**EXISTENTIALISM AND THE MEANING OF LIFE AT THE U.S. IMMIGRATION COURT - CORNELL LAW VERSION**

**By**

**Paul Wickham Schmidt**

**Retired U.S. Immigration Judge**

**Cornell University School of Law**

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**I. INTRODUCTION**

**Good afternoon. Thank you so much for inviting me. I am particularly pleased to be here at the invitation of one of the all-time greats of U.S. immigration law, Professor Stephen Yale-Loehr.**

**Steve and I go back decades, to my time at the “Legacy INS,” Jones Day, & Fragomen. Steve was working at *Interpreter Releases* and *Immigration Briefings* with one of my mentors, Maury Roberts. And, I did a little writing for both publications.**

**One of the highlights of the year back then was the “year-end formal bash” that Federal Publications, the then-owner of *Interpreter Releases* and *Immigration Briefings* put on for the authors. I just wanted to let you know, Steve, that I was still able to get into that “Jones Day era” tux, if just barely, for the recent Refugee Ball in January.**

**Of course, I am also indebted to Berger International Programs and its Coordinator Patricia J. Hall for underwriting this venture. Thanks also to the wonderful Dawne Peacock for handling the logistics.**

**Now, this is when I used to give my comprehensive disclaimer providing “plausible deniability” for everyone in the Immigration Court System if I happened to say anything inconvenient or controversial. But, now that I’m retired, we can skip that part.**

 **Additionally, because *today* is *Wednesday*, and *you* are such a great audience, I’m giving you my *absolute, unconditional, money-back guarantee* that *this* talk will be *completely free* from computer-generated slides, power points, or any other type of distracting modern technology that might interfere with your total comprehension or listening enjoyment. In other words, *I* am the “power point” of this presentation.**

**My speech is entitled: “Existentialism and the Meaning of Life at the U.S. Immigration Court.” I will start by introducing myself to you, and then I will briefly address five things: the court system’s vision, the judge’s role, my judicial philosophy, what needs to be done to reclaim the due process vision of the Immigration Courts, and how *you* can get involved. That should leave time for questions.**

**II. CAREER SUMMARY**

**I graduated in 1970 from Lawrence University a small liberal arts college in Appleton, Wisconsin, where I majored in history. My broad liberal arts education and the intensive writing and intellectual dialogue involved were the best possible preparation for all that followed.**

**I then attended the University of Wisconsin School of Law in Madison, Wisconsin, graduating in 1973. Go Badgers! And, of course I remember that dark day in Badger history, March 21, 2010, when the Big Red absolutely *crushed* my Bucky Badger 87-69 in the second round of “March Madness!”**

**I began my legal career in 1973 as an Attorney Advisor at the Board of Immigration Appeals (“BIA”) at the U.S. Department of Justice (“DOJ”) under the Attorney General’s Honors Program. Admittedly, however, the BIA’s Executive Assistant culled my resume from the “Honors Program reject pile.”**

**At that time, before the creation of the Executive Office for Immigration Review – “EOIR” for you *Winnie the Pooh* fans -- the Board had only five members and nine staff attorneys, as compared to today’s cast of thousands. Among other things, I worked on the famous, or infamous, John Lennon case, which eventually was reversed by the Second Circuit in an opinion by the late Chief Judge Irving Kaufman.[[1]](#footnote-1) As an interesting historical footnote, that case was argued in the Circuit by then Special Assistant U.S. Attorney Mary Maguire Dunne, who went on to become a distinguished Member of the BIA and one of my Vice Chairs during my tenure as Chairman.**

**I also shared an office with my good friend, the late Lauri Steven Filppu, who later became a Deputy Director of the Office of Immigration Litigation (“OIL”) in the DOJ’s Civil Division and subsequently served with me on the BIA. The Chairman of the BIA at that time was the legendary “immigration guru” Maurice A. “Maury” Roberts. Chairman Roberts took Lauri and me under this wing and shared with us his love of immigration law, his focus on sound scholarship, his affinity for clear, effective legal writing, and his humane sense of fairness and justice for the individuals coming before the BIA. Of course, Maury’s distinguished career was intertwined with Professor Yale-Loehr as it also was with current EOIR Director Juan Osuna, who will be speaking to you later this month.**

