The Green Card

Message from Elizabeth "Betty" Stevens, Outgoing ILS Chair

As my extended term as Chair of the Immigration Law Section ends, I want to take the time to thank all of you for your efforts and camaraderie over the past two years. With your help, the ILS has brought its bylaws into compliance with FBA standards, established two new Immigration Leadership luncheon sites in San Francisco and Chicago, produced a program outline with materials for a day-long pro bono immigration court training, continued to provide, through the ILS Younger Lawyers Committee, incredible content for at least six webinars a year, co-sponsored a great Asylum Law Conference in New York, and, of course, gathered all together in Memphis and then in Austin, Texas, for our annual Immigration Law Conferences.

It was marvelous seeing so many of you at our annual Conference in Austin this year – over 500 current (and hopefully some new) members gathered for a fun-filled weekend of food, fun, and CLE. I'm looking forward to seeing many of you again in Detroit next May.

Looking forward, I hope to see many more of you become involved in ILS activities. Please reach out to your colleagues across the immigration practice spectrum and encourage them to join the FBA and the Immigration Law Section. And think about helping the ILS to put on additional programming in your neck of the woods.

On a more personal note, these past two years have been a voyage of growth and new experiences – particularly in representing the FBA and ILS in promoting the FBA proposed legislation to create an Article I independent immigration court. I will continue to work on this initiative after my term ends, so don't worry – I won't fade away. Feel free to drop me a line if you are thinking of becoming involved – or just want to chat about the Section.

See you in Detroit!

Quote of the Month

The resources available to us for benign access to each other,
for vaulting the mere blue air that separates us, are few but powerful:
language, image and experience.
Toni Morrison, The Origin of Others

In This Issue

Cut to the Chase: EOIR's Troubling New Regulations

By Jeff Chase[1]

On July 2, the Department of Justice published final regulations impacting how decisions of immigration judges will be reviewed, both on appeal to the Board of Immigration Appeals and by certification to the Attorney General. I plan to cover the topic in depth in a later article, but I wanted to post my quick take on the fact that the new rule encourages the BIA to decide cases using two sentences of boilerplate language (plus a citation) that provides no insight into its determination process. However, the regs imbue such decisions with a presumption that the Board "properly and thoroughly considered all issues, arguments, and claims raised or presented by the parties on appeal or in a motion that were deemed appropriate to the disposition of the appeal or motion, whether or not specifically mentioned in the decision."

Just to be clear, the boilerplate denials look like this (in their entirety):

"ORDER: The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4)."

The above decision is referred to as an "affirmance without opinion," or "AWO" for short. In its commentary accompanying the publication of the final rule, the Department of Justice addressed a commenter's concern that the BIA may use such AWOs to quickly deny cases even if a favorable disposition is warranted where "the Board member reviewing the case simply lacked the time or inclination to spend his or her resources writing a reasoned, public opinion for that particular case." The Department responded by summarizing the BIA's process of having staff attorneys first review the record of proceedings before making a recommendation to the Board member. The Department offered such process as proof that "the use of an AWO does not reflect an abbreviated review of a case, but rather reflects the use of an abbreviated order to describe that review…"

Several facts are at odds with this claim. There is an excellent corps of staff attorneys at the BIA, but over the past few years, those staff attorneys have been pushed to decide more cases in less time or risk discipline or termination. Staff attorneys are encouraged to produce 40 decisions per month that are actually signed by Board Members, but are being assigned increasingly difficult cases to decide. One staff attorney reported needing 18 hours to complete one decision on a very unique legal issue, but was still expected to meet the overall quota. Such extreme pressure would make it tempting if not necessary for attorneys to resort to AWOs simply to keep their jobs. Furthermore, as the present EOIR Director has downgraded the staff attorney positions to entry level with no upward progression, and as the agency is strapped for funds, the Board is extremely short of such attorneys at present, further increasing the pressure on those remaining to decide more cases more quickly.

As for review by the Board Members themselves, there were always those who were known to sign anything handed to them. In a 2007 decision of the U.S. Court of Appeals for the Seventh Circuit, former Judge Richard Posner noted that one Board Member, Ed Grant, "was discovered to have decided more than 50 immigration cases in one day, requiring a decision 'nearly every 10 minutes if he worked a nine-hour day without a break,'" or 7 minutes per case if he worked an 8 hour day and took lunch. *See Kadia v. Gonzales*, 501 F.3d 817, 820 (7th Cir. 2007). I hope we can all agree that reviewing a complete record of an immigration court hearing, plus the decision drafted for such case, in seven minutes does in fact reflect an abbreviated review of the case.

In its comments to the new regs, the Department further defended its presumption argument by citing the language from a Ninth Circuit decision, *Angov v. Lynch*, 788 F.3d 893, 905 (9th Cir. 2015), relating to the reliability of a State Department consular investigation which undermined some of the factual claims of an asylum claim. In that case, the court (in a 2-1 decision) upheld the IJ's reliance on the report (in spite of its author's unavailability to testify), stating that such reports "aren't just a collection of statements by disconnected individuals. Rather, they are the unified work product of a U.S. government agency carrying out governmental responsibilities. As such, the report itself, and the acts of the various individuals who helped prepare it, are clothed with a presumption of regularity."

However, the situation in *Angov* was not analogous to a BIA decision. In carrying out an investigation to confirm or disprove factual aspects of the asylum claim, the issue of reliability in *Angov* related to the likelihood of government misconduct: i.e., whether the investigator lied, and in fact had not taken the investigatory steps claimed in the report. The presumption cited by the court was that the State Department officials did their job "fairly, conscientiously, and thoroughly," that none had a personal stake in the outcome, and that "no one lied or fabricated evidence." It should also be noted that the Court found that, because the petitioner had not formally entered the U.S., he had no constitutional due process rights, and thus could not challenge the admission of the report on such grounds. And the court conceded that the outcome would have been different had the claim arisen in the Second Circuit, whose case law favored the petitioner's argument.

However, in the context of the BIA's review on appeal, the question isn't whether the single Board member fabricated facts or had a personal stake in the claim. The question is whether the Board Member got it right - i.e. whether he or she properly interpreted the law, and applied that law correctly to the proper facts. History has demonstrated that they often do not, nor would they be expected to when signing a decision every seven minutes.

Yet through the new regulations, the Department of Justice is essentially saying that, due to the crushing case load, just trust that it is doing everything correctly, and defer to its two-sentence boilerplate decisions without requiring further explanation of its reasoning. The retort to this may be found a little later in Judge Posner's decision in *Kadia*: "Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be *understood, but not excused*, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate." *Kadia, supra* at 821 (emphasis added). I am not aware of any other court that would expect Circuit Court judges to grant them *carte blanche* to simply affix rubber-stamp denials on appeals, particularly those involving life-or-death determinations arising in the asylum context. Furthermore, regular readers of my blog or that of my friend Paul Schmidt will know that the BIA errs not infrequently in its interpretation of fact and law. And for the record, the caseload has become far more crushing in the 12 years since Judge Posner penned those words in *Kadia*.

