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Shoba Sivaprasad Wadhia
Editor-in-Chief

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Letter From the Editor-in-Chief of the *AILA Law Journal* and President of AILA

Allen Orr and Shoba Sivaprasad Wadhia

We are thrilled to bring you the Spring 2022 issue of the *AILA Law Journal* and celebrate the 75th Anniversary year of the American Immigration Lawyers Association. Our 75th Anniversary issue includes additional mediums that showcase the creative outlets or talents of our authors, reflections on being an AILA immigration attorney, and on those we have lost.

Allen: My story with AILA begins at 918 F Street NW, in Washington, DC. I still remember the national office's faxes and the staff-operated elevator. What I remember more than the classic infrastructure is the members who had a profound effect on my life. My first leadership position was Washington, DC, Chapter Young Lawyer Division (YLD) Co-Chair with the amazing Stacy Shore. That position led to me serving on the National YLD steering committee where I met my AILA lifelong friends, Gayle Oshrin, Aimee Clark, and Hamel Vyas. Our goal was to expand AILA's table. As the 75th president of AILA—and the association's first Black and Gay president—I am proud to represent that expansion. We have made our association a supportive and inclusive environment ready to meet the growing demands and challenges of the practice of immigration law.

Shoba: I have fond memories of joining AILA more than 20 years ago, while living in Washington, DC, and working the late Michael Maggio, who at the time was President of the DC chapter. I remember walking with colleagues from the Dupont Circle office to the Marriot hotel for monthly chapter meetings, at which rubber chicken but rich discussion followed. It was during this time I was fortunate to meet Allen, who, like me, was practicing immigration law in downtown DC I am also grateful that Michael encouraged all of his attorneys to attend the national AILA conferences and recall how important the conferences were in the early years and beyond. Forwarding to 2022, and year three as the Editor-in-Chief for the *AILA Law Journal*, I feel very fortunate to bridge the many dimensions of immigration.

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The 75th Anniversary issue of the *AILA Law Journal* exemplifies these dimensions. In this issue Lisa Seifert talks about joining AILA while practicing as a solo attorney in Olympia, Washington, with a photo and a "thank you" note to AILA.

John Medeiros offers a historical account of immigration in his piece "The Huddled Masses," in which he offers a timeline that begins with Prehistory and the New World, moves to the era of an Asian exclusion, and turns to the Immigration and Nationality Act and amendments, and concludes with immigration history as one of a gatherer in search for food and one of exclusion.

This volume includes two pieces that impact the process of immigration. In her piece "The Sinking Immigration Court: Change Course, Save the Ship," Stacy Caplow provides a primer of the immigration court system and offers solutions for transformation, including but not limited to expanding prehearing conferences between the immigration attorney and ICE trial attorney, and improving the selection process for immigration judges. Another key question tied to courts is jurisdiction, a topic Geoffrey A. Hoffman addresses in his piece "Reading *Pereira* and *Niz-Chavez* as Jurisdictional Cases," where he examines the state of the law and the importance of clarifying the jurisdictional consequences of defective Notices to Appear.

On substantive topics, third-year law student Nathan Hall, in his piece "With a Gun to Their Head: Adopting a Duress Exception to the Serious Nonpolitical Crime Bar," uses a case example and a history of asylum law to illustrate the importance of creating a statutory exception to the serious nonpolitical crime bar, which under the immigration statute, disqualifies an asylum seeker from protection. In their piece, "Between a Rock and a Hard Place: The Inconsistent Application of Special Immigrant Juvenile Status Under Federal Law," Maria Eijo de Tezanos Pinto and Kristine Artello discuss the remedy of Special Immigrant Juvenile Status (SIJS), a law enacted in 1990 that allows certain youth to obtain permanent immigration status if they can show, among other requirements, that a state juvenile court has determined they cannot be reunified with one or both parents because of abuse, neglect, or abandonment. The authors discuss the sources of inconsistency and offer solutions in SIJS cases, especially for those individuals who are between the ages of 18 and 21.

In "The United States Is at Risk of Failing Our Afghan Allies: Here's How the Biden Administration Can Prevent That," AILA Afghan Task Force members Mahsa Khanbabai and Parastoo Zahedi discuss the Afghans they have represented who are at risk, and call on the Biden administration to make improvements that include expanding access to humanitarian parole, streamlining the parole process through fee waivers, and developing more solutions for evacuating vulnerable Afghans who remain outside the United States. Nguyen D. Luu shares a reflection and photographs about the role he and his partner played in volunteering in legal clinics to support Afghan resettlement efforts. Says Nguyen, "As a Vietnamese-American, my family's personal refugee stories

mirrored those of the families I met at the legal clinic—stories of separation from family, permanent displacement, and hope for a new life in America."

Tahmina Watson offers a photograph and a sketch and discusses her new "identity" as "The Birding Immigration Lawyer" since the onset of the pandemic, sharing how contemplating and photographing birds has been a healing practice and has also made her a better immigration lawyer. Says Watson, "When we board airplanes, they tell us in the preflight instructions that we need to put on our own oxygen mask before attending to others. Birding has become my oxygen mask." In other creative offerings, Eric Esqueda shares "The Children Who Didn't Grow Up to Save the Future: A Poem by a Former ORR Case Manager." Karl Krooth provides a haiku. Mary Turck offers three poems titled "Magdalena," "Hell Freezes Over," and "Deportee."

On the other side of the joy (and/or coping mechanism) that creative writing and birding bring to our authors is the sorrow of loss. Friends and colleagues of Valerie Anne Zukin offer a moving in memoriam and share photos to remember the untimely death of Valerie, who "dedicated her life to pursuing justice for the most marginalized immigrants, especially those who were detained."

We also remember Anna W. Shavers, a former AILA member who died on January 22, 2022, and most recently served as the Associate Dean for Diversity and Inclusion and as Cline Williams Professor of Citizenship Law at the University of Nebraska College of Law. Anna grew up in the segregated South and faced many obstacles but spent her life committed to justice. Anna was deeply respected and loved for her gifts in immigration law, administrative law, and racial inequity, in addition to being a kind and generous mentor and friend.

Finally, we cannot close this letter without honoring the memory of the many other AILA members we have lost over the years. Their spirits, as well as their important contributions, live on.

We are grateful to our authors, Managing Editor Danielle Polen, editor Richard Link, Morgan Morrisette Wright of Full Court Press, and a dedicated editorial board that is crucial to consistently delivering high-quality issues. We hope our readers enjoy this special issue of the *AILA Law Journal*.

Allen Orr
and
Shoba Sivaprasad Wadhia

Thank You Note to AILA

Lisa Seifert

I joined AILA when I could afford it, about a year after I opened my solo immigration law practice in Olympia. Chapter meetings were an hour away in Seattle, and I would attend as often as possible. Our Washington Chapter was always welcoming and friendly. Through AILA I learned a lot. I made good friends in all parts of the country who were always there to help when I needed it. I repaid the favor to newer lawyers whenever I could, through the young lawyers division (started by my cohort in AILA), and individually on many occasions. Conferences were brain bursting! and also really fun. Like all organizations, there were things that we loved, and also things that we sometimes wanted to change. I have been glad for the comradeship, and for the advocacy for better immigration laws. Thanks AILA, and see you soon in person!

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The Huddled Masses

John Medeiros*

Abstract: Anyone who wishes to practice immigration law in this country must understand two things: the stories of those who have immigrated—both willingly and unwillingly—to the United States, and the development of laws that have prevented others from doing so. America's immigration laws have widely been based on exclusion, rather than inclusion. On taking from, rather than giving to. Taking the reader on a journey that begins several thousand years ago, "The Huddled Masses" is a literary exploration written in a style that pays homage to famed Uruguayan journalist, novelist, and social commentator Eduardo Galeano, that fuses legal research with elements of poetry and creative nonfiction to chronicle the history of U.S. immigration and the development of U.S. immigration law.

> The greatest nations are defined by how they treat their weakest inhabitants.
>
> —Jorge Ramos

Prehistory: Beringia

There is a stretch of water between Asia and North America that measures a mere 55 miles in width. It links the Arctic Ocean with the Bering Sea, and it is so cold that, even in summer, drift ice can be seen floating on its surface. It is the end of the Ice Age and monumental glaciers lock up so much water that the world's ocean levels are more than 300 feet lower than they will be in the year 2000. The result? A continuous land bridge that stretches between Siberia and Alaska. Most archeologists and anthropologists will later agree that it is across this bridge, known as Beringia, that a human first passed to populate the Americas. They will assume that he came to this land hunting elk and caribou.

> "He could not be a fish eater," they will say. "That would require a different migration."

So here he is, crouching toward Asia, our first immigrant: a wanderer in search of food.[1]

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Prehistory: Spirit Caveman

As he sits down to his last meal amid the cattails and sedges on the shore of the ancient lake, the frail man grimaces in agony. A fracture at his left temple is still healing; deep abscesses in his gums shoot bolts of pain into his skull. Still, he is a survivor; at forty-something, longlived for his people. But soon after he finishes the boiled chub that he nets from a stream in what will be western Nevada, he feels his strength ebbing like a tide. He lies down. Falls asleep. Within hours he is dead, felled by septicemia brought on by the dental abscess. When his people find him, they gently wrap his body in a rabbit fur robe and secure his bulrush-lined leather moccasins patched twice with antelope hide on the right heel and toe. His people dig a shallow grave in a rock shelter, line it with reed mats and lie him within. Some 9,400 years later, anthropologists will discover him, and they will name him Spirit Caveman.

He isn't supposed to be here. He is the wrong guy, in the wrong place, at the wrong time. According to standard anthropology script, anyone living here at this time should resemble Native Americans or, at the very least, the Asians who are their ancestors and thus, supposedly, the original Americans. But Spirit Caveman does not follow that script and neither do more than a dozen other skeletons of the Stone Age.

Who, then, were these First Americans?[2]

1492: A New World

The land is teeming with inhabitants. We witness Arawak men and women. Earthen, full of wonder as they notice something they have never seen before in their entire history. An unfamiliar boat carrying a man in fancy clothes across the ocean. When his sailors make it to shore, the Arawak, holding true to their custom to greet strangers, run to them, bringing food and gifts. The fancy man writes of this day:

> They brought us parrots and balls of cotton and spears and many other things, which they exchanged for the glass beads and hawks' bells. They willingly traded everything they owned … They were wellbuilt, with good bodies and handsome features … They do not bear arms, and do not know them, for I showed them a sword, they took it by the edge and cut themselves out of ignorance. They have no iron. Their spears are made of cane … They would make fine servants … With fifty men we could subjugate them all and make them do whatever we want.[3]

The Arawak give him gifts galore; what he really wants is gold.

1495: The Second Trip

If at first you don't succeed, try, try again. So when Christopher Columbus found no gold during his first voyage, he promises it for his second. In reality, the booty would be far greater. He rounds up 1,500 Taíno men, women, and children, and brings them to La Isabela, on the island of Hispaniola, for the best to be shipped to Spain, but first they must deliver tributes of gold every three months. On the island where Columbus and his men imagine huge gold fields to exist, they order all persons 14 years or older to collect a certain quantity of gold every three months. When they bring it, they are given copper tokens to hang around their necks. Indians found without a copper token have their hands cut off and bleed to death. Bartolomé de las Casas, the most famous of the accompanying Spanish missionaries from that trip, would later report:

> It was a general rule among Spaniards to be cruel; not just cruel, but extraordinarily cruel so that harsh and bitter treatment would prevent Indians from daring to think of themselves as human beings or having a minute to think at all. So they would cut an Indian's hands and leave them dangling by a shred of skin and they would send him on saying "Go now, spread the news to your chiefs."[4]

Thus begins the history, over 500 years ago, of the European invasion of the Indian settlements in the Americas. This starts America's recent history of immigration to its shores. A history based on subjugation.

A history based on race.

August 18, 1587: America's First English Child

On this day Captain John White's daughter, Eleanor, wife of Ananias Dare, gives birth to the first English child born in America: Virginia Dare. She is given the name because she is the first Christian born in Virginia. No one would know what becomes of her nine days after her birth,[5] and naturalization laws developed 200 years later would disqualify her from U.S. citizenship for being born a girl.[6]

1620: The Great Puritan Migration

This is the story of the Mayflower and how it arrives on America's shores with the first boatload of undocumented immigrants. The 180-ton vessel begins its historic voyage on September 16, 1620, with 102 passengers. But sometime during their journey they decide to relocate altogether in the Americas, and after 65 days, the Pilgrims sight Cape Cod.

They anchor on November 21 at Provincetown, Massachusetts, but they have no legal right to settle in that region. To overcome this technicality, they draw up the Mayflower Compact, in effect creating their own government. The document does not imply that the settlers agree upon any new or radical democratic system of government. Instead, it is a modified form of a customary church covenant to meet a temporary crisis in an unfamiliar situation. It is signed, and the first European ~~theocratic dictatorship~~ state in the New World is a throwback to the 1200s.

A pillory over here.

A public stockade over there.

All for those who engage in any disallowed activity. The Mayflower Compact, the first American settlement based on a social contract or covenant, derives its power from the consent of the people and guarantees that the colony shall remain under the iron control of the Pilgrim Fathers for the first 40 years of its existence. Forty-one men sign the compact, including societal leaders, hired men, and bond slaves, some of whom could not even write.[7]

Extraordinary about this document is its establishment of a government, by consent, at a time when England's liberties are still conditioned by the remnants of feudalism. It is not the "cornerstone of American democracy" as some enthusiasts will later claim (equal rights will come centuries later), but the compact does create a foundation for local self-government.[8]

1638-1655: Swedish Presence

Perhaps inspired by the riches other Great Powers gathered from their overseas colonies, Sweden too seeks to extend its influence to the New World. In 1637, Swedish stockholders form the New Sweden Company to trade furs and tobacco in America. The ships reach Delaware Bay in March 1638, and the settlers build a fort at Fort Christina, the site that would later be called Wilmington, the first permanent European settlement in the Delaware Valley.

During the next 17 years, more than 600 Swedes immigrate to America. The colony eventually consists of farms and small settlements along the banks of the Delaware River into Delaware, New Jersey, Pennsylvania, and Maryland. New Sweden rises to its greatest heights during the governorship of Johan Printz, but his autocratic rule leaves many settlers dissatisfied, and a petition for reform returns him to Sweden.

Johan Rising becomes governor of the Dutch capitol of New Amsterdam, which will later be called New York City. It is ruled by the hot-tempered Peter Stuyvesant. Soon after arriving in New Sweden, the Swedish Rising attempts to remove the Dutch from the colony, infuriating the Dutch leadership. In retaliation, Stuyvesant sends seven armed Dutch ships and 317 soldiers to attack the Swedes. Resistance would be useless, and the vastly outnumbered Swedes surrender to the Dutch.

Within the next twenty years, the Dutch would lose all their colonies to the British.[9]

1610-1650: Servitude Indentured

Here is how we will finance the recruitment and transport of workers from England to the colony. This convenient system shall be called "indentured servitude," and, with a little luck, it shall become one of the most successful business enterprises in the New World. There will be four forms of immigrant servitude, three of them voluntary:

1. Under the most common form, servants sign an indenture before departure, which is then sold to a master when the servant reaches the colonies. Once the servant completes his term, usually seven years, he is then no longer contractually obligated to serve his master.
2. Servants arrive without written contracts, and instead are to serve according to the "custom of the country," even if the custom is not yet defined, or changes regularly. Customary servants are younger than those with indentures, and they serve longer terms.
3. "Redemptioners" agree to pay passage upon arriving in the colonies, thus shifting much of the risk in the trade from merchants to the migrants. If unable to pay, they are sold as servants to satisfy their debt. This form of servitude will be popular in the eighteenth century with German migration to the Mid-Atlantic colonies.
4. Penal servitude, an important source of labor, will flourish in the eighteenth century when some 50,000 convicts will be shipped to the colonies.

The types of people who come to the colonies as indentured servants shall vary over time and by region, although most will be male, young, in their late teens and early twenties, and single, traveling alone. They will be chiefly English, although as opportunities and wages in England improve, we expect more will come from Scotland, Ireland, Wales, and Germany.[10]

This may be a temporary fix, but what we really need is steady labor, one where servants would be servants for life, as would their children and their children's children.

We need a new way.

1680-1808: The New Way

It is the year of our Lord 1680. Tobacco farming starts to boom, but the number of people willing to sign on as indentured servants starts to diminish. "Fear not!" we are told; we have a solution at hand. The solution is radical, and with it an entire institution starts to emigrate to America.

The ships come slowly at first, carrying only dozens until the larger ships later arrive with increasing numbers of slaves brought in from Africa, until the numbers reach 650,000.

They come unwillingly.

They are brought from a vast continent and arrive in America representing many different cultures and speaking a variety of languages. The world is not yet ready for their diversity, so they will experience more than two centuries of bondage during which much of their ancestral heritage shall fade and their differences shall disappear. They shall replace Native American slaves, who are too susceptible to diseases of European origin.

> The Africans come from many racial stocks and many tribes, from the spirited Hausas, the gentle Mandingos, the creative Yorubas, from the Ibos, Efiks and Krus, from the proud Fantins, the warlike Ashantis, the shrewd Dahomeans, the Binis and Sengalese.[11]

Slavery is an attractive proposition to landowners, where the price tag for an African male is around $27 while the salary of an indentured servant is about $0.70 per day. If you do the math correctly, you will find that it is much more economical to own a slave, as long as he lasts more than 40 days.[12]

March 26, 1790: The First Naturalization Act

The Revolutionary War has ended. Immigration remains at a low (with the exception of slaves) and the country's first census is taken. The Constitution of the new United States is the supreme law of the land, and among its many provisions: the power to set rules for naturalization in the United States would rest in the legislative branch of the federal government. Congress exercises that power by passing the Naturalization Act of 1790, the first federal naturalization law in America.

The legislation introduces requirements for naturalization, outlines procedural steps (charging the courts with carrying out this procedure), and establishes U.S. law regarding derivative citizenship for children of naturalized parents or children born to U.S. citizens abroad. The details governing these principles will evolve over the course of American history, yet the broad rules of naturalization will remain remarkably mostly unchanged. One noteworthy exception: naturalization is limited to "free white persons," disqualifying indentured servants, slaves, and women, all of whom are dependents incapable of casting an independent vote.[13]

1798: Immigrants as Political Pawns

The year is 1798, and anti-immigrant tension gives rise to the Alien and Sedition Acts. Enacted by the Federalist controlled U.S. Congress, allegedly

in response to the hostile actions of the French Revolutionary government, these laws are designed to destroy Thomas Jefferson's Republican party, which had openly expressed its sympathies for French Revolutionaries.

> **The Naturalization Act** requires that all white persons, in order to qualify for citizenship, must reside in the country for at least fourteen years prior to making application. Depending on recent arrivals from Europe for much of their voting strength, the Republicans are adversely affected by this Act.
>
> **The Alien Act** allows the President to remove those aliens judged to be dangerous to the peace and safety of the United States.

With the election of Thomas Jefferson as president in 1801, the new congress allows the Naturalization Act of 1798 to expire and quickly acts and passes the Naturalization Act of 1802, which restores citizenship requirements to five years rather than fourteen.[14]

1840s: A Potato Blight

Potatoes. Brought to Europe from the Americas. The lonely tuber flourished in new European soil, and quite well. Until now. It is a cold, wet summer in the mid-1840s, and an entire potato crop carries with it diseases never before seen in these parts of Ireland. The potato is the staple of the Irish diet; without it, there is no meal. And so it is that poor houses become overwhelmed. Soup kitchens cannot feed the hungry. Orphans wander motherless; cholera and typhus pull the half-living into mass graves. Within five years a million Irish nationals die of starvation and disease, and a half million leave their country, coming to the United States in this Great Migration with whatever hope and money they could scrap together.[15]

1870: Naturalization for Some, Not All

The year is 1870, and the Constitution is ratified with a new amendment that guarantees that the right of citizens to vote shall not be denied because of race, color, or previous condition of servitude.[16] This comes just two years after the 14th Amendment, which granted citizenship to African Americans and enslaved people who had been emancipated after the Civil War.[17] Notwithstanding these amendments, states are left with regulating suffrage.

The Immigration Act of 1870 would grant federal control over naturalization under the name of the 14th and 15th Amendments. Initially the bill is straightforward with no reference to voting rights; it punishes fraud in the naturalization process and gives federal courts jurisdiction over naturalization cases. With little drama, it passes the House. But when the Senate introduces

its version, it inserts provisions that require naturalized citizens to present a naturalization certificate authorized by a federal court in order to cast a vote. Facing opposition from within his own Republican party, the bill's author agrees to modify his version of the bill. But just before his version of the bill comes up to a vote, Senator Charles Sumner proposes yet another amendment: "that all acts of Congress relating to naturalization be, and the same are hereby, amended by striking out the word 'white' wherever it occurs so that in naturalization there shall be no distinction of race or color."

If Sumner's proposal is approved, no immigrants could be barred from naturalization, and that is not a step Congress is willing to take. His proposal nearly kills the bill. In the end, Alabama Senator Willard Warner would save the day by coming up with the language that would lead to the bill's passage, that naturalization would be extended to "aliens of African nativity and to persons of African descent."

This way, Asians would remain ineligible for naturalization.[18]

March 3, 1875: The Policing of Sexuality

Chinese immigrants have been settling on our west coast for over two decades now, and because their wages are low, racial tensions between white settlers and Chinese immigrants are heightened. To add to this, many Chinese immigrants are forcibly brought to the United States to work as prostitutes and forced laborers. Complaints reach a high pitch of hysteria when an economic depression hits the western states. Congress reacts by passing a law on March 3, 1875, which history shall remember as the first law to restrict our country's undesirables, a law to "end the danger of cheap Chinese labor and immoral Chinese women."[19] The law defines undesirables as a person from East Asia coming to the United States to be a forced laborer, any East Asian woman who would engage in prostitution, and anyone considered a criminal in their own country.

The only ban that would be effectively enforced is the ban on Asian women.[20]

1882: The Chinese Exclusion Act

The intent of the language can be seen in the Act's Preamble:

> *Whereas, in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof . . .*

Even though Chinese immigrants represent only 0.002 percent of the population, Congress passes the Chinese Exclusion Act. The Act suspends

immigration of Chinese laborers to the United States for ten years, permits Chinese laborers already here to remain in the country after a temporary absence, provides for the deportation of Chinese immigrants illegally in the United States, and bars Chinese nationals from U.S. naturalization. The law will later be extended, and this ~~racist~~ racial policy will last until 1952.

We are told the Chinese are a threat to the "good order of life." We are told that Chinese immigrants are racially different. Foreign. Un-American. We are told it is impossible for them to assimilate into a culture that excludes them, and neither the courts nor the body politic accepts them as members of the national community.[21]

1884-1885: The Mother of Exiles

From the shores we see a boat person. A tramp. A French import. Who is she? She is an immigrant herself, arriving under cover of darkness and shrouded in mystery. Little do we realize that she shall become the prominent symbol of freedom in the United States, perhaps the world.[22]

Lady Liberty.

She turns heads, and inspires poetry, such as "The New Colossus," by Emma Lazarus:

> Not like the brazen giant of Greek fame
> With conquering limbs astride from land to land;
> Here at our sea-washed, sunset gates shall stand
> A mighty woman with a torch, whose flame
> Is the imprisoned lightning, and her name
> Mother of Exiles. From her beacon-hand
> Glows world-wide welcome; her mild eyes command
> The air-bridged harbor that twin cities frame.
> "Keep, ancient lands, your storied pomp!" cries she
> With silent lips. "Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tossed to me,
> I lift my lamp beside the golden door!"[23]

She is the mother who calls many for dinner, knowing there is no food.

1875-1917: The Early Immigration Restrictions

The Chinese Exclusion Act changes the way immigration law is viewed. It is no longer about who can enter; instead, it is about who cannot. This shift

in thought allows for the passage of a series of immigration laws that exclude the following immigrants:

1882 Idiots, lunatics, convicts and persons likely to become a public charge.
1903 Epileptics; insane persons; beggars; anarchists.
1891 Those likely to become a public charge; those with contagious diseases; felons; persons convicted of other crimes or misdemeanors; polygamists; aliens assisted by others by payment of passage.
1907 Imbeciles; the feebleminded; people with tuberculosis; children without parents; women coming to the United States for prostitution or other immoral purposes; people with physical or mental defects which could affect their ability to earn a living; people who admitted the commission of an act of moral turpitude.
1917 Illiterate persons.[24]

1880-1892: A New Island

Close to the mouth of the Hudson River is a 2.5-acre island whereon land many future citizens of the United States. Formerly known as Oyster Island, Ellis Island was acquired for $10,000 by the state of New York in 1808. Now, decades later, Uncle Sam wisely decides to look after his future nephews and nieces himself, hoping to stop abuses immigrants faced when their introduction into this country was made under the supervision of certain states, notably New York, Massachusetts, Pennsylvania, Maryland, and Louisiana.

Hence, the federal government selects Ellis Island as the dumping ground for those who come to the Empire City.

It will be that way for the next 62 years.[25]

1894-1896: The Immigration Restriction League

America. Land of opportunity. Even the opportunity to manifest hatred of others in a coordinated and executable fashion. For example, let's say that your name is Charles Warren, or Robert DeCourcy Ward, or Prescott Farnsworth Hall. You—Charles, or Robert, or Prescott—graduate from Harvard University because, well, privilege. And let's say that at the time of graduating you are not impressed with the state of affairs in the world. More than anything, you are shocked by the growing number of immigrants coming to America each year. This land of the free enables you to establish the Immigration Restriction League, in response to your increasing sense of invasion by undesirable immigrants that threaten you. The league stands by your mission:

1. to advocate for the stricter regulation of immigration;
2. to issue documents and information on that subject; and
3. arouse public opinion to the necessity of a further exclusion of elements undesirable for citizenship or injurious to our national character.[26]

Such is the way with hatred.

1906-1907: A Gentleman's Agreement

A treaty with Japan in 1894 assures free immigration, and the number of Japanese workers in California continues to increase. Naturally, Japanese immigrants are met with growing hostility. Japan has decided to curb the problem by denying passports to laborers seeking to enter the United States. Racial antagonism intensifies, and on May 7, 1906, the San Francisco school board arranges for all Asian children to be placed in segregated schools.

Japan is prepared to limit emigration to the United States, but it is also deeply wounded by San Francisco's discriminatory law aimed specifically at its people. President Theodore Roosevelt, wishing to preserve good relations with Japan as a counter to Russian expansion in the Far East, persuades the school board to rescind the segregation order. And thus, on February 24, 1907, the Gentlemen's Agreement with Japan is born. It concludes in the form of a Japanese note agreeing to deny passports to laborers intending to enter the United States and recognizes America's right to exclude Japanese immigrants, further restricting Asian immigration.[27]

1911: A New Dictionary

The course of immigration is changing dramatically. Immigration levels soar to over one million people each year, and with so many people coming to America's shores, it has become increasingly difficult to classify them by country of birth. This is what keeps Republican Senator William P. Dillingham awake at night. A vocal advocate of restricting immigration, Dillingham creates the Dillingham Commission, a joint House and Senate commission formed to study changes in immigration. "We will no longer classify immigrants by their country of birth," the commission sings, "but by race or people instead." Let's believe them when they say this:

> In the preparation of this dictionary, it was neither the plan of the Commission nor the purpose of the author to attempt an original discussion of anthropology or ethnology, but rather to bring together from the most reliable sources such existing data as it was believed

> would be useful in promoting a better understanding of the many different racial elements that are being added to the population of the United States through immigration.
>
> In the more strictly ethnological topics of definition and division, or classification of races or peoples according to their languages, their physical characteristics, and such other marks as would show their relationship to one another, and in determining their geographical habitats, an effort has been made to present the view most generally accepted among ethnologists . . .

