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 and the BIA in Mogharrabi, and the regulatory presumption of future fear arising out of past persecution that applies in many asylum cases. 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.

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 rights of asylum seekers and court staff who make up our court. This is an excerpt from a longer presentation given at a number of law schools, most recently Washington & Lee Law School on Oct. 20, 2016.

Paul Wickham Schmidt is a recently retired U.S. immigration judge who served at the immigration court in Arlington, Va., and previously was chairman and member of the Board of Immigration Appeals. He also has served as deputy general counsel and acting general counsel of the former Immigration and Naturalization Service, a partner at two major law firms, and an adjunct professor at two law schools. His career in the field of immigration and refugee law spans 43 years. He has been a member of the Senior Executive Service in administrations of both parties. © 2017 Paul Wickham Schmidt. All rights reserved.

Endnotes
5See 8 C.F.R. § 1208.13(b)(1).

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?