**JOIN THE “NEW DUE PROCESS ARMY” -- FIGHT FOR DUE PROCESS IN THE UNITED STATES IMMIGRATION COURTS**

**Luncheon Address by**

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**I. INTRODUCTION**

**Good afternoon. Thank you so much for inviting me to speak at this wonderful event. I’m very honored to be here. Human Rights First is a terrific organization that provides critical legal services and policy advocacy for the most vulnerable during one of the most difficult periods in our recent history. I also congratulate each of you summer interns on your achievement of being selected for this prestigious learning opportunity.**

**My legal career, which began in 1973, has been intertwined in many ways with Human Rights First, which was founded as the Lawyers Committee around 1978. And, I’ll have to admit that we haven’t always been on exactly the same side. I have a dim recollection of perhaps being deposed by attorneys from the Lawyers Committee in connection with some Haitian litigation back in the 1980s.**

**During my stint in private practice with Jones Day and Fragomen during the late 1980s and early 1990s, I had an opportunity to work closely with the amazing Elisa Massimino who now serves as your President and Executive Director. I provided advice and counsel to the program for pro bono asylum cases in the D.C. area. Elisa has always been one of my personal “due process heroes.” As I have told Elisa and others, I think that in a different Administration, Elisa would be an outstanding choice for Attorney General of the United States. We need an Attorney General who puts human rights and Constitutional rights for all first!**

**Of course, during my 21-year career as an Appellate Judge on the Board of Immigration Appeals and a U.S. Immigration Judge at the Arlington Immigration Court, I along with my colleagues continuously benefitted from the outstanding pro bono efforts of Human Rights First and your organization’s continuing advocacy for true due process in the Immigration Courts. Indeed, during my time in Arlington, I was a “regular” at pro bono training sessions sponsored by Human Rights First, the D.C. Bar, and other community organizations.**

**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.**

**However, because today is *Wednesday* and *you* are such a great audience, I have a *special bonus gift* for you. That’s *right* folks, it’s the much-sought-after February 2017 revised edition of my *comprehensive* three-page treatise entitled *Practical Tips for Presenting an Asylum Case in Immigration Court*, which is included with this presentation *absolutely* *free of extra charge*.**

**And, that’s not all folks! I’m also 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 topic this afternoon is something very near and dear to me and which has occupied much of my career: the quest to establish *real due process* in the United States Immigration Court system. I’ll tell you right up front that what I might once have characterized as a “work in progress” has now become a “work in regress.” That’s something that should be of concern to all of us here, *indeed to all Americans* who care about our Constitution and our justice system .**

**II. THE DUE PROCESS CRISIS IN IMMIGRATION COURT**

**As most of you in this room probably recognize, t*here is no “immigration crisis” in America today*. What we have is a series of potentially solvable problems involving immigration that have been allowed to grow and fester by politicians and political officials over many years.**

**But, there *is* a *real* crisis involving immigration: *the attack on due process in our U.S. Immigration Courts* that has brought them to the brink of collapse. I’m going to tell you seven things impeding the delivery of due process in Immigration Court that should be of *grave* concern to you and to *all other Americans* who care about our justice system and our value of fundamental fairness.**

***First*, *political officials in the last three Administrations have hijacked the noble mission of the U.S. Immigration Courts.* That vision, which I helped develop in the late 1990s, is to “be the world’s best administrative tribunals guaranteeing fairness and due process for all.”**

**Instead, the Department of Justice’s ever-changing priorities, aimless docket reshuffling (“ADR”), and morbid fascination with increased immigration detention as a means of deterrence have turned the Immigration Court system back into a tool of DHS enforcement. Obviously, it is *past time* for an *independent* U.S. Immigration Court to be established *outside the Executive Branch*.**

***Second*, *there simply are not enough pro bono and low bono attorneys and authorized representatives available to assist all the individuals who need representation in Immigration Court.* This problem is *particularly* acute in detention courts, and is being aggravated by the current Administration’s “maximum detention” philosophy. We know that representation makes a *huge* difference. Represented individuals succeed at rates *four to five times greater* than unrepresented individuals.**

**There have been a number of studies documenting the substandard conditions in immigration detention, particularly those run by private contractors, which in some cases prove deadly or debilitating. Some of these studies have recommended that immigration detention be sharply reduced and that so-called “family detention” be discontinued immediately.**