**In 1976, I moved to the Office of General Counsel at the “Legacy” Immigration and Naturalization Service (“INS”). There, I worked for another legendary figure in immigration law, then General Counsel Sam Bernsen. Sam was a naturalized citizen who started his career as a 17-year-old messenger at Ellis Island and worked his way to the top of the Civil Service ranks. Perhaps not incidentally, he was also a good friend of Chairman Roberts.**

**At that time, the Office of General Counsel was very small, with a staff of only three attorneys in addition to the General Counsel and his Deputy, another mentor and immigration guru, Ralph Farb. At one time, all three of us on the staff sat in the same office! In 1978, Ralph was appointed to the BIA, and I succeeded him as Deputy General Counsel. I also served as the Acting General Counsel for several very lengthy periods in both the Carter and Reagan Administrations.**

**Not long after I arrived, the General Counsel position became political. The incoming Administration encouraged Sam to retire, and he went on to become a name and Managing Partner of the Washington, D.C. office of the powerhouse immigration boutique Fragomen, Del Rey, and Bernsen. He was replaced by my good friend and colleague David Crosland, now an Immigration Judge in Baltimore, who selected me as his Deputy. Dave was also the Acting Commissioner of Immigration during the second half of the Carter Administration, one of the periods when I was the Acting General Counsel.**

**It was during this period that I first met worked with two brilliant young lawyers, Alex Aleinikoff, who was then at the Office of Legal Counsel at the DOJ, and David Martin, who was serving as Special Assistant to the late Patt Derian, who was then the Secretary of Human Rights and Humanitarian Affairs at the Department of State. We worked together on the enactment of the Refugee Act of 1980. And, perhaps if we had done a better job, we would have avoided some of the problems that followed. As many of you probably know, David and Alex went ton to become famous professors, scholars, casebook authors, and distinguished Government Senior Executives. Until fairly recently, Alex served as the Deputy U.N. High Commissioner for Refugees, based in Geneva.**

**The third General Counsel that I served under was one of my most “unforgettable characters:” the late, great Maurice C. “Mike” Inman, Jr. He was known, not *always* affectionately, as “Iron Mike.” His management style was something of a cross between the famous coach of the Green Bay Packers, Vince Lombardi, and the fictional Mafia chieftain, Don Corleone. As my one of my colleagues said of “Iron Mike:” “He consistently and unreasonably demanded that we do the impossible, and most of the time we succeeded.” Although we were totally different personalities, Mike and I made a good team, and we accomplished amazing things. It was more or less a “good cop, bad cop” routine, and I’ll let you guess who played which role.**

**Among other things, I worked on the Iranian Hostage Crisis, the Cuban Boatlift, the Refugee Act of 1980, the Immigration Reform and Control Act of 1986 (“IRCA”), the creation of the Office of Immigration Litigation (“OIL”), and establishing what has evolved into the modern Chief Counsel system at Department of Homeland Security (“DHS”).**

**I also worked on the creation of EOIR, which combined the Immigration Courts, which had previously been part of the INS, with the BIA to improve judicial independence. Interestingly, and perhaps ironically, the leadership and impetus for getting the Immigration Judges into a separate organization came from Mike and the late Al Nelson, who was then the Commissioner of Immigration. Prosecutors by position and litigators by trade, *they* saw the inherent conflicts and overall undesirability, from a due process and credibility standpoint, of having immigration enforcement and impartial court adjudication in the same division. I find it troubling that officials at today’s DOJ aren’t able to understand and act appropriately on the glaring conflict of interest currently staring them in their collective faces.**

**By the time I left in 1987, the General Counsel’s Office, largely as a result of the enactment of IRCA and new employer sanctions provisions, had dozens of attorneys, organized into divisions, and approximately 600 attorneys in the field program, the vast majority of whom had been hired during my tenure.**

