ROUND TABLE
of Former Immigration Judges

October 23, 2020

Lauren Alder Reid, Assistant Director
Office of Policy, Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2616
Falls Church, VA 22041
Federal eRulemaking Portal: http://www.regulations.gov.

Re: Comments in Opposition to Proposed Rulemaking: 85 FR 59692
RIN 1125-AA93
EOIR Docket No. 19-0010

Dear Ms. Alder Reid,

The Round Table of Former Immigration Judges is composed of 47 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed by and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating asylum applications and appeals. Our members include nationally-respected experts on asylum law; many regularly lecture at law schools and conferences and author articles on the topic.

Our members issued decisions encompassing wide-ranging interpretations of our asylum laws during our service on the bench. Whether or not we ultimately reached the correct result, those decisions were always exercised according to our "own understanding and conscience,"[1] and not in acquiescence to the political agenda of the party or administration under which we served.

We as judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security, and for that matter, the President.

INTRODUCTION

Initially we note that the current practice of reducing the time for notice and comment, severely undermines the ability for the public to digest and comment on rules. The reduction of time to

[1] *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

30 days violates the intent of Congress to give full deliberation to regulatory changes. As experienced adjudicators, we are in a unique position to contextualize these changes. With a short comment period, it is more challenging to provide extensive feedback about the impact of these proposed regulations, which we believe will be detrimental to respondents in removal proceedings, to due process, and to immigration judges' abilities to carry out their duties in accordance with the oath they took to uphold the constitution.

A. Form I-589 Filing Requirements

1. 15-day Filing Requirement for Asylum and Withholding Applications

The proposed addition to 8 C.F.R. § 1208.2 requires an Immigration Judge to set a fixed time period of 15 days for many asylum seekers who have passed a credible fear interview, by which the applicant must file an asylum application.[2] The time period runs from the date of each asylum applicant's first hearing before the Immigration Judge. In our decades of experience as adjudicators, this rule is utterly impracticable, given the complexity of the Form I-589 application. This unreasonable rule fits a recent pattern of administrative intimidation of applicants for simply trying to access our Immigration Court and asylum system. As the rule prioritizes a promise of speed and efficiency over due process of law, the Round Table stands in opposition.

Respondents in removal proceedings have a right to legal counsel, at no expense to the government, and often at their first appearance in Immigration Court, they request one continuance in order to obtain a lawyer or representative.[3] In our decades of experience, 15 days is an insufficient amount of time in any jurisdiction to find retained or pro bono counsel to assist an asylum seeker with completion of the complicated I-589 application form. Thus, this proposed regulation means that Immigration Judges in both non-detained and detained settings throughout the United States will be explaining the intricacies of the twelve page form to respondents, further burdening their already jam-packed Immigration Court master calendar hearings.[4] Immigration Judges must value due process of law above all else, and have an enhanced duty to explain the Immigration Court process to pro se respondents.[5] This means explaining, through an in person or telephonic interpreter, the necessary steps to complete any applications for relief for which a respondent is eligible, including completion of the Form I-589 in English, with each individual box completed, and the requirement for service on DHS. The dire consequences of a failure to submit the application in the 15-day deadline will need to be explained in detail as well, increasing the time spent with each respondent. Instead of allowing respondents time to find a qualified lawyer to help them apply for asylum, this proposed regulation usurps their ability to secure counsel, and places an increased burden on the Immigration Judge.

Our time on the bench teaches us that completion of the Form I-589 is far from a simple ministerial task for a would-be asylee. Over the course of many tens of thousands of cases heard in most of the Immigration Courts located throughout the country, the members of the Round Table

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[2] 85 Fed. Reg. 59692, 59693 (2020).
[3] 8 U.S.C. § 1362.
[4] See, e.g., https://trac.syr.edu/phptools/immigration/court_backlog/ (citing 1.2 million case backlog as of August 2020) (last accessed October 18, 2020).
[5] Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002).

have listened to cases in dozens, if not hundreds, of languages, but each applicant had to completely and accurately fill out the Form I-589 in English. That process takes time for either the pro se or represented respondent because the contents of the asylum application have meaningful consequences. Finding a competent community member who speaks both languages, who can be trusted, and who has time to write the application accurately is not a 15-day task. A detained respondent may encounter no one in custody that speaks their native language as well as English. Respondents also face other structural and social barriers to prompt completion of a complex legal application that were apparent to us as Immigration Judges, such as unstable housing, psychological and medical problems arising out of trauma, and lack of transportation to legal services organizations and Court. A 15-day time limit for submission of the application is not in line with the due process guarantees we swore to uphold.

