The Green Card

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

Larry Burman, Chair

Quote of the Month

"What we are seeing is the rise of what used to be called 'the royal prerogative.' This was a well-known term to the Framers… Thomas Jefferson said 'We give them those powers only which are necessary to execute the laws (and administer the government).' When the president becomes a legislator, he becomes a government unto himself. For this reason, what the president is doing is not **one** of the dangers the Framers were concerned about; it is **the** danger the Framers were concerned about."

Jonathan Turley, professor of law, George Washington University

PUBLISH IN THE FEDERAL LAWYER!

The Federal Lawyer continues to accept submissions for feature articles of 3000 to 8000 words, as well as letters to the editor, book reviews and commentaries. Guidelines for submission can be found at the fedbar.org website under publications/federal lawyer. Deadlines fall on the first of each month from December 2016 through most of 2017. The Immigration Law issue will be May 2017 and submissions are due Jan. 1, 2017.

If authors wish to submit an article with the official endorsement of ILS, they can send their draft at least two weeks in advance of the FBA deadline to Dr. Alicia Triche at aliciatricheclc@gmail.com. She will consider whether ILS will endorse the submission and, if so, provide edits and submit on the author's behalf.

Dr. Alicia Triche is Chair of the Section's Publications Committee.

In This Issue

By Jason Dzubow

Former BIA Chairman Paul W. Schmidt on His Career, the Board, and the Purge

Paul Wickham Schmidt served as Chairman of the Board of Immigration Appeals (BIA) from 1995 to 2001. He was a Board Member of the BIA from 2001 to 2003, and served as an Immigration Judge in Arlington, Virginia from 2003 until his retirement earlier this year. He also worked in private practice and held other senior positions in government, including Deputy General Counsel and Acting General Counsel at INS. The Asylumist caught up with Judge Schmidt in Maine, where he has been enjoying his retirement, and talked to him about his career, the BIA, and the "purge" of 2003.

ASYLUMIST: How did you get started in the field of immigration?

PWS: My wife, Cathy, and I had both spent our whole lives in Wisconsin. After I graduated from law school, we wanted to go somewhere else. Because I went to law school in Wisconsin, I did not have to take the bar—I was granted automatic admission to the Wisconsin bar. I've actually never taken a bar exam. I knew if I got a job with the federal government, I would not have to take a bar, so I was interested in working for the feds. Also, I had an uncle from Wisconsin who went to DC to work for the Roosevelt Administration and stayed for an entire career, and that also attracted me to federal service.

I applied to the Department of Justice through the Honors Program, but they rejected me. At the time, the Board did not actively recruit from the Honors Program, but they looked at the pool of applicants, liked my writing experience, and asked me to apply. I didn't know anything about immigration, so the first thing I did was to go to the law school library and learn about immigration law. Then, we drove to Washington, DC for the interview. I met the Chairman, Board Members, and the Executive Assistant. Following an afternoon of interviews, the Chairman, Maurice A. "Maury" Roberts, a legendary immigration "guru," called me in and said, "We discussed it at conference, and you'll do." With that auspicious beginning, I was hired. It was 1973. At the time, the BIA had nine staff attorneys and five Board Members.

I liked the job. It was a great group of people, and I learned a lot about the law. Chairman Roberts was a mentor to me and my office-mate. I also worked with the late Lauri Steven Filppu, who became a close friend, and who went on to become a Deputy Director of the Office of Immigration Litigation and then served with me on the BIA.I liked the human interest element and that it involved creative thinking. However, there was an ideological divide among the Board Members. At that time, Board Members were political appointees, rather than career appointments as they are today. The most senior Board Member had been appointed by President Truman. Chairman Roberts was appointed at the end of the Johnson Administration. I believe the other three Board Members were appointed during the Nixon Administration and did not have prior immigration backgrounds. Also, in those days, oral argument was a right, and the Board had four days of oral argument each week.

While I was there, Lauri Filppu and I helped form the BIA employees union, which was led by our friend and colleague Joan Churchill. She later became an Immigration Judge in Arlington and served with me there for several years before her retirement. One impetus for forming the union was an incident where the Board librarian was fired in the middle of our Christmas party. We thought that was harsh. The union still exists today. Indeed, as Chairman, I later had to go "head to head" with the union on an arbitration relating to the assignment of offices.

ASYLUMIST: You started as BIA staff. How did you get to be Chairman of the Board of Immigration Appeals?

PWS: I left the BIA at the end of 1975. I felt I had done what I could do there, and the work was getting repetitive. I was ready for something new, and so I moved to the General Counsel's office at INS. At the time, Sam Bernsen was General Counsel. He was an amazing guy, who started as a messenger on Ellis Island when he was 17 and worked his way up to the top ranks of the Civil Service. He was also a good friend of Chairman Roberts. I advanced in the General Counsel's office, and by the end of the Carter Administration, I was the Deputy General Counsel and the Acting General Counsel. The Deputy General Counsel basically ran the day-to-day operations of the INS's nationwide legal program. The General Counsel during the Carter Administration, David Crosland (now an Immigration Judge in Baltimore) was the Acting Commissioner of the INS for about the last half of the Administration. At the time, I was only 31 or 32 years old. In that period, we were re-organizing the legal program. The GC took over supervision of Trial Attorneys (they were previously supervised by the District Directors—they now are called "Assistant Chief Counsels"). We also replaced Naturalization Attorneys with paralegals. Some of these changes were controversial within the INS. I got yelled at a lot by some of the District Directors. But, I can yell pretty loud too. This was really the beginning of what today are the Offices of Chief Counsel at the DHS. And, I worked on legislation, including the Refugee Act of 1980, which brought me into contact with David Martin and Alex Aleinikoff who later became well known in the immigration

and refugee world. Other big issues I worked on were the so-called Cuban Boatlift and the Iranian Hostage Crisis.

I continued as Deputy GC during the Reagan Administration. I served under General Counsel Maurice C. Inman, Jr., known as "Iron Mike." He was a real character, but we got a tremendous amount accomplished together. It was more or less a "bad cop, good cop" situation. We completed the legal program reorganization, and I also helped plan and execute the transfer of the Immigration Judges out of INS and into a separate entity, which was the "birth of EOIR" in 1983. Mike left in 1986, and I became the Acting GC again, right at the time that IRCA was enacted. But, I felt like I had reached a dead end.

I applied for jobs at law schools, and I found a head-hunter. However, it was the "Old Girl Network" through Cathy, who was then the president of our co-op preschool, which led to my next job. I was offered a senior associate position at Jones Day, which was just starting an immigration practice. At that point, the Commissioner, Al Nelson, and the Attorney General, Ed Meese, offered me the GC job, which I had always wanted. But, I turned it down. I moved over to Jones Day, and remained there as a partner until 1992.

It was difficult to be an immigration attorney in a general practice firm, and so I eventually went to Fragomen, Del Rey, and Bernsen, where I succeeded my mentor Sam Bernsen as Managing Partner of the DC Office. I did mostly business immigration. While I liked private practice, and learned much that has been helpful in making me a better judge, I felt that business immigration was like working at a well-baby clinic: Highly stressful, but fundamentally routine. We had to do as many cases as we could, as quickly as possible, which made it challenging to take on interesting cases that did not generate significant fees or repeat business. The clients wanted more for less, and there was always pressure to charge more and more money to contribute to the success of the firm. In the end, I suppose my heart was not in business immigration. I liked my clients, my colleagues, and making more money for our family than I had in government, but eventually it was not as satisfying as government work.

Around this time, the BIA Chair position opened up. I liked the idea of being in charge, and I felt there were opportunities to be creative. But, there was a lot of competition for the job. I lobbied the people I knew for their support, and in the end, I was offered the position. I began work in February 1995. I definitely think my experience in the private sector was a significant factor in my getting the job.

The goal when I started was to make the Board into the "13th Circuit," to make it more like a court, to expand the diversity and the number of Board Members, to publish more opinions, and to develop a more humane and realistic view of asylum law. There was a big backlog, and we needed more Board Members. Up until then, different Immigration Judges were being detailed to the BIA to help with the work, but this system was cumbersome and it was very expensive. The original plan was to expand the Board from five to nine Members, but with then Director Tony Moscato's help, we managed to expand it to twelve Board Members (four panels of three Members each). Attorney General Janet Reno was receptive to expanding the BIA, and we also increased the staff significantly and set up a team structure with senior supervisors. While I was there, we also changed the appeals filing system so that people could file directly with the Board (instead of filing appeals with the local court), and we added bar codes to help organize the files (up until that time, staff spent a lot of time looking for lost files). All these changes required us to expand the legal and clerical staff. And, the BIA itself kept on growing, reaching a membership of more than 20 just before the Ashcroft purge.

The expanded Board also became more polarized. Essentially, the middle fell out of the Board shortly after the *Kasinga* case in 1996. Before then, I was often in the majority, but after that time, I was out-voted in most precedential decisions. I think the enactment of the IIRIRA at the end of 1996 also had something to do with it. By the time of the *R-A-* decision in 1999—one of the most disappointing cases of my tenure because the majority squandered the chance to show real judicial leadership, take the next logical step following *Kasinga*, and "do the right thing" for domestic violence victims—I was pretty firmly entrenched in the minority for en banc decisions. I therefore often had to write or join separate dissenting opinions, known as "SOPs" in BIA lingo.

ASYLUMIST: This brings up an interesting point. I've long felt that the BIA should issue more precedent decisions, to provide more guidance to Immigration Judges. Why doesn't the Board publish more decisions? And how does the Board decide which cases will be published?

PWS: I think that following the "Ashcroft purge," the BIA has become hesitant to delve into controversial issues, particularly those that might provoke dissent. During my time at the Board, we did publish more decisions. Indeed, in my first full year as Chair, in 1996, we published approximately 40 opinions, many with separate dissents and concurrences, on cutting edge issues like particular social group, credibility, AEDPA, and IIRIRA. By contrast, in 2015, the BIA published approximately 33 decisions, and neither the dialogue nor the range of issues was nearly as extensive. Even with a greatly expanded and often divided Board, in 1999, one of my last full years as Chairman, we published 50 precedents, many dealing with extraordinarily difficult and complex issues.

The idea later promoted by the "Ashcroft crowd"—that a very large, diverse, and often divided Board cannot produce timely, important guidance–is ridiculous. Any party could request that a case be designated as a precedent decision. But generally, the Board was not receptive to party requests. The Chair or the Attorney General could also designate a decision as precedential. In addition, by majority vote, any panel could recommend a case for *en banc* consideration, and a majority vote of the Board could designate a decision as precedential. Almost all of the precedents were the result of the *en banc* process.

Ironically, one the most common reasons for publication

was because the majority wanted to "slam" the dissenters' position. These tended to be cases that illustrated important points or new interpretations of the law. Also, when new laws went into effect, and we had to interpret new statutory provisions, we were more likely to issue a precedent decision. In fact, there was a lot of controversy on the Board surrounding the dissenting positions. The Members generally got along with each other, but there was a lot of stress related to differing viewpoints. Some Members felt that dissenters were attacking the BIA as an institution. My being in the dissent in a number of precedents strained my relationship with some of my colleagues who were almost always in the majority.

Perhaps this was a consequence of my decision to change the format of BIA decisions so they looked more like court decisions. Therefore, Board Members had personal responsibility for their decisions. This made Board Members more accountable for their decisions, but it also gave them more of a personal stake in each decision.

Unfortunately, the BIA today has abandoned one of its primary functions—to provide timely expert guidance on the INA. Instead, it now publishes mostly non-controversial stuff, unless a Federal Circuit Court orders the Board to enter a precedential decision (I call this, "Go fetch me a precedent"). The initiative for shaping immigration law has gone from the BIA to the Federal Courts. There needs to be reform. I think the Board should function like the 13th Circuit; instead, it is more like the Falls Church Service Center. There are far too many single Member decisions, and the single-Member decisions are all over the place. The Board should use three Member panels in all cases where the IJ decision is not suitable for summary affirmance. That's the "original streamlining" that I instituted, and it was intended to increase dialogue and careful deliberation, not eliminate it, as has been the case under the misguided "Ashcroft reforms."

The Board also needs to be independent, but I do not see the willingness in the DOJ to make that necessary change, which would require legislation. When the DOJ wants to resist the Circuit Courts, Congress or public scrutiny, they talk about the Board's expertise. But when the DOJ addresses IJs and Board Members, they refer to them as just "DOJ Attorneys" -- employees who should follow the Attorney General. In other words, the DOJ's external message is, "The BIA is like a court, so due process is provided and you should not intervene," but the internal message to Immigration Judges and Board Members is, "You exist to implement the power of the Attorney General, you aren't 'real' independent Federal Judges."

ASYLUMIST: What other changes did you make at the Board while you were Chair?

PWS: We started doing more oral arguments, including oral arguments on the road (this is now prohibited by regulation). I thought if we were to function as an appellate court, we should be seen in the different places. Some Members liked this; others did not. Some thought oral argument was a waste of time. However, once I became an Immigration Judge, as you know, I was able to have oral argument in every case.

