**APPELLATE LITIGATION IN TODAY’S BROKEN AND BIASED IMMIGRATION COURT SYSTEM: FOUR STEPS TO A WINNING COUNTERATTACK BY THE RELENTLESS “NEW DUE PROCESS ARMY”**

**By**

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**FBA Immigration Conference**

**Austin, Texas**

**May 18, 2019**

**I. INTRODUCTION**

Once upon a time, there was a court system with a vision: *Through teamwork and innovation be the world’s best administrative tribunals guaranteeing fairness and due process for all.* Two decades later, that vision has become a *nightmare*.

Would a system with even the *faintest* respect for Due Process, the rule of law, and human life open so-called “courts” in places where no legal services are available, using a variety of largely untrained “judges,” themselves operating on moronic and unethical “production quotas,” many appearing by poorly functioning and inadequate televideo? Would a real court system put out a “fact sheet” of blatant lies and nativist false narratives designed to denigrate the very individuals who seek justice before them and to discredit their dedicated, and often pro bono or low bono, attorneys? This system is as disgraceful as it is dysfunctional.

Today, the U.S. Immigration Court *betrays* due process, *mocks* competent administration, and slaps a *false veneer* of “justice” on a “deportation railroad” designed to evade our solemn Constitutional responsibilities to guarantee due process and equal protection. It seeks to snuff out every existing legal right of migrants. Indeed, it is designed specifically to *demean, dehumanize, and mistreat* the very individuals whose rights and lives it is charged with *protecting*.

It cruelly *betrays* everything our country claims to stand for and baldly *perverts* our international obligations to protect refugees. In plain terms, the Immigration Court has become an intentionally “hostile environment” for migrants and their attorneys.

This hostility *particularly* targets the most vulnerable among us – asylum applicants, mostly families, women, and children fleeing targeted violence and systematic femicidal actions in failed states; places where gangs, cartels, and corrupt officials have replaced any semblance of honest competent government willing and able to make reasonable efforts to protect its citizenry from persecution and torture. All of these states have long, largely unhappy histories with the United States. In my view and that of many others, their current sad condition is in no small measure intertwined with our failed policies over the years – failed policies that we now are mindlessly “doubling down” upon.

My friends have given you the law. Now, I’m going to give you the “facts.” Let’s go over to the “seamy underside of reality,” where the war for due process and the survival of democracy is being fought out every day. Because we can’t really view the travesty taking place at the BIA as an isolated incident. It’s part of an overall attack on Due Process, fundamental fairness, human decency and particularly asylum seekers, women, and children in today’s “weaponized” Immigration Courts.

I, of course, hold harmless the FBA, the “Burmanator,” my fellow panelists, all of you, and anyone else of any importance whatsoever for the views I express this morning. They are mine, and mine alone, for which I take full responsibility. No party line, no sugar coating, no bureaucratic BS – just the truth, the whole truth, and nothing but the truth, as I see it based on more than four- and one-half decades in the fray at all levels. In the words of country music superstar Toby Keith, “It’s me baby, with your wake-up call.”

So here are my four tips for taking the fight to the forces of darkness through appellate litigation.

**II. FOUR STEPS**

**First,** I**f you lose before the Immigration Court, which is fairly likely under the current aggressively xenophobic “dumbed down” regime, take your appeals to the BIA and the Circuit Courts of Appeals**. There are three good reasons for appealing: 1) in most cases it gives your client an automatic stay of removal pending appeal to the BIA; 2) appealing to the BIA ultimately gives you access to the “real” Article III Courts that still operate more or less independently from the President and his Attorney General; and 3) who knows, even in the “crapshoot world” of today’s BIA, you might win.

After the “Ashcroft Purge of ’03,’’ which incidentally claimed both Judge Rosenberg and me among its casualties, the BIA became, in the words of my friend, gentleman, and scholar Peter Levinson, “a facade of quasi-judicial independence.” But, amazingly, *it has gotten even worse since then.* The “facade” has now become a “farce” – “judicial dark comedy” if you will.

And, as I speak, incredibly, Barr is working hard to change the regulations to further “dumb down” the BIA and extinguish any last remaining semblance of a fair and deliberative quasi-judicial process. If he gets his way, which is likely, the BIA will be “packed with more restrictionist judges,” decentralized so it ceases to function as even a ghost of a single deliberative body, and the system will be “gamed” so that any two “hard line” Board “judges,” acting as a “fake panel” will be able to designate anti-asylum, anti-immigrant, and pro-DHS “precedents” without even consulting their colleagues.

Even more outrageously, Barr and his “do-bees” over at the Office of Immigration Litigation (“OIL”) intend to present this disingenuous mockery as the work of an “expert tribunal” deserving so-called “*Chevron* deference.” *Your job* is to *expose* this *fraud* to the Article IIIs in all of its ugliness and “malicious incompetence.”

Yes, I know, many “real” Federal Judges don’t like immigraton cases. “Tough noogies” — that’s their job!

I always tell my law students about the advantages of helping judges and opposing counsel operate within their “comfort zones” so that they can “get to yes” for your client. But, this assumes a system operating *professionally and in basic good faith*. In the end, it’s not about fulfilling the judge’s or opposing counsel’s career fantasies or self-images. It’s about getting *Due Process* and *justice* for *your* client under law.