**In 1987, I left INS and joined Jones Day’s DC Office, a job that I got largely because of my wife Cathy and her “old girl network.” I eventually became a partner specializing in business immigration, multinational executives, and religious workers. Among my major legislative projects on behalf of our clients were the special religious worker provisions added to the law by the Immigration Act of 1990 and the “Special Immigrant Juvenile” provisions of the INA with which some of you might be familiar.**

**Following my time at Jones Day, I succeeded my former boss and mentor Sam Bernsen as the Managing Partner of the DC Office of Fragomen, Del Rey & Bernsen, the leading national immigration boutique, where I continued to concentrate on business immigration. You will note that immigration is a small community; you need to be nice to everyone because you keep running into the same folks over and over again in your career. While at Fragomen, I also assisted the American Immigration Lawyers Association (“AILA”) on a number of projects and was an adviser to the Lawyers’ Committee, now known as Human Rights First.**

**In 1995, then Attorney General Janet Reno appointed me Chairman of the BIA. Not surprisingly, Janet Reno, who recently died, was my favorite among all of the Attorneys General I worked under. I felt that she supported me personally, and she supported the concept of an independent judiciary, even though she didn’t always agree with our decisions and vice versa.**

**She was the *only* Attorney General who consistently came to our Investitures and Immigration Judge Conferences *in person* and mixed and mingled with the group. She was also kind to our clerical staff and invited them downtown to meet personally with her. She had a saying “equal justice for all” that she worked into almost all of her speeches, and which I found quite inspirational. She was also hands down the funniest former Attorney General to appear on “Saturday Night Live,” doing her famous “Janet Reno Dance Party” routine with Will Farrell immediately following the end of her lengthy tenure at the DOJ.**

**Among other things, I oversaw an expansion of the Board from the historical five members to more than 20 members, a more open selection system that gave some outside experts a chance to serve as appellate judges on the Board, the creation of a supervisory structure for the expanding staff, the establishment of a unified Clerk’s Office to process appeals, implementation of a true judicial format for published opinions, institution of bar coding for the tens of thousands of files, the establishment of a pro bono program to assist unrepresented respondents on appeal, the founding of the Virtual Law Library, electronic en banc voting and e-distribution of decisions to Immigration Judges, and the publication of the first *BIA Practice Manual*, which actually won a “Plain Language Award” from then Vice President Gore. I understand that Professor Yale-Loehr and his clinic students are very involved in the BIA pro bono project.**

**I also wrote the majority opinion in my favorite case, *Matter of Kasinga*, establishing for the first time that the practice of female genital mutilation (“FGM”) is “persecution” for asylum purposes.[[2]](#footnote-2) As another historical footnote, the “losing” attorney in that case was none other than then INS General Counsel David A. Martin, who personally argued before the Board.**

**In reality, however, by nominally “losing” the case, David actually *won* the war for both of us, and more important, for the cause of suffering women throughout the world. We really were on the same side in *Kasinga*. Without David’s help, who knows if I would have been able to get an almost-united Board to make such a strong statement on protection of vulnerable women.**

**During my tenure as Chairman, then Chief Immigration Judge (now BIA Member) Michael J. Creppy and I were founding members of the International Association of Refugee Law Judges (“IARLJ”). This organization, today headquartered in The Hague, promotes open dialogue and exchange of information among judges from many different countries adjudicating claims under the Geneva Convention on Refugees.**

**In 2001, at the beginning of the Bush Administration, I stepped down as BIA Chairman, but remained as a Board Member until April 2003. At that time, then Attorney General John Ashcroft, who was not a fan of my opinions, invited me to vacate the Board and finish my career at the Arlington Immigration Court, where I remained until my retirement on June 30 of last year. So, I’m one of the few ever to become an Immigration Judge without applying for the job. Or, maybe my opinions, particularly the dissents, were my application and I just didn’t recognize it at the time. But, it turned out to be a great fit, and I truly enjoyed my time at the Arlington Court.**

**I have also taught Immigration Law at George Mason School of Law in 1989 and “Refugee Law and Policy” at Georgetown Law from 2012 through 2014. I’ve just agreed to resume my Adjunct position with Georgetown Law for a “compressed summer course” in “Immigration Law & Policy.”**

