The Green Card

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

LARRY BURMAN, SECTION CHAIR

Quote of the Month

"So, you're saying that the government has a legitimate interest in not enforcing its laws?"

Justice Anthony Kennedy,
during oral argument in *Arizona v. US*.

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From the Editor

The 2012 Memphis Immigration Seminar is behind us now, and it was a great success as usual. The Mississippi riverboat dinner cruise was popular and well-attended. Unfortunately, because the cruise was on Friday night, participants were forced to choose between the cruise and the International BBQ Festival; a Hobson's choice indeed. Similarly, it was never easy to decide which of the five tracks to attend at any time; there were always at least two must-see presentations in each time block.

One of the highlights was the EOIR panel with Director Juan Osuna, Deputy Chief Immigration Judge Michael McGoings (a great friend of our program), the witty Board Member Edward Grant (who enjoys the rare ability of combining immigration law with movie trivia), Chief Administrative Hearing Officer Robin Stutman, and Acting General Counsel Juan Carlos Hunt. Another stellar panel was Appellate Review at the Court of Appeals, with Hon. Julia Gibbons of the Sixth Circuit, and our own Board Members Betty Stevens (OIL) and Justin Burton. The intellectual firepower of that panel was simply off the charts. My personal favorite was the presentation on the state of religious freedom by Joseph Grieboski (Institute on Religion and Public Policy). I would like to see Joe deliver an updated presentation every year; it was that good.

Of course, commenting on some panels is not intended to denigrate any of the others. We have been fortunate to attract many of the top attorneys practicing immigration law today, whether in government, the private sector, or the world of NGO's. In that last category, I would be remiss not to mention Sally Kinoshita of the Immigrant Legal Resource Center, who has done so much to broaden the humanitarian law aspects of our program.

I do wish to specifically thank the many Board Members and other presenters who gave of their limited free time to make the Seminar possible and beneficial. Special thanks to FBA Executive Director Jack Lockridge for joining us in this last year of his tenure, Cindy James for handling the vast amounts of administrative detail and making everything go so smoothly, and of course, the great Barry Frager, who put it all together as Coordinator.

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In This Issue

July/Aug. 2012 *Published by the Immigration Law Section of the Federal Bar Association*

Letter to a Young Immigration Lawyer

Jason Dzubow

One of the perks of working in an area of the law (asylum) that interests law students and young lawyers is that I periodically get to meet people seeking advice about starting a practice or finding a job doing asylum cases. It's never easy to advise people about their careers, but there are a few pieces of wisdom I've picked up over the years that I try to pass on. So for what it's worth, here are some thoughts for up-and-coming immigration lawyers:

• You can do it. This one sounds trite, so I probably should not have put it first, but I think it is the most important piece of advice I can give. It may seem difficult (or impossible) to get started in the field of asylum law, but people who persist almost always succeed. In my case, I could not find the job I wanted, so I worked at another job for a few years, put most of my income towards paying off my student loans, and then opened my own practice. I kept expecting it to fail, but so far–eight years later–I'm still in business. Also, once you get your first job in the field, it is easier to move around. I've seen many friends move between public interests jobs, private firms, government, and academia. In other words, once you're in, you're in.

• Experience in the field prior to and during law school is more important than grades, law school rankings or law journal. If you are thinking of a career in asylum law, try to gain as much experience as possible while in law school. There are many opportunities to volunteer, including at the Immigration Court or DHS, for non-profit organizations, and even for private attorneys. Also, publishing in law school journals or other journals is a good way to get some experience and attention.

• Try to get a clerkship. A clerkship or an internship with a court is a great way to learn how judges decide cases. And if you know what judges want, it will help you throughout your career. I clerked for the Third Circuit in Philadelphia and for the Immigration Court in Arlington, Virginia. Both jobs taught me a lot and made me a better lawyer.

• Volunteer. One way to get your foot in the door is to volunteer with an organization that represents asylum seekers. There are many, and they are often in need of free labor. Volunteering for one of these organizations will allow you to meet people in the field, learn about paying job opportunities, and learn the skills needed to effectively represent people in court and at the asylum office. I know several people whose volunteer positions led to full time employment. I would suggest that you think strategically about where you volunteer–some organizations are better than others for purposes of networking, learning the ropes, and getting hired.

• Keep salary expectations realistic. Your clients are refugees for Pete's sake.

• Consider opening your own practice. However, I would encourage you not to do this anywhere near Washington, DC. If I am giving you free advice, the least you can do is not compete with me. Starting a practice of your own may seem daunting, but it really is do-able. In fact, most private immigration attorneys are solo or work for small firms. There is a lot of support available from bar associations, organizations (like AILA), and other attorneys. Also, many bar associations have a person dedicated to helping lawyers start law firms. Call your bar association and ask about the resources they can offer you.

If you are thinking about a career in immigration law and asylum, I hope you will be encouraged to give it a go. It's a rewarding area of the law where you will have an opportunity to make a real difference in your clients' lives. ◆

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News You Can Use

Rome, Italy – The FBA Immigration Law Section, in conjunction with the John Felice Rome Center, Loyola University Chicago School of Law, and the Stanford University Arthur and Toni Rembe Rock Center for Corporate Governance, sponsored a distinguished panel of experts on the subject of Citizenship in a Global Era, May 25, 2012, at the Centro Studi Americani in Rome. Peggy McCormick of our Section was the coordinator; Peggy and Hon Mimi Tsankov, both Board Members, joined the impressive faculty. Robert Guest, business editor for the Economist gave the keynote address.

Washington, DC – Andres Benach, Thomas Ragland, and Jennifer Cook have formed a new firm Benach Ragland LLP, dedicated to the practice of immigration law.

San Francisco CA - The National Association of Immigration Judges (NAIJ) has certified the election of new officers: Lawrence Burman, as Secretary-Treasurer, Dorothy Harbeck, as Vice President (Eastern Region), and A. Ashley Tabaddor, as Vice President (Western Region). Judges Burman and Harbeck are, of course, members of our Section board.

Arlington, VA - In a radical break from tradition, Judge Wayne R. Iskra of the U.S. Immigration Court in Arlington, Virginia declared Thursday, May 24, as the first "Seersucker Thursday" for the Court. Normally, the season does not begin until the first Thursday after Memorial Day. In describing the motivation for his surprising announcement, Judge Iskra said "I got mine all cleaned and pressed and the buttons moved for my trip to Florida, so why not? As a progressive, I've always felt that traditions are there to be broken. Besides, the system is broken anyway." Sadly for those in the Ballston area who eagerly await the fashion highlight of the summer, this will be the last Seersucker Season at the famed Ballston Courthouse. The Immigration Court will be moving to a new state-or-the-art courthouse in Crystal City in August.

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Immigration Relief –a Haiku

By Leila B. Higgins

Credibly Confused by Counsel,
Credibly Confused by life.
He's a Good Guy!
Let's keep him.
Deportation will be too hard on the wife.

Leila B. Higgins is a student at American University Washington College of Law. *© Leila B. Higgins 2012. All rights reserved.*

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The Green Card is published by the Federal Bar Association's Immigration Law Section, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201, (571) 481-9100, (571) 481-9090 fax.

For more information about the section, please visit www.fedbar.org/Sections/Immigration-Law-Section.aspx.