We also have serious concerns about the authority that the proposed rule strips from the Immigration Judge, as it appears to divest the discretion of the Court to manage cases, with dire consequences. While the proposed rule allows Immigration Judges to extend the short 15-day filing deadline "for good cause," if the asylum seeker misses the newly set deadline, the proposed rule does not authorize the Immigration Judge to further extend the filing deadline. Instead the proposed rule mandates that if the deadline is missed, the Immigration Judge "shall" deem the ability to file waived and "the case shall be returned to the Department of Homeland Security for execution of an order of removal." As a group, this removal of discretion and flexibility concerns us, as it is part of a pattern of a lack of respect for the Immigration Judge's independence and decision-making authority.

2. Rejecting an Incomplete Application with EOIR

The proposed regulation regarding the perfection of asylum applications veers far from the day-to-day reality of Immigration Court and appears to be designed to deny any meaningful access to our Immigration Court system to many asylum seekers. The proposed regulation requires an applicant to fill out the 12-page Form I-589, in English, without missing a section or a box.[6] In our experience, that means that all applicants, including those who are pro se, need to understand how to indicate, in English, that something does not apply to them. This is particularly concerning for the many asylum applicants who are without counsel, particularly those who are detained or in MPP proceedings. Properly filling out the form and understanding whether certain questions apply or not is a complicated task. Under this NPRM, if a box is missed, the reviewing Court employee sends the application back to the respondent, and they have 30 days to correct the error, or their opportunity to file is deemed waived, absent extraordinary circumstances.[7] As this punitive rule is utterly unnecessary, overburdens the Court, and deprives applicants of due process, the Round Table opposes its implementation.

Asylum applications do not need this regulatory fix. Collectively, we have reviewed and adjudicated many thousands of Form 1-589 applications. The form asks for biographical information that may not be relevant to each applicant, and it is not obvious to the non-lawyer, non-English

[6] 85 Fed. Reg. at 59694.
[7] 85 Fed. Reg. at 59694.

speaking applicant how to address these sections. With regard to substantive sections, the questions can be unclear, further confusing the unrepresented respondent, and even attorneys. For the adjudicator, any unanswered questions can easily be managed with a brief review of the application with the respondent at the beginning of the hearing. Congress has already made clear that if an Immigration Judge believes an asylum claim has insufficient corroborating evidence, the Court can deny on that basis.[8] Judges have the tools they need to assess asylum applications as a matter of fact and law, while providing due process to the respondents before them.

The proposed rule claims to rely on the Immigration Judge's regulatory authority to set deadlines, which is well-established.[9] Yet, the rule usurps this authority entirely, as the regulation sets all deadlines with few stop-gap measures for the Immigration Judge to exercise discretion to account for the many specific factors that arise in individual cases. Many asylum applicants may be dissuaded by the initial 15-day submission deadline; still more may never get the mailed-back incomplete application. If they do, and fail to return a complete application in time, under the proposed regulations, Immigration Judges have little discretion to account for obvious due process issues around obtaining translation, travel, housing, childcare and past trauma. The stop-gap, heightened extraordinary circumstances standard in the proposed regulation does not substitute for the Court managing the submission of applications and setting individualized deadlines.

In our collective experience working within the Immigration Court system, the proposed regulation will additionally burden the already profoundly overburdened and underfunded Immigration Court system. Performing a detailed review of each page of every Form I-589 filed at the Immigration Court will required skilled personnel. These employees will be unnecessarily pulled from important duties already performed at the Court. This will result in fewer personnel being available to schedule hearings, accept filings, manage files, and, most importantly, assist judges with day-to-day management of their dockets and courtrooms. This proposed regulation is a significant burden to the system as a whole and will reduce the Court's efficiency at the critical expense of due process.

3. Submission of Any Applicable Asylum Fee

The Round Table of Former Immigration Judges firmly opposes the proposed rule related to the implementation of the new asylum application fee, as it presents another unnecessary obstacle to vulnerable asylum seekers meaningfully accessing the process due from our Immigration Court system. The proposed regulations require that the new $50 fee required for the I-589 application for asylum be submitted in connection with the asylum application "at the time of filing."[10] This timing requirement compounds the significant barrier that the asylum fee itself presents to indigent and pro se asylum applicants. At its core, the requirement in the proposed regulations is designed to deprive asylum seekers due process, so that their claims are never heard before an Immigration Judge. This is not the system we swore an oath to uphold.

