

# The Green Card

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

**HON. ROBIN E. FEDER, SECTION CHAIR**

## Quote of the Month

“The best thing for being sad,” replied Merlin, beginning to puff and blow, “is to learn something. That’s the only thing that never fails. You may grow old and trembling in your anatomies, you may lie awake at night listening to the disorder of your veins, you may miss your only love, you may see the world about you devastated by evil lunatics, or know your honour trampled in the sewers of baser minds. There is only one thing for it then — to learn. Learn why the world wags and what wags it. That is the only thing which the mind can never exhaust, never alienate, never be tortured by, never fear or distrust, and never dream of regretting. Learning is the only thing for you. Look what a lot of things there are to learn.”

—T.H. White, *The Once and Future King*

## From the Chair

Dear Colleagues:

I extend a warm welcome to our many new members and greetings to all. Thanks to the efforts of Ray Fasano, past Section Chair, over the last several years, the Immigration Law Section has expanded its programming well beyond Memphis. This year, we have created opportunities for

all of our members to participate in the Section’s activities. In addition to our existing programming in Memphis, Washington, D.C. and Rome, you will now find opportunities in Boston, Chicago, El Paso and New York—with new initiatives and enough variety to entice anyone’s participation. If you would like to bring immigration programming to your state or city, let us know—we will partner with you to make that happen! Our Committees also offer educational, networking and leadership opportunities. I encourage all Section members, new and veteran alike, to participate on one or more.

This year, the Immigration Law Section is providing many opportunities to learn all across the country. “Look what a lot of things there are to learn.”

In January, we sponsored the El Paso Chapter’s first Border Law Conference (January 30–31, 2015; Kristin Kimmelman, ILS Board member, Chair). The event was a smashing success, and will undoubtedly be repeated. This was a true FBA collaboration, in which the El Paso Chapter was supported by the FBA’s Immigration Law, Federal Litigation, Criminal Law and International Law Sections, as well as the San Antonio and Tucson Chapters of the FBA. Congratulations to Kristin and her team.

In February, we partnered with the FBA’s Southern District of New York Chapter and presented an evening devoted to “Crimmigration” (February 18, 2015; Amy Gell, ILS Board member, Chair). Amy has more New York

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events in the works for this year. You will find the details on the ILS webpage, as the plans develop!

April brings a multitude of Section events, including our second Annual ILS Symposium at American University in Washington, DC, a full-day event (April 10, 2015; co-chaired by Mark Shmueli and Hon. Dorothy Harbeck, ILS Board members). This year, the Symposium consists of an in-depth focus on the intersection of criminal law, immigration law and detention. Several weeks later, we co-sponsor the Chicago Chapter's Worksite Enforcement and Immigration Conference (April 28-29, 2015; Peggy McCormick, ILS Board member, and Marketa Lindt, Co-Chairs).

Our flagship ILS Annual Conference will once again be held in Memphis, Tennessee (May 14-16, 2015; Hon. Mimi Tsankov, Chair). The Memphis Conference, created, planned and chaired for many years by Barry Frager, ILS Board Member and Past Section Chair, will still retain Barry's unmistakable and beloved imprint. Barry and his Committee put together this year's compelling speaking program, which, as always, will cover a wide variety of hot topics and substantive law. This year, Barry opted for a self-contained program at the hotel, and included a happy hour for younger lawyers, who are participating in the Section and attending our conferences in increasing numbers. What will not change is the relatively small size of the event, ample opportunities to connect with speakers and colleagues, and the friendliness and hospitality of our hosts. For Section members, this is the place of our Section Annual Meeting--where you can learn more about the Section's business, meet the Section's leaders and fellow members, and get involved! The Conference will take place, by popular demand, during the Memphis in May International Barbecue Festival weekend. Since hotels fill quickly and there is limited space at the Conference, I encourage you to both register and make your hotel reservations as soon as possible! Conference registration information is available on the FBA website.

As with Memphis, all of our programs provide an opportunity to meet with your colleagues and to discuss the issues about which we are so passionate. Our various luncheon series, which we co-sponsor in DC, Chicago, and our newest addition of Boston, are great opportunities to learn with your colleagues in a relaxed setting. The upcoming lunch schedule includes:

March 3, 2015, Chicago Immigration Lunch Series: Karen Lundgren, Chief Counsel, Department of Homeland Security, Speaker (Peggy McCormick, ILS board member, and Eileen Momblanco, Co-Chairs);

March 11, 2015, DC Leadership Luncheon Series: Kuyomars "Q" Golparvar, Chief, Immigration Law and Practice, Immigration and Customs Enforcement, Department of Homeland Security, Speaker (Prakash Khatri, ILS board member, Chair);

March 12, 2015, Boston Brown Bag Lunch Series: Representing Unaccompanied Minors in Immigration Court, Hon. Robin Feder and Hon. Brenda O'Malley,

Speakers (Sara Ward, Esq. and Matthew Maiona, Esq., Co-Chairs);

April 8, 2015, DC Leadership Luncheon: Speaker TBD (Prakash Khatri, ILS board member, Chair);

April 21, 2015, Chicago Immigration Lunch Series: Going to Federal Court, Craig Oswald, Assistant U.S. Attorney, Justin Burton, Esq., Speakers (Peggy McCormick, ILS board member, and Eileen Momblanco, Co-Chairs).

In addition to our many learning and networking opportunities, we have undertaken several new initiatives this year. One of these is the Pro Bono Committee's effort to increase the availability and effectiveness of pro bono representation in the immigration courts. The Committee (Kate Metcalf, Chair) is currently exploring a comprehensive study to better understand the current levels of legal representation in the immigration courts and the resources available to pro se litigants. The intents of the study are to bring to light underserved areas to target for outreach programs and to propose recommendations to bolster pro bono representation across the United States. If you are interested in participating or learning more about the Committee's efforts, please let me know so that I can connect you with Kate.

Our Chapter and Section Liaison Committee (Mark Shmueli, Chair) is reaching out to FBA Chapters and is also the point of contact for Chapters looking for guidance or assistance in sponsoring immigration-related programming. This year alone, we have co-sponsored new and existing programming in Boston, Chicago, DC, El Paso and New York. The Chapter and Section Liaison Committee has also developed an application process for FBA Chapters and Sections in need of financial assistance for immigration programming. For the first time, the Section has earmarked funds for this purpose.

Our Law Student Division (Prof. Deborah Anker, Chair) mirrors the efforts of FBA National to involve law students in the Association. Law students' first contact with the FBA might be with National or it might be with the ILS Law Student Division. We welcome all law students as members. In addition, we have our first ILS law student chapter at Harvard Law School (Prof. Deborah Anker, Chair). If you are interested in starting a law student chapter of the Immigration Law Section at your law school or alma mater, let me know so that I can connect you with Prof. Anker and her Committee. In the meantime, stay tuned as we develop this area of our membership.

Our Younger Lawyers Division, and our Diversity and Membership Committees, are chaired by Robin Trangsrud, Tina Goel and Derek Julius, respectively. These three dynamic Committee Chairs are collaborating because of the overlap they discovered in their efforts to reach out to the immigration law community. Robin, Tina and Derek, younger lawyers themselves (35 and under OR practicing 10 years or less), are collectively focused on recruiting and retaining a diverse group of younger lawyers, in addition to lawyers from the larger immigration bar. Younger lawyers,

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of course, are the future of our Section. Meeting their needs and interests is critical. The diversity we seek in our membership also merits special mention. Our bylaws require that the Section's officers represent at least three judicial circuits, but we hope to achieve diversity in the following areas, as well: public/private practice, pro bono/for profit/public interest, academic/government/private practice, and age/race/ethnicity/gender/SO. This talented trio is off to a great start. In less than 5 months, Section membership has increased by 13%. By way of comparison, the FBA goal at the National level is 3% growth per year. Of course, Section members who have encouraged others to join, and all of the programs organized and run by our Section, also deserve credit for the rapid expansion in our ranks.

This year, our Social Media Committee (Tara Lundstrom, Chair) has taken care to ensure that our programs are widely advertised and that we maintain a presence on social media, the FBA website, on which we have a dedicated Section webpage, and on Facebook. Please let me know if there is an event not listed on our calendar or one that needs wider exposure.

Our Bylaws Committee (Hon. Dorothy Harbeck, Chair) is tasked with reviewing and recommending changes to our bylaws which have been in place since 1997.

The Publications Committee (Larry Burman, Chair, Dr. Alicia Triche, Vice Chair) publishes our award-winning newsletter, the Green Card, and edits articles for publication

in *The Federal Lawyer*. Dr. Triche is the current author of the Section's quarterly Immigration Update column in the *Federal Lawyer* and edits the occasional *Federal Lawyer* issue devoted to immigration law. The Jan/Feb 2015 issue of the *Federal Lawyer* has Tara Lundstrom's: "Lasting Lessons from the Border Surge: It's Time We Fund an Immigration Court System," and Dr. Triche's Immigration update: "Detention, Judicial Review, and National Security." Both are outstanding articles on the most timely issues. If you have an idea for a column for either the Green Card or the *Federal Lawyer*, or if you have any questions about how to proceed, feel free to reach out to Dr. Triche at [aliciatrichecl@gmail.com](mailto:aliciatrichecl@gmail.com)

If you are not yet involved in one or more Committees, please join us. There is much to do to make our growing Section even stronger and more vibrant. As always, I welcome your questions, comments and suggestions. Feel free to write to me or any Section officer at any time. Our addresses are on our webpage. You can always reach me at [rfeder\\_fedbar@aim.com](mailto:rfeder_fedbar@aim.com). I look forward to hearing from you. ♦

Very respectfully,  
Robin E. Feder  
Chair  
Immigration Law Section

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## Lunch with Hon. Robin E. Feder

BY LISA M. TITTEMORE, AND ILIANA DIAZ, SUNSTEIN,  
KANN MURPHY & TIMBERS LLP

The FBA's MA Chapter held a packed-room "Brown Bag Lunch" seminar on Thursday, November 13, 2014, with Immigration Judge Robin E. Feder leading the discussion, accompanied by Immigration Judge Brenda O'Malley and Court Administrator Robert Halpin.

Judge Feder discussed, in her personal capacity, the juvenile docket of the immigration courts, the impact of the recent surge of unaccompanied minors into the United States on the courts, and how these cases are being processed in Massachusetts. The seminar was held at the John F. Kennedy Building in Boston.

The event was not only well attended, but very informative. Led informally, the event also allowed for a candid discussion with those in attendance. Judge Feder expressed her support for the work of the FBA, explaining that she is the current Chair of the FBA National Immigration Section. See [www.fedbar.org/sections/immigration-law-section.aspx](http://www.fedbar.org/sections/immigration-law-section.aspx) for more information on the Section's activities.



Pictured (from left): Lisa M. Tittemore, Hon. Robin E. Feder, Michelle Schaffer and Christopher Sullivan

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## Section Events Calendar

The **Immigration Leadership monthly luncheons** are generally held on the second Wednesday of every month at La Tasca Restaurant, Washington, DC. The following are dates for future luncheon meetings. Please mark your calendars: **April 8, 2015, June 11, 2015, July 9, 2015, August 12, 2015, September 9, 2015, October 14, 2015, November 11, 2015 and December 9, 2015.** Watch for the announcements of each event, which will include e-registration information. Contact Prakash Khatri for information: Prakash@khatriilaw.com.