Motion Practice #1: File in the Right Place

Hon. Paul Wickham Schmidt[1]

This is the first in a series of short articles about the important area of motion practice before the Immigration Courts. Contrary to some popular myths, my experience is that most motions are not dilatory, but rather are essential to due process and proper docket management by Immigration Judges.

Thoughtful motions by both parties give us as judges opportunities to correct errors, resolve important and complex legal issues in advance of the hearing, schedule cases in an intelligent manner (with an increasing chance that the parties will be well-prepared for the merits hearing), ensure cases are properly consolidated for efficiency, get cases to the correct court's jurisdiction, allow the completion of the United States Citizenship and Immigration Services ("USCIS") adjudication process, and, in a number of important instances, complete cases in chambers without hearings. A good example of the latter is where all evidence has been taken at an individual hearing, but the fingerprints and biometrics need to be completed or checked. Often, this can be accomplished by a joint motion without having another Master Calendar hearing.

Follow the Immigration Court Practice Manual (ICPM)

The most convenient practical guide to proper motions practice before the Immigration Courts is the Immigration Court Practice Manual ("ICPM"), which is available online through the Executive Office for Immigration Review ("EOIR") website.[2] The ICPM, applicable nationwide, replaces all prior local rules, and has specific chapters devoted to filing[3] and motions practice[4] as well as a number of helpful forms and charts.[5] There is a comparable Board of Immigration Appeals Practice Manual, also available on the EOIR website, which applies to appellate practice.

General Rule for Filing in Immigration Court

One important, but often overlooked, aspect of motion practice is filing in the correct place. Every month, I get motions that should have been filed with the Board of Immigration Appeals ("BIA"), the Department of Homeland Security ("DHS"), or a different Immigration Court. This type of defective filing can have extremely serious consequences, such as missing filing deadlines, which may preclude a client from being heard on a matter.

Generally, a motion can be filed with our Immigration Court if: 1) the case is currently pending before a judge of our court; or 2) a judge of our court made the last decision in the case; and 3) an appeal has not been filed with the BIA.

Immigration Court/BIA Interplay

One of the most potentially confusing situations involves the jurisdiction of the BIA. Under the regulations, a motion to reopen or reconsider must be filed with the BIA if the BIA made the last decision in the case.[6] There is an exception, however, if the BIA's last decision dismissed the appeal for lack of jurisdiction, in which case any motion to reopen must be filed with the Immigration Court where the judge made the last decision.[7] For example, if the BIA dismissed for lack of jurisdiction the decision of an Arlington Immigration Judge who now sits in Baltimore, a motion to reopen must be filed with the Arlington Immigration Court, rather than the BIA or the Baltimore Immigration Court.

There is another exception, however, if the motion requests reconsideration of the BIA's decision to dismiss the appeal for lack of jurisdiction. For example, the moving party believes that the BIA's dismissal of an appeal or denial of a motion for untimeliness was erroneous, or the party requests that the BIA nevertheless take the case sua sponte. In such situations, the motion to reconsider must be addressed to the BIA, not the Immigration Judge.[8]

After a case has been remanded to me by the BIA, parties sometimes express disagreement with all or part of the BIA's ruling and ask me to take a contrary position. For example, the Assistant Chief Counsel might disagree with the BIA's determination that the respondent is statutorily eligible for relief or the respondent's counsel might disagree with the BIA's determination that the respondent has committed an aggravated felony. However, such challenges properly should be made by way of a motion to reconsider addressed to the BIA[9] or a direct appeal to the BIA of my decision upon remand. I am bound by the "law of the case" to follow the BIA's determination.

Another appeal-related jurisdictional issue arises when a motion to reopen or reconsider is filed with the Immigration Court as an alternative to, or in conjunction with, an appeal to the BIA. Even if that motion is timely filed with the Immigration Court, a later appeal to the BIA strips the Immigration Judge of jurisdiction.[10]

Additionally, if using a motion to reopen or a motion to reconsider before an Immigration Judge as a supposed "alternative" to an appeal, the litigant must consider the substantive effect. An Immigration Judge's denial of a motion to reopen or reconsider can be appealed to the BIA.[11] However, in considering the appeal of the denial of such a motion, the BIA will consider only the issues directly related to the denial of the motion, not the correctness of the underlying decision on the merits. In other words, motions to reopen or reconsider serve different purposes than, and are

not substitutes for, a direct appeal of an order of removal.

Change of Venue and Bond

Another occasional problem involves motions to change venue. Such motions must be filed with the Immigration Court which initially had jurisdiction over the case, rather the Immigration Court having jurisdiction over the place where the respondent currently resides or is detained.[12]

This situation is further complicated if the motion to change venue must be combined with a motion to reopen or a request for bond. For example if a respondent who is the subject of an in absentia order issued by the El Paso Immigration Court is currently detained in Virginia, a motion to reopen must be filed in El Paso, not with the Arlington Immigration Court.

Indeed, the Arlington Immigration Court would not even have jurisdiction to consider a motion for bond in such a case because the respondent is under a final order of removal.[13] Therefore, although the regulations direct that motions for bond be filed with "the Immigration Court having jurisdiction over the place of detention,"[14] an Immigration Judge will lack jurisdiction to order release on bond so long as the respondent remains under a final order of removal.

DHS Adjudications, Including the "Morton Memorandum"

Another issue involves adjudications committed to the Department of Homeland Security ("DHS"). The Immigration Court does not have jurisdiction over visa petitions and other DHS adjudications.[15] Consequently, motions relating to those matters must be addressed to the proper DHS authority. It might be relevant and appropriate to keep the Immigration Judge informed of such motions by filing information copies with the court and serving them on the Assistant Chief Counsel. However, such filings, although served on the Assistant Chief Counsel, do not substitute for proper filing of motion papers with the appropriate DHS adjudicating authority.

The foregoing cautionary note also applies to the recently announced DHS policy on prosecutorial discretion, the so-called "Morton Memorandum."[16] The Immigration Courts lack authority to exercise or review prosecutorial discretion.[17] Consequently, motions for an exercise of "prosecutorial discretion" under the Morton Memorandum or for any other purpose must be filed with the DHS, not the Immigration Court. However, it might be appropriate to move for a discretionary continuance of Immigration Court proceedings while the DHS is considering the request for prosecutorial discretion.

Conclusion

In this article, I have introduced the ICPM and discussed some of the ways to ensure that your motion gets to the judge or tribunal which can actually adjudicate it. In the next motions article, I will discuss the advantages of, and best practices for, in person filing of motions. ◆

Endnotes

[1]These are my views, and they do not represent the official position of the Attorney General, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, the Federal Bar Association, my colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. They also do not represent my position on any case that I decided in any capacity in the past, that is pending before me, or that might come before me in the future. They also are not legal advice and are not a substitute for reading the applicable statutes, regulations, precedents, and practice manuals. These articles are an expansion of my remarks at a D.C. Bar CLE program on September 22, 2011. © 2012 Paul Wickham Schmidt. All Rights Reserved.

[2]www.usdoj.gov/eoir.

[3]*See* Immigration Court Practice Manual ("ICPM") Ch. 3.

[4]ICPM Ch. 5.

