**A MESSAGE TO THE BIDEN-HARRIS ADMINISTRATION: THE EOIR CLOWN SHOW HAS GOT TO GO!**

**By Paul Wickham Schmidt**

**Retired U.S. Immigration Judge**

**KEYNOTE ADDRESS**

**Ohio AILA Virtual Conference**

**December 4, 2020**

 **Good morning Ohio! Hope you and yours are staying well. Thanks for arising so early to help plan the next big battle for our New Due Process Army (“NDPA”).**

**I’m retired, so I can tell it like it is: no party line, no bureaucratic doublespeak, no BS, just the truth, the whole truth, and nothing but the truth. Nevertheless, I do want to hold AILA, your organizers, you, and anyone else of any importance whatsoever harmless for the following remarks, for which I am solely responsible. To borrow the words of country music superstar Toby Keith, “it’s me baby, with your wakeup call!”**

 **47 days and counting left in the kakistocracy – governance by the worst among us. We got the job done in November. But, by no means is the fight to preserve our justice system and save our nation over. Indeed, in many ways it’s just beginning!**

**Friends, you know, and I know, what is the biggest crisis facing the American justice system today. One that undermines and threatens racial justice, social justice, equality before the law, voting rights, American values, and indeed the very foundations of our democratic institutions and our justice system.**

**It’s imperative that our incoming Administration and its leaders fully recognize the overwhelming importance and extreme urgency of immediately ending the ongoing, deadly, and dangerous “Clown Show” at EOIR – the Executive Office for Immigration Review.**

**Under the defeated but not yet departed regime, EOIR has been weaponized by White Nationalist nativists to function as America’s Star Chambers. Once envisioned by its founders, including me, as a potential “jewel in the crown” of American justice, EOIR now has become an ungodly nightmare of anti-due process, anti-immigrant propaganda, bad judges, bogus stats, uncontrollable backlogs, malicious incompetence, stupid regulations, daily doses of irrationality, abuse of private attorneys, and institution of “worst practices.” But, it doesn’t *have* to be that way! No, not at all!**

**With courage, bold action, and, most important, the *right people* in place in leadership and key judicial positions, EOIR can be fixed: sooner, not later. The Immigration Courts can, indeed, through teamwork and innovation become the world’s best courts guaranteeing fairness and due process for all, promoting a model of best practices for the Federal Judiciary as a whole, and providing a trained and ready source of due-process oriented judges with strong immigration, human rights, and equal justice backgrounds for the Article III Judiciary and public policy positions.**

**EOIR will then be positioned for the essential transition to an Article I independent U.S. Immigration Court when we have the votes.**

**But, it will require a far more progressive, visionary, and aggressive approach than past Democratic Administrations. We must immediately (and legally) clear out the deadwood and get the problem solvers from the New Due Process Army (“NDPA”) — mostly now in the NGO, clinical, and private sectors, folks like you and your colleagues — in place to fix this horribly broken system.**

**Radical, meaningful reform must be built on this simple truth: *Treating individuals with unfailing fairness, simple courtesy, and respect,* *granting relief wherever possible and at the lowest possible levels of the system speeds things up and promotes best practices and maximum efficiency without stomping on anyone’s rights. And, it saves lives!***

**By contrast, studied rudeness and insensitivity to the public, mindless “enforcement only gimmicks,” en masse denials, and trying to run a “deportation railroad” eventually lead to gross inefficiencies and systemic failure. That’s *exactly* what we’re seeing today! And, it kills innocent individuals, while shamelessly squandering taxpayer funds, and driving the lawyers, that’s YOU, nuts.**

**Also, remember that fast, dramatic, and decisive personnel actions send shockwaves through the bureaucracy and shows them the new Administration is in charge and the “clown show is over.” Dilatory use of personnel authority and letting incompetents and those responsible for the EOIR mess remain in place does the exact opposite. *See,* theObama Administration.**

**Start by cleaning out the malicious incompetents in Falls Church. Immediately disempower the current Director, Deputy Director, Head of Administration, entire BIA, Chief Immigration Judge, and General Counsel. Abolish the ridiculous, bogus, and unnecessary Office of Policy. At the earliest possible point, transfer all of these existing folks to other jobs where they can’t do any more damage to human lives or our precious, now reeling, legal system.**

**Simultaneously, the Biden-Harris Administration should bring in, on at least a temporary basis, a team of expert problem solvers from the NDPA (e.g., you, and folks like you) to run EOIR, take over the BIA, and run OCIJ while they get a permanent team installed (which might, or might not, be the same people).**

**Every one of the pernicious, invidiously motivated, unethical, and leally wrong Sessions, Whitaker, and Barr “precedents” must be vacated, thereby immediately returning the law to its prior state. The incoming Attorney General can then send the cases to the “new BIA” for them to handle as they see fit.**

***Imagine*, what could be done with a *proper* precedent in *Matter of A-B-*. Instead of wrongfully regressing asylum law, a *correctly* rewritten precedent on the actual facts and the real asylum law, a law that is supposed to be *generously interpreted* to grant life-saving protection wherever possible, could serve as a road map illustrating and requiring routine granting of well-documented domestic abuse asylum cases from the Northern Triangle and other areas.**