**April 10:** In conjunction with American University, Washington Law School, the Section will present a seminar on **Crimmigration** (the intersection of immigration and criminal law). Registration is free to AU students and alumni, very reasonable for others. Contact Mark Shmueli for information: Mark@MarkShmueli.com.

**April 21:** In conjunction with the Chicago chapter, the Section will present a seminar on **Going to Federal Court**, at Kent College of Law, Chicago IL. Register on the FBA website. Contact Peggy McCormick for information. mmcormick@mmhpc.com

**May 15-16:** Our flagship section event, the **Memphis Immigration Law Seminar**, at the Sheraton Downtown Hotel, Memphis, TN. Save money by grabbing an early bird registration by April 17, on the FBA website. Make a reservation at the special FBA rate of \$163 per night by calling 901-527-7300 (be sure to mention the FBA rate!), by April 21. The seminar will kick off with a dinner at the legendary Rendezvous Restaurant on Thursday the 14th, followed by two full days of the finest immigration seminars in the country, plus great evening events. Don't miss Memphis at this exciting time of year: Memphis in May, International Barbeque Festival, and the great music of Beal Street. ♦

# FEDERAL BAR ASSOCIATION Immigration Law Conference

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**May 15-16, 2015**  
Sheraton Memphis  
Downtown Hotel

To register today, visit  
[www.fedbar.org/ImmLaw15](http://www.fedbar.org/ImmLaw15)

## Immigration Court: The Other Backlog and What to Do About It

BY JASON DZUBOW

We all know about the backlog at the Asylum Offices, but in this article, I want to focus on another backlog—in the Immigration Courts—and what can be done to improve the situation. The Court backlog has been a bit off my radar; I suppose because the Immigration Courts have always been slow, and so delay in that realm was the norm. But the fact is, the delays in Court have gotten worse. My furthest case is currently set for March 2019. I expect to travel to the Court in my hovercraft.

The basic problem for the Courts, and across the government, is money. Resources are limited and now, with a Congressional leadership hostile to immigration, it seems less likely that the budget for EOIR—the Executive Office for Immigration Review; the agency that oversees the Courts—will be expanded (though a new, anti-immigration bill pending in the House would create 50 new Immigration Judge positions). However, there are some reforms that could be implemented that would not require additional money from the government.

Below are a few suggestions. Some might require Congressional action; others would not. Given the current situation, something needs to be done. Perhaps some of these ideas would help alleviate the Court backlog:

**Impose Costs:** Criminal and civil courts routinely impose costs and fines on people in the system, so why shouldn't Immigration Courts do the same? There generally is only one reason that a person would have a case before an Immigration Judge—he violated the immigration law. Maybe the violation wasn't his fault (think referred asylum seekers), and so a fine or payment of costs is not warranted, but the IJ can make this determination. The Immigration Court system is expensive, and it seems fair that people who are in the system because they violated the law should help pay for it. And of course, this money could be used to help improve the system.

**Premium Processing:** Certain application before USCIS allow for premium processing. The applicant pays additional money and receives a faster decision (though not necessarily a better decision). Maybe the Immigration Courts could create some type of premium processing so that an alien could pay additional money to speed up her case. The people who pay the premium processing fee would benefit the most from this plan, but the infusion of money into the system should benefit everyone.

With regard to the imposition of costs and premium processing, it seems a reasonable question to ask: Is this fair to people who cannot afford to pay? I suppose it is not, but America is not really a fair place. We are a *liaise faire*

capitalist democracy. Every man for himself, and all that. We routinely fine the poor for being poor, and while I don't like imposing costs in the immigration context, it is a way to improve the system for everyone—even those who cannot pay.

One last point here. Maybe one way to ease the burden would be to spread out the cost. If an alien is fined or forced to pay costs (to pay for the court, DHS, his own detention, etc.), those costs could be paid over time. Instead of receiving a green card, for example, the alien could receive a conditional green card that must be renewed every two years. As long as he continues to pay his debt, the card will be renewed.

**Empower DHS:** DHS attorneys are overworked and lack the resources necessary to properly do their jobs. Adding additional staff to the various Trial Attorneys offices would allow DHS to review cases in advance. This would allow attorneys like me to file applications for relief in advance. DHS could then review the applications and—where appropriate—agree to the relief. Of course, DHS would not agree to relief in all cases, but in many cases, relief is not contested.

If we could agree on relief in advance, we could remove the case from the Court's docket, thus freeing space for other cases. Indeed, perhaps this could be combined with premium processing, so that the alien can pay a fee to DHS to review her case (and DHS could use this money to hire more staff). Maybe DHS could even meet with the alien to further explore whether relief is appropriate. If, after examining the case, DHS determines that relief is appropriate, it could inform the Court, which would then grant the relief without a hearing.

There has been some (tepid) movement in this direction, with prosecutorial discretion, but that does not go far enough. Aliens who are eligible for substantive relief do not want prosecutorial discretion; they want their cases granted. If DHS had the resources to review and decide cases in advance, it would help alleviate the backlog before the Immigration Courts.

**Pre-Master Calendar Hearings:** Let's face it, Master Calendar Hearings ("MCH") are a huge waste of time. Why not require any alien who enters the system to attend a pre-MCH with a member of the Court staff (not an IJ). The pre-MCHs could be arranged by language group, so that everyone attending speaks the same language and the Court staff member could be fluent in that language (or have an appropriate interpreter). At the pre-MCH, the aliens would watch a video—in their own language—explaining the system

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and their rights (basically what the IJ repeats to *pro se* aliens 31 times each MCH). The staff member could answer basic questions and encourage the *pro se* aliens to find lawyers (basically what the IJ does 31 times each MCH). Aliens who will not use a lawyer can be scheduled for an in-person MCH, like what we have now. Aliens who say they will hire a lawyer will be given a deadline for the lawyer to enter her appearance (see the next suggestion for more on lawyers and MCHs). If the deadline passes, the alien will need to attend an in-person MCH.

**e-Master Calendar Hearings:** EOIR now requires all attorneys to register and obtain an EOIR ID Number. As far as I can tell, EOIR does nothing with these ID numbers. However, it (supposedly) is a first step towards electronic filing. Federal courts across the United States require electronic filing, and I see no reason that the Immigration Courts should not do the same. Once an attorney enters her appearance, she should be able to go on-line and plead to the allegations and charges in the Notice to Appear (the charging document in Immigration Court). She should also indicate the relief sought. If there is some reason that the lawyer needs to see the IJ, she can request to appear at a regular MCH. But for the large majority of cases, all the pleadings and requests for relief could

be done on-line. How, you ask, would this be an improvement over the current system, where lawyers can file written pleadings? At least in my experience, written pleadings are a huge pain in the tuchus. IJs often ignore them until the last minute, and we have to repeatedly call the Court to see whether the IJ will rule on them. So they really are not worth the trouble. If there was an easy electronic system that actually worked, and we could avoid MCHs, attorneys would be much inclined to use that system. It would save Court and DHS time, and it would also save attorney time and perhaps reduce costs for the alien.

OK, I suppose that is more than enough for now. If anyone at EOIR wants to hire me to implement these changes, you know where to reach me. ♦



*Jason Dzubow is a partner in Dzubow & Pilcher PLLC, an immigration law firm in Washington, DC. His blog, "The Asylumist," is the only blog in the U.S. devoted to asylum law and can be viewed at [www.Asylumist.com](http://www.Asylumist.com)*

## **TOP EIGHT SIGNS YOUR IMMIGRATION ATTORNEY MIGHT NOT BE A SPRING CHICKEN**

**BY DR. ALICIA TRICHE**

- 1.** Every once in a while, they accidentally refer to that person at the other table as "the Service".
- 2.** They don't know what a "DAR" is. When they go to the window, they ask for the tapes.
- 3.** To them, "Juan Osuna" is that guy who edits Interpreter Releases.
- 4.** They own a Bates stamp. They still use it.
- 5.** If their client didn't get served by certified mail, then their client is not in absentia.
- 6.** "The clock" is a thing that hangs on their wall, for the purpose of telling time.
- 7.** In their office is a hard copy of a red-lined INA that came into their possession somewhere around 1997.
- 8.** "I'm a dreamer" is a line from a John Lennon song.

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# Immigration Judges Roundtable at Chicago-Kent Law School

## BY MARGARET (PEGGY) McCORMICK

The Immigration Law Committee of the Chicago Chapter of the Federal Bar Association, in coordination with the national FBA Immigration Law Section, presented an Immigration Judges Roundtable hosted by the Chicago-Kent Student Chapter of the Federal Bar Association at IIT Chicago-Kent College of Law on Tuesday, Nov. 4, 2014.

The lively discussion topics ranged from best-practices, historical discussions of immigration law, this past summer's influx of undocumented, unaccompanied children, and the future of immigration law. After the roundtable, students, attorneys, and judges mingled in a spirited environment. The Chicago-Kent Student Chapter of the Federal Bar Association looks forward to partnering for four similar events next semester. ♦



Hon. Jennie I. Giambastiani, Hon. Robert D. Vinikoor, Hon. Sheila McNulty, and program moderator, Eileen Momblanco, Immigration Committee member.



Patrick Etchingham, law student and Program Director for the Chicago-Kent Student Chapter of the FBA, welcomes attendees to the roundtable discussion.



Board Member, Mary Meg McCarthy, and Immediate Past President, Margaret McCormick.

Christine Young,  
attorney for  
Homeland Security  
Investigations, poses  
a question to the  
judges.



## The Tragedy of Artesia

BY MEGAN JORDI

Driving away from Artesia last night, my eyes unexpectedly filled with tears and I cried chest-heaving sobs. After a week of representing detained women and children refugees in immigration court bond hearings, the stress of the week, the lack of sleep, and the weight of the tragedy of Artesia hit me. I was reminded of my body's same reaction almost 10 years ago when I drove away for the last time from the unaccompanied minor detention center in South Texas where I had been working as a volunteer paralegal. That was the experience that got me into this work in the first place. But this time it was supposed to be different. This time I was a lawyer. This time I knew the larger contexts of things and the nuanced political climate that manipulates humanitarian crises into fodder for politicians' games. Logically, I understood opposing counsel's arguments in court, even if I disagreed with them. But if I understood how things worked now, why was I feeling such raw emotion all over again?

The tragedy of Artesia is not only its inhumanity. The stark brown landscape, makeshift trailers, chain link fences with barbed wire, and the uniformed officers made to look tough with muscles and guns certainly do nothing to soften the harsh reality of detention. But what hit me at the end of this week was that the real tragedy of Artesia is in its suppressed humanity. Artesia is a place no one wants to be. The town smells like gas from the local oil refinery, the most popular restaurant at night is the Taco Bell-KFC combo establishment on Main Street, and now it's known as the place where hundreds of traumatized Central American and Mexican women and children are confined in the bastardized name of national security. As one lawyer put it, "Everyone cries in Artesia."