This justifies the government from taking positions such as "Negroes are alike in inhabiting hot countries and in belonging to the lowest division of mankind from an evolutionary standpoint," and "the 'Jewish nose,' and to a less degree other facial characteristics are found well-nigh everywhere throughout the race, although the form of the head seems to have become quite the reverse of the Semitic type."[28]

This racist, albeit controversial dictionary would be used to reduce immigration numbers over the next four decades.

1918: No More Reds

The climate of repression established during World War I continues even after the war ends. This time, government interests focus on communists. Building on earlier immigration laws, Congress passes the Anarchist Act of 1918 with three purposes in mind. This law authorizes the deportation of any immigrant who:

1. opposes all organized government (anarchism);
2. advocates the overthrow of the government "by force or violence"; or
3. belongs to any organization teaching these views.[29]

The Secretary of Labor rules that the Communist Party advocates violent revolution. Therefore, any alien who is a member of that Party shall be deported.

1921, 1924: A Case for Quotas

Immigration in the early twentieth century is extremely high relative to nineteenth century levels. Congress responds to this influx of immigrants by passing the Emergency Quota Act of 1921. Under this new legislation, European immigration is limited to three percent of each country's foreign-born

population currently residing in the United States as of the most recent census. Three years later, the Johnson-Reed Act—known informally as the Immigration Act of 1924—would further limit the number of immigrants allowed into the country through a national origin quota. The quotas will reduce the number of visas to two percent of each nation's number of foreign-born residents as of the 1890 census. The choice to use the 1890 census, as opposed to the 1910 census, is clearly intentional, because up to 1890, America still had a largely homogenous population. From 1890 to 1914, some 15 million immigrants had entered America from the Middle East and from the South and the East of Europe.

By choosing 1890 as the key year, Congress could exclude more undesirables.[30]

1922: The Free White Man

His name is Takao. He is born in Japan in 1875 and moves to the United States at the age of 19. He goes on to study at the University of California, and later moves to Hawaii, where he marries a woman of Japanese descent and fathers two U.S. citizen children.

When American colonists overthrow the kingdom of Hawaii, Congress extends birthright citizenship to the land. Takao applies for naturalization, but his application is denied. He later appeals the decision all the way to the U.S. Supreme Court. His arguments are simple: (1) many people from Japan have light skin color, so if skin color were the determining factor, then those from Japan should be thought of as white, and (2) good character should play a role in decisions of naturalization.

Naturalization is still a privilege extended to "free white persons," and for the first time, the U.S. Supreme Court decides, exactly what that term means. Before this case, a number of lower courts had already determined the following people were not white: Chinese (1878), Hawaiians (1889), Burmese (1894), Japanese (1894, 1902, 1908, 1910), Mexicans (1897), Native Americans (1900), Armenians (1905), Filipinos (1916 and 1917), Koreans (1921), and anyone of mixed heritage.

Interestingly, South Asians were not white in 1909 and 1917, but in 1910, 1913, 1919, and 1920 they were.

Similarly, in 1909, 1910, and 1915, Syrians were white, but were not in 1913 and 1914.

Surprising absolutely no one, the Court rules that the words "white person" "were meant to indicate only a person of what is popularly known as the Caucasian race."

This opens the door to other legal challenges so much that the term "free white person" is now narrowly defined as a person with white skin with European ancestry.[31]

May 13, 1939: The Voyage of the *St. Louis*

The German transatlantic liner *St. Louis* sails from Hamburg, Germany, for Havana, Cuba. On the voyage are 937 passengers, almost all of whom are Jewish refugees fleeing the Third Reich. The majority of the Jewish passengers had already applied for U.S. visas, and plan to stay in Cuba only until they could enter America. When the *St. Louis* arrives in Havana harbor on May 27, Cuba invalidates their entry documents, and admits only 28 passengers—6 of whom are not Jewish (4 Spanish and 2 Cuban nationals). The remaining 22 are admitted because they seem to have valid entry documents. An additional passenger ends up in a Havana hospital after a suicide attempt. After refusing to admit the passengers, Cuba orders the ship out of its waters.

Sailing so close to Florida, passengers on the *St. Louis* cable President Franklin D. Roosevelt asking for refuge. But Roosevelt never responds. The White House had already decided not to admit the passengers, and a State Department telegram sent to the ship states that passengers must await their turns on the waiting list and then qualify for and obtain visas before they may be admissible into the United States.

Such is the way with quotas.

Based on the formula established by the Quota Act of 1924, the annual combined German-Austrian quota of 27,370 had already been filled. President Roosevelt could issue an executive order to admit additional refugees but chooses not to do so for a variety of political reasons.

Following the U.S. government's refusal to permit the passengers to disembark, the *St. Louis* sails back to Europe on June 6, 1939, and all of its passengers would later find themselves under Nazi rule.[32]

1941-1942: A New Internment

December 7, 1941. While negotiations are going on with Japanese representatives in Washington, Japanese carrier-based planes sweep in without warning over Oahu and attack the bulk of the U.S. Pacific fleet moored in Pearl Harbor. Of the military casualties, 2,280 are killed and 1,109 wounded. Sixty-eight civilians die.

December 8, 1941. The United States declares war on Japan, under the leadership of President Franklin D. Roosevelt, and Japanese-Americans would find their lives severely altered.

February 19, 1942. President Roosevelt issues Executive Order 9066, under which the military commander on the West Coast is given the authority by the President to exclude any person deemed to be a danger to national security. The military feels that the threat of a Japanese invasion is realistic, so to prevent pro-Japanese actions, the entire Japanese-American population of the west coast of the United States—two-thirds of whom are U.S. citizens—is

moved to Midwestern states and forced to live in ~~concentration~~ internment camps.

Two years later the U.S. Supreme Court rules that Executive Order 9066 is constitutional on the grounds that it was nothing more than an exclusion order not based on racism.[33]

1943: The Chinese Aren't So Bad After All

There is an odd change in the air. Chinatown turns from a crime- and drug-ridden place to a quiet, colorful tourist attraction. Well-behaved and education-conscientious Chinese children are welcomed by public school teachers. China herself becomes allies with the America during World War II, and the Japanese have replaced China as the undesirable Asians.

Such is the way with war.

One would expect these events to lead up to some sort of reward for the Chinese. So it is that on December 17, 1943, Congress passes the Chinese Exclusion Repeal Act. As immigration from China resumes, most of the immigrants are women, wives of Chinese men already in the United States. Many couples are reunited after decades apart. There is rejoicing in the streets and throughout Chinatown one can smell the scent of fresh ginger and roast duck.

Everyone is so happy that no one remembers that the quota for China is still much lower than it is for each country of Europe.[34]

1946: A Time for Decolonization

Perhaps, they thought, by supporting U.S. naturalization of its citizens, the country could prosper with remittances sent back to the island, and this could lead to its own independence. So explains the support by the Philippine Commonwealth government of the Luce-Celler Act. Under it, India and the Philippines would be removed from the Asiatic Barred Zone, granting the privilege of admission to the United States as quota immigrants, and eligibility for naturalization to races indigenous to India and persons of Filipino descent.[35]

1952: The Immigration and Nationality Act of 1952

After two years of study, the bill headed by Senator Pat McCarran of Nevada, and Congressman Francis Walter of Pennsylvania is finally approved. It will bring into one comprehensive statute the multiple laws that govern immigration and naturalization to the United States. It shall repeal and codify earlier laws, remove all remaining racial prohibitions, and retain quotas. It will be the mother of all immigration laws. President Harry S. Truman will veto

the bill, castigating its national origin quotas. But Congress will override the veto, and the bill shall become law on June 27, 1952.

It shall be the foundation for all immigration laws and procedures going forward.[36]

1965: The Law of Unintended Consequences

First comes the Civil Rights Act of 1964, the landmark law that bans discrimination based on race, color, religion, sex, and national origin.

Next comes the Voting Rights Act of 1965, which prohibits racial discrimination in the voting process.

And if American democracy were not already busting out of its seams, now comes the Hart-Celler Immigration Act of 1965.

In a solemn ceremony beneath the Statue of Liberty on October 3, 1965, President Lyndon Johnson signs the historic legislation reminding the public just above a whisper that the legislation would not have a significant impact. "This bill that we will sign today is not a revolutionary bill," he says. "It does not affect the lives of millions. It will not reshape the structure of our daily lives . . . Yet it is still one of the most important acts of this Congress and of this administration. For it does repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American nation."

The cruel and enduring wrong, of course, is the quota system based on national origin established by the previous law, which directed 70 percent of the immigration slots to northern Europeans. The previous law significantly limited immigration from southern and eastern Europe and maintained formidable barriers against those from Asia and Africa. In the most recent reform from 1952, Congress established an Asia Pacific Triangle, and each country in this geographic area was awarded a minimum quota of 100, but the total immigration from the triangle could not exceed 2,000. And if more than 20 countries came into being within the triangle, all triangle countries would have their annual quotas reduced.

So Hart-Celler Act is more than symbolic. It is an intentional act designed to change the makeup of America forevermore by creating real equal opportunity for groups whose opportunity to immigration had been restricted in the past. Since the passage of the Act, upwards of 75 percent of immigrants have been from Asia, Africa, or Central or South America.[37]

The (mostly) white face of America will never be the same.

1986: The Immigration Reform and Control Act of 1986

On the right are the conservatives; for them, the word *immigration* means *enforcement*. On the left are the liberals; for them, it means *legalization*. When

the two collide, we get bipartisan-supported comprehensive immigration reform. Such is the case with the Simpson-Mazzoli bill, more commonly referred to as the Immigration Reform and Control Act of 1986. Some call it IRCA. Some call it amnesty. Others call it a mistake.

To appease the conservatives, the bill improves security against illegal crossings at the southern border, and for the first time in history, our country imposes sanctions on employers who knowingly hire undocumented workers. Employment in the United States is, after all, a magnet, and IRCA helps weaken its pull by making employers responsible for verifying the employment authorization of their employees. Failure to do so will result in civil, and sometimes criminal, penalties.

In theory, it makes sense.

In practice, it is a disaster, as the Government Accountability Office would later report that widespread discrimination would be its by-product.[38]

To appease liberals, the bill establishes provisions prohibiting discrimination based on citizenship and national origin and legalizes over three million undocumented immigrants living in the United States at the time the law was passed.

There was not supposed to be more than triple that number just twenty years later.[39]

This was not supposed to fail.[40]

1990: The Double-Edged Sword

The Immigration Act of 1990 carries much promise—but with its promise also comes punishment. On one hand, IMMACT90 elevates immigration levels in both the employment-based and family-based categories. It establishes a diversity residence lottery for nationals of countries that have been underrepresented in their numbers of immigrants and codifies a temporary haven for people who have fled unsafe conditions. It also changes several exclusion grounds (most notably the exclusion of homosexuals) and allows for a waiver for battered spouses and children.

But the same law expands the definition of certain crimes and heightens criminal grounds for deportation. It expands the courts' ability to issue removal orders in absentia, expands court authority to sanction attorneys, and limits an individual's time to seek counsel.

IMMACT90 is a double-edged sword.[41]

1993: Double Blunder

Seven years after the passage of IRCA, President Bill Clinton selects Zoe Baird as his choice for U.S. Attorney General, whose responsibility it is to oversee federal immigration laws. But soon after his announcement

it is reported that Baird has been employing an undocumented couple as domestic workers in violation of the 1986 law. Clearly, this dooms her nomination.[42]

As if the embarrassment weren't bad enough for the administration, the President's second choice, Justice Kimba Wood, also employed an undocumented immigrant. Justice Wood withdraws her nomination, even though her actions (unlike Baird's) were legal at the time.[43]

Employer sanctions. They're not just for companies anymore.

1996: Preemption and Habeas Corpus

It's called the Supremacy Clause and it states that the U.S. Constitution and federal law take precedence over state laws and constitutions. It means that our federal structure of government precludes states from taking actions that are federal in scope. But what happens when the federal government fails to do its job? That is the question states are asking in 1996, and the answer provided by Congress is the Illegal Immigration Reform and Immigrant Responsibility Act. As its name so gruesomely implies, most of the provisions of IIRAIRA focus on the apprehension and removal of undocumented immigrants presently in the United States, but in the process, Congress transforms many other areas of immigration law.[44]

One such transformation is the restriction—and in some cases elimination—of judicial review. Another is the inclusion of a provision that allows the attorney general to enter into cooperative agreements with states and localities under which trained state and local law enforcement officers can perform enforcement functions otherwise reserved for federal authorities.[45]

Without giving immigrants their day in court, the law violates the most revered element of the U.S. Constitution—the establishment of the United States as a society governed by the rule of law.[46]

2001: The Year of the PATRIOT

September 11, 2001. A terrorist attack on New York's World Trade Center. With one of the most creative acronyms in the history of U.S. immigration law, Congress passes the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, a piece of antiterrorist legislation, aspects of which are of concern to human rights groups. Most notably, the Act contains a provision that includes new government powers to detain foreign nationals suspected of involvement in terrorism or any other activity that endangers the national security of the United States for up to seven days without charge.

More than five years later, over 750 people will have been detained indefinitely, without ever being charged with a crime, including children and the elderly. There will be numerous hunger strikes and suicide attempts.

Civil liberties will never be the same.[47]

2002-2003: The Roundup

The Alien Registration Act of 1940 required all noncitizens over the age of fourteen to register with designated authorities. It was created to undermine left-wing political groups in the United States. Well, before September 11, 2001, the registration requirements were rarely enforced. Now the rules have changed.

In 2002, Attorney General John Ashcroft announces the National Security Entry-Exit Registration System (NSEERS). But unlike the original registration program, NSEERS specifically targets visitors from Muslim-majority countries. In the first phase of NSEERS registration, these countries include Iran, Iraq, Libya, Sudan, and Syria.

But by far the most controversial part of the program is its second phase. Unlike the first phase, which registers people at airports upon their entry into the United States, the second phase includes a domestic, in-person and call-in registration, and pertains only to males over the age of sixteen who are lawfully admitted into the United States in a temporary status who are citizens of Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Saudia Arabia, Pakistan, Bangladesh, Egypt, Indonesia, Jordan, or Kuwait.

Ironically, anyone from these countries who enters illegally is not required to register under NSEERS upon their entry; the registration only applies to those already here.

Of the 82,000 men who register, 13,000 have overstayed their status, many of whom have been waiting for their permanent resident visa to become current. Still, they register under NSEERS, hoping to win leniency by demonstrating their willingness to cooperate with the campaign against terror. Instead, all are subjected to removal proceedings.[48]

Attorney General Ashcroft holds his ground, citing the statutory foundation for the program is also linked to section 263 of the Immigration and Nationality Act (INA). But under that section, the attorney general is permitted to only require registration for several classes of nonimmigrants including (1) alien crewmen, (2) holders of border-crossing identification cards, (3) aliens confined in institutions, (4) aliens under order of removal, (5) aliens who are or have been on criminal probation or criminal parole within the United States, and (6) aliens of any other class not lawfully admitted to the United States for permanent residence.[49]

But none of these classifications allow for the selective enforcement of registration and mistreatment of nonimmigrants based on national origin or religion. Nevertheless, to the dismay of many, the NSEERS program is held by many courts to be consistent with the law.[50]

2008-2010: The Repeal of the HIV Immigration and Travel Ban

It has been over twenty years, and the United States remains on a list of only twelve countries worldwide (including Saudi Arabia and Libya) that ban entry to immigrants living with HIV. But soon HIV would be removed from the list of communicable diseases of public health significance, reversing what many consider to be two decades of discrimination. The final regulations are published on November 2, 2009, and the law to remove HIV from the dreaded list goes into effect on January 4, 2010.[51]

Whether it is the cause or the effect, the 2012 World AIDS Conference, which was in jeopardy as a result of the restrictions, can now be held in the United States after all.[52]

2010: The United State of Arizona

We are told the federal government really does have its hands full, with no way of fixing a system too long broken. Such is the rationale behind Arizona's law S.B. 1070, which tests the legal limits of a trend toward greater state involvement in the enforcement of federal immigration law. "If the feds can't fix it, we will!" We hear Arizonans chant. Again.

It is a chant similar to the one we heard in 1988, when the voters of Arizona narrowly passed a referendum amending the state constitution to declare English the official language of the state, requiring that the state and its political subdivisions "act in English and no other language." The Arizona Supreme Court would later invalidate the move on both first amendment and equal protection grounds,[53] but now, in 2010, though the chanting is similar, the focus is quite different.

The law is passed on April 23, 2010, and its major provisions include the following:

- it directs state and local law enforcement officers to make a reasonable attempt to determine a person's immigration status,
- it authorizes police to make an arrest without a warrant if they have probable cause to believe the person has committed any immigration violation,

- it criminalizes under state law activities prohibited by U.S. immigration law, and
- it makes it illegal for an unlawful immigrant to apply for or solicit work in the state of Arizona.

It is called attrition through enforcement, and it is designed to encourage the voluntary exit of undocumented immigrants.[54] "We're working in cooperation with the federal government," Arizona tells us, but there is no cooperative agreement as established by IIRAIRA. Instead, the state has engaged itself in an independent state enforcement effort preempted under federal law. And though its supporters deny it, the Arizona law allows state and local enforcement authorities to profile others based on race, color, or national origin, something the state's own supreme court, and its own circuit court previously determined was not permissible.[55]

It is anticipated that other states will join Arizona on any new ground that S.B. 1070 establishes, furthering the fragmentation of immigration enforcement.[56]

Such is the way with nation-states.

2015: An Emperor's Campaign

It comes out of reality television shows and conspiracy theories. Out of a nationalism not seen since the Nazi regime. He pauses on the stage before addressing the crowd—a few dozen that he would describe as thousands—in a building that bears his name. Within the first few minutes of his speech, he homes in on one single issue that would define his campaign and, ultimately, his presidency. "The U.S. has become a dumping ground for everybody else's problems." The crowd cheers and he thanks them. "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they are bringing those problems with us [*sic*]. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people … It's coming from more than Mexico. It's coming from all over South and Latin America. And it's coming probably, probably from the Middle East."

The crowd puffs up like a toxic chest.

"I would build a great wall—and nobody builds walls better than me, believe me—and I build them very inexpensively. I will build a great, great wall on our southern border and I will have Mexico pay for that wall. Mark my words."

And he ends this speech with a pledge. "Sadly, the American Dream is dead. But if I get elected President, I will bring it back bigger and better and stronger than ever before. And we will make America great again."[57]

2017-2021: The Great Demolition

The Emperor's Great Wall

"Kirstjen, Darling," the Emperor says to his homeland security secretary. "What about the wall? It's got to be steel bollards." He says this after being convinced that concrete would be too easy to break apart. "Love that design. It's got to be steel bollards right next to each other." No bars at the top, he says, just bollards. For him this has to be beautiful. "Think of it like flagpoles. A flagpole next to another flagpole next to another flagpole. I have the best flagpole guy in the country." He is a master negotiator who cannot cut a deal with Congress—a contradiction obsessed with a one-dimensional solution to a multi-dimensional problem. He speaks of building trenches along the fence's border, filled with water and snakes and alligators. And how the fence should be electrified so anyone touching it would receive injurious shock.

He waxes on that the tops of the bollards need to be pointy and sharp enough to pierce human flesh in an instant. That the pointy parts should be painted "flat black" because that would draw in the most heat from the sun and make the structure too hot to touch.

It does not matter that black paint would cost an additional $1 million per mile.

And it does not matter who owns the land. "Just take the land and let them sue us," the Emperor says.

He wants those who climb the wall to be burned and maimed and cut into pieces. It does not matter they are seeking safe haven.[58]

Third Time's the Charm

The Great Demolition begins with a travel ban. Just seven days into the new government, and he rolls out the executive order as though it is manna from heaven. The edict is effective immediately, and suspends entry of nearly all nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. It is challenged in the courts within hours as a blatant disregard for First Amendment protections and is temporarily enjoined in parts.

He then signs another executive order bearing the same title one month later. Iraq is removed from the list, and the implementation date is delayed. Looking to the courts with a wishful eye, the Emperor grimaces when he learns that this order, too, is subject to a nationwide restraining order.

Rolling up his sleeves for one final attempt, he licks his quill with a lustful grin and pens Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorist or Other Public-Safety Threats." This one is different. This one restricts travel from people from Iran, Libya, Somalia, Syria, and Yemen, and adds three

non-Muslim countries (Chad, North Korea, and Venezuela) so courts can look away when Americans say, "Muslim Ban."

While lower courts issue nationwide injunctions, the Supreme Court ultimately allows the ~~Muslim~~ travel ban to be implemented.[59]

Zero Tolerance

Jose is five years old and cries himself to sleep each night after being separated from his father at the border. He is not alone. A secretly recorded audio clip details the cries of children wailing "Mami" and "Papá" with border agents saying, "Well, we have an orchestra here, right? What we're missing is a conductor." Six-year-old Alison pleads with an officer to call her aunt to pick her up. These are the voices of the children behind the Emperor's Zero Tolerance policy, his hard-line approach to curbing immigration by separating children from their families and then declaring them unaccompanied minors. Some will be placed with other families; others will be kept in cages. The United Nations calls it unconscionable. The Pope calls it immoral. The Emperor calls it justifiable. And two years and over 2,500 separations later, the world will call it shocking.[60]

BAHA

He laughs, and *BAHA* takes on new meaning. *Buy American, Hire American* is a decree that seeks to accomplish two things. The *Buy American* half of the order directs federal agencies to monitor and enforce laws that encourage consumers to buy items made in America. This means compliance. This means all manufacturing processes must occur in the United States. This means government contracts must avoid use of foreign-sourced content. The *Hire American* half of the order calls for strict enforcement of immigration laws—particularly those laws aimed at legal immigration, drastically reducing the number of high-skilled workers coming to the United States and doubling the number of denials of petitions filed on behalf of professional workers.[61]

The Emperor with his *BAHA* laugh coveys a message to the rest of the world that America no longer welcomes the talent skilled immigrants bring to the country. The welcome mat is forever sullied.[62]

The Disappearing Refugee Trick

He finds joy in plummeting numbers of those who enter his fiefdom. Upon taking the throne he immediately suspends the admission of all refugees for 120 days. This allows him time to think.

And thinks he does, of ways to spread his fear. He reduces the number of refugee admissions to its lowest number since the formal refugee resettlement program began in 1980:

Year one: from 110,000 to 50,000
Year two: from 50,000 to 45,000
Year three: from 45,000 to 30,000
Year four: from 30,000 to 18,000

But that is not enough. In year four he determines the 18,000 would be divided not by region of origin, but by the following, let us say, *curious* priorities:

- 5,000 for refugees fleeing religious persecution, certain former Soviet and Indochinese, and Iranian religious minorities (e.g., Christians);
- 4,000 for Iraqis who assisted the U.S. armed forces;
- 1,500 for Guatemalans, Hondurans, and Salvadorans; and
- 7,500 for other refugees, including those referred by a U.S. embassy, family unification programs, and those cleared by refugee admissions programs by September 2019, and those currently in Australia, Nauru, or Papua New Guinea who are included in a refugee transfer arrangement between the United States and Australia [insert question mark and/or exclamation point here][63]

COVID: The Emperor's New Friend

What starts out as an outbreak in China swiftly becomes a global pandemic. And if you need an excuse to curb immigration, a pandemic is the perfect solution. Rather than diverting his focus to the dire public health crisis it becomes, the Emperor supercharges his anti-immigrant agenda, fueled by his newest friend. His claim to fame:

- complete ban on travel from 31 countries;
- suspension of visa processing for family- and employment-based immigrants;
- Invocation of Title 42, a 1944 public health statute that allows the Emperor to expel asylum seekers, including unaccompanied minors, without first hearing their claims, effectively ending asylum at the U.S. southern border; and
- suspension of refugee resettlement.

What does not significantly change, however, is interior enforcement and detention, deportations (with exceptions for flights to China, Italy, and South Korea), and immigration court hearings for detainees.[64]

The pandemic would seal his legacy as an unrelenting ruler whose demolition of the immigration system will take years, if not decades, to rebuild.

* * *

The history of immigration to the United States is the history of a gatherer. A gatherer who wandered in search of food. And since that first step, others have followed suit. And others after them. And as more gatherers arrive, more feel the need to make this land their home. For some, this means to share it with other inhabitants.

For others, it means to exclude them.

This is what became of that step first across the dividing line between Asia and North America when the ocean levels were low enough to allow for safe passage. What started as a quest for survival remains so even to this day, and the passage is still not safe.

This much, we can be sure, will never change.

Notes

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The Sinking Immigration Court

Change Course, Save the Ship

Stacy Caplow*

Abstract: If there is one area of agreement in the many debates about the state of our immigration system, it is that the immigration court is in crisis. Years of appeals for reform have gone unheeded while backlogs continue to increase dramatically, eliminating any illusion of efficiency and fundamental fairness. The past administration's management policies exacerbated the problems. While the Biden administration is well aware of this situation and has begun to roll back some of the worst damage caused by its predecessor, much work remains to be done. This article offers some short-term proposals for ground-level reforms to some of the practices in the courts that would bring immigration adjudication into greater conformity with other litigation settings and might restore greater confidence in the courts as a place where expeditious, fair, and humane proceedings take place.

Introduction

Immigration court, where hundreds of judges daily preside over wrenching decisions, including matters of family separation, detention, and even life and death, is structurally and functionally unsound. Closures during the pandemic, coupled with unprecedented backlogs, low morale, and both procedural and substantive damage inflicted by the Trump administration, have created a full-fledged crisis. The court's critics call for radical reforms.[1] That is unlikely to happen.[2] Instead, the Biden administration has taken several much-needed steps to reverse many of the misguided policies that led to inefficiencies and inequities. In addition, the President has returned to the go-to, cure-all solution: adding immigration court judges and support personnel[3] to help address the backlog, which now exceeds 1.5 million cases.[4]

No one could oppose additional resources, although a large infusion of immigration judges and the opening of new courtrooms between 2017 and 2020 did little to halt the ever-growing number of pending court cases, which increased by more than 500,000 over that time period,[5] or the waiting times, which now average 905 days.[6]

Additional resources, though critical, are not enough. I propose a series of practical case management reforms that could expedite and professionalize the practice in immigration court. Linked with a more transparent and more inclusive process for selecting immigration judges, these changes would make the immigration courts more efficient, more accurate, and fairer, but not at

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the expense of the compelling humanitarian stakes in the daily work of the court. While these reforms do not require legislation, they do require the will to transform the practice and culture of the court. They would be a major step forward in improving the experiences, the professionalism, and the outcomes in immigration court.