The BIA Pro Bono Project also started during my time as Chair. Under the Pro Bono Project, volunteer attorneys come to the Board office, review appeals of unrepresented immigrants, and then assign meritorious appeals to volunteer attorneys for representation. There was a lot of internal opposition to the Project because it was seen as the BIA deciding who gets represented and who does not. We had not done anything like this before. But, it has been highly successful.

The Virtual Law Library was also started under my tenure, with strong support and encouragement from Director Moscato. Also, we instituted an "electronic en banc voting system." We also eliminated the position of "Chief Attorney Examiner/Alternate Board Member" and gave the duties of overseeing BIA staff to the two Vice Chairs who assisted me. That was after the last Chief Attorney Examiner, Neil Miller, who recently retired, was appointed to the Board by Attorney General Reno.

ASYLUMIST: Your Chairmanship ended in April 2001, a few months into the George W. Bush Administration. What happened?

PWS: John Ashcroft was President Bush's first Attorney General. He was advised by Kris Kobach, who was then at DOJ. Kobach is now Secretary of State in Kansas and is well known for his outspoken restrictionist positions. Ashcroft and his people did not like some of the Board opinions, and they particularly did not like Board Member Lory Rosenberg and several others of us. They apparently thought the Board was too liberal, even though the so-called "liberal wing" was consistently outvoted on almost all meaningful precedents where there was a "split Board."

I'd add that the dissenters have eventually been proved right by subsequent decisions from the Federal Courts and even from the BIA itself on issues like protection for domestic violence victims, more critical examination of IJ credibility decisions, application of the categorical approach and modified categorical approach to crimes, and a less restrictive approach to CAT protection. Board Member Rosenberg was known for being quite outspoken in separate opinions criticizing some of the BIA's jurisprudence. But, she often was proved right over time. Indeed, the Supreme Court favorably cited one of her dissenting opinions, something that, to the best of my knowledge, no other Board Member has ever achieved. So, in many ways we were punished for being ahead of our time.

About a week after Ashcroft got there, EOIR Director Kevin Rooney told me that the DOJ leadership wanted me out as the Chair. It wasn't Kevin's decision. He made it clear that he was just the messenger. Because I was a career member of the Senior Executive Service, this decision probably violated Civil Service rules which would have required the

new Administration to keep me in place for a period of time – perhaps 120 days – before booting me to another position. But I realized that if Ashcroft didn't want me, I could not survive in the job, and dislodging me might hurt the BIA by provoking an attack on the entire institution to justify removing me. I wanted to resolve the situation; not stretch it out, and I wanted something workable. If I had resisted, it might have been a little hard to justify moving me, since I had all outstanding performance reviews with SES bonuses up until that point, but then they could have started attacking the Board, and I did not want that.

I was not ready to go back into private practice. Also, I did not want to move to another location — at the time, I was taking care of my dad, who was in a retirement home near the BIA. Also, I wanted to avoid becoming a "hall-walker" at the DOJ.

I asked Kevin what I could do. I thought (completely naively as it turned out) that they might need some loyal opposition, so I asked whether I could step down as Chair and go to the BIA as a Board Member. Eric Holder, Deputy AG, a Clinton appointee at DOJ, and future Attorney General under President Obama, was still there during the transition. If he had been gone, who knows what would have happened? Also, there had been a regulation change creating more BIA positions. So we agreed that I would step down as Chair, and with Eric Holder's assistance, I become a BIA Board Member.

It all happened quickly—in a week. I announced that I was stepping down as Chair. It was a fake-y announcement. I said I wanted to spend more time adjudicating cases and less time managing. Lori Scialabba, who was one of my Vice Chairs, and is now the Deputy Director of USCIS, became Acting Chair. I did not change my views about the law; I regularly voted against the majority on issues that were important to me, particularly asylum and other protection issues. But I continued doing my job.

Then came the reorganization where Ashcroft cut Board Members. He removed Board Members John Guendelsberger, Cecelia Espenosa, Lory Rosenberg, Gus Villageliu, and me. Technically, Lory left before the final cut, and another Board Member who undoubtedly would have been axed, applied for a voluntary transfer to an IJ position in another city. I learned about it when Kevin Rooney (who at one point was my career hero) called me up to his top floor office. He was shaking, and he told me, "You did not make the cut." He said, "They did not like some of your opinions, particularly dissents where you joined with Lory Rosenberg."

There was no application or interview process to decide who should stay and who should go. There was no interview. The reason I was cut is because they did not like my opinions—Ashcroft apparently wanted a cowed, compliant Board where nobody would speak up against Administration policies or legal positions that unfairly hurt migrants or limited their due process.

Part of the stated rationale for the reorganization was that there were too many Board Members and it was too contentious, and therefore not "efficient." In the Government immigration world, "efficiency" is often a buzzword for actions that take away or reduce the rights of migrants. But the workload clearly demanded more than the 12 Board Members that Ashcroft left. A few months after the cut, they had to start using BIA staff attorneys as "temporary" Board Members because they needed more Board Members to do the work. Some of these attorneys eventually became Board Members. So they were upgrading staff, rather than doing independent hiring. Basically, this was a cover up for Ashcroft's inappropriate and politically motivated reduction in permanent Board Members. The real reason for the reduction in the BIA's size was to eliminate opposing views from the dialogue.

ASYLUMIST: How do you think these changes have affected the Board?

PWS: Well, the picture has not been pretty. The summer of 2000 was the last time that an outsider was appointed to the Board. In my view, many of the current Members are "going along to get along," because the clear message of the Ashcroft cuts was that resisting the majority, particularly speaking up for the rights of migrants, could be career threatening. The Board has abandoned the pretense of diversity. Also, the idea that they can operate effectively with a smaller number of Members is simply a ruse. The BIA uses temporary Members to fill the gap. But they cannot vote *en banc*, so this truncates the *en banc* process. The Board ends up rubber-stamping cases. Also, since mostly three-Member panels, rather than the *en banc* Board, now issue precedent decisions, the majority of Board Members are able to escape accountability on most such cases because they don't have to take a public vote. Only the votes of the three panel members are publicly recorded. The BIA also seldom hears oral argument anymore, so it has become very distant and inaccessible to those most affected by its decisions. Moreover, quietly and gradually, the BIA has had to add additional permanent Board Members because the Ashcroft cuts left the BIA short of the number required to do the work. But, there never has been a public acknowledgement by EOIR or the DOJ of what Ashcroft did and why it has been necessary to take corrective action.

I respect the current Board Members, indeed many of them are personal friends, and I certainly recognize the difficulties of their job. But, almost none of the current Board Members have substantial achievements in the private immigration sector, particularly in the area of asylum scholarship and asylum advocacy. They are all appointed from within Government, which is often viewed as a way of bringing in reliable "company people," who won't rock the boat. This is supposed to be the Supreme Court of immigration. But it is not actively trying to attract the best and brightest from all sectors of immigration practice, including private practice, academics, clinical professors, and NGO leaders, in addition to those with substantial achievements in government service, in a fair competitive selection process.

One problem is that Board Member positions are less

attractive today because they are less visible, less secure, and viewed by some as an assembly line operation after the Ashcroft reforms. A Board Member can be moved to the FOIA unit if they are out of political favor. As a result, the Board doesn't get the type of outside applicants it really needs – partners in major law firms, tenured academics, respected clinical professors, and high ranking NGO officials, at a time when our system needs their voices more than ever. The example set by Ashcroft is continuing—the current Administration has not changed that. Board Members do not rock the boat, and they all too often do not reflect or fully understand the needs of other constituencies from outside government service, particularly the needs of asylum seekers and others seeking protection in today's chaotic Immigration Courts.

Maybe the BIA has reduced the backlog, but that has been done with smoke and mirrors. The quality of work has fallen off. They reduced the backlog by compromising the most important function of Board: Guaranteeing due process to individuals appearing in Immigration Court, which requires courageous public deliberation and spirited dialogue on the most important and controversial issues, where dissenting positions are accepted as an essential part the judicial dialogue and therefore supported, rather than suppressed. In my view, since the Ashcroft purge, the BIA has become a deliberative body that no longer publicly deliberates. That's bad for the public, bad for the justice system, bad for due process, and, actually, bad for the Board Members themselves.

ASYLUMIST: And what happened to you, after the "purge?"

PWS: I thought about volunteering to become an IJ, but then I would have had to leave Washington, DC. I did not want to leave my community, plus my dad was still in the area. Kevin floated the idea of early retirement, but I did not want that either.

EOIR created non-judicial positions for some of the "cut" Board Members, like glorified staff attorney positions or senior jobs in the General Counsel's Office. To show how ludicrous this was, at a time when the Board needed experienced judges more than ever, some of the top judges in the system, who had been selected following a competitive nationwide search, were sent off to perform non-judicial work at the same salary. There was an almost immediate adverse reaction from the Circuit Courts as the Board launched many "not quite ready for prime time" decisions into the judicial review process.

Kevin said I could become an Assistant Chief Immigration Judge (ACIJ), but no position was open at the time. I waited for weeks. I was going to be out as a Board Member, but I had not been reassigned. EOIR sent me to IJ training school, but I was still part of the BIA. I went to *en banc* meetings, but I sat mute. After the IJ training, I did not have a start date or a position. I was a "lame duck," and I was angry and frustrated.

Finally, I told Kevin that I had to go. There was no reason for me to be there. My things were packed. But then he told me that Ashcroft had directed that I be moved to an IJ position in Arlington, Virginia. He told me that a vacancy had been created overnight, and the Attorney General moved me to the top of the "waiting list." The Arlington Court was a desirable posting, so there was a waiting list for internal transfers there. Kevin said that someone decided I should be in an adjudication position. It was a huge break for me to get out of the Headquarters "Tower" in Falls Church. I doubt that I would have remained at EOIR as long as I did if I had been in the Tower. I had too much pent up anger, and the Tower would have reminded me of it every day. The Arlington Immigration Court was a great chance for me to put all of that behind me.

I think someone went to bat for me at the Department; I had no relationship with the Attorney General, so I theorize that someone must have intervened on my behalf to put me in Arlington. So, I'm probably the only Immigration Judge who got the position without ever applying for it.

ASYLUMIST: We've only covered about two-thirds of your career, but I know you need to get back to the really important things in life, like your kayak, so I'll ask one last question: Suppose you were the "Immigration Czar," what would you do with EOIR?

PWS: As you know from history, being a "Czar" of anything can be a life-limiting opportunity. Having had several "career-limiting opportunities" already, I think I'll take a pass on that job. But seriously, I'm glad you asked the question. Here is my "five-point program" for a better Immigration Court–one that would fulfill its vision, drafted by a group of us when Kevin Rooney was the Director: "Through teamwork and innovation being the world's best tribunals guaranteeing fairness and due process for all."

First, and foremost, the Immigration Courts must return to the focus on due process as the one and only mission. That's unlikely to happen under the DOJ—as proved by over three decades of history, particularly recent history. It will take some type of independent court. I think that an Article I Immigration Court, which has been supported by groups such as the ABA and the FBA, would be best. Clearly, the due process focus has been lost when officials outside EOIR have forced ill-advised "prioritization" and attempts to "expedite" the cases of frightened women and children from the Northern Triangle who require lawyers to gain the protection that most of them need and deserve. Putting these cases in front of other pending cases is not only unfair to all, but has created what I call "aimless docket reshuffling" that has thrown our system into chaos. Evidently, the idea of the prioritization is to remove most of those recently crossing the border to seek protection, thereby sending a "don't come, we don't want you" message to asylum seekers. But, as a deterrent, this program has been spectacularly unsuccessful. Backlogs have continued to grow across the board, notwithstanding an actual reduction in overall case receipts.

Second, there must be structural changes so that the Immigration Courts are organized and run like a real court system, not a highly bureaucratic agency. This means that sitting Immigration Judges, like in all other court systems, must control their dockets. If there are to be nationwide policies and practices, they should be developed by an "Immigration Judicial Conference," patterned along the lines of the Federal Judicial Conference. That would be composed of sitting Immigration Judges representing a cross-section of the country, several Appellate Immigration Judges from the BIA, and probably some U.S. Circuit Judges, since the Circuits are one of the primary "consumers" of the court's "product."

Third, there must be a new administrative organization to serve the courts, much like the Administrative Office of the U.S. Courts. This office would naturally be subordinate to the Immigration Judicial Council. Currently, the glacial hiring process, inadequate courtroom space planning and acquisition, and unreliable, often-outdated technology are simply not up to the needs of a rapidly expanding court system like ours. The judicial hiring process over the past 16 years has failed to produce the necessary balance because judicial selectees from private sector backgrounds--particularly those with expertise in asylum and refugee law--have been so few and far between.

Fourth, as you know, I would repeal all of the so-called "Ashcroft reforms" and put the BIA back on track to being a real appellate court. A properly comprised and functioning BIA should transparently debate and decide important, potentially controversial, issues. The BIA must also "rein in" those Immigration Courts with asylum grant rates so incredibly low as to make it clear that the generous dictates of the Supreme Court in *Cardoza-Fonseca* and the BIA itself in *Mogharrabi* are not being followed.

