**JUSTICE BETRAYED: THE INTENTIONAL MISTREATMENT OF CENTRAL AMERICAN ASYLUM APPLICANTS BY THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**By**

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**Hi, I’m Paul Schmidt, moderator of this panel. So, I have something useful to do while my wonderful colleagues do all the “heavy lifting,” please submit all questions to me in writing. And remember, free beer for everyone at the Bullock Texas State Museum after this panel!**

**Welcome to the front lines of the battle for our legal system, and ultimately for the future of our constitutional republic. Because, make no mistake, once this Administration, its nativist supporters, and enablers succeed in eradicating the rights and humanity of Central American asylum seekers, all their other “enemies” — Hispanics, gays, African Americans, the poor, women, liberals, lawyers, journalists, civil servants, Democrats — will be in line for “Dred Scottification” — becoming “non-persons” under our Constitution. If you don’t know what the “Insurrection Act” is or “Operation Wetback” was, you should “tune in” to today’s edition of my blog [immigrationcourtside.com](http://immigrationcourtside.com) and take a look into the future of America under our current leaders’ dark and disgraceful vision.**

**Before I introduce the “Dream Team” sitting to my right, a bit of asylum history.**

**In 1987, the Supreme Court established in *INS v. Cardoza-Fonseca* that a well founded fear of persecution for asylum was to be interpreted generously in favor of asylum applicants. So generously, in fact, that someone with only a 10% chance of persecution qualifies.**

**Shortly thereafter, the BIA followed suit with *Matter of Mogharrabi*, holding that asylum should be granted even in cases where persecution was significantly less than probable. To illustrate, the BIA granted asylum to an Iranian who suffered threats at the Iranian Interests Section in Washington, DC. Imagine what would happen to a similar case under today’s regime!**

**In the 1990s, the “Legacy INS” enacted regulations establishing that those who had suffered “past persecution” would be presumed to have a well-founded fear of future persecution, unless the Government could show materially changed circumstances or a reasonably available internal relocation alternative that would eliminate that well-founded fear. In my experience as a judge, that was a burden that the Government seldom could meet.**

**But the regulations went further and said that even where the presumption of a well founded fear had been rebutted, asylum could still be granted because of “egregious past persecution” or “other serious harm.”**

**In 1996, the BIA decided the landmark case of *Matter of Kasinga*, recognizing that abuses directed at women by a male dominated society, such as “female genital mutilation’ (“FGM”), could be a basis for granting asylum based on a “particular social group.” Some of us, including my good friend and colleague Judge Lory Rosenberg, staked our careers on extending that much-need protection to women who had suffered domestic violence. Although it took an unnecessarily long time, that protection eventually was realized in the 2014 precedent *Matter of A-R-C-G*-, long after our “forced departure” from the BIA.**

**And, as might be expected, over the years the asylum grant rate in Immigration Court rose steadily, from a measly 11% in the early 1980s, when EOIR was created, to 56% in 2012, in an apparent long overdue fulfillment of the generous legal promise of *Cardoza-Fonseca*. Added to those receiving withholding of removal and/or relief under the Convention Against Torture (“CAT”), approximately two-thirds of asylum applicants were receiving well-deserved, often life-saving legal protection in Immigration Court.**

**Indeed, by that time, asylum grant rates in some of the more due-process oriented courts with asylum expertise like New York and Arlington exceeded 70%, and could have been models for the future. In other words, after a quarter of a century of struggles, the generous promise of *Cardoza-Fonseca* was finally on the way to being fulfilled. Similarly, the vision of the Immigration Courts as “through teamwork and innovation being the world’s best administrative tribunals guaranteeing fairness and due process for all” was at least coming into focus, even if not a reality in some Immigration Courts that continued to treat asylum applicants with hostility.**

**And, that doesn’t count those offered prosecutorial discretion or “PD” by the DHS counsel. Sometimes, this was a humanitarian act to save those who were in danger if returned but didn’t squarely fit the somewhat convoluted “refugee” definition as interpreted by the BIA. Other times, it appeared to be a strategic move by DHS to head off possible precedents granting asylum in “close cases” or in “emerging circumstances.”**

**In 2014, there was a so-called “surge” in asylum applicants, mostly scared women, children, and families from the Northern Triangle of Central America seeking protection from worsening conditions involving gangs, cartels, and corrupt governments.There was a well-established record of femicide and other widespread and largely unmitigated gender-based violence directed against women and gays, sometimes by the Northern Triangle governments and their agents, other times by gangs and cartels operating with the knowledge and acquiescence of the governments concerned.**

**Also, given the breakdown of governmental authority and massive corruption, gangs and cartels assumed quasi-governmental status, controlling territories, negotiating “treaties,” exacting involuntary “taxes,” and severely punishing those who publicly opposed their political policies by refusing to join, declining to pay, or attempting to report them to authorities. Indeed, MS-13 eventually became the largest employer in El Salvador. Sometimes, whole family groups, occupational groups, or villages were targeted for their public acts of resistance.**