Immigration and Customs Enforcement (ICE) officers roam the grounds of the detention center in khakis and sunglasses, escorting detainees and lawyers from trailer to trailer. It's obvious who's in charge when even lawyers have to have an escort to go to the bathroom. I didn't know any of the officers' names at the beginning of the week. In my mind, they were carrying out a job with which I fundamentally disagreed. They were the enemy. But as the days passed, my perspective slowly changed. We began to seem like bad actors in a B-list movie, trying to play roles that didn't come naturally. I began noticing the way the officers smiled and greeted the detainees, the way they joked in bad Spanish with the children, and their countless attempts to entertain toddlers with paper airplanes, toys, and singing along to Pixar movies in Spanish. You could see which children had endeared themselves to certain officers. "That one's the best," an officer said to me, pointing at a 5-year old indigenous Guatemalan boy, who had entertained himself for an hour transporting wads of paper from his stash

to where the officer sat. The officer would accept the paper wads, saying, "Grah-si-us," not realizing the child only spoke Quiché. But that wasn't the point.

The point is that Artesia resurrects a deeply rooted humanity in each person who ends up there, causing everyone to feel the most basic human instincts on an emotional level. ICE officers had been sent from all over the country—Boston, LA, Miami, among others—to run this facility in the middle of the desert, incentivized by increased pay and the promise that their stint would be temporary. Three lawyers from across the nation—one law professor, one firm attorney, and myself, a non-profit lawyer—all came armed with a sense of duty and social justice, statutes in hand, ready to fight. We were all soldiers prepared for battle with one another. What happened was just the opposite. We all fell victim to our most basic human emotions that happen when people with very different experiences come together in a confined space under tragic circumstances. The intense intimacy we began to experience with one another was jarring to our brainwashed hearts and minds that had been trained to see each other as less-than-human. This was not what we had been told to feel. This was not what Washington had in mind. Like the unnatural feeling soldiers must feel when sent to kill people they have never met, we—the refugees, the lawyers and the ICE officers—felt as though we had all become pawns in Washington's games.

The movie "Crash," says in its opening lines, "I think we miss...touch so much, that we crash into each other, just so we can feel something." The women's stories of survival against the odds, the horror of watching sick children get sicker from the trauma of confinement, and my disbelief at how government attorneys via video monitor could argue that these women and children should be kept in detention, will all stay with me. But the experiences that really changed me were the ones where humanity was allowed to surface despite the inhuman protocols we were supposed to follow—the ones that highlighted the interconnectedness of all of us. I remember the Honduran woman who wailed, "God is Great!", her hands uplifted, while ICE officers smiled and congratulated her on her release on bond; the little Guatemalan boy who, mimicking his mother's emotional response to being granted bond, ran to me and threw his arms around my legs; the ICE officer who brought me coffee in my 12<sup>th</sup> hour of work when he could see I was flailing; the judge who didn't make a woman stand to be sworn in because she was holding her sleeping, sick child in her arms; the little boy who drew me a picture of his house in El Salvador with rivers and animals and rainbows while his mother testified about her brutal rape in that very house in the next room; and the ICE officer who said everything I was

feeling: “These are not the people we should be detaining. All of us on the ground know that. But nobody listens to us.”

What would our world look like if we were allowed to feel? Who would we be if we were allowed to connect with those most different from us? What if those on the ground who had contact with these refugees had a say about how they should be treated and the policies that directly affected them?

After over 80 hours of work by each lawyer and over 100 hearings altogether, more than 50 women and their children were released on bond to continue their fight for asylum in the United States. I do not know how many of them will be successful in the end and how many of them will be

ordered removed back to their countries. What I do know is that humans are resilient, especially when they are shown a little compassion along the way. And if given the chance to connect with one another, we will always naturally lean towards compassion over disdain, understanding over quick judgment, and love over hate. ♦



*Megan Jordi is co-founder of the only legal non-profit in New Mexico—the New Mexico Immigrant Law Center.*

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Rome CLE, Margaret

(Peggy) McCormick

# Persecutor or Common Criminal? Assessing a Government's Inability or Unwillingness to Control Private Persecution

BY JOSEPH HASSELL

In all asylum and withholding of removal cases under the Immigration and Nationality Act, an applicant must establish that he or she has been persecuted, has a well-founded fear of persecution, or is more likely than not to be persecuted in the designated country of removal. Sections 101(a)(42)(A), 208(b)(1)(B)(i), 241(b)(3)(C) of the Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i), 1231(b)(3)(C). Persecution “always implies some connection to government action or inaction,” generally in the form of direct government action or government supported action. *See, e.g., Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014) (internal quotation marks and citation omitted).

However, the Board of Immigration Appeals and the Federal circuit courts of appeals universally acknowledge that for purposes of asylum and withholding of removal under the Act “persecution” may involve a “government’s inability or unwillingness to control *private* conduct.”<sup>1</sup> *See id.* (emphasis added) (citation omitted); *see also Malu v. U.S. Att’y Gen.*, No. 13-10409, 2014 WL 4073115, at \*8 (11th Cir. Aug. 19, 2014); *Paloka v. Holder*, No. 12-4987-ag, 2014 WL 3865992, at \*3 (2d Cir. Aug. 7, 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496, 503 (3d Cir. 2011); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975) (formalizing the “unwilling or unable” to control standard for non-governmental persecution in the context of a claim made under former section 243(h) of the Act, 8 U.S.C. § 1253(h) (1970)).

This article will first present some background information on the “unable or unwilling” to control standard, including a brief exposition of the standard’s origins, the appropriate standard used to review a government’s unwillingness or inability to protect an alien, and the contours of an alien’s burden of proof on the issue. It will then discuss other common issues that arise in assessing a government’s ability and willingness to control private conduct. For instance, what effect, if any, does an alien’s failure to report private acts of persecution to the authorities have on the analysis? How can adjudicators assess the efficacy of laws or government policies proscribing the private persecution at issue? What is the distinction between a government’s *willingness* to control a private actor and its *ability* to do so, and how should

adjudicators measure a government’s inability to protect an alien from private conduct?

## Background

### *Historical Perspective*

The Board first suggested that private acts that a government was unable or unwilling to control could constitute persecution in *Matter of Eusaph*, 10 I&N Dec. 453 (BIA 1964). *See Cece v. Holder*, 733 F.3d 662, 679 (7th Cir. 2013) (en banc) (Easterbrook, J., dissenting). In *Matter of Eusaph*, the alien claimed that he was eligible for temporary withholding of deportation under former section 243(h) of the Act because he asserted that he would be harmed by Hindus in India on account of his Muslim faith and Pakistani nationality. The Board denied the alien’s application for relief. Although the Board recognized that persecution could be perpetrated by private actors, it found that the record did not reflect that the Indian Government tolerated, sponsored, or condoned private violence against Pakistani Muslims, or “that the police powers of the government have degenerated to the point where it is *unable* to take proper measures to control individual cases of violence in this respect which arise.” *Matter of Eusaph*, 10 I&N Dec. at 454–55 (emphasis added). Based on this finding, the Board concluded that the alien did “not meet the burden resting upon him to establish persecution.” *Id.* at 454.

The Board continued to refine the “unable or unwilling” to control standard and finally formalized it in 1975. *See Matter of Pierre*, 15 I&N Dec. at 462 (collecting cases); *see also Matter of Tan*, 12 I&N Dec. 564, 568 (BIA 1967) (“Mob action may be a ground for staying deportation under section 243(h) where it is established that a government *cannot control* the mob.” (emphasis added)). Synthesizing its prior reasoning on the subject, the Board in *Matter of Pierre* held that an alien could qualify for temporary withholding of deportation under former section 243(h) of the Act “even though the persecution was at the hands of individuals not connected with any government” as long as the alien showed “that the government concerned was either *unwilling or unable* to control the persecuting individual or group.” 15 I&N Dec. at 462 (emphasis added).

Following the enactment of The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, the Board concluded that its previous construction of the term “persecution” under former section 243(h) was fully applicable to the term as it appeared in section 101(a)(42)(A) of the Act. *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other*

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grounds, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). Accordingly, asylum applicants under section 208 of the Act were also required to show that they were persecuted by the government or by forces the government was “unable or unwilling” to control. *See id.*; *Matter of McMullen*, 17 I&N Dec. 542, 545 (BIA 1980) (citing, inter alia, *Matter of Pierre*, 15 I&N Dec. 461, and *Matter of Tan*, 12 I&N Dec. 564, and noting that “[w]hile these cases were decided prior to the enactment of the Refugee Act of 1980, we believe they are applicable to an alien seeking 243(h) relief, or asylum, under the new Act”).

In December 2000, the former Immigration and Naturalization Service proposed a regulation to clarify the meaning of various terms in asylum law. Included in the regulation was “further guidance as to what was meant by . . . the requirement that the government be ‘unable or unwilling to control’ non-governmental persecutors.” *See Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,590–91, 76,597 (proposed Dec. 7, 2000). The regulation provided a list of pertinent evidence for adjudicators to consider in determining whether a government was “unable or unwilling” to control a private actor. *Id.* at 76,591. That list, which was not intended to be exhaustive, included the following: evidence that the government condoned or was complicit in the private harm being inflicted; the alien’s attempts, if any, to obtain government protection and the government’s response to those attempts; government action that is perfunctory; repeated government unresponsiveness; general country conditions; the nature of the government’s laws or policies with regard to the complained of harm; and the steps, if any, the government has taken to prevent the infliction of such harm. *Id.* at 76,587, 76,591. As of this writing, the proposed regulation has not been finalized.

Nevertheless, the Board continues to employ the “unable or unwilling” standard in determining an alien’s eligibility for asylum and withholding of removal under the Act. *Matter of A-R-C-G*, 26 I&N Dec. 388, 395 (BIA 2014) (remanding so that an applicant for asylum could demonstrate that the Guatemalan Government was “unwilling or unable” to control her abusive husband); *Matter of W-G-R*, 26 I&N Dec. 208, 224 n.8 (BIA 2014) (stating that “to be eligible for withholding of removal under the Act, the respondent would have to establish that the Salvadoran Government is unable or unwilling to control Mara 18 gang members”). As noted, all of the circuit courts have adopted and continue to employ the same standard, although their applications and interpretations of this standard are less than uniform.

#### *Standard of Review*

It is important for adjudicators to recognize that a government’s ability and willingness “to control private actors is a ‘question of fact that must be resolved based on the record in each case.’” *See, e.g., Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013) (quoting *Menjivar*, 416 F.3d at 921). The circuit courts review an Immigration Judge’s factual findings regarding a government’s ability and willingness to control private actors for substantial evidence, meaning

that a circuit court will uphold those findings unless “any reasonable adjudicator would be compelled to conclude to the contrary.” Section 242(b)(4)(B) of the Act, 8 U.S.C. § 1252(b)(4)(B); *see also, e.g., Lima v. Holder*, 758 F.3d 72, 78 (1st Cir. 2014).