Fifth, and finally, the Immigration Courts need e-filing NOW! Without it, the courts are condemned to "files in the aisles," misplaced filings, lost exhibits, and exorbitant courier charges. Also, because of the absence of e-filing, the public receives a level of service disturbingly below that of any other major court system. That gives the Immigration Courts an "amateur night" aura totally inconsistent with the dignity of the process, the critical importance of the mission, and the expertise, hard work, and dedication of the judges and court staff who make up our court.

ASYLUMIST: Very ambitious! I'd love to hear more, but that would probably take another day or two.

PWS: Thanks for the offer. But, all things considered, I'm heading out onto Linekin Bay in my kayak. Due process forever!

ASYLUMIST: Thank you so much for your time and your thoughts. Happy paddling. ■

Jason Dzubow is founder and partner in Dzubow & Pilcher, PLLC. His practice focuses on immigration law, asylum, and appellate litigation. He has been recognized by Washingtonian Magazine *as one of the best immigration lawyers in Washington, D.C. He is an adjunct professor at George Washington University Law School. His blog,* The Asylumist, *is the only blog in the U.S. devoted exclusively to asylum law.*
www.asylumist.com

Immigration Law Section News

DENVER, CO—The Section's annual immigration law conference and CLE will be held May 11-13 at the downtown Denver Embassy Suites. See the colorful announcement in this issue. To coin a phrase, it will be HUGE. With all the changes that the new Administration will bring, don't miss this conference. Be sure to register by March 31 to take advantage of the early bird rates! Register on the FedBar website.

The **YOUNGER LAWYERS DIVISION** of the Immigration Law Section (ILS-YLD) is excited to announce the highly anticipated webinar series, which is scheduled to launch in 2017. The ILS-YLD and the Diversity Committee has several excellent speakers lined up. The various speakers will cover a series of topics, from family-based immigration, to removal defense, and more. Stay tuned for more information on the upcoming webinars.

For the third year in a row, the ILS-YLD will be hosting a Happy Hour at the Annual Immigration Law Conference in Denver, Colorado on May 12, 2017. We hope that this event encourages younger members of the ILS to meet other ILS members of all ages. We hope to see you all at the Happy Hour this year in Denver!

ROANOKE, VA—Oct. 4, 2016. Rachel L.D. Thompson, attorney at Poarch Law in Salem, Virginia, accepted the Alison Parker Young Professional Award at the 2016 Women of Achievement awards luncheon, hosted by DePaul Community Resources and Carilion Clinic and held at the Sheraton Roanoke Hotel & Conference Center. The criteria for the nomination included demonstrating great potential both personally and professionally, having ten years or less of professional experience, overcoming a personal or professional challenge, having a strong community impact through professional accomplishments, and enhancing community life through professional activities. ■

Thompson is an attorney at Poarch Law, a full-service immigration law firm representing families, businesses and individuals. She also serves on the board of the Younger Lawyers Division of the Federal Bar Association and speaks locally and throughout Virginia on immigration law.

Article

Indicia of Reliability in the Information Age: An Overview of Internet Sources in Immigration Proceedings

By Edward Grodin

> [T]here is nothing "magical" about the admission of electronic evidence. . . . [W]hile electronic evidence may present some unique challenges to admissibility and complicate matters of establishing authenticity and foundation, it does not require the proponent to discard his knowledge of traditional evidentiary principles ...

Jonathan D. Frieden & Leigh M. Murray, *The Admissibility of Electronic Evidence Under the Federal Rules of Evidence*, 17 Rich. J.L. & Tech. 5, ¶ 2 (2010), jolt.richmond.edu/v17i2/article5.pdf. Surprising, then, that one federal court in 1999 referred to information on the internet as "voodoo." *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999). By 2013, another federal court had explicitly dismissed that view. *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013). Few would argue with the proposition that access to information, whether voodoo or not, has greatly expanded as a result of internet resources.[1]

Yet, with great power comes great responsibility—or peril. This article will provide an overview of the reception of internet sources in immigration proceedings. Specifically, this article will delve into the most significant topics pertaining to the use of internet evidence: authentication, open-source materials, credibility and corroboration issues, administrative notice of online materials, the persuasiveness of internet evidence for the merits of a case, and issues associated with web address citations and "link rot." As will be seen, some forms of internet evidence (such as online versions of official publications) have been treated more or less like any other piece of evidence, while other sources (such as Wikipedia) have generated heightened skepticism.

Overview of Evidentiary Standards in Immigration Proceedings

Federal courts applying the Federal Rules of Evidence have assessed internet evidence under the existing parameters of the

Rules. As one court has held, in order for "electronically stored information" to be admissible, it must be (1) relevant; (2) authentic; (3) not hearsay or, if so, admissible under an exception to the rule barring hearsay evidence; (4) original or duplicate, or admissible as secondary evidence to prove its contents; and (5) sufficiently probative as to outweigh any prejudicial effect. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007). Thus, for example, the Seventh Circuit in *United States v. Jackson* found that postings on an internet message board constituted hearsay under Federal Rule of Evidence 801. 208 F.3d 633, 637 (7th Cir. 2000). The court also rejected the defendant's attempt to frame the evidence as a regularly kept record of the internet service provider and therefore admissible under the business records exception. *Id.* Furthermore, the court affirmed the exclusion of the evidence under Rule 901's authentication requirements. *Id.* at 638. Similarly, in *United States v. Bansal*, the Third Circuit affirmed the District Court's admission of screenshots of the defendant's website from the Wayback Machine (which archives all websites through date-specific snapshots) as properly authenticated by an expert witness per Federal Rule of Evidence 901. 663 F.3d 634, 667 (3d Cir. 2011).

By contrast, Immigration Courts apply a broad standard of evidentiary admissibility, asking only "whether the evidence is probative and its admission is fundamentally fair." *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011) (quoting *Espinoza v. INS,* 45 F.3d 308, 310 (9th Cir. 1995)) (internal quotation marks omitted); *see also Matter of J.R. Velasquez*, 25 I&N Dec. 680, 683 (BIA 2012); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999); *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980). The Federal Rules of Evidence are not binding in immigration proceedings, though they may "provide helpful guidance" in ascertaining whether the admission of particular evidence comports with due process. *Matter of D-R-*, 25 I&N Dec. at 458-59 & n.9; *see Fei Yan Zhu v. Att'y Gen. of U.S.*, 744 F.3d 268, 273–74 & n.8 (3d Cir. 2014). As such, evidence that would normally be inadmissible before a federal court, such as hearsay, may be admitted in Immigration Court. *See, e.g.*, *Matter of Stapleton*, 15 I&N Dec. 469, 470 (BIA 1975); *Matter of Ponco*, 15 I&N Dec. 120, 123 (BIA 1974) (citations omitted) ("The hearsay nature of a given item of evidence may well have a substantial effect on the probative value of that evidence; however, if relevant, hearsay evidence is admissible in deportation proceedings."). The regulations governing removal proceedings confirm the breadth of admissibility: "The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7(a).

Under the Immigration Court Practice Manual, internet evidence receives nearly the same treatment as any other material. Notwithstanding the digital existence of internet sources, the Manual states that "[a]ll documents should be submitted on standard 8.5" x 11" paper, in order to fit into the Record of Proceedings." Immigration Court Practice Manual, Chapter 3.3(c)(v) (Feb. 4, 2016). The only rule to directly address internet evidence—Rule 3.3(e)(iii)—simply notes that "[w]hen a party submits an internet publication as evidence, the party should follow the guidelines in subsection (ii)," which addresses the need to provide identifying information for the evidence, "as well as provide the complete internet address for the material."[2] *Id.*, Chap. 3.3(e)(iii). Moreover, the Manual's citation rules under Appendix J expressly call for citation to the website address for internet materials and also direct that a URL be provided for other sources (namely, State Department country reports) when available.[3] *Id.*, App. J at J-15.

Evidentiary Issues Pertaining to Internet Sources

Authentication

Courts often confront questions regarding the acceptable means of authenticating internet sources. As a general rule, "proper authentication requires some sort of proof that the document is what it purports to be."[4] *Velasquez*, 25 I&N Dec. at 684 (quoting *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006)); *see Vatyan v. Mukasey*, 508 F.3d 1179, 1182 (9th Cir. 2007) (allowing authentication through "any recognized procedure"); *Matter of D-R-*, 25 I&N Dec. at 458 (noting an Immigration Judge's broad discretion regarding authentication, and emphasizing that the method of authentication affects weight rather than admissibility). Authentication issues arise most frequently in the context of foreign documentation. The authentication of foreign documents has been extensively discussed in a previous edition of the *Immigration Law Advisor*. Suzanne DeBerry, "Measured Reliance: Evaluating the Authenticity of Foreign Documents in Removal Proceedings," *Immigration Law Advisor*, Vol. 4, No. 8 (Sept. 2010).

In *Qiu Yun Chen v. Holder*, the Seventh Circuit was faced with a document posted on a Fujian (Chinese) government website. 715 F.3d at 212. Qiu Yun Chen, a mother of two boys born in the United States, sought asylum from China on the ground that the government would forcibly sterilize her. *Id.* at 208. The Immigration Judge and the Board of Immigration Appeals denied her claim, finding that she did not establish a well-founded fear of forced sterilization. *Id.* Part of the Board's reasoning rested on the lack of authentication for certain Chinese government documents, including one (the Fujian website posting) which showed that violators of China's one-child policy were required to undergo sterilization. *Id.* at 212. The court itself cited to multiple internet sources throughout its decision and ultimately concluded that the Fujian website posting was authentic because of the Chinese government website domain name.[5] *Id.* In a subsequent Chinese sterilization decision, the Seventh Circuit even cited to the website from *Qiu Yun Chen* (including a URL to an English translation on an online translation service, Microsoft Translator) on its own. *Xue Juan Chen v. Holder*, 737 F.3d 1084, 1086 (7th Cir. 2013).

Addressing a similar Chinese sterilization claim and citing to the Seventh Circuit's reasoning, the Third Circuit noted that a government domain name can authenticate a document taken from the internet. *Fei Yan Zhu*, 744 F.3d at 273 (quoting *Qiu Yun Chen*, 715 F.3d at 212). The court remanded the case to the Board to determine whether the website printouts were authentic and reliable, especially in light of the Board's disregard for such evidence (which dealt with local and provincial policies)

but acceptance of U.S. country reports which failed to discuss Zhu's home region. *Id.* at 275–76.

By contrast, the Board rejected internet articles in another Chinese sterilization asylum claim. *Matter of H-L-H- & Z-Y-Z*, 25 I&N Dec. 209 (BIA 2010), *abrogated on other grounds by Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012). In *Matter of H-L-H- & Z-Y-Z,* the Board emphasized the probative weight of the State Department country report while declining to give such weight to internet evidence of local sterilization policy. *Id.* at 214. Specifically, the Board stated that the internet documents were "unsigned and unauthenticated and fail[ed] to even identify the authors[,]" though the Board recognized the difficulty in procuring authenticated documents from a persecutor. *Id.* at 214–15 & n.5.

Open-Source: The Case of Wikipedia

Beyond the issue of authentication, the internet has opened a significant Pandora's box for legal proceedings: the possibility of ongoing, public modification or "open-source" editing. Open-source generally denotes a process of peer collaboration, which can lead to wildly divergent reliability depending on the verification methods in place. Perhaps the greatest symbol of so-called open-source information is Wikipedia, a free online encyclopedia with limited editorial regulation of its content. *See generally Wikipedia:About*, perma.cc/2M94-7PG6 (last visited Nov. 8, 2016). As one commentator has noted, "the rapid fluidity of information being posted and changed on Wikipedia means that when courts cite to a Wikipedia article, there is little guarantee that future readers of the opinion will find the exact same article." Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. Rev. Discourse 27, 49 (2010). So how have courts reacted to Wikipedia?

To put it mildly, with extreme skepticism. *Badasa v. Mukasey* remains one of the most thorough (and negative) assessments of Wikipedia's role as evidence in immigration proceedings. 540 F.3d 909 (8th Cir. 2008). In *Badasa*, the Department of Homeland Security ("DHS") submitted documents, including a Wikipedia article, to rebut the legitimacy of a purported Ethiopian identity document called a *laissez-passer*. *Id.* The Immigration Judge and Board found that the *laissez-passer* did not establish the alien's identity and ultimately denied her application for asylum, though the Board expressed reluctance about the Immigration Judge's reliance on Wikipedia. *Id.* at 909–10. On review, the Eighth Circuit remanded the record to the Board to more fully explain its conclusion that the Immigration Judge's credibility determination did not contain clear error in light of the Immigration Judge's reliance on evidence from Wikipedia. *Id.* at 910. The court used Wikipedia's own statements about its open-source nature to conclude that "the [Board] presumably was concerned that Wikipedia is not a sufficiently reliable source on which to rest the determination that an alien alleging a risk of future persecution is not entitled to asylum." *Id.*

In the same vein, the Fifth Circuit cited to *Badasa* in calling Wikipedia "an unreliable source of information" and therefore finding that the Immigration Judge's use of a Wikipedia article to justify an adverse credibility finding to be "without merit." *Bing Shun Li v. Holder*, 400 F. App'x 854, 857 (5th Cir. 2010) (unpublished). In fact, the court disapproved of Wikipedia so strongly that, despite finding the Immigration Judge's use of the article to be harmless error, it wrote about the issue "only to express [the court's] disapproval of the [Immigration Judge's] reliance on Wikipedia and to warn against any improper reliance on it or similarly unreliable internet sources in the future." *Id.* at 858.

