context to determine whether a conviction categorically fits within the generic definition of a "crime of violence" under 18 U.S.C. § 16(b)—"a felony . . . that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *See* section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (providing that an aggravated felony crime of violence is defined with respect to, inter alia, 18 U.S.C. § 16(b)). *E.g.*, *Rodriguez-Castellon v. Holder*, 733 F.3d 847, 854 (9th Cir. 2013) (applying *James* in the § 16(b) context post-*Descamps*); *Van Don Nguyen v. Holder*, 571 F.3d 524, 529-30 (6th Cir. 2009) (applying *James* in the § 16(b) context pre-*Descamps*); *Perez-Munoz v. Keisler*, 507 F.3d 357, 362, 362-64 (5th Cir. 2007) (same); *Matter of U. Singh*, 25 I&N Dec. 670, 674, 677-78 (BIA 2012) (same); *see also Aguilar v. Att'y Gen. of U.S.*, 663 F.3d 692, 697 (3d Cir. 2011) (applying "an ordinary and obvious sense" standard in discerning whether an offense was a crime of violence under § 16(b)).

Although the *Descamps* Court reserved the issue, 133 S. Ct. at 2293 n.6, defendants in Federal sentencing proceedings may argue that *Descamps*' and *Moncrieffe*'s strict focus on the elements of an offense and the least of the acts criminalized by those elements undermines *James*' holding that one look to the "ordinary case" in determining whether the statute creates a "substantial risk" of the use of force. In fact, the First and Fourth Circuits seem to have narrowed the application of the "ordinary case" standard in light of *Descamps'* emphasis on elements of a statute rather than the conduct typically encompassed by those elements. *See United States v. Fish*, No. 12-1791, 2014 WL 715785, at *18 (1st Cir. Feb. 26, 2014) (Dyk, J., dissenting) (stating that "the majority [opinion] suggests that *James* is no longer good law after *Descamps*."); *Aparicio-Soria*, 740 F.3d 155-56 (holding that the defendant's Maryland conviction of resisting arrest did not qualify as a "crime of violence" under the categorical approach because the statute, at a minimum, required mere offensive touching); *United States v. Carthorne*, 726 F.3d 503, 514 (4th Cir. 2013) (holding that the elements of assault and battery of a police officer in Virginia cannot be viewed as presenting a serious risk of physical injury because the statute's elements may be satisfied by de minimis touching or without causing physical injury to another).

However, the First Circuit in *Fish* did not wholly discount the "ordinary case" standard in light of *Descamps*. Instead, *Fish* suggests a hybrid approach. Under *Fish*, a sentencing court must first determine whether a statute is divisible pursuant to *Descamps*. If the statute is divisible, a court may then use the modified categorical approach to see under which statutory alternative a defendant was convicted. Once a court determines which alternative served as the basis of a defendant's conviction, a court may then look to see whether that alternative qualifies as a crime of violence in the "ordinary case." In doing so,

however, the First Circuit cautioned that it would be contrary to *Descamps* and *Duenas-Alvarez* to find that a conviction qualified as a crime of violence in the "ordinary case" under either the categorical or modified categorical approach if the statute had been actually applied in the past "to conduct that failed to meet the textual requirements of the [generic offense] at issue." *Fish*, 2014 WL 715785, at * 10. Thus, the court in *Fish* found that a limited version of *James*' "ordinary case" standard continued to apply, but only after *Descamps*' divisibility analysis and *Duenas-Alvarez*'s realistic probability test allowed it scope to do so.

In contrast, the Eighth Circuit in an en banc decision in *United States v. Tucker* used the "ordinary case" standard to determine whether a conviction presented a "serious potential risk of injury to another," even though the statute of conviction was indivisible and overbroad. 740 F.3d 1177, 1182-83 (8th Cir. 2014) (en banc) ("[B]ecause the portion of the Nebraska statute under which Tucker was convicted is textually *indivisible* [under *Descamps*] as between escape from secure custody and escape from nonsecure custody, we now examine whether 'the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.'") (emphasis added) (quoting *James*, 550 U.S. at 208).

Under the categorical approach, the Eighth Circuit concluded that the defendant's conviction was not a violent felony under the ACCA because while the generic conduct proscribed by the overly broad statute involved a "significant likelihood of 'confrontation leading to violence,'" such risks "are much less" in relation to the non-generic conduct captured by the statute's overly broad elements. *Id.* at 1183 (noting that "[c]ommon sense thus indicates that the portion of the statute under which Tucker was convicted encompasses both conduct that does and conduct that does not present a serious potential risk of physical injury to another."). Thus, in the Eighth Circuit's eyes, the statute did not qualify as a predicate offense, not on account of its indivisibility, but rather as a consequence of its overbreadth. *Id.* (holding that, due to the statute's overbreadth, the court could not determine whether "a conviction under [the indivisible] portion of the statute could be considered to present a serious potential risk of injury to another in the 'ordinary case.'") (quoting *James*, 550 U.S. at 208).

