**THE ATTACK ON DUE PROCESS IN THE UNITED STATES IMMIGRATION COURTS**

**Keynote Address by**

**Paul Wickham Schmidt**

**United States Immigration Judge (Retired)**

**WOMEN’S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA**

**Crowell & Moring**

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**I. INTRODUCTION**

**Thank you so much for inviting me to speak at this wonderful event. I’m *honored* to be here. Thanks also to Crowell & Moring for providing this lovely facility.**

**When I got off the subway at Metro Center tonight, I came out on the corner of 12 & F Street, NW. I spent the first two years of my legal career *right at that spot* working as an Attorney Advisor for the Board of Immigration Appeals, the “BIA,” in the days before the creation of the Executive Office for Immigration Review (“EOIR”). The BIA was located on the top floor of the now long demolished “International Safeway Building,” which believe it or not, actually contained a functioning Safeway grocery store.**

**As the “new kids on the block,” the late Lauri Filppu and I got sent down to Safeway to buy beer and supplies for the office parties. A little like being the “Junior Justice” at the Supreme Court, I suppose – but, maybe, not so much. Interestingly, Lauri and I both went on to eventually serve as appellate judges – “Board Members” – at the BIA. He served with me when I was BIA Chair in the late 1990’s.**

**I don’t recognize much of the “Ol’ Hood.” Then, it was mostly wig shops, record stores, souvenir stands, and a few lunch counters that catered to the “work and tourist” lunch crowd. *Not* a place you wanted to be after dark.**

**The one remaining “landmark” is the Hotel Harrington. But the “Kitcheteria” and the aptly named “Pink Elephant Lounge” have been replaced by something called “Harry’s Family Bar & Grill” that still has kind of a “Kitcheteria/Pink Elephant” aura about it. At any rate, the ‘hood and the quarters at the BIA bore no resemblance to this splendid building and the Crowell & Moring “digs.”**

**The Women’s Bar Association of DC is a *terrific* organization,[[1]](#footnote-1) and you are extremely fortunate to have such great lawyers, leaders, and amazing human beings as my friends Pauline Schwartz and Leticia “Letty” Corona involved.**

**They were part of the “life saving crew” at the Arlington Immigration Court during my tenure on the bench. They are also stalwarts of the “New Due Process Army” which I will discuss later. And, as I already mentioned, Pauline & Letty were the creators of the four hypotheticals and the “power points” that we used as a “lead in” tonight.**

**I also want to recognize my long-time friend and colleague retired U.S. Immigration Judge Joan Churchill whom I understand was your keynote speaker at this event last year. Joan and I actually met as BIA Attorney Advisors in 1973, and were part of the “lunch foursome.” So, we got to know the neighborhood’s culinary offerings very well. We also served together for a number of years on the bench after I was reassigned to the Arlington Immigration Court in 2003.**

***Courageous women* are rightfully dominating our news. We should all recognize that Judge Churchill’s pioneering role as one of the first female U.S. Immigration Judges in the nation helped to pave the way for a more diverse judiciary and for all the women who serve as U.S. Immigration Judges today. And Judge Churchill *definitely* is a role model who, no mater how tough and challenging things got, absolutely could *never* be bullied or intimidated.**

**I was thinking of Judge Churchill as I walked over her tonight. After her initial appointment to the bench, she was the target of some petty but persistent attempts to drive her out by the “macho culture” that then prevailed at the “Legacy DHS” and was unhappy that she, rather than ”one of their own,” had been appointed to the judgeship.**

**We discussed what happened then and over the years. To the best of my knowledge, there was no *overt* sexual act involved. But, the pattern of harassment and attempts to create an inhospitable work environment were certainly directed at Judge Churchill’s *gender* as a woman. So, it fits today’s definition of “sexual harassment.”**

**In any event, in Judge Churchill’s case they “picked on the wrong person.” So, for those of you, particularly younger lawyers, and particularly women lawyers, who have never met her, tonight is you chance to meet a true “American legal and judicial hero” who paved the way for others to follow.**

**I'd also like to recognize another distinguished former colleague from the Arlington Immigration Court, Judge Lawrence O. Burman who is here tonight. As many of you know, through his tireless work with the Federal Bar Association, Judge Burman has been a leader in promoting better Immigration Court practice through continuing legal education.**

**And, in his capacity as an officer of the National Association of Immigration Judges, the “NAIJ, ”he has also been one of the leaders in fighting for the creation of an independent Article I U.S. Immigration Court. I trust that by the end of my speech tonight you *will understand* why that effort is so timely and critical to our nation’s justice system. For the record, both Judge Churchill and I are retired members of the NAIJ. Indeed, Judge Churchill is a past President of the NAIJ.**

**Now, as Judge Burman and Judge Churchill know, this is the point at which I used to deliver my comprehensive disclaimer giving everyone in Government “plausible deniability” for everything I might say, particularly anything that might come too close to the truth. I do not have to do that any more. But, I will give the Women’s Bar Association of DC the benefit by disclaiming that anything I might say tonight represents *their views* or any approximation thereof. No, folks, tonight everything I say is *my view, and only my view: no bureaucratic “doublespeak,” no party line, no sugar coating!* I’m going to tell you *exactly* what I *really* think!**