[5]*See, e.g.*, ICPM Appendix A (Immigration Court Addresses), D (Deadlines), F (Sample Cover Page), G (Sample Proof of Service), K (Where to File), P (Sample Table of Contents), Q (Sample Proposed Order).

[6]8 C.F.R. §1003.2(a). See generally ICPM Appendix K.

[7]*Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974), modified, *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998); *see* 8 C.F.R. §1003.23(b)(1)(ii) ("Motions to reopen or reconsider a decision of an Immigration Judge must be filed with the Immigration Court having administrative control over the Record of Proceeding.")

[8]*Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998).

[9]Board of Immigration Appeals Practice Manual § 5.2(a)(iii)(B). Such motions are, however, "disfavored." Id.

[10]8 C.F.R. §1003.23(b)(1); see ICPM § 5.7(h).

[11]8 C.F.R. §1003.1(b)(3).

[12]8 C.F.R. §1003.14(a).

[13]Custody determinations for aliens under final orders of removal are committed to the DHS. 8 C.F.R. §1241.2.

[14]8 C.F.R. 1003.19(c)(2).

[15]*See,e.g., Matter of Aurelio*, 19 I&N Dec. 458 (BIA 1987).

[16]"Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, et al., June 17, 2011, available online at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[17]*See,e.g., Matter of Bahta*, 22 I&N Dec. 1381, 1391-92 (BIA 2000).

The Fortnight in Review

ANGELO A. PAPARELLI

It's been a momentous, startling and exasperating two weeks. The Supreme Court ended the term with three blockbuster decisions, and U.S. Citizenship and Immigration Services (USCIS) held a less-noticed public engagement that knocked the socks off one important segment of the stakeholder community.

In Arizona v. United States, the Court -- notwithstanding the ludicrous claims of victory from AZ Gov. Jan Brewer -- voided most of SB1070 on federal preemption grounds, while all but inviting suits on the lone-surviving section, the vile "show-me-your-papers" provision that many fear will release a Pandora's opened box of racial and ethnic profiling.

In National Federation of Independent Business v. Sebelius, a SCOTUS majority in an opinion by Chief Justice John Roberts, calling balls and strikes, upheld most of the Affordable Care Act.

In American Tradition Partnership v. Bullock, a five-Justice majority threw out a century-old Montana law banning corporate campaign contributions in light of Citizens United v. Federal Election Commission.

In an Engagement with Director Alejandro Mayorkas and USCIS Economists, USCIS allowed practitioners of the dismal science to heap more mud into the already opaque pool of confusion that sits atop the EB-5 employment-creation immigrant-investor green card category.

Each of these events -- though some are quite positive -- carries seeds of concern that are likely to sprout noxious weeds within the immigration ecosphere for years to come. Here, then, are what pleases and what remains lodged in my craw.

The Arizona Ruling

The Court put a brake on most state laws that interfere with federal sovereignty over immigration. Now, perhaps, grandstanding politicians in state legislatures and cities will think twice before wasting precious resources defending laws that harm business and damage a state's brand, while victimizing U.S. citizens and mixed-status families.

Moreover, in prose almost resembling poetry (to my ears at least), the Court majority offered a paean to American immigration: The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here.

And paraphrasing the words (bolded below) of Voltaire, Spiderman and others before them, the majority homed in on the nub of the problem, a failure of people and polity to push for comprehensive immigration reform:

The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.

Still, the Court's majority should never have promoted the urban legend that immigrants are more prone to criminal conduct than the population at large. Citing a much-criticized study from a partisanly wolfish think tank wearing nonpartisan sheep's garb, the majority decision observed:

[In] the State's most populous county, [unauthorized] aliens are reported to be responsible for a disproportionate share of serious crime. See, e.g., Camarota & Vaughan, Center for Immigration Studies, Immigration and Crime: Assessing a Conflicted Situation 16 (2009) (Table 3) (estimating that unauthorized aliens comprise 8.9% of the population and are responsible for 21.8% of the felonies in Maricopa County, which includes Phoenix).

The Health-Care Decision

The word "immigration" came up but once in the opinion -- a comparison of Congress's comparative authority under its constitutional power to tax and to regulate commerce:

[A]lthough the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes. (Emphasis added.)

National Federation of Independent Business v. Sebelius, however, is likely to be far more important for what was left unsaid about immigration -- the scope of comparative rights to health care afforded to legal and undocumented immigrants.

Concerning health coverage for the latter group, the subject is rife with obvious controversy, typified famously by Rep. Joe Wilson's impudent "you-lie!" charge to President Obama during the 2009 State of the Union address

to Congress. The President was right then when he explained that the Affordable Care Act excludes coverage for unauthorized immigrants.

In truth, however, the legislation will probably have a mixed, uncertain impact on the undocumented:

At first glance, the Affordable Care Act's implications for immigrants seem obvious. The legislation benefits legal immigrants and leaves out the undocumented. As of 2014, it provides legal immigrants with subsidies to purchase insurance, requiring them, like other Americans, to maintain coverage and offering them access to state insurance exchanges. But the law denies undocumented immigrants any subsidies or even the use of the exchanges to buy insurance with their own money.

The full story, though, is more complicated. The act leaves in place a five-year waiting period for legal immigrants to qualify for Medicaid and the Children's Health Insurance Program. As a result, though they will be able to use the exchanges to purchase subsidized coverage, many recently arrived legal immigrants with incomes below or near the poverty line are likely to remain uninsured for want of resources to pay their share of the costs. Yet because the act provides substantially increased aid to community health centers, it may help many immigrants -- both legal and undocumented -- receive medical care even without insurance.

The Montana Slap Down

This decision -- which says nothing directly about immigration -- is shocking not so much for its jurisprudence as its tone-deaf disregard of the damage caused by the tsunami of anonymously donated sums unfairly determining the outcome of countless federal and state elections in the wake of Citizens United. Immigration reform -- like every other policy decision facing post-Citizens United America -- will be derailed by the corrupting influence of secret money in politics and its foreseeable result: infinitely pliable legislators bending to the will of their unnamed masters.

The EB-5 Engagement with Economists

Historians of the EB-5 visa know that this benighted category has witnessed persistent government ineptitude from its inception. In its early years, a series of former immigration officials teased informal guidance letters from naïve or inattentive occupants of the INS general counsel's office allowing all sorts of riskless forms of creative financing to serve, improperly, as qualifying $500,000 or $1 million investments. Not surprisingly, EB-5 fraud schemes flourished. That jig was up when a quartet of precedent decisions outlined a new set of EB-5 rules.

Now in its twenty-secondth year, the EB-5 program and its growing population of stakeholders still beg for publication of clear and reasonable regulations that maintain the integrity of the category yet are faithful to its legislative text, history and purpose, and are applied with consistent standards of interpretation.

Even the most jaundiced audience members at the June 22, 2012 engagement came away dumbfounded, however, by the breadth of the economists' pronouncements of new and extreme extralegal interpretations and requirements. As a partial transcription of the presentation and later Q & A reveals, the government's supposedly economics-based interpretation of how investments lead to job creation has taken on such a miserly cast that it will out-Scrooge Scrooge.

