

**AILA DC — I WANT YOU FOR THE IMMIGRATION BENCH: A
Blueprint for America's Better Federal Judiciary of the Future!
— 01-11-23**

As time goes by, my career in immigration has become an ever smaller “historical footnote.” Therefore, I’m going to begin by telling you a bit about who I am and where I’m coming from. Then, I’ll pitch YOU to apply to become an Immigration Judge. Finally, I’ll share some of the pros and cons of immigration judging at today’s EOIR. I hope we’ll have some time for your questions at the end.

I.

I graduated in 1970 from Lawrence University a small liberal arts college in Appleton, Wisconsin, where I majored in history. My broad liberal arts education and the intensive writing and intellectual dialogue involved were the best possible preparation for all that followed. I then attended the University of Wisconsin School of Law in Madison, Wisconsin, graduating in 1973. Go Badgers!

I began my legal career in 1973 as an Attorney Advisor at the Board of Immigration Appeals (“BIA”) at the U.S. Department of Justice (“DOJ”) under the Attorney General’s Honors Program. Admittedly, however, the BIA’s Executive Assistant culled my resume from the “Honors Program reject pile.”

At that time, before the creation of the Executive Office for Immigration Review – “EOIR” for you Winnie the Pooh fans —

the Board had only five members and nine staff attorneys, as compared to today's cast of thousands. Among other things, I worked on the famous, or infamous, John Lennon case, which eventually was reversed by the Second Circuit in an opinion by the late Chief Judge Irving Kaufman.^[1]

I also shared an office with my good friend, the late Lauri Steven Filppu, who later became a Deputy Director of the Office of Immigration Litigation ("OIL") in the DOJ's Civil Division and subsequently served with me on the BIA. The Chairman of the BIA at that time was the legendary "immigration guru" Maurice A. "Maury" Roberts. Chairman Roberts took Lauri and me under this wing and shared with us his love of immigration law, his focus on sound scholarship, his affinity for clear, effective legal writing, and his humane sense of fairness and justice for the individuals coming before the BIA.

In 1976, I moved to the Office of General Counsel at the "Legacy" Immigration and Naturalization Service ("INS"). There, I worked for another legendary figure in immigration law, the late Sam Bernsen, then General Counsel. Sam started his career as a 17-year-old messenger at Ellis Island and worked his way to the top of the Civil Service ranks. Perhaps not incidentally, he was also a good friend of Chairman Roberts.

At that time, the Office of General Counsel was very small, with a staff of only three attorneys in addition to the General Counsel and his Deputy, another mentor and immigration guru, Ralph Farb. At one time, all three of us on the staff sat in the same office!

In 1978, Ralph was appointed to the BIA, and I succeeded him as Deputy General Counsel. I also served as the Acting General Counsel for several very lengthy periods in both the Carter and Reagan Administrations.

Not long after I arrived, the General Counsel position became political. The incoming Carter Administration encouraged Sam to retire, and he went on to become a name and Managing Partner of the Washington, D.C. office of the powerhouse immigration boutique Fragomen, Del Rey, and Bernsen.

He was replaced by my good friend and former colleague, the late Judge David Crosland, who was sitting in Baltimore, at the time of his recent death. Dave selected me as his Deputy. Dave was also the Acting Commissioner of Immigration during the second half of the Carter Administration, one of the periods when I was the Acting General Counsel.

The third General Counsel that I served under, during the Reagan Administration, was one of my most “unforgettable characters:” the late, great Maurice C. “Mike” Inman, Jr. He was known, not always affectionately, as “Iron Mike.” His management style was something of a cross between the famous coach of the Green Bay Packers, Vince Lombardi, and the fictional Mafia chieftain, Don Corleone.

As my one of my colleagues said of “Iron Mike:” “He consistently and unreasonably demanded that we do the impossible, and most of the time we succeeded.” Although we were totally different personalities, Mike and I made a good team, and we

accomplished amazing things. It was more or less a “good cop, bad cop” routine, and I’ll let you guess who played which role.

Among other things, I worked on the Iranian Hostage Crisis, the Cuban Boatlift, the Refugee Act of 1980, the Immigration Reform and Control Act of 1986 (“IRCA”), the creation of the Office of Immigration Litigation (“OIL”), and establishing what has evolved into the modern Chief Counsel system at Department of Homeland Security (“DHS”).