**Not surprisingly in this context, the vast majority of those who arrived during the so-called “surge” passed “credible fear” screening by the DHS and were referred to the Immigration Courts, or in the case of “unaccompanied minors,” to the Asylum Offices, to pursue their asylum claims.**

**The practical legal solution to this humanitarian flow was obvious — help folks find lawyers to assist in documenting and presenting their cases, screen out the non-meritorious claims and those who had prior gang or criminal associations, and grant the rest asylum. Even those not qualifying for asylum because of the arcane “nexus” requirements appeared to fit squarely within the CAT protection based on likelihood of torture with government acquiescence upon return to the Northern Triangle. Some decent BIA precedents, a robust refugee program in the Northern Triangle, along with continued efforts to improve the conditions there would have “sealed the deal.” In other words, the Obama Administration had all of the legal tools necessary to deal effectively and humanely with the misnamed “surge” as what it *really* was — a humanitarian situation and an opportunity for our country to show human rights leadership!**

**But, then things took a strange and ominous turn. After years of setting records for deportations and removals, and being disingenuously called “soft on enforcement” by the GOP, the Obama Administration began believing the GOP myths that they were wimps. They panicked! Their collective “manhood” depended on showing that they could quickly return refugees to the Northern Triangle to “deter” others from coming. Thus began the “weaponization” of our Immigration Court system that has continued unabated until today.**

**They began imprisoning families and children in horrible conditions and establishing so-called “courts” in those often for profit prisons in obscure locations where attorneys generally were not readily available. They absurdly claimed that everyone should be held without bond because as a group they were a “national security risk.” They argued in favor of indefinite detention without bond and making children and toddlers “represent themselves” in Immigration Court.**

**The Attorney General also sent strong messages to EOIR that hurrying folks through the system by “prioritizing” them, denying their claims, “stuffing” their appeals, and returning them to the Northern Triangle with a mere veneer of due process was an essential part of the Administration’s “get tough” enforcement program. EOIR was there to “send a message” to those who might be considering fleeing for their lives — don’t come, you won’t get in, no matter how strong your claim might be.**

**They took judges off of their established dockets and sent them to the Southern Border to expeditiously remove folks before they could get legal help. They insisted on jamming unprepared cases of recently arrived juveniles and “adults with children” in front of previously docketed cases, thereby generating total chaos and huge backlogs through what is known as “aimless docket reshuffling” (“ADR”).**

**Hurry up scheduling and ADR also resulted in more “in absentia” orders because of carelessly prepared and often inadequate or wrongly addressed “notices” sent out by overwhelmed DHS and EOIR court staff. Sometimes DHS could remove those with in absentia orders before they got a chance to reopen their cases. Other times, folks didn’t even realize a removal order had been entered until they were on their way back.**

**They empowered judges with unusually high asylum denial rates. By a ratio of nine to one they hired new judges from prosecutorial backgrounds, rather than from the large body of qualified candidates with experience in representing asylum applicants who might actually have been capable of working within the system to fairly and efficiently recognize meritorious cases, promote fair access to pro bono counsel, and insure that doubtful cases or those needing more attention did not get “lost” in the artificial backlogs being created in an absurdly mismanaged system. In other words, due process took a back seat to “expedience” and fulfilling inappropriate Administration enforcement goals.**

**Asylum grant rates began to drop, even as conditions on the ground for refugees worldwide continued to deteriorate. Predictably, however, detention, denial, inhumane treatment, harsh rhetoric, and unfair removals failed to stop refugees from fleeing the Northern Triangle.**

**But, just when many of us thought things couldn’t get worse, they did. The Trump Administration arrived on the scene. They put lifelong White Nationalist xenophobe nativists Jeff Sessions and Stephen Miller in charge of eradicating the asylum process. Sessions decided that even artificially suppressed asylum grant rates weren’t providing enough deterrence; asylum seekers were still winning too many cases. So he did away with *A-R-C-G-* and made it harder for Immigration Judges to control their dockets.**

**He tried to blame asylum seekers and their largely pro bono attorneys, whom he called “dirty lawyers,” for having created a population of 11 million undocumented individuals in the U.S. He promoted bogus claims and false narratives about immigrants and crime. Perhaps most disgustingly, he was the “mastermind” behind the policy of “child separation” which inflicted lifetime damage upon the most vulnerable and has resulted in some children still not being reunited with their families.**

**He urged “judges” to summarily deny asylum claims of women based on domestic violence or because of fear of persecution by gangs. He blamed the judges for the backlogs he was dramatically increasing with more ADR and told them to meet new quotas for churning out final orders or be fired. He made it clear that denials of asylum, not grants, were to be the “new norm” for final orders.**

