**THE 5-4-1 PLAN FOR RESTORING DUE PROCESS TO A BIASED & DYSFUNCTIONAL U.S. IMMIGRATION COURT**

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1. INTRODUCTION

Good afternoon. Thanks so much to your Chapter Chair Carrie Pastor for inviting me and to you for coming out to listen.

Carrie and I have just returned from the Federal Bar Association (“FBA”) Annual Immigration Conference in Austin, Texas. We had over 500 enthusiastic attendees, an unprecedented level of interest and enthusiasm. And, most exciting, next year’s conference will be right here in Detroit, for the first time. I congratulate your chapter and look forward to once again shattering all attendance records!

While in Austin, I met with and recruited many new members of the “New Due Process Army.” These are legal professionals who are committed to fighting as hard and as long as it takes to triumph against the vicious attack on our Constitution, the rule of law, and human decency being waged daily by this Administration – much of it directed against the most vulnerable and deserving of our protection. Those consist of scared and desperate women, children, and families seeking legal asylum protection, fleeing from the “failed states” of the Northern Triangle of Central America. That is an area where femicide, gangs acting as de facto governments, and government corruption are rampant.

As many of you know, I’m retired, so I no longer have to give my famous, or infamous, “super-comprehensive disclaimer.” However, I do want to hold Carrie, the FBA, you, and anybody else of any importance whatsoever “harmless” for my following remarks.

They are solely my views, for which I take full responsibility. That’s right, no party line, no “bureaucratic doublespeak,” no BS. Just the truth, the whole truth, and nothing but the truth, of course as I define truth, based on my four and one-half decades in the fray at all levels of our immigration system.

Some say that I speak in anger. I prefer to think of it as passion. But, either way, I am channeling the anger and outrage of those of us like my many colleagues in the Roundtable of Former Immigration Judges who have spent major parts of our professional lives, however imperfectly, trying to advance “good government” and working to make the EOIR vision of “guaranteeing fairness and Due Process for all a reality.

Of course, watching the system that we worked so hard to build being destroyed by a White Nationalist kakistocracy generates anger and outspoken criticism. Since those in the system, other than officers of the National Association of Immigration Judges (“NAIJ”) have been “muzzled,” if we don’t speak out for judicial independence, who will? And, for those of you who aren’t familiar with the term, a “kakistocracy” is “government by the least suitable or competent among us” – in other words, government by “the worst among us.”

I will tell you about my “5-4-1 program.” I’m going to highlight five horrible problems infecting justice and Due Process in today’s U.S. Immigration Courts; four badly needed and long overdue reforms, and one critical solution.

II. THE FIVE PROBLEMS

Turning to the problems, the U.S. Immigration Court, which includes both a trial division and an appellate division known as the Board of Immigration Appeals (“BIA”) isn’t a “court system” as any right-thinking person would envision it.

***First, unlike any normal court system, the chief prosecutor, the Attorney General selects, directs, and “supervises” the “judges.”*** Not surprisingly, over the last decade, over 90% of the judges have come directly from government or prosecutorial backgrounds. Well-qualified candidates from private practice, NGOs, and academia have effectively been excluded from participation in today’s immigration judiciary.

As part of his “improper influence” over the Immigration Courts, former Attorney General Sessions imposed, over the objection of all judges I’m aware of, demeaning and counterproductive “production quotas” that elevate productivity and expediency over quality, Due Process, and fundamental fairness.

And, current Attorney General Bill Barr has enthusiastically aggravated this problem. As we 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.”

***Second, notwithstanding that, according to the Supreme Court, “everything that makes life worth living” might be at issue in Immigration Court, there is no right to appointed counsel.***Therefore, DOJ has taken the absurd position that infants, toddlers, and others with no understanding whatsoever of our complicated legal, asylum, and immigration systems are forced to “represent themselves” in life or death matters against experienced ICE Counsel. The Government disingenuously claims that this complies with Due Process.

Obviously, these first two factors give the DHS a huge built in advantage in removal proceedings. But, sometimes that isn’t enough. Somehow, despite the odds being stacked against them, the individual respondent or applicant prevails. That’s when the “third absurdity” comes in to play.

***The chief prosecutor, the Attorney General, can reach into the system and change any individual case result that he or she doesn’t like and rewrite the immigration law in DHS’s favor through so-called “certified precedents.”***  Former Attorney General Sessions, a committed lifelong xenophobe and the self-proclaimed “king of immigration enforcement” exercised this authority often, more in less than two years than the preceding two Attorneys General over the eight years they served. Sometimes he intervened even before the BIA had a chance to rule on the case or over the joint objections of both the individual and the DHS. Barr recently intervened to reverse a long-standing precedent and thereby deprive individuals who had demonstrated a “credible fear” of persecution from even seeking a bond from an Immigration Judge.