Notwithstanding *Descamps*, the Ninth Circuit has applied the "ordinary case" standard in the immigration context. Although the Ninth Circuit in *Rodriguez-Castellon* only mentioned *Descamps* in passing, the court applied *James*' "ordinary case" standard to determine whether a conviction of lewd and lascivious acts under section 288(c)(1) of the California Penal Code was a crime of violence under § 16(b). In doing so, the court stated that "a state crime may categorically be a crime of violence for purposes of § 16(b) even when a state court has, in some cases, construed the statute as requiring something less than violent force." *Rodriguez-Castellon*, 733 F.3d at 855. According to the court, a State crime of conviction "involves a substantial risk" of the use of force and is therefore a crime of violence under § 16(b) if "the *conduct* covered by that crime raises a substantial risk of physical force 'in the ordinary case,' even though, *at the margin*, some violations of the state statute may not raise such a risk." *Id.* (emphases added). Hence, under *Rodriguez-Castellon*, the "lower limit[s]" or the least of the acts criminalized by the elements of a criminal statute are not relevant to the categorical analysis of a crime of violence. *Id* at 862.

Conclusion

Although it remains to be seen whether *Descamps* applies with full force in the immigration context, extending its holding into the immigration sphere would necessarily limit the universe of offenses that carry immigration consequences. In his concurring opinion in *Descamps*, Justice Kennedy recognized that a strict focus on the elements of conviction under the categorical approach would render a "large number" of State statutes "indivisible," and individuals convicted of serious crimes under such statutes would no longer be subject to the ACCA. 133 S. Ct. 2276, 2293-94 (Kennedy, J., concurring). By logical extension, the holding in *Descamps* necessitates that many aliens convicted of violating indivisible statutes will no longer be subject to removal and may now be eligible for relief, irrespective of whether their actual crimes involved facts that would render them removable or disqualify them from applying for relief.

Justice Alito acknowledged the impact of the Court's articulation of the categorical approach in *Descamps* and argued that "while producing very modest benefits at most, the Court's holding will create several serious problems." *Id.* at 2301 (Alito, J., dissenting). According to Justice Alito, the Court's holding undermined the fundamental objectives of the ACCA: (1) to ensure that violent, dangerous recidivists received enhanced penalties; and (2) that those penalties would be applied uniformly, regardless of the vagaries of State law. Under the majority's holding, Justice Alito asserted, an individual convicted of breaking and entering into a building in California to commit a felony therein would escape ACCA treatment, while an individual convicted of performing the same, dangerous acts in Virginia would not. *Id.* at 2302 (citing Cal. Penal Code § 459 and Va. Code Ann. § 18.2-90).

The Court in *Moncrieffe* similarly recognized that aliens "whose real-world conduct [is] the same" may be treated differently in immigration proceedings depending on the jurisdiction and statute of conviction. 133 S. Ct. at 1693 n. 11. The Court responded to these concerns by stating that such was "the longstanding, natural result of the categorical approach, which focuses not on the criminal conduct a defendant 'commit[s],' but rather what facts are necessarily established by a conviction for the state offense. Different state offenses will necessarily establish different facts." *Id.*

Notwithstanding Justice Alito's apprehensions,

Descamps and the categorical approach remain the law of the land. What's more, as noted above, a number of circuits have applied its holding in the immigration context. In light of the far-ranging implications the Supreme Court's decision may have on assessing the immigration consequences of criminal convictions, it is therefore vital for immigration adjudicators to appreciate the contours of the Court's holding in *Descamps* and to understand how it applies. ◆

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Endnotes

[1]As noted, the Board adopted a similarly expansive view of the modified categorical approach in *Matter of Lanferman*, 25 I&N Dec. at 723-30. The Board mentioned the Ninth Circuit's broad version of the modified categorical approach in *Aguila-Montes de Oca*, 655 F.3d 915, but it did not rely on the Ninth Circuit's reasoning. *Matter of Lanferman*, 25 I&N Dec. at 729 n.8.

[2]The Supreme Court, the circuits, and the Board have similarly reasoned that when Congress directs immigration adjudicators to determine whether a prior *conviction* carries immigration consequences, Congress intends adjudicators to use the categorical approach. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1684 (citing *Taylor*, 495 U.S. 575); *Ceron v. Holder*, 747 F.3d 773, 780 (9th Cir. 2014) (citing same); *Matter of Introcaso*, 26 I&N Dec. 304, 308 (BIA 2014) (citing same). As previously mentioned, however, it remains to be seen whether an immigration adjudicator's examination of a prior criminal conviction is strictly limited to a statute's text and the record of conviction. *See Matter of Silva-Trevino*, 24 I&N Dec. 687.