The Board, on the other hand, reviews an Immigration Judge’s findings regarding the “unable or unwilling” to control issue for clear error. 8 C.F.R. § 1003.1(d)(3)(i). “[A] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Matter of R-S-H*, 23 I&N Dec. 629, 637 (BIA 2003) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (internal quotation marks omitted). The Board misapplies this deferential standard if it weighs the evidence regarding a government’s ability or willingness to control private actors differently from the Immigration Judge, or if the Board finds facts relating to the issue that were not found by the Immigration Judge. *See id.*

For instance, in *Crespin-Valladares*, 632 F.3d 117, the United States Court of Appeals for the Fourth Circuit found that, rather than reviewing the Immigration Judge’s findings for clear error, the Board instead concluded, without further elaboration, that the State Department report in the record demonstrated “that the Salvadoran government has focused law enforcement efforts on suppressing gang violence” and thus the aliens had “not shown that the government would be unable or unwilling to protect them from MS-13.” *Id.* at 128 (quoting the Board’s unpublished decision) (internal quotation mark omitted). The Fourth Circuit noted that the Immigration Judge had “identified a litany of reasons as to why attempts by the Salvadoran government to control gang violence have proved futile.” *Id.* The court remanded the case, in part, because the Board had not reviewed the Immigration Judge’s findings regarding the “unable or unwilling” to control issue under the correct standard. *Id.* at 128–29; *see also Vitug v. Holder*, 723 F.3d 1056, 1064 (9th Cir. 2013) (holding that the Board misapplied the clear error standard when it disregarded the Immigration Judge’s finding that the Government of the Philippines was unable or unwilling to protect the alien from anti-gay violence and instead made its own findings of fact on the issue); *Boraj v. Holder*, 559 F. App’x 51, 53 (2d Cir. 2014) (remanding because the Board denied asylum and withholding of removal based on its own factual findings that the Albanian authorities were willing and able to protect the alien from gang members, even though the Immigration Judge had made no findings in this regard).

#### *Burden of Proof*

As noted, an applicant for asylum or withholding of removal under the Act bears the burden of establishing that he or she has been persecuted in the designated country of removal. 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b).<sup>2</sup> An applicant may carry this burden by presenting direct or circumstantial evidence of past persecution. *See, e.g., Madrigal v. Holder*, 716 F.3d 499, 505 (9th Cir. 2013). Accordingly,

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an applicant for asylum and withholding of removal must show—through direct or circumstantial evidence—that the government of the country of removal was unable or unwilling to protect him or her from past persecution inflicted by private actors. *See, e.g., Aldana-Ramos*, 757 F.3d at 17.<sup>3</sup>

In this regard, several circuits have held that it is the applicant's burden to prove that the government's failure to control a private persecutor (for example, by declining to arrest or prosecute such an individual) is indicative of the government's complicity in the private act or its complete helplessness to stop it. *See, e.g., Jonaitiene v. Holder*, 660 F.3d 267, 271 (7th Cir. 2011) (noting that there may be a reasonable basis for government inaction on a particular report of criminal activity); *Menjivar*, 416 F.3d at 921 (same); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (holding that the alien had not demonstrated that the German Government was unable or unwilling to control the private actors where he contended that the police failed to investigate his reports but "admitted that he did not give the police the names of any suspects because he did not know any specific names" and his wife testified "that the police investigated the complaints, but were ultimately unable to solve the crimes").

Furthermore, the Eighth Circuit has made clear that generalized evidence of "ineffectiveness and corruption do not, alone, require a finding that the government is 'unable or unwilling'" to control a private persecutor where the evidence the government's actual response indicates the contrary to be the case. *Gutierrez-Vidal*, 709 F.3d at 733 (quoting *Khilan v. Holder*, 557 F.3d 583, 586 (8th Cir. 2009) (per curiam)) (internal quotation marks omitted); *see also Menjivar*, 416 F.3d at 922 ("We deem the news articles regarding gang activity too general to dictate a conclusion that [a gang member's] specific acts directed toward [the alien] were persecution by the government.").

The alien in *Khilan* was kidnapped by Muslim separatists in the Kashmir region of India. The police arrested several individuals suspected of the kidnapping. However, fearing retaliation, the alien refused to cooperate with the police's investigation. After a review of the evidence presented, the Immigration Judge and the Board found that the Indian Government opposes Kashmiri Muslim separatists and provides protection to people threatened by them. The Eighth Circuit agreed. The court acknowledged that the alien had presented significant evidence of separatist and religious violence in India, as well as widespread corruption and abuse of police power in that country. *Id.* at 585. However, the court noted that this general evidence, without more, was insufficient to prove that the Indian Government was "unable or unwilling" to control the separatists where the evidence specific to the alien's case indicated that the police not only promptly intervened, but also mounted an effective response. *Id.* at 586; *see also Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007) ("In determining whether a government is willing and able to control persecutors, . . . a prompt response by local authorities to prior incidents is 'the most telling datum.'" (emphasis added) (citation omit-

ted)). Specifically, the Indian police arrested a number of suspects in the alien's kidnapping and attempted to further their investigation. The court observed that the Indian Government could not "be faulted for [the alien's] own refusal to cooperate with the investigation." *Khilan*, 557 F.3d at 586.

In contrast, the Ninth Circuit has made clear that generalized evidence of *effectiveness* does not necessarily prevent aliens from meeting their burden of proof where there is specific evidence that the aliens have repeatedly sought government protection to no avail. *See Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004). In *Mashiri*, a family of Afghan nationals had been subjected to multiple incidents of anti-foreigner violence in Germany, which they repeatedly reported to the local police. The local police declined to intervene on their behalf and at one point informed them that anti-foreigner violence "happened all the time and that foreigners 'better try to take care of [themselves].'" *Id.* at 1121. The Immigration Judge acknowledged the specific evidence of the German Government's refusal to protect the aliens but, relying on more general evidence in the State Department report, found that the aliens had "failed to meet [their] burden of proof because [they] could not prove 'harm or fear of harm from a group that the [German] government is unwilling or unable to control on a country-wide basis.'" *Id.* at 1122 (third alteration in original) (quoting the Immigration Judge's decision).

The Ninth Circuit remanded, concluding that the Immigration Judge's finding was based on legal error. The court noted that it had "never required an applicant proceeding on a past persecution theory to prove that her 'past experience reflected conditions nationwide.'" *Id.* (citation omitted). In fact, the court held that an alien could meet his or her "burden with evidence that the government was unable or unwilling to control the persecution in the applicant's *home city or area.*" *Id.* (emphasis added). It is unclear whether this holding extends beyond the Ninth Circuit. Nevertheless, *Mashiri* illustrates an important point. In determining whether an alien has established that the government is unable or unwilling to control private conduct, adjudicators should not disregard a government's actual response to the alien's requests for protection or focus exclusively on general evidence of government effectiveness in controlling private actors. *See Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056 (9th Cir. 2006) ("Evidence of background country conditions alone cannot establish that specific acts of persecution did or did not occur.").

But adjudicators should not discount general evidence or evidence of country conditions altogether in assessing whether an alien has met his or her burden on the "unable or unwilling" issue. General evidence of government corruption or ineffectiveness is especially relevant in cases where the government has failed to take action or has failed to take effective action in the alien's specific case, despite the alien's repeated efforts to obtain government protection. *Aldana-Ramos*, 757 F.3d at 17; *Aliyev v. Mukasey*, 549 F.3d 111 (2d Cir. 2008); *see also Matter of O-Z- & I-Z-*, 22 I&N

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Dec. 23, 26 (BIA 1998) (upholding a grant of asylum where “the respondent reported at least three . . . incidents to the police, who took no action beyond writing a report”). For instance, in *Aliyev*, 549 F.3d 111, the alien, an ethnic Uyghur, was beaten by Kazakh nationalists. He reported the assault to the police, and the police referred him to the hospital for medical testing but “nothing further was done in terms of an investigation.” *Id.* at 118. Days after the assault, the nationalists threatened to kill the alien. His home was later bombed. The alien reported the bombing to the police and a single sheriff reported to the scene “but nothing further was ever done.” *Id.* at 119.

The Second Circuit noted that the alien had presented specific evidence “that despite repeated reports of violence to the police, no significant action was taken on his behalf.” *Id.* However, the court did not base its conclusion wholly on the police’s actual response to the alien’s requests for protection. The court ultimately determined that the Kazakh police’s perfunctory actions were indicative of its inability or unwillingness to protect the alien based on evidence that one of his attackers was the nephew of a high-ranking Kazakh Government official and country conditions reports documenting that the Kazakh police were generally “poorly paid and believed to be corrupt.” *Id.*

Similarly, in *Aldana-Ramos*, 757 F.3d 9, the First Circuit remanded the case to the Board to determine whether the aliens (siblings) had presented sufficient evidence that the Guatemalan Government was unable or unwilling to control members of the “Z” gang, who had killed their father and had repeatedly threatened and intimidated them. In that case, the aliens had testified that the Government had failed to act on their behalf. They also testified that the Guatemalan police were generally unwilling to investigate the “Z” gang. In the court’s view, this evidence of general ineffectiveness bolstered their testimony that a local judge had dismissed all charges against a member of the “Z” gang suspected of killing their father and released the gang member after the judge was bribed.

Aliens may also meet their burden of proof on the “unable or unwilling” to control issue using specific evidence of government inaction in their case where there is general evidence that the government is complicit in or tacitly approves of the private persecution. The First Circuit found that an alien presented this type of evidence in *Ivanov v. Holder*, 736 F.3d 5 (1st Cir. 2013). In *Ivanov*, skinheads beat and kidnapped the alien, a Pentecostal Christian, holding him captive for 3 days. His parents filed a police report after the alien’s kidnapping but nothing was done. Following the kidnapping and the alien’s eventual release, he was summoned to police headquarters, where a Federal law enforcement official demanded that he testify against his pastor. The alien refused. A few days later, skinheads attacked the alien in his apartment lobby and threw Molotov cocktails at his home. The alien reported the attack, but the police again took no action. The Immigration Judge and the Board found that the alien had not sufficiently established that the Russian Government was unable or unwilling to protect him.

The First Circuit disagreed.

The court observed that there was “nothing in the record to suggest that [the alien’s] abusers were ever apprehended, punished, or even looked for, in spite of having severely beaten and detained him for three days.” *Id.* at 13. Notably, the court found that this specific evidence of Government inaction was consistent with more general reports that local authorities failed to adequately respond to attacks against religious minorities. The court also found the police’s inaction following the second skinhead attack, which occurred days after a Federal official pressured the alien to testify against his pastor, was also evidence that the Russian Government was less than willing or able to protect the alien. According to the court, this specific evidence of inaction was corroborated by reports that Russian officials generally treated leaders of minority religious sects as security threats and gave tacit or active support to the view that Russian Orthodoxy was “the country’s so-called ‘true religion.’” *Id.* On this record, the court concluded that “[l]ocal authorities either failed to take action against, or perhaps even supported, [the alien’s] persecutors. Their failure to respond signals their unwillingness or inability to control [the alien’s] persecutors.” *Id.* at 14 (emphasis added).

Absent general evidence of complicity, corruption, or ineffectiveness, it may be more difficult for an alien to show that specific instances of government inaction are indicative of its inability or unwillingness to control private conduct. In fact, the Seventh Circuit has held that in such a case, it remains the alien’s burden to show that government inaction was a deviation from standard law enforcement procedure. See *Jonaitiene*, 660 F.3d at 271. In *Jonaitiene*, the aliens (two siblings) asserted that they had been persecuted in Lithuania by an individual named Reika, whom the siblings had reported to the authorities for producing fraudulent visas. In retaliation, Reika lit the aliens’ mother’s apartment door on fire. No one was harmed by the blaze. The local fire department investigated the fire, but the police did not. Prosecutors also declined to institute criminal proceedings against Reika for participating in the fraudulent visa scheme.

The Seventh Circuit found that the police’s failure to investigate the arson and the Government’s decision not to prosecute Reika did not satisfy the aliens’ burden to show that the Lithuanian Government was unable or unwilling to protect them from private conduct. According to the court, the record was “[m]issing . . . any indicator as to why” the government did not to act “and whether [these decisions] constituted a deviation from standard operating procedures.” *Id.* The court noted, for instance, that the aliens had not shown “whether the investigation of fires is normally left to the fire department [in Lithuania], which did investigate the incident.” *Id.* The court was similarly left to guess “whether the Lithuanian government was presented with sufficient evidence to prosecute Reika but chose not to do so.” *Id.*; cf. *Doe*, 736 F.3d at 879.