Take for example a recent decision of the Fourth Circuit. In *Orellana v. Barr*, No. 18-1513 (4th Cir. May 23, 2019), the court found that the BIA had distorted the evidence of record in order to conclude that the government had been willing and able to control the non-government persecutor by ignoring the many credible instances in which the police did not respond to the petitioner's call for help, and instead focusing on the few isolated incidents in which they did respond. So had the BIA chosen to decide the case with a two-sentence AWO, should the same circuit court have credited the Board with properly considering and weighing all of the police's responses and non-responses, without such distortion, because government employees are presumed to properly carry out their duties? The Third Circuit reversed the BIA for its troubling, erroneous overreach in *Alimbaev v. Att'y Gen.* of U.S., 872 F.3d 188 (3d Cir. 2017), finding the Board to have violated its proper standard of review, and then wrongly reversed based on false insinuation and minor nitpicking. Had the BIA relied on a two-sentence AWO in that case, should the circuit court have just assumed that none of those errors had occurred, and that the BIA had instead reached the correct conclusion for the right reasons?

The BIA has certainly not earned the deference the Department of Justice believes it deserves based on the regulatory presumption. Hopefully, the circuit courts will waste no time in pointing this out in future appeals of the AWOs we can expect to see frequently from the BIA.

Endnotes:

[1]Reprinted with permission. The original version, published July 5, 2019, appears at <https://www.jeffreyschase.com/blog/2019/7/5/eoirs-troubling-new-regulations> (accessed Aug. 6, 2019).

Judge Lawrence O. Burman, Founder and Designated Mascot of The Green Card. Photo by Helen Parsonage.

ILS Section Awards Presented at Annual Conference in Austin

The awards ceremony is a longstanding tradition at the Annual Immigration Law Conference. This May in Austin, the ILS Awards Committee presented section awards for distinguished and outstanding service to the FBA. The following constitute the official remarks of the Awards Committee.

Government Lawyer of the Year- Judge Ashley Tabaddor

The ILS Government Atty of the Year award goes to Judge Ashley Tabaddor for her work over the past year to defend the integrity of the immigration court and due process. As President of the National Association of Immigration Judges, she has led its public campaign against the Attorney General's institution of quotas on the immigration judges. Judge Tabaddor consistently argues that rushing cases to be completed places the interests of the eoir ahead of assuring that respondents are entitled to full and fair hearing of their cases. Before her appointment as an immigration judge in 2005 judge Tabaddor served as an assistant US attorney for Central California, a trial attorney in the Department of Justice civil division, and an attorney advisor for the Executive Office for Immigration Review.

Barry Frager Award- Kelli Duehning

Kelli Duehning is a Senior Counsel at the San Francisco office of Berry, Appleman, & LLP. Prior to joining BAL, Kelli had a successful 17-year-career at DHS and USCIS. Kelli is currently active as a Board member of the Immigration Law Section and as a member of the FBA's Northern District of CA Chapter, where she launched the West Coast leadership luncheon. Kelli has been extremely helpful in planning the FBA-ILS' Annual Conference this year, particularly in finding government professionals to participate as speakers. Always done with a positive attitude, Kelli's leadership and contributions to the ILS have been outstanding. We are proud to provide her with the Barry Frager Award for Service to the ILS.

NGO lawyer of the Year- Kate Goettel

Kate Melloy Goettel is a litigation attorney in the National Immigrant Justice Center's federal litigation unit, where she is a dedicated advocate for immigrant rights. Prior to joining NIJC, Kate worked for seven years in the Department of Justice's Office of Immigration Litigation, most recently as senior litigation counsel. Kate has practiced in nearly 40 federal district courts, seven courts of appeal, and the U.S. Supreme Court. Before joining DOJ, Kate clerked for two years for a U.S. District Judge. She graduated with distinction from the University of Iowa College of Law, where she worked in the law school's immigration clinic and interned in NIJC's asylum project. Her contributions to FBA-ILS as a board member and officer have been immeasurable. We are honored to present her with the ILS NGO Lawyer of the Year award.

Younger Lawyer of the Year - Lauren McClure

Lauren McClure is an associate attorney at Kriezelman, Burton and Associates based out of Chicago, Illinois. She is a member of the ICE ERO Liaison Committee and co-chair of the Fall Conference Planning Committee. She previously served as the Secretary of State Liaison Committee chair and the New Members Division chair, each for two years. She previously served as chair of the Chicago Bar Association's Immigration & Nationality Law Committee from 2014-2015. She is also currently active with the Federal Bar Association, Immigration Law Section's Younger Lawyer's Division. In that committee, she has had tremendous success organizing monthly webinars available to the section. Lauren is always eager to help and has positively contributed to the success of the FBA-ILS-YLD webinar series. We are honored to present her with the ILS Younger Lawyer of the Year award.

2019 Annual Convention a Great Success

By Alexandra Ribe, Esq.

"We need to be better lawyers, smarter lawyers...yes: super-lawyers," proclaimed Ira Kurzban. The lunch time crowd listening to his keynote speech at the 2019 FBA Immigration Law Conference seemed acutely passionate and committed to fighting for the most vulnerable immigrants—this year, perhaps more than ever before. The annual 2019 FBA Immigration Law Conference took place May 17–18 in Austin, Texas at the AT&T Conference Center. The AC is always an ideal venue for practitioners to get together learn new tips and tricks, catch up on the ever changing body of case law, and simply feel like they are among their own, and this year did not disappoint.

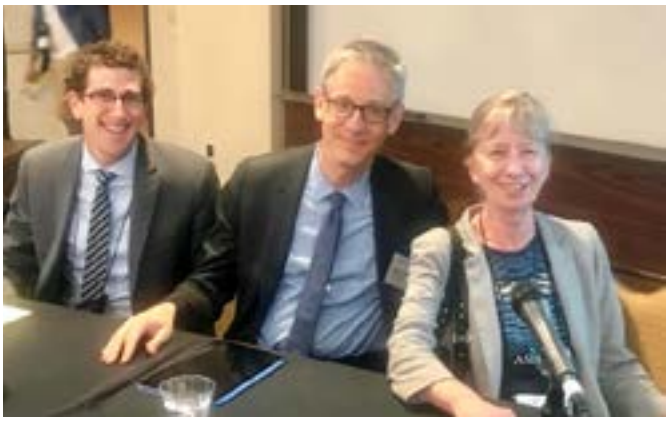
The Annual FBA Immigration Law Conference is unique in that its panelists include not only immigration practitioners, but also immigration judges and representatives from the Department of Homeland Security and other government agencies. To put it mildly, this has been a year of many changes: from the prohibition of bond after a positive credible fear interview, to higher scrutiny on affidavits of support, and proposed termination of nearly every Temporary Protected Status program, every area of the law presented substantial challenges for those needing to be kept up to date. Panelists were eager to ensure attendees were well apprised of these changes, and well-armed to make (or consider) persuasive challenges.

The five tracks covered topics for both beginners and seasoned practitioners. Topics ranged from ethics, advanced asylum, SIJ updates, habeus petitions, to H1B current issues. The two day conference was jam packed with sessions for every kind of immigration practitioner. Highlights included retired Judge Paul Schmidt, retired IJ and former Chair of the BIA, who presented a panel on tips for writing briefs. Judge Schmidt enthusiastically presented a well-received critique of the current immigration court system—including mindless docket reshuffling and arbitrary quota requirements. Another memorable moment was Charlie Oppenheim's early announcement of the progression for the July visa bulletin. The room nearly exploded in applause when he announced that the F2A category would be current for each country, and the SIJ preference category would move up to July 2016 in the not-yet-released July visa bulletin.