**Please keep in mind that if *everyone* agreed with me, my career wouldn’t have turned out the way it did. On the other hand, if *nobody* agreed with me, my career wouldn’t have turned out the way it did. In bureaucratic terms, I was a “survivor.” I have also, at some point in my career, probably been on *both* sides of many of the important issues in U.S. immigration law.**

**One of the challenges that lawyers will face in Immigration Court is that different judges have distinct styles, philosophies, and preferences. I always felt that although we might differ in personality and approach, at least in Arlington we all *shared* a commitment to achieving fairness and justice.**

**As a sitting judge, I encouraged meticulous preparation and advance consultation with the DHS Assistant Chief Counsel to stipulate or otherwise narrow issues. In Arlington, for example, even with a new high of 10 Immigration Judges, the average docket is still 3,000 cases per judge. There currently are more than 30,000 pending cases at the Arlington Court. Because of this overwhelming workload, efficiency and focusing on the disputed issues in court are particularly critical.**

**I was always happy to get the “typical clinic phone books,” with the caveat that each “phone book” had to come with a “road map”
to help the Assistant Chief Counsel and me easily find and focus on the highlights of the case.**

**I also urged everyone appearing in court to speak up and *project your voice*. Immigration courtrooms, in addition to being cramped, tend to be “dead” in acoustic terms. Mumbling or speaking into notes results in constant requests for repetition, which in turn detracts from the coherency of the presentation.**

**III. THE DUE PROCESS VISION**

**Now, let’s move on to the other topics: First, vision. The “EOIR Vision” is: “Through teamwork and innovation, be the world’s best administrative tribunals, guaranteeing fairness and due process for all.” In one of my prior incarnations, I was part of the group that developed that vision statement. Perhaps not surprisingly given the timing, that vision echoed the late Janet Reno’s “equal justice for all” theme.**

**Sadly, the Immigration Court System is moving *further* away from that due process vision. Instead, years of neglect, misunderstanding, mismanagement, and misguided priorities imposed by the U.S. Department of Justice have created judicial chaos with an expanding backlog now exceeding an astounding one half million cases and no clear plan for resolving them in the foreseeable future. There are now more pending cases in Immigration Court than in the entire U.S. District Court System, including both Civil and Criminal dockets, with fewer than half as many U.S. Immigration Judges currently on board as U.S. District Judges.**

**And, the new Administration promises to add hundreds of thousands, if not millions, of new cases to the Immigration Court docket, again without any transparent plan for completing the half million already pending cases consistent with due process and fairness. In fact, notably, and most troubling, concern for fairness and due process in the immigration hearing process has not appeared anywhere in the Administration’s many pronouncements on immigration.**

**Nobody has been hit harder by this preventable disaster than asylum seekers, particularly scared women and children fleeing for their lives from the Northern Triangle of Central America. In Immigration Court, notwithstanding the life or death issues at stake, unlike criminal court there is no right to an appointed lawyer. Individuals who can’t afford a lawyer must rely on practicing lawyers who donate their time or on nonprofit community organizations to find free or low cost legal representation. Although the Government stubbornly resists the notion that all asylum seekers should be represented, studies show that represented asylum seekers are at least five times more likely to succeed than those who must represent themselves. For recently arrived women with children, the success differential is an astounding fourteen times![[3]](#footnote-3)**

**You might have read about the unfortunate statement of an Assistant Chief Judge for Training who claimed that he could teach immigration law to unrepresented toddlers appearing in Immigration Court. Issues concerning representation of so-called “vulnerable populations” continue to challenge our Court System. I am well aware that the Cornell Clinic has done some *wonderful* pro bono appellate work with needy populations. But, even with Clinics and Non-Governmental Organizations pitching in, there simply are not enough free or low cost lawyers available to handle the overwhelming need. In fact, EOIR Director Juan Osuna once declared in an *officially-sanctioned* TV interview that the current system is *“broken.”[[4]](#footnote-4)***

**Notwithstanding the admitted problems, I still believe in the EOIR vision. Later in this speech I’m going to share with you some of my ideas for reclaiming this noble due process vision.**