And, if Article III judges don’t start living up to their oaths of office, enforcing fair and impartial asylum adjudication, and upholding Due Process and Equal Protection under our Constitution *they will soon have nothing but immigration cases on their dockets.* They will, in effect, become full time Immigration Judges whether they like it or not. *Your* job is not to let them off the hook.

**Second, challenge** **the use of Attorney General precedents such as *Matter of A-B-* or *Matter of M-S-* on ethical grounds.** The U.S. Court of Appeals for the D.C. Circuit, in a recent decision written by Judge Tatel invalidating the rulings of a military judge on ethical grounds said: “This much is clear: whenever and however military judges are assigned, rehired, and reviewed, they must always maintain the appearance of impartiality.”[[1]](#footnote-1)

Like military judges, Immigration Judges and BIA Judges sit on life or death matters. The same is true of the Attorney General when he or she chooses to intervene in an individual case purporting to act in a quasi-judicial capacity.

Yet, Attorney General Barr has very clearly lined himself up with the interests of the President and his partisan policies, as shown by his recent actions in connection with the Mueller report. And, previous Attorney General Jeff Sessions was a constant unapologetic cheerleader for DHS enforcement who publicly touted a White Nationalist restrictionist immigration agenda. In Sessions’s case, that included references to “dirty attorneys” representing asylum seekers, use of lies and demonstrably false narratives attempting to connect migrants with crimes, and urging Immigration Judges adjudicating asylum cases not to be moved by the compelling humanitarian facts of such cases.

Clearly, Barr and Sessions acted *unethically* and *improperly* in engaging in quasi-judicial decision making where they were so closely identified in public with the government party to the litigation. My gosh, in what “justice system” is the “chief prosecutor” allowed to reach in and change results he doesn’t like to favor the prosecution? It’s like something out of Franz Kafka or the Stalinist justice system.

Their unethical participation should be a basis for invalidating their precedents. In addition, individuals harmed by that unethical behavior should be entitled to new proceedings before fair and unbiased quasi-judicial officials — in other words, they deserve a decision *from a real judge*, not a *biased DOJ immigration enforcement politico*.

**Third, make a clear record of how due process is being intentionally undermined, bias institutionalized, and the rule of law mocked in today’s Immigration Courts.** This record can be used before the Article III Courts, Congress, and future Presidents to insure that the system is *changed*, that an *independent* Article I U.S. Immigration Court *free of Executive overreach and political control* is created, and that *guaranteeing due process and fundamental fairness to all is restored as that court’s one and only mission.*

Additionally, we are making an *historical record* of how those in charge and many of their underlings are *intentionally abusing* our constitutional system of justice or looking the other way and thus enabling such abuses. And, while many Article III judges have stood tall for the rule of law against such abuses, others have enabled those seeking to destroy equal justice in America. They must be *confronted* with their derelictions of duty. Their *intransigence* in the face of dire emergency and *unrelenting human tragedy and injustice* in our immigration system *must* be recorded for future generations. They must be held *accountable*.

**Fourth, and finally, we must fight what some have referred to as the “Dred Scottification” of foreign nationals in our legal system.** The absolute mess at the BIA and in the Immigration Courts is a result of a policy of “malicious incompetence” along with a concerted effort to make foreign nationals “non-persons” under the Fifth Amendment.

And, while foreign nationals might be the most visible, they are by no means the only targets of this effort to “de-personize” and effectively “de-humanize” minority groups under the law and in our society. LGBTQ individuals, minority voters, immigrants, Hispanic Americans, African Americans, women, the poor, lawyers, journalists, Muslims, liberals, civil servants, and Democrats are also on the “due process hit list.”

**III. CONCLUSION & CHARGE**

In conclusion, the failure of Due Process at the BIA is part of a larger assault on Due Process in our justice system. I have told you that to thwart it and to restore our precious Constitutional protections we must: 1) take appeals; 2) challenge the precedents resulting from Sessions’s and Barr’s unethical participation in the quasi-judicial process; 3) make the historical record; and 4) fight “Dred Scottification.”

I also encourage all of you to read and subscribe (it’s free) to my blog, [immigrationcourtside.com](http://immigrationcourtside.com), “The Voice of the New Due Process Army.” If you like what you have just heard, you can find the longer, 12-step version, that I recently gave to the Louisiana State Bar on “Courtside.”

*Folks, the antidote to “malicious incompetence” is “righteous competence.”* 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, with resulting “Aimless Docket Reshuffling,” intentionally “jacked up” and uncontrollable court backlogs, and “dumbed down” judicial facades being pursued by this Administration and furthered by the spineless sycophants in EOIR management 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 America great and different from most of the rest of the world will go down with it. As the late Dr. Martin Luther King, Jr., said in his *Letter from a Birmingham Jail*, “injustice anywhere is a threat to justice everywhere.”

The Immigration Court’s once-noble due process vision is being mocked and trashed before our very eyes by arrogant folks who think that they can get away with destroying our legal system to further their selfish political interests.

*Now is the time to take a stand for fundamental fairness and equal justice under law! Join the New Due Process Army and fight for a just future for everyone in America! Due process forever! “Malicious incompetence” never!*

*(05-17-19)*

1. *In re: Abd Al-Rahim Hussein Al-Nashir*

   https://www.washingtonpost.com/world/national-security/in-a-setback-for-guantanamo-court-throws-out-years-of-rulings-in-uss-cole-case/2019/04/16/6c63e052-606b-11e9-bfad-36a7eb36cb60\_story.html [↑](#footnote-ref-1)