The day-to-day implementation of the proposed rule is overly burdensome on Immigration Judges to implement, causing further delays in the system. Already overloaded with cases on

[8] 8 U.S.C. § 1158(b)(1)(B)(ii).
[9] 85 Fed. Reg. 59694.
[10] 85 Fed. Reg. at 59695.

their packed dockets, Immigration Judges will be inserted into this process, required to explain and monitor the payment process, which takes place outside of the Department of Justice. Fees are not accepted at Immigration Courts and are instead paid to the Department of Homeland Security—a confusing process that the Immigration Judge will be required to explain to each applicant if failure to timely file the fee will result in the rejection of their application for asylum. This added burden on adjudicators is unnecessary and compromises their duty to provide due process under the law, making their job ministerial rather than judicial.

We have specific concerns about the impact of this proposed regulation for detained and pro se asylum seekers. In our collective experience, access to counsel for the tens of thousands of detained immigrants, many of them detained asylum seekers, is a systemic and growing problem, and makes the Immigration Judge's job more difficult. Adding any layer of complexity to the asylum application process will only increase this inequity. The fee itself, which we oppose, presents a significant barrier, but with time, indigent and detained applicants may be able to obtain funds to pay the fee, given the general unavailability of a fee waiver, as fee waivers have been significantly curtailed recently by the agency.[11] However, the immediate requirement to pay the fee in order to preserve the right to apply for asylum is a drastic penalty for many indigent and detained refugees, and will result in meritorious cases being abandoned or deemed waived. Requiring payment for the filing of an asylum application would unlawfully deprive a large group of applicants of the ability to apply for asylum based solely on their financial status

Further, even the represented asylum seeker who locates pro bono or private counsel is unnecessarily burdened by the proposed regulations. The Model Rules of Professional Conduct discourages attorneys from advancing fees for their clients.[12] The requirement of a fee of any kind can delay the filing of the asylum application, rendering the opportunity to file the application waived, or, in any case, untimely filed. In our experience, there is no fairness to either the represented or pro se asylum applicant in this proposed regulation, and the Round Table stands in opposition.

B. Form I-589 Procedural Requirements

1. Supplementing the Record

The agency proposes to revise the wording of 8 C.F.R. § 1208.12, which for 30 years has allowed adjudicators of asylum applications to consider relevant country condition evidence from a variety of sources, including those outside of the U.S. government, and to weigh such evidence as they see fit.

In the NPRM, the agency cited *M.A. v. U.S. I.N.S.*, 899 F.2d 304, 313 (4th Cir. 1990) for the proposition that "[a] standard of asylum eligibility based solely on pronouncements of private organizations or the news media is problematic almost to the point of being non-justiciable."[13]

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[11] 8 C.F.R. § 106.3.
[12] Model Rule of Prof. Conduct 1.8(e).
[13] It bears noting that one member of our Round Table, former Immigration Judge William Van Wyke, argued M.A. before the Fourth Circuit; another Round Table member, former BIA Member Lory D. Rosenberg, drafted an amicus brief in that case on behalf of AILA.

Disturbingly, the agency misrepresented the decision in the NPRM. *M.A.* was an appeal from a BIA precedent decision, *Matter of A-G-*, 19 I&N Dec. 502 (BIA 1987). In that decision, the BIA held that while generally government conscription does not constitute persecution, an exception exists where military service would require the engagement in "inhuman conduct condemned by the international community as contrary to the basic rules of human conduct." And it was in determining what constitutes the requisite condemnation by the international community that the Fourth Circuit found reliance on the pronouncements of private organizations or the news media alone to be problematic. The context would have become clear had the agency included the decision's very next sentence: "[n]either petitioner nor amici state the extent of general violence by military units needed to be reported by private groups in order to constitute 'international condemnation.'"

Had the agency sought accuracy, it would have cited the far more recent circuit court decisions which stand for the exact opposite of the agency's position. For example, just last year, in *Alvarez-Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019), the same Fourth Circuit that decided *M.A.* reversed the agency's denial of asylum by relying entirely on the statements of Dr. Thomas J. Boerman, an expert on Central America, and Dr. Max Manwaring, a retired professor of military strategy at the U.S. War College, both of whom are non-government sources.