**IV. THE ROLE OF THE IMMIGRATON JUDGE**

**Changing subjects, to the role of the Immigration Judge: What’s it like to be an Immigration Judge? As an Immigration Judge, I was an administrative judge. I was *not* part of the Judicial Branch established under Article III of the Constitution. The Attorney General, part of the Executive Branch, appointed me, and my authority was subject to her regulations.**

**We should all be concerned that the U.S. Immigration Court system is now *totally* under the control of Attorney General Jeff Sessions, who has consistently taken a negative view of immigrants, both legal and undocumented, and has failed to recognize the many essential, positive contributions that immigrants make to our country.**

**Perhaps ironically, the late Judge Terence T. Evans of the Seventh Circuit Court of Appeals offered one of the best descriptions of what it’s like to be an Immigration Judge. Judge Evans was not one of us, but saw plenty of our work during his lifetime. Judge Evans said:**

**Because 100 percent of asylum petitioners want to stay in this country, but less than 100 percent are entitled to asylum, an immigration judge must be alert to the fact that some petitioners will embellish their claims to increase their chances of success. On the other hand, an immigration judge must be sensitive to the suffering and fears of petitioners who are genuinely entitled to asylum in this country. A healthy balance of sympathy and skepticism is a job requirement for a good immigration judge. Attaining that balance is what makes the job of an immigration judge, in my view, excruciatingly difficult**.[[5]](#footnote-5)

 **My Arlington Immigration Court colleague Judge Thomas G. Snow also gives a very moving and accurate glimpse of an Immigration Judge’s life in a recent article from *USA Today*:**

 **Immigration judges make these decisions alone. Many are made following distraught or shame-filled testimony covering almost unimaginable acts of inhumanity. And we make them several times a day, day after day, year after year.**

**We take every decision we make very seriously. We do our best to be fair to every person who comes before us. We judge each case on its own merits, no matter how many times we’ve seen similar fact patterns before.**

**We are not policymakers. We are not legislators. We are judges. Although we are employees of the U.S. Department of Justice who act under the delegated authority of the attorney general, no one tells us how to decide a case. I have been an immigration judge for more than 11 years, and nobody has ever tried to influence a single one of my thousands of decisions**

**And finally, because we are judges, we do our best to follow the law and apply it impartially to the people who appear before us. I know I do so, even when it breaks my heart.[[6]](#footnote-6)**

 **My good friend and colleague, Judge Dana Leigh Marks of the San Francisco Immigration Court, who is the President of the National Association of Immigration Judges, offers a somewhat pithier description: “[I]mmigration judges often feel asylum hearings are ‘like holding death penalty cases in traffic court.’”[[7]](#footnote-7)**

**Another historical footnote: as a young lawyer, then known as Dana Marks Keener, Judge Marks successfully argued the landmark Supreme Court case *INS v. Cardoza Fonseca*, establishing the generous “well-founded fear” standard for asylum, while I helped the Solicitor General’s office develop the unsuccessful opposing arguments for INS.[[8]](#footnote-8) Therefore, I sometimes refer to Judge Marks as one of the “founding mothers” of U.S. asylum law.**

 **From *my* perspective, as an Immigration Judge I was half scholar, half performing artist. An Immigration Judge is *always* on public display, particularly in this “age of the Internet.” His or her words, actions, attitudes, and even body language, send powerful messages, positive or negative, about our court system and our national values. Perhaps not surprisingly, the majority of those who fail at the job do so because they do not recognize and master the “performing artist” aspect, rather than from a lack of pertinent legal knowledge.**

**One of the keys to the Immigration Judge’s job is issuing scholarly, practical, well-written opinions in the most difficult cases. That ties directly into the job of the Immigration Court’s amazing Judicial Law Clerks (“JLCs”) assisted by all-star legal interns from law schools like *yours*. The JLC’s job *is*, of course, “to make the judge look smart,” no matter how difficult or challenging that might be in a particular case. I hope that some of *you* will have the opportunity to serve as a JLC or an intern at Arlington or some other Immigration Court. It is a direct, “hands on” way of improving the system while taking advantage of a unique learning environment.**