Truth be told, I'm no economist and I have no formal training on when a new job is "created." (In parochial school, I learned that only God can create; in public school, I learned that neither matter nor energy can be created.) But I understand the painful yet salutary principle of capitalism known as "creative destruction" espoused by economist Joseph Schumpeter, namely, that there will be winners and losers, but ultimately more innovation, prosperity and jobs will ensue. (Phrased more prosaically, I would put it that "if you want to make an omelet you need to crack a few eggs.")

Despite my lack of training in the mathematics of job creation, I understand, as the Obama administration confirms, that counting newly created jobs is not an exact science but rests on a variety of arguable presumptions and inferences. I also accept the precept that investments in America will more readily be made if the laws regulating the investment are not ever-changing, impracticable, unclear or arbitrarily applied.

Sadly, however, as commenters on the EB-5 engagement have noted, the USCIS economists' rabbit-from-the-hat proclamations have been "startling," are affected by fear and nervousness, and made it "riskier for Regional Centers to do any development type of EB-5 projects. [and] . . . [harder] for potential EB-5 investors to ascertain whether an EB-5 project complies with the EB-5 requirements."

My view, which I shared with USCIS leadership, is this:

With all respect to the economists and to your fine team, there really needs to be an engagement that discusses fundamental legal principles that take into account the law, the legislative history and the purpose of the EB-5 program. The direction the economic analysis is going -- in my view -- will destroy the program and hurt its salutary goals of investment and job creation in the United States.

As you can see, it's been a long and exhausting two weeks. I need a vacation! ◆

Conference on Citizenship in a Global Era

Rome, Italy

On May 25, 2012, the Federal Bar Association, Immigration Law Section, Loyola Law School and the John Felice Rome Center and Stanford Law School's Arthur and Toni Rembe Rock Center for Corporate Governance sponsored the inaugural Conference on Citizenship in a Global Era in the eternal city. The program was chaired by Margaret H. McCormick and F. Daniel Siciliano.

Pasta Dinner in Trastevere the night before the conference. The program began with a dinner in Rome's magnificent Piazza di Santa Maria in Trastevere where about 35 people gathered for a pasta dinner outdoors in the lovely Ristorante Galeassi.

Centro di Studi Americani The next day, the conferees convened at the Centro di Studi Americani, a four-hundred year old Palazzo built by Carlo Maderno. The Centro is in front of the famous and beautiful Fontana delle Tartuge or Turtle Fountain (which, for centuries, was the only source of water for the nearby Jewish Ghetto.)

The Conference covered broad issues of citizenship of very current relevance. We were pleased to have speakers from various European countries, both US and European trained, as well as a number of US lawyers, including

AILA president Eleanor Pelta. Robert Guest, Business Editor for *The Economist* recounted stories of his travels through dozens of countries and 44 American states, observing how America's unique ability to attract and absorb migrants lets it tap into the energy of all the world's diaspora networks. The program was designed to be relevant to a broad cross section of practices, with both policy and practice consideration s discussed on a number of issues.

The Party Afterward After the conference, all the attendees were invited back for antipasto at the Residenza Giubbonari, just 400 meters from the Centro, where the organizers had rented apartments, including one with two beautiful terraces overlooking the domes of Rome. The party lasted for several hours, and everyone heralded the conference as a wonderful success.

We have already begun our plans for the May, 2013. You will not want to miss it next year!

The Tension of Padilla *Retroactivity in New Jersey: Developments in Ineffective Assistance of Counsel Regarding the Immigration Consequences of Criminal Proceedings*

AMELIA WILSON

For many non-citizens facing removal in immigration proceedings, a last opportunity for relief is the defense that they received ineffective assistance of counsel when accepting plea deals in criminal court in violation of the standards set forth in the seminal cases of *State v. Nuñez-Valdéz*, 200 N.J. 129 (2009) and *Padilla v. Kentucky*, 559 U.S. ---, 130 S.Ct. 1473 (2010). The gravamen for the U.S. Court of Appeals for the Third Circuit and the New Jersey Supreme Court subsequent to the *Padilla* decision was whether this standard should retroactively apply to cases where convictions pre-date *Padilla*'s ruling. Applying the same governing retroactivity principle, these courts reached clashing interpretations. The U.S. Court of Appeals for the Third Circuit in *U.S. v. Orocio*, 645 F.3d 630 (3d Cir. 2011) found *Padilla* merely restated an existing requirement and was therefore retroactive. In contrast, the New Jersey Supreme Court found in *State v. Gaitan*, 209 N.J. 339 (2012) that *Padilla* was a new rule and therefore prospective only.

Realizing this tension, the Superior Court of New Jersey Appellate Division in *State v. Barros* recognized that the defendant had a "colorable claim for relief in the federal courts of the State" directed him to petition for a writ of *habeas corpus* in the United States District Court for the District of New Jersey.[1]

On April 30, 2012, the U.S. Supreme Court granted *certiori* to *U.S. v. Chaidez*, a case arising from the Northern District of Illinois which assesses *Padilla*'s retroactivity.[2]

A. Governing Legal Principles

a. Ineffective Assistance of Counsel

The Sixth Amendment of the United States Constitution and the New Jersey Constitution guarantee criminal defendants the right of counsel, which requires that defendants receive "effective assistance of counsel."[3] To establish an ineffective assistance of counsel claim, a defendant must establish:

1) the performance prong—*i.e.*, whether counsel's representation "fell below an objective standard of reasonableness" and

2) the prejudice prong- *i.e.*, whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [4]

With the *Strickland* standard in mind, both the New Jersey Supreme Court and the United States Supreme Court decided cases concerning ineffective assistance of counsel claims in which guilty pleas were followed by immigration consequences. In 2009, the New Jersey Supreme Court in *Nuñez-Valdéz* imposed a duty on counsel to avoid providing false or affirmatively misleading information about the deportation consequences of a guilty plea.[5] A year later, the United Supreme Court in *Padilla* mandated that defense attorneys must affirmatively advise their clients of the potential immigration consequences of pleading guilty or essentially the attorney is at risk of providing constitutionally defective assistance of counsel.[6]

b. Retroactivity

The U.S. Supreme Court precedent of *Teague v. Lane*, 489 U.S. 288 (1989) governs retroactivity of constitutional principles to criminal cases. The *Teague* test for determining whether a constitutional principle involved in a criminal case should be applied retroactively was based on classification of a "new rule" or an "old rule." A rule is "new" "if the result was not dictated by precedent existing at the time the defendant's conviction became final."[7] There is a general rule of nonretroactivity for new rules on collateral review.[8] A new rule is retroactively applicable to cases on collateral review only if:

1) the new rule places certain kinds of criminal conduct beyond the power of the criminal law-making authority to proscribe or

2) the new rule is a "watershed rule[ ] of criminal procedure" that "alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[9]

Put another way, a new rule is not entitled to retroactive application, whereas an old rule should be retroactively applied on direct and collateral review.

B. Third Circuit Reasons that *Padilla* is an Old Rule and Therefore Retroactive

The Third Circuit ruling in *U.S. v. Orocio*, 645 F.3d 630 (3d Cir. 2011) was the first U.S. Circuit Court of Appeals to rule on the retroactivity of *Padilla*. This case emanated from a guilty plea in U.S. District Court of New Jersey to simple possession of a controlled substance. Orocio was arrested in New Jersey on October 3, 2003 and was later charged by indictment in federal court with drug trafficking. As a result of a plea agreement Orocio pled guilty on October 7, 2004 to one count of posses-

1--- A. 3d ---, 2012 WL 1365801 (N.J. Super. A.D. 4/20/12), at *slip op*. * 6.