Certainly the chosen venue of Austin, TX also lived up to its appeal. After kicking off the conference with a welcome dinner at the Austin Federal Courthouse, Friday evening featured a Young Law Division Happy Hour and Awards Reception at the Bullock Texas State History Museum. The conference concluded in real Texas fashion with a closing reception at the Broken Spoke, where many of the attendees and panelists hit the dance floor for two-step and western swing dance lessons.

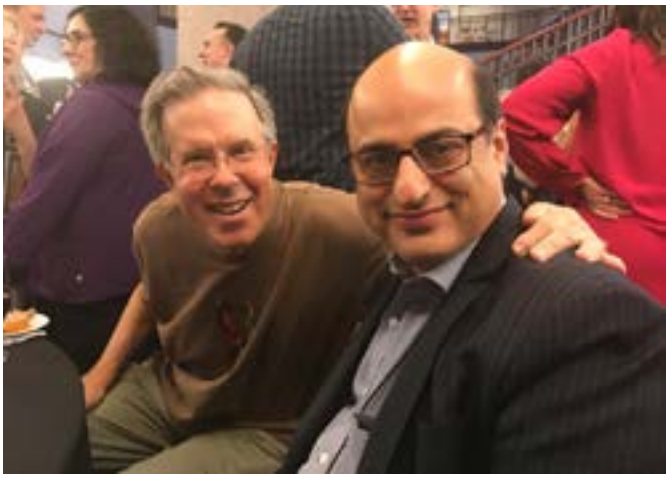
While the barbeque and live music that Austin is famous for were reason enough to attend, this year the conference can be summarized by Mr. Kurzban's words during his keynote address: "The soul of this nation is literally in your hands. So work at it every day." All the attorneys at the conference knew that, while our jobs were only going to get harder, the outcome of our work has never been more important. Panelists discussed careful analysis and challenges to Notices to Appear, the types of evidence to submit to stave off the seemingly inevitable H1B Request for Evidence, and tips for bringing a mandamus action when backlogs seem like cases are never going to be adjudicated. All in all, practitioner attendees came away newly motivated, and armed to tackle any new BIA decisions or policy memoranda that may come our way.

Photo Album: ILS Annual Convention Austin, Texas May 17–18, 2019

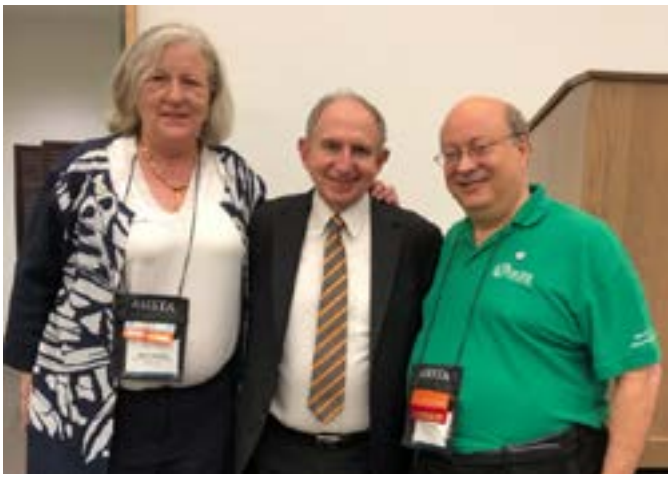


Left to right: Joshua Altman, Jeffrey Chase and Helen Parsonage

CAIR Coalition attorneys Anna Frimpong Houser (left) and Courtney Gore



Carl Shusterman and Cyrus Metha



Left to right: ILS Chair Betty Stevens, keynote speaker Ira Kurzban, and Conference Chair Barry Frager

Publication Opportunity

Is your office in the news? Get your story in The Green Card. Email the editor, Dr. Alicia Triche at aliciatricheclc@gmail.com.

FBA Welcomes New Programs Chair, Jeff Joseph

ILS is pleased to welcome our newest Executive officer, Jeff Joseph. Programs Chair is a new office created by recent amendments to our by-laws. Joseph is a graduate of the University of Denver, College of Law. He is a past Chapter Chair of the Colorado Chapter of the American Immigration Lawyers Association (AILA) and a past elected director on the AILA National Board of Governors. Mr. Joseph currently serves on the AILA Employment and Verification Committee He has formerly served in numerous leadership positions in AILA including as Chair of the AILA National 2011 Annual Conference, the AILA National Liaison Committee with the headquarters of the Department of Labor for three years, and the Executive Office for Immigration Review for two years, two terms as chair of the AILA Amicus Committee, for three years as a member of the National US Citizenship and Immigration Services Liaison Committee and for three years as a member of the National Immigration and Customs Enforcement Liaison Committee. Mr. Joseph was on the Board of Trustees of the American Immigration Council from 2006-2012 and served as Chair of the Litigation Action Committee. In 2004, he received the *Joseph Minsky Young Lawyer Award* from AILA. In 2005, he was named a finalist in the Denver Bar Association/Denver Business Journal Best of the Bar Awards. In 2008, Mr. Joseph was nominated by the Denver Business Journal as one of Denver's "*Forty under 40*" which recognizes forty young entrepreneurs for their business skills, leadership and community service. In 2009-2018, Mr. Joseph was selected by his peers for inclusion into the *Best Lawyers in America* in the field of immigration. And, in 2015 was named *Best Immigration Lawyer of the Year* in Denver by Best Lawyers. In 2006 through 2018, Mr. Joseph was named a Colorado *Superlawyer* by Colorado *Superlawyer* Magazine. *5280 Magazine* also named Mr. Joseph a "Top Lawyer" in the area of immigration law for 2006 through 2018. Joseph Law Firm, P.C. has also been ranked as a Top Tier law firm in the field of Immigration Law by *U.S. News and World Reports*. In 2008, Mr. Joseph was appointed by Governor Bill Ritter to the Colorado Nonimmigrant Agricultural Seasonal Worker Pilot Program Advisory Council. He has been qualified as an expert witness before the state and federal courts on employment-related and criminal-related immigration issues, and is a frequent local and national lecturer on various immigration topics. Mr. Joseph has been an invited speaker at the annual AILA conferences every year since 2001, and he has also addressed numerous other regional and state immigration conferences. Mr. Joseph has represented clients before the United States Citizenship and Immigration Service, the Executive Office for Immigration Review, the Board of Immigration Appeals, the U.S. District Courts, and the Circuit Courts of Appeals, and has published several opinions in those courts. He is an adjunct professor of immigration law at the University of Denver Sturm College of Law. He is bilingual in English and Spanish.

Disclaimer

Any opinions contained in The Green Card are attributable solely to the individual authors, and do not reflect the official positions of ILS and/or the Federal Bar Association.

Judge Denise Slavin Speaks to "Asylumnist" Jason Dzubow on the Immigration Courts, the National Association of Immigration Judges, Article I, and the Leadership at EOIR

By Jason Dzubow

Immigration Judge Denise Slavin recently retired after 24 years on the bench. The Asylumist caught up with her to ask about her career, her role as a leader in the National Association of Immigration Judges, and the state of affairs at the Executive Office for Immigration Review ("EOIR").

Asylumist: Tell me about how you got to be an Immigration Judge ("IJ"). What did you like and dislike about the job?