**We could have practical, sensible, precedents written by scholar-judges to advance the concept of gender-based asylum rather than trying to eradicate it in a disgusting, racist, misogynist effort to send mostly brown-skinned women back to torture and death. For, make no mistake, White Nationalist racism and wanton cruelty have been at the heart of this regime’s vile, illegal, and immoral immigration and refugee policies.**

**The solution to the overwhelming Immigration Court backlog, largely self-created by DOJ politicos and EOIR bureaucrats mindlessly engaging in what I call “Aimless Docket Reshuffling,” is NOT to hire an additional 500 judges, thereby adding to the chaos, confusion, and inconsistency. Over the past four years, this regime has proved, *beyond any reasonable doubt*, that without a professional due-process committed court system administered and ultimately composed of expert judges and sufficient, well-trained staff, employing 21st century, cutting edge technology, more judges will simply mean more backlogs and more injustice! And, the *only* thing the current system has produced in abundance is *injustice* – we’ve had plenty; we don’t need any more!**

**The backlog can, and should be cut drastically and quickly. As I always say, *it’s not rocket science*!**

**Get all the non-detained, non-criminal cases more than 18 months old off the Immigration Court docket using the many tools readily available. Do things like:**

* + - **Extend DACA;**
		- **Expand TPS;**
		- **Enable TPS adjustments to LPR:**
		- **Send NLPR Cancellation Cases to USCIS for initial adjudication;**
		- **Encourage stateside processing;**
		- **Return to DHS those with apparent LPR eligibility if visa petitions or naturalization of family members were approved;**
		- **Send all unaccompanied kids to the Asylum Office *before* referring those who can’t be granted at the earliest level to Immigration Court;**
		- **Return to DHS those with approved or approvable U, V, T, SIJ status waiting for numbers to immigrate;**
		- **Use other forms of PD where necessary;**
		- **Work with the private bar and DHS to maximize representation and schedule merits hearings in a reasonable manner to reduce the number of continuances;**
		- **Empower the “new BIA” to “crack heads” if DHS officials, or for that matter, IJs resist or fail to carry out these policies.**

**Immediately cutting the backlog, as I suggest, would allow the “new EOIR” to operate at or close to “real time” without building backlog. With the current 500 IJs deciding a realistic average of approximately 500 cases/year, the “due process decisional capacity” of the EOIR system is about 250,000 - 300,000 cases annually.**

**For the first time in history, DHS must be required to respect and operate within this capacity. No more intentionally “overloading” system to create bogus backlogs and then claim “fake emergencies,” disingenuously blaming the victims: respondents, their lawyers, and the judges themselves. DHS must respect court capacities and operate with the same prudence and professionalism as every other law enforcement agency in America.**

**If more judges are needed on a strictly temporary basis (e.g., there is a *real*, rather than a manufactured emergency) have an auxiliary judiciary made up of qualified retired IJs, and other retired Federal and State judges ready to step in and handle routine tasks that involve primarily fact finding rather than immigration/human rights expertise (e.g., setting bonds, scheduling cases, granting non-dispositive motions, etc.). This would free up more IJ time. This is known as the “Lister/Schmidt Proposal,” and it can be found on my blog, immigrationcourtside.com.**

**In the longer run, the incoming Administration should consider transferring the Asylum Office to EOIR and using Asylum Officers similarly to U.S. Magistrate Judges in the Article III system.**

**As you know, a big part of the current problem is a broken, highly politicized, and over-bureaucratized Immigration Judge hiring system. Over the past three Administrations, it has intentionally been skewed to favor DHS prosecutors, insiders, and other government employees to the exclusion of well qualified experts from the private sector. The most glaring deficiency, at all levels of our current Federal Judiciary, is the absence of those who have ever represented an individual in Immigration Court and the essential practical expertise in the law and problem solving that they have developed. Folks like many of you and your colleagues!**

**We must establish a new, efficient, timely merit selection process for future IJ and BIA appointments emphasizing expertise in immigration, human rights, and demonstrated commitment to due process, involving meaningful input from private/NGO/academic bars. Then, apply these merit criteria to retention decisions for those IJs appointed by the current regime still in their two-year probation period.**

**It’s also absolutely essential that the “new EOIR” end the practice of hiding the recruitment process “under a rock” with ridiculous deadlines that clearly favor “pre-selected” insiders. EOIR must actively and aggressively recruit and encourage IJ applications from minorities, women, and immigration/human rights lawyers. Given that Vice President Elect Harris has broken new ground as a super-talented woman, minority, and the child of immigrants, it should be the best possible time to reach, inspire, and hire a far more diverse and representative Immigration Judiciary.**

**The merit selection process must highly value experience representing individuals in Immigration Court (not just ICE). That also means that it will be necessary for the private sector to develop slates of outstanding candidates by “beating the bushes” and encouraging the “best and brightest” among you to apply for these critically important positions.**