The Fifth Circuit relied exclusively on Dr. Boerman's testimony in reversing the BIA's denial of withholding of removal under the Convention Against Torture in *Morales-Morales v. Barr*, 933 F.3d 456 (5th Cir. 2019). And the Fifth Circuit this year reversed the BIA's denial of a motion to reopen to apply for asylum based on changed country conditions by relying on the submission of "a number of documents in support of her motion, including expert declarations, news articles, and reports demonstrating the elimination of systemic protections for women against gender-based violence following a 2009 military coup in Honduras." *Inestroza-Antonelli v. Barr*, 954 F.3d 813, 815 (5th Cir. 2020). A few years earlier, the Seventh Circuit relied on the testimony of Dr. Bernd Fischer, a Professor in Balkan History at Indiana University–Purdue University Fort Wayne and an expert on Albania, to reverse the BIA's denial of asylum to a young Albanian woman living alone who feared being targeted by sex traffickers. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

Earlier this year, the Second Circuit in *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020) relied on the expert affidavit of Aracely Bautista Bayona, a private lawyer and human rights activist, along with the U.S. Department of State Country Report on El Salvador in concluding that the asylum seeker was targeted by MS-13 gang members on account of an imputed political opinion. Given the nuances of such a determination, which turned on systemic patriarchal gender bias in Salvadoran society, the court would likely have been unable to reach its conclusion in the absence of the non-governmental expert's affidavit. If we are being honest, that is precisely why the agency now seeks to limit reliance on such resources.

There is an important reason why the regulation as written permits reliance on such a wide array of sources. As the U.S. Court of Appeals for the Seventh Circuit has observed, "[b]ecause the State Department's country reports are so general—they may reveal which groups are at greatest

risk, but not how much risk and not how the country's forces operate day-to-day—the administrative record needs concrete, case-specific evidence, the equivalent of what physicians and vocational experts supply in a Social Security disability case." *Banks v. Gonzales*, 453 F.3d 449, 453 (7th Cir. 2006).

The court in that case continued: "[t]he Social Security Administration would not dream of omitting medical and vocational evidence when responding to a disability claim; the SSA knows, as many decisions hold, that ALJs cannot play doctor but must have evidence; why do immigration officials so often stand silent at asylum hearings and leave the IJ to play the role of country specialist, a role for which an overworked lawyer who spends his life in the Midwest is so poorly suited?" *Banks v. Gonzales*, *supra* at 454. It is exactly this type of omission of country evidence that the agency seeks to accomplish through this regulatory amendment.

The Seventh Circuit also noted in an earlier decision that the State Department country report in evidence "serves as a source of good background information, but it cannot replace the specific testimony of a credible witness. *See*, *e.g.*, *Bace v. Ashcroft*, 352 F.3d 1133, 1139 (7th Cir.2003) ('[I]t would be improper to find that a witness's testimony about specific events could be `contradicted' by a generalized State Department report broadly discussing conditions in the applicant's country of origin.')." *Kllokoqi v. Gonzales*, 439 F.3d 336, 343 (7th Cir. 2005).

Since the issuance of the above decisions, the BIA has added the requirements of particularity and social distinction to particular social group determinations. These requirements greatly increase the need for specific country condition information. For example, social distinction requires an asylum applicant to establish that the particular social group being considered is viewed as a distinct group within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014). How would an asylum applicant accomplish this without non-governmental evidence? In the words of one commentator, "as long as the law continues to require proof of social visibility and particularity, experts will be sought out to provide testimony on the legal and societal attitudes toward and choate nature of a range of social groups…"[14]

Other recent decisions have further increased the need for specific country condition evidence. In a 2017 precedent decision, the BIA held that for one to establish persecution on account of their membership in the particular social group consisting of their family, an asylum applicant must establish an animus towards his family comparable to that experienced by the Romanov family in 1917 Russia. *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017). The Attorney General then certified that same decision to himself to create a more difficult standard for establishing that one's family is a particular social group in the first place. *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). And in asylum claims involving a non-governmental persecutor, the Attorney General has stated that the long-standing legal requirement to establish that the government was unwilling or unable to control the persecutors now requires a showing that the government either condoned the persecutor's actions, or was entirely helpless to prevent them. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). Clearly, an asylum applicant cannot satisfy all of these requirements relying on publicly available U.S. government reports alone.

