# IMMIGRATION COURTS: RECLAIMING THE VISION

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

First, and foremost, the immigration courts must return to the focus on due process as the *one and only mission*. The improper use of our due process court system by political officials to advance enforcement priorities and/or send "don't come" messages to asylum seekers, which are highly ineffective in any event, must *end*. That's unlikely to happen under the Department of Justice—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 American Bar Association and the Federal Bar Association, would be best.

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

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

Second, there must be structural changes so that the immigration courts are organized and run like a *real* court system, *not* a highly bureaucratic agency. This means that *sitting immigration judges*, like in all other court systems, must control their dockets. The practice of having administrators in Falls Church, Va., and bureaucrats in Washington, D.C.—none of whom are sitting judges—be responsible for daily court hearings and 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. It would be composed of sitting immigration judges representing a cross-section of the country, several appellate immigration judges from the Board of Immigration Appeals (BIA), and probably some U.S. circuit judges, since the circuits are one of the primary "consumers" of the court's "product."

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

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

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

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

For example, let's take a brief "asylum magical mystery tour" down the East Coast.[4] In New York City, 84 percent of the asylum applications are granted. Cross the Hudson River to Newark, N.J., and that rate sinks to 48 percent, still respectable in light of the 47 percent national average but inexplicably 36 percent lower than New York. Move over to the Elizabeth Detention Center Court in Elizabeth, N.J., where you might expect a further reduction, and the grant rate *rises* again to 59 percent. Get to Baltimore, and the grant rate drops to 43 percent. But, move down the BW Parkway a few miles to Arlington, Va., still within the Fourth Circuit like Baltimore, and it rises again to 63 percent. Then, cross the border into North Carolina, still in the Fourth Circuit, and it drops remarkably to 13 percent. But, things could be worse. Travel a little further south to Atlanta and the grant rate bottoms out at an astounding 2 percent.

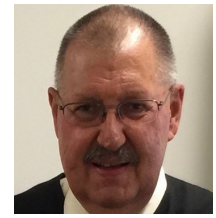
In other words, by lunchtime some days the eight immigration judges sitting in Arlington have granted more than the five asylum cases granted in Atlanta during the entire Fiscal Year 2015! An 84 percent to 2 percent differential in fewer than 900 miles! Three other major non-detained immigration courts,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

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

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

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

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



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## Endnotes

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

[2]*Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

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

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

[5]*See* 8 C.F.R. § 1208.13(b)(1).

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