Recently, in *Matter of L-A-C-*, the Board definitively came down against the use of Wikipedia evidence. 26 I&N Dec. 516, 526–27 (BIA 2015). On appeal in withholding-only proceedings, the applicant submitted new evidence in the form of a Wikipedia article, which the Board construed as a motion to remand. *Id.* at 526. However, the Board denied the motion, commenting that such evidence was not previously unavailable and that "Wikipedia articles lack indicia of reliability and warrant very limited probative weight in immigration proceedings." *Id.* (citing *Badasa*, 540 F.3d at 910).

As in *L-A-C-*, other courts have assessed Wikipedia evidence beyond reliability concerns. In reviewing the Board's denial of a motion to reopen, the Seventh Circuit noted that the motion did not contain new information, as the accompanying Wikipedia article was undated. *Vahora v. Holder*, 707 F.3d 904, 911 (7th Cir. 2013). In an unpublished decision, the Eleventh Circuit discussed the Board's denial of a motion to reopen which had included Wikipedia and other internet evidence regarding changed country conditions in Kosovo. *Gashi v. U.S. Att'y Gen.*, 213 F. App'x 879, 881 (11th Cir. 2007) (unpublished). Without commenting on the propriety of the evidence, the court upheld the Board's denial of the motion because the evidence simply did not reflect a sufficient change in country conditions warranting asylum relief. *Id.* at 882–83. Interestingly, in the context of a review of the Board's denial of a motion to reopen, the Seventh Circuit seems to have taken administrative notice of a Wikipedia page on the Mexican drug war for the proposition that "[t]he existence of unrest in Mexico is well known . . . ." *Cruz-Mayaho v. Holder*, 698 F.3d 574, 578 (7th Cir. 2012).

Credibility and Corroboration

The REAL ID Act of 2005 set the current credibility and corroboration standards that an applicant for relief must meet. *See* REAL ID Act § 101(h)(2), Pub. L. No. 109-13, 119 Stat. 231 (2005). Under the REAL ID Act standards, the applicant bears the burden of proving that he or she satisfies the applicable eligibility requirements and merits a favorable exercise of discretion where applicable. Section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A). The Immigration Judge weighs the applicant's testimony along with the documentary evidence. Section 240(c)(4)(B) of the Act, 8 U.S.C. § 1229a(c)(4)(B). The Judge may require the applicant to provide corroborative evidence, unless the applicant demonstrates that such evidence cannot be reasonably obtained. *Id.* Consequently, in making a credibility determination, the Judge considers, *inter alia*, the consistency of the applicant's testimony with the other record evidence. Section 240(c)(4)(C) of the Act, 8 U.S.C. § 1229a(c)(4)(C).

Following these criteria, courts have used internet evidence to assess an applicant's credibility. For example, in *Tawuo v.*

Lynch, the Seventh Circuit affirmed an Immigration Judge's adverse credibility finding premised partly on plagiarism concerns relating to two internet articles. 799 F.3d 725, 727–28 (7th Cir. 2015). Specifically, the Immigration Judge accused the applicant of lifting text "nearly verbatim" from articles on the Wikinews website and placing it in his affidavit. *Id.* at 727. When confronted with the similarity, the applicant indicated that he "personally wrote articles about the events he described in his affidavit, and he speculated that somebody might have used this information in the Wikinews article." *Id.* at 728 (internal quotation marks omitted). The Immigration Judge noted that the applicant produced no evidence that he had authored any articles. *Id.* Ultimately, the court concluded that the Immigration Judge's adverse credibility finding was reasonable based on the applicant's "apparent plagiarism . . . , along with his weak explanation for it . . . ." *Id.*

Compare *Tawuo* to the Second Circuit's decision in *Li v. Mukasey*, 529 F.3d 141 (2d Cir. 2008). In *Li*, the court found that the Immigration Judge's adverse credibility finding, based in part on the Judge's consideration of "information downloaded from a website[,]" was unreasonable. *Id.* at 148. In particular, the court held that "the website statement cannot fairly be construed to contradict [the alien's] testimony[,]" and in fact the internet evidence corroborated elements of her claim.[6] *Id.* at 149. The court avoided the larger issue of "the reliability foundation appropriate to evaluation of information published on the Internet in proceedings not strictly controlled by the Federal Rules of Evidence" because the parties agreed to the admission of the internet evidence. *Id.* at 148 n.6 (citations omitted).

In addition, despite the general ease of internet access, courts may demand corroborative evidence that is reasonably available on the internet. Recall, for example, the earlier discussion of parallel citation to the URL for a State Department country report. Such evidence can illustrate changed country conditions for a motion to reopen. However, the regulations require the party seeking to reopen proceedings to support the motion with "affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1). Citing to that regulation, the First Circuit in *Yang Zhao-Cheng v. Holder* rejected the movant's contention that the Board erred in refusing to take administrative notice of State Department country reports on China from 1997 to 2009. 721 F.3d 25, 28 (1st Cir. 2013). The court noted, "That these reports are available on the Internet does not relieve [the movant] of his burden to submit to the [Board] evidence supporting his claim." *Id.* As such, the court denied the petition for review. *Id.* at 29.

Administrative Notice

The pervasiveness of internet access not only affects litigants—it can also impact the Immigration Court's work. Administrative notice entails the court's recognition of "commonly known facts" without the admission of such evidence by a party. *See, e.g.*, *Matter of R-R-*, 20 I&N Dec. 547, 551 n.3 (BIA 1992) (internal citations omitted) ("It is well established that administrative agencies and the courts may take judicial (or administrative) notice of commonly known facts. Therefore, this Board may properly take administrative notice of changes in foreign governments."); *see also Matter of S-E-G-*, 24 I&N Dec. 579, 587 n.4 (BIA 2008) (taking administrative notice of the most recent State Department country report). In this way, administrative notice of internet sources represents one method of "promoting accuracy and efficiency in the judicial process." Erin G. Godwin, *Judicial Notice and the Internet: Defining A Source Whose Accuracy Cannot Reasonably Be Questioned*, 46 Cumb. L. Rev. 219, 220 (2016). *See generally* Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. Rev. 125 (2014) (examining the use of judicial internet research and exploring ways to minimize the potential risks). Previous editions of the *Immigration Law Advisor* have delved further into the topic of administrative notice. Robyn Brown & Vivian Carballo, "Beyond the Record: Administrative Notice and the Opportunity To Respond," *Immigration Law Advisor*, Vol. 9, No. 8 (Sept. 2015); Audra E. Santucci & Judith K. Hines, "'World, Take Good Notice': The Circuits' View of Administrative Notice," *Immigration Law Advisor*, Vol. 1, No. 11 (Nov. 2007).

Multiple circuit courts have had occasion to review judicial internet research that has turned into administratively noticed facts. For instance, in *Caushi v. Attorney General of the United States*, the Third Circuit faced a situation where the Immigration Judge questioned an asylum applicant about the contents of two internet articles the Judge had obtained *sua sponte*. 436 F.3d 220, 223 (3d Cir. 2006). Specifically, the Judge asked the applicant whether the articles accurately reflected a demonstration in which the applicant had taken part. *Id.* After the Judge denied the application for relief, the applicant argued before the Board that the Judge's reliance on non-record internet evidence was erroneous; the Board affirmed the Judge's decision. *Id.* at 224. On review, the court remanded the record on grounds unrelated to the administratively noticed internet evidence but warned in a footnote against taking *sua sponte* notice without placing such evidence in the record:

> We also note that, although an IJ may introduce evidence into the record, [when] the Immigration Judge relies on the country conditions in adjudicating the alien's case, the source of the Immigration Judge's knowledge of the particular country must be made part of the record. Here, the IJ relied on Internet articles from CNN and the BBC as evidence of the events that took place in Tirana on September 13, 1998. Although the IJ may introduce evidence *sua sponte*, and therefore the IJ's reliance on these articles was not error, we agree with Caushi that the IJ inappropriately neglected to place the complete articles in the record. If, upon remand, the immigration court wishes to rely on these articles or any other evidence, such evidence must be placed in the record.

Id. at 231 n.7 (internal citations and quotation marks omitted) (alteration in original). Yet, in a subsequent decision, the Third Circuit suggested that the Immigration Judge's use of non-record internet articles to question an asylum applicant about the "gay scene" in Turkey constituted harmless error because the Judge did not rest his decision on the articles, despite failing to admit the articles into the record. *Ozmen v. Att'y Gen. of U.S.*, 219 F. App'x 125, 128 (3d Cir. 2007) (unpublished).

In *Ogayonne v. Mukasey*, the Immigration Judge had *sua*

sponte introduced internet materials related to country conditions for an asylum claim and proceeded to question the applicant about the materials (as well as give the applicant's attorney an opportunity to ask questions about the documents). 530 F.3d 514, 518 (7th Cir. 2008). The Immigration Judge denied the asylum application, and the Board affirmed. *Id.* The Seventh Circuit observed that the admission of the documents was proper because (1) they "merely stated commonly acknowledged facts that were amenable to official notice[,]" (2) the Judge gave the parties an opportunity to respond, (3) the applicant's attorney did not object to the evidence or allege any prejudice, and (4) other record evidence corroborated the information therein. *Id.* at 520. The petitioner did not challenge the documents' admission but argued that the Judge wrongly engaged in "adversarial" questioning premised on the internet articles, thereby depriving him of due process. *Id.* at 522. However, the court disposed of that argument, finding that the Judge's line of questioning did not evince any sort of prejudice and was based on properly admitted evidence. *Id.* at 522–23.

Similarly, the Second Circuit dealt with the Board's administrative notice of internet sources in *Chhetry v. U.S. Department of Justice*. 490 F.3d 196 (2d Cir. 2007). In adjudicating an alien's motion to reopen based on changed country conditions, the Board denied the motion solely on administratively noticed facts from websites that supposedly detailed certain events that had occurred after the filing of the motion. *Id.* at 198–99. First, the court held that "the [Board] did not err in taking administrative notice of changed country conditions based on news articles found on yahoo.com, or the websites of CNN and BBC News." *Id.* at 199. Importantly, the court emphasized that "[t]he particular source relied upon . . . matters only to the question of accuracy or verifiability." *Id.* at 200. Because the internet evidence derived from well-known, reputable news organizations and the movant did not challenge the accuracy of the information, the court considered the facts "commonly known and undisputed." *Id.* However, the court found that the Board exceeded its discretion by failing to afford the movant an opportunity to rebut the Board's (dispositive) inferences stemming from those facts.[7] *Id.*

Circuit courts have also pointed to non-record internet evidence to justify their own decisions. For example, in *Ahmed v. Holder*, the Ninth Circuit held that the Immigration Judge abused her discretion in denying a continuance to an alien in the midst of his appeal of a visa petition denial; in so holding, the court relied in part on the estimated processing time for such an appeal as reflected on the website of United States Citizenship and Immigration Services. 569 F.3d 1009, 1014 (9th Cir. 2009). In another case, within the context of reviewing the Board's determination that the asylum applicant posed a danger to the security of the United States, the Third Circuit took judicial notice of the "About Us" page for a website that hosted certain videos found on a computer in the applicant's apartment. *Yusupov v. Att'y Gen. of U.S.*, 650 F.3d 968, 985 n.23 (3d Cir. 2011).

Merits

As discussed at the beginning of this article, internet sources are neither magic nor voodoo—they are evidence like any other. As a result, once internet evidence has cleared the hurdles described in the previous sections, its sole purpose is to help a party meet its burden of proof. Therefore, this article will provide a sample of the ways in which internet evidence has affected the merits of various cases.

One of the best examples of the merits impact of internet evidence at the Board level is *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011). In that case, the Board discussed the firm resettlement bar to asylum relief. After providing a framework within which to assess firm resettlement issues, the Board applied the framework to the applicant. The Board stated that the DHS's "indirect evidence" that the applicant could acquire Senegalese residence through his spouse established a prima facie showing of an offer of firm resettlement. *Id.* at 504–05. The applicant attempted to rebut the DHS's showing by submitting a pertinent provision of Senegalese law, which did not explicitly indicate that a foreign man could obtain citizenship through a female Senegalese citizen. *Id.* at 505. One of the DHS's pieces of evidence referenced an official Senegalese government website which allegedly addressed such a scenario; however, the DHS did not provide a copy and translation of the website, and the applicant's attorney could not locate the website. *Id.* Consequently, "[i]n light of the conflicting and incomplete evidence in the record," the Board remanded the record to the Immigration Judge for further fact-finding. *Id.*

Internet evidence can play a large role in whether or not an asylum applicant meets his or her burden of proof in other ways. In *Makhoul v. Ashcroft*, the First Circuit found that a Lebanese man who feared Syrian soldiers serving as occupation forces in Lebanon did not enunciate a well-founded fear of persecution. 387 F.3d 75, 82 (1st Cir. 2004). He based his fear on the fact that he "had posted anti-Syrian political statements on an Internet chat site and had downloaded provocative political material." *Id.* at 78. The court used the anonymity of the internet against him: "As far as anyone can tell, both he and his activities in cyberspace have gone unnoticed. This is not the stuff of which objectively reasonable fears of future persecution are constructed." *Id.* at 82. The Second Circuit employed similar reasoning against a Chinese asylum applicant who feared retribution from Chinese authorities for her pro-democracy internet publication:

> [E]ven if we accept Y.C.'s suggestion that the Chinese government is aware of every anti-Communist or pro-democracy piece of commentary published online—which seems to us to be most unlikely—her claim that the government would have discovered a single article published on the Internet more than eight years ago is pure speculation.