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[14] Karen Musalo, "The Evolving Refugee Definition," *African Asylum At a Crossroads: Activism, Expert Testimony, and Refugee Rights* (2015 Ohio Univ. Press) at 91.

To illustrate this point, should a hypothetical asylum applicant whose claim is based on domestic violence suffered in El Salvador wish to meet the legal requirements using only government issued country condition reports, what would be available to offer? The most recent (2019) Department of State Country Report on El Salvador contains two short paragraphs addressing domestic violence:

> The law prohibits domestic violence and generally provides for sentences ranging from one to three years in prison, although some forms of domestic violence carry higher penalties. The law also permits restraining orders against offenders. Laws against domestic violence remained poorly enforced, and violence against women, including domestic violence, remained a widespread and serious problem. In July 2018 the Salvadoran Organization of Women for Peace (ORMUSA) reported that in 2016 and 2017, only 5 percent of the 6,326 reported crimes against women went to trial.
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> On April 24, a woman died in Guazapa after being beaten by her husband days earlier. The Attorney General's Office charged her husband with femicide. According to the woman's children, her husband had been previously deported from the United States after being implicated in a similar case of violence against women.

The above language is of no use in establishing social distinction. It provides no help in establishing nexus to a protected ground. As to whether the government is unwilling or unable to provide protection, the Country Report states that the law generally prohibits domestic violence; that such laws are poorly enforced generally; but that in one of the more than 6,000 reported cases, an offender was prosecuted, although only after he had already beaten his wife to death. It provides no assistance in determining if internal relocation would be reasonable, and if so, whether such relocation would allow the applicant to avoid future persecution, another legal issue in asylum claims. Obviously, the DOS Country Report provides an immigration judge with an insufficient amount of information for adjudication purposes.

What other government resources could the above asylum applicant turn to? The Department of State publishes a separate report on International Religious Freedom, as does the U.S. Commission on International Religious Freedom (but only as to specified countries). However, the above domestic violence hypothetical does not involve religion. Therefore, in this hypothetical, an adjudicator would clearly require non-governmental country condition evidence to fully assess the asylum claim.

Previously, the U.S. Department of State issued Country Profiles designed to provide additional country information for use in asylum adjudication. However, one of the members of the Round Table who previously served as EOIR's country condition subject matter expert attended a meeting at the U.S. Department of State on February 22, 2012, at which DOS informed EOIR that it was discontinuing publication of its Country Profiles.

The same Round Table member attended another meeting at the Department of State on June 4, 2014 that was requested by USCIS RAIO personnel who found their work hampered by the lack of detail contained in the DOS Country Reports on China. The DOS country experts indicated that the Department would not be providing more detail in future reports, and referred those in

attendance to the reports of the Congressional-Executive Commission on China ("CECC") as the best governmental source of country condition information on that country. Unfortunately, the CECC publishes information on only one country; there is no equivalent government source of information on other countries of origin.

As a result of the lack of information available from the Department of State, EOIR sought assistance from the Library of Congress ("LOC") in filling the information gap. However, in spite of being a part of the federal government, the LOC charged EOIR a fee to research and write responses to specific country condition inquiries submitted by Immigration Judges at an average cost of $900 per inquiry. Furthermore, the requesting Immigration Judges found the LOC responses to be of limited value.

EOIR did take the positive step of creating its own publicly-accessible database of country condition materials compiled from U.S. government, foreign government, and non-governmental organizations, which was launched in November 2013 and remains housed on the EOIR Virtual Law Library.[15] The country condition database enjoyed the enthusiastic support and approval of then-EOIR director Juan Osuna; former BIA chair David Neal; and present BIA Deputy Chief Appellate Immigration Judge Chuck Adkins-Blanch. The country condition database took EOIR staff years to develop, and was announced with some fanfare by the agency. EOIR expended significant time and resources building and publicizing its database of country condition information, and has maintained and updated the database up to the present. The agency is thus asked to explain its major reversal as to the value of non-U.S. government sources in the present NPRM when EOIR organizes, posts, and updates such sources on its own website.