Changes to the Practices and the Culture of the Immigration Court

Immigration hearings are adversarial. While the stakes are very high and often punitive—removal, ongoing detention, family separation—the proceedings are considered civil matters. Yet little attention has been paid to their deviations from standard civil procedures. Immigration court bears little resemblance to typical civil litigation settings in both the pretrial and trial context. Most of the characteristic judicial tools regulating litigation are absent: pretrial discovery, pretrial settlement or status conferences to resolve or narrow issues, or enforcement tools that require government lawyers to participate in a meaningful way long before the merits hearing. Evidentiary stipulations are rare or occur only at the last minute, when they are unhelpful.

Generally, the prosecutors in immigration court, the Office of the Principal Legal Advisor (OPLA), a division of U.S. Immigration and Customs Enforcement (ICE), assign no trial attorney (TA) to a case until a few weeks prior to an individual hearing.[7] If a case is pending for several years, as so many are these days, it is impossible to have any kind of substantive discussion in advance to narrow issues or to talk over the conduct of the hearing, possible forms of settlement, or alternative relief. Years pass while proceedings stagnate, and individuals are in limbo. Delays can result in huge costs: the governing law might change,[8] personal circumstances might evolve, memories may fade, witnesses may become unavailable, evidentiary submissions might require updating, files might be misplaced.

The immigration court should adopt practices familiar in civil and criminal tribunals around the country. The court should not be reluctant to implement these strategies due to high TA caseloads. Indeed, better case management might reduce caseloads while also benefitting respondents. Accordingly, the immigration court should adopt the following common litigation supervision tools in order to expedite and rationalize proceedings.

Assign Trial Attorneys to Cases Promptly

A TA should be assigned to review a case at the earliest possible time following the initial master calendar appearance, where pleadings are entered. At a minimum, a TA should be assigned at the request of any respondent who wants to discuss a case, regardless of when the individual hearing is

scheduled. To foster meaningful discussions, TA conferences should occur at the latest as soon as the respondent has completed evidentiary filings. In the many affirmative asylum cases referred to court, there would be an extensive evidentiary record at the first master calendar appearance. Although the government lawyers in immigration court are busy, like prosecutors in any busy court in the nation, they can handle a large caseload without waiting until the last minute to review the claim.

The positive impact of a prompt TA assignment system will benefit everyone—respondents, TAs, and immigration judges (IJs). For example, although many cases require a credibility finding based on in-person testimony, some claims simply do not. If there is no basis for doubting credibility after considering the evidence, and the law is clear, a one-, two-, or three-year wait for a decision is unconscionable. Under the current system, the TA does not review the submissions until shortly before the merits hearing. Accordingly, when the TA finds a file in which credibility is not an issue, often the TA does not seriously contest the facts or the eligibility for relief. This results in half-hearted cross-examination, if any at all, and a quick grant of relief without opposition. Unfortunately, this relief occurs only after years of delay and anxiety, plus extensive unnecessary preparation that often involves logistical headaches and inconveniences to witnesses. Earlier, thorough case assessment could avoid the stress to respondents whose lives are on hold, could result in fewer or more focused hearings, and could accomplish the timeliness and efficiency goals of the Executive Office for Immigration Review (EOIR).

Require Prehearing Conferences

The EOIR Practice Manual provides for a prehearing conference.[9] This tool, commonplace in other kinds of courts, is rarely used. Neither IJs nor TAs routinely invite or encourage prehearing conferences. Following the lead of many civil and criminal courts, there should be a regularly scheduled in-court status conference in every case upon a simple request from either party, or on the IJ's initiative, conducted as expeditiously as possible after the pleadings at the master calendar hearing. In the alternative, if the attorneys have conferred, they could report the outcome of their discussions to the IJ, who could then take this into account when scheduling an individual hearing. This could achieve great efficiencies and fairer outcomes.

A mandatory prehearing conference, therefore, would necessitate assigning a specific TA to a case well in advance of the hearing. For a meaningful conference, a respondent's lawyer would generally need to submit evidence and even a memorandum of law. A process similar to a summary judgment motion might result. If the TA concedes that there are no factual disputes or lack of credibility, the judge could decide the legal basis for relief. This procedure might result in an abbreviated evidentiary hearing, might require only an oral argument, or even could be decided on written submissions.

A few prototypical cases illustrate how this might work. Imagine an asylum seeker who has suffered or who has a well-founded fear of persecution on account of sexual orientation and who comes from a country whose homophobic laws and oppression of LGBTQ people are undisputed. If the asylum seeker is credible, well-settled law would surely warrant a grant of asylum. Or suppose a woman who was subjected to genital circumcision has medical records confirming this condition. Again, under well-settled law she is likely to be granted asylum. Or a one-year filing deadline bar could be resolved without the need for testimony based on written submissions. These issues could be resolved at a prehearing conference. Another set of cases might involve requests for cancellation of removal. The prehearing conference could conclude that objective evidence satisfies most of the statutory factors. This could narrow the case so that the IJ would only hear evidence relevant to the hardship determination. If the TA reviewed the evidence and conceded that the hardship standard had been satisfied, this could eliminate the need for a hearing altogether.

Immigrants and their advocates shoulder the burden of multiyear delays and suffer from the resulting uncertainty and angst. Meanwhile, they build lives despite their unpredictable future, increasing the harsh impact of eventual deportation. During the interval, immigration advocates' caseloads multiply. Years later, when a hearing is finally held, the consequences of delay are substantial. Court submissions need to be updated. Legal claims may be affected by changes in the law. Witnesses may be unavailable. Memories may fade. This is particularly harsh for asylum seekers, whose credibility is at the heart of any immigration hearing but whose trauma may have affected their ability to recall events, particularly the persecution they would prefer to forget. Accelerating resolution through prehearing processes following a full presentation of the claim by the respondent and a full review of the evidence by the government would divert cases from the court's hearing dockets.

A serious and sincere discussion of the claims and the evidence might resolve many cases more expeditiously. Relief could be granted without a full hearing, which often takes hours and sometimes multiple adjournments. In some instances, TAs could choose to terminate the proceedings through an exercise of prosecutorial discretion. Good case management, effective communication, and open-mindedness are imperative to making the system work more smoothly and more quickly.

Make Greater Use of Prosecutorial Discretion as a Case Management Tool

Resolving a case through an exercise of prosecutorial discretion is another tool available to, but rarely employed by, the government. The new administration acted promptly to reinstate prosecutorial discretion as a tool for case resolution by issuing an interim guidance memo in May 2021[10] and additional

guidelines in September 2021.[11] These directives both incentivize TAs to use prosecutorial discretion as part of the holistic case-management reforms that will benefit the TAs, the immigration court, and the respondents. This guidance reestablishes priorities and encourages the resuscitation of vigorous prosecutorial discretion. The earlier guidance memo gives express permission to the TAs to consider prosecutorial discretion even in the absence of a request.[12] Its reference to "mutual interest" strives to break down the adversarial barriers that obstruct judiciously exercised discretion and encourages shared problem-solving.

Some OPLA offices have established protocols for submitting requests for prosecutorial discretion. It is too early to tell whether this change in policy will result in a change in culture in the field. In the past, requests were not very successful despite encouraging guidelines and priorities.[13] But even if the TAs do not take initiative, at the very least those offices with written protocols have created a structure in which to engage in serious discussions about the direction of a case on the court's docket. All OPLA offices should prepare and publicize similar protocols.

A commitment to exercising discretion at the ground level is even more urgent. In the past, despite policy guidance from above, TAs were reluctant to explore options for alternative outcomes, particularly when any kind of criminal conviction was involved. Discretion benefits from general guidelines but, by its nature, should not be constrained by absolute rules.

In reaction to the Department of Homeland Security (DHS) May directive, EOIR has encouraged its judges to inquire whether the matter is a removal priority for the government or if there can be a resolution through an exercise of prosecutorial discretion.[14] IJs cannot force TAs to take certain actions relating to the merits of a case, but they can review the evidence in a pretrial conference and make a strong suggestion about the best resolution at an in-court prehearing conference.

Enforce the Immigration Court Practice Manual Evenhandedly

After years without any standardized practices, the EOIR published its Immigration Court Practice Manual.[15] This guidance was a welcome development. On its face, it appears to govern all aspects of practice neutrally. A closer reading of the Manual, however, reveals how one-sided these rules and the practice they govern really are. The everyday reality is even more blatantly lopsided because only respondents' attorneys do the work that the Manual regulates. The power imbalance between the parties and the close relations between the immigration bench and the prosecutors is embedded in the contents, language, and impact of the Manual.

In most cases before IJs the burden of proof to secure relief is on the respondent, once removability is established.[16] This means that respondents, represented in only about 60 percent of all cases,[17] submit all the evidence

to support their application for relief. In the Manual, there are detailed rules relating to filings, motions, and the conduct of hearings down to the types of tabs, cover sheets, identifiers for motions, cover pages, tables of contents, proof of service, witness lists, and hole punching. Submissions must be filed and served at least 15 days in advance of the hearing.[18]

Because government lawyers rarely submit any evidence other than proof of removability, if the respondent does not concede, none of these rules affect their workload. On the rare occasion that the TAs do file a proposed exhibit, they often do so on the day of the hearing, and rarely 15 days in advance. Flagrant disregard of the rules is tolerated by IJs without prejudice to the government lawyer. If this happens, typically a Hobson's choice is given to the respondent: accept the late service or postpone the case. These days, postponement can mean years. The respondent, anxious and prepared for that day's testimony, is likely to opt for the former, letting the government ignore the rules with the IJs permission.

The IJs should behave more forcefully to enforce the rules. They should preclude the evidence. Or cite the government lawyer for contempt in an egregious case. Instead, acceptance of lazy lawyering encourages even less compliance with the rules. This, in turn, fosters an appearance that the IJs are aligned with the prosecutors.

Be Attentive to Professional Standards in the Courtroom

These practical manifestations of the imbalance of power—the reluctance to regulate, sanction, or discipline—and the very environment of the courtroom expose the cozy connection between the immigration bench and the prosecution. They undermine any fiction of independence. IJs preside in courts in which former colleagues (perhaps friends) appear. Respondents sit in the room, often in a cone of incomprehension due to language barriers, while government lawyers chat with IJs. But, even without understanding what is being said, the appearance of a friendly relationship is visible to any observer. The integrity and objectivity of the court is seriously damaged by these everyday departures from appropriate courtroom conduct. There is an obvious and easy remedy for the appearance of partiality inferred from the comradery between the prosecutor and the judge. The IJs and TAs must change the atmosphere inside these courtrooms to one of dignity and seriousness by maintaining a professional distance and refraining from one-sided conversations.

Apply Disciplinary Rules to Government Lawyers as Well as Immigration Advocates

Lawyer disciplinary rules must be applied equally to ICE attorneys as well as attorneys for respondents. This recommendation may seem obvious.

Yet the policy guidance promulgated by EOIR in 2018[19] raises serious concerns. It establishes policies and procedures for reporting ineffective assistance of counsel or other violations of rules of professional conduct identified by the EOIR. Of course, protecting immigrants against unscrupulous or incompetent lawyers is a worthy goal. But these disciplinary rules apply only to immigrant advocates and not government lawyers.[20] EOIR should promptly issue equivalent guidance that applies to ICE attorneys who might commit ethical violations. In the absence of attempts by EOIR to be evenhanded, the 2018 policy guidance is a troubling example of bias within the court system.

Changes to the Immigration Court Bench

Introduction

Attorney General Garland and new EOIR leadership have taken several significant steps to reverse many of the more controversial and harmful administrative policies inflicted by the prior administration that limited the ability of IJs to decide their cases carefully and fairly.[21] But more can be done. The Attorney General must rehabilitate the reputation of the immigration court, which suffered from appointments intended to instantiate government policy rather than adjudicate impartially.[22] The Attorney General and EOIR leadership must also continue to retract the damaging management directives of the former administration, a course of action they have started. Finally, they must institute some truly transformative initiatives.

Removing unrealistic performance metrics will improve morale and incentivize judges to be independent thinkers without fear of interference or reprisals.[23] As many commentators have suggested, the Attorney General should establish a system of logical adjudication priorities.[24] The Attorney General helpfully revoked the Damoclesean sword of quantitative performance metrics or quotas,[25] which encourage hasty outcomes that devalue the stakes involved in most hearings. As is true with the proposal to adopt standard civil litigation measures in immigration court, changing metrics and priorities does not require legislation or rulemaking. While a return to the "old normal" will not fully address the structural capture of this court by the Department of Justice (DOJ) and the widely divergent outcomes between courts,[26] it will be an important improvement.

The Past Decade of Immigration Court Growth

Injecting new resources into the immigration courts is a common prescription for a system that is overloaded, backlogged, and inefficient. This approach seems sensible and has indeed been tried. Surprisingly, it has not

had much success. The following table shows the exponential growth in judges over the past decade.

Fiscal Year	Total IJs Hired	Total IJs on Board
2010	17	245
2011	39	273
2012	4	267
2013	8	262
2014	0	249
2015	20	254
2016	56	289
2017	64	338
2018	81	395
2019	92	442
2020	99	517
2021	65	559

Executive Office for Immigration Review Adjudication Statistics: Immigration Judge Hiring[27]

As the table shows, between 2017 and the end of 2020 almost 336 judges were added to the ranks, supposedly to clear up the considerable backlog that already existed at that time. Over that same period, almost 100 courtrooms were added, totaling 474 at the end of 2020.[28] As of fiscal year 2021, there were 559 immigration judges,[29] and as of February 2022, 66 immigration courts.[30]

Despite these additional resources, delays continue to increase. Although EOIR asserts, "The timely and efficient conclusion of cases serves the national interest,"[31] today many hearings are adjourned for as long as two or three years. Swift and certain justice after a full and fair removal proceeding eludes most people.

While some of this eye-popping number of pending matters is attributable to the influx of asylum seekers at the southern border,[32] ICE also has been filing new removal cases.[33] In addition, the pandemic shut most of the courts for more than a year. These external forces have intensified pressures, but they are not the root causes of the court's dysfunction. Adding more judges will not solve the well-recognized structural defects of the court itself.

An immigration bench that has been populated to serve political goals lacks genuine independence and is subject to political branch dictates. The Trump DOJ further diminished judicial independence (and morale) by imposing performance metrics,[34] limiting the exercise of discretion,[35] litigating to decertify the judges' union,[36] muzzling individual judges,[37] and radically changing long-standing legal principles.[38] On its own website, the stature of

this tribunal is downgraded to "quasi-judicial,"[39] dropping the pretense of independence and reducing its stature.

Mismanagement decisions and the almost total departure from normal litigation practices contribute to the dysfunction of the court. Judges were prevented from using sound judgment to supervise their caseloads and preside over life-altering removal proceedings. Administrative inefficiencies that have long plagued this court worsened under the policies adopted by the four-year, multi-faceted Trump assault on immigration. Old cases languished while new cases poured in.

Considering this grim reality, the time has come to rethink some embedded assumptions and practices, particularly those that do not have to wait for structural court reform.

Surveying the Trump-Era Appointed Immigration Judges

The job of IJ, as one IJ famously said, consists of hearing "death penalty cases in a traffic court setting."[40] Immigration court needs to be staffed by experienced judges committed to applying the law with both rigor and compassion. IJs need to be able to use the tools that judges normally employ in other settings to administer their courts effectively. Knowledgeable, fair-minded, even-tempered, confident, and courageous judges should be the norm.

The following collective profile of these IJs deserves detailed attention. It calls into question whether fair and impartial adjudication can be achieved if past practices remain the norm as more IJs are appointed.

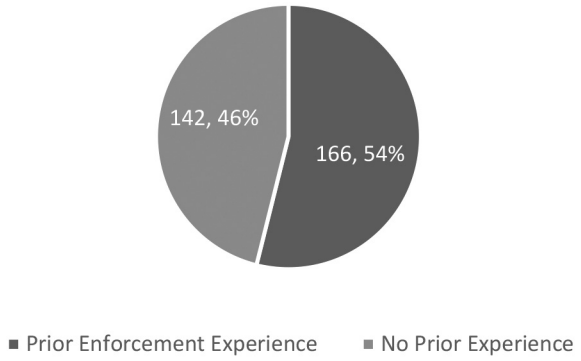
Government Enforcement Background

From 2017 to 2020, DOJ hired judges who were drawn predominantly from current or former employees of one or more government-side immigration prosecution, enforcement, or related agencies.[41] (See Figure 1.) Filling the bench with lawyers from this career path is not new, or particularly surprising, since these are candidates who actually do have a deep knowledge of the law and a familiarity with the court. But a career in enforcement risks distorting objectivity and impartiality.

Although a career in immigration practice is an obvious advantage, a review of the IJ biographies reveals that only a handful—about 10 or 11—worked in either private practice or public interest organizations representing immigrants. This represents a striking imbalance among the IJs with considerable immigration practice backgrounds. One of the two obvious sources of experienced immigration attorneys—immigrant advocates—is barely represented.

Furthermore, these numbers show not only that government-side lawyers are overly represented but also that close to half of new IJs appear to have

Figure 1. Prior Government Immigration Enforcement Experience



no discernable knowledge of immigration law or experience in immigration practice. This further highlights the absence of immigration advocates on the bench.

The credentials of newly installed judges sitting in the New York immigration court is representative of this distortion: eight previously worked for immigration enforcement agencies, three had represented immigrants at some point, and three had no prior immigration practice experience at all.[42]

Lawyers with government immigration careers are not the only former law enforcement employees sitting on the immigration court bench:

- Former prosecutors: 51 percent of new IJs' credentials include past positions as either federal and/or state prosecutors, or both. (See Figure 2.)
- Members or former members of the military: many have military records (often in combination with prosecutorial credentials), an advantage in the selection process. But generally, these IJs have no immigration law experience. (See Figure 3.)

Many individual biographies include a combination of these backgrounds; such as one or more government enforcement jobs, prior prosecutorial positions, and military service. At the risk of overgeneralizing, there are many common characteristics in these backgrounds that could discourage independence and critical or creative thinking, as well as produce intolerance for inefficiency, aggressive advocacy, or other perspectives.

Judicial Experience

At first blush, prior judicial experience would seem to be a plus for IJs. However, only a handful of the new IJs, 46, have sat on any bench, all of which were state-level tribunals or administrative courts with no obvious

Figure 2. Prior Prosecutorial Esperience

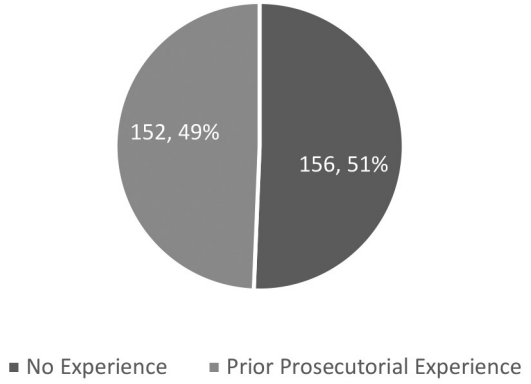
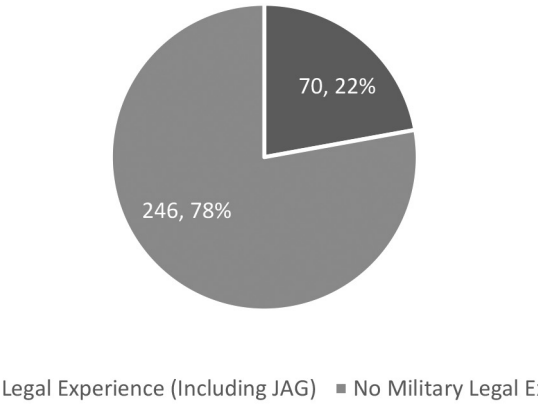


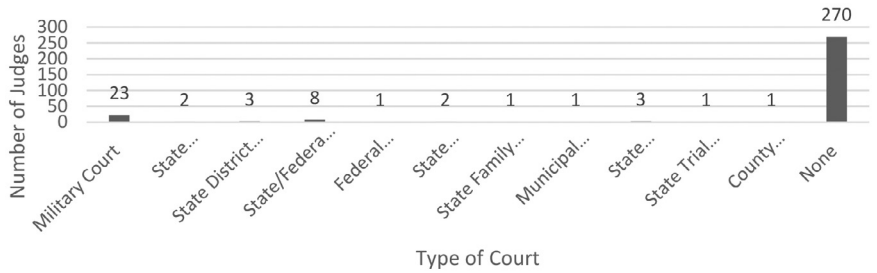
Figure 3. Military Legal Experience (Including JAG)



immigration jurisdiction. The skills acquired from judicial experience in town courts or at Social Security hearings may not be transferable to immigration court. (See Figure 4.)

In addition to prior judicial experience, judicial training has the potential to play a positive role in immigration court adjudication. The haste to seat these judges, however, resulted in IJ assignments after reduced training.[43] Even more worrisome, just as more judges were being added, veteran judges were leaving the bench, some in reaction to the new pressures to perform.[44] This diminished the opportunity for ongoing mentorship by experienced judges, as well as reduced the gains that were intended to result from the additional resources. Large caseloads, in conjunction with insufficient judicial training, incentivized new IJs to rush through hearings, and has predisposed them to deny applications in decisions replete with incomplete or sloppy reasoning.[45] The Round Table of Former Immigration Judges, "a group of 51 former Immigration Judges and Members of the Board of Immigration Appeals who

Figure 4. Prior Judicial Experience



are committed to the principles of due process, fairness, and transparency in our Immigration Court system,"[46] bears witness to the degrading of the court and, speaking with the voice of years of experience, has been an increasingly active and vocal critic of the recent developments at the court both before Congress and as *amicus curiae*.[47]

Legal Experience

Generally, ascent to the judiciary occurs after a lawyer acquires expertise in a legal field, and demonstrates maturity, judgment, and capacity. Knowledge of the law, an even temperament, impartiality, and the ability to make reasoned decisions are the basic qualities associated with judging. Lawyers usually spend many years acquiring and deepening these qualities. The EOIR requirement of seven years post-bar admission seems minimal.

The survey of the IJs appointed during the prior administration showed that most new IJs do have more than the minimum amount of experience. But when their years in practice are framed by the kind of experience the majority of them have, it presents a troubling picture. Whether criminal enforcement or government-side immigration lawyer, it is likely that they have spent their formative years and extensive careers opposing or obstructing relief and challenging credibility. These experiences inevitably shape their judicial outlook.

The Biden Appointments to Date

Between May and December 2021, the new administration installed 72 new immigration judges and one Board of Immigration Appeals (BIA) appellate IJ.[48] There was immediate skepticism about whether the earliest IJ appointments in May represented an improvement, since many had similar backgrounds to their immediate predecessors and most had been hired before

2021.[49] Since then, there have been three more rounds of appointments, adding 56 additional IJs. While it is impossible to draw definite conclusions based on such limited data, when contrasting the 2017–2020 appointments with those made by the new administration (the "2021 IJs"), some cautious optimism for long-term change is possible. These tables chart some of the key characteristics of all four rounds of installations in 2021, although only the last three cycles are entirely Biden-era appointments.

Government Enforcement Background

The most obvious imbalance represented by past appointments is the overrepresentation of IJs with immigration enforcement backgrounds at ICE, U.S. Citizenship and Immigration Services (USCIS), or other agencies. In contrast to the earlier raft of appointments where 54 percent of the new IJs worked in these positions, only 27, or 37 percent, of the 2021 IJs came with those credentials. (See Figure 5.)

- Former prosecutors: Another notable attribute of past appointments was the extensive state and/or federal prosecutorial background of those IJs. More than half, 51 percent, had worked in prosecutor's offices, many in combination with immigration enforcement and/or the military. In 2021, that number decreased to 37 percent. (See Figure 6.)
- Members or former members of the military: fewer of the 2021 IJs served in the military or in the military reserves, illustrated by a slight decrease from 22 percent to 17 percent. (See Figure 7.)

Figure 5. Prior Government Immigration Enforcement Experience

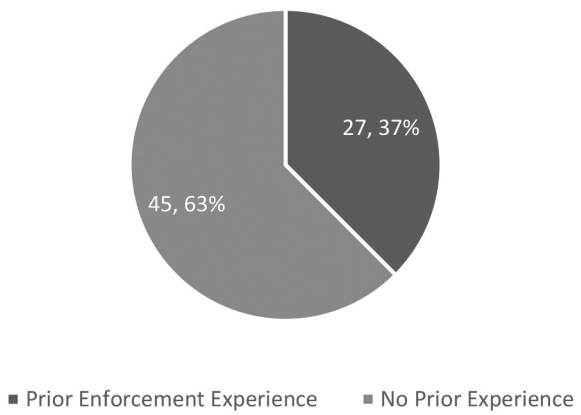


Figure 6. Prior Prosecutorial Experience

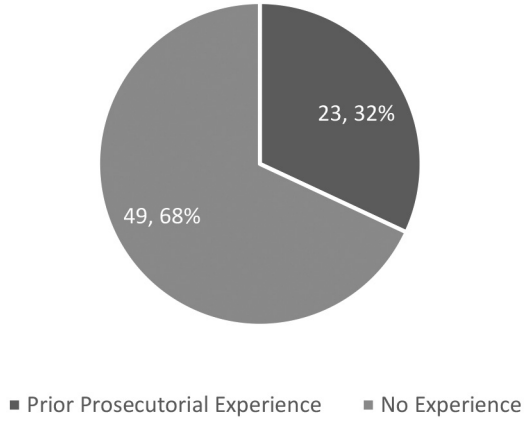
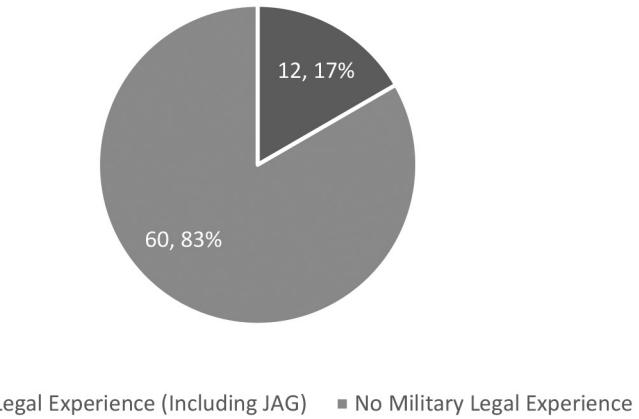


Figure 7. Military Legal Experience (Including JAG)



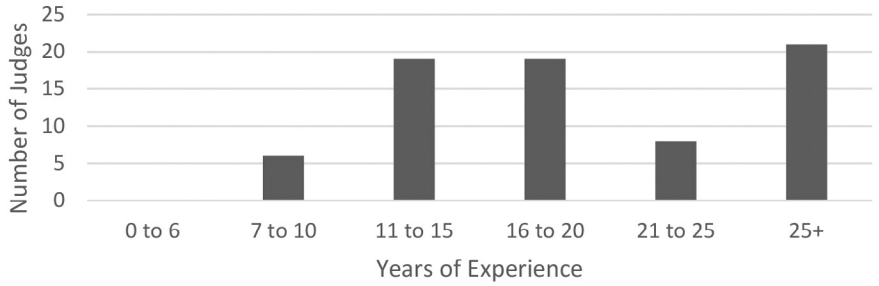
Immigrant Advocacy Background

An even more noticeable shift is taking place in the effort to diversify the bench. Of the IJs appointed during the Trump years, only 10 or 11 had any background as immigrant advocates in either the public or private sector. Of the 2021 IJ appointments, 14 of 72, or 19.4 percent, represented immigrants. Many of these IJs spent their entire careers at nonprofits in various parts of the country, while a few worked extensively at private immigration law firms.