Y.C. v. Holder, 741 F.3d 324, 334 (2d Cir. 2013). The court even took a moment of self-reflection to dissect the particular risks of "pro-democracy claims":

> What makes cases like this one particularly thorny is that pro-democracy claims may be especially easy to manufac-

ture. Any Chinese alien who writes something supportive of democracy (or pays for such writing to be published in his or her name) and publishes it in print or on the Internet may in some cases do so principally in order to assert that he or she fears persecution. And, because Internet postings in particular may become accessible anywhere, the applicant can argue that the Chinese government is aware or likely to become aware of his or her pro-democracy stance. *Id.* at 338.

The internet also serves as an important vehicle for uncovering up-to-the-minute country conditions. In *Raza v. Gonzales*, the First Circuit affirmed the Board's denial of an untimely motion to reopen based on changed conditions where a Pakistani man converted from Sunni to Shia Islam. 484 F.3d 125 (1st Cir. 2007). He sought to prove a recent escalation in violence against Shiite Muslims in Pakistan through various internet articles. *Id.* at 126–27. The court found that he had not shown prima facie entitlement to asylum, as would permit reopening. *Id.* at 129. The court reasoned that the internet articles did not demonstrate widespread violence in Pakistan and did show that "most of Pakistan's Sunnis and Shiites reside peacefully together." *Id.* Likewise, in an unpublished decision, the Sixth Circuit held that the DHS's evidence of changed country conditions (comprised of internet news articles from "an international organization, the UN Office for the Coordination of Humanitarian Affairs[,] and BBC News") sufficiently rebutted the asylum applicant's fear of persecution in Mauritania. *Sy v. Mukasey*, 278 F. App'x 473, 476 (6th Cir. 2008) (unpublished). Although the applicant characterized the evidence as "internet gossip," the court emphasized "the broad array of evidence permitted in immigration courts . . . ." *Id.*

Web Address Citations and "Link Rot"

A seemingly innocuous but critical issue with internet evidence involves the very use of a web address citation. As noted above, Appendix J requires that a URL accompany the citation to a State Department country report and that a URL be provided for an internet publication. The Board has cited to internet sources directly or in parallel many times in its decisions.[8]

However, URLs can cause a unique set of problems. For one, URLs can be notoriously unwieldy; this has led to special citation rules for URLs. The Bluebook: A Uniform System of Citation R. 18.2.2(d) (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) (citation to the root URL is appropriate where the full URL is excessively long or contains many non-textual characters or where submission of a form or query is needed to obtain the information). In such circumstances, a URL shortening service may also alleviate unnecessary clutter. *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting) (citing to a URL processed through the Google URL Shortener). Additionally, URLs suffer from a digital disease commonly referred to as "link rot." Through this phenomenon, URL hyperlinks become useless due to the disappearance or alteration of the underlying source and its specific web address at a given point in time. *See generally* Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996–2010)*, 15 Yale J.L. & Tech. 273 (2013). One study in 2013 found that 29% of the URLs in U.S. Supreme Court opinions between 1996 and 2010 were invalid. *Id* at 306–07. Unsurprisingly, some of the links contained in the Board's decisions have succumbed to this fate. *E.g.*, *Matter of J-E-*, 23 I&N Dec. 291, 293 (BIA 2002) (State Department Background Note); *Matter of Kao*, 23 I&N Dec. 45, 53 (BIA 2001) (State Department country report); *Matter of R-A-*, 22 I&N Dec. 906, 920 n.2, 926, 935 (BIA 1999) (United Kingdom House of Lords decision), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (AG 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008). To counter link rot, some courts have begun to incorporate the use of web archiving tools, such as Perma, to essentially generate a permanent copy of the internet source. *See, e.g.*, *United States v. DE L'Isle*, 825 F.3d 426, 436 (8th Cir. 2016); *United States ex rel. Garbe v. Kmart Corp.*, 824 F.3d 632, 644 (7th Cir. 2016).

Conclusion

The internet has unlocked the potential for litigants and courts to use and abuse electronically stored information. However, one thing is clear: the internet is here to stay. Accordingly, parties and adjudicators must do their best to follow basic evidentiary principles where the internet source fits neatly within the existing rules (such as online versions of official publications) and to adapt where the source presents unique challenges (such as Wikipedia). New technologies will further test the limits of evidentiary acceptance in immigration proceedings. However, if the past is any indication, courts will be up to the task of tackling even the most difficult internet materials. ■

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Endnotes

[1]It will therefore come as no surprise to learn that home internet use has risen from 18% in 1997 to 74.4% in 2013, according to U.S. Census Bureau statistics. Thom File & Camille Ryan, U.S. Census Bureau, *Computer and Internet*

Use in the United States: 2013 at 4 (2014), perma.cc/H3RN-563C.

[2]Chapter 3.3(e)(ii), which governs publications as evidence, provides as follows:

> When a party submits published material as evidence, that material must be clearly marked with identifying information, including the precise title, date, and page numbers. If the publication is difficult to locate, the submitting party should identify where the publication can be found and authenticated.

In all cases, the party should submit title pages containing identifying information for published material (e.g., author, year of publication). Where a title page is not available, identifying information should appear on the first page of the document. For example, when a newspaper article is submitted, the front page of the newspaper, including the name of the newspaper and date of publication, should be submitted where available, and the page on which the article appears should be identified. If the front page is not available, the name of the newspaper and the publication date should be identified on the first page of the submission.

Copies of State Department Country Reports on Human Rights Practices, as well as the State Department Annual Report on International Religious Freedom, must indicate the year of the particular report.

[3]In fact, the Manual implies that for certain legislative history evidence, a citation to a website's URL alone would suffice to identify a source. *See* Practice Manual, App. J at J-12 (emphasis added) ("If a source is difficult to locate, include a copy of the source with your filing (*or an Internet address for it*) and make clear reference to that source in your filing.").

[4]Certain types of documents have specified methods of authentication. *See, e.g.*, 8 C.F.R. §§ 1003.41 (authenticating conviction documents), 1287.6 (authenticating domestic and foreign official records).

[5]Interestingly, the court appears to have performed its own internet research in determining that "gov.cn is 'The Chinese Central Government's Official Web Portal,' as explained in 'The Central People's Government of the People's Republic of China,' english.gov.cn/ . . . ." *Qiu Yun Chen,* 715 F.3d at 212.

[6]Specifically, the court determined that the Immigration Judge misinterpreted the evidence as going against the alien's claim of her Falun Gong leadership position; whereas the Immigration Judge read the website to proclaim that "there are no leaders" within Falun Gong, the court construed the statement as "there is no leader[,]" which contextually referred to Falun Gong not being a "cult, religion, or sect." *Li*, 529 F.3d at 148.

[7]The court did not state how the Board should have afforded the movant an opportunity to rebut. Rather, the court expressed doubt, without deciding, that the ability to file a subsequent motion to reopen would cure a lack of notice. *Chhetry*, 490 F.3d at 201. However, in its order, the court remanded the case to the Board "for further proceedings, including, if additional factual development is appropriate, further proceedings before the Immigration Judge." *Id.* In a later case where the administratively noticed facts constituted the sole basis for reversing a grant of asylum, the court determined that the availability of a motion to reopen did not afford the movant due process. *Burger v. Gonzales*, 498 F.3d 131, 135 (2d Cir. 2007). The Ninth Circuit has suggested that the Board could allow the parties to "move[] for leave to supplement their briefs, supplement the evidence, withdraw their applications for asylum, or seek other relief." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992).

[8]*Matter of Khan*, 26 I&N Dec. 797, 801 (BIA 2016) (Form I-192); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 393, 394 (BIA 2014) (Committees on Foreign Relations and Foreign Affairs country report, State Department country report, and a Canadian news article); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230, 235, 250 (BIA 2014) (Convention and Protocol Relating to the Status of Refugees, two United Nations High Commissioner for Refugees guidance documents, an Australian High Court decision, and a European Union directive); *Matter of W-G-R-*, 26 I&N Dec. 208, 211, 220–21, 222 (BIA 2014) (Convention and Protocol Relating to the Status of Refugees, a European Union directive, and a State Department country report); *Matter of Eac, Inc.*, 24 I&N Dec. 556, 557, 561 (BIA 2008) (Executive Officer for Immigration Review's roster of recognized organizations and their accredited representatives, as well as various immigration law resources); *Matter of J-E-*, 23 I&N Dec. 291, 293, 298, 299–300, 302, 306 (BIA 2002) (State Department Background Note, European Convention for the Protection of Human Rights and Fundamental Freedoms, State Department country report, and a State Department report to the United Nations Committee on Torture); *Matter of Yanez-Garcia*, 23 I&N Dec. 390, 414 n.11 (BIA 2002) (Justice Department's Virtual Law Library); *Matter of Kao*, 23 I&N Dec. 45, 52 n.6, 53 (BIA 2001) (State Department country report, and Statistical Analysis Report from the National Center for Education Statistics); *Matter of R-A-*, 22 I&N Dec. 906, 920 n.2, 926, 935 (BIA 1999) (United Kingdom House of Lords decision), *vacated*, 22 I&N Dec. 906 (AG 2001), *remanded*, 23 I&N Dec. 694 (AG 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (AG 2008).

From the Editor

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

Larry Burman, editor

Immigration Courts—Reclaiming the Vision

By Hon. Paul Wickham Schmidt (ret.)

Our Immigration Courts are going through an existential crisis that threatens the very foundations of our American Justice System. I have often spoken about my dismay that the noble due process vision of our Immigration Courts has been derailed. What can be done to get it back on track?

First, and foremost, the Immigration Courts must return to the focus on due process as the *one and only mission*. The improper use of our due process court system by political officials to advance enforcement priorities and/or send "don't come" messages to asylum seekers, which are highly ineffective in any event, must *end*. That's unlikely to happen under the DOJ—as proved by over three decades of history, particularly recent history. It will take some type of independent court. I think that an Article I Immigration Court, which has been supported by groups such as the ABA and the FBA, would be best.

Clearly, the due process focus has been lost when officials outside EOIR have forced ill-advised "prioritization" and attempts to "expedite" the cases of frightened women and children from the Northern Triangle who require lawyers to gain the protection that most of them need and deserve. Putting these cases in front of other pending cases is not only unfair to all, but has created what I call "aimless docket reshuffling" that has thrown our system into chaos.

Evidently, the idea of the prioritization was to remove most of those recently crossing the border to seek protection, thereby sending a "don't come, we don't want you" message to asylum seekers. But, as a deterrent, this program has been *spectacularly* unsuccessful. Not surprisingly to me, individuals fleeing for their lives from the Northern triangle have continued to seek refuge in the United States in large numbers. Immigration Court backlogs have continued to grow *across the board*, notwithstanding an actual *reduction* in overall case receipts and an increase in the number of authorized Immigration Judges.

Second, there must be structural changes so that the Immigration Courts are organized and run like a *real* court system, *not* a highly bureaucratic agency. This means that *sitting Immigration Judges*, like in all other court systems, must control their dockets. The practice of having administrators in Falls Church and bureaucrats in Washington, D.C., none of whom are sitting judges responsible for daily court hearings, manipulate and rearrange local dockets in a vain attempt to achieve policy goals unrelated to fairness and due process for individuals coming before the Immigration Courts must *end*.

If there are to be nationwide policies and practices, they should be developed by an "Immigration Judicial Conference," patterned along the lines of the Federal Judicial Conference. That would be composed of sitting Immigration Judges representing a cross-section of the country, several Appellate Immigration Judges from the BIA, and probably some U.S. Circuit Judges, since the Circuits are one of the primary "consumers" of the court's "product."

Third, there must be a new administrative organization to serve the courts, much like the Administrative Office of the U.S. Courts. This office would naturally be subordinate to the Immigration Judicial Conference. Currently, the glacial hiring process, inadequate courtroom space planning and acquisition, and unreliable, often-outdated technology are simply not up to the needs of a rapidly expanding court system like ours.

In particular, the judicial hiring process over the past 16 years has failed to produce the necessary balance because judicial selectees from private sector backgrounds – particularly those with expertise in asylum and refugee law – have been so few and far between.

Fourth, I would repeal all of the so-called "Ashcroft reforms" at the BIA and put the BIA back on track to being a real appellate court. A properly comprised and well-functioning BIA should transparently debate and decide important, potentially controversial, issues, publishing dissenting opinions when appropriate. *All* BIA Appellate Judges should be *required* to vote and take a public position on *all* important precedent decisions. The BIA must also "rein in" those Immigration Courts with asylum grant rates so incredibly low as to make it clear that the generous dictates of the Supreme Court in *Cardoza-Fonseca*[1] and the BIA itself in *Mogharrabi*[2] are not being followed.