Judge Slavin: Before I became a Judge, I had some very different turns in my career. Early on, I worked for the Maryland Commission for Human Relations, where I prosecuted state civil rights complaints. I admired the hearing examiners, and I felt that I wanted to do that type of work. I knew [Immigration Judge] Larry Burman when I was in college, and he suggested I apply to the INS to become a trial attorney. I worked as a trial attorney from 1987 to 1990.

I then worked for the Department of Justice, Office of Special Investigations. This was maybe my favorite job. We investigated Nazi war criminals, and I worked on many interesting cases, including the case of John Demjanjuk. During my five years at the Office of Special Investigations, Judge Creppy became the Chief Immigration Judge. Since I knew him from my work in employer sanctions at INS, I called to congratulate him, and he suggested that I apply for an Immigration Judge position. I applied and got the job.

I started work as an IJ in 1995. My first assignment was in Miami doing non-detained cases. I loved it there–the city was exotic and multicultural. It almost felt like I wasn't living in the United States. It was also a good court for me to start my career on the bench. I hadn't practiced in Miami as a Trial Attorney, so there were no expectations of me. Also, it is a large court with many judges to learn from.

I did non-detained cases for 10 years in Miami, but the work started to become a bit tedious. An opportunity came up and I transferred to the detained docket at Krome Detention Center. I loved working on those cases. The legal issues were cutting edge. I remember one three-month period, where our cases resulted in three published BIA decisions. For detained cases, the law develops quickly, and it was very challenging to keep up to speed.

I would have been happy to remain in Miami, but family issues brought me to Baltimore. The DHS and private-bar attorneys in Baltimore are very professional, and my colleagues were excellent mentors. All this helped make my time there very enjoyable.

Asylumist: What could DHS attorneys and the private bar do better in terms of presenting their cases? Are there any common problems that you observed as an IJ?

Judge Slavin: There are a lot of good DHS attorneys in Baltimore. DHS attorneys get a lot of credit with judges if they narrow the issues and stipulate to portions of the case. For example, it is so tedious when DHS inquires about every step the alien takes from her country to the United States. If there is no issue with the journey to the U.S., it is not worth going into all this, and it uses up precious court time. When DHS attorneys ask such questions, it would sometimes be frustrating for me as a Judge, since I do not know what they have in their file and what they might be getting at. But if there is nothing there, it is very frustrating to sit through. DHS attorneys should only explore such avenues of questioning if they think there is an issue there. When they focus on real issues, and don't waste time sidetracking, they gain credibility with the IJs.

As for the private bar, I appreciate pre-hearing briefs on particular social groups. Also, explaining whether the applicant is claiming past persecution and the basis for that, whether there is a time bar, and nexus. Of course, this can sometimes be straightforward, but other times, it is a bigger issue and a brief is more important.

I encourage both parties to work together to reach agreement on issues whenever possible. Court time is so valuable, Judges want to spend it on the disputed issues.

Asylumist: What about lawyers who are bad actors, and who violate the rules?

Judge Slavin: IJs are prohibited from reporting attorneys directly to bar associations. Instead, we report the offending lawyer to internal EOIR bar counsel, who then makes a decision about whether or not to go to the state bar. Personally, I have been hesitant to report private attorneys because I think the

system is unfair–it allows you to report a private attorney, but not a DHS attorney. Although this is unfair (and it is another reason why Immigration Courts should be Article I courts), there were times when I had to report blatant cases of attorney misconduct.

Asylumist: Looking at your TRAC statistics, your denial rates are much higher for detained cases. Some of this probably relates to criminal convictions and the one-year asylum bar, but can you talk about the difference in grant rates for detained vs. non-detained cases? Do IJs view detained cases differently? Perhaps in terms of the REAL ID Act's evidentiary requirements (since it is more difficult to get evidence if you are detained)?

Judge Slavin: There were two detention centers in the Miami area—Krome and Broward Transitional Center–and they produced two different types of cases. At Krome, detainees mostly had convictions and had been in the U.S. for years. It is very difficult to win asylum if you have been here for that long. It's hard to show that anyone would remember you, let alone persecute you, if you return to your country after a decade or more. BTC held newly arriving individuals who were claiming asylum. They generally had more viable claims.

As a Judge, I did account for people being detained. I didn't want to deprive someone of the right to get a piece of evidence, but I didn't want to keep the person detained for an extra three months at government expense to get the document. If there is no overriding reason to require corroboration, I would not require it for detained applicants. In many cases, corroboration that you would normally expect, you cannot get in the 30-day time-frame of a detained case. I have continued cases were there was needed corroboration, but I generally tried to avoid that.

Also, in adjudicating detained cases, it is important to consider the spirit of the asylum law, which is generous. But for people with convictions, we have to balance the need to protect an individual from persecution against the competing interest to protect the United States from someone who has committed crimes here. In a non-detained asylum case, the potential asylee should be given the benefit of the doubt, but–for example–in a detained case where the applicant has multiple criminal convictions, the person may not receive such a benefit of the doubt, and a Judge would rather err, if at all, on the side of caution and protect the community.

Asylumist: Again, looking at the TRAC statistics, your grant rates tend to be higher than other IJs in your local court. What do you think accounts for that? How do different IJs evaluate cases so differently?

Judge Slavin: In asylum cases, we don't have a computer to input information and come up with an answer. The immigration bench does and should reflect the diverse political backgrounds of people in our country. I am more on the liberal side, but I will defend colleagues who are more conservative. We don't want only middle-of-the road judges; we want the immigration bench to reflect our society.

As far as the TRAC numbers, it's true that people who are represented by attorneys are generally more successful in court. However, if you have a bad case, most decent lawyers won't take it. Such cases would be denied even with a lawyer. Since people with weak cases have a harder time finding lawyers, the disparity between represented and unrepresented individuals is not as dramatic as the TRAC statistics suggest.

Asylumist: One idea for reducing disparities between IJs is to hold training sessions where "easy" and "hard" judges evaluate a case and discuss how they reach different conclusions. Do you think this is something that would be helpful? What type of training do IJs need?

Judge Slavin: We have not had this type of training, but it would be interesting. EOIR has not been consistent about training. In-person trainings come and go. They do hold video training sessions, but these are horrible. Judges would get some time off the bench to watch the videos, but due to the pressing backlog, we would usually do other work while we were watching.

Also, looking at talking heads is not a good way to learn new information. In addition, the social opportunities to talk to other Judges with different backgrounds and different judicial philosophies that occur only during in-person trainings are invaluable.

The National Association of Immigration Judges ("NAIJ") has tried to get EOIR to hold different types of trainings, such as regional conferences–where, for example, all the IJs in the Eleventh Circuit would get together–but unfortunately, EOIR has not gone for that approach.

In my experience, the more interactive trainings are more helpful. I've learned the most from talking with other IJs and from in-person trainings. This was one of the advantages of serving on a big court like Miami–the opportunity to interact with many other judges and see how they handled their dockets.

Another idea is to give IJs "sabbatical time" off the bench, to observe the cases of other judges. Seeing and talking to other judges about how they handle different issues is very helpful.

Asylumist: You mentioned the NAIJ, the National Association of Immigration Judges, which is basically a union for Immigration Judges. How did you get involved with the NAIJ? What did you do as a member and leader of that organization?