Judicial Experience

Like the earlier appointments, few of the new IJs have much judicial experience. Only 18 percent (13), down from 27.7 percent, have sat on any kind of

Figure 8. Prior Legal Experience of Immigration Judges



bench, but, again, these were only state-level or administrative tribunals. This reduction may signify the recognition that unrelated judicial experience does not add very much to the qualifications required to be an effective IJ, since neither the law nor the procedures have much in common with municipal, county, or agency courts.

Legal Experience

Like the earlier appointments, most of the 2021 IJs have substantial practice experience, and presumably the promise of maturity and judicial disposition that these years generally bring. Again, how this translates to the bench may depend on the nature of their past experience and how it has shaped their values, biases, and beliefs. (See Figure 8.)

A more significant and positive development is the decrease in the number of IJs with no discernable immigration law background, knowledge, or experience. Thirty-two percent (23) of the 2021 IJs had no apparent immigration law background, in contrast to about 50 percent of the IJs appointed in the prior administration. Given the complexity of immigration laws, the intensity of immigration court practice, and the stakes involved, these inexpert IJs are faced with a steep, possibly intimidating, learning curve. Better and more training is imperative but starting with a more knowledgeable pool is important progress and a distinct advantage.

Bias in Results

The traditional selection process seems to yield IJs with questionable qualifications and possible biases. The data tend to confirm the prediction that the newly appointed IJs with these credentials have been granting fewer requests for asylum relief.[50] According to EOIR's own statistics, the asylum denial rate in all courts increased from a low of 20 percent to a high of 32 percent in 2018, to a range of 31.75 percent to 54.53 percent by 2020.[51]

The increasing number of negative asylum decisions is even more obvious when examining the decisions of individual IJs. Between 2013 and 2018, 58 judges denied asylum more than 90 percent of the time, and 69 judges denied asylum between 80 percent and 90 percent of the time.[52] Over the five-year period 2015-2020, the number of IJs who denied asylum more than 90 percent of the time rose to 109, and the number denying asylum between 80 percent and 90 percent of the time rose to 111.[53] While some toughening of legal standards imposed by the Trump administration might account for a portion of this surge in denials,[54] the coincidence between these dramatic numbers and the infusion of new IJs appointed by the Trump DOJ is hard to ignore.

The short time frame makes it hard to draw reliable comparisons between the first year of the Biden administration and the last several years under Trump. Multiple factors make it difficult to draw conclusions based on recent reports of asylum results. Courts have been closed due to COVID, so fewer asylum cases have been adjudicated. Many cases involving claims from the southern border experience lengthy delays. Yet one recent well-respected source concludes that asylum grant rates have risen from 29 percent to 37 percent over the past year alone.[55] This upward trend may continue as more cases are heard by the courts and as more IJs with less inclination to rubber-stamp denials take the bench.

A Better Judicial Selection Process

An infusion of new personnel provides an opportunity to scrutinize and reform the appointment process of IJs to make it less vulnerable to political influences. By many accounts, it was intensely politicized in the Trump years. Appointment to the court is governed by DOJ, allowing the country's chief prosecutor to unilaterally advance a frequently biased agenda.[56] This undeniable conflict is nothing new, but it demeans the integrity of the bench. Even worse, the opaqueness of the selection process shields an agenda that is suspect, based on the profile of the IJs appointed by the Trump administration.[57]

A cleaner, more transparent merit selection process, typical of most judicial systems, would enhance the reputation of the court. A recruitment process that is attractive to a wider range of applicants might invite a more diverse applicant pool. The work is very demanding, but it pays well.[58]

In addition, the criteria for the job are now absurdly undemanding. Aside from a law degree and licensure in any U.S. jurisdiction, an applicant must have

> a full seven (7) years of post-bar experience as a licensed attorney preparing for, participating in, and/or appealing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority. Qualifying administrative law

> experience involves cases in which a formal procedure was initiated by a governmental administrative body.[59]

While knowledge of or experience in immigration law may be an advantage, it is not an expressed job qualification. Nor does lack of background in the field appear to pose any kind of barrier to selection, as is evident from the number of IJs with no demonstrable professional experience in the field.

Change is in the air. EOIR has added language to the announcement of new IJs that for the first time publicly solicits a more varied pool of applicants. It states, "EOIR recognizes that a diverse and inclusive bench reflects the public we serve, and the agency encourages qualified candidates from all backgrounds to join our corps of dedicated adjudicators."[60] Whether this call will be heeded is unknown, but it is a start.[61]

Without the need for legislative reform, DOJ and EOIR could improve the perception and reality of the immigration court selection process. Simple improvements include the following steps to elevate the selection standards: (1) requiring a minimum of 10 years' experience, (2) requiring more direct knowledge of immigration law, (3) assuring a neutral merit-selection process that incentivizes applications from immigrant advocates, (4) opening the selection process for more public input, (5) improving training and oversight that emphasizes competence more than productivity, (6) restoring morale by recognizing and respecting the responsibility placed on IJs and treating them not as employees but as judicial officers, (7) overseeing and questioning the basis for abnormally high denial rates, and (8) instituting and implementing periodic recertification standards.

Conclusion

Is there a life preserver on this sinking ship? As immigration courts reopen following the pandemic, they are facing an unprecedented backlog. Cases are already postponed years into the future. Due to a now shared interest of the court and ICE to address the burdensome and shameful backlog, the new administration is in the position to institute real reform to the way business is conducted. It has started to steer in a positive direction. This is a potentially defining moment when change may actually begin to happen.

On a lifeboat, survival depends on a commitment to problem solving, trust, and collaboration until rescue arrives. The same is true with immigration court improvement. In tackling the crisis resulting from the backlog and the prior enforcement priorities, the Biden administration needs to have robust consultations with the immigrant advocates' bar and other stakeholders and incentivize everyone involved with the system to work collaboratively with each other. To make this happen, a true cultural change must occur at every level of immigration litigation.

The new administration is articulating goals to redress past mistakes, to ameliorate the backlog, and to seriously change enforcement priorities. A few significant steps have been taken. EOIR appears to be recruiting and appointing IJs from a more diverse pool. It also has repaired some damaging missteps and has issued a series of helpful guidance and policy memoranda reacting to the DHS prosecutorial discretion directive.[62] It has reinforced its commitment to supporting pro bono representation,[63] and has replaced the previous ill-advised, onerous case flow and filing deadline policies.[64] But the jury is still out on the buy-in to any kind of long-term genuine reform.

Someday structural reform may truly reshape the court enough to eliminate the qualifier *quasi*. IJs may become full-fledged judges capable of making legally sound decisions in courtrooms where dignity, respect, patience, and compassion are the norm without fear of retribution.

Until then, even without legislative structural reform, immigration court can be dramatically improved. Directives from the top are an important first step. Positive changes in the field also must be encouraged, monitored, and supported so that the reality reflects the aspirations.

The new administration can bring immigration court into conformity with general adjudication norms and practices. Recognize the demands of presiding over life-altering matters on the judges' well-being by giving them the resources, the power, and the trust to be *full-fledged* judges. These steps would help the immigration court emerge from the current crisis as a body that applies the law consistently and efficiently, without sacrificing fairness and humanitarian considerations.

Notes

* Stacy Caplow teaches Immigration Law at Brooklyn Law School, where she also has codirected the Safe Harbor Project since 1997. An earlier version of this article was published on August 1, 2021, in *The Insightful Immigration Blog*, http://blog.cyrusmehta.com/2021/08/the-sinking-immigration-court-change-course-save-the-ship.html. Many thanks to Brooklyn Law School student Benjamin Kaplan for his research assistance and to Professor Maryellen Fullerton for her unending support.

1. *See, e.g.*, American Bar Association Commission on Immigration, 2019 Update Report: Reforming the Immigration System: Proposals to Create Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf (containing more than 100 specific recommendations); AILA, *Featured Issue: Immigration Courts*, AILA Doc. No. 21041931; Hearing before House Committee on the Judiciary, Courts in Crisis: The State of Judicial Independence and Due Process in U.S. immigration courts, Jan. 29, 2020, https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2757; New York City Bar Association, Report on the Independence of the Immigration Courts (2020), https://www.nycbar.org/member-and-career-services/committees/reports-listing/

reports/detail/independence-of-us-immigration-courts. Statement of Immigration Judge A. Ashley Tabbador on behalf of National Association of Immigration Judges before House Committee on the Judiciary, Jan. 29, 2020, https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf; Letter from AILA, et al. to members of Congress (July 11, 2019), AILA Doc. No. 19070802.

Other voices include the Round Table of Former Immigration Judges and law professors. *See, e.g.*, Letter to Attorney General Merrick Garland from law professors, AILA Doc. No. 21050334; Julia Preston, *Is It Time to Remove Immigration Courts from Presidential Control?* (Aug. 28, 2019), https://www.themarshallproject.org/2019/08/28/is-it-time-to-remove-immigration-courts-from-presidential-control; Federal Bar Ass'n, *Congress Should Establish an Article I Immigration Court*, https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/; Mimi Tsankov, *Human Rights Are at Risk*, ABA Human Rts. Mag., Apr. 27, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/human-rights-at-risk/. *See also* Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 Bender's Immig. Bull. 3, 5 (2008) (the author was an immigration judge); Maurice Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 18 (1980) (the author was the retired Chair of the Board of Immigration Appeals).

For more recent voices, see N.Y. Times Editorial Board, *Immigration Courts Aren't Real Courts. Time to Change That*, N.Y. Times, May 8, 2021, https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html; Allison Peck, *Biden Should Call for Article I Immigration Courts*, The Hill, Apr. 28, 2021, https://thehill.com/opinion/immigration/550693-biden-should-call-for-article-i-immigration-courts (Prof. Peck is the author of the newly published book *The Accidental History of the U.S. Immigration Courts: War, Fear, and the Roots of Dysfunction*).

2. Creating an Article I court requires legislation and major reorganization. Federal Judicial Center, *Courts: A Brief Overview*, https://www.fjc.gov/history/courts/courts-brief-overview. On February 3, 2021, just as this article was being finalized, Representatives Zoe Lofgren (D-CA), Jerrold Nadler (D-NY), and Hank Johnson (D-GA) introduced the Real Courts, Rule of Law Act of 2022, legislation that would "establish, under Article 1 of the Constitution of the United States, a court of record to be known as the United States Immigration Courts." *See* https://lofgren.house.gov/sites/lofgren.house.gov/files/2.3.22%20-%20The%20Real%20Courts%2C%20Rule%20of%20Law%20Act%20of%202022%20Full%20Text.pdf.

3. President Biden's proposal is part of his overall budget planning:

> *Supports Efforts to Reduce the Immigration Court Backlog*. In order to address the nearly 1.3 million outstanding cases before the immigration courts, the discretionary request makes an investment of $891 million, an increase of $157 million or 21 percent over the 2021 enacted level, in the Executive Office for Immigration Review. This funding supports 100 new immigration judges, including support personnel, as well as other efficiency measures to reduce the backlog.

Letter from Executive Office of the President, Apr. 9, 2021, enclosure 2, at 22, https://www.whitehouse.gov/wp-content/uploads/2021/04/FY2022-Discretionary-Request.pdf. *See also Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, Jan. 20, 2021, https://www

.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/.

4. TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/. This statistic is complicated and does not fully account for all matters, because some have been "inactive" and thus excluded from the final figure. The Executive Office for Immigration Review (EOIR) reports 1,399,680 pending cases as of the end of FY2021 (Oct. 31). *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, https://www.justice.gov/eoir/page/file/1242166/download.

5. *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions*.

6. TRAC Immigration, *Immigration Court Backlog Tool*.

7. "The Office of the Principal Legal Advisor (OPLA) is the largest legal program in DHS, with over 1,250 attorneys and 290 support personnel. By statute, OPLA serves as the exclusive representative of DHS in immigration removal proceedings before the Executive Office for Immigration Review, litigating all removal cases including those against criminal aliens, terrorists, and human rights abusers." https://www.ice.gov/about-ice/opla.

8. A particularly pointed example of this is the double reversal of the interpretation of "particular social group" as applied to survivors of domestic violence. Before the Trump years, claims would be heard under the standard set forth in *Matter of A–R–C–G–*, 26 I&N Dec. 388 (BIA 2014). Then came *Matter of A–B–*, 27 I&N Dec. 316 (AG 2018), which virtually disqualified victims of domestic violence and gang violence from gaining asylum, followed by a lame-duck AG decision, *Matter of A–B–* (II), 28 I&N Dec. 199 (AG 2021). The Biden administration then vacated *A–B–*, 28 I&N Dec. 307 (AG 2021), and restored *A–R–C–G–*.

9. "Pre-hearing conferences are held between the parties and the immigration judge to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and otherwise simplify and organize the proceeding." Immigration Court Practice Manual ch. 4.18.

10. Memorandum from John D. Trasviña, ICE Principal Legal Advisor, to all OPLA attorneys, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), AILA Doc. No. 21060499.

11. Memorandum from Alejandro N. Mayorkas, DHS Secretary, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), AILA Doc. No. 21093010.

12. Memorandum from John D. Trasviña, at 7-8.

13. For an example of the policies for the exercise of prosecutorial discretion during the Obama administration, see Memorandum from John Morton, Director of ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), AILA Doc. No. 11061734.

14. Memorandum from Jean King, EOIR Acting Director, *Effect of Department of Homeland Security Enforcement Priorities* (June 11, 2021), AILA Doc. No. 21061133.

15. The Manual is available online at https://www.justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual.

16. INA § 240(c)(4).

17. Interestingly, while there is consensus that representation makes a huge difference to positive outcomes, the denial rate for asylum increased 12% between 2018 and 2020 notwithstanding representation. *Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates*, https://www.justice.gov/eoir/page/file/1062991/download.

18. One of the more onerous changes imposed on advocates was the advancing of the filing deadline in nondetained cases from the long-standing rule of 15 days before an individual hearing to 30 days before the hearing. This revision was rescinded, and the 15-day default filing deadline reinstated on December 16, 2021. Memorandum from David Neal, EOIR Director, *Filing Deadlines in Non-Detained Cases* (Dec. 16, 2021), AILA Doc. No. 21121605; Immigration Court Practice Manual ch. 3.1(b)(2)(A).

19. Memorandum from James R. McHenry III, EOIR Director, *Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct* (Dec. 18, 2018), AILA Doc. No. 18121938.

20. *See* AILA Letter to EOIR Director James McHenry, Feb. 15, 2019, AILA Doc. No. 19021549.

21. Attorney General Garland has been actively withdrawing decisions issues by his predecessors. *See, e.g.*, *Matter of A–C–A–A–*, 28 I&N Dec. 351 (AG 2021), vacating in its entirety *Matter of A–C–A–A–*, I&N Dec. 84 (AG 2020), and restoring discretion to IJs in case management; *Matter of Cruz Valdez*, 28 I&N Dec. 326 (AG 2021), overruling *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018), and restoring ability of IJs to administratively close cases. These decisions also free up TAs to exercise prosecutorial discretion.

22. Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call, Oct. 29, 2019, https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/; Tom Dart, *Jeff Sessions Accused of Political Bias in Hiring Immigration Judges*, The Guardian, June 16, 2018, https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges; Patt Morrison, *How the Trump Administration Is Turning Judges into "Prosecutors in a Judge's Robe*," L.A. Times, Aug. 29, 2018, https://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-judge-ashley-tabaddor-20180829-htmlstory.html/.

23. This article does not address the long-standing arguments advanced for an independent Article I court. For a selection of perspectives on that, see the sources cited in note 1, *supra*.

24. *See, e.g.*, Gregory Chen and Peter Markowitz, *Recommendations for DOJ and EOIR Leadership to Systematically Remove Non-Priority Cases From the Immigration Court Backlog* (updated Feb. 11, 2021), AILA Doc. No. 21050301.

25. *See* Memorandum from James R. McHenry III, EOIR Director, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), AILA Doc. No. 18011834. IJs were required to complete 700 cases per year. A completion record of less than 560 cases was considered unsatisfactory. *EOIR Performance Plan: Adjudicative Employees*, https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf. These highly unpopular metrics, which caused many experienced IJs to resign, were withdrawn by the EOIR in October 2021. Debra Cassens Weiss, *DOJ Lifts Trump-Era Case Quotas for Immigration Judges*, ABA Journal, Oct. 21, 2021, https://www.abajournal.com/news/article/justice-department-lifts-trump-era-case-quotas-for-immigration-judges.

26. Philip G. Schrag, et al., Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (2009). For example, in the Atlanta immigration court, every

judge's denial rate exceeds 90%, in contrast to the New York immigration court, where 29 judges deny in less than 30% of cases. TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, https://trac.syr.edu/immigration/reports/judge2020/denialrates.html.

27. https://www.justice.gov/eoir/page/file/1242156/download.

28. *Executive Office for Immigration Review Adjudication Statistics: Number of Courtrooms*, https://www.justice.gov/eoir/page/file/1248526/download.

29. *Executive Office for Immigration Review Adjudication Statistics: Immigration Judge Hiring*, https://www.justice.gov/eoir/page/file/1242156/download.

30. *EOIR Immigration Court Listing*, https://www.justice.gov/eoir/immigration-court-administrative-control-list.

31. Memorandum from the Attorney General for the Executive Office of Immigration Review, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017), AILA Doc. No. 17120633.

32. At the beginning of January 2021, the total number of pending cases from El Salvador, Guatemala, and Honduras was 715,557. TRAC Immigration, *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, https://trac.syr.edu/immigration/reports/637/. An additional 212,849 cases from Mexico raised the total to 928,406. *Id.*

33. Austin Kocher, *ICE Filed Over 100,000 New Cases and Clogged the Courts at the Peak of the Pandemic* (Sept. 16, 2020), https://documentedny.com/2020/09/16/ice-filed-over-100000-new-cases-and-clogged-the-courts-in-the-peak-of-the-pandemic/.

34. Memorandum from James R. McHenry III, EOIR Director, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), AILA Doc. No. 18011834.

35. *Matter of Castro-Tum*, 27 I&N Dec. 271, 272 (AG 2018).

36. *Matter of EOIR*, 71 FLRA No. 207 (FLRA 2020). In December 2021, the Biden administration formally recognized the judge's union after months of indecision. *See* Settlement Agreement Between the U.S. Department of Justice, Executive Office of Immigration Review and the National Association of Immigration Judges, https://www.aila.org/File/Related/19081303l.pdf; Eric Katz, *Biden Administration Recognizes Immigration Judge Union, Reversing Trump Decision*, Dec. 7, 2021, https://www.govexec.com/workforce/2021/12/biden-administration-recognizes-immigration-judge-union-reversing-trump-decision/187358/.

37. Amiena Khan and Dorothy Harbeck, *DOJ Tries to Silence the Voice of the Immigration Judges—Again!* The Federal Lawyer (Mar.-Apr. 2020), https://immigrationcourtside.com/wp-content/uploads/2020/04/Immigration-TFL_Mar-Apr2020.pdf; Allison Frankel, *Immigration Judges' Union Sues to Block DOJ Speech Restrictions* (July 1, 2020), https://www.reuters.com/article/us-otc-immigration/immigration-judges-union-sues-to-block-doj-speech-restrictions-idUSKBN24277N; Laila L. Hlass et al., *Let Immigration Judges Speak* (Oct. 24, 2019), https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html.

38. *Matter of A–B–*, 27 I&N Dec. 316 (AG 2018) (virtually disqualifying victims of domestic violence and gang violence for asylum). *See also* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (effective Jan. 11, 2021).

39. EOIR, *Immigration Judge*, https://www.justice.gov/legal-careers/job/immigration-judge-16.

40. IJ Dana Marks provided this unforgettable description on immigration courts on an episode of *Last Week Tonight with John Oliver* (HBO). The segment is available on YouTube at https://www.youtube.com/watch?v=9fB0GBwJ2QA&t=11s (Judge Marks's quote at 2:36).

41. The charts that follow were prepared from the biographical information contained in EOIR announcements of new IJs appointed by an attorney general serving in the Trump administration between May 2017 and January 2021. The government agencies include OPLA, which is the prosecution branch of ICE, which in turn is a branch of the Department of Homeland Security (DHS). The Office of Immigration Litigation (OIL) is a division of DOJ that represents the government in federal court.

42. *Presiding Under Pressure* (May 21, 2019), https://www.wnyc.org/story/presiding-under-pressure.

43. Training now is only a few weeks rather than months. Reade Levinson, et al., *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts* (Mar. 8, 2021), https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179 (describing inter alia the selection and abbreviated training processes).

44. Eighty-two experienced immigration judges resigned in fiscal years 2017–2019. TRAC Immigration, *More Immigration Judges Leaving the Bench*, https://trac.syr.edu/immigration/reports/617/. *See also* Tal Kopan, *Outgoing SF Immigration Judge Blasts Immigration Court as "Soul Crushing," Too Close to ICE*, S.F. Chronicle, May 18, 2021, https://www.sfchronicle.com/politics/article/Exclusive-Outgoing-SF-immigration-judge-blasts-16183235.php; Molly Hennessey-Fiske, *Immigration Judges Are Quitting or Retiring Early Because of Trump*, L.A. Times, Jan. 27, 2020, https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump; Ben Schamisso, *Why This Burned-Out Immigration Judge Quit Her Job* (Feb. 25, 2020), https://www.newsy.com/stories/why-this-burned-out-immigration-judge-quit-her-job/; Katie Benner, *Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies*, N.Y. Times, Sept. 13, 2019, https://www.nytimes.com/2019/09/13/us/politics/immigration-courts-judge.html; Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable* (Feb. 13, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump; Ilyce Shugall, Op-Ed, *Why I Resigned as an Immigration Judge*, L.A. Times, Aug. 4, 2019, https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies.

45. This is not necessarily a new criticism. For example, more than 15 years ago, Judge Richard A. Posner decried "the systematic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum." *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004).

46. *See* Jeffrey S. Chase, *Round Table of Former Immigration Judges on the Restarting of MPP* (Dec. 6, 2021), https://www.jeffreyschase.com/blog/2021/12/6/round-table-of-former-immigration-judges-on-the-restarting-of-mpp.

47. *See, e.g.*, Statement of the Round Table of Former Immigration Judges to the House Judiciary Committee on Immigration Court Reform, Jan. 29, 2020, https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD022.pdf (36 signers); Brief for *Amici Curiae* Former Immigration Judges in Support of Petitioner, *Barton v. Barr*, No. 18-725 (filed July 2, 2019), https://www

.supremecourt.gov/DocketPDF/18/18-725/104750/20190702122304670_18-725%20tsac%20Immigration%20Law%20Professors%20Brief.pdf.

48. *EOIR Announces 17 New Immigration Judges* (May 6, 2021), https://www.justice.gov/eoir/file/1392116/download; *EOIR Announces 10 New Immigration Judges* (July 16, 2021), https://www.justice.gov/eoir/page/file/1412741/download; *EOIR Announces 24 New Immigration Judges* (Oct. 27, 2021), https://www.justice.gov/eoir/page/file/1444911/download; *EOIR Announces 22 New Immigration Judges* (Dec. 17, 2021), https://www.justice.gov/eoir/page/file/1457171/download. The BIA member, appointed in October 2021, is Andrea Saenz, whose background includes substantial teaching and leadership positions in immigrant advocacy organizations as well as several years as a clerk in the immigration court and as a staff attorney at the Second Circuit Court of Appeals. *See EOIR Announces New Appellate Immigration Judge* (Oct. 14, 2021), https://www.justice.gov/eoir/page/file/1442001/download.

49. Andrew Cohen, *Biden's New Immigration Judges Are More of the Same* (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-new-immigration-judges-are-more-same; Alyssa Aquino, *17 New Immigration Judges Largely Held Prior Gov't Roles* (May 6, 2021), https://www.law360.com/articles/1382143.

50. In FY 2020, the denial rate for asylum, withholding or removal, or Convention Against Torture (CAT) relief increased to 71.6 percent, up from 54.6 percent in FY 2016 (73.7 percent of immigration judge decisions denied asylum). TRAC Immigration, *Asylum Denial Rates Continue to Climb*, https://trac.syr.edu/immigration/reports/630/; *see also* Paul Moses and Tim Healy, *Here's Why the Rejection Rate for Asylum Seekers Has Exploded in America's Largest Immigration Court in NYC* (Dec. 2, 2019), https://www.thedailybeast.com/heres-why-the-rejection-rate-for-asylum-seekers-has-exploded-in-americas-largest-immigration-court-in-nyc.

51. *Executive Office for Immigration Review Adjudication Statistics: Asylum Decision Rates*, https://www.justice.gov/eoir/page/file/1248491/download.

52. TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts* FY 2013–2018, https://trac.syr.edu/immigration/reports/judge2018/denialrates.html.

53. TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts* FY 2015–2020, https://trac.syr.edu/immigration/reports/judge2020/denialrates.html.

54. *Matter of A–B–*, 27 I&N Dec. 316 (AG 2018).

55. TRAC Immigration, *Asylum Grant Rates Climb Under Biden*, https://trac.syr.edu/immigration/reports/667/.

56. The Attorney General has the power to certify matters for their review. 8 CFR § 1003.1(h).

57. Reade Levinson, et al., *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts* (Mar. 8, 2021), https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179; Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration* (May 4, 2020), https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration; Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call, Oct. 29, 2019, https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/; *see* Memorandum from James R. McHenry III, Director EOIR, for the Attorney General, *Immigration Judge and Appellate Immigration Judge Hiring Process* (Feb. 19, 2019), https://www.justice.gov/oip/foia-library/general_topics/eoir_hiring_procedures_for_aij/download. The DOJ also had been called out for

making political appointments during the George W. Bush administration. *See* DOJ, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General (July 28, 2008), ch. 6, https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf.

58. As of January 2020, the lowest starting salary is $138,630 and ultimately caps at $181,500. EOIR, *2020 Immigration Judge Pay Rates*, https://www.justice.gov/eoir/page/file/1236526/download.

59. EOIR, *Immigration Judge*, https://www.justice.gov/legal-careers/job/immigration-judge-7. This web page refers to a section called "How You Will Be Evaluated," which appears nowhere. Military service assures a strong preference.

60. *EOIR Announces 24 New Immigration Judges* (Oct. 27, 2021), https://www.justice.gov/eoir/page/file/1444911/download.

61. Section 602 of The Real Courts, Rule of Law Act of 2022 explicitly recognizes the importance of prior legal experience in immigration law and the need to draw a judiciary that "to the extent practicable, reflects a balance of individuals with prior legal experience in the public sector and private sector" without regard to political affiliation.

62. *See, e.g.*, Memorandum from Alejandro N. Mayorkas, DHS Secretary, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), AILA Doc. No. 21093010.