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 policies, as shown by his recent actions in connection with the Mueller report. And, previous Attorney General Jeff Sessions was a constant cheerleader for DHS enforcement as well as publicly favoring 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 clearly 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.

***Fourth, this system operates under an incredible 1.1 million case backlog, resulting largely from what we call “Aimless Docket Reshuffling” or “ADR,” by DOJ politicos and their EOIR underlings.*** This largely self-created backlog continues to grow exponentially, even with a significant increase in judges, without any realistic plan for backlog reduction. In other words, under the “maliciously incompetent” management of this Administration, more judges have meant more backlog.

Even more disgustingly, in an attempt to cover up their gross incompetence, DOJ and EOIR have tried to shift the blame to the *victims*— asylum applicants, migrants, their hard working often pro bono or low bono lawyers, and the judges themselves. Sophomoric, idiotic non “solutions” like “deportation quotas for judges,” limitations on legitimate continuances, demeaningly stripping judges of the last vestiges of their authority to manage dockets through administrative closing, and mindlessly re-docketing cases that should remain off docket have been imposed on the courts over the objections of most judges.

For example, Sessions abolished “administrative closing” of dormant or non-priority cases and imposed what are likely unconstitutional limitations on continuances. However, this ignores the fact that much, probably the majority, of Immigration Court delay and continuances are the result of “Aimless Docket Reshuffling” generated by EOIR itself. Despite falsely claiming to be an “fair and impartial court system” EOIR routinely “pretzels itself up” to meet DHS Enforcement’s ever changing “priority of the day,” without regard to administrative efficiency or the due process rights of individuals whose cases have been pending for years before these inept “captive courts.”

The result has been an increase in “Aimless Docket Reshuffling” (“ADR”) the only thing that DOJ politicos and EOIR bureaucrats seem to excel in. Perhaps, some of YOU have been victims of ADR!

***Fifth, the Administration, DOJ, and EOIR use so-called “civil immigration detention” mostly in absurdly, yet intentionally, out of the way locations, to limit representation, coerce migrants into abandoning claims or appeals, and supposedly deter future migration, even though there is scant evidence that abusive detention actually acts as a deterrent.*** This is done with little or no effective judicial recourse in too many cases. Indeed, a recent TRAC study shows neither rhyme nor reason in custody or bond decisions in Immigration Court, even in those cases where the Immigration Judges at least nominally had jurisdiction to set bond.

Now, I’ve told you how due process and fairness are being mocked by DOJ and EOIR in a dysfunctional Immigration Court system where judges have effectively been told to act as “DOJ attorneys” carrying out the policies of their “partners” in DHS enforcement, supposedly a separate party to Immigration Court proceedings but now “driving the train.”

Indeed, in a move vigorously and publicly protested by our “Roundtable of Former Immigration Judges,” EOIR recently 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? What kind of “court system” acts in such an unethical manner against one party and in favor of another? This system is as disgraceful as it is dysfunctional.

1. THE FOUR REFORMS

Here are the four essential reforms. ***First, and foremost,a return to the original “Due Process Focus” of the Immigration Courts***: through teamwork and innovation be the world’s best courts guaranteeing fairness and Due Process for all. DOJ politicos and EOIR bureaucrats must be removed from their improper influence over this system that has turned it into a tool of DHS enforcement. Everything done by the courts must go through a “Due Process filter.”

***Second, replace the antiquated, inappropriate, bloated, and ineffective “Agency-Style Structure” with a “Court-Style Structure” with sitting judges rather than DOJ politicos and EOIR bureaucrats in charge.***Court administration should be decentralized through local Chief Judges, as in other systems, appointed competitively through a broad-based merit system and required to handle a case load. Sitting judges, not bureaucrats, must ultimately be in charge of administrative decisions which must be made in a fair and efficient manner. That process would consider the legitimate needs of DHS enforcement, along with the needs of the other parties coming before the court, and results in a balanced system, rather than one that inevitably favors DHS enforcement over Due Process, quality, and fairness.

***Third, create a professional administrative office modeled along the lines of the Administrative Office for U.S. Courts to provide modern, effective judicial support and planning.*** The highest priorities should be implementing a nationwide e-filing system following nearly two decades of wasted and inept efforts by EOIR to develop one, efforts that have once again been put “on hold” due to mismanagement. A transparent, merit-based hiring system for Immigration Judges, with fair and equal treatment of “non-government” applicants and a system for obtaining public input in the process is also a must. Additionally, the courts must be redesigned with the size of the dockets and public service in mind, rather than mindlessly jamming a 21st century workload into “mini-courts” designed for a long bygone era.