Judge Slavin: I had two mentors–Judge Bruce Solow and Judge John Gossart–who were both past presidents of NAIJ. They encouraged me to get involved with the organization. I ran for Vice President with Judge Dana Leigh Marks, who ran for President. I call Judge Marks my sister from another mother. I love her to death. Prior to becoming VP, I had done some secretarial-type duties for the NAIJ, like taking the minutes. I originally joined NAIJ to help improve the Immigration Court system.

As they say, bad management makes for good unions. When management is good, the number of NAIJ members falls, and when management is bad, more judges join. The situation these days is not good. In particular, the politicization of the Immigration Courts has been outrageous. This has been going on in several administrations, but has reached a peak in the current Administration.

Another issue is that we have judges doing more and more with less and less. It's crazy. When I was in Miami and we had a thousand cases per judge, we were hysterical. When I left the

court in Baltimore, I had 5,000 cases! Despite this, management at EOIR thinks that judges are not producing. The idea of this is absurd. Management simply does not recognize what we are doing, and this is bad for morale.

The previous Director of EOIR, Juan Osuna, appreciated the court and the judges, even if there were some political issues. When you have someone who does not appreciate what you are doing, and who gives you production quotas, it creates a very difficult environment.

These days, I do worry, especially for the newer judges. If you have to focus on getting cases done quickly, it will cause other problems–some cases that might have been granted will be denied if the applicant does not have time to gather evidence. Also, while many decisions can be made from the bench, for others, the Judge needs time to think things through. For me, I had to sleep on some of my cases–they were close calls. I needed time to decide how best to be true to the facts and the law. I also had to think about how my decision might affect future cases—most IJs want to be consistent, at least with their own prior decisions. To make proper decisions often takes time, and if judges do not have time to make good decisions, there will be appeals and reversals. For these reasons, production quotas will be counter-productive in the long run.

Other problems with the court system include the aimless docket reshuffling, which started with the Obama administration. IJs should determine on their own how cases are set on their dockets. Cases should be set when they are ready to go forward, not based on the priorities of DHS.

The main issue here is that DHS [the prosecutor] is very much controlling EOIR [the court]. The ex-parte communication that occurs on the macro level is unheard of–the priorities of DHS are communicated through backdoor channels to EOIR, and then EOIR changes its priorities. Have you ever heard of a state prosecutor's office telling a state court which cases to set first? This re-shuffling affects IJs' dockets–we would receive lists of case numbers that we had to move to the front of the queue. We had no control over which cases had to be moved. Instead, cases were advance based on DHS priorities.

Maybe one silver lining of the politicization under the current Administration is that it has helped people realize the need for an Article I court.

Asylumist: Bad management makes for good unions. What is your opinion of the leadership at EOIR today? What more could they do to support judges?

Judge Slavin: It's hard to think about EOIR in this political environment. Former Director Juan Osuna was wonderful. He spent a lot of time minimizing damage to the court by the Department of Justice and Congress; for example, by explaining how judicial independence and due process prevented placing artificial constraints on the number or length of continuances granted. These concepts seem to elude the current leadership of EOIR, and the administration has moved to strip us of the tools we need (such as administrative closure) to control our dockets.

The court has many needs that are not being addressed. We need more and better training. We need larger courtrooms–it drives me crazy that we cannot get courtrooms the size we need; with children, families, and lawyers–we need more space.

Also, we need more judges. I retired, and a lot of people coming up behind me are getting ready to retire. It is hard to keep up with the numbers. One idea is to implement phased retirement for IJs, so judges could work two or three days per week. This was approved four years ago, but not implemented. I do not know why.

Judge Marks [former President of the NAIJ] and I talked to EOIR about hiring retired IJs back on a part-time basis. We asked about this 10 years ago, and they are finally getting around to it. That will help, and hopefully, EOIR can step up that program.

Recent changes that affected judges directly, such as limiting administrative closure, are not good for case management.

The NAIJ leadership and I have talked to EOIR Director James McHenry about some of this. He is not getting it. He is very young, and he thinks he has a new approach, but he does not know the history or background of EOIR, and he does not seem to grasp what the agency needs to do. He also does not understand how overworked judges have been for such a long time, and seems to think the problems with the court are based on lack of commitment and work ethic of the judges. Nothing could be farther from the truth.

Asylumist: How would it help if Immigration Courts became Article I courts?

Judge Slavin: Article I courts would still be part of the Executive Branch. Immigration is a plenary power, but when it comes to case-by-case adjudication, that issue disappears. The bottom line is that people are entitled to due process, and that requires judicial independence. I don't think you can have due process without judicial independence. This is one of the hallmarks of the America legal system. Even arriving aliens are entitled to due process. If we change that, we are starting to give up who we are. If we are trying to save the U.S. from terrorists by eliminating due process for all, what are we saving? It is taking away an important tenant of our democratic system.

There is a plan to transition the Immigration Courts to Article I courts. The Bankruptcy Court did it. The plan allows for grandfathering of sitting IJs for a limited period. The sooner this is done, the easier it will be. And in fact, it must be done.

If we had Article I courts, we would eliminate aimless docket reshuffling and political priorities. Judges would control their own dockets, and this would lead to better morale and better efficiency.

Asylumist: Thank you for talking to me today.
Judge Slavin: Thank you

Reprinted with author's permission. The original version of this interview appeared in The Asylumnist Blog May 22, 2019. See <http://www.asylumist.com/2019/05/22/judge-denise-slavin-on-the-immigration-courts-the-national-association-of-immigration-judges-article-i-and-the-leadership-at-eoir/> (accessed Aug. 7, 2019)

The Case for an Article I Immigration Court: How it Started, Why It's Needed More Than Ever, Moving Forward

By Alexandra Williams, Esq.

At Article I, section 8, the Constitution provides Congress power "To constitute tribunals inferior to the Supreme Court." These Congressional tribunals, commonly known as "Article I courts," include the US Courts of Military and Veterans Appeals, Tax Court, and the US Court of Federal Claims. Immigration Courts, however, are not yet included on that list. Instead, they are technically a component of the Executive Branch. The following is an overview of the development of US Immigration Courts within that context:

•1893: Congress creates the basis of the modern immigration court system by replacing state and local inspection practices with federal "Boards of Inquiry." These Boards consisted of "no less than four" inspectors who reviewed and decided cases of people seeking to enter the United States.[1]

•1903 – 1913: Immigration responsibilities moved between the Department of Treasury to the Department of Commerce to the Department of Labor ("DOL").[2]

•1921: The Secretary of Labor created a "Board of Review" to handle administrative appeals because of an increasingly complex case appeals.[3]

•1933: The Immigration and Naturalization Service ("INS") was created with the Department of Labor by Executive Order Number 6166.[4]

•1940: INS moved from the DOL to the Department of Justice ("DOJ") and the Attorney General reconfigures the Board of Review as the Board of Immigration Appeals ("BIA"). [5]

•1952: Congress eliminates the Boards of Special Inquiry and establishes "special inquiry officers" to review and decided deportation cases. Modern day immigration judges.[6]

•1973: Special inquiry officers are authorized to use the title "Immigration Judge."[7]

•1983: The Attorney General creates the Executive Office of Immigration Review ("EOIR")[8]

•2002: The Department of Homeland Security ("DHS") is created, and Congress decides to keep EOIR within DOJ.[9]

In 1981, the Final Report of the Select Commission of Immigration and Refugee Policy first recommended the creation of an Article I Immigration Court to the President of the United States and Congress, which "would result in more efficient and uniform processing of cases."[10] The Commission believed that an Article I court would offer an advantage over the present "quasi-judicial system" because it would provide one hearing and one appellate review in place of the layering of review that characterized the present system:

"This would offer the potential for introducing judicial uniformity into the review of denials of applications and petitions – matters that now occupy the attention of district courts around the country. The elimination of potential disparate rulings by the courts of appeals should discourage further litigation." [11]

The commission was also of the view that an Article I immigration court would be more likely to attract "outstanding adjudicators," which would enhance the quality of decisions and generally eliminate the need for further review.