**A *rational* response might have been to develop creative alternatives to detention, and to work closely with and support efforts to insure access to legal representation for *all individuals* in Removal Proceedings. *Instead*, the response of the current Administration has been to “double down” on detention, by promising to detain all undocumented arrivals and to create a new “American Gulag” of detention centers, most privately run, along our southern border, where access to attorneys and self-help resources is limited to non-existent.**

***Third, the Immigration Courts have an overwhelming caseload.* Largely as a result of “aimless docket reshuffling” by Administrations of both parties, the courts’ backlog has now reached an astounding 610,000 cases, with no end in sight. Since 2009, the number of cases pending before the Immigration Courts has tripled, while court resources have languished.**

**The Administration’s detention priorities and essentially random DHS enforcement program are like running express trains at full throttle into an existing train wreck without any discernable plan for clearing the track!” You can read about it in my article in the latest edition of *The Federal Lawyer*, which also is posted on my blog immigrationcourtside.com.**

***Fourth,* *the immigration system relies far too much on detention.* The theory is that detention, particularly under poor conditions with no access to lawyers, family, or friends, will “grind down individuals” so that they abandon their claims and take final orders or depart voluntarily. As they return to their countries and relate their unhappy experiences with the U.S. justice system, that supposedly will “deter” other individuals from coming.**

**Although there has been a downturn in border apprehensions since the Administration took office, there is little empirical evidence that such deterrence strategies will be effective in stopping undocumented migration in the long run. Indeed, last month the number of apprehensions started to rise again.**

**In any event, use of detention, as a primary deterrent for non-criminals who are asserting their statutory right to a hearing and their constitutional right to due process is *highly* inappropriate. Immigration detention is also expensive, and questions have been raised about the procedures used for awarding some of the contracts.**

***Fifth*, *we need an appellate court, the Board of Immigration Appeals, that functions like a real court not a high-volume service center.* Over the past decade and one-half, the Board has taken an overly restrictive view of asylum law that fails to fulfill the generous requirements of the Supreme Court’s landmark decision in *Cardoza-Fonseca* and the Board’s own precedent in *Matter of Mogharrabi*. The Board has also failed to take a strong stand for respondents’ due process rights in Immigration Court.**

**Largely as a result of the Board’s failure to assert positive leadership, there is a tremendous discrepancy in asylum grant rates – so-called “refugee roulette.” Overall grant rates have inexplicably been falling. Some courts such as Atlanta, Charlotte, and some other major non-detained courts have ludicrously low asylum grant rates, thereby suggesting a system skewed, perhaps intentionally, against asylum seekers. Perhaps not coincidentally, the Board has become totally “government-dominated” with no member appointed from the private sector *this century*.**

***Sixth, the DOJ selection process for Immigration Judges and BIA Members has become both incredibly ponderous and totally one-sided*. According to a recent GAO study, it takes on the average nearly *two years* to fill an Immigration Judge position. No *wonder* there are scores of vacancies and an unmanageable backlog!**

**And, it’s not that the results of this glacial process produce a representative immigration judiciary. During the Obama Administration, approximately 88% of the Immigration Judge appointments came directly from government backgrounds. To date, Attorney General Jeff Sessions’s judicial appointments have been almost 100% from the government sector. In other words, private sector expertise has been almost totally *excluded* from the 21st Century immigration judiciary.**

***Seventh, 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.**

**III. ACTION PLAN**

**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 students, 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!” Indeed, one of my former “all-star students” in Refugee Law & Policy at Georgetown Law, B. Shaw Drake, currently is working in your New York office under the extremely prestigious Equal Justice Works Fellowship program. Drake is an “original enlistee” in the “New Due Process Army.”**

**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, working for or with Human Rights first is a *fantastic* way to contribute to assertively protecting the due process rights of migrants. Internships and JLC positions at the Immigration Courts are also ways for law students and recent law grads to contribute 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, teachers, and others who are not lawyers but who can qualify to provide pro bono representation in Immigration Court to needy migrants thorough properly recognized religious and community organizations.**

**Even if you are a lawyer not practicing 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, like Human Rights First, and religious groups that assist migrants for little or no charge. *Never* has the need for such services been greater.**

**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.**

**IV. CONCLUSION**

**In conclusion, I have shared with you the U.S. Immigration Court’s noble due process vision and the ways it currently is being undermined and disregarded. I have also shared with you some of my ideas for effective court reforms 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. Congratulations again on your positions, and have a *great* summer.**

**(07-24-17)**