**V. MY JUDICIAL PHILOSOPHY**

 **Next, I’ll say a few words about *my* philosophy. In all aspects of my career, I have found five essential elements for success: fairness, scholarship, timeliness, respect, and teamwork.**

 **Obviously, *fairness* to the parties is an essential element of judging. *Scholarship* in the law is what allows us to fairly apply the rules in particular cases. However, sometimes attempts to be fair or scholarly can be *ineffective* unless *timely*. In some cases, untimeliness can amount to unfairness no matter how smart or knowledgeable you are.**

 ***Respect* for the parties, the public, colleagues, and appellate courts is absolutely necessary for our system to function. Finally, I view the whole judging process as a *team* exercise that involves a coordinated and cooperative effort among judges, respondents, counsel, interpreters, court clerks, security officers, administrators, law clerks and interns working behind the scenes, to get the job done correctly. Notwithstanding different roles, we all share a *common* interest in seeing that our justice system *works*.**

 **Are the five elements that I just mentioned limited to Immigration Court? They are not only essential *legal* skills, they are also necessary *life* skills, whether you are running a courtroom, a law firm, a family, a PTA meeting, a book club, or a soccer team. As you might imagine, I am a *huge* fan of clinical experience as an essential part of the law school curriculum. Not only do clinical programs make important actual contributions to our justice system – due process in action – but they teach *exactly* the type of intellectual and practical values and skills that I have just described.**

**Fortunately, here at Cornell you have a *great* role model in Professor Yale-Loehr who embodies, exemplifies, and teaches these five critical elements every day. Thanks again for all you do, Steve.**

**VI. RECLAIMING THE VISION**

**Our Immigration Courts are going through an existential crisis that threatens the very foundations of our American Justice System. Earlier, I told you 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 was lost during the last Administration when officials outside EOIR 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 was not only unfair to all, but has created what I call “aimless docket reshuffling” that has thrown the Immigration Court system into chaos and dramatically increased the backlogs.**

**Although those misguided Obama Administration priorities have been rescinded, the reprieve is only fleeting. The Trump Administration has announced plans to greatly expand the “priority” targets for removal to include even those who were *merely accused* of committing *any* crime. The Administration also plans a new and greatly expanded “immigration detention empire,” likely to be situated in remote locations near the Southern Border, relying largely on discredited private “for profit” prisons. The Administration also wants to make it more difficult for individuals to get full Immigration Court hearings on asylum claims and to expand the use of so-called “expedited removal,” thereby seeking to completely avoid the Immigration Court process.**

**Evidently, the idea, similar to that of the Obama Administration, 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. 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.**

**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[[9]](#footnote-9)* and the BIA itself in *Mogharrabi[[10]](#footnote-10)* 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.[[11]](#footnote-11) 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.[[12]](#footnote-12) 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 Immigration Judges sitting in New York 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%.**

**Indeed a recent 2017 study of the Atlanta Immigration Court by Emory Law and the Southern Poverty Law Center found:**

**[S]ome of the Immigration Judges do not respect rule of law principles and maintain practices that undermine the fair administration of justice. During the course of our observations, we witnessed the following [issue, among others]. Immigration Judges made prejudicial statements and expressed significant disinterest or even hostility towards respondents in their courts. In at least one instance, an Immigration Judge actively refused to listen to an attorney’s legal arguments. In another instance, an Immigration Judge failed to apply the correct standard of law in an asylum case. [[13]](#footnote-13)**

**This is hardly “through teamwork and innovation being the world’s best administrative tribunals guaranteeing fairness and due process for all!” These unusually low asylum grant rates are *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.[[14]](#footnote-14) 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.[[15]](#footnote-15)**

**Over the past 16 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 ruined the lives of many who were denied protection that should have been granted. We need a BIA which functions like a Federal Appellate Court and whose overriding mission is to ensure that the *due process visio*n 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.**

**VII. GETTING INVOLVED**

 **Keep these thoughts in mind. Sadly, based on actions to date, I have little hope that Attorney General Sessions will support due process reforms or an independent U.S. Immigration Court, although it would be in his best interests as well as those of our country if he did. However, eventually our opportunity *will come*. When it *does*, those of us who believe in the primary importance of constitutional due process *must* be ready with concrete reforms.**