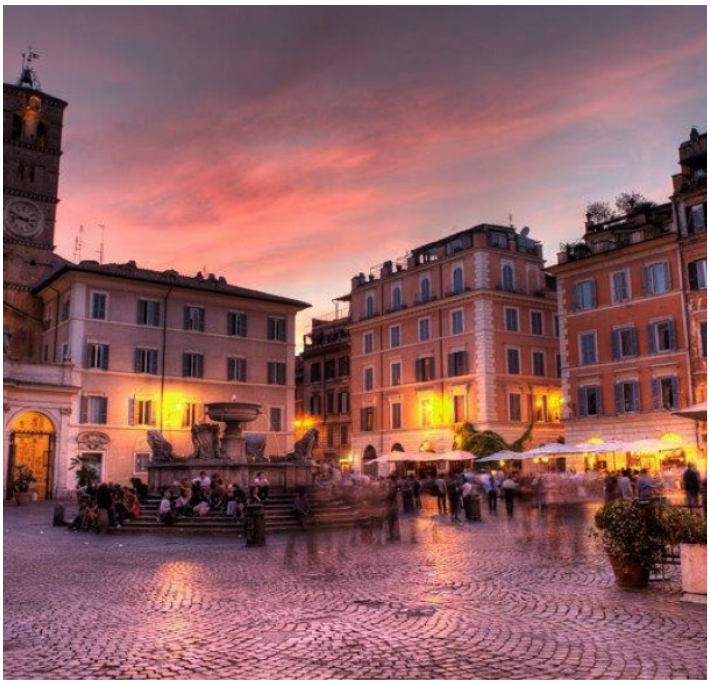
[3]Sixth Amendment constitutional protections do not apply in immigration proceedings. *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710, 716-17, *vacated on other grounds*, 25 I&N Dec. 1 (A.G. 2009).

[4]It should be noted that the Supreme Court has taken the position that generic crimes can be defined by reference to facts *other than* formal elements. For instance, in *Moncrieffe*, 133 S. Ct. at 1687, and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 567-68 (2010), the Court held that when Congress chooses to define a generic Federal offense by reference to punishment under Federal law, it may be necessary to take account of a State statute's formal elements *and* relevant Federal sentencing factors.

Citizenship in a Global Era

By Margaret (Peggy) McCormick

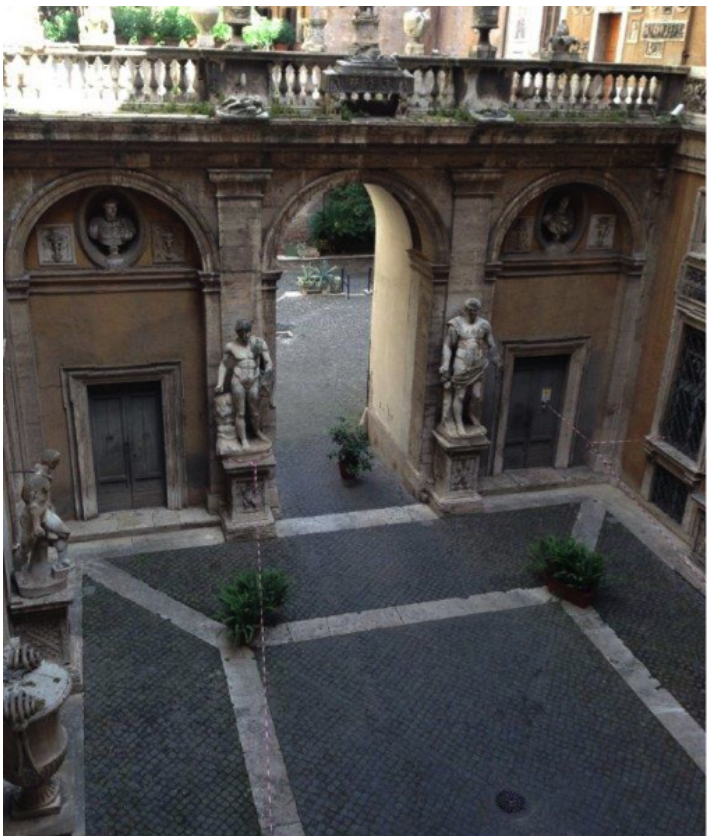
The Immigration Law Section and the Chicago Chapter of the Federal Bar Association, together with the Arthur and Toni Rembe Rock Center for Corporate Governance, Stanford Law School and the John Felice Rome Center and PROLAW, sponsored the third annual Citizenship in a Global Era Conference in Rome, Italy on September 23, 2014. The evening before the program, many gathered in the beautiful Piazza di Santa Maria in Trastevere for a pasta dinner al fresco at the Ristorante Galeassi.