Nearly a decade has passed since Professors Andy Schoenholtz, Phil Shrag, and Jaya Ramji-Nogales published their seminal work *Refugee Roulette*, documenting the large disparities among Immigration Judges in asylum grant rates.[3] While there has been some improvement, the BIA, the only body that can effectively establish and enforce due process within the Immigration Court system, has not adequately addressed this situation.

For example, let's take a brief "asylum magical mystery tour" down the East Coast.[4] In New York, 84% of the asylum applications are granted. Cross the Hudson River to Newark and that rate sinks to 48%, still respectable in light of the 47% national average but inexplicably 36% lower than New York. Move over to the Elizabeth Detention Center

Court, where you might expect a further reduction, and the grant rate *rises* again to 59%. Get to Baltimore, and the grant rate drops to 43%. But, move down the BW Parkway a few miles to Arlington, still within the Fourth Circuit like Baltimore, and it rises again to 63%. Then, cross the border into North Carolina, still in the Fourth Circuit, and it drops remarkably to 13%. But, things could be worse. Travel a little further south to Atlanta and the grant rate bottoms out at an astounding 2%.

In other words, by lunchtime some days the eight Immigration Judges sitting in Arlington have granted more than the five asylum cases granted in Atlanta during the entire Fiscal Year 2015! An 84% to 2% differential in fewer than 900 miles! Three other major non-detained Immigration Courts, Dallas, Houston, and Las Vegas, have asylum grants rates at or below 10%.

That's *impossible* to justify in light of the generous standard for well-founded fear established by the Supreme Court in *Cardoza-Fonseca* and the BIA in *Mogharrabi*, and the regulatory presumption of future fear arising out of past persecution that applies in many asylum cases.[5] Yet, the BIA has only recently and fairly timidly addressed the manifest lack of respect for asylum seekers and failure to guarantee fairness and due process for such vulnerable individuals in some cases arising in Atlanta and other courts with unrealistically low grant rates.[6]

Over the past 15 years, the BIA's inability or unwillingness to aggressively stand up for the due process rights of asylum seekers and to enforce the fair and generous standards required by American law have robbed our Immigration Court System of credibility and public support, as well as ruining the lives of many who were denied protection that should have been granted. We need a BIA that functions like a Federal Appellate Court and whose overriding mission is to ensure that the due process vision of the Immigration Courts becomes a *reality r*ather than an unfulfilled promise.

Fifth, and finally, the Immigration Courts need e-filing NOW! Without it, the courts are condemned to "files in the aisles," misplaced filings, lost exhibits, and exorbitant courier charges. Also, because of the absence of e-filing, the public receives a level of service disturbingly below that of any other major court system. That gives the Immigration Courts an "amateur night" aura totally inconsistent with the dignity of the process, the critical importance of the mission, and the expertise, hard work, and dedication of the judges and court staff who make up our court. ■

This is an excerpt from a longer presentation given at a number of law schools, most recently Washington & Lee Law School on Oct. 20, 2016.

Paul Wickham Schmidt is a recently retired U.S. Immigration Judge who served at the Immigration Court in Arlington Virginia, and previously was Chairman and Member of the Board of Immigration Appeals. He also has served as Deputy General Counsel and Acting General Counsel of the former Immigration and Naturalization Service, a partner at two major law firms, and an adjunct professor at two law schools. His career in the field of immigration and refugee law spans 43 years. He has been a member of the Senior Executive Service in Administrations of both parties.

Endnotes

[1]*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

[2]*Matter of Mogharrabi*, 19 I&N Dec. 4379(BIA 1987).

[3]Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007);

[4]All statistics are from the EOIR FY 2015 *Statistics Yearbook,* available online at www.justice.gov/eoir/page/file/fysb15/download.

[5]*See* 8 C.F.R. § 1208.13(b)(1).

[6]*See, e.g., Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015) (denial of due process where IJ tried to bar the testimony of *minor respondent* by disqualifying him as an *expert witness under the Federal Rules of Evidence*). While the BIA finally stepped in with this precedent, the behavior of this Judge shows a system where some Judges have abandoned any discernable concept of "guaranteeing fairness and due process." The BIA's "permissive" attitude toward Judges who consistently deny nearly all asylum applications has allowed this to happen. How does this live up to the EOIR Vision of "through teamwork and innovation being the world's best administrative tribunals guaranteeing fairness and due process for all?" Does this represent the best that American justice has to offer?

Racism in U.S. Immigration: A Historical Overview

By Jeffrey S. Chase

Origins

Racism was codified in this country's original naturalization law. The Naturalization Act of 1790 limited the right to naturalize to "free white persons." Following the Civil War, the Act of July 14, 1870, added "aliens of African nativity" and "aliens of African descent" to those eligible to naturalize. However, all others considered "non-white" continued to be barred from obtaining United States citizenship. In 1922, the Supreme Court denied Takao Ozawa, a Japanese immigrant who had lived in the U.S. for 20 years, the right to become a naturalized citizen because he "clearly" was "not Caucasian." In interpreting the term "free white persons," the Court found that "the framers did not have in mind the brown or yellow races of Asia."[1] In *United States v. Bhagat Singh Thind*,[2] the Supreme Court reached the same conclusion regarding an "upper-caste Hindu" who claimed a lineage classified as "Aryan" or "Caucasian." The Court determined that "Aryan" related to "linguistic, and not at all with physical, characteristics," and concluded that the term "free white persons" as understood by the common man, would not include those of Hindu ancestry.[3] It was not until passage of the McCarran-Walter Act in 1952 that the naturalization law was amended to read that "[t]he right of a person to become a naturalized citizen shall not be denied or abridged because of race or sex…"[4]

Additionally, Native Americans were not accorded citizenship. According to one source, Native Americans were referred to as "domestic foreigners" in their own country.[5] In 1856, U.S. Attorney General Caleb Cushing stated "Indians are the subjects of the United States, and therefore are not, in mere right of home-birth, citizens of the United States."[6] Cushing added that Native Americans could not obtain citizenship through the naturalization laws of the time, which Cushing stated "apply only to foreigners, while "Indians are not foreigners, and they are in our allegiance, without being *citizens* of the United States. Moreover, those acts apply only to 'white' men."[7] Native Americans were finally recognized as U.S. citizens by the Indian Citizenship Act of 1924.

1880s: The Exclusion of Immigrants from China

In 1882, Congress enacted the Chinese Exclusion Act as a 10-year bar on the entry of laborers from China. The text of the statute begins with the sentence "Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof…" It was extended in 1892 for another 10 years (as part of the Geary Act), and then made permanent in 1902. Although the act was repealed by the Magnuson Act in 1943, the new legislation only allowed the admission to this country of 105 immigrants per year from China. It was not until the Immigration Act of 1965 that full-scale Chinese immigration to the U.S. was restored.

1920s-30s: Keeping America "White"

The Immigration Act of 1924 limited immigration from any country to 2 percent of the number of immigrants from that country that were in the U.S. in 1890, and further excluded Asians. The purpose was to stop the growing number of Polish, Italian, Greek, and Slavic immigrants, as well as Jewish immigrants (who were referred to at the time as members of the "Hebrew race," considered the lowest of all the European "races").[8] In signing the bill into law, President Calvin Coolidge declared that "America must be kept American."[9] Such view was motivated by the belief that "persons of northern European stock were superior to…the 'races' of southern and eastern Europe," who at that time, "were racialized as non-white," and was also motivated by strong anti-semitism.[10]

Madison Grant, described as a "prolific non-scientist" and "popularizer of the eugenics movement,"[11] was called in as an expert to influence Congress by convincing its members of the threat posed by the immigration of Southern Europeans of "inferior stock."[12] Grant was the author of a highly influential book, *The Passing of the Great Race*," in which he propagandized his theory of Nordic racial superiority. In a fan letter written to the author in the early 1930s, Adolf Hitler referred to the book as his "Bible."[13]

During the 1930s, perhaps 2 million people of Mexican heritage (including some U.S. citizens) were deported, on the belief that Mexicans were taking scarce jobs away from Americans during the Great Depression. The mass deportations led to a shortage of agricultural workers at the beginning of WW II, which led to the institution of the Bracero program, which allowed 4.6 million Mexicans to enter the U.S. legally. However, this spurt in immigration from Mexico eventually led to more mass deportations in 1954.[14]

1940s: Barring Jewish Refugees; Japanese-American Denaturalization

Strong anti-semitic sentiments in the United States (combined with the general anti-immigration mood caused by the Great Depression) resulted in a closed-door policy towards Jewish refugees during and after World War II.

The desire to prevent Jewish refugees from entering this country led Breckinridge Long, the State Department official in charge of the Visa Division during the war, to author a memo advising consular officers to "delay and effectively stop for a temporary period of indefinite length the number of immigrants into the United States. We could do this by simply advising our consuls to put every obstacle in the way and to require additional evidence and to resort to various administrative devices which would postpone and postpone and postpone the granting of the visas." As a result, 90 percent of the visas allotted for German and Italian-controlled countries were never issued, which prevented some 190,000 Jews from escaping Nazi atrocities.[15] The U.S. also infamously turned away ships of Jewish refugees fleeing Nazi persecution, the most famous example involving the ship *The St. Louis*, the plight of whose passengers was later memorialized by Hollywood in the 1976 film *The Voyage of the Damned*.

After the war, the allies established displaced persons ("DP") camps in Europe. When President Truman sent former INS Commissioner Earl G. Harrison to visit the DP camps to assess the conditions, his harrowing report to the President included the line "we appear to be treating the Jews as the Nazis treated them, except we are not exterminating them."[16]

In addition to the closed door policy towards Jewish refugees, the policy of interning Japanese-Americans during the war led to the deportation of some U.S. citizens of Japanese descent. Maurice Roberts was an INS official assigned to conduct hearings to determine deportability for this group. Roberts recounted that the internees included 77,000 Japanese-Americans who were U.S. citizens by birth, and another 43,000 who were lawful permanent residents. Roberts wrote "[i]n racial terms suprisingly Hitler-like, Lt. General John L. DeWitt, Commanding General of the Western Defense Command, declared that the Japanese constituted an enemy race whose racial strains remained undiluted despite successive generations on U.S. soil."[17] DeWitt's statement made no mention of anti-miscegenation laws prohibiting Asian-Americans from marrying "white persons," which existed in 7 states in 1910, and had more than doubled to 15 states by 1950.[18]

In 1944, Congress enacted an amendment to 8 U.S.C. § 801, to allow for loss of citizenship through written renunciation "whenever the United States shall be in a state of war." A U.S. District Court recognized that the motivation behind such amendment was the illegality of the continued detention of American citizens: "if renunciations of American citizenship could be obtained from those in Tule Lake [an internment camp], it was thought they could then be detained as alien enemies without doing violence to our traditional constitutional safeguards."[19] The court recounted the extreme conditions which led to many of the renunciations that followed, including "[m]ass hysteria; the outgrowth of the combined experience of evacuation, loss of home, isolation from outside communication and concentration in an enclosed, guarded, overpopulated camp with little occupation, inadequate and uncomfortable living accommodations, dreary and unhealthful surroundings and climatic conditions, producing neurosis built on fear, resentment, uncertainty, hopelessness and despair…"[20] Paraphrasing from a comparable decision, the court stated that "it is shocking to the conscience that an American citizen be confined *without authority* and then, while so under duress and restraint, for his Government to accept from him a surrender of his constitutional heritage."[21]

1950s: The McCarren-Walter Act; "Operation Wetback"

In 1952, Congress enacted the McCarren-Walter Act. In a very recent article, two scholars point to a cause and effect between that Act's removal (for the first time in this country's history) of "being white" as a prerequisite for naturalization, and the mass deportations to Mexico that were carried out two years later by the Eisenhower Administration.[22]

In 1954 (the same year that the Supreme Court decided *Brown v. Board of Education*), the government carried out the Special Mobile Force Operation, more commonly referred to as "Operation Wetback." The program resulted in the deportation of an estimated one million people to Mexico, some of whom were U.S. citizens. In the view of Professors Louis Hyman and Natasha Iskander, the program's "enforcement approach - assuming those who were not white had dubious citizenship" - reflected resistance to the McCarren-Walter Act's "legal shift" of removing racial barriers to naturalization.[23] The program has been referred to as "a humanitarian catastrophe;" in which some of those deported died of sunstroke after being deported into the Mexican desert; others were deported in cargo ships under conditions described as comparable to "an eighteenth-century slave ship."[24]

1980s: Haitian Interdiction

In the words of Kevin R. Johnson, "No U.S. policy approached…the government's extraordinary treatment of Black persons fleeing the political violence in Haiti."[25] Following the October 1991 military coup in Haiti that overthrew the democratically-elected Aristide government, which was in turn followed by a reign of political terror, the U.S. Coast Guard interdicted 34,000 Haitians at sea over a six-month period. Johnson quoted his colleague Stephen Legomsky as stating "[t]he public would never [have stood] for this if the boat people were Europeans."[26] In *Sale v. Haitian Centers Council, Inc.*,[27] the Supreme Court upheld the policy initiated by President George H.W. Bush, and surprisingly continued under President Clinton, of repatriating the intercepted Haitians to Haiti without first screening the returnees to see if they qualified for refugee status. In its *amicus* brief, the NAACP referred to the policy as "separate but unequal." In his dissenting opinion, Justice Brennan concluded that the Haitian refugees "do not claim a right of admission to this country. They do not even argue that the Government has no right

to intercept their boats. They demand only that the United States, land of refugees and guardian of freedom, cease forcibly driving them back to detention, abuse, and death. We should not close our ears to it."[28]

Post- 9/11: Registration of Muslims

In response to the terrorist acts of September 11, 2001, on September 10, 2002, the National Security Entry-Exit Registration System ("NSEERS") was implemented by the INS. The program required males over the age of 16 who were nationals of designated countries to register. 24 of the 25 countries designated were predominantly Muslim countries (the sole exception being North Korea). The program was indefinitely suspended in April, 2011.