**The “new EOIR” must bring in a highly competent legal manager, with an immigration background and well-versed in the most modern technology, to head up EOIR Administration and straighten out the current ungodly mess. Someone who will end to two decades of disgraceful incompetence and waste by installing a functioning nationwide e-filing system, like almost every other court in America.**

**Work cooperatively and creatively with the pro bono community toward universal representation. Tap in to the best of the cutting-edge programs already out there in the private sector to train and accredit many more non-attorney representatives to fill the representation gap, particularly in asylum cases.**

**The Biden Administration must make peace with the union — the NAIJ. Barr and his EOIR cronies recently took advantage of a corrupted Federal labor relations process to “decertify” the NAIJ as punishment for their leaders speaking out against the gross mismanagement and concerted assault on due process at EOIR.**

**Install NAIJ President Judge Ashley Tabaddor or another current NAIJ Officer as the new Chief Immigration Judge with a mandate to fix problems and improve working conditions for everyone in the Immigration Courts. “Can” all the stupid and counterproductive due-process denying “production quotas” at the BIA and for IJs. Turn bogus “big brother IJ dashboards” into *useful* technology that will actually *aid* in the fair and timely substantive decision-making process. Emphasize fairness, scholarship, analysis, quality, and efficiency for judges at both the trial and appellate levels. Return docket control and management to the local IJs.**

**To establish badly needed judicial independence, once the “Biden-Harris Team of Judicial Experts” is in place at EOIR, give them support and let them creatively solve problems. That means, no more political meddling and interference from “downtown.” No more micromanagement by politicos and hacks. No more certifications of cases to AG unless requested by the new BIA Chair.**

**We also need an AG who is advocate for human rights and immigrants’ rights. Additionally, there is a pressing need for immigration/human rights experts from the NDPA in authoritative positions in other parts of the DOJ, like the SG’s Office, OIL, and the Office of Legal Policy, as well as, of course DHS, ORR, State, and even CDC.**

**Remember: This isn’t “rocket science!” It’s just common sense, “practical scholarship,” best practices, moral courage, humanity, and respect for human dignity! All of which you and other members of the NDPA have in abundance! Most of all, it’s about getting the right practical experts in the key positions within the incoming Administration.**

**Unlike the Article III Courts, the “EOIR Clown Show” can be removed, replaced, and justice at all levels improved just by a putting the right experts from the NDPA in charge right off the bat. Because these are Executive positions that do not require Senate confirmation, Mitch McConnell’s permission is not required.**

**Democratic Administrations, particularly the Obama Administration, have a history of not getting the job done when it comes to achievable immigration reforms within the bureaucracy. If you don’t want four more years of needless death, disorder, demeaning of humanity, and deterioration of the most important “retail level” of our justice system, let the incoming Biden Administration know: *Throw out the EOIR Clown Show and bring in the experts from the NDPA to turn the Immigration Courts into real, independent courts of equal justice and humanity that will be a source of national pride, not a deadly and dangerous national embarrassment!***

**Contrary to all the mindless “woe is me” suggestions that it will take decades to undo Stephen Miller’s racist nonsense, *EOIR is totally fixable — BUT ONLY WITH THE RIGHT FOLKS FROM THE NDPA IN CHARGE!*It only becomes “mission impossible” if the Biden-Harris Administration approaches EOIR with the same indifference, lack of urgency, and disregard for expertise and leadership at the DOJ that often has plagued past Democratic Administrations on immigration, human rights, and social justice.**

**It won’t take decades, nor will it take zillions of taxpayer dollars! With the right folks in leadership positions at EOIR, support for independent problem solving (not mindless micromanagement) from the AG & DOJ, and a completely new BIA selected from the ranks of the NDPA experts, we will see drastic improvements in the delivery of justice at EOIR by this time next year. *And, that will just be the beginning!***

***No more clueless politicos, go along to get along bureaucrats, unqualified toadies, and restrictionist holdovers calling the shots at EOIR, America’s most important, least understood, and “most fixable” court system! No more abuse of migrants and their hard-working representatives! No more ridiculous, “Aimless Docket Reshuffling” generating self-created backlogs! No more vile and stupid White Nationalist enforcement gimmicks being passed off as “policies!” No more “Amateur Night at The Bijou” when it comes to administration of the immigrant justice system at EOIR!***

***Get mad! Get angry! Stop the nonsense! Tell every Democrat in Congress and the Biden Administration to bring in the NDPA experts to fix EOIR! Now! Before more lives are lost, money wasted, and futures ruined! It won’t get done if we don’t speak out and demand to be heard!***

***This is our time! Don’t let it pass with the wrong people being put in charge — yet again! Don’t be “left at the station” as the train of immigrant justice at Justice pulls out with the best engineers left standing on the platform and the wrong folks at the controls! Some “train wrecks” aren’t survivable!***

***Repeat after me*: “Hey hey, ho ho, the EOIR Clown Show has got to go!” Then pass it on to the incoming Administration! Let them know, in no uncertain terms, that you’ve had enough! More than enough!**

**Thanks for listening, have a great conference, stay well, take care of your families, and, always remember the NDPA rallying cry, Due Process Forever!**

**(12-04-20)**