Piazza di Santa Maria in Trastevere

The program was held at the Centro di Studi Americani, housed in the five hundred year old Palazzo Antici Mattei, an exquisite example of 17th century Rome. The Centro has hosted the program every year and is a very fitting venue. It was created seventy years ago to foster seminars and symposia in collaboration with other organizations on an array of cultural, political and economic subjects concerning the United States and its relations with Italy and Europe.

There were approximately sixty five people in attendance, including twenty international lawyers taking an LLM in Rule of Law from the Loyola Rome Center and eighteen speakers, with lawyers and scholars from the U.S. and Europe. The conference was co-chaired by Peggy McCormick, current Secretary of the ILS and outgoing president of the Chicago Chapter of the FBA, and Dan Siciliano, Professor and Associate Dean for Executive Education at Stanford Law School.

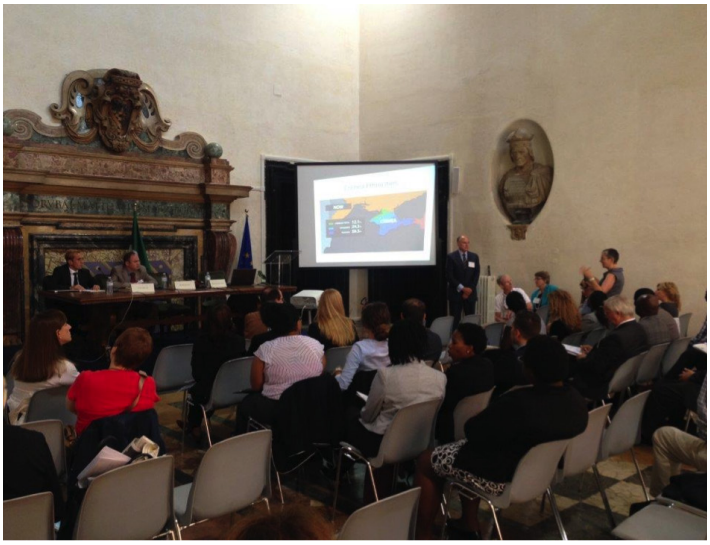


Courtyard of the Centro di Studi Americani, in the Pallazzo Antici Mattei

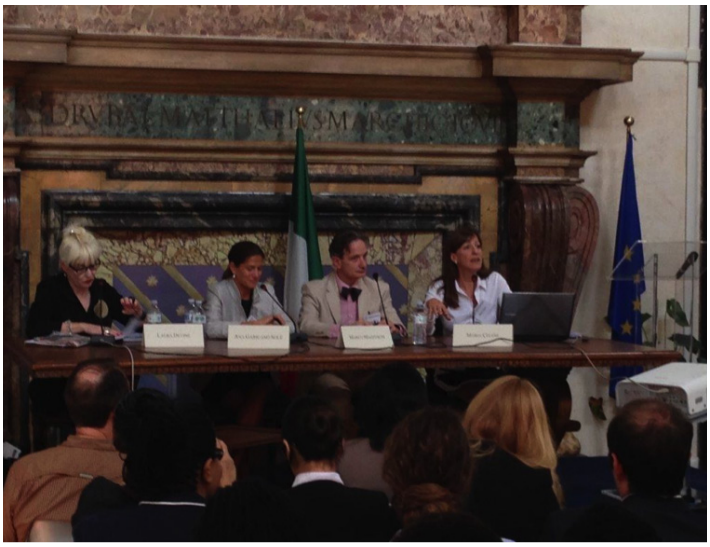
The program included a range of topics relating to citizenship. The first panel addressed the citizenship implications of the Russian annexation of Crimea, with a highly charged discussion about the idea of Russia protecting Russian-speaking people residing in other countries, to the point of annexing a geographically contiguous area because the majority of those Ukrainian citizens speak Russian. In a discussion following the presentation, one of LLM students, a Ukrainian, was able to explain the cruel realities of the current situation in Ukraine.

Another timely topic considered was the secession movements in Scotland, Catalonia and Padania. The Scottish vote rejecting secession occurred just days before the conference. The speakers reviewed the reasons for the secession movements in each of these jurisdictions. With respect to Padania, it was noted that northern Italy, unlike Catalonia and Scotland, does not have the same cultural and linguistic reasons for secession. Economics is always a factor, but one of the big issues for secession movements is how the decision is made: is it through a vote of the people of only in seceding region or through a vote of the people in the entire country?