The same Round Table member was invited along with other EOIR personnel to attend a country condition training event on asylum claims from the Northern Triangle countries of Central America based on gang violence on July 10, 2014 at DHS headquarters. The main presenters invited by DHS to speak on this topic were Douglas Farah, a private national security consultant and journalist, and Steven Dudley, co-director of InSight Crime, a non-governmental organization. In other words, USCIS chose to train its asylum officers and country researchers (and invited EOIR personnel) on this important topic with non-government experts. The EOIR attendees were so impressed with Mr. Farah's presentation that he was invited to repeat it at a plenary session of the 2015 EOIR Legal Training Conference, at which the entire corps of Immigration Judges, BIA Members, and BIA staff attorneys were in attendance. The choice of speakers by both DHS and EOIR constituted a concession of the quality of information from non-governmental sources.

Of course, not all sources of information are equal. It has always remained for the Immigration Judge to determine whether evidence is admissible, and if so, the evidentiary weight it should be afforded. The NPRM deceptively claims that "[a]lthough materials provided by non-governmental organizations are sometimes helpful, the current regulatory text could be read to imply that they always are, which is not necessarily the case."[16]

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[15] https://www.justice.gov/eoir/country-conditions-research.
[16] 85 Fed. Reg. at 59695.

In fact, nothing in the present language suggests that any type of materials are always helpful. The exact language of the present regulation is: "the asylum officer[17] may rely on material provided by the Department of State, the Office of International Affairs, other Service offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions." The agency is asked to point to any word that implies absolute reliability. Of course, Immigration Judges have always reached independent decisions as to reliability on a case-by-case basis.

We also wish to emphasize that we served as Immigration Judges and BIA Members. We have centuries of collective experience adjudicating many thousands of claims for asylum, withholding of removal and CAT protection. We can speak with absolute authority to the value of non-government sources of country condition evidence, in particular, the ability to hear testimony from country experts. It is difficult to fathom how anyone who has adjudicated immigration cases could dismiss the value of such sources of information. In what way do the drafters of the NPRM envision publicly available government-issued documents satisfying all of the asylum requirements discussed above? The agency is asked to name the documents that would fit such bill.

Although the agency states in the NPRM that it further seeks to broaden the scope of government components from which country condition evidence may be considered, it makes no mention of what specific evidence or reports these components purportedly publish that would be useful to immigration judges, and for what purpose they are prepared.

Immigration judges and the BIA must remain neutral, fair, and independent of political influence, a difficult goal given EOIR's placement within the Department of Justice, a very non-neutral prosecutorial agency headed by a Presidential appointee strongly influenced by political considerations. The question of who is preparing the information alluded to in the NPRM and for what purpose must be considered in light of evidence of record in *Saget v. Trump*, 375 F.Supp.3d 280 (E.D.N.Y. 2019). The case involved DHS's intentional, politically-motivated manipulation of country condition information in order to justify its termination of Temporary Protected Status ("TPS") to Haiti.

As *Saget* details, RAIO's country condition research unit provided USCIS higher-ups with a report on Haiti's country conditions describing a dire situation warranting extension of TPS. USCIS official Brandon Prelogar reacted to the RAIO Report by stating "[w]e can comb through the country conditions to try to see what else there might be, but the basic problem is that it IS bad there [with regard to] all of the standard metrics." *Saget* at 321. USCIS official Robert Law, who had spent the prior four years as the Government Relations Director of the staunchly anti-immigrant lobby group FAIR rewrote the report in less than 30 minutes and "made the document fully support termination." Soon thereafter, Law assigned a colleague an "important research project" to find data on Haiti to support the conclusion to terminate TPS. Id. The decision also stated that the prior year, USCIS had responded to a similarly dire RAIO Report on Haiti by requesting data on the number of Haitians in the U.S. who received public assistance or had committed crimes in an attempt to justify terminating TPS status.

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[17] For some reason, "asylum officer" has not been changed to "immigration judge," although 8 C.F.R. §1208.12 applies to EOIR only, whereas asylum officers exist only within DHS.

Given that the NPRM is being proposed by the same administration involved in *Saget*, the agency is asked to clearly explain in detail in response to public comment, how it intends to prevent similar attempts to provide unreliable reports intended to influence Immigration Judges and the BIA to deny deserving claims for asylum. Those in positions of influence over immigration policy within the Department of Justice, most notably the Attorneys General under the present administration, have made no secret of their desire to deny and remove asylum seekers as quickly as possible. Given (1) the fact that asylum seekers may face torture or death if returned to their country of origin, (2) our nation's international treaty obligations to not return refugees or those facing torture, and (3) our nation's values as a protector of human rights, very real safeguards must be established to prevent the manipulation of country condition evidence for political purposes irrespective of any administration's particular views on immigration.