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

**As many of you in this room probably recognize, there is no “overall 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.**

**And, unfortunately, the current Administration with its anti-immigrant attitudes and polarizing racial and ethnic rhetoric intends to make the problems worse rather than better. That starts with the *absolute disaster* in our beleaguered U.S. Immigration Courts.**

**There is a realcrisis 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.” The “fundamental flaw” here is that as mere “administrative courts” situated within the U.S. Department of Justice, the U.S. Immigration Courts are not truly independent in the same way as other major “specialized” court systems, such as the Tax Court and the Bankruptcy Courts.**

**In the best of times, placing the Immigration Courts within the Department of Justice is problematic. With the anti-immigrant, xenophobic, self-styled “immigration enforcer-in-chief “ Jeff Sessions as Attorney General, it is a *disaster* from a due process and fundamental fairness standpoint.**

**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. Indeed, Sessions recently announced a series of so-called “reforms” which, *far* from *improving* the Immigration Courts, mostly would further compromise fairness, professionalism, and due process.**

**He plans to impose case completion quotas – read “deportation quotas” -- for judges. At the same time he mischaracterizes statistics in attempting disingenuously to “fob off “ primary blame for the current monumental backlog of 650,000 pending cases on *overworked private attorneys*, the “real heroes” of our system, and unrepresented migrants, the *real victims* of ADR, while ignoring and attempting to cover up the *real cause of the problem* – *Aimless Docket Reshuffling* (“ADR”) instituted by DOJ politicos attempting to use the Immigration Courts as an adjunct of DHS enforcement.**

**Sessions intentionally ignores his own data showing that that recent increases in requests for continuance are coming from *DHS and EOIR itself*, rather than from the private bar! Obviously, it is past time for a truly 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. Removal proceedings conducted by U.S. Immigration Judges are considered “civil” in nature, although in many cases they have consequences *far more serious* than criminal prosecutions. Consequently, migrants appearing in Removal Proceedings are *not* entitled to appointed counsel, as they would be in criminal proceedings. Therefore, the role of private attorneys, and particularly those serving on a pro bono or “low bono” basis, as many of you in this room are doing or have done in the past, become absolutely critical to achieving due process.**

**This problem is particularly acute in so-called “detention courts.” We *know* that representation makes a *huge difference*. Represented individuals succeed at rates four to five times greater than unrepresented individuals.**

**Accordingly, an Attorney General *truly* interested in due process, fairness, and efficiency, would emphasize the need to insure adequate access to counsel. Instead, Sessions has gone out of his way to *wrongly* characterize attorneys as potential “fraudsters” who supposedly are impeding the progress of his “deportation railway” with dilatory requests for continuances and applications for asylum provided by U.S. and internal law. Session’s *intentional* distortion of what is *really* happening in Immigration Court should *outrage every American* who cares about the Constitutional right to due process and integrity and *intellectual honesty* from U.S. government officials!**

**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 *intentionally* is limited to non-existent.**

**The documentation of the need for attorneys to represent respondents in Removal Proceedings to achieve fundamentally fair results is extensive and widely available. Given that, I ask *you* what kind of Attorney General and what kind of Government would *intentionally* locate traumatized individuals, many women and children, who are seeking potentially life-saving relief under our laws, in obscure poorly run detention facilities where access to counsel is impeded? *Is this something of which we can be proud as a nation or should accept as simply “business as usual” in the age of Trump and Sessions?***

**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* 650,000 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 May 2017 edition of The Federal Lawyer.**

**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 this Administration took office, there is little empirical evidence that such deterrence strategies will be effective in stopping undocumented migration in the long run. 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.**

**Moreover, Sessions has publicly delivered *shockingly* extreme anti-asylum statements *directly to EOIR adjudicators*. He intentionally and substantially mis-stated the full scope of asylum protection by suggesting that critical “particular social group” protection that is a key element of both U.S. and international protection laws is somehow “less worthy” than other grounds; suggested rampant asylum fraud without supporting evidence; criticized case law that has appropriately recognized rights to protection greater than Sessions and his restrictionist allies want; and suggested, *again without evidence*, that lawyers are the *problem*, rather than the *solution*.**

**Sessions’s “cure” would be *further reductions in the rights of asylum seekers*, and more use of “expedited removal” which assigns nearly absolute ability to block asylum seekers from receiving full hearings to totally unqualified and biased law enforcement personnel.**

**Since retiring, I have been a forthright critic of some of the Obama Administration’s misguided and overly restrictive immigration policies, particularly the unnecessary prioritization and detention of scared women and children from the Northern Triangle seeking asylum. However, Sessions has heaped *unjustified* criticism on the Obama Administration for the things they did *absolutely correctly and in accordance with the law*: correctly applying “credible fear standards in exactly the generous manner contemplated by law and for properly releasing good faith asylum seekers from detention, rather than making them part of Sessions’s un-American “New American Gulag.”**