2*Chaidez v. U.S.*, 655 F.3d 684 (7th Cir. 2011) *certiori granted by Chaidez v. U.S.*, 2012 WL 1468539 (Apr. 30, 2012) (No. 11-820). Interestingly, the Northern District of Illinois initially held *Padilla* to be retroactive and this determination was then overturned by the Ninth Circuit.

3*Strickland v. Washington*, 466 U.S. 668, 686 (1984).

4*Strickland*, *supra,* at 688-94; *see also State v. Fritz*, 105 N.J. 42, 58 (1987) (adopting *Strickland* standard for ineffective assistance of counsel claims under New Jersey Constitution).

5*Nuñez-Valdéz*, *supra*, at 131.

6*Padilla, supra,* at 1483.

7*Teague*, *supra*, at 301.

8*See generally Danforth v. Minnesota*, 552 U.S. 264, 279 (2008).

9*Teague*, *supra*, at 311.

sion of a controlled substance in contravention of 21 *U.S.C.* § 844. This guilty plea triggered his removal proceedings.

The *Orocio* Court discussed its analysis under two U.S. Supreme Court precedents *Teague* and *Strickland*. *Orocio* concluded that because *Padilla* "followed directly from *Strickland* and long established professional norms, it is an "old rule" for *Teague* purposes and is retroactively applicable on collateral review."[10] The *Orocio* Court reasoned that *Padilla* did not "break new ground" but instead merely "reaffirmed defense counsel's obligation to the criminal defendant during the plea process."[11] In support of its contention that *Padilla* is an old rule, *Orocio* cited to the *Padilla* opinion itself which seemingly anticipated the retroactive application of its holding when it considered the possibility of floodgates and the effect on final convictions.[12] *Orocio* held *Padilla* involves an old rule and thus commanded retroactive application.[13]

C. New Jersey Supreme Court finds *Padilla* is a "New Rule" and Therefore Retroactive

On February 28, 2012, the New Jersey State Supreme Court issued its long-awaited ruling in *State v. Gaitan*, 209 N.J. 339 (2012). The subject of this case (consolidated with *State v. Goulbourne*) is a petition for post conviction relief (PCR). Defendant was a lawful permanent resident who on June 27, 2005 pled guilty to third degree distribution of a controlled dangerous substance within 1000 feet of a school pursuant to *N.J.S.A.* 2C:35-7. This guilty plea rendered him removable as an aggravated felon under the Immigration and Nationality Act (INA) § 237(a) (2) (A) (iii).

Pursuant to the principles of *Teague* and *Strickland*, the *Gaitan* Court conclusively held that *Padilla* presents a new rule and should not be applied retroactively.[14] In the first part of its analysis the *Orocio* Court reasoned that *Padilla* is a new rule not because of *what* it applies (*Strickland*), but *where* it applies (to collateral immigration consequences of a plea bargain).[15] *Padilla* is not a simple application of *Strickland* to new facts.

The *Gaitan* Court further found that reasonable minds could disagree about whether *Padilla* could be anticipated and therefore was not dictated by precedent.[16] The *Gaitan* Court observed the various viewpoints expressed in the *Padilla* opinion and also the pre-*Padilla* disagreement among federal courts about whether there is a Sixth Amendment duty to provide advice about collateral consequences.

The *Gaitan* Court observed that the Supreme Court has never applied *Strickland* to collateral consequences of a guilty plea. Put another way, it has never before held that Sixth Amendment requires a criminal attorney to provide advice about matters not directly related to the criminal prosecution. The New Jersey Supreme Court held that "[although the [U.S.] Supreme Court stated in *INS v. St. Cyr* that defense counsel should advise clients about immigration consequences…the context was not a discussion of the Sixth Amendment right to counsel, and the Court did not require such advice."[17]

Lastly, the *Gaitan* Court deduced that the *Padilla* decision itself does not provide evidence that the Court believed it was applying an old rule.[18] Although *Padilla* was heard and decided on habeas corpus review, Respondent Kentucky failed to raise as a defense that Padilla was seeking review of a new rule. Moreover, the Court's concern about a flood of challenges does not shed light as to whether it is a new or old rule. The Court's concern could have been regarding all cases on direct appeal and collateral review or cases just on direct appeal.

The *Gaitan* ruling is in direct conflict with the Third Circuit ruling in *Orocio, supra* which was decided eight months earlier. Significantly, the *Gaitan* Court acknowledged the *Orocio* decision:

> The Third Circuit, the first Court of Appeals to address the issue, initially concluded that *Padilla* involved the application of the existing *Strickland* test, which made its holding applicable on collateral review.[19]

Instead of following *Orocio*'s analysis, *Gaitan* takes its lead instead from a footnote in a subsequent case decided by the same three judge panel that decided *Orocio* and noted that "there is no judicial consensus on the issue [of *Padilla*'s retroactivity] and [that] many lower courts have come to a contrary conclusion."[20]

> *Gaitan* observed:
> In the past, noncitizens who committed certain crimes had opportunities to avoid deportation or removal, either through statutory waivers or the exercise of judicial discretion. However, beginning in 1990, most forms of relief for noncitizens who committed crimes qualifying as aggravated felonies were eliminated, thereby rendering them almost certain to be removed.

Gaitan, supra, at 358. After a short history of the development of U.S. immigration laws, the *Gaitan* Court noted the comment of the U.S. Supreme Court that "[b]ecause of changes to immigration laws, "if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable...."[21] *Gaitan* also mentioned that as early as 1988, New Jersey Plea Forms included a question addressing possible immigration consequences.[22]

In applying the two exceptions of *Teague* to *Padilla*, *Gaitan*

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10 *Orocio*, *supra*, at 641.
11 *Orocio*, *supra*, at 638.
12 *Orocio*, *supra*, at 641.
13 To date, the Fifth, Seventh and Tenth Circuits have held that Padilla should not be retroactively applied. See *U.S. v. Amer*, -- F.3d --, 2012 WL 1621005 (5th Cir. 2012), *U.S. v. Chang Hong*, 671 F.3d 1147 (10th Cir. 2011) and *Chaidez*, supra.
14 *Gaitan*, *supra*, at 371.
15 *Gaitan*, *supra*, at 368.
16 *Gaitan*, *supra*, at 368-69.
17 *Gaitan*, *supra*, at 369.
18 *Gaitan*, *supra*, at 369-70.
19 *Gaitan*, *supra*, at 366-67.
20 *Gaitan*, *supra*, at 366 quoting *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 228 n. 5 (3d Cir. 2011) (calling possibility that *Padilla* is not retroactive "far from remote.")
21 *Id*. at 360-61 *citing Padilla*, 130 S.Ct. at 1480.
22 *Id*. at 362.

Subpoenas in Immigration Court

Andrea Saenz

Although noncitizens in removal proceedings lack the full constitutional protections of criminal defendants or the broad discovery tools of civil litigants in federal court, they are not entirely without protections related to evidence. Aliens have an explicit statutory right to present evidence and cross-examine adverse witnesses. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(B). Evidence is not always easy to obtain, however, and parties may need the resources of the court to exercise this right or to help meet their burdens of proof and production. This article explains the Immigration Court's subpoena power, its treatment by the Board of Immigration Appeals and federal circuit courts of appeals, and the incomplete enforcement mechanisms Immigration Judges now have.