In *Doe*, the Ninth Circuit found that the alien had satisfied his burden of proof despite the fact that the Russian police had rejected his second complaint pursuant a Russian law

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enforcement regulation, the contents of which were never identified. The court found that the alien's failure to identify the regulation's contents (and thus his failure to show that his complaint was not discharged pursuant to standard law enforcement procedures) was not fatal to his claim. Instead, the court noted that there was other circumstantial evidence of the Russian Government's tacit approval of the private persecution in the record. Significantly, "the Russian police rejected his first complaint out of hand, questioning why he did not simply defend himself, and subsequently dismissed his second complaint without doing anything more than interviewing him at the hospital where he was being treated for his injuries." *Id.* "The police did so even though [the alien] did identify his attackers both times, and there was substantial evidence that the assaults were motivated by anti-homosexual bias." *Id.*

### Additional Issues

#### *Failure to Report*

An alien's "[f]ailure to inform law enforcement of threats or attacks [he or she] claims to have suffered is *material* to the rejection of claims of government participation or complicity in past persecution." *Mejilla-Romero v. Holder*, 600 F.3d 63, 73 (1st Cir. 2010) (emphasis added). Nevertheless, a failure to report persecution is *not* essential to showing that a government is unable or unwilling to control private conduct. See *Matter of S-A*, 22 I&N Dec. 1328, 1335 (BIA 2000).

In *Matter of S-A*, the Board found that an alien's failure to report her father's abuse to the Moroccan authorities was not fatal to her asylum claim because the alien had convincingly showed that going to the police would have been futile or would have subjected her to a risk of increased harm. The Board first noted that under Moroccan law and social norms "a father's power over his daughter is unfettered." *Id.* at 1330, 1335. Thus, reporting the abuse would have been futile because the police would have declined to intervene on her behalf and stop her father's abusive conduct.

In addition to being futile "in light of societal religious mores," the alien had also shown that turning to the police for protection was "potentially dangerous." *Id.* at 1332-33. Evidence in the State Department report "corroborate[d] ... testimony concerning the futility and perils of seeking governmental protection," and the Board noted that few women reported abuse because "domestic violence is commonplace [in Morocco] and legal remedies are generally unavailable to women" who, upon losing in court, "are returned to the abusive home." *Id.* at 1333. Accordingly, the Board held that "[a]lthough she did not request protection from the government, the evidence convinces us that even if the respondent had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct." *Id.* at 1335.

In line with *Matter of S-A*, no circuit has imposed a so-called "reporting requirement." *Castro-Martinez v. Holder*, 674 F.3d 1073, 1080-81 & n.1 (9th Cir. 2011) ("To be clear '[t]he reporting of private persecution to the authorities is not ... an essential requirement for establishing government

unwillingness or inability to control attackers.'" (alteration in original) (citation omitted)). Instead, most circuits require an alien to show, beyond mere speculation, what a government *would have done* had the alien sought government protection (namely, that it would have been unable or unwilling to protect her). See, e.g., *Almutairi v. Holder*, 722 F.3d 996, 1003 (7th Cir. 2013) (concluding that the alien had not shown that the Kuwaiti Government was unable or unwilling to protect him from private threats because he never reported the threats to the authorities and the alien "could only speculate that the Kuwaiti government might not protect him if he did seek its help"); *Shaghil v. Holder*, 638 F.3d 828, 834 (8th Cir. 2011) (finding it significant that the alien never reported the persecution to the police because there was "no evidence the government was unable or unwilling to control [the alien's] assailants in this case, and generalized evidence of occasional police failures, without more, is insufficient to show" that reporting would have been futile); *Mejilla-Romero*, 600 F.3d at 73-74 (finding that the record did not support the alien's contention that his failure to report a gang attack was justified because the record showed that the Honduran Government was committed to combatting gang violence and the police had previously intervened on the alien's behalf); *Lopez v. U.S. Att'y Gen.*, 504 F.3d 1341, 1345 (11th Cir. 2007) (holding that "[a]lthough the failure to report persecution to local government authorities generally is fatal to an asylum claim, . . . it would be excused where the [the alien] convincingly demonstrates that those authorities would have been unable or unwilling to protect her, and for that reason she could not rely on them" (citing *Matter of S-A*, 22 I&N Dec. at 1335)); *Montes v. Holder*, 394 F. App'x 95, 99 (5th Cir. 2010); *Procel v. Att'y Gen. of U.S.*, 374 F. App'x 354, 356 (3d Cir. 2010); *El Ghorbi v. Mukasey*, 281 F. App'x 514, 517 (6th Cir. 2008); *Xi Yan Lin v. U.S. Att'y Gen.*, 272 F. App'x 51, 53 (2d Cir. 2008) (finding that the alien failed to show that the Chinese Government was "unable or unwilling to control" her husband's abuse where she made no effort to seek assistance and the record indicated that the Government had taken an "increased interest in preventing domestic violence").

The circuit with the most developed law on this issue is the Ninth Circuit. See generally *Vitug*, 723 F.3d at 1065; *Castro-Martinez*, 674 F.3d at 1080-81; *Afriyie v. Holder*, 613 F.3d 924, 927-28, 932 (9th Cir. 2010); *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010); *Ornelas-Chavez*, 458 F.3d at 1057; *Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005); *Deloso v. Ashcroft*, 393 F.3d 907, 858, 866 n.5 (9th Cir. 2005). The circuit's decision in *Castro-Martinez*, in particular, contains the most in-depth discussion of the issue to-date. Most notably, this decision discusses the types of evidence an alien may present to fill the evidentiary gap and show, beyond mere speculation, what the government *would have done* had the alien sought government protection.

The alien in *Castro-Martinez* feared returning to Mexico because he had been raped by a group of teenagers as a child. The teenagers threatened the alien and instructed him not to report the rape to the authorities. Based on

these threats, the alien did not report the rape and fled the country. The Ninth Circuit reiterated that it did not require an alien to report private persecution in order to establish that a government was unable or unwilling to control such conduct. *Castro-Martinez*, 674 F.3d at 1080–81. The court stated, moreover, that it had never required “any victim, let alone a child, . . . to report a sexual assault to the authorities.” *Id.* at 1081.

Nevertheless, the court found that the alien’s failure to report the rape to the Mexican authorities was material insofar as it left a “gap in proof about how the government would [have] respond[ed]” had the alien reported the rape. *Id.* (quoting *Rahimzadeh*, 613 F.3d at 922) (internal quotation marks omitted). The court determined that an alien could fill this evidentiary gap in four different ways. First, the alien could “demonstrate the government’s lack of ability or willingness to respond to violence by ‘establishing that private persecution of a particular sort is widespread and well-known but not controlled by the government.’” *Id.* (quoting same). Second, the alien could “show[] that [he or] others have made reports of similar incidents to no avail.” *Id.* (quoting same) (internal quotation marks omitted); see also *Matter of O-Z- & I-Z-*, 22 I&N Dec. at 26. Third, the alien could meet his burden by “demonstrating that a country’s laws or customs effectively deprive [him] of any meaningful recourse to governmental protection.” *Castro-Martinez*, 674 F.3d at 1081 (quoting *Rahimzadeh*, 613 F.3d at 921) (internal quotation marks omitted); see also *Matter of S-A-*, 22 I&N Dec. at 1330, 1332–33, 1335. Finally, the alien could also fill the evidentiary gap by “convincingly establish[ing] that [going to the authorities] would have been futile or would have subjected [the individual] to further abuse.” *Castro-Martinez*, 674 F.3d at 1081 (alterations in original) (quoting *Rahimzadeh*, 613 F.3d at 922) (internal

quotation marks omitted).

The court found the alien’s unsubstantiated assertions that reporting the rape would have been futile or would have subjected him to an increased risk of harm, “without more, [were] not sufficient to fill the gaps in the record regarding how the Mexican government would have responded had [the alien] reported his attacks.” *Id.* In fact, the court found that nothing in the record indicated that the Mexican authorities would have ignored the rape of a child or that authorities would have failed to provide such a child with protection. Accordingly, the Ninth Circuit declined to grant the alien’s petition for review and upheld the Board’s denial of his application for asylum and withholding under the Act.

#### *Effective Law or Paper Tiger?*

Like an alien’s failure to report, the mere existence of a law or government policy in the country of removal prohibiting the private persecution at issue is material to, but *not* necessarily dispositive of, whether the government is able and willing to control such conduct. When there is evidence of a law or policy barring private persecution, an adjudicator should consider and address the efficacy of the law or policy. For example, what are the punishments imposed by the legal regime or policy? What defenses does the law provide to the alleged persecutor? What societal values does the legal regime or policy reflect? What is the leadership’s attitude toward the law or policy? See generally *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011); *Fiadjoe v. Att’y Gen. of U.S.*, 411 F.3d 135, 160–61 (3d Cir. 2005).

While the alien in *Sarhan* was living in the United States, her cousin spread false rumors throughout the alien’s community in Jordan that the alien had committed adultery. The alien’s brother caught wind of these rumors, believed them, and repeatedly threatened to kill the alien upon her

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return to Jordan in order to restore the family's honor. In other words, the alien's brother was threatening to commit a so-called "honor crime" or "honor killing." *Sarhan*, 658 F.3d at 651, 657. The Immigration Judge denied the alien's application for withholding of removal under the Act, finding that the Jordanian Government was able and willing to protect the alien from her brother because the record reflected that the Jordanian Government criminalizes "honor killings" in its penal code and that the perpetrators of these killings are invariably prosecuted and convicted. The Immigration Judge recognized that "honor killings" were punished less severely than other forms of premeditated murder. However, the Immigration Judge observed that the Jordanian Government was "trying to reform the penal code" and institute stricter punishments. *Id.* at 660. The Board affirmed the Immigration Judge's decision for similar reasons.

The Seventh Circuit rejected the Immigration Judge's and the Board's analyses. The court acknowledged that the perpetrators of "honor killings" were invariably convicted and punished for their crimes. In fact, the Jordanian Government had obtained 17 convictions for each of the 17 "honor killings" perpetrated in 2007. Nevertheless, the court concluded that "[p]rosecution at times is an empty gesture." *Id.* at 658. The court found it significant that although all other forms of premeditated murder were punished by death in Jordan, the average sentence for an "honor killing" was 6 months' imprisonment or less. The court found such sentences to be de minimis, "result[ing] in little more than a slap on the wrist." *Id.* In addition, the only form of protection the Jordanian Government offered to potential "honor killing" victims was voluntary, indefinite incarceration of the victim. And in some cases, the court observed, potential victims of "honor crimes" remained in voluntarily incarceration for up to 20 years.

In the Seventh Circuit's view, even though the Jordanian Penal Code prohibited "honor crimes," the record compelled the conclusion that the Jordanian Government was unable or unwilling to protect potential "honor killing" victims. The court noted that "[a] six-month sentence for [an 'honor killing,' a] kind of premeditated murder, when all other murders are punished much more severely, sends a strong social message of toleration for the practice." *Id.* According to the court, "[t]he legal regime and the minimal punishments that result mean that the Jordanian government at best does almost nothing and at worst promotes the practice of honor killings." *Id.* at 659.