63. Memorandum from David Neal, EOIR Director, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021), AILA Doc. No. 21110804.

64. Memorandum from Tracy Short, EOIR Chief Immigration Judge, *Revised Case Flow Processing Before the Immigration Courts* (Apr. 2, 2021), AILA Doc. No. 21040237; Memorandum from David Neal, EOIR Director, *Filing Deadlines in Non-Detained Cases* (Dec. 16, 2021), AILA Doc. No. 21121605.

Reading *Pereira* and *Niz-Chavez* as Jurisdictional Cases

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Abstract: The defective NTA problem has important ramifications for respondents in removal proceedings. Two recent Supreme Court decisions, *Niz-Chavez v. Garland* and *Pereira v. Sessions*, considered aspects of this issue. This article explores how these cases must be read jurisdictionally. It discusses how the defective NTA problem implicates the jurisdiction of the immigration court versus a mere "claims-processing" rule. Determination of this issue is crucial but yet to be determined by the Supreme Court. Lower courts have addressed it in conflicting ways. Arguments of those who resist a jurisdictional reading prioritize the implementing regulations over the governing statute, and characterize the defective NTA problem as a procedural claim incumbent on the respondent to raise and fully exhaust. Unfortunately, such an approach ignores the fact that DHS has the responsibility for drafting and filing the NTA. The article concludes with a discussion of potential remedies for respondents and the 1.6 million court backlog.

Introduction

The Notice to Appear (NTA) is the charging document prepared by the Department of Homeland Security (DHS) against an immigrant respondent.[1] It *must* contain certain required information, including but not limited to the time and place of hearing.[2] When properly filed with the immigration court, that act of filing initiates the court's jurisdiction.[3] Two recent Supreme Court cases have addressed the "defective NTA issue."[4] The first case is *Pereira v. Sessions*, and it stands for the proposition that a defective NTA missing the time and place of removal proceedings cannot be used to stop the time required for cancellation of removal claims.[5] The second, *Niz-Chavez v. Garland*, addressed a related issue, whether a subsequent notice of hearing from the court could perfect or cure the defective NTA. The high court found that such a notice of hearing, filed after a defective NTA, could not.[6]

Jurisdiction is the starting place for any litigation. Therefore, it is surprising that confusion still persists concerning the jurisdictional effect of a line of Supreme Court cases with profound ramifications for immigration law. *Pereira* and its recent progeny *Niz-Chavez* are fascinating cases. Not merely because of what they say explicitly about what is or is not a valid NTA, but more importantly because of what they must mean. The recent attempt by the Board of Immigration Appeals (BIA) in *Matter of Arambula-Bravo*[7] to

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explain away any jurisdictional problem resonates well with DHS. However, the BIA has embraced an analysis of the statute and regulations that does not comport with *Niz-Chavez*. Before *Arambula-Bravo*, several immigration judges had granted termination under a jurisdictional reading of *Pereira* and *Niz-Chavez*.[8] Some circuit courts rejected the argument that jurisdiction was implicated, but others saw the issue through the lens of a claims-processing rule.[9] This article discusses the defective NTA problem as implicating the jurisdiction of the immigration court versus a claims-processing rule.[10] It also addresses the problems with prioritizing the implementing regulations over the governing statute, as well as characterizing the defective NTA problem as a procedural claim that must be raised by immigrants in proceedings, rather than as a problem for DHS, who are the ones who have the responsibility for drafting and filing the NTA in the first place. The article concludes with the issue of what potential remedies may exist for respondents in the event the crucial jurisdictional issue is finally decided in their favor.[11]

As soon as *Pereira* came down, some commentators immediately saw how the decision would impact the very jurisdictional foundations of the immigration court, and not just the "stop-time" rule relating to cancellation of removal.[12] As I discussed in a prior article, there was much litigation about how *Pereira* affected a host of topics.[13] Some of those topics related to *in absentia* orders, voluntary departure, cancellation of removal, and jurisdiction.[14] Many of these issues now have been answered definitively. The *Pereira* stop-time rule, however, was interpreted narrowly and its full effect diminished by *Matter of Bermudez-Cota*, among other cases, where the Board embraced an argument by DHS that a subsequent notice of hearing could somehow "cure" or "perfect" a defective NTA.[15] Therefore, so the argument went, the "stop-time" rule still applied, but now the time should be interpreted as "stopped" by EOIR's (not DHS's) subsequent Notice of Hearing (NOH) and not by the invalid NTA. Such a strained reading, with its many-layered difficulties, ruled the day until the Supreme Court rejected such a creative approach in *Niz-Chavez*. *Bermudez-Cota* and other Board cases, such as *Matter of Rosales Vargas and Rosales Rosales*, also purported to reject any jurisdictional consequences from *Pereira*.[16]

In *Niz-Chavez*, the "two-step" procedure for perfecting the defective NTA was brought into sharp relief and soundly rejected as not in conformity with the governing statute, specifically INA § 239(a), 8 U.S.C. § 1229(a).[17] That statutory provision is entitled "Initiation of Removal Proceedings," and requires, among other things, that the NTA have "the time and place at which the proceedings will be held."[18] As the high court found in *Niz-Chavez*, the interpretation of *Pereira* by the BIA and also several circuit courts flies in the face of the plain language of the statute. The Supreme Court homed in on the exact language of § 1229(a)(1), which explains that "written notice (in this section referred to as a 'notice to appear') shall be given . . . to the alien . . . specifying" the time and place of the hearing. Of importance to the high court

was the indefinite article "a" in the statute, which mandates a single document comprising the NTA, not a series of documents or steps. The other relevant statutory section, 8 U.S.C. § 1229b(d)(1), similarly contains the indefinite article, and states that the stop-time rule is triggered "when the alien is served *a* notice to appear under section 1229(a)." The Court's analysis also referenced other statutory provisions in support of its conclusion that Congress could not have envisioned or intended for multiple or different *notices* to appear, but instead a single or unitary charging document to initiate proceedings.[19]

However, neither Justice Sotomayor's decision in *Pereira* nor Justice Gorsuch's decision in *Niz-Chavez* directly addressed the elephant in the room; that is, whether the validity (or invalidity) of the NTA affects the jurisdiction of the immigration court's removal proceedings. *Pereira*'s use of the term "narrow" to describe its own holding has been used as fodder for the argument that its decision should somehow be limited only to the issues presented.[20] Unfortunately, the matter cannot be disposed of so quickly. Such a conclusion is not supported because "jurisdiction," as one of *the* most important concepts in any litigation, can be raised at any time: after the initiation of proceedings, on appeal, and even after a final decision is reached on the merits.[21] Furthermore, the argument that the Supreme Court somehow *sub silentio* discredited or rejected the jurisdictional argument by failing to raise it is belied by the Court's own precedent decisions.[22] In prior cases, the Court has made clear that there is no precedential effect that can be "read into" any "unaddressed jurisdictional defects" not addressed by a court.[23]

The Circuit Split Concerning How the Jurisdictional Issue Should Be Interpreted

There is now an interesting circuit court split as to how the jurisdictional issue should be analyzed after *Pereira* and *Niz-Chavez*. On the one hand, one group of circuits (the First, Third, Eighth, and Ninth) find that there is allegedly no jurisdictional problem with a defective NTA.[24] In these courts' view, it is not a cause for termination or dismissal of removal proceedings before the immigration court. A paradigmatic case in this regard is *Karingithi v. Whitaker*, where the court of appeals rejected any reading of *Pereira* to confer a jurisdictional problem so long as an NOH is later sent to the respondent.[25] The panel stated that its reading of the regulations was consistent with *Matter of Bermudez-Cota*.[26] The panel also concluded that the Board's decision in *Bermudez-Cota* warranted deference and therefore should be followed.[27] Of course, after *Niz Chavez* this two-step rationale can no longer stand and must be rejected. Nevertheless, the Ninth Circuit reaffirmed its prior outdated approach in *United States v. Bastide-Hernandez*, a case postdating *Niz-Chavez*, where it stated that "the regulation means what it says, and controls . . . [applying]

Karingithi … jurisdiction of the immigration court vests upon the filing of [a notice to appear]. . . ."[28]

The Ninth Circuit, as well as the other circuits rejecting the jurisdictional argument, have attempted to hinge their reasoning on language found in the federal regulations. They provide that the time and place of hearing in the NTA is only required "when practicable" and thus, so the argument goes, these regulations somehow trump the Immigration and Nationality Act's (INA's) statutory requirements for a valid NTA. The BIA also seems to reason in this way in its new post-*Niz-Chavez* case addressing this issue: *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021). In that case, the Board first recognized that it could no longer rely on *Bermudez-Cota*'s rationale embracing the "two-step" approach, but did cite that prior case for several propositions, including that *Pereira* was "narrow" and only related to stop-time and furthermore that the Supreme Court did not address jurisdiction. The BIA also cited *Matter of Rosales Vargas and Rosales Rosales* for the observation that "certain rules regarding initiation of proceedings … are 'claims-processing' rules that do not implicate … jurisdiction. . . ."[29] The Board then proceeded to rely on *Karingithi* and *Aguilar Fermin v. Barr*, another case in the Ninth Circuit reaffirming the flawed rationale of both *Karingithi* and the now discredited *Bermudez-Cota*.[30]

A close reading of *Arambula-Bravo* reveals that the BIA has attempted to shimmy out of any potential difficulties brought about by *Niz-Chavez* by narrowly interpreting the Supreme Court's latest case and reembracing pre-*Niz-Chavez* precedents. According to the BIA, *Niz-Chavez* can only be cited for the following limited holding: that a subsequent notice cannot cure the defective NTA for stop-time purposes, but that omission of the required information in the original NTA has no effect on jurisdiction. In the words of the Board, it is "immaterial" to jurisdiction.[31] Importantly, the Board goes on to make a *major* concession when it holds that "application of *Niz-Chavez* is limited to the types of relief implicated by *Pereira*," citing a Ninth Circuit case applying *Pereira* and *Niz-Chavez* to voluntary departure.[32] This off-hand comment in *Arambula-Bravo* presaged the later pronouncement by the BIA in *Matter of M–F–O–*[33] that a defective NTA does not end the accrual of physical presence for purposes of voluntary departure at the conclusion of proceedings under 8 U.S.C. § 1229c(b).[34]

If the defective NTA, lacking the time and place of hearing, does not (according to the BIA) implicate jurisdiction, then what does it mean? The BIA now has acknowledged that its own precedent decision in *Rosales Rosales* "clarified" that the regulations surrounding initiation of proceedings represent "claims-processing" rules.[35] In a footnote, citing an amicus brief, the BIA in *Arambula-Bravo* importantly also addressed a related issue: whether violation of the statute, i.e., the INA, implicates claims-processing rules that could have support a respondent seeking to reopen a case or seeking termination.[36] In the same footnote, the Board preferred to "leave for another day" the issue

of whether a violation of INA § 239(a) implicates a claims-processing rule.[37] In the BIA's view, the issue was not brought up by the parties, and therefore had been waived.[38]

This acknowledgment of a possible claims-processing rule violation by the BIA is crucial. It aligns with the other group of circuits, namely, the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits, which all have found that the defectiveness of the NTA, while purportedly still not rising to the level of a jurisdictional problem, does implicate a violation of a claims-processing rule.[39] Does this recognition provide any purchase for a respondent to hang their hat on the violation of such rules for purposes of seeking new relief? In *Ortiz-Santiago v. Barr*,[40] for example, the court of appeals found that the defective NTA raised by the petitioner implicated a claims-processing rule, but then concluded that he did not raise the failure to include the time and date of his hearing until the appeal was pending with the BIA. This is the most common refrain of courts that reject claims brought under a claims-processing rationale as either untimely or failing to show that the litigant had been prejudiced.

In a subsequent case the following year, *De La Rosa v. Garland*,[41] the Seventh Circuit went further and found that a litigant bringing a claims-processing rule violation did *not* need to show prejudice. In that case, a Mexican national filed a motion to terminate based on the fact that his notice to appear was defective. The immigration judge and BIA both denied the claim. The Seventh Circuit cited a U.S. Supreme Court case for the proposition that "[l]ike other mandatory claims-processing rules, those found in section 1229 '[i]f properly invoked . . . must be enforced, but they may be waived or forfeited.'"[42] Interestingly, the emphasis has now shifted to whether the litigant has "properly invoked" the claims-processing rule violation, and not on whether there has been any prejudice. The salient issue now is whether a person has made a "timely objection" or whether there exists both "excusable untimeliness and a showing of prejudice." The important holding in *De La Rosa* is as follows: "A noncitizen who raises a timely objection to a noncompliant Notice to Appear, consistent with *Niz-Chavez* and *Ortiz-Santiago*, is entitled to relief without also having to show prejudice from the defect."[43]

The Flaws Inherent in Viewing "Claims-Processing" as the Rubric

There are flaws inherent in a claims-processing rule versus a jurisdictional analysis. First, the history of the regulatory provisions reveals that the "when practicable" language was meant for only a limited purpose and not as a catch-all or wholesale invalidation of the statute.[44] In 1996 Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRAIRA),[45] which fundamentally transformed the system of notification to respondents from orders to show cause (OSCs) to NTAs. The important change from the

old regime centered on the fact that OSCs explicitly did not require time and place of hearing but that information could be placed "in the order to show cause *or otherwise*."[46] The preamble to the new regulations explained that the rule "implements the language of the amended Act *indicating that the time and place of the hearing must be on the Notice to Appear*."[47] The regulations that the legacy Immigration and Naturalization Service (INS) and Executive Office for Immigration Review (EOIR) ultimately adopted, at 8 C.F.R. § 1003.18 (indicating the information was required only "when practicable"), authorized the very two-step process invalidated by *Niz-Chavez* and rejected by IIRAIRA.

Reliance on the "when practicable" language is further undermined when research is reviewed relating to the scope and context of such language in the regulations. For example, as noted by an amicus brief submitted by former BIA Chairman and Immigration Judge Paul Wickham Schmidt supporting the petition in *Pereira v. Sessions*, there was at one time an "Interactive Scheduling System" that DHS could access to determine the immigration courts' availability, but that system appears to have fallen into disuse.[48] Moreover, the Federal Register reveals that the exception was only intended to apply in unusual circumstances such as "power outages" or "computer crashes."[49] If, as it now appears, the "when practicable" language was supposed to be used only in extreme situations, then the exception has swallowed the rule, where virtually 100 percent of NTAs lack the "time, place, or date" of hearing.[50]

When viewed against the historical background, there is no question that the BIA's reliance in *Arambula-Bravo* on the regulations in favor of the governing statute (i.e., the INA) as a basis to reject the jurisdictional reading is wholly incorrect. In addition, rejection of the jurisdictional argument is not supported by Supreme Court precedents, which are not taken into account in *Arambula-Bravo*. For example, the leading case relating to claims-processing is *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). That case dealt with a claim of employment discrimination and the numerosity requirement of 15 employees in Title VII of the Civil Rights Act of 1964.[51] In *Arbaugh*, the Supreme Court set forth the analysis for determining whether something is a jurisdictional defect from a claims-processing rule. Specifically, the Supreme Court found the 15-employee rule was not jurisdictional but rather an element of the "claim for relief" that could be waived.[52] Significantly, the Court reiterated that a jurisdictional defect could be raised "at any stage of litigation."[53]

Now consider the time-and-place requirements under INA § 239(a) in comparison to the *Arbaugh* case. They certainly are not an element of any "claim for relief" that is found within the INA. Rather, the time and place of hearing is a prerequisite for the immigration court to hear the removal proceedings in the first place. This certainly sounds more like a jurisdictional requirement than, in the words of the Supreme Court, an "ingredient" of a claim.[54] Moreover, the title to the relevant statutory provision is "Initiation of Removal Proceedings," which is more proof that the provision was meant to trigger jurisdiction rather than a mere "claims-processing" rule. Finally, this

reading is consistent with other Supreme Court cases, such as *United States v. Kwai Fun Wong*,[55] a case brought under the Federal Tort Claims Act (FTCA). In that case, the time limitations found within the FTCA were found to be nonjurisdictional.[56] The Supreme Court reaffirmed that filing deadlines for plaintiffs were "quintessential claim-processing rules" that do not deprive the court of jurisdiction.[57]

Considering that the time limitation for bringing a claim as found in *Kwai Fun Wong* is the "quintessential" claims-processing rule, there can be no question that INA § 239(a)'s "time and place" requirements on the face of an NTA should be found distinguishable. First, they are *not* a "statute of limitations," but rather are required to comply with due process and to apprise respondents of the proceedings against them. Again, INA § 239(a) does not represent any respondent's claim for relief but rather relates to the *government's* duty to trigger the court's jurisdiction. The requirement also is not imposed on the "plaintiff" as in a typical civil matter, but rather on the government, who has due process and other Constitutional obligations. Furthermore, it is of no objection that the time and place is a "technical" requirement for the government. One can think of other jurisdictional requirements in federal statutes that similarly create "technical requirements" but which are jurisdictional in nature. One such example is the amount-in-controversy requirement of 28 U.S.C. § 1332.[58] In that statute, diversity jurisdiction is dependent upon, inter alia, *more than* $75,000 in controversy between the parties. Such a technical rule has been held to be jurisdictional.[59] It is not about claims processing, but is necessary to confer jurisdiction.[60]

The unfortunately misguided approach that is now embraced in certain circuits and the BIA privileges the regulations over the statute and analogizes "the initiation of removal proceedings" statute to a mere claims-processing rule. In doing so, there is a hidden assumption that removal proceedings are "civil" in nature and thus presumably must be like any civil litigation in federal court. More crucially, such an approach misapprehends who made the mistake in the first place: the federal agency, DHS, and not the immigrant respondent, who had nothing to do with drafting or filing the NTA. In civil litigation a claim is brought by a plaintiff and defended by a defendant with concomitant rules governing such claims. Such an assumption may seem superficially supported by the fact that removal proceedings are "civil" and not "criminal" in nature. However, it ignores that removal proceedings require procedural protections under the Fifth Amendment and other statutory and constitutional provisions. Such protections are analogous to (albeit not nearly as extensive as) those found in criminal law. The facile conclusion that INA § 239(a) can be confined to a claims-processing rule analogous to rules required for plaintiffs who proceed in a civil litigation ignores these important distinctions and devalues the constitutional protections to which all responded are entitled.

It should be noted that the U.S. Solicitor General (SG) recently responded to a petition for certiorari on this very issue by similarly arguing that the

regulations allow for missing information on the NTA, without regard to the statute or the import of *Niz-Chavez*.[61] The SG points to the "where practicable" language coupled with 8 C.F.R. § 1003.15(b) and (c), which omit the date and time of the initial hearing from the list of information to be provided to the immigration court in an NTA. On top of these regulations, the SG notes that the regulations also authorize the immigration court to provide "notice to the government and the alien of the time, place, and date of hearing" when "that information is not contained" in the NTA, citing 8 C.F.R. § 1003.18(b). Importantly, however, the SG has appeared to concede that "any requirement that an NTA filed with the immigration court contain the date and time of the initial removal hearing is . . . rather . . . simply a 'claim-processing rule.'" According to the SG, a defect in the NTA had to have been raised at the first instance, that is, the initial removal hearing, presumably meaning the first master calendar hearing. This concession is a big one. It means the government has taken the position that the violation, even if not jurisdictional in nature, must have consequences, provided an objection thereto is timely made.

What Remedies Should Be Recognized?

What remedies flow from a recognition in the future, by either the Supreme Court, a circuit court, or the BIA, that defective NTAs do have jurisdictional consequences? What remedies would follow from the fact that there has been a violation of claims-processing rules? No one would argue that it would be a good idea to reopen all *possible* removal proceedings that occurred post-IIRAIRA (i.e., after the date of its enactment on April 1, 1997) such that a *grant* of relief from removal could be open to attack on the basis of a flawed NTA. On the other hand, limiting a remedy to only those cases where there has been a showing of prejudice should also *not* be required, as shown by the Seventh Circuit's *De La Rosa* case discussed above, so long as a timely objection is made to a claims-processing violation.[62] Some may seek to limit the remedy, if a claims-processing violation were found, to respondents who had raised their objection to the defective NTA before some definite point in time. One might imagine a rule that argues for the point to be made before a final order of removal is issued, before the appeal, or at the first master calendar hearing. If, as has been maintained in this article, the violation instead is *jurisdictional* in nature, then the issue can be raised even after a final decision is reached.[63]

There is also a valid argument for equitable tolling of the time period, in appropriate cases, where the respondent was unaware of the government's violation, faced ineffective assistance, or had some other reason to excuse a delay in bringing the motion to reopen.[64] Whenever the objection is made, there can be no question that a remedy already exists under the sua sponte

authority of the BIA or immigration court in certain cases through the vehicle of a properly filed motion to reopen.[65] If the case is on appeal before the BIA, then a motion to remand could be brought. If the case is still within the time period for a statutory motion to reopen, then the motion could be filed within 90 days of the final order of removal. As argued in an amicus brief filed in the *Arambula-Bravo* case itself, there could be a reasonable time limit imposed on all motions to reopen seeking to address the defective NTA from the date of a future Supreme Court case clarifying the issue. Historically, such time limits have been imposed for a "reasonable" time after the intervening change or clarification of law in a particular case. DHS itself imposed an approximate six-month cutoff following *Niz-Chavez*, according to its policy memorandum, indicating that it would presumptively join in motions to reopen up until November 16, 2021.[66]

Determining the issue of the jurisdictional effect of a defective NTA has important consequences for a variety of issues. First, it impacts whether immigration courts will be viewed (correctly) as "real" courts or whether they will be seen as products of partisanship and political influence. In the past, the decisions of attorneys general with political agendas have caused some to question the courts' political independence. A ruling that maintains and enforces the statutory requirements that Congress intended for proper jurisdiction in the immigration courts would go a long way toward correcting the misapprehension by some in the public and within the immigration bar that EOIR is merely political and not a true juridical entity. Defining the proper jurisdiction of the courts coincides with the current movement to push for immigration courts to be Article I courts, on par with other such tribunals, such as the U.S. Court of Military Appeals, Veterans Appeals, Federal Claims, and Tax Court, among others.[67]

Forcing EOIR and DHS to address the defective NTA issue as a hard-and-fast rule, jurisdictional in nature, would go a long way toward addressing a fundamental structural flaw in the current system: namely, the enormous current backlog of cases (1.6 million at last count).[68] As mentioned, there used to be an "Interactive Scheduling System" by which DHS and EOIR effectively could communicate with each other to increase efficiency and judicial economy of cases. Instead, the intent of Congress with the passing of IIRAIRA was thwarted by a regulation that permitted the majority of cases to be filed under defective NTAs with no date/time of proceeding, thus giving rise to the current backlog and inefficient system of today. Resolving the backlog must be a primary objective of EOIR in order to fix the current broken and outdated system.[69] Clarifying that the defective NTA problem implicates a jurisdictional rule would address the backlog by forcing the governmental agencies to work to effectuate the intent of Congress in IIRAIRA that demanded that certain information be included on the NTA, for purposes of efficiency and, more importantly, due process.

Notes

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1. INA § 239; 8 U.S.C. § 1229; 8 C.F.R. § 1003.14.
2. INA § 239(a)(1)(G)(i), 8 U.S.C. § 1229(a)(1)(G)(i).
3. *See* 8 C.F.R. § 1003.14 (jurisdiction and commencement of proceedings).
4. *Pereira v. Sessions*, 138 S. Ct. 2105 (2018); *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).
5. 138 S. Ct. at 2114.
6. 141 S. Ct. at 1481.
7. 28 I&N Dec. 388 (BIA 2021).
8. In conversations with attorneys at the Public Law Center, a nonprofit in California, I learned that, for example, the San Diego Immigration Court had granted terminations. Also, district courts around the nation have credited the arguments of defendants arguing that their prior orders of removal were not valid due to the defective NTA issue in their criminal illegal reentry section 1326(d) cases. *See, e.g.*, *United States v. Gutierrez-Ramirez*, No. 18-cr-00422-BLF-1, 2019 WL 3346481, at *6 (N.D. Cal. July 25, 2019) (holding that a defective notice to appear deprives the immigration court of jurisdiction).
9. See the discussion of a circuit split related to jurisdictional rejection versus concession of claims-processing rule violation, below.
10. The author of this article wrote an *amicus curiae* brief for the UH Law Center's Immigration Clinic in the *Arambula-Bravo* case. That brief can be found at https://www.law.uh.edu/faculty/ghoffman/21-20-07.pdf. In addition, he has served as a consultant for attorneys in cases relating to the issues in this article, most recently for a petition for certiorari filed in the Supreme Court on the jurisdictional issue raised by *Niz-Chavez*. The cert. petition can be found at https://www.supremecourt.gov/DocketPDF/19/19-863/145153/20200608154523956_19-863%20Niz-Chavez%20Petition.pdf. In addition, he has authored a number of posts on issues related to *Pereira* and *Niz-Chavez*, which are referenced in the request to appear as amicus. *See* https://www.law.uh.edu/faculty/ghoffman/21-20-07.pdf.
11. This issue of remedies was discussed in the author's amicus brief, https://www.law.uh.edu/faculty/ghoffman/21-20-07.pdf.
12. *See* Kit Johnson, Pereira v. Sessions: *A Jurisdictional Surprise for Immigration Courts*, 50.2 Colum. Human Rights L. Rev. 1 (2019). *See also* Lonny Hoffman, Pereira*'s Aftershocks*, 61 Wm. & Mary L. Rev. 1 (2019).
13. Geoffrey A. Hoffman, *Litigation Post-Pereira: Where Are We Now?* 1 AILA L.J. 135 (2019).
14. *See id.* at 144; *see also* note 34, *infra*.
15. *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).
16. *Matter of Rosales Vargas and Rosales Rosales*, 27 I&N Dec. 745 (BIA 2020). Former immigration judge Jeffrey Chase in an email to the author (shared with permission), dated November 26, 2021, made an excellent point that *Bermudez-Cota* relied

on the two-step notice theory, and in doing so the Board seemed to be saying that jurisdiction existed because the two documents together constituted the proper NTA. Therefore, logically, if the two documents now under *Niz-Chavez cannot* be combined to make a proper NTA, then there can be no jurisdiction. It appears that the Board is not being logical in continuing to credit *Bermudez-Cota* while simultaneously finding no jurisdictional consequence to a defective NTA.