Other topics included Citizenship by Investment in



Ernest Raskauskas (standing), in private practice in Washington DC, moderated a session on citizenship issues in the Ukraine. Other speakers included Luca Ratti (far left at speaker table) a professor at American University in Rome and Petro Kostiv (right) the current president of the Ukrainian Bar Association in the US.



The panel on Secession movements was moderated by Maria Celebi, a US attorney practicing in Istanbul. Speakers included attorneys Marco Mazzeschi, an Italian lawyer from Florence; Ana Garicano Sole, a Spanish lawyer from Barcelona; and Laura Divine, a British lawyer from London.

Malta and through Military Service in the U.S. Jean-Philippe Chetcuti, a practicing Maltese lawyer, in the course of his presentation, made everyone want to at least visit Malta, if not invest the country directly. Margaret Stock, awarded the MacArthur genius grant because of her work with MAVNI (Military Accessions Vital to the National Interest), provided interesting insights into the MAVNI program in the US.

In one panel, Evan Epstein, from Stanford, presented a view from Silicon Valley on the elite citizens who have access to citizenship in many jurisdictions and addressed current phenomena, like Bitcoin, a software-based, online payment system, offering monetary currency independent of any government. His colleague and co-panelist, Betty Louie, Senior Counsel at DLA Piper in Rome, discussed the implications, particularly on small and medium-sized businesses in Italy, when they are bought by foreign corporations, changing the nationality of the corporation and the culture of the companies.

Another panel explored the idea of Citizenship as a Human Right, with particular consideration of unaccompanied minors at the U.S. border and the boat loads of migrants drowning off the cost of the Italian island Lampedusa.

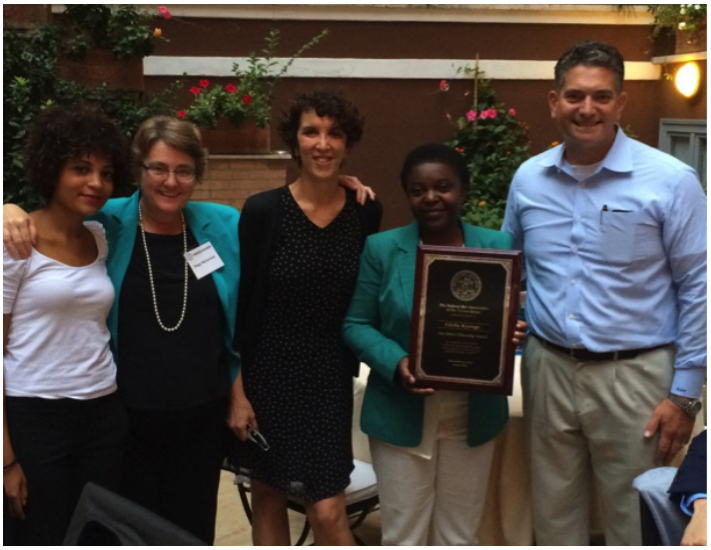
For the panel on citizenship as a human right, from the left: Kate Nash, Professor of Sociology and Director of the Centre for the Study of Global Media and Democracy at Goldsmiths, University of London; William Loris, Director of the Loyola University School of Law, Chicago LL.M. Program on Rule of Law for Development (PROLAW) offered at the John Felice Rome Center; Pietro Pennisi an Italian lawyer who practices in Florence; and Mary Meg McCarthy, executive director of Heartland Alliance's National Immigrant Justice Center in Chicago.

A highlight of the program was the evening reception, held in the courtyard of the lovely Hotel Ponte Sisto, where we honored Ms. Cécile Kyenge, Italy's former Director of Integration, with our first Global Citizen Award. Ms. Kyenge, born in the Democratic Republic of the Congo, immigrated to Italy in 1983 to study medicine and became an ophthalmologist. Though a doctor, she was interested in politics, particularly in promoting social inclusion and integration, especially to those from Africa. In 2002 she founded an intercultural association called DAWA, which means "medicine" in Swahili, to promote better understanding between Italy and the Congo.

On April 28, 2013, Prime Minister Enrico Letta appointed her as the Minister for Integration, making her the country's first cabinet member of African descent. Ms. Kyenge began making proposals to revise immigration policies, including amending the law to allow those born in Italy to immigrants to become Italian citizens. She used her post to expand awareness of Italy's immigration issues.

Ms. Kyenge's term as the Minister for Integration concluded on February 22, 2014, and shortly thereafter, she was elected to represent Italy in the European Parliament. She remains committed to promoting human rights.