The court additionally found that the Jordanian Government's *attempts* to reform its Penal Code in order to punish "honor killings" more severely were insufficient evidence of "concrete government action." *Id.* at 660 ("Attempts to amend laws to help curb violence against women are welcome steps, but they are not evidence that the government of Jordan has the power or the desire to protect a" potential victim of an "honor crime"). In fact, the court found that the Jordanian Government's repeated failures to institute better protections for potential victims reflected "a widespread unwillingness to recognize the abuse involved or take action against the problem." *Id.* at 659. Finally, the court noted

that voluntary, indefinite incarceration of potential victims was not a cognizable form of government protection; it was "direct persecution, in the form of deprivation of an innocent person's liberty, by the government." *Id.* at 660.

Statements made by a country's leadership disparaging a law or policy which prohibits private persecution (and/or statements approving of the banned practice) may also be relevant in assessing whether a government is willing and able to effectively enforce such a prohibition. *See Fiadjoe*, 411 F.3d at 160–61. The alien in *Fiadjoe* was a victim of Trokosi, a form of ritualistic slavery customary among some tribes in Ghana. The alien was enslaved by her father who repeatedly beat and sexually assaulted her. The Immigration Judge denied the alien's application for asylum and withholding of removal, in part, because the alien had not shown that the Ghanaian Government was unable or unwilling to control her father. The Immigration Judge based this conclusion on evidence that the Ghanaian Constitution prohibited slavery, that the Ghanaian Government had prohibited Trokosi, and that several thousand slaves were freed as a result. The Board affirmed but the Third Circuit disagreed with the Immigration Judge's conclusion.

The court noted that the practice of Trokosi continued in Ghana despite its prohibition. In fact, the Ghanaian Government had not prosecuted a single Trokosi practitioner since the practice was banned. The court additionally cited statements made by Ghana's president and a presidential aide which approved of Trokosi and were critical of anti-Trokosi activism as further evidence that the Ghanaian Government had little desire to protect Trokosi victims. *Id.* at 161 (observing that Ghana's "most powerful man" "Jerry Rawlings, the country's charismatic if not exactly democratic, president . . . has spoken of Trokosi as an important part of Ghana's cultural heritage"); *see also id.* at 161 n.5 (noting that the record contained a statement by "a presidential aide criticiz[ing] anti-Trokosi activists for being insensitive to indigenous cultural and 'religious' beliefs and practices"). The court found that the Ghanaian leadership's critical attitude toward the Government's prohibition of Trokosi was highly relevant to assessing the Ghanaian Government's ability and willingness to protect Trokosi victims because such statements reflected "the deep hold that the Trokosi religion has upon substantial elements of the Ghanaian people." *Id.* at 161.

Accordingly, *Sarhan* and *Fiadjoe* stand for the proposition that the mere existence of a legal regime or government policy to combat private persecution is not necessarily evidence of a government's ability and willingness to control persecutors. To determine a government's willingness and ability to provide adequate protection to an individual protected by a law or policy, adjudicators should also examine: the *efficacy* of such legal regimes or policies (that is, the defenses it provides to private persecutors, the manner in which the law or policy is enforced, and the punishments imposed); what those laws or policies say about a society's view of the banned practice; and the government's leadership's attitudes toward the law or policy. *See Sarhan*, 658 F.3d at 657–60; *Fiadjoe*, 411 F.3d at 160–61. *Cf. Bal v. Att'y Gen. of U.S.*, 406 F. App'x 640,

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643 (3d Cir. 2011) (concluding that the record did not compel a finding that the Turkish Government would be unable or unwilling to protect the alien from future harm because the State Department report indicated that Turkish law prohibited “honor killings,” violators were subject to life imprisonment, and the alien did not identify any evidence indicating that the Turkish police would refuse to protect him).<sup>4</sup>

#### *Willingness versus Ability*

Adjudicators should be mindful that the “unable or willing” standard is set forth in the disjunctive. As a result, there may be instances where a government is *willing* to control a private persecutor, but is *unable* to do so. An obvious example of a government that is *unable* to control private conduct would be a failed state incapable of enforcing its own laws or of controlling its population. See *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (finding that the former Somalian Government was unable to effectively protect the alien from female genital mutilation (“FGM”) because, “[a]lthough the former government adopted a policy favoring the eradication of [FGM] in 1988, the central authority in Somalia subsequently fell and the policy was never implemented”; thus “[t]here does not appear to be any effective protection at present from FGM for an unwilling woman or girl”). Another example might be a government that is battling separatists or insurgents who control large swathes of a country’s territory. See, e.g., *Khattak v. Holder*, 704 F.3d 197, 206 (1st Cir. 2013) (holding that although the Pakistani Government had taken military action against the Taliban in the alien’s home province, “such military action indicates that the Pakistani government is *willing* to take on the Taliban, [but] such action does not show that the Pakistani government is *able* to protect its citizens from Taliban attacks”); *Hor v. Gonzales*, 421 F.3d 497, 498–99, 502 (7th Cir. 2005) (finding “strong evidence” that the Algerian Government was unable to protect the alien from Islamist separatists because the Algerian military informed the alien (a veteran) that they could offer him nothing in the way of protection and an Algerian court advised the alien to stay safe by “maintain[ing] a low profile”).

Another, more challenging, example might involve a government that is struggling to combat criminal elements (e.g., drug cartels, gangs, and human traffickers) operating in its territory. See *Madrigal*, 716 F.3d at 506–07; *Garcia*, 665 F.3d at 499–501, 503; *Burbiene v. Holder*, 568 F.3d 251, 255–56 (1st Cir. 2009). These cases often prove more challenging because they require adjudicators to assess the “*efficacy*” of a government’s efforts to combat these criminal elements. See *Madrigal*, 716 F.3d at 506 (emphasis added).

The alien in *Madrigal* was a former Mexican army soldier who had been threatened, shot at, and kidnapped by members of the Los Zetas drug cartel. The Immigration Judge and the Board denied the alien’s application for asylum and withhold-ing of removal under the Act, finding that the Mexican Federal Government’s substantial law enforcement and military efforts to combat drug cartels and eliminate cartel-related violence evidenced the Mexican Government’s willingness and ability to control members of Los Zetas. The Ninth Circuit disagreed,

finding that the Board’s analysis was based on legal error.

According to the court, the Board’s analysis “focused only on the Mexican government’s willingness to control Los Zetas, not its *ability* to do so. The [Board] cited various statistics on the efforts of the national Mexican government to combat drug violence, but it did not examine the efficacy of those efforts.” *Madrigal*, 716 F.3d at 506. The court noted that “[s]ignificant evidence in the record call[ed] into doubt the Mexican government’s ability to control Los Zetas.” *Id.* For instance, the country conditions evidence indicated “that violent crime traceable to drug cartels remains high despite the Mexican government’s efforts to quell it.” *Id.* at 506–07. “Furthermore, notwithstanding the superior efforts of the Mexican government at the national level, corruption at the state and local levels ‘continue[d] to be a problem.’” *Id.* at 507 (citation omitted). Finally, the court found that the Mexican government’s arrests of “‘79,000 people [over 7 years] on drug trafficking related charges’—may be of limited practical significance to [the alien’s] situation, because corruption is also rampant among prison guards, and prisoners can and do break out of prison with the guards’ help.” *Id.* Because the Board did not appear to consider the efficacy of the Mexican Government’s efforts to control members of the Los Zetas cartel, the court remanded the case for further analysis.

Thus, *Madrigal* stands for the proposition that even a government’s “superior efforts” to combat criminal elements may only reflect its *willingness* to control such individuals, not its actual *ability* to do so. See *id.* at 506–07; see also *Garcia*, 665 F.3d at 503 (concluding that “although the Guatemalan government displayed *great willingness* to protect [the alien] before and after her testimony in the . . . murder trial, this willingness sheds no light on Guatemala’s *ability* to protect her. The fact that Guatemala saw fit to relocate [the alien] to Mexico is tantamount to an admission that it could not protect her [from the gang] in Guatemala” (first emphasis added)). Nevertheless, *Madrigal*, *Garcia*, and cases like them fail to answer a crucial question: How should adjudicators assess the *efficacy* of a government’s efforts to protect an alien? Or, put another way, how exactly should adjudicators quantify a government’s *inability* to control private conduct?

#### *Quantifying a Government’s Inability*

The Seventh Circuit has noted that a government need not provide “perfect law enforcement” to its citizens to be deemed willing and able to protect them from persecution. See *Urbina-Dore v. Holder*, 735 F.3d 952, 954 (7th Cir. 2013). Nevertheless, it is unclear just how far a government may stray from ideal law enforcement before it is deemed unable to control private persecution. See *id.* (citing *Cece*, 733 F.3d at 679–80 (Easterbrook, J., dissenting) (observing that the utility of the “unable or unwilling” to control standard “is limited when we do not know how much shortfall in law enforcement counts as ‘inability’ to protect citizens”)); see also *Damayanti v. Gonzales*, 209 F. App’x 601, 603 (7th Cir. 2006) (observing that government “protection occasionally fails, but *perfection is not required*” (emphasis added)).

The Board first attempted to refine the meaning of a gov-

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ernment's inability to control private conduct in *Matter of McMullen*, 17 I&N Dec. 542. The alien in *Matter of McMullen* claimed that he would be killed by a terrorist organization known as the Provisional Irish Republican Army if deported to Ireland. The Board denied the alien's asylum claim, finding that while the evidence reflected the Irish Government's "difficulty in controlling terrorism" it did not establish that "the government there, which is a stable one, would not be *able*, if necessary, to protect the [him]." *Id.* at 546 (emphasis added). Thus, according to the Board in *McMullen*, a stable government's mere "difficulty . . . controlling" private conduct is not indicative of that government's *inability* to do so. *Id.*

The Fifth, Seventh, and Eleventh Circuits use a similar standard to measure a government's inability to control private persecution. Each of these circuits has defined a government's inability to protect a victim from private persecution as a "complete helplessness to protect [such] victims." *Bueso-Avila v. Holder*, 663 F.3d 934, 936 n.2 (7th Cir. 2011) (quoting *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)) (internal quotation mark omitted); *Guillen-Hernandez v. Holder*, 592 F.3d 883, 886–87 (8th Cir. 2010) (quoting *Menjivar*, 416 F.3d at 921 (citing the "complete helplessness" standard enunciated in *Galina* and deferring to Board's interpretation of government inability in *Matter of McMullen*)); *Shehu v. Gonzales*, 443 F.3d 435, 437 (5th Cir. 2006) (quoting *Galina*, 213 F.3d at 958).

In *Guillen-Hernandez*, the aliens (siblings) feared that an individual named Romel, who had killed their father and brother, would harm them upon their removal to El Salvador. Following the murders, the police initiated an investigation, which resulted in Romel's arrest and trial for the murders. Romel failed to appear for the last hearing of his murder trial and was convicted in absentia. It was suspected that Romel went into hiding. A warrant was issued for Romel's arrest, but he was never apprehended. Seven years after the murders, the aliens immigrated to the United States. During that 7 year period, the aliens lived in El Salvador without incident. Based on this evidence, the Immigration Judge and the Board concluded that the aliens had not shown that the Salvadoran Government was unable or unwilling to protect them. The Eighth Circuit agreed.