Immigration Judges may issue subpoenas for the attendance of witnesses or the production of documents during the removal proceeding. INA § 240(b)(1); 8 C.F.R. §§ 1003.35(b), 1287.4(a)(2)(ii). They may also order depositions taken for the testimony of essential witnesses who are not reasonably available for the hearing. 8 C.F.R. § 1003.35(a). Subpoenas may be issued sua sponte or on application of either party, provided the motion for subpoena states what the party expects to prove with the requested evidence and shows there has been a diligent but unsuccessful effort to obtain it. 8 C.F.R. §§ 1003.35(b)(1)(2), 1287.4(a)(2)(ii)(A)(B). If those requirements are met and the Immigration Judge is satisfied that the witness will not appear or produce the requested material and that the evidence is essential, he or she shall issue a subpoena. 8 C.F.R. §§ 1003.35(b)(3), 1287.4(a)(2)(ii)(C). The *Immigration Court Practice Manual* contains detailed instructions for filing a motion for subpoena, as well as a sample subpoena. *Immigration Court Practice Manual*, § 4.20, at 82, App. N, at N-1 (Apr. 1, 2008), www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm.

In practice, subpoenas are usually requested by the respondent, who generally lacks the resources of the Department of Homeland Security ("DHS") or the Department of Justice ("DOJ") to obtain documents. Respondents might request subpoenas for the testimony of hard-to-reach witnesses, or for the production of medical records, criminal records, or other materials that might make their case stronger, including documents in the DHS's possession. One common scenario involves allegations of marriage fraud in cases where the Government introduces out-of-court statements from the respondent's former spouse and the respondent seeks to cross-examine that person. In this and related fact patterns, the denial of a subpoena may be closely linked with an Immigration Judge's decision to rely on or dismiss the hearsay documents in question when ruling on the case in chief.

Immigration Court Subpoenas at the Board and in the Federal Courts

The federal courts have reviewed requests to subpoena various categories of information, with only one real trend apparent: the courts carefully review whether the Immigration Judge faithfully applied the regulatory standards for a subpoena. The standard of review used by the circuit courts of appeals may depend on whether the Immigration Judge's action is framed as a constitutional violation or as a statutory or regulatory violation, although in most cases, the denial of a subpoena will be reviewed for an abuse of discretion. *See Guevara Flores v. INS*, 786 F.2d 1242, 1252 (5th Cir. 1986) (finding no abuse of discretion under the regulation); *Marroquin-Manriquez v. INS*, 699 F.2d 129, 136 (3d Cir. 1983) (stating that the Immigration Judge's denial of a subpoena was "not an abuse of discretion nor a denial of due process").

Reversal of an Immigration Judge's Denial of a Subpoena

While the use of subpoenas may be rare in some Immigration Courts, the circuit courts have not been shy about reversing those Immigration Judges who dismissed valid motions without following the regulations or who made no attempt to enforce a subpoena that had been issued. The Board has been quieter on the topic of Immigration Court subpoenas and has not mentioned them in a precedent decision since 1995.

In *Malave v. Holder*, 610 F.3d 483, 487-88 (7th Cir. 2010), the United States Court of Appeals for the Seventh Circuit reversed an Immigration Judge who admitted written statements accusing Malave of marriage fraud but denied a subpoena request for her ex-husband based on the Immigration Judge's belief that the witness could not be found. Judge Richard Posner, writing for the panel, dismissed this reason as speculation, writing that "[a] prediction that a person can't be found, or that cross-examination won't be fruitful, is a poor reason to deny a litigant the statutory entitlement to cross-examine adverse witnesses." *Id.* at 488. This approach is in contrast to an early Board case where the Board upheld the Immigration Judge's denial of a subpoena, among other reasons, because the respondent did not sufficiently show that her father, a migrant worker, could be located. *Matter of Vergara*, 15 I&N Dec. 388, 389-90 (BIA 1975). Although the court in *Malave* states that it avoided the question of what constitutes proper enforcement of a subpoena, the opinion assumes that the Immigration Judge could have asked "federal agents to enforce the subpoena"—which, as discussed later, may not be such a useful assumption. *Malave*, 610 F.3d at 486. *Malave* also emphasizes that while there is no Sixth Amendment right of confrontation in removal proceedings, the rights to a fair hearing and cross-examination of adverse witnesses have been provided by statute, so the improper denial of a subpoena is still a violation of an alien's rights and therefore potential grounds for reversal. *Id.* at 487.

The Eleventh Circuit recently reversed an Immigration Judge for denying a subpoena in an unpublished but thorough decision. *Xue Tong Zou v. United States Att'y Gen.*, 367 F. App'x

36, 40 (11th Cir. 2010). The Immigration Judge denied a motion to subpoena the author of a forensic document report that found several of Zou's documents to be false, reasoning that because the DHS promised to produce the witness, a subpoena was not necessary. At several subsequent hearings, however, the DHS did not produce the witness and appeared to have made no efforts to do so. The Immigration Judge did not issue a subpoena or grant a continuance; instead she indicated that she afforded "great weight" to the forensic report and denied Zou's application for asylum. *Id.* at 39. The court found this deprived the petitioner of a fair hearing, stating that "[t]he IJ's broad authority to regulate the course of the proceeding does not trump Zou's constitutional right to a fair hearing." *Id.* at 40.

Most other cases involving Immigration Court subpoenas come from the Ninth Circuit, where Immigration Judges have been reversed for a number of different reasons. In *Agyeman v. INS*, 296 F.3d 871, 883 (9th Cir. 2002), the Immigration Judge was found to have erred by repeatedly telling the respondent, detained thousands of miles from home, that his wife had to testify in person, instead of informing him that she could be subpoenaed to appear at a local office of the former Immigration and Naturalization Service ("INS"). In *Kaur v. INS*, 237 F.3d 1098 (9th Cir. 2001), the court found error where the Immigration Judge denied a request to subpoena the country conditions documents the asylum office used to determine that the respondent was not credible, finding that they were not "essential." The court acknowledged that the Immigration Judge was required to consider the case independently of the asylum officer's assessment but stated that "there was a high probability not only that the government would challenge the Kaurs' credibility, but that the resource materials would be a cornerstone of the government's effort to impeach their testimony." *Id.* at 1101. The court concluded that the documents would enable the Kaurs to ensure that they addressed any discrepancies between their claim and the resource materials, and since an adverse credibility determination was due high deference on appeal, they had made a showing the materials were essential.

The Ninth Circuit has also criticized the Government when subpoenas were issued but not obeyed or enforced. In another marriage fraud case, the Immigration Judge's reliance on a hearsay affidavit from the petitioner's wife was found to be fundamentally unfair where the INS knew she was available to testify but chose not to call her. *Saidane v. INS*, 129 F.3d 1063, 1065 (9th Cir. 1997). The fact that the Immigration Judge had issued a subpoena for the witness, who did not obey it, did not cure the unfairness. *See also Ramos de Rojas v. Gonzales*, 2007 WL 705832 (9th Cir. Mar. 6, 2007) (unpublished) (finding a violation of 8 C.F.R. § 1003.35(b) and prejudice to the petitioner where the Immigration Judge had issued a subpoena for a witness to testify in person and bring documents relating to the petitioner s daughter but allowed the witness to testify telephonically and without the documents).