 **So, do we abandon all hope? *No, of course not!* Because there are hundreds of newer lawyers out there who are former Arlington JLCs, interns, my former student, and those who have practiced before the Arlington Immigration Court.**

 **They form what I call the “New Due Process Army!” And, while *my* time on the battlefield is winding down, *they are just beginning the fight!* They will keep at it for years, decades, or generations -- whatever it takes to force the U.S. immigration judicial system to live up to its promise of “guaranteeing fairness and due process for all!”**

 **What can *you* do to get involved *now*? The overriding due process need is for *competent representation* of individuals claiming asylum and/or facing removal from the United States. Currently, there are not nearly enough pro bono lawyers to insure that everyone in Immigration Court gets represented.**

 **And the situation is getting worse. With the Administration’s expansion of so-called “expedited removal,” lawyers are needed at *earlier* points in the process to insure that those with defenses or plausible claims for relief *even get into* the Immigration Court process, rather than being summarily removed with little, if any, recourse.**

**Additionally, given the pressure that the Administration is likely to exert through the Department of Justice to “move” cases quickly through the Immigration Court system with little regard for due process and fundamental fairness, resort to the Article III Courts to require fair proceedings and an unbiased application of the laws becomes even more essential. Litigation in the U.S. District and Appellate Courts has turned out to be effective in forcing systemic change. However, virtually no unrepresented individual is going to be capable of getting to the Court of Appeals, let alone prevailing on a claim.**

**Obviously, your own Immigration Clinic here at Cornell Law is a fantastic opportunity. Internships and JLC positions at the Immigration Courts are also ways of contributing to due process while learning.**

**I have been working with groups looking for ways to expand the “accredited representative” program, which allows properly trained and certified individuals who are not lawyers to handle cases before the DHS and the Immigration Courts while working for certain nonprofit community organizations, on either a staff or volunteer basis. The “accredited representative” program is also an *outstanding opportunity* for retired individuals, like professors, who are not lawyers to qualify to provide pro bono representation in Immigration Court to needy migrants thorough properly recognized religious and community organizations.**

 **Even if you are not practicing or do not intend to practice immigration law, there are many outstanding opportunities to contribute by taking pro bono cases. Indeed, in my experience in Arlington, “big law” firms were some of the major contributors to highly effective pro bono representation. It was also great “hands on” experience for those seeking to hone their litigation skills.**

 **Those of you with language and teaching skills can help out in English Language Learning programs for migrants. I have observed first hand that the better that individuals understand the language and culture of the US, the more successful they are in navigating our Immigration Court system and both assisting, and when necessary, challenging their representatives to perform at the highest levels. In other words, they are in a better position to be “informed consumers” of legal services.**

 **Another critical area for focus is *funding* of nonprofit community-based organizations and religious groups that assist migrants for little or no charge. *Never* has the need for such services been greater.**

**But, many of these organizations receive at least some government funding for outreach efforts. We have already seen how the President has directed the DHS to “defund” outreach efforts and use the money instead for a program to assist victims of crimes committed by undocumented individuals.**

**Undoubtedly, with the huge emphases on military expansion and immigration enforcement, to the exclusion of other important programs, virtually all forms of funding for outreach efforts to migrants are likely to disappear in the very near future. Those who care about helping others will have to make up the deficit. So, at giving time, remember your community nonprofit organizations that are assisting foreign nationals.**

**Finally, as an informed voter and participant in our political process, *you* can advance the cause of Immigration Court reform and due process. For the last 16 years politicians of *both parties* have largely stood by and watched the unfolding due process disaster in the U.S. Immigration Courts without doing anything about it, and in some cases actually making it worse.**

**The notion that Immigration Court reform must be part of so-called “comprehensive immigration reform” is simply *wrong.* The Immigration Courts *can* and *must* be fixed *sooner* rather than later, regardless of what happens with overall immigration reform. It’s time to let your Senators and Representatives know that we need *due process reforms* in the Immigration Courts as one of our *highest national priorities*.**