First, the court found that the "extensive police investigation, trial, and conviction of Romel amply support[ed] the [Board's] finding that the Salvadoran government was *willing* to control Romel." *Guillen-Hernandez*, 592 F.3d at 887 (emphasis added). The court acknowledged that the police never apprehended Romel. However, this fact, alone, was not demonstrative of the Salvadoran Government's "complete *helplessness* to protect" the aliens. *Id.* (emphasis added). The court observed that "none of the [aliens] experienced any actual harm during the seven years between the murders and their arrival in the United States." *Id.* The court additionally concluded that "[w]hile Romel's disappearance could conceivably be evidence of El Salvador's unwillingness or ineffectiveness to control Romel, it is also substantial evidence that Romel fears punishment at the hands of a government *ready and willing to enforce its criminal laws*." *Id.* (emphasis added). Thus, the Eighth Circuit's decision in *Guillen-Hernandez* indicates that occasional instances of government ineffectiveness (namely, in failing to apprehend a

convicted murderer) are not necessarily indicative of its inability to control such an individual or to protect potential victims if the record contains other evidence of government effectiveness.

The First Circuit has not formally adopted the "complete helplessness" standard. Instead, it looks to see whether the government's inability to control criminal conduct is distinguishable from any other government's struggles to control a criminal element. See *Khan v. Holder*, 727 F.3d 1, 8 (1st Cir. 2013) (citing *Burbiene*, 568 F.3d at 255). In *Burbiene*, the alien, a Lithuanian who feared that she would be kidnapped by human traffickers, argued that the Lithuanian Government was unable to control human trafficking activity. The First Circuit upheld the Board's decision to deny the alien asylum, finding that "Lithuania is 'making every effort to combat' human trafficking, 'a difficult task not only for the government of Lithuania, but for any government in the world.'" *Id.* at 255 (citation omitted). Citing the State Department report, the court noted that the Lithuanian government had strengthened its laws to better combat human traffickers, investigated trafficking organizations, instituted criminal proceedings against traffickers, and provided assistance to trafficking victims.

The court acknowledged that the Lithuanian Government "has not been able to completely eradicate the problem of human trafficking within its borders, and that the problem persists despite . . . 'significant efforts' by the government." *Id.* However, the court found that such a record did not demonstrate "that Lithuania's inability to stop the problem is *distinguishable from any other government's struggles to combat a criminal element*. Lithuania has experienced both setbacks and successes in its fight against this crime. But these circumstances do not subject the victims of human trafficking to 'persecution' under the [Act]." *Id.* at 255–56 (emphasis added).<sup>5</sup>

## Conclusion

Many challenges arise in assessing whether a government is unable or unwilling to control private persecution. This article has focused on only a few of those challenges. Adjudicators should be mindful of the appropriate standard of review for assessing this issue and also keep in mind, in evaluating past persecution, that general country conditions regarding government effectiveness and ineffectiveness do not trump evidence relating to the government's actual response to an alien's requests for government intercession. An alien's failure to report private persecution, and evidence of a law or government policy barring the private persecution at issue, are material to but not dispositive of a government's willingness and ability to intervene. Further, a government's willingness to control private conduct is distinct from its ability to do so. The largest outstanding issue facing adjudicators is quantifying a government's inability to control private persecution. As asylum and withholding of removal claims under the Act based on privately inflicted harm become increasingly common, the Board and the circuits will necessarily have to refine the standards for measuring just how far a government may depart from ideal law enforcement before it is deemed either complicit in private persecution or incapable of stopping it. ♦

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## Endnotes

<sup>1</sup>Persecution may also be established by showing that the government is unwilling or unable to *protect* the applicant from private persecution. The circuits use the phrases “unable or unwilling to *control*” and “unable or unwilling” to *protect* interchangeably. See, e.g., *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (stating that an applicant can show the government is “unable or unwilling to *control*” private acts by establishing that “the government condoned [the private acts] or at least demonstrated a complete helplessness to *protect* the victims”) (emphases added)). This article will do the same.

<sup>2</sup>In the event an applicant for asylum or withholding of removal under the Act establishes past persecution, the burden generally shifts to the Department of Homeland Security to rebut the presumption that the alien possesses a well-founded fear of persecution. See 8 C.F.R. §§ 1208.13(b)(1)(i)(A), (B), (ii), 1208.16(b)(1)(i)(A), (B), (ii). But see 8 C.F.R. §§ 1208.13(b)(1), 1208.16(b)(1)(iii). This article will only discuss the contours of an alien’s burden of proof in establishing past persecution.

<sup>3</sup>Persecution must be inflicted “on account of” one of the five protected grounds listed under section 101(a)(42)(A) of the Act (providing that an alien qualifies as a refugee if they fear “persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”); see also section 241(b)(3)(A) of the Act (rendering an alien eligible for withholding of removal under the Act if the alien would suffer persecution on account of her race, religion, nationality, membership in a particular social group, or political opinion). However, it is important for adjudicators to understand that an alien *does not* have the burden to establish that a government’s refusal to protect him or her from private persecution was “on account of” one of the five protected grounds. See *Matter of R-A*, 22 I&N Dec. 906, 923 (BIA 1999) (en banc) (“[We] understand the ‘on account of’ test to direct an inquiry into the motives of the entity actually inflicting the harm.”), *vacated* 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008). An Immigration Judge’s confusion of the “unable or unwilling” to control and “on account of” issues was responsible, at least in part, for the Third Circuit’s decision to remand *Valdiviezo-Galdamez v. Att’y Gen. of U.S.* (*Valdiviezo-Galdamez I*), 502 F.3d 285, 289 (3d Cir. 2007) (finding that the Immigration Judge erred “by placing the burden on [the alien] to prove *both* that the police refused to protect him from the gang members and that this refusal was ‘on account of’ [a protected ground]”).

<sup>4</sup>Besides affecting the assessment of a government’s ability and willingness to control private conduct, evidence of an effective law may also influence the assessment of the social distinction of a proposed particular social group’s (“PSG”). “Social distinction refers to recognition by society ... To be socially distinct, a group need not be seen by society; it must instead be *perceived* as a group by society.” *Matter of W-G-R*, 26 I&N Dec. at 216. The Board has held that evidence of social distinction may “include whether the society in question recognizes the need to offer protection to [the group], including whether the country has criminal laws designed to protect [the

group], whether those laws are *effectively enforced*, and other sociopolitical factors.” *Matter of A-R-C-G*, 26 I&N Dec. at 394 (emphasis added); cf. *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (en banc) (“It is difficult to imagine better evidence that a society recognizes a particular class of individuals as uniquely vulnerable, because of their group perception by gang members, than that a special witness protection law has been tailored to its characteristics.”). It is notable that the Board cited *effective* enforcement as a criterion for social distinction in *Matter of A-R-C-G*. Obviously, an effectively enforced law would be highly relevant to assessing a government’s willingness and ability to protect an alien shielded by such a law. However, it remains to be seen whether the Board or the circuits would find that an *ineffectively* enforced law, tailored to protect a particular group, like the laws discussed in *Sarhan* and *Fiadjoe*, would be demonstrative of a group’s social distinction.

<sup>5</sup>To the author’s knowledge the Ninth Circuit is the only circuit that has held that government inaction stemming from a lack of financial resources is indicative of a government’s inability to control private conduct. *Doe*, 736 F.3d at 878 (noting that “[i]t does not matter that financial considerations may account for such an inability to stop elements of ethnic persecution. What matters instead is that the government ‘is unwilling or unable to control those elements of its society’ committing the acts of persecution”) (quoting *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1198 (9th Cir. 2000) (holding that “any lack of funding might be labeled as a governmental choice [made by the Russian Government] (contrast the current Russian military campaign in Chechnya)”) (internal quotation marks omitted)). The Third Circuit has signaled its reluctance to “second-guess” the manner in which a country allocates its scarce resources, but it did not rule out the possibility that a “disproportionate allocation of scarce resources” may, in some cases, be indicative of a government’s inability or unwillingness to protect vulnerable individuals. See *Soobrian v. Att’y Gen. of U.S.*, 388 F. App’x 182, 191 (3d Cir. 2010).

*Joseph Hassell is a Judicial Law Clerk at the Board of Immigration Appeals.*

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# Immigration on a Clean Slate: Game-Changing Proposals on Visa Modernization

BY ANGELO A. PAPARELLI

Terabytes of text have already been generated in the course of extolling or excoriating President Obama for his November 20 Executive Actions on Immigration. The prolific foaming of bloviating mouths has mostly been prompted by the promise of deferred action and work permits for undocumented immigrants under the DACA and DAPA programs. Surprisingly, however, his equally profound measures to improve the legal immigration system have been lost in the GOP's ongoing *Sturm und Drang* over what they dub "Executive Amnesty."

Among these legal immigration reforms, an almost overlooked November 21, 2014 Presidential Memorandum ("Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century") invited the submission of individual and stakeholder recommendations to improve legal immigration. If the Obama Administration were to embrace the best of the recommendations submitted in response, many good things would flow from this crowd-sourcing initiative. Without involving or seeking the consent of Congress, the Administration could readily adopt a plethora of path-breaking innovations to our legal immigration system which would profoundly improve how this country welcomes and benefits from foreign strivers, entrepreneurs, scientists, students, investors and other worthy contributors.

As my colleagues, Gary Endelman and Cyrus Mehta put it recently:

At the end of the day, immigration policy is not only, or even primarily, about the immigrants but about how the United States can attract and retain the best and the brightest regardless of nationality who wish to join us in writing the next chapter of our ongoing national story. There are two ways to achieve progress. Congress can change the law, which it persists in refusing to do, or the President can interpret the existing law in new ways, which he has done.

The November 14 memorandum directed the Secretaries of Homeland Security and State to solicit proposals from stakeholders and the public to modernize the legal immigration and visa system. The Secretaries of DHS and DOS would then evaluate the proposals so submitted in consultation with several Cabinet members (the Attorney General, and the Secretaries of Agriculture, Commerce, Labor, and Education), and other federal officials (the Director of the Office of Management and Budget, the Director of the National Economic Council, the Assistant to the President

for Homeland Security and Counterterrorism, the Director of the Domestic Policy Council, and the Director of the Office of Science and Technology Policy). The official invitation to submit ideas took the form of a December 30 Notice of Request for Information, which allowed the submission of up to 30 pages of commentary by January 29. The comment period has closed, and the proposals are now posted online for all to see.

Some of the most thoughtful suggestions, accompanied in many cases by convincing citation to legal authority, came from members of the Alliance of Business Immigration Lawyers (ABIL); members of the American Immigration Lawyers Association (AILA); a collection of 16 business-immigration stakeholder organizations (the 16); two individuals, attorney Nicole Kersey of Kersey Immigration Compliance (KIC), and Don Crocetti, managing member of Immigration Integrity Group, LLC (IIG) who formerly served as Chief of the Fraud Detection and Nationality Security Directorate (FDNS) of U.S. Citizenship and Immigration Services (USCIS); the American Immigration Council (the Council); the Society for Human Resource Management through its strategic affiliate, the Council for Global Immigration (CFGFI); the U.S. Chamber of Commerce (the Chamber); the International Medical Graduate Taskforce (IMGT); the Center for American Progress (CAP) and the Global Workers Justice Alliance (GWJA).