Affirmance of an Immigration Judge's Denial of a Subpoena

Less colorful, but more common, are cases where the federal courts or the Board affirmed Immigration Judges' denial of a subpoena. Several courts have found that Immigration Judges did not err in finding that the respondent did not make a diligent effort to obtain the evidence before seeking a subpoena. *See Stolaj v. Holder*, 577 F.3d 651, 659 (6th Cir. 2009) (noting there is no Sixth Amendment right of confrontation in removal proceedings); *Quintanilla v. Gonzales*, 151 F. App'x 53, 55 (2d Cir. 2005); *Matter of Duran*, 20 I&N Dec. 1, 3 (BIA 1989). Other Immigration Judges have been affirmed where they found the evidence requested by the subpoena was not "essential," as required by the regulation. *See Cuadras v. United States INS*, 910 F.2d 567, 573 (9th Cir. 1990); *Marroquin-Manriquez*, 699 F.2d at 136; *Martinez-Garcia v. Holder*, 312 F. App'x 707, 708 (5th Cir. 2009) (per curiam); *Hernandez v. Mukasey*, 261 F. App'x 985, 986 (9th Cir. 2007) (noting there must be prejudice to prevail on a due process challenge); *Quintanilla*, 151 F. App'x at 55; *Matter of Linnas*, 19 I&N Dec. 302, 309 (BIA 1985). In a rare case dealing with subpoenas in the context of a bond proceeding, the Board affirmed the Immigration Judge's denial of a subpoena and admission of correspondence from the Department of State for a respondent accused of posing a threat to national security. *Matter of Khalifah*, 21 I&N Dec. 107, 110, 112 (BIA 1995). The Board agreed with the Immigration Judge that bond proceedings are informal and that the denial did not cause him prejudice since the Immigration Judge did not rely on the hearsay evidence in finding the respondent a flight risk.

For those who are both subpoena enthusiasts and Beatles fans, Immigration Court subpoenas even figured in the deportation case against John Lennon. *Matter of Lennon*, 15 I&N Dec. 9, 13-14 (BIA 1974), *vacated on other grounds by Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). The Board affirmed the Immigration Judge's denial of a subpoena for materials in support of Lennon's motion to terminate the proceedings as improvidently begun (that is, politically motivated), noting that such a motion was outside the scope of the court's jurisdiction. While the Board's holding regarding Lennon's deportability for a drug conviction has been overruled by *Matter of Esqueda*, 20 I&N Dec. 850 (BIA 1994), the proposition that Immigration Judges should not issue subpoenas in support of issues outside the court's jurisdiction appears as sound as ever.

Courts have also affirmed Immigration Judges who issued a subpoena but properly declined to enforce it. In *Matter of DeVera*, 16 I&N Dec. 266, 269 (BIA 1977), the Immigration Judge was affirmed where he admitted hearsay evidence after finding that the INS had made a reasonable but unsuccessful attempt to produce a subpoenaed witness. The Seventh Circuit affirmed an Immigration Judge's finding that a subpoena only required the DHS to produce evidence in its possession, so there was no statutory obligation to continue the proceedings for the DHS to produce a video that was actually in the FBI's possession. *Skorusa v. Gonzales*, 482 F.3d 939, 942-43 (7th Cir. 2007). Most recently, the Sixth Circuit affirmed an Immigration Judge's use of written statements from a respondent's husband where the Immigration Judge had issued subpoenas for the husband at two different addresses, both of which were returned by the post office. *Sova v. Holder*, 451 F. App'x 543, 546-47 (6th Cir. 2011). The court noted that DHS was the party who requested the subpoenas, and that since Sova had not

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properly applied for a subpoena herself under the regulations, she could not then claim that the IJ had failed to enforce the subpoena. *Id.* at 547 (citing *Stolaj*, 577 F.3d at 659).

Enforcement Power and Problems

The central difficulty with Immigration Court subpoena power, as judges who have issued subpoenas know, is enforcement. In an Article III court, a person who fails to comply with a subpoena may be found in contempt of court and subject to fines or imprisonment. *See* Fed. R. Civ. P. 45(e); 18 U.S.C. § 401(3) (giving federal courts the power to punish disobedience of lawful court orders with fines, imprisonment, or both). This is not the case in Immigration Court. All the same, Immigration Judges cannot ignore the issue of enforcement because there is a statutory right to present evidence and because, even with the incomplete enforcement scheme that exists, courts have resources that respondents lack. *See Malave*, 610 F.3d at 487; *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004); *Saidane*, 129 F.3d at 1065.

In practice, the official nature of a subpoena probably induces compliance by the majority of those who are served with a subpoena. For those who resist, however, Immigration Judges do not currently have a working contempt authority or the power to issue civil money penalties. On paper, contempt authority is explicit in the Act and was added as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546. Section 240(b)(1) of the Act ("The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act.") But pending the publication of regulations for the contempt power, Immigration Judges still lack the ability to issue formal sanctions. Rulemaking in this regard was initially delayed because the law was enacted during the period when attorneys for the former INS and Immigration Judges were both DOJ employees, raising some concerns about allowing the latter to sanction the former.[1] Following the creation of the Department of Homeland Security, it seems that concern no longer exists. Executive Office for Immigration Review (EOIR) Director Juan Osuna testified before Congress in May 2011 that EOIR intends to submit proposed regulations on sanction authority and civil money penalties to the Office of Management and Budget for interagency review in the near future.[2]

Even without the contempt power, there remains one explicit enforcement mechanism for subpoenas: the regulations provide that Immigration Judges should refer cases of noncompliance to the United States Attorney's Office to request a subpoena for the same materials from the United States District Court. 8 C.F.R. §§ 1003.35(b)(6), 1287.4(d). This is essentially a way for Immigration Judges to access the contempt power of the federal court.[3] This process, however, seems to be little, if ever, used. *See, e.g.*, *Ocasio*, 375 F.3d at 107 (stating that the INS filed a motion asking the Immigration Judge to seek district court assistance in enforcing the subpoena, but not indicating whether the Immigration Judge did so); *Sova*, 451 F. App'x at 546-47 (noting that the enforcement provision is written in mandatory terms, but declining to find error by the Immigration Judge in not invoking it because the petitioner did not herself seek a subpoena under the regulations.) Research uncovered a very small number of petitions for subpoenas filed in district courts, and exactly one subpoena actually issued under the regulation, so it has worked at least once. *United States v. Moran-Gutierrez*, 2009 WL 4975264 (N.D. Tex. Dec. 18, 2009) (ordering the Immigration Judge's subpoena for a witness to be enforced).