**Folks, the U.S Immigration Court system is on the verge of collapse. And, there is every reason to believe that the misguided “enforce and detain to the max” policies being pursued by this Administration will drive the Immigration Courts over the edge. When that happens, a large chunk of the entire American justice system and the due process guarantees that make American great and different from most of the rest of the world will go down with it.**

**VIII. CONCLUSION**

**In conclusion, I have introduced you to one of America’s largest and most important, yet least understood, court systems: the United States Immigration Court. I have shared with you the Court’s noble due process vision and my view that it is not currently being fulfilled. I have also shared with you my ideas for effective court reform that would achieve the due process vision and how *you* can become involved in improving the process. *Now is the time to take a stand for fundamental fairness! Join the New Due Process Army!*  *Due process forever!***

 **Thanks again for inviting me and for listening. I’d be happy to take questions.**

**(03/09/17)**

1. *Matter of Lennon*, 15 I&N Dec. 9 (BIA 1974), *rev’d Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975). [↑](#footnote-ref-1)
2. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996). [↑](#footnote-ref-2)
3. TRAC Immigration, “Representation is Key in Immigration Proceedings Involving Women with Children,” Feb. 18, 2015, available online at <http://trac.syr.edu/immigration/reports/377/>. [↑](#footnote-ref-3)
4. “Immigration Director Calls for Overhaul of Broken System,” NBC Bay Area News, May 27, 2015, available online. [↑](#footnote-ref-4)
5. *Guchshenkov v. Ashcroft*, 366 F.3d 554 (7th Cir. 2004) (Evans, J., concurring).
 [↑](#footnote-ref-5)
6. Hon. Thomas G. Snow, “The gut-wrenching life of an immigration judge,” USA Today, Dec. 12, 2106, available online at http://www.usatoday.com/story/opinion/2016/12/12/immigration-judge-gut-wrenching-decisions-column/95308118/ [↑](#footnote-ref-6)
7. Julia Preston, “Lawyers Back Creating New Immigration Courts,” *NY Times*, Feb. 6, 2010. [↑](#footnote-ref-7)
8. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). [↑](#footnote-ref-8)
9. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). [↑](#footnote-ref-9)
10. *Matter of Mogharrabi*, 19 I&N Dec. 4379(BIA 1987). [↑](#footnote-ref-10)
11. Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, [*Refugee Roulette: Disparities in Asylum Adjudication*](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983946), 60 Stan. L. Rev. 295 (2007); [↑](#footnote-ref-11)
12. All statistics are from the EOIR FY 2015 *Statistics Yearbook,* available online at <https://www.justice.gov/eoir/page/file/fysb15/download>, [↑](#footnote-ref-12)
13. See Emory Law/SPLC Observation Study Rips Due Process Violations At Atlanta Immigration Court — Why Is The BIA “Asleep At The Switch” In Enforcing Due Process? What Happened To The EOIR’s “Due Process Vision?” in immigrationcourtside.com, available online at <http://immigrationcourtside.com/2017/03/02/emory-lawsplc-observation-study-rips-due-process-violations-at-atlanta-immigration-court-why-is-the-bia-asleep-at-the-switch-in-enforcing-due-process-what-happened-to-the-eoirs-due-proces/> [↑](#footnote-ref-13)
14. *See* 8 C.F.R. § 1208.13(b)(1). [↑](#footnote-ref-14)
15. *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. Indeed the *Washington Post* recently carried a poignant story of a young immigration lawyer who was driven out of the practice by the negative attitudes and treatment by the Immigration Judges at the Atlanta Immigration Court. Harlan, Chico, “In an Immigration Court that nearly always says no, a lawyer’s spirit is broken,” *Washington Post*, Oct. 11, 2016, available online at <https://www.washingtonpost.com/business/economy/in-an-immigration-court-that-nearly-always-says-no-a-lawyers-spirit-is-broken/2016/10/11/05f43a8e-8eee-11e6-a6a3-d50061aa9fae_story.html>

 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? [↑](#footnote-ref-15)