The Future

The above is intended as a simple overview of U.S. immigration policies that were impacted by racial criteria.[29] As future administrations respond to calls to restrict or deport certain classes of people based on racial criteria, it is hoped that our nation's past mistakes may serve as guidance in formulating policies based on justice and fairness to all. ■

The author is an Attorney Advisor at the Board of Immigration Appeals, Executive Office for Immigration Review (EOIR), U.S. Department of Justice. The author wrote this article in his personal capacity, and the views expressed herein are solely his own, and do not necessarily represent the positions of EOIR or the Department of Justice.

Endnotes

[1]*Takao Ozawa v. United States*, 260 U.S. 178 (1922).

[2]261 U.S. 204 (1923).

[3]*Id.* at 214-15.

[4]Pub. L. 414 (June 27, 1952), Sec. 311.

[5]Warren J. Blumenfeld, "Immigration Policy and Racism," *Huffington Post* Feb. 1, 2013.

[6]Felix S. Cohen, *Handbook of Federal Indian Law: With Reference Tables and Index* (U.S. Gov't Printing Office, 1945), p.155.

[7]*Id*.

[8]Blumenfeld, *supra*.

[9]Stephen Mihm, "Paleoconservatism Is Back," *Bloomberg View*, Nov. 27, 2016, www.bloomberg.com/view/articles/2016-11-27/paleoconservatism-is-back

[10]Kevin R. Johnson, "Race, The Immigration Laws, And Domestic Race Relations: a 'Magic Mirror' into the Heart of Darkness," 73 Indiana Law Journal 1111, 1129 (Fall, 1998).

[11]Ann Gibson Winfield, "Eugenics and Education in America: Institutionalized Racism and the Implications of History, Ideology, and Memory," p.74 (2007).

[12]"European Immigration and Defining Whiteness," RACE.com, www.understandingrace.org/history/gov/eastern_southern_immigration.html.

[13]Edwin Black, "Hitler's Debt to America," *The Guardian*, February 5, 2004, www.theguardian.com/uk/2004/feb/06/race.usa.

[14]*See* NPR, "It Came Up in the Debate: Here Are 3 Things To Know About 'Operation Wetback," Nov. 11, 2015, www.npr.org/sections/thetwo-way/2015/11/11/455613993/it-came-up-in-the-debate-here-are-3-things-to-know-about-operation-wetback.

[15]*See The American Experience*: "America and the Holocaust: People and Events - Breckinridge Long," at www.pbs.org/wgbh/amex/holocaust/peopleevents/pandeAMEX90.html)

[16]*See* U.S. Holocaust Museum, "Resources," "Report of Earl G. Harrison," at www.ushmm.org/exhibition/displaced-persons/resourc1.htm.

[17]Maurice A. Roberts, "The Tule Lake Hearings," 73 *Interpreter Releases* 1065, 1066 (Aug. 12, 1996).

[18]*See e.g.* Hrithi Karthikeyan and Gabriel J. Chin, "Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian-Americans, 1910-1950," 9 Asian American Law Journal Vol. 9:1 (2002).

[19]*Tadayasu Abo v. Clark*, 77 F.Supp. 806, 809 (N.D. Cal. 1948).

[20]*Id*. at 808.

[21]*Id*. at 811.

[22]Louis Hyman and Natasha Iskander, "What the Mass Deportation of Immigrants Might Look Like," *Slate* Nov. 16, 2016. The authors are an associate professor of history at Cornell University and an associate professor of public policy at New York University.

[23]*Id*.

[24]Jeet Heer, "Operation Wetback Revisited," *The New Republic*, April 25, 2016, newrepublic.com/article/132988/operation-wetback-revisited

[25]Kevin R. Johnson, "Race, the Immigration Laws, and Domestic Race Relations: A 'Magic Mirror' Into the Heart of Darkness,' 73 INDIANA L.J. 1111, 1144 (1998).

[26]*Id*.

[27]509 U.S. 155 (1993).

[28]*Sale v. Haitian Centers Council, supra* at 208.

[29]For a much more in-depth, scholarly treatment of the topic, please refer to Kevin Johnson's excellent article, for which the full citation may be found in footnote 8.

Competency Issues in Removal Proceedings: An Update

By Ilana Snyder

It is well settled that a criminal defendant will not stand trial if he is "suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a), (d). It is also well established that "[d]eportation is not a criminal proceeding," *Carlson v. Landon,* 342 U.S. 524, 537 (1952), and therefore "a lack of competency in civil immigration proceedings does not mean that the hearing cannot go forward." *See Matter of M-A-M-*, 25 I&N Dec. 474, 479 (BIA 2011); *accord Brue v. Gonzales*, 464 F.3d 1227, 1233 (10th Cir. 2006); *Nee Hao Wong v. INS*, 550 F.2d 521, 523 (9th Cir. 1977). Yet immigration proceedings "must [still] conform to the Fifth Amendment's requirement of due process." Mimi E. Tsankov, *Incompetent Respondents in Removal Proceedings,* Immigration Law Advisor, Vol. 3, No. 4, at 1 (Apr. 2009) (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Paramount among these due process rights is that a respondent must receive a "full and fair hearing," *Carlson*, 342 U.S. at 537–38, in which the respondent has a "reasonable opportunity" to examine and present evidence, *see* section 240(b)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(4)(B), an ability to consult with his counsel, if represented, *see Matter of M-A-M-*, 25 I&N Dec. at 479, and an opportunity to testify fully in support of his claims for relief from removal, *see Matter of E-F-H-L-*, 26 I&N Dec. 319, 324 (BIA 2014). The first part of this article examines Board decisions clarifying procedures for determining competency, and the second part examines regulations and decisions elucidating the safeguards that an Immigration Judge may need to consider to protect the Fifth Amendment rights of respondents with a mental illness or cognitive disability.[1]

Determining Competency

Assessing Competency Where Indicia of Incompetency Are Observed

In its landmark *Matter of M-A-M-*, decision, the Board held that Immigration Judges must assess an alien's competency where indicia of incompetency are observed. 25 I&N Dec. at 484. The respondent, a native and citizen of Jamaica, was admitted to the United States as a lawful permanent resident in 1971. *Id.* at 475. In 2008, the Department of Homeland Security ("DHS") placed the respondent into removal proceedings. *Id.* The respondent, appearing pro se, "had difficulty answering basic questions, such as his name and date of birth" and indicated that he had been diagnosed with schizophrenia. *Id.* He also informed the Immigration Judge that he needed medication. *Id.* At the next hearing, the respondent stated that he had a history of mental illness and requested a change of venue to be closer to family, a request that was denied. *Id.* In four additional hearings, the respondent's mental health was referenced. At a merits hearing before a different Immigration Judge, the Immigration Judge admitted the respondent's mental health evaluations into the record and noted the respondent's mental competency issues but did not make a finding regarding competency. *Id.* at 475–76. On appeal, the respondent argued that the Immigration Judge erred in not assessing his mental competency. *Id.* at 476.

In a decision remanding the record for further proceedings, the Board ordered the Immigration Judge, to "take steps to assess the respondent's competency, apply safeguards as warranted, and articulate her reasoning." *Id.* at 484. The Board made several significant holdings in the case. The Board first held that respondents in removal proceedings are presumed to be competent. *Id.* at 477. Next, the Board instructed Immigration Judges who observe indicia of incompetency to further determine if a respondent is competent to participate in immigration proceedings. *Id.* at 479–80. Where no indicia of incompetency are observed, the Board concluded that there is no duty to examine an alien's competency. *Id.* at 477 (citing *Munoz-Monsalve v. Mukasey*, 551 F.3d 1, 6 (1st Cir. 2008)). "Indicia of incompetency" are either observed by the Immigration Judge or evidenced in the record. *Id.* at 479. An Immigration Judge's observation of "certain behaviors by the respondent, such as the inability to understand and respond to questions, the inability to stay on topic, or a high level of distraction," may constitute indicia of incompetency. *Id.* Evidence-based indicia may include "medical reports or assessments from past medical treatment or from criminal proceedings, as well as testimony from medical health professionals." *Id.* at 479. Additionally, evidence may include: "school records regarding special education classes or individualized education plans; reports or letters from teachers, counselors, or social workers; evidence of participation in programs for persons with mental illness; evidence of applications for disability benefits; and affidavits or testimony from friends or family members." *Id.* at 479–80.

In this competency inquiry, the Immigration Judge must determine if the "alien is competent to participate in immigration proceedings." *Id.* at 479. "The test . . . is

whether he or she has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses." *Id.* After the inquiry, the Immigration Judge must articulate his or her reasoning in concluding whether an alien is sufficiently competent to proceed. *Id.* at 480–81. If the respondent lacks sufficient competency to proceed, the Board instructed Immigration Judges to institute "safeguards" to ensure a fair hearing. *Id.* at 481 (citing section 240(b)(3) of the Act). In cases where the alien is found to be competent to proceed, the hearing can move forward without "safeguards," but with the caveat that "competency is not a static condition," meaning that the Immigration Judge may later need to evaluate whether the alien is still competent to represent him or herself. *See id*. at 480 (quoting *Indiana v. Edwards*, 554 U.S. 164, 175 (2008)).

Mental Competency Determinations Are Fact-Finding, Non-Adversarial Proceedings

In *Matter of J-S-S-*, 26 I&N Dec. 679 (BIA 2015), the Board clarified the burden of proof, standard of proof, and standard of review for mental competency determinations. The respondent, a native and citizen of Haiti, had been admitted to the United States as a lawful permanent resident in 1997. *Id.* at 679. He later committed two drug offenses that made him removable. *Id.* at 680. The respondent presented evidence of his "long history of mental illness, starting in childhood, when he began experiencing auditory and visual hallucinations." *Id.* He also presented "three separate forensic evaluations" used to determine his competency in criminal proceedings, testimony of the attorney who represented him in the criminal trial, and additional mental health records from another detention center. *Id.* The Immigration Judge found that this record evidenced indicia of incompetency and conducted an individualized mental health assessment in accordance with *Matter of M-A-M-*. *Id.* at 680–81, 684. The Immigration Judge considered the respondent's testimony at his hearings and the documentary evidence regarding his mental health (while also noting that the respondent had not provided updated mental health records in the final months preceding his merits hearing) and concluded that the respondent was competent to proceed. *Id.*

On appeal, the respondent argued that the Immigration Judge erred by "misallocating the burden of proof" in the competency determination. *Id.* at 679. Specifically, the respondent argued that he should "bear the initial burden to raise a competency issue," but that once indicia of incompetency are identified, the DHS should bear the burden "to show, by a preponderance of the evidence, that the alien is competent to proceed or that safeguards can be put into place to protect his or her due process rights." *Id.* at 681. The Board disagreed with the respondent's argument that mental competency determinations in immigration proceedings should be governed by the standards used in Federal criminal trials, concluding instead that the allocation of proof applied should be similar to that "employed in Federal habeas proceedings, which are also civil in nature." *Id.* at 682–83. The Board held "that neither party bears a formal burden of proof in immigration proceedings to establish whether or not the respondent is mentally competent, but where indicia of incompetency are identified, the Immigration Judge should determine if a preponderance of the evidence establishes that the respondent is competent." *Id.* (citing *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1225 (9th Cir. 1993)). With respect to the standard of proof to be applied, the Board utilized the preponderance of the evidence standard, noting that the Supreme Court has endorsed applying this standard to competency issues in criminal cases. *Id.* at 683 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 355–62 (1996)).

The Board next considered the standard of review for competency determinations and concluded that "[a] finding of competency is a finding of fact." *Id.* at 684. Since the Board reviews findings of fact for clear error, 8 C.F.R. § 1003.1(d)(3)(i), the Board held that it reviews competency findings under this standard. *Id*. In applying this standard of review, the Immigration Judge's competency determination was held to be not clearly erroneous. *Id.* at 684.

Safeguards

If an alien is deemed mentally incompetent in removal proceedings, the Immigration Judge must prescribe "safeguards" to protect the hearing rights and privileges of the alien. Section 240(b)(3) of the Act. The Code of Federal Regulations identifies necessary procedural safeguards to protect the due process rights of incompetent aliens in immigration proceedings, *see, e.g.*, 8 C.F.R. § 1240.10(c), but it is the duty of the Immigration Judge to ensure that the safeguards he or she implements are sufficient to afford the alien a fair hearing. *See Carlson*, 342 U.S. at 537–38 (noting that Congress requires that aliens in deportation proceedings be provided with a "full hearing" conducted "in a manner consistent with due process").