While the majority of commissioners recommended the creation of Article I immigration courts, Commissioner Robert McClory believed that immigration judges ("IJ") could be "independent of the agency whose cases they must decide" via the establishment of an independent body within the DOJ consisting of administrative law judges assigned to hear immigration cases.[12] The BIA could also be incorporated into this independent body.

There has been discussion of an Article I Immigration Court since the mid-70s and the first bill was introduced by Representative Bill McCollum (R-FL-5) on March 1, 1982. The bill never made it out of the House Judiciary Committee.[13] The following year, the EOIR was created through an internal DOJ reorganization which also incorporated the BIA, a strikingly similar structure to Commissioner McClory's single paragraph idea from the Final Report of the Select Commission on Immigration and Refugee Policy from 1981.[14]

Why an Article I Immigration Court is Needed More Than Ever

"We make life and death decision in traffic court settings."[15]

Why is the time ripe to make another push for an independent immigration court? Practitioners, judges, and policymakers all come back to the same thing: entrenched bureaucracy within the DOJ which leaves immigration courts with *only a public perception of independence.* By being housed in a law enforcement agency, where the Attorney General is the chief prosecutor, the interests of the agency supersede the ability of the immigration court to function as a court. Instead, the processes are politicized, and the backlog of cases is approaching 1,000,000.[16] Practitioners and judges alike know all too well that the lack of respect and professionalism, the inefficient use of judicial resources, and the dual role the IJ must play as both neutral arbiter and department attorney are just a few of the reasons why the current system does not work.

Dual/Dueling Roles Played by Immigration Judges

The public (and the courts of appeals) perceive immigration judges as independent, neutral arbiters, while the DOJ considers immigration judges to be department attorneys. Thus, IJs are placed in an ethical dilemma: accountability to DOJ in terms of meeting performance metrics and case completion[17]

quotas, facing disciplinary action for good faith decisions, and dealing with constant shifts in policies and priorities, while simultaneously being independent, neutral decision-makers on the bench, often making life and death decisions. We expect an IJ to know the law and not be biased, not to come in saying, "I'm not making my quota, so I have to triage this."[18] As such, many judges are leaving due to the burden and stress of dealing with this duality.

Perception of Independence, Respect, and Professionalism in the Courtroom

The fact of the matter is that IJs and BIA members are subject to substantial agency supervision as DOJ retains ultimate control over IJ decisions and employment. If a BIA decision is at odds with the attorney general's stated agenda, he or she can certify it to him or herself and decide it differently, or even remove the Board member who decided it.[19] By the DOJ's own admission, IJs are "[DOJ] attorneys who are designated by the attorney general to conduct [immigration court] proceedings, and they are subject to the attorney general's direction and control."[20] Christine Lockhart Poarch puts it best her 2016 article: "this fundamental internal conflict betrays appearances and undermines transparency within a court system that decides critical liberty interests."[21]

In essence, because both the IJ and the Assistant Chief Counsels ("ACC") for DHS are employees of the executive branch, they both represent the federal government.[22] In *Reimagining the Immigration Court Assembly Line*, the Appleseed Network notes that "one of the most powerful tools given to judges is the ability to sanction attorneys who appear before them,… [which] allows judges to control their courtrooms by enforcing norms of fair play and decorum."[23] Even when used sparingly, this authority protects the public and ensures greater accountability by immigration practitioners on both sides of the bar. Although IJs have been granted contempt authority,[24] they cannot use it because DOJ has "'flat out refused' to enact regulations that allow judges to hold DHS attorneys in contempt."[25] As such, DHS can push back harder to effectuate the policies of the current administration. Simple asylum claims that would normally be readily grantable are taking much longer because of DHS's nit-picking, forcing private bar attorneys to come up with, for example, more creative particular social groups, in turn making merits' hearings longer and often spaced out over multiple sessions, thereby increasing the backlog.

Docket Management and Efficient Use of Judicial Resources

Currently, IJs lack authority to supervise law clerks and support personnel. Besides deciding cases, they must devote their time to finding files, making copies, and performing clerical duties. Just a few years ago, immigration courts were still recording proceedings on old cassette tape decks, and the court still lacks a fully implemented e-filing system for anything other than entries of appearance by counsel, despite an assurance from James McHenry, Director of EOIR, that a nationwide rollout of a fully electronic filing and case management system would take place in the beginning of 2019.[26]

There has been a lot of interference in the independence of IJs by DOJ's attempts (and successes) to control the docket. The philosophy of this administration shines through in the number of cases that the Attorneys General have certified to themselves where neither side has taken steps to bring up an issue. *Matter of Castro Tum*, for example, took away and IJs ability to administratively close proceedings to access relief through a promulgated regulation, reliable docket management tool.[27] In *Matter of L-A-B-R*, the Attorney General held that an immigration judge should rely primarily on two factors in making good cause determinations for continuances: the likelihood of collateral relief sought and whether the relief will materially affect the outcome of the removal proceedings.[28] *Matter of S-O-G- & F-D-B* limited the power of IJs to dismiss and terminate removal proceedings.[29] In *Matter of L-E-A*, acting Attorney General Whitaker directed the BIA to refer its published decision of the same name to him for review, a seeming attempt to undo a well-settled area of law before both the BIA and many federal circuit courts.[30] And *Matter of M-S-* stripped IJs of the authority to grant bond to asylum seekers after establishing a credible fear of persecution.[31]

IJs have been caught in the mess of constant changes and re-prioritization of cases and docket structure with barely enough time to digest and understand the directives. Even though it appears that case completions are up, the backlog is actually surging due to agency inefficiency and ineffective use of resources, causing massive stress among court personnel. Immigration Judge Amiena Khan, speaking in her capacity as Executive Vice President of the National Association of Immigration Judges, indicates that while more judges have been hired, a comparable amount of support staff have not, leaving current support staff stressed, disenchanted, and with poor morale.[32] Now, EOIR has indicated that in-person interpreters will no longer be present at initial hearings, a move certain to risk due process and handicapping IJs from completing cases needed to meet their quotas.[33]

Federal Bar Association Proposal

"Let's move them into a new building with Wi-Fi!"[34]

In 2013, the Federal Bar Association ("FBA"), at the recommendation of the Immigration Law Section, called on Congress to establish an Article I court that would assume the adjudicatory responsibilities currently performed by EOIR within the DOJ. This could create an immigration court system with full independence from the executive branch, greater control over cases, costs savings, and increased professionalism by placing all immigration related adjudications within the U.S. Immigration court, not spread out among different agencies.