17. *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021).
18. 8 U.S.C. § 1229(a)(1)(G)(i).
19. *Niz-Chavez*, 141 S. Ct. at 1481.
20. *Pereira*, 138 S. Ct. at 2110.
21. *See United States v. Cotton*, 535 U.S. 625, 630 (2002); *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).
22. *See Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).
23. *Id.*
24. *See, e.g.*, *Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019); *Nkomo v. U.S. Att'y Gen.*, 930 F.3d 129 (3d Cir. 2019); *Ali v. Barr*, 924 F.3d 983 (8th Cir. 2019); *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019). The circuit split is discussed in detail in the Public Law Center's cert. petition relating to the jurisdictional issue, and can be found online at https://law.uh.edu/faculty/ghoffman/Petition%20for%20Certiorari%20and%20Appendix.pdf.
25. *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019).
26. *Id.* at 1159.
27. *Id.* at 1161.
28. *Bastide-Hernandez*, 3 F.4th 1193, 1196 (9th Cir. 2021).
29. *Arambula-Bravo*, 28 I&N Dec. at 390.
30. *Id.*
31. *Id.* at 391.
32. *Id.* at 392 (citing *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1184–86 (9th Cir. 2021)).
33. 28 I&N Dec. 408 (2021).
34. For another important case recently applying *Niz-Chavez* more broadly outside of the context of cancellation of removal, see *Rodriguez v. Garland*, 15 F.4th 351 (5th Cir. 2021) (*in absentia* orders). Although the Fifth Circuit appeared to be leading the way for the circuits in recognizing *Niz-Chavez*'s effect on *in absentia* orders, subsequent to that decision it issued another decision, *Spagnol-Bastos v. Garland*, 19 F.4th 802 (5th Cir. 2021). In *Spagnol-Bastos*, it has limited *Rodriguez*, distinguishing the former case by stating that in *Rodriguez* the petitioner provided authorities with "a viable mailing address and therefore did not forfeit his right to notice under § 1229a(b)(5)(B)." 19 F.4th at 808, n.2. The rule in the Fifth Circuit, therefore, appears to require that a viable mailing address was provided. In addition, as this article was going to press, the BIA weighed in on this issue in *Matter of Laparra*, 28 I&N Dec. 425 (BIA 2022), explicitly disagreeing with the Fifth Circuit in *Rodriguez*, and finding in violation of *Niz-Chavez* that a defective NTA purportedly does *not* trigger reopening of an *in absentia order* so long as a "statutorily compliant" notice of hearing is issued thereafter. Given the Board's latest pronouncement, it raises an interesting problem that likely will be litigated in the future: i.e., whether the BIA can adopt a different interpretation of a statute from that adopted by a court of appeals given that the Fifth Circuit has already ruled. *See*

National Cable & Telecommunications Ass'n v. Brand X Internet Services (*Brand X*), 545 U.S. 967, 982 (2005).

35. *Arambula-Bravo*, 28 I&N Dec. at 390 (citing *Rosales Rosales*).

36. *Id.* at 392, n.3.

37. *Id.*

38. *Id.* (citing *De La Rosa*).

39. *See, e.g.*, *U.S. v. Cortez*, 930 F.3d 350 (4th Cir. 2019); *Pierre-Paul v. Barr*, 930 F.3d 684 (5th Cir. 2019); *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2010); *Lopez-Munoz v. Barr*, 941 F.3d 1013 (10th Cir. 2019); *Hernandez v. U.S. Att'y Gen.*, 784 F. App'x 742, 2019 WL 4389132 (11th Cir. 2019).

40. 924 F.3d 956 (7th Cir. 2019).

41. 2 F.4th 685 (7th Cir. 2020).

42. *Id.* at 687 (citing *Hamer v. Neighborhood Hous.*, 138 S. Ct. 13, 17 (2017)).

43. *Id.* at 688.

44. *See* Public Law Center's Cert. Petition, at 8 (noting that the "preamble to the regulations explained, in a section entitled 'The Notice to Appear (Form I-862),' that the rule 'implements the language of the amended Act indicating that the time and place of the hearing must be on the Notice to Appear' … and recognized that the government would need 'automated scheduling' to issue notices to appear with the required time-and-place information.")

45. Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

46. Public Law Center's Cert. Petition, at 7 (discussing old provision and citing *Ortiz-Santiago v. Barr*, 924 F.3d 965, 962 (7th Cir. 2019)) (emphasis added).

47. 62 Fed. Reg. 449 (emphasis added).

48. Public Law Center's Cert. Petition, at 9.

49. *Id.*

50. *See Pereira*, 138 S. Ct. at 2111.

51. *Arbaugh*, 546 U.S. at 501.

52. *Id.* at 502.

53. *Id.* at 506.

54. *Id.* at 503.

55. 575 U.S. 402 (2015).

56. *Id.* at 410.

57. *Id.*

58. *See* Public Law Center's Cert. Petition, at 15.

59. *See Arbaugh*, 546 U.S. at 513.

60. *Id.*

61. The SG's response in opposition is on file with the author.

62. *De La Rosa v. Garland*, 2 F.4th 685 (7th Cir. 2020).

63. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506–07 (2006).

64. *Lugo-Resendez v. Lynch*, 831 F.3d 337 (5th Cir. 2016).

65. *See, e.g.*, *Kucana v. Holder*, 558 U.S. 233, 251, n.8 (2010) (discussing unreviewability of sua sponte motions).

66. *See ICE Interim Litigation Position Regarding Motions to Reopen in Light of the U.S. Supreme Court Decision in* Niz-Chavez v. Garland (June 9, 2021), AILA Doc. No. 21061030.

67. For a discussion from the ABA on the Article I issue and immigration courts, see, e.g., Federal Bar Ass'n, *Congress Should Establish an Article I Immigration Court*, https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/.

68. *See* TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/. *See also* Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, Time.com, Jan. 20, 2022.

69. In an email dated November 24, 2021 (shared with permission), a former chairman of the BIA, Paul Wickham Schmidt, commented to the author that "the only reason for statutory non-compliance was that EOIR and DHS 'managers' decided it was too much trouble to comply with the statute." He continued, "After creating a huge, entirely unnecessary problem, they are now arguing that the effect of statutory compliance would be too great for a multi-billion dollar immigration bureaucracy to handle." Schmidt's point is well taken: that the "EOIR backlog" has largely been "self-created" and is not the fault of the respondents, who are the real victims. I would add that the point is so important because it supports the fact that *Niz-Chavez* honors the statute (not the regulations) and requires jurisdictional consequences for the self-created defective NTA problem, which has also played a part in creating the 1.486 million-case backlog.

With a Gun to Their Head

Adopting a Duress Exception to the Serious Nonpolitical Crime Bar

Nathan Hall*

Abstract: Current asylum laws include several bars to entry into the United States. Among these is the "serious nonpolitical crime" bar, which prohibits entry to any asylum seeker who is suspected of having committed such a crime in their home country. A serious problem with the bar is that it does not contain a duress or coercion exception, meaning that even crimes committed under duress serve as bars to asylum. Thus, an asylum seeker who sells drugs or commits a theft with a gun to their head will not be allowed into the United States. The problem is only more serious because of the nature of gang violence in the Northern Triangle, common origin countries for U.S. asylum seekers. This article documents the gap in the statute as well as the statutory law and judicial decisions that have formed the basis of this problem today. While this article does provide a framework for decision makers to find a duress exception under the current law, it ultimately proposes a statutory exception to be added.

Introduction

William Ernesto Rubio Barahona is a son and a husband.[1] He is a native and citizen of El Salvador and entered the United States without documents in December of 2012.[2] Mr. Barahona's father was murdered in 2006 by one of the most prominent gangs in El Salvador, MS-13.[3] His father was a police officer who had been investigating a murder by the gang.[4] After his father was murdered, the gang began extorting money from him and his mother.[5] He was only 13 years old.[6] Eventually, the gang attempted to recruit him and threatened to kill him if he did not join.[7] He resisted, refusing to drive a getaway car[8] and declining to steal a police uniform.[9] He was forced at gunpoint to rob a man, and when he came back empty handed, he was shot by a member of the gang.[10] When he woke up at the hospital, he was charged with unlawful possession of a firearm.[11] Members of the gang attended the trial, and Mr. Barahona was too scared to testify against them.[12] He fled to the United States, fearing for his life and safety, in 2012.[13]

In 2018, his wife Cecila Rivera de Rubio, who had been granted asylum in the United States after she had been sexually assaulted by the same gang,[14] filed an asylum petition on Mr. Barahona's behalf.[15] In reviewing the petition, the Department of Homeland Security (DHS) found that he had an Interpol

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Red Notice requesting his extradition to El Salvador for being charged with the crime of participating in an "illicit gathering."[16] The Red Notice indicated that Mr. Barahona was speculated to be a *gatillero* (hitman) for MS-13, according to an investigation performed in 2010.[17]

The immigration judge (IJ) denied his asylum petition based on this information, finding that there were serious reasons to believe that Mr. Barahona had committed a "serious nonpolitical crime"[18] outside the United States.[19] This barred Mr. Barahona's asylum claim under 8 U.S.C. § 1158(b)(2)(A)(iii).[20] The Board of Immigration Appeals (BIA) dismissed his appeal in 2020, rejecting his argument that he had committed the crimes under duress.[21] Mr. Barahona's case has since been appealed and remanded back to the BIA for consideration of a separate issue.[22] Mr. Barahona has suffered immensely at the hands of MS-13, yet because he was forced to associate with them, he was barred from asylum because he was deemed by the BIA to have committed a "serious nonpolitical crime."[23]

As this case illustrates, U.S. immigration law needs to accommodate duress exceptions to its bars to asylum. Under 8 U.S.C. § 1158(b)(2),[24] there are certain exceptions to who is eligible for asylum in the United States. These include persons who have been convicted of a particularly serious crime in the United States[25] (which includes any aggravated felony[26]), provided any material support to a terrorist organization,[27] participated in persecution,[28] or have firmly resettled in another country prior to coming to the United States.[29] This article focuses on the same bar that Mr. Barahona faced, the "serious nonpolitical crime" bar, codified at 8 U.S.C. § 1158(b)(2)(A)(iii).[30]

The serious nonpolitical crime bar makes one ineligible for asylum when "[t]here are serious reasons for believing the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."[31] "Serious reasons for believing"[32] has been interpreted as requiring a standard of proof equivalent to probable cause.[33] This means that no criminal conviction by a foreign government is required to make a finding that the asylum seeker committed the serious nonpolitical crime.[34] Indeed, at the time of Mr. Barahona's trial, DHS was unable to verify whether the charges in El Salvador were still pending.[35] In these proceedings, IJs are often sitting as de facto criminal courts in the sense that they are determining whether a crime has been committed in the first instance.[36]

There is no exception for duress or coercion under the serious nonpolitical crime bar.[37] The lack of a duress exception has the potential to lead to absurd results like the one in Mr. Barahona's case: a store owner is forced to sell drugs out of their house by a gang, a family is threatened with death unless the father agrees to help the gang carry out a robbery, or young men are watched by armed older members as they engage in gruesome "initiation" rituals.[38] In each of these hypothetical scenarios, the culprit would be barred from asylum because they committed a serious nonpolitical crime.[39] Because of the immense power of organized criminal syndicates like MS-13,[40] these scenarios will only become more common as the United States remains a refuge

for many people in Northern Triangle[41] countries.[42] U.S. immigration law is in need of a change to prevent these kinds of humanitarian abuses.

The United States should adopt a statutory change to the INA that expressly provides for a duress exception to the serious nonpolitical crime bar to asylum. The rising number of immigrants from the Northern Triangle and the proliferation of gang violence there means that the issue of duress will only become a larger problem.[43] While there is a legal framework available for federal judges and BIA members to find this exception,[44] recent decisions and the legislative demonstrate that this would likely be a temporary solution.[45] Statutory reform is a more preferable option for lasting change.[46]

This article explores the history of the serious nonpolitical offense bar to asylum in the INA, addresses an alternative international law interpretation, and then focuses on how the law in this area has evolved through caselaw developed by courts and the BIA. Those sections seek to provide context to these statutory provisions and background for potential judicial or statutory reform. This article then looks at the country conditions in the Northern Triangle countries that relate to the practical need for a duress exception to this bar to asylum. It analyzes why this exception is needed and the judicial framework that might be available to judges for finding a duress exception, and addresses counterarguments that ultimately lead to the conclusion that statutory reform is preferable. Lastly, this article examines options for statutory reform: incorporating common law defenses for all immigration law or creating a duress exception solely for the serious nonpolitical crime bar to asylum.

History

This section outlines the history of U.S. asylum policy beginning with the legislative history of the asylum provisions and proceeding to examine international and judicial interpretations. It begins with a brief history of the INA and the U.S. position on asylum. It then proceeds to discuss how the specific language of the serious nonpolitical crime bar was enacted, the purpose of the broader statutory scheme it was contained in, and the goals of the administration that passed it. This section also discusses a potential alternative interpretation of the provision based on the provisions origin in the international law context. Next it addresses how the bar has been interpreted by courts and tells the story of how the duress exception failed under a parallel bar. Finally, this section explores the country conditions that practically justify a duress exception to the serious nonpolitical crime bar.

United States Asylum Policy

The INA was passed in 1952 with no refugee or asylum provision.[47] During the 1950s and 1960s, Congress would occasionally pass ad hoc statutes to

help during specific crises.[48] In 1965, Congress created a "seventh preference" under the INA's existing preference and quota system[49] for certain groups of refugees fleeing Communist countries, certain areas of the Middle East, and natural disasters.[50] In 1980, Congress passed what would become the current statutory framework for dealing with refugees and asylum seekers, the Refugee Act of 1980.[51] This act gave the president the power to determine how many refugees to accept in a given year,[52] adopted the statutory definition of refugee still used today,[53] and created the Office of Refugee Resettlement within the Department of Health and Human Services to administer these laws.[54] The refugee acceptance ceiling set by the president is often far above the actual number admitted, with only 53,691 out of 110,000 possible admissions being granted in 2017.[55]

In 1996, restrictions to asylum were added. To justify these restrictions, Representative Bill McCollum, a cosponsor of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA),[56] said in a discussion of its Committee Report:

> We have had lots of people coming in here claiming [asylum]. Most of them who claim it have no foundation in claim at all. Once they get a foot in the airport or wherever, they make that claim, they get into the system, many of them are never heard from again. We do not get the kind of speedy process we need to resolve this.[57]

IIRAIRA was enacted as part of an effort by President Bill Clinton and certain Democratic senators to co-opt the Republican "tough on crime" stance by cracking down on illegal immigration.[58] Indeed, the Conference Report on H.R. 2022 states the purpose of IIRAIRA is

> to amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States.[59]

The law conflated criminality with a lack of immigration status,[60] expanded the number of offenses that could lead to removal,[61] and created other barriers to being granted asylum, including a one-year deadline to file and the introduction of the expedited removal process.[62] Shortly after its enactment, one observer called the bill "the most diverse, divisive and draconian immigration law enacted since the Chinese Exclusion Act of 1882."[63]

International Guidance

There is a potential alternative interpretation of the serious nonpolitical crime bar distinct from its legislative history. The specific language itself, "serious nonpolitical crime," parallels that from the United Nations Convention Relating to the Status of Refugees.[64] In relevant part, it states, "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that … he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."[65] The U.N. Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (hereinafter Handbook) explicitly mentions duress and notes, "Factors generally considered to constitute **defences** to criminal responsibility should be considered."[66] It says that the provision was included to prevent receiving countries from admitting criminals but also to do justice to refugees who have committed less serious crimes or ones of a political nature.[67] Under the Handbook's interpretation, the asylum seeker should also be afforded due process of law in the receiving country, and the degree of persecution as well as any mitigating circumstances should be considered.[68]

Judicial Interpretations

While the origin of the phrase "serious nonpolitical crime" might suggest the Handbook is an appropriate interpretive device,[69] the Supreme Court has rejected this construction.[70] In a case prior to the creation of the serious nonpolitical crime bar enacted in IIRAIRA, Justice Stevens noted:

> We do not suggest, of course, that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). Indeed, the Handbook itself disclaims such force, explaining that "the determination of refugee status under the 1951 Convention and the 1967 Protocol … is incumbent upon the Contracting State in whose territory the refugee finds himself."[71]

When considering the phrase in *INS v. Aguirre-Aguirre*,[72] a case shortly after the enactment of IIRAIRA, Justice Kennedy wrote for the majority saying, "The U. N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts."[73] It held that the proper inquiry was not a balancing test between the asylum seekers' alleged criminal actions and their feared persecution.[74] Rather, the proper test under the plain language of the statute was to weigh the political objective of the actions against their criminal nature.[75] In that case, Aguirre-Aguirre

vandalized buses, assaulted passengers, and destroyed property in stores in order to protest certain governmental policies in Guatemala.[76] The Court found that the crimes were disproportionate to the political goals that the group had.[77] After *Aguirre-Aguirre*, courts and the BIA have further interpreted the bar to asylum, holding that robbery,[78] embezzlement,[79] and organ harvesting[80] all constitute serious nonpolitical crimes.[81] The Ninth,[82] Second,[83] and Eighth Circuits[84] have all held that the "serious reasons to believe" standard articulated by the statute is equivalent to probable cause.

Courts have disfavored a potential duress exception to the serious nonpolitical crime bar. The Second Circuit directly considered the question of duress under this bar to asylum in *Hernandez-Hernandez v. Barr*.[85] In this case, Hernandez-Hernandez admitted to committing multiple murders but maintained that he committed them under duress. The agency accepted that they were committed under duress but determined that there was no duress exception to this statutory bar.[86] The court decided to remand the case to the BIA because of a prior BIA decision holding that there *was* a duress exception to the persecutor bar to asylum.[87] They believed that if there were an exception for that bar, then the BIA needed to explain why the same exception should not apply here.[88] In another case, *Beltran v. Barr*,[89] the Ninth Circuit faced a similar issue of possible duress under the serious nonpolitical crime bar. This case involved a man who testified he was impliedly coerced by a cartel into carrying a backpack of drugs across the border.[90] The court held on this issue that even if the defense did exist, which they did not ultimately decide, Beltran did not put forth enough evidence to establish the defense.[91] The most recent BIA precedent, Mr. Barahona's case, has followed the same trend as the courts of appeals. The BIA held in *Matter of W–E–R–B–*,[92] the name of the case prior to its appeal to the Eighth Circuit, that there is not an established duress exception to the serious nonpolitical crime bar.[93]

An illustration of how courts and the Department of Justice have dealt with duress exceptions to statutory bars to asylum is the saga of *Matter of Negusie*.[94] Negusie was a dual national of Eritrea and Ethiopia who was forced to work as a prison guard for the Eritrean government.[95] The case went up to the Supreme Court on the question of whether there was a duress exception to the persecutor bar.[96] The Supreme Court remanded the case all the way back to the BIA,[97] which decided that there was a duress exception.[98] After the BIA made the decision, Attorney General Jeff Session referred the issue to himself for consideration.[99] This rendered the BIA decision without effect until he made a final determination.[100] On November 5, 2020, Attorney General William Barr issued an opinion, ultimately deciding that there was no duress exception to the persecutor bar.[101] Following the logic of *Hernandez-Hernandez*[102] and *Matter of W–E–R–B–*,[103] which both rely on *Negusie*, any finding of a duress exception for the serious nonpolitical crime bar will likely require an overturning of or distinction from *Negusie*.[104]

Country Conditions

The conditions of the countries most affected by asylum law also give rise to practical reasons to find a duress exception to the serious nonpolitical crime bar. The United States has seen an increasing number of immigrants from the Northern Triangle countries (Honduras, Guatemala, and El Salvador).[105] This influx is the result of a mix of factors, including high levels of poverty, increasing homicide rates paired with ineffective governance, and susceptibility to natural disasters.[106] The increase in asylum seekers, specifically, is markedly dramatic, with the number of people seeking asylum in the United States from Honduras growing from 100 in 2010 to 81,375 in 2019, El Salvador growing from 319 in 2010 to 113,404 in 2019, and Guatemala growing from 362 in 2010 to 114,404 in 2019.[107]

One of the reasons this increase exists is the strengthening of criminal syndicates in Northern Triangle countries.[108] Gang membership in 2016 in these countries was estimated to be about 30,000 Barrio 18 members and 24,000 MS-13 members,[109] although tallying gang membership has been historically difficult.[110] In El Salvador, gangs are estimated to make around $20 million a year from extortion schemes, and may well be the country's largest employer, hiring 60,000 in various roles, including as lookouts, collectors, and assassins.[111] Gangs cost the country 16 percent of their gross domestic product,[112] and it is estimated that over 500,000 people who do not belong to the gang, such as relatives, business partners, politicians, and law enforcement, are financially dependent on the gangs.[113] Their reliance on extortion makes them different than drug cartels, which generate their income primarily from drug sales,[114] and their presence is so uncontested that Mauricio Ramírez Landaverde, El Salvador's minister of justice and security, who oversees the national police force, is quoted as saying, "[Y]ou don't know where the state ends and the criminal organizations begin."[115]

These gangs do target certain groups for violence, most notably young women,[116] and have participated in human trafficking.[117] They target primarily local business owners and those in transportation industries for extortion, but they do not limit themselves to just these industries.[118] *The Economist* lays out a chilling illustration of how this extortion happens:

> With buses, the involuntary partnership begins when a "neighbourhood kid approaches you with a ringing mobile phone," says the route's "negotiator." On the line is a gang leader, calling from jail to discuss *la renta*. At first, the negotiator simply paid the Mara Salvatrucha, the gang that controls most of the territory through which the route passes. But in 2014 the caller was from Barrio 18, which controls the hillside area that abuts the route office, where 30 buses spend the night. The zone was in dispute, the gangster pointed out. He dropped the name of a recent murder victim, and "offered to make sure my

> drivers stayed safe, for a small contribution," the negotiator recalled. He hung up and ignored subsequent calls, until one night the route office was machinegunned, nearly killing a bus driver who was taking a shower. Since then, the negotiator has paid both gangs. The $350 for Barrio 18 is slipped into the apron of an old woman who climbs the hill with a wooden cane on the first Friday of each month.[119]

The power these gangs possess over the population and the extortion schemes they run make them incredibly dangerous actors in a region whose fleeing population is surging.[120]

Analysis

While the existing literature has discussed the possibility of exceptions for the "persecutor" bar[121] and for the "material support" bar,[122] there has been no direct discussion of the possibility of a duress exception for the serious nonpolitical crime bar. This gap is particularly glaring considering that courts and the BIA have directly dealt with the issue of duress as it relates to the serious nonpolitical crime bar in recent years.[123] Broad discussion has been had about common-law defenses in immigration law generally,[124] but IJs often sit as de facto criminal courts in hearings involving the serious nonpolitical crime bar, making this conversation particularly important. Because asylum cases involving the serious nonpolitical crime issue do not require immigration judges to necessarily rely on a previous conviction,[125] determine whether a certain action is committed by a terrorist group,[126] or make a decision about persecution[127]—all of which would be within the routine functions of immigration courts[128]—it is especially important that immigration judges consider duress in this context.[129]

Two separate attorneys general felt strongly enough about duress exceptions to statutory bars to asylum that they dealt with the issue themselves.[130] And as the BIA stated in *Matter of W–E–R–B–*, the Attorney General's decision in *Negusie* will have a direct impact on how the possibility of duress exceptions will be treated under other bars to asylum.[131] Not only, then, is this issue important in academic discussion due to the unique nature of the serious nonpolitical crime, it is salient to both courts and attorneys general.

Additionally, the proliferation of gang violence[132] in countries with increasingly high numbers of immigrants and asylum seekers to the United States[133] mandates a discussion about the duress exception to the serious nonpolitical crime bar specifically. Extortion and coercion go hand in hand.[134] Not only has the number of asylum seekers from Northern Triangle countries skyrocketed,[135] but the extortive gangs that they are fleeing have also grown.[136]

An additional reason asylum seekers fleeing criminal organizations like MS-13 and Barrio 18 face problems under the serious nonpolitical crime bar

is that these gangs escape classification as a terrorist organization. Were these gangs designated as terrorist organizations, those wrapped up in their extortion schemes would face a problem under the "material support bar" at 8 U.S.C. § 1182(a)(3)(B)(iii),[137] possibly in addition to the serious nonpolitical crime bar at 8 U.S.C. § 1158(b)(2)(A)(iii).[138] However, there could be a possible benefit to asylum seekers fleeing gang violence, one they do not normally have,[139] since terrorist groups are more likely to be understood as "political actors."[140] Treating terrorist groups as political actors would give asylum seekers a stronger case for fleeing due to persecution based on "political opinion," a protected ground for asylum.[141] It is not clear whether designation as a terrorist organization would guarantee that the gang would be viewed as a political actor or if the designation would do more harm than good.[142] There is a significant practical trade-off, however, as the INA bars anyone seeking asylum who has provided "material support" to a terrorist organization.[143] "Material support" is broader than a "serious nonpolitical crime" in that it might encompass totally innocent acts that, even done intentionally, might not be crimes.[144] There is also no duress exception to the material support bar to asylum,[145] meaning that the "war tax"[146] paid under the threat of death would exclude a massive amount of people fleeing gang violence from being eligible for asylum.[147] Along with the policy reasons that MS-13 and Barrio 18 should not be classified as terrorist organizations, their organizational structure and transnational impact show that the "terrorist" designation does not quite fit.[148]

Another practical reason to consider duress exceptions to asylum bars is that they generally help avoid absurd results. An illustration of this is Judge Hamilton's concurrence in *Jabateh v. Lynch*,[149] an asylum case at the Seventh Circuit that found that an ex-government official was ineligible for asylum because he had provided material support to a terrorist organization.[150] Believing that the same result could have been reached on different grounds,[151] Judge Hamilton wrote to express his disagreement with both the breadth of activity that "material support" had come to encompass in recent decisions,[152] and the unavailability of duress for asylum seekers who had provided even benign or unknowing support to terrorist organizations.[153] He explained the absurdity that might occur:

> For example, the government took the position at oral argument in this case that the material support bar would apply to a doctor or nurse who provided emergency medical care to a person she "should have known" was affiliated with a group that uses violence. Given the Board's approach to duress in *M-H-Z*, the bar would apply even if she provided the medical care at gunpoint. Really?[154]

It is easy to imagine a similar scenario that would apply to the serious nonpolitical crime bar. An MS-13 *clica* in Northern Guatemala decides to start targeting an ethnic minority that holds a large amount of political power in

their neighborhood. The gang begins to threaten members of the ethnic group to go along with a small drug operation they are conducting out of storefronts, or else face "elimination." The gang also threatens that they better not try to move to another neighborhood, or the gang would get its "friends" to off them instead. A few people agree to go along with the operation, but later decide to flee to the United States and seek asylum. Even if an IJ finds that they only committed the crime under duress, and that they would otherwise be eligible for asylum, they would be denied.[155] As Judge Hamilton continues:

> Many deserving asylum-seekers could be barred otherwise. For example, the grocer who sells groceries to a known rebel fighter who is shopping for dinner would be providing support to terrorism. The taxi driver, the plumber, the dentist—anyone who has even minor commercial contact with a known terrorist, even in a setting that does not advance the goals of a terrorist organization—has supported terrorism. This broad approach could bar people simply because the places they have escaped from are ones where terrorists were active.[156]

Simply replace "terrorist" with "coercive criminal organization" and the predicament becomes clear.