Sally Silvers, an American lawyer who has practiced in Rome for thirty years, made a presentation in English and in Italian at the reception and described how Ms. Kyenge has endured racist insults and threats with grace and determination to fight for the rights of immigrants. Ray Fasano ILS chair, presented the award to Ms. Kyenge. ◆

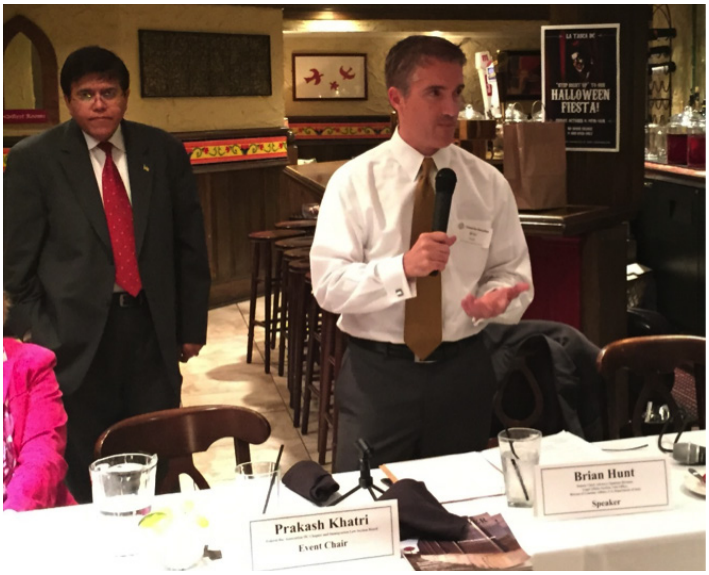


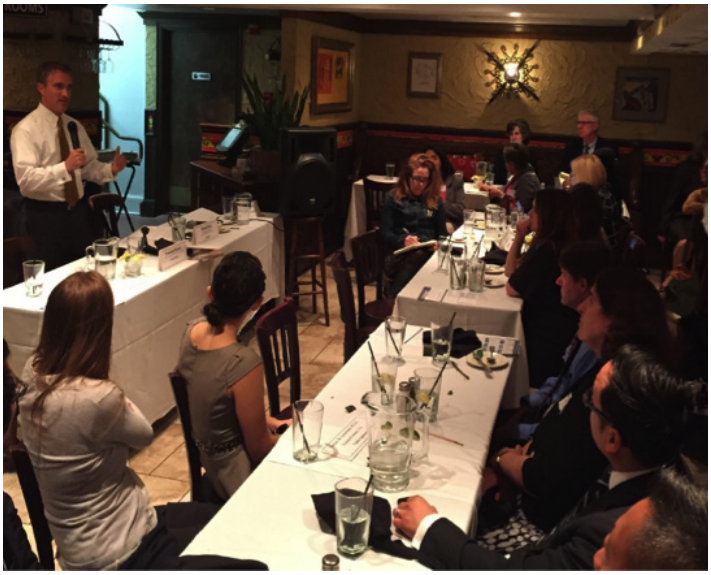
From left: Ms. Kyenge's daughter, Giulia; Peggy McCormick, program co-chair; Sally Silvers, an American attorney based in Rome who gave the presentation, in both English and Italian; Ms. Kyenge; and Ray Fasano, outgoing chair of the ILS.

Immigration Leadership Luncheons continue to attract FBA member Participation

The Second Wednesday of each month, the FBA Immigration Law Section in partnership with the District of Columbia Chapter of the FBA, holds its monthly Immigration Leadership Luncheon at the La Tasca Restaurant in Downtown DC. The luncheons attract FBA members employed by the various US Government agencies in Washington, Immigration Judges and Private sector attorneys. The October 8th, 2014 speaker was Brian Hunt, the Deputy Chief of the Advisory Opinions Division in the Legal Affairs section of the Visa Office in the Bureau of Consular Affairs at the State Department.

The next Immigration Leadership luncheon will be at La Tasca Restaurant on Wednesday, November 12th at Noon. The speaker will be Leon Fresco, Deputy Assistant Attorney General at the United States Department of Justice-Office of Immigration Litigation. He will discuss, among other things, the growing case load of Immigration litigation in the Federal District and Circuit Courts. His office has over 300 lawyers handling these matters. For more information on the luncheons contact Prakash Khatri at prakash@khatrilaw.com. ◆





Brian Hunt with the Chair of the Immigration Leadership Luncheons.