Here are just a few of the many recommendations (accessible through the hyperlinks in the preceding paragraph) which I believe would comprehensively transform and improve America's decrepit immigration system:

**Improve access to justice.** ABIL, AILA and the Council urged the Department of State (DOS or State) and U.S. Customs & Border Protection (CBP) to grant every individual interviewed by a federal immigration official the right to the representation of an attorney (either in person or by electronic means, but still at no cost to the government). The right to counsel would extend to (a) visa applicants who are interviewed by a consular officer, (b) applicants seeking admission to the U.S. during secondary or deferred inspection who are interviewed by a CBP officer, and (c) petitioners seeking immigration benefits who are interviewed in the course of FDNS site visits by USCIS investigators. ABIL also urged State and DHS to create a pilot system of binding review of decisions by consular officers to refuse certain categories of visas (all immigrant visas and nonimmigrant refusals under the E-1 treaty trader, E-2 treaty investor, E-3 Australian specialty occupation worker, H-1B specialty occupation, L-1 intracompany transferee and O-1 extraordinary ability visa categories).

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**Develop a single body of "immigration common law" and revitalize the advisory opinion process.** ABIL proposed the creation of a single administrative tribunal to hear appeals from decisions and adjudications by all federal immigration agencies, thereby consolidating the work of multiple federal appellate panels and reducing the complexity and inconsistency of precedent and non-precedent immigration law decisions. ABIL also proposed that State publish all of its now-secret Advisory Opinions which guide consular officers in visa determinations and that USCIS adopt a published IRS-style private letter ruling process whereby the party seeking written guidance on the legal consequences of a particular set of facts would receive a binding interpretation but other stakeholders might benefit from the agency's non-binding guidance in analogous circumstances.

**Prohibit relitigating prior USCIS decisions granting employment-based immigration benefits.** The 16, the Chamber, AILA and CFGI proposed that USCIS give "binding deference" to the agency's previous grants of employment authorization whenever a petition seeking extension of the employer's petition and of the worker's nonimmigrant status involves the same employer, same employee, and same job duties, unless an adjudicator can establish, and articulate with specificity, fraud or clear gross error. Such a change would necessarily reduce the burdensome and frequent requests for additional evidence (RFEs) and introduce a welcome measure of reliability, consistency and predictability to the process of extending the work permission of nonimmigrant employees. To make this change, USCIS would need to adopt IIG's proposal to speedily transition away from its "antiquated paper environment, supported primarily by legacy INS [Immigration and Naturalization Service] main-frame systems and databases with little to no interface or advance search or analytics capabilities" and instead it must "automate" "all USCIS systems and filing processes".

**Hasten the issuance of work visas, immigrant visas, green cards, work authorization and international travel permission.** Many commenters (including ABIL, AILA, CFGI and the 16) proposed that State and USCIS adopt a range of proposals which, in various ways, would (a) count only the principal worker and not the dependents when reporting and applying the cutoff date on available immigrant visas as announced in State's Visa Bulletin, (b) recapture the hundreds of thousands of immigrant visas from prior years that were unused and thus squandered because of inadequacies in the way green-card quotas were allocated between DOS and USCIS, (c) allow for much earlier acceptance of employment-based applications for adjustment of status, thereby hastening the issuance of Employment Authorization Documents (EADs) and Advance Parole travel authorization, and (d) plug gaps in the grant of employment authorization by extending it for longer periods or on an interim basis to more categories, e.g., persons in U visa status, applicants for renewal of EADs, and persons holding employment-based work-visa status in nonimmigrant categories omitted by the 240-day period of interim employment authorization allowed

in the Form I-9 (Employment Eligibility Verification) regulations. GWJA also urged that USCIS, upon approving an immigrant visa petition, automatically forward the notice of appearance (Form G-28) to State's National Visa Center so that prolonged delays now experienced in the recognition of attorney representation would be eliminated.

**Clarify and liberalize the rules on immigration successorship in interest.** ABIL proposed that DHS and DOS adopt a successor in interest principle that would (a) expand the range of situations in which corporate restructurings are recognized for immigration purposes, thereby allowing uninterrupted employment authorization and the preservation of pipeline employment-based immigrant visa and adjustment of status benefits, and (b) dispense with current USCIS interpretations whereby immigration successorship requires an "assumption of all or some liabilities, whether they be solely immigration-related liabilities or liabilities associated with the occupational classifications of the particular beneficiaries affected by the change in corporate circumstances."

**Adopt improvements to promote investment, entrepreneurship, job creation and business innovation.** Many of the commenters suggested changes to spur investments, business activity, innovation and job creation. CFGI proposed the creation of a "Robust Trusted Employer Program" which would allow faster and more streamlined approvals of requests for immigration benefits submitted by "any employer that can demonstrate a track record of compliance with applicable [immigration] laws." ABIL urged the Obama Administration to "create an agency to support and protect the economic benefits of immigration within the Department of Commerce or another cabinet department." AILA and ABIL proposed that DHS "create explicit immigration protections and benefits for small businesses," e.g., by (a) rescinding the Neufeld Memorandum (which effectively abolished the distinction, long recognized in precedent decisions that, for immigration purposes, a corporation is to be considered distinct from its owners), (b) clarifying that the customary attributes of start-ups and small businesses are not necessarily indicia of fraud, and (c) adopting in formal policy guidance and ultimately in regulations the formal recognition that the characteristics of start-ups as set forth in USCIS's Entrepreneur in Residence training materials are acceptable examples of legitimate forms of business operations and activities. ABIL and AILA also proposed numerous improvements that should be implemented by USCIS's EB-5 Immigrant Investment Program Office (IPO) in order to promote the IPO's announced goals of enhanced transparency of eligibility criteria, speedier case processing and the safeguarding of EB-5 program integrity.

**Enhance immigrant and nonimmigrant protections and promote immigration integrity.** A number of commenters suggested that DHS and DOS should ease eligibility requirements or offer enhanced benefits to individuals seeking or holding a particular visa status. IMGT offered a range of suggestions to improve the lot of foreign medical graduates

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(FMGs) including, among other proposals, H-1B cap gap relief for FMGs, clarification that J-2 dependents of FMGs are not subject to the two-year, home-country, physical-presence requirement applicable to J-1 FMGs, and clearer and more expansive interpretations of (a) "affiliated or related" parties eligible for exemption from the annual H-1B quota, and (b) requirements for the physician national interest waiver. GWJA also suggested several improvements, including, for example, enhanced protections available to individuals who have applied for or hold U visa status, job "portability" benefits for H-2B workers, greater age-out protections for dependents in VAWA cases, and an obligation undertaken by DOS to provide more explicit statements of the actual grounds for a visa refusal and not merely uninformative citation to the general ineligibility ground of denial found at Immigration and Nationality Act (INA) § 214(b). CAP urged DHS and DOS to improve transparency and reporting of data on LGBT individuals who seek or hold refugee admission or asylum status. Don Crocetti of IIG suggested that USCIS automate immigration case processing and build "a person and organization centric data system complete with electronic filing and web-based interviews" -- a system which "contains advanced and 'Big Data' analytics to support a proactive anti-fraud operation."

**Freeze I-9 and worksite enforcement until USCIS has decided all DACA/DAPA applications for work permission.** Nicole Kersey of KIC, along with ABIL, proposed that the DHS Secretary cause U. S. Immigration and Customs Enforcement (ICE) to suspend and defer, on a temporary basis, worksite investigations and enforcement of certain employer-sanctions provisions of the Immigration Reform and Control Act (relating to the maintenance of Forms I-9 and the duty of employers to refrain from knowingly hiring or continuing to employ unauthorized workers). The temporary freeze would end, they proposed, once USCIS certifies that it has decided all applications for work permission under the DACA and DAPA program. The purpose of the proposed deferral of ICE enforcement, Ms. Kersey and ABIL explained, would be to avoid actions that might undermine the President's goals of maintaining family unity in mixed-status households and encouraging eligible DACA and DAPA applicants to "get right with the law" and "come out of the shadow." These laudable Presidential purposes, the proponents maintained, would be jeopardized if ICE -- by virtue of a worksite enforcement action -- were to impose a duty on employers to fire unauthorized workers who may ultimately receive employment permission.

**Improve Federal Immigration IT Infrastructure.** AILA suggested several IT enhancements, including USCIS acceptance of online payment of filing fees, standardization of web-published protocols and response times to email queries submitted to consular officers at posts worldwide, and permitting additional functionality in the "myUSCIS" Case Status Online query system by allowing access to the actual RFE or notices of intent to revoke or deny a petition issued rather than merely viewing a report that an RFE or notice

has been issued (which must then await delivery by snail mail). In addition, ABIL and AILA suggested that -- in the words of the AILA comment -- "As USCIS continues to develop ELIS [the USCIS Electronic Immigration System] and expand its functionality to other forms and uses, it would be in the agency's best interest to reach out to vendors and large-scale users, including AILA, for regular usability testing and feedback." ABIL proposed a variety of additional IT suggestions:

1. DHS (USCIS and CBP) DOL (the Office of Foreign Labor Certification (OFLC)) and DOS (the Bureau of Consular Affairs [BCA]) should work to achieve interoperability for users so that employers, petitioners and applicants for immigration benefits, lawyers, law firms and organizational stakeholders such as universities need not be forced to re-enter the same data into disparate, siloed systems;
2. All possible questions in online forms that function as a database, such as the BCA's DS-160, where distinct questions appear as determined based on earlier answers to prior questions, should be published and available in full with a cross-referencing of questions and answers by visa category so that the public, as contemplated by the Paperwork Reduction Act, can know in advance what information to assemble.
3. All electronic forms should provide the opportunity to expand on or clarify an answer to any question on the form in data fields permitting unlimited entry of text, since many questions cannot be answered truthfully and fully with, for example, a simple "yes" or "no" reply. Many such questions require the application of fact to law and thus require an answer that is consistent with applicable law. As currently configured, these forms invite a later accusation by federal immigration authorities of, *inter alia*, a willful, material misrepresentation under INA § 212(a)(6)(C), a falsely made document under INA § 274C(f), or a false statement under 18 U.S.C. § 1001;
4. The attorney for an employer (with authorization of the subject individual employee or family member) should be allowed to access and download the electronic I-94. As the CBP e-I-94 system now is configured, only the applicant for admission who is ultimately admitted, or his or her attorney, can access the database and retrieve the I-94. Many large corporations centralize the management of their foreign employee's maintenance of immigration status through counsel. Without access to the e-I-94 system by corporate counsel, this process is severely impeded and the prospect

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of an inadvertent violation of the unlawful-presence 3- and 10-year bars could occur; and

5. Online visa application[s] and [USCIS] immigration forms should allow the user to move from one screen to the next without completion of all relevant data requested in the screen. Often, some but not all information is not presently available. The online systems should also allow saving, downloading, and emailing partially completed forms so that information already provided need not be required to be re-entered again. ◆

*Since other commenters' proposals were not summarized, and additional comments of the submitters identified above may have been given unintentional short shrift, I encourage all immigration stakeholders to spend as much time as possible reading the full set of comments and then, using all forms of social and traditional media, to focus public attention on the innumerable ways that DHS, DOS and the several agencies that administer federal immigration laws can optimize our nation's legal immigration system. It is broken; so let's make the Administration fix it.*

### ***From the Editor***

Please send all news items to me at [LBurman@aol.com](mailto: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

# The Green Card

Immigration Law Section  
Federal Bar Association  
1220 North Fillmore Street, Suite 444  
Arlington, VA 22201