The agency's proposal to amend the regulation to allow Immigration Judges to submit evidence into the record is an interesting one. The proposal raises the question of the proper role of Immigration Judges in adjudicating asylum claims. Judges in adversarial systems such as the immigration courts are generally meant to be blank slates, considering only the evidence presented by the parties. However, the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* recognize at paras. 66-67 that asylum seekers need not understand the reasons for their persecution, but it is for the adjudicator, and not the applicant, to ascertain such reasons and determine whether they meet the legal requirements for protection. And para. 196 states that it may be up to the adjudicator to produce the necessary evidence in support of the application, a concept adopted by the BIA in *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

However, given the present administration's track record for undermining asylum eligibility through regulations, precedent decisions, and policy, there must be safeguards to prevent the abuses of USCIS in *Saget v. Trump*, *supra* from being transposed to the Immigration Court context. While most immigration judges will seek to honor their international law obligations and the requirements of neutrality and due process, the possibility exists for a minority to latch onto a document which they enter into the record as a means of denying relief. For example, if the agency or Department were to assign a "special research project" (as was done in *Saget*) to create, e.g., a document that gives a one-sided, overly optimistic picture of a government's willingness and ability to control gang violence, certain immigration judges could enter such document into evidence in order to conclude that asylum applicants from that country did not meet their burden of showing that the government was unwilling or unable to protect them. As such determination involves a question of fact, it can only be reversed if found to be clearly erroneous by the BIA. And 8 C.F.R. § 1208.12(b), which states that "[n]othing in this part shall be construed to entitle the applicant to conduct discovery directed toward the records, officers, agents, or employees of the Service, the Department of Justice, or the Department of State," would make it more difficult for those representing asylum applicants to uncover any improper motives on the part of the government in preparing such documents.

As to providing safeguards, in November 2006, the International Association of Refugee Law Judges ("IARLJ"), of which some from our Round Table are members, published a 21-page document entitled Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist.

The organization's checklist contains nine questions for judges to consider. The first three questions address the relevancy and adequacy of the information: (1) How relevant is the COI to the case at hand? (2) Does the COI source adequately cover the relevant issue? (3) How current or temporally relevant is the COI? The next three questions address the source of the information: (4) Is the COI material satisfactorily sourced? (5) Is the COI based on publicly available and accessible sources? (6) Has the COI been prepared on an empirical basis using sound methodology? Two questions address the nature/type of the information: (7) Does the COI exhibit impartiality and independence? (8) Is the COI balanced and not overly selective? And the last question addresses prior judicial scrutiny: (9) Has there been judicial scrutiny by the other national courts of the COI in question? The agency is advised to incorporate this checklist into the proposed regulation as a requirement for an immigration judge's unilateral submission of evidence.

As mentioned above, EOIR has already created a country condition database on its Virtual Law Library website. It is not clear why immigration judges could not suggest the inclusion of documents they would like to consider for inclusion in the EOIR database. However, due to concerns as to whether the present administration might seek to "weaponize" the database by only including documents consistent with its political objectives, a system for determining inclusion or removal of documents on the site, and meaningful oversight of such procedures and content must be created. We suggest the formation of a committee including multiple stakeholders, including non-government members.

2. The Asylum Adjudication Clock

The Round Table of Former Immigration Judges objects to the proposed changes regarding the time period in which Immigration Judges would be required to adjudicate asylum cases. First, while we understand that EOIR does not adjudicate applications for employment authorization, we believe that eliminating 8 C.F.R. § 1208.7 in its entirety would create more, not less confusion for asylum applicants and their counsel. The current regulation at 8 C.F.R. § 1208.7 provides asylum applicants information and guidelines that help them understand how their proceedings in immigration court impact their eligibility for employment authorization. Removing this regulation in its entirety will remove transparency in the process for eligibility for employment authorization. A better solution to eliminate confusion would be to add language that clarifies that EOIR is not responsible for considering or adjudicating applications for employment authorization while also explaining that an asylum applicant's proceedings in immigration court impacts the applicant's eligibility for employment authorization.