Ebola and Inadmissibility

By Cyrus D. Mehta and David A. Isaacson

The United States has started Ebola screenings at 5 major airports.[1] Will these screenings really be effective, or are they being implemented by the administration to demonstrate that it is doing something to assuage public fears? The administration has also been criticized by Republican leaders who are pushing to restrict, if not completely block off, air travel from West Africa. The tragic death of Thomas Duncan in Dallas from Ebola who had flown into the United States from Liberia has further exacerbated these fears.

While the airport screenings would apply to all travelers from affected West African countries,[2] including U.S. citizens, non-citizens would certainly be more vulnerable. The fears stemming from the Ebola epidemic are redolent of an earlier time when immigrants who travelled to the shores of the United States were processed at Ellis Island and excluded for a host of diseases, notably including the eye infection trachoma.[3] A Marine General recently warned about hordes of Ebola infected immigrants running for the U.S. border,[4] stoking similar fears today. Anti-immigrant groups are using Ebola, along with ISIS, to further their argument that immigrants are dangerous to the United States, and several Republican politicians including former Massachusetts Senator and current New Hampshire Senate candidate Scott Brown, North Carolina Senate candidate Thom Tillis, and Senator Rand Paul, have cited Ebola to support increased border security along the U.S.-Mexico border.[5]

Pursuant to section 212(a)(1)(A)(i) of the Immigration and Nationality Act (INA), aliens who are determined to have a communicable disease of public health significance are ineligible to receive visas and ineligible to be admitted in the United States. By regulation, under 42 CFR 34.2, the term "communicable disease of public health significance" includes "quarantinable communicable diseases as listed in a Presidential Executive Order," a list which has included Ebola and other viral hemorrhagic fevers since President George W. Bush issued Executive Order 13295 in 2003. Under the authority of INA section 232, 8 U.S.C. 1222, aliens arriving in the United States may be subjected to detention and physical and mental examination to determine whether they are afflicted with a condition that would render them inadmissible, such as Ebola.

Interestingly, however, under INA 232(b) and 42 CFR 34.8, an applicant for admission who was suspected of having Ebola and found inadmissible on that basis, who disputed the finding, could appeal to a board of medical officers. Presumably, even if one has been quarantined after showing signs of being infected but has recovered, he or she ought to be admitted into the United States. And since INA §212(a)(1) is not among the grounds which can be a basis for expedited removal under INA §235, 8 U.S.C. §1225, this would presumably all take place, even for a nonimmigrant, in the context of regular removal proceedings before an Immigration Judge, unless DHS felt it could argue with a straight face that the nonimmigrant also fell under INA §212(a)(6)(C) or §212(a)(7) and was thus amenable to expedited removal. The nonimmigrant might, for example, be said to have lied to a consular officer or DHS officer about their illness and thus become inadmissible under INA §212(a)(6)(C)(i).

A Lawful Permanent Resident (LPR), on the other hand, at least if returning from a trip of less than 180 days and not having committed any crimes or taken any other actions which would otherwise cause them to be treated as an applicant for admission, would not be regarding as seeking admission to the United States, pursuant to INA section 101(a)(13)(C), 8 U.S.C. §1101(13)(C). That is, the LPR would be considered rather as if he or she had never left the United States at all, because under section 101(a)(13)(C), becoming medically inadmissible under section 212(a)(1) doesn't cause an LPR to be regarded as seeking admission in the way that certain criminal conduct does. So the LPR would be allowed in, if perhaps under quarantine, not necessarily because he or she were admissible but because admissibility is irrelevant for someone who is not an applicant for admission. There does not appear to be any provision in INA section 237, regarding deportability, which would relate to those who become afflicted with contagious diseases after already having been admitted.

An LPR who had been out of the United States for more than 180 days could potentially be in a more troubling situation. Under INA §101(a)(13)(C)(ii), an LPR who "has been absent from the United States for a continuous period in excess of 180 days" is not entitled to the statutory protection against being regarding as seeking admission, so such an LPR could be found inadmissible under INA 212(a)(1)(A)(i) if infected with Ebola. And although a waiver of such inadmissibility is available pursuant to section 212(g)(1) of the INA, that section requires for a waiver of 212(a)(1)(A)(i) inadmissibility that the waiver applicant have a qualifying relative of one of various sorts, unless he or she is a VAWA self-petitioner. So an LPR absent from the United States for more than 180 days who does not have a spouse, parent (if the LPR is unmarried), son, or daughter who is either a U.S. citizen, or an LPR, or someone who has been issued an immigrant visa, might not be allowed back into the United States after being infected with Ebola, having become an inadmissible applicant for admission and being ineligible for a 212(g)(1) waiver.