I also worked on the creation of EOIR in 1983, which combined the Immigration Courts, which had previously been part of the INS, with the BIA to improve judicial independence. Interestingly, and perhaps ironically, the leadership and impetus for getting the Immigration Judges into a separate organization came from Mike and the late Al Nelson, who was then the Commissioner of Immigration. Prosecutors by position and litigators by trade, they saw the inherent conflicts and overall undesirability, from a due process and credibility standpoint, of having immigration enforcement and impartial court adjudication in the same division.

I find it troubling that officials at today’s DOJ tolerate and even aggravate some of the problems and glaring conflicts of interest that EOIR originally was created to overcome. Indeed, as I will discuss later, the Trump Administration “weaponized” the Immigration Courts for use as a tool to enforce their nativist, restrictionist immigration agenda. For example, former Attorney General Jeff Sessions referred to supposedly fair and impartial Immigration Judges as “in partnership” with DHS enforcement.

By the time I left in 1987, the General Counsel's Office, largely as a result of the enactment of IRCA and new employer sanctions provisions, had dozens of attorneys, organized into divisions, and approximately 600 attorneys in the field program, the vast majority of whom had been hired during my tenure.

In 1987, I resigned from INS and joined Jones Day's DC Office, a job that I got largely because of my wife Cathy and her "old girl network." I eventually became a partner specializing in business immigration, multinational executives, and religious workers. Among my major legislative projects on behalf of our clients were the special religious worker provisions added to the law by the Immigration Act of 1990 and the "Special Immigrant Juvenile" provisions of the INA with which some of you might be familiar.

Following my time at Jones Day, I succeeded my former boss and mentor Sam Bernsen as the Managing Partner of the DC Office of Fragomen, Del Rey & Bernsen, the leading national immigration boutique, where I continued to concentrate on business immigration. You will note that immigration is a small community; you need to be nice to everyone because you keep running into the same folks over and over again in your career. While at Fragomen, I also assisted the American Immigration Lawyers Association ("AILA") on a number of projects and was an adviser to the Lawyers' Committee, now known as Human Rights First.

In 1995, then Attorney General Janet Reno appointed me Chairman of the BIA. Not surprisingly, the late Janet Reno was

my favorite among all of the Attorneys General I worked under. I felt that she supported me personally, and she supported the concept of an independent judiciary, even though she didn't always agree with our decisions and vice versa.

She was also hands-down the funniest former Attorney General to appear on "Saturday Night Live," doing her famous "Janet Reno Dance Party" routine with Will Farrell immediately following the end of her lengthy tenure at the DOJ.

Among other things, as Chair, I oversaw an expansion of the Board from the historical five members to more than 20 members, a more open selection system that gave some outside experts a chance to serve as appellate judges on the Board, the creation of a supervisory structure for the expanding staff, the establishment of a unified Clerk's Office to process appeals, implementation of a true judicial format for published opinions, institution of bar coding for the tens of thousands of files, the establishment of a pro bono program to assist unrepresented respondents on appeal, the founding of the Virtual Law Library, electronic en banc voting and e-distribution of decisions to Immigration Judges, and the publication of the first BIA Practice Manual, which actually won a "Plain Language Award" from then Vice President Gore.

I also wrote the majority opinion in my favorite case, *Matter of Kasinga*, establishing for the first time that the practice of female genital mutilation ("FGM") is "persecution" for asylum purposes.^[2] As another historical footnote, the "losing" attorney in that case was none other than my good friend, then INS General Counsel David A. Martin, now a famous emeritus

immigration professor at University of Virginia Law who personally argued before the Board. Ms. Kasinga was superbly represented by superstar practical scholar and role model Karen Musalo, now the founding Director of the Center for Gender and Refugee studies at U.C. Hastings Law.

In reality, however, by nominally “losing” the case, David actually won the war for both of us, and more important, for the cause of suffering women throughout the world. We really were on the same side in *Kasinga*. Without David’s help, who knows if I would have been able to get an almost-united Board to make such a strong statement on protection of vulnerable women.

During my tenure as Chairman, then Chief Immigration Judge (now BIA Judge) Michael J. Creppy and I were founding members of the International Association of Refugee Law Judges (“IARLJ”). This organization, today headquartered in The Hague, promotes open dialogue and exchange of information among judges from many different countries adjudicating claims under the Geneva Convention on Refugees. Since my retirement, I have rejoined the IARLJ as a Vice President for the Americas.