**His sycophantic successor, Bill Barr, an immigration hard-liner, immediately picked up the thread by eliminating bond for most individuals who had passed credible fear. Under Barr, the EOIR has boldly and publicly abandoned any semblance of due process, fairness, or unbiased decision making in favor of becoming an Administration anti-asylum propaganda factory. Just last week they put out a “bogus fact sheet” of lies about the asylum process and the dedicated lawyers trying to help asylum seekers. The gist was that the public should believe that almost all asylum seekers from the Northern Triangle are mala fide and that getting them attorneys and explaining their rights are a waste of time and money.**

**In the meantime, the Administration has refused to promptly process asylum applicants at ports of entry; made those who have passed credible fear “wait in Mexico” in dangerous and sometimes life-threatening conditions; unsuccessfully tried to suspend the law allowing those who enter the U.S. between ports of entry to apply for asylum; expanded the “New American Gulag” with tent cities and more inhumane prisons — dehumanizingly referred to as “beds” as if they existed without reference to those humans confined to them; illegally reprogrammed money that could have gone for additional humanitarian assistance to a stupid and unnecessary “wall;” and threatened to “dump” asylum seekers to “punish” so-called “sanctuary cities.” Perhaps most outrageously, in violation of clear statutory mandates, they have replaced trained Asylum Officers in the “credible fear” process with totally unqualified Border Patrol Agents whose job is to make the system “adversarial” and to insure that fewer individuals pass “credible fear.”**

**The Administration says the fact that the “credible fear” pass rate is much higher than the asylum grant rate is evidence that the system is being “gamed.” That’s nativist BS! The, reality is just the opposite: that so many of those who pass credible fear are eventually rejected by Immigration Judges shows that something is *fundamentally wrong with the Immigration Court system.* Under pressure to produce and with too many biased, untrained, and otherwise unqualified “judges,” many claims that should be granted are being wrongfully denied.**

**Today, the Immigration Courts have become an openly hostile environment for asylum seekers and their representatives. Sadly, the Article III Courts aren’t much better, having largely “swallowed the whistle” on a system that every day blatantly mocks due process, the rule of law, and fair and unbiased treatment of asylum seekers. Many Article IIIs continue to “defer” to decisions produced not by “expert tribunals,” but by a fraudulent court system that has replaced due process with expediency and enforcement.**

**But, all is not lost. Even in this toxic environment, there are pockets of judges at both the administrative and Article III level who still care about their oaths of office and are continuing to grant asylum to battered women and other refugees from the Northern Triangle. Indeed, I have been told that more than 60 gender-based cases from Northern Triangle countries have been granted by Immigration Judges across the country even after Sessions’s blatant attempt to snuff out protection for battered women in *Matter of A-B-*. Along with dependent family members, that means hundreds of human lives of refugees saved, even in the current age.**

**Also significantly, by continuing to insist that asylum seekers from the Northern Triangle be treated fairly in accordance with due process and the applicable laws, we are making a record of the current legal and constitutional travesty for future generations. We are building a case for an independent Article I Immigration Court, for resisting nativist calls for further legislative restrictions on the rights of asylum seekers, and for eventually holding the modern day “Jim Crows” who have abused the rule of law and human values, at all levels of our system, accountable, before the “court of history” if nothing else!**

**Eventually, we will return to the evolving protection of asylum seekers in the pre-2014 era and eradicate the damage to our fundamental values and the rule of law being done by this Administration’s nativist, White Nationalist policies.That’s what the “New Due Process Army” is all about.**

**Here to tell you how to effectively litigate for the New Due Process Army and to save even more lives of deserving refugees from all areas of the world, particularly from the Northern Triangle, are three of the “best ever.” I know that, because each of them appeared before me during my tenure at the Arlington Immigration Court. They certainly brightened up my day whenever they appeared, and I know they will enlighten you with their legal knowledge, energy, wit, and humanity.**

**Andrea Rodriguez is the principal of Rodriguez Law in Arlington Virginia. Prior to opening her own practice, Andrea was the Director of Legal Services at the Central American Resource Center (CARECEN). She is a graduate of the City University of New York Law and George Mason University.**

**Eileen Blessinger is the principal of Blessinger Legal in Falls Church, Virginia. Eileen is a graduate of the Washington College of Law at American University. In addition to heading a multi-attorney practice firm, she is a frequent commentator on legal issues on television and in the print media.**

**Lisa Johnson-Firth is the principal of Immigrants First, specializing in removal defense, waivers, family-based adjustment, asylum and Convention Against Torture claims, naturalization, U and T visas, and Violence Against Women Act petitions. She holds a J.D. from Northeastern University, an LLB from the University of Sheffield in the U.K., and a B.A. degree from Allegheny College.**

**Andrea, starting with you, what’s the real situation in the Northern Triangle and the sordid history of the chronic failure of state protection?**