In 2017, and revised in 2019, the FBA drafted a model bill with proposed legislation that would establish a "United States Immigration Court" with the functions that are currently performed by EOIR judges, administrative law judges, and the Board of Immigration Appeals.[35] In 2018, the National Association of Immigration Judges ("NAIJ") endorsed the FBA model bill. Both the American Immigration Lawyers Association ("AILA") and the American Bar Association ("ABA") have expressed their support for an Article I immigration court but have stopped short of endorsing the FBA's proposed bill.

The new court would be comprised of a trial division

operating in various locations within the United States, much like the current Immigration Courts, and an appellate division based in the Washington, DC area, much like the current BIA. All judges of the court would have fixed terms of office. The judges in the appellate division would be appointed by the President, subject to senate confirmation, and the judges in the trial division would be appointed by the appellate division using a merit selection process.

The substantive law of immigration and the corresponding enforcement and policy-determining responsibilities of the Departments of Homeland Security and Justice under the INA would be unchanged. However, the legal precedents established in decisions of the new court's appellate division would be binding on those departments as well as other executive branch authorities with administrative responsibilities under the Act and other immigration-related laws. Final decisions of the new court would be subject to review in the regional U.S. courts of appeals under the same circumstances as EOIR's administrative decisions had been reviewed by those courts, but only with respect to constitutional claims, issues of statutory or regulatory interpretation, or other questions of law. Findings of fact by the new court would not be subject to further judicial review.

Highlights[36]

- Rulemaking authority (similar to that held by the federal courts generally) to prescribe its own rules of practice and procedure (including evidence), and regulatory authority under the INA (transferred from the Attorney General) to spell-out details of its adjudicative proceedings to the extent not explicitly covered in the INA as amended by this legislation
- Mandamus-like authority in ongoing cases to compel agency action unlawfully withheld or unreasonably delayed
- Civil contempt authority (via imposition of money penalties)
- Case management firmly under judicial control (not administrative oversight as in EOIR)
- Administrative authority to govern its own bar (i.e., regulate and, where necessary, sanction those who practice before it)
- Ability to manage its own budget, with funding requests exempt from OMB review
- Judges removable only for good cause (i.e., gross misconduct, neglect of duty, incompetence, outside practice of law, or disability)
- Authority to obtain staff support for court and chambers, subject to availability of funds
- Judges collectively or individually supervise and direct their chambers and court staff
- DOJ ability to appeal from BIA decisions so that Federal courts could get petitions for review from both sides
- Ability to expand the E-filing system

Moving Forward

There's been significant resistance to an Article I immigration court over the years from both Democrats and Republicans because, simply put, when you're the party in power you don't want to give it up. However, as of late, there has been interest from both sides of the aisle. Senator Mazie K. Herono (D-HI) introduced the "Immigration Court Improvement Act" in 2018 and then again in 2019, co-sponsored by Senators Kamala Harris (D-CA), Bernie Sanders (I-VT), Catherine Cortez Masto (D-NV), Kirsten Gillibrand (D-NY), Amy Klobuchar (D-MN), Tina Smith (D-MN), and Corey Booker (D-NJ), Jacky Rosen (D-NV), Jeff Merkley (D-OR). Republicans have been much more receptive to the idea of an Article I Court given the current humanitarian crises, heated rhetoric, and the implementation of an immigration policy that does not actually fit within American values.

The latest iteration of the Senate Bill was referred to the Senate Judiciary Committee, but no other action has been taken. While these bills attempt to address the issues inherent to our current system, they stop short of the establishment of an Article I court. FBA Immigration Law Section Chair, Elizabeth "Betty" Stevens, believes that bills will be introduced in both the House and the Senate next year with hearings sure to take place in the House. She's skeptical, however, of the bill's ability to get out of committee in the Senate. It's even less likely that the President would sign such a bill and gathering enough support to override a presidential veto in this divisive climate is certainly out of the question. Moving forward, the legislative effort to establish an Article I immigration court must be a bi-partisan initiative if it has any chance of success.

Alexandra Williams is an associate attorney at Murray Osorio, PLLC and immigration law firm in Fairfax, Virginia. *The content of this article was made possible by an in-depth review of published articles from seasoned practitioners, many of whom are cited below. In addition, the author is immensely grateful to Elizabeth ("Betty") Stevens, Of Counsel at Poarch Law and Chair of the Immigration Law Section of the FBA and the Honorable Immigration Judge Amiena Khan, who granted her interviews which provided a plethora of knowledge and content for this article. Judge Khan spoke only in her capacity as Executive Vice President of the National Association of Immigration Judges and did not represent the views of Executive of Office for Immigration Review or the Department of Justice.*

Endnotes:

[1]Immigration Act of 1893, Act of March 3, 1893 (27 Statutes-at-Large 570), *available at:* https://www.loc.gov/law/help/statutes-at-large/52nd-congress/session-2/c52s2ch206.pdf

[2]Executive Office of Immigration Review, Department of Justice, Evolution of the U.S Immigration Court System: Pre-1983, *available at:* https://www.justice.gov/eoir/evolution-pre-1983

[3]*Id.*

[4]Exec. Order No. 6166 (June 10, 1933), available at: https://www.archives.gov/federal-register/codification/executive-order/06166.html#19.

[5]5 Fed. Reg. 3,502 (Sept. 4, 1940).

[6]Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (June 27, 1952)

[7]38 Fed. Reg. 8,590 (April 4, 1973)

[8]48 Fed. Reg. 8,083 (Feb. 25, 1983)

[9]*See generally,* Homeland Security Act, Pub. L. No. 107-296, § 1517, 116 Stat. 2135, 2311 (Nov. 25, 2002) (codified at 6 U.S.C. § 557.

[10]U.S. immigration policy and the national interest: the final report and recommendations of the Select Commission on Immigration and Refugee Policy with supplemental views by commissioners, March 1, 1981, *available at:* https://hdl.handle.net/2027/umn.31951d008310060

[11]*Id.*

[12]*Id.* at 375.

[13]Immigration Court and Procedure Reform Act of 1982, H.R. 5649, 97th Cong. (1982).

[14]Executive Office of Immigration Review, Department of Justice, *About the Office, available at:* https://www.justice.gov/eoir/about-office.

[15]The Honorable Immigration Judge Amiena Khan, Executive Vice President of the National Association of Immigration Judges ("NAIJ"), paraphrasing the sentiments of past President of the NAIJ, the Honorable Judge Dana Leigh Marks. Quotes and commentary from Judge Khan and Judge Marks are only made in their personal capacities as part of the NAIJ and do not represent the views of EOIR or DOJ.

[16]Interview with Immigration Judge Amiena Khan, Executive Vice President of the National Association of Immigration Judges, who spoke with the author only in her capacity as EVP of the NAIJ. Any commentary attributed to her in this article does not represent the views of EOIR or DOJ.

[17]A case can be classified as completed someone is ordered or volunteers to be removed, the court terminates the case because there are no longer grounds for removal, someone is granted relief to stay in the US, or the case is closed on administrative grounds.

[18]Interview with Judge Khan, supra at note 16.

[19]L.A. Times, *"Five on Immigration Board Asked to Leave; Critics Call It a Purge,"* (March 12, 2003), available at: https://www.latimes.com/archives/la-xpm-2003-mar-12-na-immig12-story.html.