These challenges do not mean that violation of an Immigration Court subpoena is without consequences. A violation of a subpoena may result in adverse rulings that can have a significant impact on the outcome of a removal case.[4] For example, several Immigration Judges have found the DHS's decision not to produce witnesses to be of great significance in suppression cases alleging egregious Fourth Amendment violations. This kind of case could easily implicate subpoena issues, as in *Xue Tong Zou*, 367 F. App'x at 40, where the DHS avoided a subpoena by promising to produce a witness and then did not produce her. *See also Navia-Duran v. INS*, 568 F.2d 803, 807 (1st Cir. 1977) (finding the petitioner's admissions involuntary and reversing the finding of deportability, because although the petitioner had moved to subpoena INS officers, the Immigration Judge denied the motions and improperly held that the circumstances of her arrest were immaterial); *cf. Matter of Escobar*, 16 I&N Dec. 52, 53 (BIA 1976) (finding that a subpoena for information about the respondent's alleged illegal arrest was properly denied where the evidence of deportability was obtained independently of the arrest); *Matter of Gonzales*, 16 I&N Dec. 44, 46 (BIA 1976) (holding, in a suppression case, that subpoenas were properly denied where there was no showing they were necessary and it appeared that "counsel wished to go on a fishing expedition in his questioning").

Additionally, if an alien tried to subpoena evidence in an asylum case, it could affect the analysis of whether he or

1 *See* American Bar Association Commission on Immigration, *Reforming the Immigration System* 5-16 to -17 (2010), *available at* http://www.americabar.org.

2 *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 7 (2011) (statement of Juan P. Osuna, Director, Exec. Office for Immigration Review), *available at* http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf.

3 It also may be the case that individuals or entities who object to subpoenas will have to make motions to quash in federal district court as opposed to immigration court. *See Moyle v. INS*, 944 F.2d 909 (9th Cir. 1991) (unpublished) (in employer sanctions case, finding that object of the administrative law judge's subpoena waived his objections by not "challeng[ing] the propriety of service in enforcement proceedings before the district court.")

4 Additionally, attorneys who violate court orders might be subject to disciplinary complaints with various internal and external authorities. *See* 8 C.F.R. § 1003.102(g) (EOIR may discipline practitioners who engage in conduct that would constitute contempt of court in a judicial proceeding); § 1003.102(n) (same, for practitioners who engage in conduct that is prejudicial to the administration of justice or undermines the integrity of the adjudicative process.")

she met the requirement to show that corroborating evidence could not reasonably be obtained. *See* INA § 208(b)(1)(B)(ii); 8 U.S.C. § 1158(b)(1)(B)(ii); REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, § 101(a)(3), 119 Stat. 302, 303; *cf. Qiao Zhen Jiang v. Holder*, 341 F. App'x 126, 128 (6th Cir. 2009) (stating that the petitioner's *failure* to attempt to subpoena witnesses "cements the soundness of the IJ's availability determination"); *Matter of Y-L, A-G- & R-S-R-*, 23 I&N Dec. 270, 284 (A.G. 2002), *disapproved of on other grounds*, *Zheng v. Ashcroft*, 332 F.3d 1186, 1196-97 (9th Cir. 2003), and *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) (finding that R-S-R- failed to corroborate his claim after the Immigration Judge "pointedly invited" him to subpoena witnesses and he did not do so). The Eleventh Circuit applied a similar sort of logic in affirming that DHS did not violate the confidentiality provisions in 8 C.F.R. § 208.6 while conducting a fraud investigation into the petitioner's documents. Da Tong Peng v. Att'y Gen. of the U.S., 340 F. App'x 121, 125 (3d Cir. 2009) (as the petitioner had years to request or subpoena the DHS's documents or investigative methods, and did not do so, there was insufficient evidence that the regulations were violated.)

Immigration Judges' ability to use noncompliance with court orders as the basis for rulings on substantive matters flows reasonably from the Immigration Judge's broad powers to issue subpoenas, admit and weigh evidence, rule on removability and relief, and "otherwise regulate the course of the hearing." *See* 8 C.F.R. § 1240.1(c). These powers suggest that Immigration Judges may take actions analogous to what a federal district court judge may do in imposing nonmonetary sanctions that are short of a contempt order on disobedient parties. These include taking certain facts as established, prohibiting disobedient parties from advancing certain claims or introducing certain evidence, staying proceedings until the order is obeyed, or striking pleadings in whole or in part. Fed. R. Civ. P. 37(b)(2)(A).

Conclusion

Subpoenas can be a useful tool in Immigration Court to build the record and ensure that the parties have a full opportunity to present their cases and cross-examine witnesses. The regulatory requirements for issuing a subpoena are straightforward and are closely enforced in the federal courts. Although the current enforcement scheme for Immigration Court subpoenas is a work in progress, Immigration Judges are not without recourse and may use noncompliance with a subpoena as support for rulings on evidence, removability, and relief, or, for the more adventurous judge, for a referral to the local U.S. Attorney's Office. What the circuit courts caution, however, is that Immigration Judges should not let potential enforcement problems get in the way of deciding whether a subpoena should properly be issued in the first place. As Judge Posner encouraged, "The best way to find out if a subpoena will work is to issue one." *Malave*, 610 F.3d at 488. ◆

Andrea Saenz is an Attorney Advisor at the New York (Varick Street) Immigration Court, Executive Office for Immigration Review (EOIR), U.S. Department of Justice. This is a revised version of an article that first appeared in the Immigration Law Advisor, Vol. 5, No. 7.

The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the author and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

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emphatically opined: Neither of those exceptional circumstances is evident here. The case does not implicate substantive criminal activity nor does it reach the heights required for a "watershed" rule.[23]

The *Gaitan* Court commented that the only previous example the U.S. Supreme Court has ever provided of a new rule that has met the watershed standard has been *Gideon v. Wainwright's* holding that indigent criminal defendants must be provided counsel.[24] Since the standard was set forth in *Teague*, no new rule has met the "watershed" threshold.

D. Reconciling the Two Disparate Decisions and Remedies

One distinction between the two decisions is that *Orocio* deals with a conviction in federal court under the U.S. Code while *Gaitan* deals with a conviction in New Jersey state court under the New Jersey criminal code. The different fora allow for the divergent interpretation within New Jersey for the time being.

The Superior Court of New Jersey Appellate Division in *State of New Jersey v. Barros*, ---A.3d----, 2012 WL 1365801 (N.J.Super.A.D. 2012) suggested that defendants, in the meantime, seek *habeas* relief in the federal court in New Jersey ("For that reason, we will stay our mandate to allow defendant an opportunity to file a petition for a writ of *habeas corpus* in the United States District Court for the District of New Jersey). The Superior Court stated that "noncitizens in defendant's position are likely entitled to federal *habeas corpus* relief when that relief is sought within the Third Circuit." Such action would provide relief to those individuals with NJ convictions seeking post-conviction relief and who have had their PRC petitions dismissed by the criminal courts following the *Gaitan* decision.

Ultimately, the retroactivity of *Padilla* will be determined by the U.S. Supreme Court, which has just agreed to hear arguments on this issue during its upcoming term that begins in October (with a decision likely early next year).[25] ◆

Amelia Wilson is the detention attorney for the Immigrant Rights Program, American friends Service Committee, in Newark, NJ.

23 *Gaitan*, *supra*, at 365-66.
24 *Gaitan*, *supra*, at fn. 9.
25 *Chaidez v. U.S.*, 655 F.3d 684 (7th Cir. 2011) *certiori granted by Chaidez v. U.S.*, 2012 WL 1468539 (Apr. 30, 2012) (No. 11-820).