Second, the proposed regulations seek to heighten the standard for adjudicating asylum cases outside of the 180 day period set forth at INA § 208(d)(5)(A).[18] The NPRM specifically distinguishes between the standard for a continuance, which is "good cause" and the "exceptional circumstances" standard for an immigration judge adjudicating an asylum case in more than 180 days.[19] The agency, through this proposed regulation, would require immigration judges to meet an impossibly high standard if they are unable to complete an asylum application within 180

[18] 85 Fed. Reg. at 59696-97.
[19] 85 Fed. Reg. at 59697.

days. The agency specifically proposes to amend 8 C.F.R. § 1003.10(b) to state that an Immigration Judge *shall* adjudicate an asylum application within 180 days.[20] The regulation would also include examples of what constitutes exceptional circumstances that would permit an Immigration Judge to complete the adjudication of the application outside the 180 deadline. Such examples include, "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances."[21] Although the NPRM indicates that the 180 day deadline is targeted at adjudicators, not applicants, there is no language that considers the circumstances of the Immigration Judge's docket, the Immigration Judge's circumstances, or any reference to the adjudicator at all. Moreover, although the deadline is targeted at Immigration Judges, the impact will be felt by the applicants, whose cases will be rushed, and whose due process rights will be trampled.

One of the justifications the agency provides for amending the regulation is the volume of pending asylum applications. The agency indicates that "[a]s of August 14, 2020, EOIR has over 560,000 applications for asylum and withholding of removal pending."[22] The agency also suggests that the Immigration Judge Corp's failure to adjudicate asylum applications within 180 days may be impacted by the language of 8 C.F.R. § 1208.7(a)(2), "which could be interpreted to allow either party to unilaterally delay the adjudication of an asylum application without necessarily showing exceptional circumstances, in contravention of the statute."[23] However, we, as former Immigration Judges, know that the language of 8 C.F.R. § 1208.7(a)(2) has nothing to do with Immigrations Judges' failure to consistently adjudicate applications within 180 days. Rather, the volume of cases on each Immigration Judge's docket and the need to prioritize some cases over others is the primary reason asylum cases are not all heard within 180 days. The agency must account for this problem. There are simply not enough days in the year or hours in the day for most immigration courts to meet this deadline in every asylum case on every docket. From our own experience, we know that on many dockets, it is mathematically impossible to meet this deadline. We urge the agency to consider and acknowledge this issue rather than create more deadlines and limitations for the Immigration Judge Corps to meet while also complying with their oath.

Furthermore, the NPRM would amend 8 C.F.R. § 1003.31(c) "to ensure that the setting of deadlines for filing supporting documents does not inadvertently extend the 180-day deadline absent exceptional circumstances. In short, the changes would incorporate the 180-day timeline by limiting an immigration judge's ability to set filing deadlines that would cause the adjudication of an asylum application to exceed 180 days absent a showing of exceptional circumstances."[24] The NPRM similarly would amend 8 C.F.R. § 1003.29 to limit Immigration Judges' ability to grant continuances in asylum cases.[25] As discussed above, there are many factors related to Immigration Judges' dockets that render it impossible to complete every asylum case on the docket within 180 days. Limiting Immigration Judges' abilities to set deadlines and grant continuances

[20] 85 Fed. Reg. at 59699.
[21] 85 Fed. Reg. at 59699.
[22] 85 Fed. Reg. at 59697.
[23] 85 Fed. Reg. at 59697.
[24] 85 Fed. Reg. at 59697.
[25] 85 Fed. Reg. at 59699.

that are appropriate for their docket, and requiring that Immigration Judges hear cases in an expeditious manner is yet another example of the agency removing any semblance of independence from the Immigration Judges. Immigration Judges are professionals who should be treated as such. They are required to be neutral arbiters and afford all respondents due process. These proposed regulations, consistent with several prior proposed regulations, will exacerbate the due process crisis asylum seekers are currently facing in Immigration Court. We therefore strongly object to the elimination of 8 C.F.R. § 1208.7 as well as the amendments to 8 C.F.R. §§ 1003.10, 1003.29, and 1003.31. We do not object to the elimination of 8 C.F.R. § 1208.9, as we agree with the agency that the regulation applies exclusively to DHS and is irrelevant to EOIR.

CONCLUSION

We respectfully request that the Department of Justice withdraw, rather than finalize, the proposed rule for all of the reasons discussed above.

Very truly yours,
The Round Table of Former Immigration Judges
/s/

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