In 2001, at the beginning of the Bush Administration, I stepped down as BIA Chairman, but remained as a Board Member until April 2003. At that time, then Attorney General John Ashcroft, who was not a fan of my opinions, invited me to vacate the Board and finish my career at the Arlington Immigration Court, where I remained until my retirement on June 30, 2016.

So, I'm one of the few ever to become an Immigration Judge without applying for the job. Or, maybe my opinions, particularly the dissents, were my application and I just didn't recognize it at the time. But, it turned out to be a great fit, and I truly enjoyed my time at the now "legacy" Arlington Immigration Court.

I have also taught Immigration Law at George Mason School of Law in 1989 and "Refugee Law and Policy" at Georgetown Law from 2012 through 2014. Upon retirement, I've resumed my Adjunct Professor position with Georgetown Law for a "compressed summer course" in "Immigration Law & Policy."

Please keep in mind that if everyone agreed with me, my career wouldn't have turned out the way it did. On the other hand, if nobody agreed with me, my career wouldn't have turned out the way it did.

In bureaucratic terms, I was a "survivor." I have also, at some point in my career, probably been on both sides of many of the important issues in U.S. immigration law.

II.

Now, those of you who read my blog immigrationcourtside.com or have heard me speak before, or both, know that I am an outspoken critic of the last four Administrations' gross mismanagement and misdirection of our Immigration Courts. So, you might well ask why I am here recruiting YOU to become part of a court system that I have consistently lampooned and

characterized as dysfunctional, FUBAR, and badly in need of long-overdue reforms.

A better question might be why AG Garland, VP Harris, Deputy AG Lisa Monaco, and Associate AG Vanita Gupta AREN'T here today actively recruiting you to apply to become Immigration Judges in their system. It's a hugely important court, perhaps the largest in the Federal Government, that cries out for excellence, practical immigration scholarship, and badly needs a much more diverse, representative, and expert judiciary to achieve equal justice for all in America.

The short answer is because I CARE, and THEY DON'T. I have a vision of a model court system unswervingly dedicated to due process, fundamental fairness, great practical scholarship, best judicial practices, fantastic public service, and equal justice for all! THEY DON'T!

After two largely fruitiness and frustrating years of the Biden Administration's bungling immigration and social justice missteps, it's painfully clear that the needed management, personnel, operational, and expertise reforms needed at EOIR AREN'T going to come from above.

But, if you have been in Immigration Court and thought "Hey, there is a better, more informed, more efficient, more just way to run this railroad, why isn't it happening," THIS is YOUR chance to get on board and change the direction of EOIR and the lives and livelihoods that depend on it! See that the next generations of dedicated immigration lawyers won't face some of the unnecessary and counterproductive roadblocks and bad

experiences that you have had to deal with in seeking justice for your clients before EOIR!

There is a great opportunity right now! The Biden Administration has selected Immigration Judges in a more merit-based manner than their predecessors. Immigration expertise and practical skills in representing individuals in Immigration Court are being given more equal weight with Government prosecutorial experience. This has produced a somewhat more balanced group of new Immigration Judges.
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As you are probably aware, some recent appointments are universally-respected and nationally-recognized “practical scholars” in immigration and human rights with deep experience in helping individuals successfully navigate our broken and backlogged EOIR system.

However, as many of you also are painfully aware, overall, the substantially expanded Immigration Judiciary still contains far too many members of the “asylum deniers club” who reject upwards of 90% of all asylum applications. There also are expertise issues with some judges who lack immigration experience. Overall, the system sorely needs consistency, with asylum grant rates “ranging” from 0-99 per cent!

Additionally, the BIA remains largely dominated by holdovers from the last Administration who often demonstrate little sympathy for asylum seekers and other migrants. Moreover, there are still far too many examples of Circuits reversing and remanding the BIA for failing correctly to apply basic legal standards.

These festering “quality control issues” are the main reason why I am encouraging and challenging YOU to apply for Immigration Judge positions at EOIR! We need a better Immigration Judiciary, indeed a better Federal Judiciary, and that starts, but by no means ends, with getting the best and brightest “practical scholars,” like you, to apply for these critical, life determining judicial positions at the “retail level” of our American Justice system.

What better place to start forcing some long overdue changes than by getting more NDPA “practical scholar/experts” — like YOU — onto the EOIR bench where lives are on the line every minute of every working day? There are lots of ways to do justice at the “retail level” despite, or perhaps because of, the indifference of those in charge!