**Folks, Senator Elizabeth Warren, Senator Corey Booker, and the Congressional Black Caucus tried to tell the nation and the world why Jeff Sessions was *clearly unqualified* to serve as Attorney General. They were *ignored* and in Senator Warren’s case *rudely silenced* by Majority Leader Mitch McConnell for *speaking truth*. Now those of us who believe in the Constitutional Due Process and fairness for all, the rule of law, and a proper and generous application of U.S. asylum and refugees laws are seeing the disturbing results.**

**That an individual with such high biased, legally inaccurate, factually unsupported, and inappropriately negative views of U.S asylum law and the plight of refugees and asylees would hold *any* position of responsibility in the Government of the U.S. is disturbing at best. That he would be *in charge of* a court system that is often the last and *only* resort for those seeking due process, fundamental fairness, and legal protection from persecution and torture under our domestic laws and international conventions is *simply appalling.***

**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!**

**While Sessions claims that he has “streamlined” the process in some mysterious way, his goal of a 6-8 month hiring cycle is still beyond what should be necessary in a properly run and administered merit-based system.**

**And, the results to date have been less than impressive. Most of the recent hires appear to have been “in the pipeline” under the last Administration. As the system crumbles and the DOJ requests additional Immigration Judges, the reality is that 45 judicial positions, more than 10% of the total authorized, remain vacant.**

**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. In other words, private sector expertise has been almost totally excluded from the 21st Century immigration judiciary.**

**Sessions has actually done slightly better at hiring those with experience in the private sector. However, most attribute this to applicants whose selection was pending “background clearance” at the end of the last Administration, rather than to any conscious decision by Sessions to create a more diverse and representative 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.**

**Sessions has assured us that an “E-Filing Pilot Program” will be in place in the Immigration Courts at some point in mid-2018. But, folks, EOIR has been “studying” and “developing” e-filing since 2001 -- a period of *nearly 17 years* – *without achieving any meaningful end product*! Indeed, most of us involved in that initial e-filing study are now retired, dead, or both. (Happily, I’m in “group one.”)**

**Moreover, those of us who have lived through past DOJ/EOIR “pilot programs,” “upgrades,” and “rollouts” know that they are often are plagued by slipping implementation dates, “Not Quite Ready For Prime Time”(“NQRFPT”) hardware and software, and general administrative chaos.**

**The U.S. Immigration Court, its employees, and its hundreds of thousands of frustrated “customers” deserve *modern, professional court management* which simply *is not going to happen* under the DOJ, particularly in the “Age of Trump & Sessions.”**

**III. ACTION PLAN**

**Keep these thoughts in mind. Not surprisingly, based on actions to date, I have no 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.**

**Outrageously, Sessions actually proposes to move the court system in the *opposite direction* – elevating false efficiencies, case completions, and legislative and administrative gimmicks to truncate rights above fairness, quality, and guaranteeing due process for individuals. What kind of court system does that? Sounds like something out of a Third World dictatorship, not a 21st Century democracy!**

**However, eventuallyour 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 at present? 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 mytime 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 earlierpoints 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.**

**Several state and local government initiatives like those in New York, California, and Chicago have been very successful in expanding Immigration Court representation, particularly in detained cases, improving results, and resisting Administration enforcement overreach. I understand that a similar movement in Maryland might soon be underway. If it happens, all you Maryland residents in the audience should let your state legislators know that you stand behind due process, fairness, and justice for our immigrant communities.**

**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, and religious groups that assist migrants for little or no charge. Neverhas 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. We have seen a graphic example this week of how decent citizens who have had enough of this Administration’s lawless behavior, anti-American attitudes, and trampling on our Constitution and our humane national values can rise up, be heard, and succeed in changing the future for the better, even against supposedly prohibitive odds. 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 canand must be fixed soonerrather 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,” “haste makes waste” 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.**

**Trump, Sessions, and their arrogant cronies have a dark xenophobic, homophobic, Islamophobic plan for America that completely ignores or downgrades the essential contributions of immigrants of all types, all nationalities, and all economic and educational levels. It essentially “ disses” our *true* heritage and greatness as a “country of immigrants.”**

**This darkness *does not* represent *my* view of America as a *humane, generous, and tolerant nation of immigrants, both “documented” and “undocumented*,” nor do they reflect *my understanding* of the proper meaning of the Due Process Clause of the U.S. Constitution, which *applies equally to all individuals in the U.S.*, *not just citizens*. I sincerely hope that they do not reflect *your views* either! If not, please *join me in standing up and being heard in opposition* to this Administration’s aggressively xenophobic, homophobic, Islamophobic programs and their intentional downgrading of due process and fairness in our U.S. Immigration Courts.**

**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.**

**(Revised, 12-19-17)**

1. I’ve since joined the WBA. [↑](#footnote-ref-1)