***Fourth, a real Appellate Division that performs as an independent court, must replace the “Falls Church Service Center” a/k/a the BIA.*** The crippling John Ashcroft purge-related bogus “reforms” turned the BIA into a subservient assembly line. Now, Barr threatens to further “dumb down” the appellate process through the regulations I mentioned earlier. These ill-advised procedures which have destroyed professionalism and appellate independence at the BIA must be eradicated. The BIA today a false “deliberative body” that is far removed from the public it serves and no longer deliberates in a publicly visible manner.

A new, independent Appellate Division, not politicos and bureaucrats, must be responsible for promulgating precedents in controversial areas, insuring that the generous asylum standards set forth years ago by the Supreme Court in *INS v. Cardoza-Fonseca* and by the BIA in *Matter of* *Mogharrabi* are made realities, not just lip service. The Appellate Division must finally rein in wayward judges, the worst of whom have turned some areas into veritable “asylum and due process free zones” resulting in loss of public confidence as well as denial of Due Process and unfair removals to life threatening situations.

Some might say that these reforms only deal with two of the five glaring problems — prosecutorial control and political interference. But, an independent, judge-run, Due Process focused U.S. Immigration Court where judges control their own dockets free from political interference and bureaucratic incompetence will be able to work with both private entities and the DHS to solve the problems leading to lack of representation, “Aimless Docket Reshuffling” and backlog building, and abusive use of immigration detention.

Naturally, all problems that have been allowed to fester and grow over decades of calculated indifference and active mismanagement won’t be solved “overnight.” Additional legislative fixes might eventually be necessary. But, fixing Due Process is a prerequisite that will enable other problems and issues to be constructively and cooperatively addressed, rather than just being swept under the carpet in typical bureaucratic fashion.

1. THE ONE SOLUTION

***So, now the “One Solution:” Congress must create an independent Article I U.S. Immigration Court.*** That’s exactly what the ABA Commission on Immigration recommended in a comprehensive study and report released earlier this year.

Indeed, the ABA Commission found that the current system is so dysfunctional that it withdrew a previous recommendation for hiring more Immigration Judges at present. In other words, putting additional new, and often inadequately trained, judges in a badly broken system will aggravate the problems, rather than solving them. In this respect, it’s important to recognize that although this Administration has substantially increased the number of Immigration Judges on the bench, more judges have actually resulted in more backlog given the lack of discipline and competent management in the overall immigration system, including the Immigration Courts.

For example, incompetent management planning at EOIR has resulted in interpreter shortages, hiring freezes, and suspension of the much-needed “e-filing pilot program.” All of this leads to more “EOIR-style ADR.”

Thus, the ABA joins the FBA, AILA, and the NAIJ, all organizations to which I belong, in recommending an Article I legislative solution. Significantly, after watching this Administration’s all-out assault on Due Process, common sense, truth, the rule of law, human decency, and best practices, the ABA deleted a prior “alternative recommendation” for an independent agency within the Executive Branch. In other words, we now know, beyond any reasonable doubt, that the Executive Branch is both unwilling and unable to run an independent court system in accordance with Due Process.

I highly recommend that you read the comprehensive ABA report in two volumes: Volume I is an “Executive Summary;” Volume II contains the “Detailed Findings.” You can find it on the ABA website or on [immigrationcourtside.com](http://immigrationcourtside.com/) my blog, which, of course, I also highly recommend.

1. CONCLUSION

In closing, we need ***change*** and we need it ***now***! Every day in our so-called “Immigration Courts” Due Process is being mocked, fundamental fairness violated, and unjust results are being produced by a disastrously flawed system run by those with no interest in fixing it. Indeed, as I mentioned, one of the stunning recommendations of the ABA is that no further judges be added to this totally dysfunctional and out of control system until it is fixed.

As the great Dr. Martin Luther King, Jr., once said “injustice anywhere is a threat to justice everywhere.” Tell ***your*** elected representatives that you’ve had enough injustice and are sick and tired of being treated as actors in a repertory company specializing in “theater of the absurd” masquerading as a “court system.” Demand Article I now!

Thanks for listening! Get inspired! Join the New Due Process Army, do great things, save deserving lives, and remember: Due Process Forever, malicious incompetence never!

(05-22-19)

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)