Necessary Safeguards: Service of the Notice To Appear and Admissions of Removability

Immigration Judges likely face the question of which procedural safeguards must and may be implemented in a mentally incompetent respondent's case. Where an incompetent respondent is unrepresented, an Immigration Judge is prohibited from accepting an admission of removability from the respondent. 8 C.F.R. § 1240.10(c). In such cases, identifying an individual involved in the alien's life (hereinafter referred to as a "facilitator") who is willing and able to help the Immigration Judge fully implement the safeguards will help to move proceedings along. *See generally Matter of Gomez-Gomez*, 23 I&N Dec. 522, 528 (BIA 2002) (noting that "an adult relative who receives notice on behalf of a minor alien bears the responsibility to assure that the minor appears for the hearing"). The

regulations suggest that "a near relative, legal guardian, or friend" may potentially fill this role, since they are listed as individuals who may accompany an alien during pleadings. *See* 8 C.F.R. § 1240.10(c).

The requirements for service of the Notice to Appear ("NTA") will differ if the alien is confined. When an incompetent alien who cannot understand the nature of proceedings is "confined in a penal or mental institution or hospital," the Department is required to serve the "person in charge of the institution or hospital" with the NTA. 8 C.F.R. § 103.8(c)(2)(i). For mentally incompetent aliens, whether or not they are detained, the DHS must serve the person with whom the incompetent alien resides and, whenever possible, a facilitator. *See* 8 C.F.R. § 103.8(c)(2)(ii). The facilitator, roommate, or guardian cannot himself lack competency and must not be a minor. *See Matter of E-S-I-*, 26 I&N Dec. 136, 142 (BIA 2013).

In *Matter of E-S-I-*, the Board clarified these requirements for service of the charging document. The respondent, a lawful permanent resident, had been transferred from a mental institution to the custody of the DHS. In an earlier decision, the Board had concluded that the respondent's transfer from a mental institution constituted indicia of incompetency and that the DHS erred in not serving the person in charge of the facility pursuant to 8 C.F.R. § 103.8(c)(2)(i). *Id.* at 137. The DHS subsequently issued a new NTA. The Immigration Judge found that the respondent lacked the competency to proceed and that the DHS had again failed to properly serve the person in charge of the institution, this time at the DHS's Otay Mesa Detention Facility. *Id.* The Immigration Judge terminated proceedings, citing 8 C.F.R. § 103.8(c)(2)(i). *Id.* On appeal, the DHS argued that it was not required to serve the person in charge of the Otay Mesa facility since is not a "penal or mental institution or hospital," and that service of the document on an Assistant Officer in Charge was proper. *See id.* at 137–38.

In a decision remanding the record for further proceedings, the Board explained that while "detention in the immigration context is not punitive," the term "confinement" for the purposes of 8 C.F.R. § 103.8(c) means a "custodial setting of *any type.*" *See id.* at 140 (emphasis added). In so holding, the Board imposed a uniform approach, "focus[ing] on the fact of confinement, rather than on the nature of the institution." *Id.* Thus, service of the NTA has not been effectuated on "persons who lack mental competency and are in a custodial setting of any type," unless the DHS serves the person of authority in the institution or his delegate. *Id.* Additionally, the Board held that also serving the respondent, even if he or she is believed to be incompetent, is a "prudent course of action," because competency may not be ascertainable at the time of service. *Id.*

Additional Safeguards: Docketing Tools and the Asylum Context

For both the detained and nondetained mentally incompetent alien, the Immigration Judge may excuse the respondent's physical appearance in Immigration Court where a facilitator, guardian, or attorney agrees to appear on the alien's behalf. *See* 8 C.F.R. §§ 1240.4, 1240.43. Moreover, the Immigration Judge may choose to close the hearing to the public and may reserve appeal rights for the respondent. *Matter of M-A-M-*, 25 I&N Dec. at 482–83. The Immigration Judge may actively aid in the development of the record and may also docket or manage the case to facilitate the alien's acquisition of counsel or treatment, and even continue the case where "good cause" is shown. *See id.* Ultimately, in evaluating any additional safeguards to apply, the Immigration Judge should consider the particular circumstances of the case and articulate his or her consideration of safeguards for the record. *Id*.

Docketing Tools: Administrative Closure

In *Matter of M-A-M-*, the Board contemplated administrative closure as a possible alternative where sufficient safeguards cannot be instituted to ensure that a respondent is competent to proceed. 25 I&N Dec. at 483. The Board noted that administratively closing proceedings may be an alternative while other options, such as seeking treatment for a respondent, are explored. *Id.* In a case not directly pertaining to mental competency issues, the Board again addressed the subject of administrative closure in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). The Board held that an Immigration Judge must evaluate a motion for administrative closure under the "totality of the circumstances." *Id.* at 696. *Matter of Avetisyan* is most noted for overruling *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996), which required both parties to agree to administrative closure before the Immigration Judge could temporarily remove the case from his or her docket. Perhaps of relevance in the mental competency context is the Board's determination that administrative closure may be suitable where "an action or event that is relevant to immigration proceedings but . . . outside the control of the parties or the court . . . may not occur for a significant or undetermined period of time." *Id.* at 692. On the other hand, administrative closure may be inappropriate to await "an event or action that may or may not affect the course of an alien's immigration proceedings (such as a collateral attack on a criminal conviction)." *Id.* at 696. Mental competency issues, however, may be qualitatively different from a situation where administrative closure is sought to await the outcome of proceedings in another forum.

In the Asylum Context: Accepting a Respondent's Fear as Subjectively Genuine

In *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), the Board articulated an additional safeguard for aliens with competency issues that affect the reliability of their testimony. The respondent, a native and citizen of Honduras, had "difficulty meaningfully answering basic questions," provided "confusing and disjointed" and "nonresponsive" testimony, and also "laughed inappropriately during the

hearing." *Id.* at 609–10. He further insisted that he had arrived "last year," which according to his testimony was in 2006, yet the hearing was conducted in 2013, and it was "not in dispute" that he arrived in the United States in 2012. *Id.* The respondent's attorney explained to the Immigration Judge that he believed that his client had a "cognitive disability that affected his ability to testify." *Id.* Although the Immigration Judge noted the respondent's unusual behavior and testimony, he did not evaluate competency under the framework discussed in *Matter of M-A-M-*. *Id.* The Immigration Judge denied all forms of protection-based relief, finding that the respondent did not testify credibly and therefore could not satisfy his burden of proof. *Id.*

In its decision to remand, the Board first found that the facts above constituted "indicia of incompetence," and that the Immigration Judge erred in not conducting a competency assessment. *Id.* The Board then recognized that an alien suffering mental illness or cognitive disability "may exhibit symptoms that affect his ability to provide testimony in a coherent linear manner." *Id.* at 611 (citing *Matter of M-A-M-*, 25 I&N Dec. at 480). Therefore, the Board reasoned, inconsistencies, inaccurate details, or inappropriate demeanor during testimony "may be reflective of a mental illness or disability, rather than an attempt to deceive the Immigration Judge." *Id.* Accordingly, it was held that "where a mental health concern may be affecting the reliability of the applicant's testimony, the Immigration Judge should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim." *Id.* at 612.

In the Asylum Context: Changed or Extraordinary Circumstances

Generally, an asylum application must be filed within "1 year after the date of the alien's arrival in the United States." Section 208(a)(2)(B) of the Act, 8 U.S.C. § 1158(a)(2)(B). However, an Immigration Judge may accept a late filing if the alien can demonstrate "changed circumstances which materially affect the applicant's eligibility for asylum" or "extraordinary circumstances relating to the delay in filing." 8 U.S.C. § 1158(a)(2)(D). "Extraordinary circumstances" may include "[l]egal disability (e.g., the applicant was an unaccompanied minor *or suffered from a mental impairment*) during the 1-year period after arrival." 8 C.F.R. § 1208.4(a)(5)(ii) (emphasis added).

The Board conducts an "individualized analysis" to "determin[e] whether extraordinary circumstances exist to excuse an alien's failure to meet the deadline for filing an asylum application." *Matter of Y-C-*, 23 I&N Dec. 286, 287–88 (BIA 2002) (en banc). In *Matter of Y-C-*, the respondent entered the United States without inspection as a 15-year-old unaccompanied minor. He was served with a Notice to Appear upon arrival and detained. Almost 1 year later, the respondent was paroled from the custody of the former Immigration and Naturalization Service to the custody of his uncle. *Id.* at 286. The respondent attempted to file an asylum application about 5 months later, but the Immigration Judge refused to accept it. *Id.* at 288. The respondent subsequently filed an asylum application, but the Immigration Judge concluded that the respondent was not eligible for this form of relief because he had not filed his application within 1 year of his arrival or shown extraordinary circumstances to excuse this delay. *Id.* at 287. In considering the respondent's appeal, the Board stated that the respondent's unaccompanied minor status did not necessarily by itself constitute an extraordinary circumstance. *Id.* at 288. Rather, "the respondent must establish the existence or occurrence of the extraordinary circumstances, must show that those circumstances *directly relate* to his failure to file the application within the 1-year period, and must demonstrate that the delay in filing was *reasonable* under the circumstances." *Id.* at 288 (emphasis added). After considering the factors presented, including the respondent's legal disability (i.e., minority) during his custody in the juvenile detention facility, the Board concluded that the respondent demonstrated extraordinary circumstances, as contemplated in 8 C.F.R. § 1208.4(a)(5)(ii), that excused his delay in filing and that the application was filed within a reasonable period considering these circumstances.

In contrast, in an unpublished decision addressing "extraordinary circumstances" as discussed in 8 C.F.R. § 1208.4(a)(5), the United States Court of Appeals for the Ninth Circuit concluded that substantial evidence supported the Board's determination that an alien's mental illness had not directly related to his failure to file within the 1-year time frame. *Saqib v. Holder*, 312 F. App'x 900, 902 (9th Cir. 2009). The Ninth Circuit noted that "[the respondent's] mental illness did not prevent him from filing a number of other petitions in an attempt to remain in the United States, and he admitted that he consciously chose to pursue those other methods rather than seek asylum." *Id.* at 902. The panel therefore determined that the Board correctly concluded that the alien's mental illness did not directly relate to his failure to file the application within the 1-year period. *Id.*

Conclusion

The legal landscape surrounding mental competency in immigration proceedings has developed significantly since 2009. Perhaps most notably, in *Matter of M-A-M-* and *Matter of J-S-S-*, the Board has provided Immigration Judges with guidance for determining whether a respondent is competent to proceed.[2] The initial consideration is whether indicia of incompetency are present. Since there is a presumption of competency, if no indicia of incompetency are observed, then the Immigration Judge has no duty to evaluate a respondent's competency. If indicia of incompetency are observed, however, the Immigration Judge must determine if a preponderance of the evidence establishes that the respondent is competent. In holding that neither party bears the burden to establish a

respondent's competency, the Board has indicated that the process should be a "collaborative approach enabl[ing] both parties to work with the Immigration Judge to fully develop the record." *Matter of J-S-S-*, 26 I&N Dec. at 681–82. The Immigration Judge should articulate this factual finding on the record, and if competency is not established by a preponderance of the evidence, the Immigration Judge must prescribe "safeguards" to protect the rights and privileges of the alien. These safeguards may include those required by statute and regulation, as well as other safeguards that an Immigration Judge may conclude are appropriate to protect a respondent's rights in proceedings. Ultimately, in discharging his or her duty to ensure that the safeguards implemented are sufficient to afford the alien a fair hearing, the Immigration Judge should consider the totality of the facts and circumstances. ■

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Endnotes

[1]The author notes that detained, unrepresented respondents in the Ninth Circuit may be entitled to additional specialized procedures beyond those described in *Matter of M-A-M-*. Pursuant to the *Franco-Gonzalez* permanent injunction, all detained aliens who are members of the Plaintiff Class (aliens "having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel in their detention or removal proceedings"), who have been detained for longer than 180 days must be provided with a custody redetermination hearing. *Franco-Gonzalez v. Holder,* No. CV 10-02211, 2013 WL 3674492, at *3 (C.D. Cal. Apr. 23, 2013) (partial judgment and permanent injunction order), *as amended by Franco-Gonzalez v. Holder*, No. CV 2:10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014) (order further implementing permanent injunction). All plaintiff class members who, after a judicial competency inquiry by an Immigration Judge, are determined to be incompetent to represent themselves must then be provided with a qualified representative as a reasonable accommodation under section 504 of the Rehabilitation Act, 29 U.S.C. § 794. *Id.* at *3.

[2]As previously noted, additional procedures to address mental competency issues have been implemented in the Ninth Circuit pursuant to the orders in *Franco-Gonzalez v. Holder*, No. CV 2:10-02211, 2014 WL 5475097 (C.D. Cal. Oct. 29, 2014), and *Franco-Gonzalez v. Holder,* No. CV 10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

The Green Card

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