Folks, approximately a decade ago, the asylum grant rate at EOIR exceeded 50%! When grants of withholding (many the result of the 1-year-bar on asylum) and CAT were added in, almost 2/3 of asylum applicants who got a merits determination received some form of legal protection! At the Arlington Immigration Court, the grant rate got as high as 72%, with a group of judges from different backgrounds.

The vast majority of these cases were not appealed to the BIA. Slowly, but steadily, the EOIR system “at the retail level” was committing to expertise, sound scholarship, due process, fundamental fairness, faithful application of the generous legal principles established in *Cardoza*, *Mogharabi*, *Kasinga* and the

regulatory presumption of future future persecution based on past persecution.

For years, those precedents and that regulation were resisted by many EOIR judges who continued, in practice, to apply the higher “more likely than not” standard specifically rejected in *Cardoza*. But, following a series of savagely critical reversals of EOIR asylum denials by the Courts of Appeals, the ground started to shift toward a more generous, proper, and correct interpretation of asylum law. Notably, those Court of Appeals “roastings” came after AG John Ashcroft “purged” the BIA in 2003 of appellate judges, including me, who spoke out for a better legal interpretation of asylum laws — one that faithfully followed *Cardoza*, *Mogharrabi*, *Kasinga*, and international standards!

As I used to tell my Georgetown Law students, a quarter century after the Supremes’ landmark decision in *INS v. Cardoza-Fonseca*, establishing the generous “well-founded fear” standard for asylum (reasonable likelihood = 10% chance) and the BIA’s implementation of that standard in *Matter of Mogharrabi* (asylum can be granted even where it is significantly unlikely that persecution will occur) *the more generous standard was actually achieving “traction” at EOIR!*

The law hasn’t changed very much since 2012. But, the progress toward a “*Cardoza/Mogharrabi* compliant” interpretation and application of asylum law halted and regressed substantially during the last part of the Obama Administration and during the Trump era.

What did change, for the worse, was the attitude of politicians, who have seen the Immigration Courts as captive “tools” to deter asylum seekers and “send negative messages” rather than insuring that they function as due-process-oriented, independent, subject matter expert, courts of law. The qualifications of those selected as Immigration Judges were “watered down” to favor high-volume government prosecutorial experience over demonstrated expertise in immigration and asylum laws and “hands on” experience representing individuals before EOIR.

Not surprisingly, asylum grant rates dropped precipitously during the Trump years. Although they have rebounded some under Biden, they still remain below the 2012 levels. It’s certainly not that conditions have substantially “improved” in major “sending countries.” If anything, conditions are worse in most of those countries than in the years preceding 2012.

So, if the law hasn’t changed substantially and country conditions haven’t improved, what has caused regression in asylum grant rates at EOIR? It comes down to poor judging, accompanied by inadequate training, too much emphasis on “churning the numbers over quality and correctness,” and a BIA that really doesn’t believe much in asylum law and lacks the expertise and commitment to consistently set and apply favorable precedents and end disgraceful inconsistencies and “asylum free zones” that continue to exist.

Some of the most disgraceful, intentional asylum misinterpretations by Sessions and Barr now have been

reversed by Garland. Unfortunately, he failed to follow-up to insure that the correct standards are actually applied, particularly to recurring circumstances. It's one of many reasons that the Biden Administration struggles to re-establish a fair and efficient legal asylum system at the Southern Border — notwithstanding having two years to address the problems!

But, it doesn't have to be this way! Recently, as I noted earlier, a number of notable “practical scholar experts” have been appointed to the Immigration Judiciary. When such well-qualified jurists reach a “critical mass” in the expanding EOIR, systemic changes and improvements in practices and results will happen.

The “dialogue” among Immigration Judges from government backgrounds and those from the private/NGO sector will improve. Lives will be saved. Life-threatening inconsistencies and wasteful litigation to correct basic mistakes at all levels of EOIR will diminish. *The EOIR system will resume movement toward the former noble, but now long abandoned, vision of “through teamwork and innovation, being the world’s best administrative tribunals, guaranteeing fairness and due process for all!”*

III.

Are there risks? Of course! Immigration Judges are not “tenured.” As I can tell you, from experience, they serve at the pleasure of the Attorney General!

Could we get another Ashcroft, Sessions, or Barr? Sure! I tend to think that there is a better chance of avoiding that if we start changing EOIR today, from the bottom up! Because it sure isn't happening from the "top down!"