We wonder whether such a loss of LPR status due to an infection would be constitutional, but we know that according to the Supreme Court, long-term absences from the United States can strip returning residents of some of their constitutional protections. The regrettable decision in Shaughnessy v. Mezei, 345 U.S. 2006 (1953), which upheld the refusal to admit a returning resident without a hearing and his resulting indefinite detention on Ellis Island, has never been overturned (though its practical effect with regard to the permissible length of detention under current statutes was limited by Clark v. Martinez, 543 U.S. 371 (2005)), and Mr. Mezei had lived in the U.S., apparently lawfully although before the INA of 1952 was enacted and the modern LPR status created, for many years before his 19-month absence. An LPR who is absent from the United States for more than 180 days and becomes infected with Ebola in the meantime may be at risk of becoming the modern Mezei. At the very least, however, the government should be held to the burden of showing such an LPR's alleged medical inadmissibility by clear, convincing, and unequivocal evidence, as in Woodby v. INS, 385 U.S. 276 (1966), just as LPRs alleged to be inadmissible on other bases have been found entitled to the protection of the Woodby standard in such cases as Ward v. Holder, 733 F.3d 601 (6th Cir. 2013). (The BIA in Matter of Rivens, 25 I&N Dec. 623 (BIA 2011), has acknowledged that clear and convincing evidence is required to declare an LPR an applicant for admission under INA §101(a)(13)(C), although it reserved judgment on the question whether there is a difference for these purposes between clear and convincing evidence as mentioned in INA §240(c)(3)(A) and clear, unequivocal and convincing evidence as mentioned in Woodby.)

As a practical matter, it is unlikely that any non-citizen found to be infected with Ebola would be turned away on the next flight home, or even paroled into the US for a removal proceeding, as this would expose others to the Ebola virus. He or she would be quarantined in a hospital and treated in the United States. If this person fully recovers, he or she should be found admissible. Otherwise, this person will unfortunately under the current state of medical advances in the treatment of Ebola most likely not be alive.

While the United States should not be nonchalant about the spread of deadly infectious diseases such as Ebola, the question is whether screenings at airports are the right way to deal with the problem? Ebola can incubate in a person for up to 21 days before an infected person shows symptoms, as was the case with Mr. Duncan. It has recently come to light that Mr. Duncan's treatment was less than satisfactory as he was discharged from the hospital when he had a high fever.[6] There are very few passengers who fly into the United States each day from the three countries that are at the epicenter of the Ebola epidemic – Liberia, Sierra Leone and Guinea. Blocking off flights from these countries, due to political grandstanding, will hurt these countries' economies even further, and will have an adverse impact on trade and investment. This will further hinder their efforts to stem Ebola, and one way to stem an epidemic is to keep people working and normal. In addition, perceived fears about who has Ebola can result in racial profiling of people of certain nationalities, resulting in wrongful denial of visas or admission into the United States.

As a recent editorial in the Washington Post aptly stated, "The answer to Ebola is fighting it there, at the source, not at the U.S. border. No one is protected when a public health emergency is used for political grandstanding."[7] Centers for Disease Control and Prevention Director Thomas Frieden sensibly told reporters, "Though we might wish we can seal ourselves off from the world, there are Americans who have the right of return and many other people that have the right to enter this country."[8] As The Economist noted in its recent article on the topic that Dr. Frieden and Dr. Anthony Fauci, head of the infectious diseases component of the National Institutes of Health, have explained, "quarantining West Africa would be unwise. It would weaken governments, trap Americans and spur travellers to move in roundabout ways that make them harder to track."[9] If the administration believes that screening those who arrive in the United States for Ebola symptoms may be a helpful component of a broader anti-Ebola strategy, it should not be taken too far. We must also be careful not to exclude from the United States people who show no real signs of being infected, and accord those who do appear to have been infected full due process to either contest or overcome inadmissibility. ◆

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Endnotes

[1]Sabrina Tavernise, "Newly Vigilant, U.S. Will Screen Fliers for Ebola," New York Times, Oct. 8, 2014, www.nytimes.com/2014/10/09/us/newly-vigilant-us-is-to-screen-fliers-for-ebola.html.

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[3]*See* Katherine Schlosser, Trachoma Throughout History, www.nps.gov/elis/forteachers/upload/Trachoma-Through-History-2.pdf.

[4]Jessica Roy, "Marine General Warns of Hordes of Ebola-Infected Foreigners Running for the U.S. Border," New York, Oct. 9, 2014, nymag.com/scienceofus/2014/10/marine-general-stokes-immigrant-ebola-fears.html.

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[9]Lexington, "The Ebola alarmists: Stoking panic will not help America fight Ebola," The Economist, Oct. 11, 2014, www.economist.com/news/united-states/21623713-stoking-panic-will-not-help-america-fight-ebola-ebola-alarmists?fsrc=email_to_a_friend.

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