[20]Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court,* Bender's Immgr. Bull. (Jan. 1, 2008), naij-usa.org/wp-content/uploads/2014/06/UrgentPriority_1-1-08.pdf (citing authorities delegated to the director of the executive office for immigration review and the chief immigration judge, 72 Fed. Reg. 53,673, 53,673 (Sept. 20, 2007)); *see also* Dana Leigh Marks, *Mischaracterization of Immigration Judges by the United States Department of Justice*, Nat'l Ass'n Immigr. Judges (May 15, 2016), naij-usa.org/wp-content/uploads/2016/05/NAIJposition-paper-May-2016-classification-of-IJs.pdf

[21]Christine Lockhart Poarch, *Immigration Court Reform: Congress, Heed the Call*, The Federal Lawyer, October/November 2016, *available at:* http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2016/OctoberNovember/Columns/Immigration-Law-Update.aspx?FT=.pdf

[22]INA § 101; 8 U.S.C. § 1101(b)(4). The Office of Personnel Management has categorized career attorney positions as Schedule A. 5 C.F.R. § 213.3102. All immigration judges are career Schedule A appointees.

[23]Appleseed Network, *Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, (2012), www.appleseednetwork.org/wp-content/ uploads/2012/03/Reimagining-the-Immigration-Court-AssemblyLine.pdf.

[24]Illegal Immigration Reform and Immigrant Responsibility Act of 1996, division C of Pub. L No. 104-208, sections 304, 371 [the latter amended by section 1125(c)(4) of National Defense Authorization Act of FY 2004.]

[25]Rafael Bernal, *Immigration judges lash out at Sessions,* The Hill (Aug. 8, 2018), *available at:* https://thehill.com/latino/401011-immigration-judges-lash-out-against-sessions (quoting NAIJ President Ashley Tabaddor.)

[26]Statement of James McHenry, Director of the Executive Office for Immigration Review, Department of Justice, Before the Subcommittee on Border Security and Immigration Committee on Judiciary United States Senate, *Strengthening and Reforming America's Immigration Court System*, April 18, 2018, *available at:* https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Testimony.pdf

[27]27 I&N Dec. 271 (A.G. 2018).

[28]27 I&N Dec. 405, 406 (A.G. 2018).

[29]27 I&N Dec. 462 (A.G. 2018).

[30]27 I&N Dec. 494 (A.G. 2018).

[31]27 I&N Dec. 509 (A.G. 2019) (enjoined by *Padilla v. U.S. Immigration & Customs Enforcement,* No. 2:18-cv-00928-MJP (W.D. Wash.))

[32]Interview with Immigration Judge Amiena Khan, Executive Vice President of the National Association of Immigration Judges, who spoke with the author only in her capacity as EVP of the NAIJ. Any commentary attributed to her in this article does not represent the views of EOIR or DOJ. Judge Khan also points out that given the increased hiring of IJs, EOIR currently has one of the largest number of probationary judges in its history. During this probationary period, IJs do not have all the protections of more senior immigration judges in that they are employed at-will and can be fired for cause or no cause. As such, it's possible that this large group of individuals could be more inclined, by nature of their current status, to the follow the agency's overview of law enforcement and removal so as not to effectuate their untimely termination.

[33]*Id.*

[34]Elizabeth Stevens, Of Counsel at Poarch Law and Chair of the Immigration Law Section of Federal Bar Association.

[35]Summary of Proposed "United States Immigration Court Act" (Jan. 16, 2019), *available at:* http://www.fedbar.org/Image-Library/Government-Relations/Summary-of-Model-Legislation-for-an-Article-I-Immigration-Court.aspx;

[36]Federal Bar Association, Briefing: *FBA Model Bill to Establish an Article 1 U.S. Immigration Court*, available at: http://www.fedbar.org/Image-Library/Government-Relations/FBA-Model-Article.aspx

Legitimation of Children Under the Immigration and Nationality Act

By Abraham Kim

This Summer, the Green Card is pleased to provide access to a featured, full-length scholarly article. Mr. Abraham Kim, a staff attorney at the BIA, provides thoughtful and thoroughly researched commentary on the issues of legitimation and derivative citizenship. The full article can be found here:

http://www.fedbar.org/Image-Library/Sections-and-Divisions/Immigration/Abraham-Kim-Legitimation-Article.aspx

Abstract:

One of the most popular television shows in the world in recent memory was Home Box Office's *Game of Thrones*, based on the series of fantasy novels by author George R.R. Martin.[1] In Martin's complicated fantasy universe, illegitimacy and legitimation are central themes. In particular, the mysterious identity of the character Jon Snow, introduced as the illegitimate son of Ned Stark, garnered much attention from fans of the show.[2] Another character, Ramsay Snow, became the legitimated son of Roose Bolton.[3] In Martin's fiction, legitimation is linked to inheritance and succession rights and is typically achieved by royal decree.[4] Although *Game of Thrones* is a recent show, illegitimacy and legitimation have been major themes in literature for centuries.[5] In the real world, legitimation has long been a topic of debate in United States immigration law, particularly in the areas of citizenship, naturalization, and visa preference classification.

This article will discuss U.S. citizenship law, focusing on issues related to derivative citizenship and out-of-wedlock birth. Specifically, the article will explore the issue of legitimation in light of recent precedent decisions from the Board and the circuit courts of appeals. First, after a short overview of U.S. derivative citizenship law, the article will discuss the background and relevant statutory provisions of legitimation. Second, the article will examine significant Board and circuit court precedent cases prior to the Board's decision in *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). Third, the article will discuss *Matter of Cross* and how the Board addressed the disparate approaches advanced in its prior decisions. Finally, this article will review recent circuit court precedent cases regarding the interpretation of legitimation, as well as the constitutionality of legitimacy-based statutory classifications in derivative citizenship cases.

Abraham Kim is an Attorney Advisor with the Board of Immigration Appeals. He is a graduate of the University of California, Berkeley, and Washington University School of Law. He was also a Judicial Law Clerk and Attorney Advisor for the Chicago Immigration Court, having entered through the Attorney General's Honors Program. This article was written in his personal capacity and does not express or reflect the views or positions of the Department of Justice and the United States Government. This article also contains no legal advice and may not be construed to create or limit any rights enforceable by law.

Endnotes:

[1]Trey Williams, *HBO is Preparing for a World Without "Game of Thrones"—Its Most Popular Show*, MARKETWATCH (Aug. 31, 2017, 2:12 p.m.), https://www.marketwatch.com/story/hbo-must-prepare-for-a-world-without-game-of-thrones-its-most-popular-show-2017-08-29; Alison Flood, *George R.R. Martin: a New Game of Thrones Book is Coming . . .*, THE GUARDIAN, (Apr. 26, 2018, 5:55 PM), https://www.theguardian.com/books/2018/apr/25/george-rr-martin-winds-winter-not-coming-2018-sixth-volume-game-thrones-targaryen.

[2]Megan McCluskey, *Who is Jon Snow's Father? See His Game of Thrones Family Tree*, TIME (Aug. 16, 2017), time.com/4900151/who-is-jon-snows-father/.

[3]*See* GEORGE R. R. MARTIN, A STORM OF SWORDS 997 (2000).

[4]*Id.* at 629.

[5]*See, e.g.,* Charles Dickens, BLEAK HOUSE 407-10 (Alfred A. Knopf 1991) (1853).

The Green Card

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