In the end, there is nothing any one of us can do to guarantee the outcome of future national elections. But, you can use your skills right now to create individual justice on a daily basis as a judge in Immigration Court.

Even if, as some of my Round Table of Former Immigration Judges colleagues did during the last Administration, you at some point feel compelled to leave the bench as a "matter of conscience," you will do so having saved lives and learned precious knowledge of the "inner workings" of EOIR that will help you to help others in the future. That could be back at a law firm, as a teacher, as a legal scholar, political activist, or as a mentor and managing guru at an organization fighting for social justice.

And, one big advantage you have over Government "lifers" is that you already know how to make a living "on the outside." If the job does eventually come to an end, you will find ample opportunities to use your "enhanced practical expertise" to contribute elsewhere.

Can EOIR be a difficult place to work? Yes, it can! The current so-called "management" of the Immigration Courts is, as you well know, "less than stellar." But, that can be changed over

time as the quality and expertise of the line judges from which many of the administrators and supervisors are selected improves.

Moreover, as we always told ourselves at the Arlington Court, whatever craziness is going on at EOIR as a whole, within your individual courtroom you have basic control over the substantive results in the individual cases coming before you. You can choose to “do the right thing” and interpret asylum laws correctly and generously. For the same reason that nobody ever effectively cracks down on the “asylum deniers club,” it’s unlikely that they are going to stop you from doing a high-quality job — as long as you can “keep the line moving!” It’s “building America, one case at a time” as I used to say during my days on the bench.

Three other factors to consider. At some point in the future, I think we will get an independent Article I Immigration Court. Then, it will be critical that the initial group of “grandfathered” judges, who are likely to have an inside track on full-term appointments, be a diverse and representative group of practical scholar-experts.

Additionally, we have seen how far right nativists and anti-democrats have obtained outsized influence among the Article III Judiciary during GOP Administrations through a concerted effort “leveraging” their Federalist Society and Heritage Foundation experience. Some successful GOP judicial appointees have barely any other legal credentials. Yet, here they are. On the bench and determining YOUR future based on

a narrow, distorted, often anti-democracy right-wing view of the world!

We can see that Dem Administrations have basically been “slow on the uptake,” to put it kindly. They have traditionally wasted too many Article III picks on “wishy washy centrist ivory towerists” who lack the “in the trenches” legal experience, the intellectual courage and toughness, and the unswerving commitment to fight for due process and equal justice under the Constitution. Thus, they often get “steamrolled” by right wing activist judges.

Also, among Article III jurists appointed by both parties, lack of “retail level experience” and practical scholarship in immigration, human rights, and equal justice is a common denominator. With immigration-related cases perhaps forming the biggest issue in Federal courts these days, absence of this “hands on” expertise and serious scholarship is threatening our entire legal system.

Building a progressive, due-process-oriented, practical scholarly Immigration Judiciary should be a first step toward a badly-needed overhaul of the often moribund and out of touch Article III Judiciary. And, what better training ground and source of appointments to the Article III Judiciary than a strong, scholarly, progressive, highly efficient, problem-solving Immigration Judiciary. Certainly, it would be much better than relying on the Federalist Society and the Heritage Foundation to provide our future Federal Judges!

But, we can't get there with the current composition. We need "new blood" — a diverse group of Immigration Judges who better reflect the intellectual excellence of the New Due Process Army as well as the composition and the immigration impact of the communities supposedly served by EOIR!

Third, and finally, being an Immigration Judge is a golden opportunity to teach and mentor other lawyers on sound immigration scholarship, due process, best practices, and creative problem solving. While EOIR does not have the individually assigned judicial law clerks (JLCs) of comparable court systems, there are plenty of talented, energetic, brilliant Immigration Court JLCs and Attorney Advisors out there eager to help you do justice and to learn and grow from your experiences. And the same is true of newer lawyers on both sides appearing before you.

I found it to be one of the most satisfying aspects of being an Immigration Judge. Indeed much of the "younger core strength" of the New Due Process Army is comprised of former Arlington interns and JLCs, my former Georgetown Law students, and those who appeared before me during my 21 years on the trial and appellate benches at EOIR!

So, warriors of the NDPA, check out USA Jobs, make those applications for EOIR judgeships! Storm the tower from below! Make a difference in the lives of others, stand up for due process and fundamental fairness for all persons, and help save

our democracy! Become better judges for a better America! If not YOU, then who?

Thanks for listening, and Due Process Forever!

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