The statutory language of the serious nonpolitical crime bar itself comes from the United Nations Convention Relating to the Status of Refugees,[157] which means it should incorporate its supplement, the U.N. Handbook.[158] The legislative history of IIRAIRA, which undoubtedly points toward tighter immigration restrictions for noncitizens who have been suspected to have committed a crime,[159] and the source for the statutory language, the U.N. Convention, along with its supplemental interpretation guide, conflict.[160] This means there is an alternative route for judicial interpretation. Justice Kennedy, in his opinion in *INS v. Aguirre-Aguirre*, even called the U.N. Handbook a "useful interpretive aid."[161] In fact, the test that the Court affirms in *Aguirre-Aguirre* comes almost directly out of the U.N. Handbook,[162] establishing its utility in interpreting asylum law. The U.N. Handbook makes explicit that duress should be considered when determining whether someone has committed a serious nonpolitical crime.[163] It would be entirely reasonable for an IJ or BIA opinion to use this U.N. Handbook as an interpretive aid.[164]

The serious nonpolitical crime bar is also a unique bar to asylum. Only under this bar is an IJ making a determination about the lawfulness of an action without relying on a prior conviction[165] or interpreting the law in a way that is familiar to them given other areas of immigration law. This distinction makes former Attorney General Barr's opinion in *Matter of Negusie*[166] distinguishable from future decisions about duress exceptions to the serious nonpolitical crime bar. Many of the arguments made in *Matter of Negusie* fall flat when applied to the serious nonpolitical crime bar. For example, former Attorney General Barr notes that this would burden the judicial resources of

the immigration system by complicating investigations into an act that happened often years in the past.[167] However, regarding the serious nonpolitical crime bar, much investigation is already required, given that the IJ is tasked with making a decision in the first instance as to whether the conduct was unlawful.[168] In a similar vein, the lack of statutory ambiguity that Barr relies on in *Negusie* does not necessarily exist with the serious nonpolitical crime bar.[169] There is no clear statutory answer as to whether judges should look to U.S. statutory law, federal common law, or the laws of other countries in determining whether a serious nonpolitical crime was committed.[170]

Finally, immigration law sits on a foundation of federal common law, meaning that common-law defenses, like duress, should be available. The fact that the serious nonpolitical crime bar specifically uses the word "crime" is sufficient to mandate the availability of common-law defenses.[171] Notably, in *Guo Qi Wang v. Holder*,[172] the court held that state-sponsored organ harvesting, legal in the noncitizen's home country, still constituted a serious nonpolitical crime.[173] This shows that courts are using some standard other than simply a conviction in a foreign country to determine whether the activity was criminal. If they are using American criminal-law principles, it follows that common-law defenses should be available to them as they are to American criminal defendants. If they are using international criminal-law principles, they should recognize that these principles incorporate several common-law defenses, including duress, as well.[174]

Taken together, these principles offer modes of judicial interpretation that could be used to find a duress exception to the serious nonpolitical crime bar without statutory reform. IJs could distinguish *Negusie* and find that the uniqueness of the serious nonpolitical crime bar warrants the implicit inclusion of a duress exception. They could also look to the animating principles of the provision and use the U.N. Handbook to interpret the provision differently. They might be swayed by the idea that federal common law dictates they should incorporate affirmative defenses because the definition of "crime" they use adheres to either U.S. or international criminal law.[175] They could also find that there is a duress exception to the serious nonpolitical crime bar because there is a policy need to prevent absurd results and make sure that deserving noncitizens have the opportunity to have their asylum claims heard. This analysis gives judges several avenues for finding a duress exception to the serious nonpolitical crime bar.

Proposal

Despite there being several avenues for judicial interpretation that would amount to the finding of a duress exception to the serious nonpolitical crime bar, legislative change is preferable because of the executive actors who have outsized power in determining the law. As demonstrated by the *Negusie* saga

discussed above, the attorney general and the BIA wield an extraordinary amount of power in interpreting the law. Because both are parts of the executive branch, changing administrations means that judicial interpretations can change in the span of just a few years. Additionally, although the origin of the serious nonpolitical crime bar is the United Nations Convention Relating to the Status of Refugees,[176] the legislative history of IIRAIRA is hard to overcome.[177] The clear purpose of the legislation was to place more barriers to legal status in the United States for those who had committed any kind of crime.[178] Judges could look back to this history and use it to reinforce the idea that no duress exception was intended.

There are two major options for legislative reform. The first is an expansive amendment to asylum law that makes clear that federal common law, including affirmative common-law defenses like duress, are applicable to asylum law. An example of this kind of provision is seen at 28 U.S.C. § 3308 on federal debt-collection procedure, specifically fraudulent transfers involving debts. It reads, "Except as provided in this subchapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause shall apply to actions and proceedings under this subchapter." A similar provision could be placed at the beginning of 8 U.S.C. § 1158[179] making similar principles applicable to asylum.

The second major option is to create exceptions derived from common-law defenses exclusively for the serious nonpolitical crime bar. Since this bar is unique because it requires IJs to make determinations of criminal behavior, it would follow that federal common-law defenses be available for this bar alone. This could be done by inserting a clause similar to the one for federal debt-collection procedure as a subpoint to 8 U.S.C. § 1158(b)(2)(A)(iii).[180] Another option, perhaps one that might have been more palatable to the drafters of IIRAIRA, would be to include a list of mitigating factors similar to those found at 18 U.S.C. § 3592(a). These would include common-law defenses and other circumstances that would mitigate against a serious nonpolitical crime. For example, a drug trafficking offense committed under duress would not be a per se serious nonpolitical crime as it is now, but it would also not preclude an IJ from finding that the noncitizen committed a serious nonpolitical crime. While this does not fully incorporate the federal common law to the extent that international principles suggest,[181] it may be a more balanced option for legislative reform.

While a narrower statutory exception might be more politically feasible, a broader amendment to all of asylum law is preferable. The BIA and its interpretation of the INA should conform more closely to the United Nations Convention Relating to the Status of Refugees so that the United States can uphold its international obligations.[182] Despite the serious nonpolitical crime bar being unique in its criminal implications, there are still real problems that arise from the lack of a duress exception to other bars to asylum, as

demonstrated by the *Negusie* example. The positive impact this kind of reform would have extends beyond the serious nonpolitical crime bar itself.[183]

Conclusion

There should be a duress exception to the serious nonpolitical crime bar to asylum. There is a major gap in the literature around duress exceptions for bars to asylum, which is even more significant considering the uniqueness of this particular bar. Practical considerations, the humanitarian origins of the provision,[184] and the federal common law[185] all mandate that this exception exists. While there are legal frameworks that judges could use to find that this exception already exists, legislative reform is preferable to create lasting change. We cannot continue to pretend that it is acceptable to deny noncitizens who are undergoing a de facto criminal trial the same common-law defenses available to U.S. citizens. These are people deserving of asylum who are only engaging in criminal behavior when they have a gun to their heads.

Notes

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1. *Barahona v. Wilkinson*, 2021 U.S. App. LEXIS 2911, at *2–3 (8th Cir. Feb. 3, 2021).
2. *Id.* at *2.
3. *Id.* at *3.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at *4.
8. *Id.* at *3.
9. *Id.*
10. *Id.* at *4.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at *2, *4.
15. *Id.* at *2.
16. *Id.* "Illicit Gathering" under Article 345 of the Salvadoran Penal Code is meant to target organized crime and criminal gangs. Canada: Immigration and Refugee Board of Canada, *El Salvador: Anti-Gang Law Enforcement Efforts, Including Anti-Gang Legislation (2011-2015)* (Sept. 2, 2015), https://www.refworld.org/docid/560b855e4.html.
17. *Id.*

18. 8 U.S.C. § 1158(b)(2)(A)(iii), INA § 208(b)(2)(A)(iii). Moving forward, this note will use the U.S.C. citation in the text of the note itself and list the concurrent Immigration and Nationality Act (INA) citation in the footnotes. This is meant to give helpful guidance to practitioners and students who are more familiar with the INA's provisions. The INA is a comprehensive immigration statute that was enacted originally in 1952 and has since been amended several times. U.S. Citizenship and Immigration Services (USCIS), *Immigration and Nationality Act*, https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act.

19. INA § 208(b)(2)(A)(iii).

20. *Barahona*, U.S. App. LEXIS 2911, at *3.

21. *Matter of W–E–R–B–*, 27 I&N Dec. 795, n.8 (BIA 2020).

22. *Barahona*, U.S. App. LEXIS 2911, at *11. The Eighth Circuit ultimately decided that the Interpol Red Notice was not enough evidence to meet the "serious reasons for believing" standard discussed below. *Id.*

23. *Matter of W–E–R–B–*, n.8.

24. INA § 208(b)(2).

25. 8 U.S.C. § 1158(b)(2)(A)(ii), INA § 208(b)(2)(A)(ii).

26. 8 U.S.C. § 1158(b)(2)(B)(i), INA § 208(b)(2)(B)(i). Aggravated felonies are enumerated at 8 U.S.C. § 1101(a)(43), INA § 101(a)(43), and include, among other things, illicit trafficking of controlled substances, (a)(43)(B), a crime of violence, (a)(43)(F), and fraud or deceit in excess of $10,000, (a)(43)(M)(i).

27. 8 U.S.C. § 1158(b)(2)(A)(v), INA § 208(b)(2)(A)(v).

28. 8 U.S.C. § 1158(b)(2)(A)(i), INA § 208(b)(2)(A)(i).

29. 8 U.S.C. § 1158(b)(2)(A)(vi), INA § 208(b)(2)(A)(vi).

30. INA § 208(b)(2)(A)(iii).

31. *Id.*

32. 8 U.S.C. § 1158(b)(2)(A)(iii), INA § 208(b)(2)(A)(iii).

33. *McMullen v. INS*, 788 F.2d 591, 599 (9th Cir. 1986).

34. A conviction of a crime by a foreign government is not per se a serious nonpolitical crime, and some prosecution may in fact be persecution and the basis for an asylum claim. *See, e.g.*, *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997). In determining if a crime is not a serious nonpolitical crime, the political nature of the crime must outweigh its common law character. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 429 (1999).

35. *Barahona*, 2021 U.S. App. LEXIS 2911, at *4-5.

36. *See* Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. Rev. 142, 186 (2019) ("Since the serious nonpolitical crime bar does not require a conviction, the determination of whether a crime has been committed does not involve reassessing culpability that a criminal court has already determined.").

37. *Matter of W–E–R–B–*, 27 I&N Dec. 795, n.8 (BIA 2020) (holding that there is no duress exception to the serious nonpolitical crime bar to asylum).

38. Sonja Wolf, *Mara Salvatrucha: The Most Dangerous Street Gang in the Americas?* 54 Latin American Politics and Society 65, 72 (2012) (the physical elimination of a rival gang member is a required initiation ritual in some areas). InSight Crime, *MS13 in the Americas: How the World's Most Notorious Gang Defies Logic, Resists Destruction*, Center for Latin American & Latino Studies, 26, 36 (2018) (*el brinco* ("the beating") is an initiation ritual where new recruits are beaten for sometimes minutes on end. Sexual abuse is an alternative for women being initiated into the gang).

39. Robbery, drug trafficking, and torture are all examples of serious nonpolitical crimes. *Matter of Y–L–, A–G–, and R–S–R–*, 23 I&N Dec. 270 (AG 2002) (drug trafficking); *Matter of Ballester-Garcia*, 17 I&N Dec. 592 (BIA 1980) (robbery); *Guo Qi Wang v. Holder*, 583 F.3d 86, 89 (2d Cir. 2009) (torture).

40. InSight Crime, *MS13 in the Americas*, n.9. Notably, these gangs should not be designated as terrorist organizations, and classifying them as such would move the analysis under a different bar to asylum. Jillian Blake, *MS-13 as a Terrorist Organization: Risks for Central American Asylum Seekers*, 116 Mich. Law Rev. 39, 40 (2017). See discussion of the material support bar, *infra*.

41. The "Northern Triangle" refers to the countries of El Salvador, Honduras, and Guatemala. Amelia Cheatham, *Central America's Turbulent Northern Triangle*, Council on Foreign Relations (2019), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle. *See also* Robbie Whelan, *Why Are People Fleeing Central America? A New Breed of Gangs Is Taking Over*, Wall St. J., Nov. 2, 2018, https://www.wsj.com/articles/pay-or-die-extortion-economy-drives-latin-americas-murder-crisis-1541167619 (emphasizing the power and control that gangs have over the economies of Northern Triangle countries).

42. Amelia Cheatham, *Central America's Turbulent Northern Triangle*.

43. *See infra* section on International Guidance.

44. *See infra* Analysis section.

45. *See infra* section on History.

46. *See infra* Analysis section.

47. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 et seq.).

48. Stephen H. Legomsky & David B. Thronson, Immigration and Refugee Law and Policy 1146 (7th ed. 2019) (citing U.S. Congr. Research Service, Review of U.S. Refugee Resettlement Programs and Policies 7–11 (Comm. Print, Senate Com. on the Judiciary, 1980)).

49. This refers to the immigration system of numerical caps called "quotas" and the categories of immigrants allowed into the United States as described generally today at 8 U.S.C. § 1151(a), INA § 201(a) and quantified at 8 U.S.C. § 1151(c), INA § 201(c). The "seventh preference" built on the existing system of immigrants instead of creating a new system for refugees.

50. *See* Legomsky & Thronson, at 1147 (citing Pub. L. No. 89-236 § 3, 79 Stat. 911, 913 (Oct. 3, 1965)).

51. *Id.* at 1149.

52. *Id.*

53. *Id.* "The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42), INA § 101(a)(42).

54. *See* Legomsky & Thronson, at 1150.

55. Nawad Mossaad, *Annual Flow Report: Refugees and Asylees: 2017*, DHS Office of Immigration Statistics 3 tbl. 1 (Mar. 2019).

56. Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724.

57. 142 Cong. Rec. H. 11071.

58. Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. on Migration and Hum. Security 192, 193 (2018).

59. H.R. Rep. No. 104-828 (1996).

60. Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, at 192.

61. *Id.* at 194.

62. *Id.* at 196.

63. David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 Cornell L. Rev. 820, 821 (1983) (quoting Dan Danilov, *U.S. Courts Offer No Protection from Latest Immigration Law*, Seattle Post-Intelligencer, Dec. 17, 1996, at A19.).

64. United Nations Convention Relating to the Status of Refugees, ch. 1, art. 1, § F(b). *See also* *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) ("As we explained in *Cardoza-Fonesca*, 'one of Congress' primary purposes' in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees.").

65. United Nations Convention Relating to the Status of Refugees, ch. 1, art. 1, § F(b).

66. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, 130 (Reissued 2019) (emphasis in original).

67. *Id.* at 36.

68. *Id.*

69. *See* United Nations Convention Relating to the Status of Refugees, ch. 1, art. 1, § F(b).

70. *Aguirre-Aguirre*, 526 U.S. at 427.

71. *INS v. Cardoza-Fonesca*, 480 U.S. 421 n.22 (1987) (citing Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 1 (ii) (Geneva, 1979)).

72. 526 U.S. 415 (1999).

73. *Aguirre-Aguirre*, 526 U.S. at 427.

74. *Id.* at 430.

75. *Id.* at 432.

76. *Id.* at 418.

77. *Id.* at 431.

78. *Matter of Ballester-Garcia*, 17 I&N Dec. 592 (BIA 1980).

79. *Kenyeres v. Ashcroft*, 538 U.S. 1301 (2003).

80. *Guo Qi Wang v. Holder*, 583 F.3d 86 (2d Cir. 2009).

81. Lastly, drug trafficking has found to be a per se serious nonpolitical crime, except under extremely specific circumstances. *Go v. Holder*, 640 F.3d 1047, 1052 (9th Cir. 2011).

82. *Id.*

83. *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

84. *Barahona v. Wilkinson*, 2021 U.S. App. LEXIS 2911, at *9, *11 (8th Cir. Feb. 3, 2021).

85. 789 F. App'x 898 (2d Cir. 2019).

86. *Id.* at 900–01.

87. *Id.* The persecutor bar refers to the bar to asylum for any person who orders, incites, or assists in the persecution of another on account of a protected class. 8 U.S.C. § 1158(b)(2)(A)(i), INA 208(b)(2)(A)(i). The prior BIA decision was *Matter of Negusie*, which has since been overturned. *Matter of Negusie*, 28 I&N Dec. 120 (AG 2020).

88. *Hernandez-Hernandez*, 789 F. App'x at 900–01.

89. 756 F. App'x 773 (9th Cir. 2019).

90. *Id.* at 774.

91. *Id.*

92. 27 I&N Dec. 795 (BIA 2020).

93. *Id.* n.8.

94. 28 I&N Dec. 120 (AG 2020).

95. *Negusie v. Holder*, 555 U.S. 511, 514–15 (2009).

96. *Id.* at 516.

97. *Id.* at 525.

98. *Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018).

99. *Matter of Negusie*, 27 I&N Dec. 481 (AG 2018).

100. *Id.*

101. *Matter of Negusie*, 28 I&N Dec. 120 (AG 2020).

102. 789 F. App'x 898 (2d Cir. 2019).

103. 27 I&N Dec. 795 n.8 (BIA 2020).

104. The status of *Negusie* and immigration law more broadly is subject to change with the pending decision of new Attorney General Merrick Garland, who has referred the case to himself for consideration. *See Matter of Negusie*, 28 I&N Dec. 399 (AG 2021).

105. Allison O'Connor, et al., *Central American Immigrants in the United States* (Aug. 15, 2019), https://www.migrationpolicy.org/article/central-american-immigrants-united-states-2017; D'Evra Cohn, et al., *Rise in U.S. Immigrants from El Salvador, Guatemala and Honduras Outpaces Growth from Elsewhere* (Dec. 7, 2017), https://www.pewresearch.org/hispanic/2017/12/07/rise-in-u-s-immigrants-from-el-salvador-guatemala-and-honduras-outpaces-growth-from-elsewhere/.

106. Peter J. Meyer & Maureen Taft-Morales, Cong. Rsch. Serv., IF11151, Central American Migration: Root Causes and U.S. Policy (2019).

107. Migration Policy Institute, *Refugee and Asylum Seeker Populations by Country of Origin and Destination, 2000–19* (July 30, 2019), https://www.migrationpolicy.org/programs/data-hub/charts/refugee-and-asylum-seeker-populations-country-origin-and-destination.

108. *See* Meyer & Taft-Morales, Central American Migration: Root Causes and U.S. Policy; InSight Crime, *MS13 in the Americas: How the World's Most Notorious Gang Defies Logic, Resists Destruction*, Center for Latin American & Latino Studies, n.9 (2018); InSight Crime, *Barrio 18* (Feb. 13, 2018), https://www.insightcrime.org/el-salvador-organized-crime-news/barrio-18-profile-2/. The two major players are MS-13 and Barrio 18. They have become so prolific that they are known simply as "letters" and "numbers" respectively. Robbie Whelan, *Why Are People Fleeing Central America? A New Breed of Gangs Is Taking Over*, Wall St. J., Nov. 2, 2018, https://www.wsj.com/articles/pay-or-die-extortion-economy-drives-latin-americas-murder-crisis-1541167619. For more information on both groups, see Clare Ribando Seelke, Cong. Rsch. Serv., RL34112, Gangs in Central America (2016).

109. Clare Ribando Seelke, Gangs in Central America, fig. 2.

110. InSight Crime, *MS13 in the America*, annex 1.

111. Robbie Whelan, *Why Are People Fleeing Central America?*

112. This GDP estimate comes from a combination of the total cost of violence. Additionally, Salvadoreans pay about 3% of their GDP to the gangs. *The Gangs That Cost 16% of GDP*, The Economist (May 21, 2016), https://www.economist.com/the-americas/2016/05/21/the-gangs-that-cost-16-of-gdp.

113. *Id.*

114. InSight Crime, *MS13 in the Americas* 63 ("The MS13 is still far from constituting a drug cartel or anything like it.").

115. Robbie Whelan, *Why Are People Fleeing Central America?*

116. InSight Crime, *MS13 in the Americas* 26.

117. *Id.* at 45.

118. Sonia Nazario, *Pay or Die*, N.Y. Times, July 26, 2019, https://www.nytimes.com/interactive/2019/07/25/opinion/honduras-corruption-ms-13.html. On the issue of how gang violence might qualify certain people for asylum, see Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 Berkeley La Raza L.J. 109 (2013); *The Gangs That Cost 16% of GDP* ("Such extortion is an unavoidable feature of life in El Salvador. A vast, meticulously organised network touches every business, from kerbside tortilla-sellers to multinationals."), https://www.economist.com/the-americas/2016/05/21/the-gangs-that-cost-16-of-gdp.

119. *The Gangs That Cost 16% of GDP*.

120. Migration Policy Institute, *Refugee and Asylum Seeker Populations by Country of Origin and Destination, 2000-19* (July 30, 2019), https://www.migrationpolicy.org/programs/data-hub/charts/refugee-and-asylum-seeker-populations-country-origin-and-destination.

121. Frank M. Walsh, *Navigating the "Series of Rocks": Applying the Lessons from the Material Support Bar to Include Duress, De Minimis, and Age of Consent Exceptions to the Persecutor Bar*, 22 Fla. J. Int'l L. 227 (2010); Charles S. Ellison, *Defending Refugees: A Case for Protective Procedural Safeguards in the Persecutor Bar Analysis*, 33 Geo. Immigr. L.J. 213 (2019).

122. John Flud, Comment, *Duress and the Material Support Bar in Asylum Law: Finding Equity in the Face of Harsh Results*, 59 S. Tex. L. Rev. 537 (2018); Gregory F. Laufer, Note, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act's "Material Support for Terrorism Provision,"* 20 Geo. Immigr. L.J. 437 (2006).

123. *See e.g.*, Hernandez-Hernandez v. Barr, 789 F. App'x 898 (2d Cir. 2019).

124. Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. Rev. 142 (2019); Elizabeth A. Keyes, *Duress in Immigration Law*, 44 Seattle L. Rev. 307 (2021).

125. The particularly serious crime bar will apply if there is a conviction, but also if there are "serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. § 1158(b)(2)(A)(ii), (iii), INA § 208(b)(2)(A)(ii)(iii).

126. The material support bar, 8 U.S.C. §§ 1158(b)(2)(A)(v), 1182(a)(3)(B)(iv)(VI); INA §§ 208(b)(2)(A)(v), 212(a)(3)(B)(iv)(VI), relies on a determination of what constitutes a terrorist group.

127. The persecutor bar to asylum, 8 U.S.C. § 1158(b)(2)(A)(i), INA § 208(b)(2)(A)(i), requires a finding that one was involved in the persecution of another.

128. Immigration courts rely on convictions in determining inadmissibility, *see* 8 U.S.C. § 1182(a)(2), INA § 212(a)(2), and deportability, *see* 8 U.S.C. § 1227(a)(2), INA § 237(a)(2). Immigration courts determine terrorist activity in determining inadmissibility, *see* 8 U.S.C. § 1182(a)(3)(b), INA § 212(a)(3)(b), and deportability, *see* 8 U.S.C. § 1227(a)(4)(b), INA § 237(a)(4)(b). Lastly, immigration courts make persecution determinations when granting or denying asylum. *See* 8 U.S.C. § 1101(a)(42), INA § 101(a)(42).

129. *See* Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. Rev. 142, 186 (2019) ("Since the serious nonpolitical crime bar does not require a conviction, the determination of whether a crime has been committed does not involve reassessing culpability that a criminal court has already determined.").

130. *Matter of Negusie*, 27 I&N Dec. 481 (AG 2018); *Matter of Negusie*, 28 I&N Dec. 120 (AG 2020).

131. *Matter of W–E–R–B–*, 27 I&N Dec. 795 n.8 (BIA 2020).

132. Robbie Whelan, *Why Are People Fleeing Central America? A New Breed of Gangs Is Taking Over*, Wall St. J. Nov. 2, 2018, https://www.wsj.com/articles/pay-or-die-extortion-economy-drives-latin-americas-murder-crisis-1541167619.

133. Migration Policy Institute, *Refugee and Asylum Seeker Populations by Country of Origin and Destination, 2000-19* (July 30, 2019), https://www.migrationpolicy.org/programs/data-hub/charts/refugee-and-asylum-seeker-populations-country-origin-and-destination.

134. InSight Crime, *MS13 in the Americas: How the World's Most Notorious Gang Defies Logic, Resists Destruction* 24 (2018) ("In fact, they have a duty to obtain tribute for the gang, which often means taking violent or coercive actions against others.").

135. Migration Policy Institute, *Refugee and Asylum Seeker Populations by Country of Origin and Destination, 2000–19*.

136. Clare Ribando Seelke, Cong. Rsch. Serv., RL34112, Gangs in Central America 4 (2016).

137. INA § 212(a)(3)(B)(iii). The material support bar disqualifies for asylum any noncitizen who has contributed material support to a terrorist organization. The BIA has defined material support broadly and to be without a quantitative requirement. *Matter of A–C–M–*, 27 I&N Dec. 303 (BIA 2018).

138. INA § 208(b)(2)(A)(iii).

139. *See e.g.*, *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008) (holding that general aversion to gangs does not constitute a political opinion).

140. Jillian Blake, *MS-13 as a Terrorist Organization: Risks for Central American Asylum Seekers*, 116 Mich. Law Rev. 39, 46 (2017).

141. *Id.* 8 U.S.C. § 1158(b)(1)(B)(i), INA § 208(b)(1)(B)(i).

142. Blake, *MS-13 as a Terrorist Organization* at 47 ("While MS-13 should be treated as a serious threat, it should not formally be designated a terrorist organization because of the harmful effect such a designation would have on Central American asylum seekers.").

143. 8 U.S.C. § 1158(b)(2)(A)(v), INA § 208(b)(2)(A)(v); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI), INA § 212 (a)(3)(B)(iv)(VI).

144. *Hernandez v. Sessions*, 884 F.3d 107, 109 (2d Cir. 2017) (providing foodstuffs to revolutionary forces).

145. *Id.*

146. A "war tax" is an extortive payment made to a gang in exchange for safety, essentially not risking direct violence by the gang. Sonia Nazario, *Pay or Die*, N.Y. Times, July 26, 2019, https://www.nytimes.com/interactive/2019/07/25/opinion/honduras-corruption-ms-13.html.

147. Molly O'Toole, *Micro-Extortion by Gangs Is Costing El Salvador Millions of Dollars a Year, $10 at a Time* (June 17, 2017), https://qz.com/1008580/micro-extortion-by-gangs-is-costing-el-salvador-4-billion-a-year-10-at-a-time/.

148. InSight Crime, *MS13 in the Americas* 5 (hesitating to call MS-13 a transnational criminal organization, much less a terrorist organization).

149. 845 F.3d 332 (7th Cir. 2017).

150. *Id.* at 341.

151. *Id.* at 343 (Hamilton, J. concurring).

152. *Id.*

153. *Id.* at 348.

154. *Id.*

155. *See, e.g.*, *Hernandez-Hernandez v. Barr*, 789 F. App'x 898 (2d Cir. 2019).

156. *Jabateh v. Lynch*, 845 F.3d at 348.

157. United Nations Convention Relating to the Status of Refugees, ch. 1, art. 1, § F(b).

158. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection 119 (reissued 2019).

159. H. Rep. No. 104-828 (1996).

160. *Compare id. with* United Nations Convention Relating to the Status of Refugees, ch. 1, art. 1, § F(b), *and* the UNHCR Handbook 119.

161. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

162. *Compare id.* at 432 *with* the UNHCR Handbook 118.

163. UNHCR Handbook 119.

164. The inconsistency of the BIA's interpretation of the law with the United States's international obligations is a subject of critique. *See* Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 Duke L.J. 1059 (2011).

165. Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. Rev. 142, 186 (2019) ("Since the serious nonpolitical crime bar does not require a conviction, the determination of whether a crime has been committed does not involve reassessing culpability that a criminal court has already determined.").

166. 28 I&N Dec. 120 (AG 2020).

167. *Id.* at 151–52.

168. *See* Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*.

169. *Negusie*, 28 I&N Dec. at 131–32.

170. *See* 8 U.S.C. § 1158(b)(2)(A)(iii), INA § 208(b)(2)(A)(iii).

171. *See* Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*.

172. 583 F.3d 86 (2d Cir. 2009).

173. *Id.* at 91.

174. *See* Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*.

175. *See id.*

176. United Nations Convention Relating to the Status of Refugees, ch. 1, art. 1, § F(b).

177. *See* H.R. Rep. No. 104-828 (1996).

178. *Id.*

179. INA § 208.

180. INA § 208(b)(2)(A)(iii).

181. *See* Fatma E. Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*, 66 UCLA L. Rev. 142 (2019).

182. Bassina Farbenblum, *Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond* Chevron, 60 Duke L.J. 1059, 1121 (2011).

183. *See* Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*.

184. *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (reissued 2019).

185. *See* Marouf, *Invoking Federal Common Law Defenses in Immigration Cases*.

Between a Rock and a Hard Place

The Inconsistent Application of Special Immigrant Juvenile Status Under Federal Law

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Abstract: According to federal immigration law, minors who obtain a Special Immigrant Juvenile Status (SIJS) classification can obtain a green card. To be eligible for SIJS, the Immigration and Nationality Act requires, among other things, that the minor be under 21 years of age and that a state juvenile court determine that the minor cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar cause. Most states determine that minors age out of the juvenile court's jurisdiction at age 18. This discrepancy leads to an inconsistent application of federal law, because the eligibility for SIJS depends on the physical location of the child at the time of determination. A mechanism that would allow a more consistent application of federal immigration law is needed to avoid unfairness in the determination of SIJS between ages 18 and 21. Potential solutions are discussed.

Introduction

Under the auspices of humanitarian and practical considerations for vulnerable children, Congress enacted the Immigration Act of 1990 legislation to protect undocumented immigrant children who have been abused, neglected, or abandoned by a parent through the Special Immigrant Juvenile (SIJS) status.[1] If immigrant minors are in the United States and have been abused, abandoned, or neglected by a parent, such minor may be eligible for SIJS classification, they may petition juvenile courts for protection under SIJS. If SIJS classification is granted, the minor may qualify for lawful permanent residence (also known as getting a green card). However, the legal quagmire of state juvenile courts and jurisdictions overlaid with administrative court delays and inconsistencies has resulted in juveniles not being able to employ this statute in the way Congress intended. In this article, the legal structure of SIJS and the gaps in the systems will be shown to expose how these vulnerable youths face not only locating a safe place but also legal limbo with little recourse. It is difficult to appreciate the barriers, so what follows is a composite case study to show the reality faced for SIJS petitioners and their caregivers.

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Case Study[2]

Ernesto was born in Honduras to a single mother. Ernesto's mom abandoned him when he was only one year old, and he has not had any communication with her ever. Ernesto left Honduras because he was being harassed by a gang to join them. He was threatened with physical harm and possible death if he refused them. Escaping from this situation, Ernesto traveled to the southern border of the United States and entered without inspection, hoping to reunite with an uncle living in Virginia. Shortly after crossing the border, Ernesto was detained by U.S. authorities and placed in a shelter in Houston. He was released to his uncle and placed in removal proceedings. Ernesto's uncle wanted to take legal custody of the child and request SIJS for him so that Ernesto did not have to return to his home country and face the gang, who would probably try to kill him. Ernesto's uncle immediately contacted a lawyer and initiated the relevant legal proceedings for these purposes.

Although Ernesto had not lived in the area for jurisdictional purposes for more than six months, the judge followed the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act for the "vacuum jurisdiction." The judge determined that in a case like this where the six months of jurisdiction had not been met, and the child was from another country, absent a custody proceeding in the other country a Virginia court could exercise emergency jurisdiction. In fact, the judge did so. Ernesto's uncle felt relieved he could rescue his nephew from such a vulnerable situation. However, Ernesto was running out of time. He was 17 and was turning 18 in a couple of months. Although the court filings were made prior to his eighteenth birthday, by the time the hearing was held, he had turned 18. The judge was very aware of the July 2021 expansion of Virginia juvenile court jurisdiction[3] and interpreted it as giving the judge authority to adjudicate a family law issue up until the child is 21 years old. However, the court determined that the issue of custody was moot, and therefore did not hear testimony on the issue. The judge stated that the court could not enter an order providing a custody determination for someone over 18 years of age. The judge entered an order to confirm these findings related to a SIJS petition, that the petitioner had been abandoned and was a vulnerable youth. However, because SIJS eligibility requires that the youth either be declared dependent on the juvenile court or have been placed under some agency's authority or placed with an individual or entity,[4] United States Citizenship and Immigration Services (USCIS) denied Ernesto's petition for SIJS and he was ordered removed to Honduras.

Ernesto is not alone. Many youths in the United States face the same situation. Absent a custody order, USCIS will likely deny SIJS status when considering these children's I-360 SIJS petition. While USCIS has discretion to grant such a petition on humanitarian grounds, this discretion has not been exercised to keep youth in America in the experience of the authors. This article sets out the current status of SIJS classification, the current legal

rulings, the continued jurisdiction issues, federal supremacy arguments, lack of transparency on data regarding these proceedings, and potential solutions for the problems that we see with the current SIJS processes.

Special Immigrant Juvenile Status: Legal Framework

To establish eligibility for SIJS classification, immigrant juveniles who are physically present in the United States must show, among other things, that they are unmarried and under 21 years of age.[5] But most importantly, they must show that they have been subject to a state juvenile court order determining that they cannot reunify with one or both of their parents due to abuse, neglect, abandonment, or a similar basis under state law.[6] For these purposes, INA § 101(a)(27)(J)(i) establishes that there are two possible scenarios: (1) the child must have been declared dependent upon the juvenile court, or (2) the juvenile court must have placed the child in the custody of a state agency or department, or an individual or entity appointed by the state or juvenile court. Furthermore, 8 C.F.R. § 204.11(c)(3) establishes that the juvenile court's dependency declaration or custodial placement must be made in accordance with state law governing such determinations. Additionally, INA § 101(a)(27)(J)(ii) requires that the record must contain a judicial or administrative determination that it is not in the children's best interest to return to their, or their parent's, country of nationality or last habitual residence.

The requirements for SIJS eligibility can also be found in the USCIS Policy Manual, in volume 6, part J. The Manual expounds on the requirements in three ways. First, USCIS requires that the minor must have sought the juvenile court order to obtain relief from abuse, neglect, abandonment, or a similar basis under state law and not primarily to obtain an immigration benefit.[7] Second, if the juvenile is in the custody of the Department of Health and Human Services (HHS), and seeks a juvenile court order that changes their custody status or placement, USCIS requires a written consent from HHS/Office of Refugee Resettlement (ORR).[8] Third, USCIS requires the minor to have a valid court order issued by a juvenile court and that the court order and/or supplemental evidence submitted establish that the court had competent jurisdiction to make judicial determinations about the minor's dependency and/or custody and care as a juvenile under the relevant state laws.[9]

According to USCIS policies, juveniles need to meet all the requirements at both moments: at the time the SIJS petition is filed and at the time USCIS adjudicates the petition.[10] However, USCIS understands that the child does not need to be under the jurisdiction of the juvenile court that issued their order if the court's jurisdiction ended solely because the child was adopted or placed in a permanent guardianship, or because they aged out of the juvenile court's jurisdiction.[11] In other words, the child can still file for SIJS with USCIS even after they become of age according to the relevant state law as

long as they are still considered a minor according to the Act (i.e., if they are under 21 years of age).

USCIS Interpretation of the SIJS Provisions of the Act

USCIS has the sole authority to implement the SIJS provisions of the Act and regulation.[12] USCIS policies regarding the implementation of the SIJS provisions of the Act and regulation have varied over time, sometimes in response to the outcome of litigation. For example, in California various claimants came together to argue that USCIS incorrectly imposed a new requirement on SIJS classification eligibility by not approving SIJS petitions for petitioners who were placed in guardianships under Cal. Prob. Code § 1510.1 when they were ages 18, 19, and 20.[13] USCIS had been denying SIJS petitions on the ground that the probate court did not have jurisdiction to "reunify" the petitioner with one or both parents.[14] The parties later reached a settlement, as a result of which USCIS changed its policy.

Consistent with the INA § 101(a)(27)(J)(i), USCIS interprets the definition of juvenile court at 8 C.F.R. § 204.11(a) to mean a court located in the United States having jurisdiction under state law to make judicial determinations about the dependency and/or custody and care of juveniles. However, USCIS holds that whether a state court order submitted to USCIS establishes a petitioner's eligibility for SIJS classification is a question of federal law and that it is within the sole jurisdiction of USCIS.[15] In *Matter of A–O–C–*,[16] the USCIS Administrative Appeals Office (AAO) decided that although the regular majority age in Massachusetts is 18, the probate and family court took competent jurisdiction over the petitioner as a juvenile under Massachusetts law because although the petitioner was 20 when the court entered its decree, Massachusetts law as amended defined the term "child" as "an unmarried person under the age of 21."[17] As a result, the decree was issued by a "juvenile court," as that term is defined at 8 C.F.R. § 204.11(a).

In *Matter of E–A–L–O–*, the AAO understood that the petitioner had not shown that the court decree provided him with any protective or remedial relief pursuant to the Massachusetts child protection provisions or any other Massachusetts law, apart from findings enabling him to file an SIJS petition with USCIS.[18] Also, it understood that there was no evidence that the court took jurisdiction over the petitioner in any other prior or related proceeding providing him any type of relief or remedy from parental abuse, neglect, abandonment, or a similar basis under Massachusetts law.[19] It noted that the decree consisted of four brief "findings of fact" and that the petitioner did not request anything from the juvenile court other than findings related to SIJS classification, including a request for the court to "retain jurisdiction over [him] until the SIJS process is complete."[20] Furthermore, it noted that other statements contained in the underlying petition showed that the petitioner's

primary motive in seeking the juvenile court order was to obtain an immigration benefit.[21] It determined that the petitioner had not shown that he sought the juvenile court decree for any reason other than to enable him to file his petition for SIJS classification. USCIS recognized that there may be some immigration-related motive for seeking a juvenile court order.[22] However, to warrant USCIS's consent, the requisite SIJS determinations must be made under state law in connection with proceedings granting some form of relief or remedy from parental abuse, neglect, abandonment, or a similar basis that the court has authority to provide under state law, rather than, as in this case, requesting only factual findings relating to an immigration benefit under federal law.[23] In this case, it was understood that the preponderance of the evidence did not show that the petitioner sought the juvenile court decree to obtain relief from parental abuse, neglect, abandonment, or a similar basis under state law rather than primarily to obtain an immigration benefit.[24] Consequently, the AAO determined that USCIS's consent to a grant of SIJS classification was not warranted and the petitioner was deemed ineligible.

Chevron Deference to USCIS and EOIR Interpretations

The decisions of USCIS officers and the AAO regarding immigration benefit requests are administrative decisions. Additionally, immigration courts of the Executive Office for Immigration Review (EOIR) are not courts established by Article III of the U.S. Constitution. They are administrative courts whose decisions are subject to the "*Chevron* deference" doctrine. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[25] the Supreme Court clarified the scope and extent to which a federal court should defer to a federal agency's interpretation of a statute that the agency itself has authority and obligation to administer. The Court held:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[26]

Since the intent of Congress by defining the age of the minor is unambiguous in the sense that it intended to grant SIJS eligibility to minors under 21 years of age and not only those under 18, the administrative agencies must carry out the clearly expressed intent of Congress and not impose restrictions that would limit the age range of children that would be eligible to such immigration relief under the Act.

Federal Preemption of State Law

For SIJS purposes, federal law examines the state or local determinations through dependency or juvenile court to determine whether the juveniles' claims about abuse, neglect, or abandonment by a parent have been factually determined.

This area is not the only one where the federal government has inserted itself into state family law. For example, Congress grants states funds to address child abuse and neglect under the Child Abuse and Prevention Treatment Act (CAPTA), but only if the state has a definition of child abuse and neglect.[27] In addition, the federal government has set the standard for review of children removed from their homes for longer than year[28] and set the jurisdiction for Native American children under the Indian Child Welfare Act of 1978.[29] Also, the Individuals with Disabilities Education Act requires that states provide education to all children with disabilities from age 3 to 21.[30] The assertion of federal law over matters relating to children has multiple precedents, especially when youth are at risk because of circumstances beyond their own control (e.g., parental abuse, neglect or abandonment, and a status component for the child, such as ethnicity, country of national origin, or disability).

Apart from the *Chevron* doctrine, federal preemption of state law has a long-recognized history under the Supremacy Clause[31] of the Constitution. Federal preemption has been recognized by the courts in three different forms. The first type is when federal law specifically states that it preempts state law.[32] The second type is when federal statutes are so numerous or complex that they create an exclusive federal area of law leaving no room for states to take legislative action.[33] Lastly, there is so-called conflict preemption, where one cannot comply with both federal regulations and state law because it is "a physical impossibility."[34]

Federal law has the exclusive jurisdiction to determine immigration policies and procedures. In *Arizona v. United States*, the Supreme Court held that federal immigration law preempted a state law penalizing undocumented immigrants who worked without authorization.[35] The court found that Arizona's law was "an obstacle to the regulatory system Congress chose."[36] The *Arizona* decision evidences that the Supreme Court considers immigration law as the province of the federal government based on authority expressly granted to Congress by Article I, § 8 of the Constitution.[37]

The Age of Majority

In *Matter of A–O–C–*, the AAO established that state law, not federal law, governs the definition of "juvenile," "child," "infant," "minor," "youth," or any other equivalent term for juvenile that applies to the dependency or custody proceedings before the juvenile court.[38] As stated in *Budhathoki v. Nielsen*,

"Although the regulation permits an applicant for SIJS status to be someone who has not yet become age 21, what controls on eligibility for that status is the state law governing decisions over the care and custody of juveniles."[39]

However, the Immigration and Nationality Act (INA) defines the term "child" as it applies to the SIJS statute as an "unmarried person under twenty-one years of age."[40] Since the INA is a federal law that governs the immigration law in the United States, its definition of "child" should prevail.

The problem that arises from using a state's definition of child is not only that state definitions are not uniform throughout the country, but also that most state legislations establish the age of majority at 18. There are only three states that have a different majority age. Alabama[41] and Nebraska[42] set the age of majority at 19 and Mississippi sets it at 21.[43] Therefore, except for Mississippi, where the age of majority coincides, the INA and state law are in conflict regarding juveniles between 18 and 21 years of age. Thus, if state law were to prevail in SIJS matters, identical cases of minors would have different results depending on the state in which the minor is domiciled.

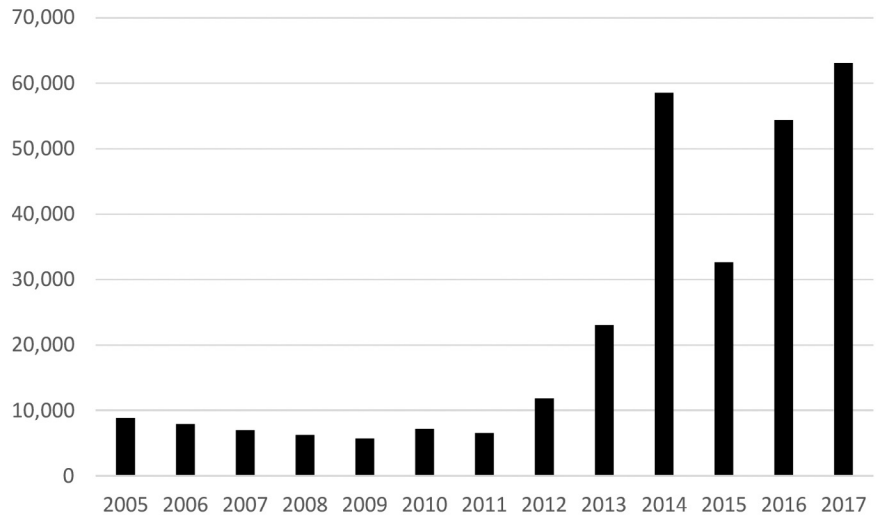
Some states have been extending the age of majority for at-risk youth. For example, in some states, youth who are in foster care before the age of 18 may petition the court to continue the dependency order until age 21 if certain factors are met.[44] These types of extensions recognize that transitioning to young adulthood requires different support measures for youth who lack a permanent family. Scholars have also conducted more research to show that young adults between the ages of 18 to 21 have neurological development similar to youth under 18,[45] which has been the basis for advocacy on increasing the age of majority for criminal liability.[46]

SIJS Filing and Approval Statistics

At this point, the SIJS law has been in effect since 1990 and has changed over time. However, there is a lack of transparency on how many SIJS petitions have been filed, how often, and how successful they have been. While names on the cases should be withheld, USCIS could publish the numbers annually on the age of petitioners, number of petitions, number of denials, number of deportations, and number of granted petitions.

Transactional Records Access Clearinghouse (TRAC) collects information from a variety of government agencies and departments through the Freedom of Information Act (FOIA).[47] TRAC obtained information regarding unaccompanied minors and deportation proceedings using the FOIA process from EOIR.[48] The data, covering the years 2005 through 2017, only includes cases that commenced when the youth was under the age of 18. The data does not provide information on the age of the youth or young adult when the case was decided. In 2018, the Trump administration began including all minors, accompanied and unaccompanied, in this data.[49] Therefore, the data after 2017

Figure 1. Juvenile Case Numbers



Source: TRAC, juvenile immigration data 2005-2017.

has been excluded from the analysis. In Figure 1, the number of unaccompanied youths from 2005 to 2017 shows a large increase in 2014, with nearly half reduction in 2015, and then returning to above 50,000 for 2016 and 2017.

TRAC also indicated how many unaccompanied youths have legal representation and how many do not. Figure 2 shows that as the number of unaccompanied youths entering the United States was increasing, the number of youths represented by an attorney also increased, from 44 percent in 2005 to the highest at 69 percent in 2015.

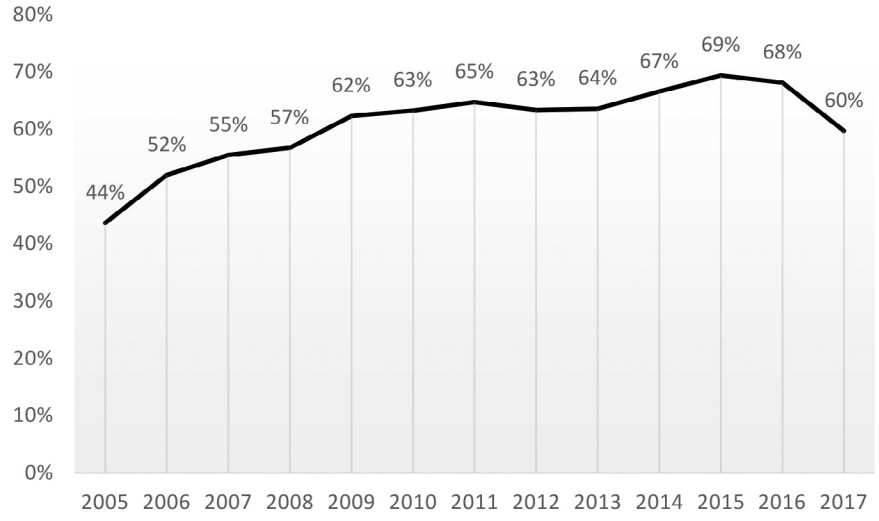
Legal representation is very important to the outcome. Interestingly, the data clearly shows that legal representation improves the likelihood that youths will not be deported, as seen in Figure 3.

This type of data is important because it shows whether a program is working as Congress intended. Additionally, it also shows that legal representation needs to be provided to every unaccompanied youth to ensure that their legal rights are protected. In this case, the data does not provide any information about whether these youth filed SIJS petitions or not. Therefore, it is hard to determine how effectively this law is at protecting youth at any age, let alone the young adults in limbo from age 18 to 21 in nearly all states.

Minors Between 18 and 21

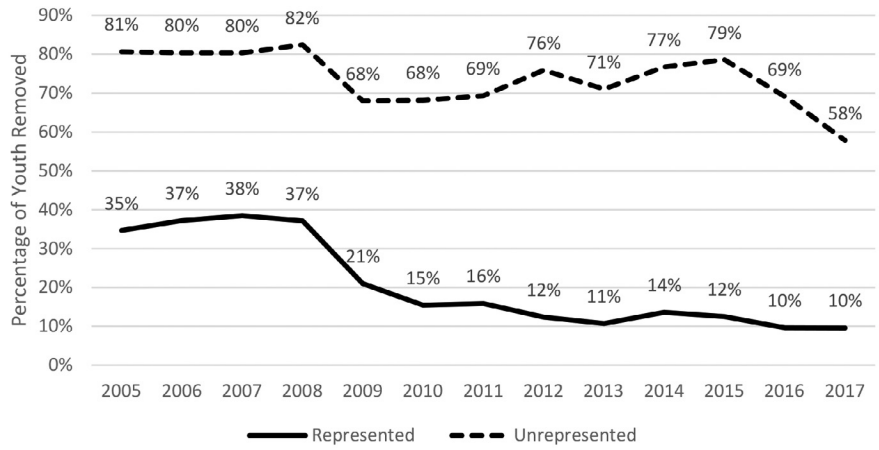
Except for the cases of minors in jurisdictions in which a class action has been initiated in this regard (such as New York) or where the legislature passed

Figure 2. Percentage of Youth Represented, 20052017



Source: TRAC, juvenile immigration data, 2005-2017.

Figure 3. Unaccompanied Youth Deported Based on Representation



Source: TRAC, juvenile immigration data, 2005-2017.

an amendment specifically to address this issue (such as Massachusetts), when the age of majority does not coincide with the INA (i.e., in most cases), minors between 18 and 21 will not be able to benefit from the relief granted by the SIJS status. For these reasons, some states such as Virginia have introduced modifications to mitigate this situation. A recent amendment to § 16.1-241(A1) of the Code of Virginia, which went into effect on July 1, 2021,

extended the Virginia juvenile courts' jurisdiction for young people seeking factual findings to satisfy eligibility requirements for SIJS. The amendment was aimed to facilitate minors' access to SIJS and subsequent protection in the United States by legal permanent residency after they have turned 18. Otherwise, those minors would be subject to a removal order to their home country, where they have been abused, neglected, or abandoned by one or both parents. However, this amendment does not solve situations in which a child "aged out" prior to this amendment.

Furthermore, even in cases where a child was 17 years old prior to July 1, 2021, and the child "aged out" after that, some Virginia juvenile courts continue to be reluctant to make the determinations needed to qualify for SIJS. Juvenile judges often believe that after the child turns 18, their decision would become moot, even when including the relevant findings of fact will allow the child to apply for SIJS, thus protecting them from further abuse, neglect, and/or abandonment. However, the Virginia Supreme Court has found that a case is not moot where an actual controversy remains.[50] A controversy would still exist in this case because relief could still be afforded through SIJS.[51] However, unless the court had effectively granted dependency or placed the child with legal guardians under state law, any findings, even done with retroactive effect, might not be enough to warrant USCIS's consent, because SIJS determinations must be made in connection with the granting of some form of relief under state law from parental abuse, neglect, or abandonment, rather than only for purposes of obtaining an immigration benefit under federal law.[52]

In cases where a child was under 18 years when the proceedings started and the child "aged out," juvenile courts could enter nunc pro tunc orders to amend, to avoid the problem of lack of jurisdiction. For example, in the abovementioned *Matter of A–O–C–*,[53] the AAO acknowledged that the probate and family court had entered two amended orders nunc pro tunc after its initial order. Since by the time the amended orders were entered the legislature had already amended the Massachusetts definition of "child" for purposes of alleging that return to the child's country of origin is not in the child's best interest, AAO understood that the orders were entered by a court with competent jurisdiction to make judicial determinations over the dependency, custody, and care of the petitioner as a juvenile under state law.[54] Therefore, if a court in Virginia would enter an order nunc pro tunc under current Virginia law, USCIS would most likely find that such court had sufficient jurisdiction for such determination.

Although courts are entitled to enter an order nunc pro tunc to amend a record with retroactive effect, doing so is within their discretion.[55] Therefore, if the court is unwilling to reopen the case and enter an order nunc pro tunc to amend the record with retroactive effect, there is no way to compel the court to do so. If, as is often the case, the court believes that after the minor turns

18 years the matter is moot as explained above, it is unlikely that the judge would enter an order nunc pro tunc to amend the record. Therefore, in such a case, a child between 18 and 21 years would not be eligible to qualify for SIJS even after the relevant state legislature introduced an amendment like the one in Virginia. This would be so even when USCIS's current position holds that the child does not need to be under the jurisdiction of the juvenile court that issued the order if the court's jurisdiction ended solely because they "aged out of the juvenile court's jurisdiction." Thus, the minor would not be able to access the relief established by federal law under the SIJS statute.

Conclusion

Article I, § 8 of the U.S. Constitution delegates to Congress the power "[t]o establish a uniform Rule of Naturalization . . . throughout the United States." Therefore, it makes no sense that a federal law, such as the INA, is applied arbitrarily based on locality rather than uniformly applied in the different jurisdictions. However, the courts are applying the standards inconsistently regarding the SIJS determination because of requirements introduced by the USCIS Policy Manual. Part of the solution will include legal representation for all unaccompanied minors who enter the United States to determine whether they should be seeking SIJS petitions. Additionally, it is imperative to establish a mechanism that would allow a more consistent application of federal immigration law to avoid unfairness in the determination of SIJS in children between the ages of 18 and 21. One alternative would be to allow a closed dependency or juvenile court ruling about the neglect, abuse, or abandonment to serve for the determination of the juvenile's status, especially when they have aged out of the system and the court has closed the case because under state law they lack continuing jurisdiction. Another option would be to have states extend their authority in cases where the juvenile is not native born until age 21 to allow USCIS to finish its rulings on SIJS petitions. An alternative would be for USCIS to modify its policy regarding the purpose of juvenile court determinations so as to eliminate the requirement that they not be primarily made to obtain an immigration benefit. This is particularly important in those jurisdictions where there is no other relief available for individuals between 18 and 21 pursuant to state law because they have aged out of the juvenile court's jurisdiction. USCIS's interrogation to determine whether the youth's primary intent is for the immigration benefit rather than their safety directly undermines congressional intent to bring these particularly vulnerable youths into legitimate society. Congress recognized this need because not letting them in will result in them remaining in the shadows and becoming victims of gangs and continued violence or engaging in violent criminal activity to survive.[56]

Notes

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1. Immigration Act of 1990, Pub. L. No. 101-649, § 153(a), 104 Stat. 4978, 5005–06.
2. All names have been changed to protect the identity of the child and the family. The facts are typical of these types of cases.
3. Codified at Va. Code Ann. § 16.1-241(A1).
4. INA § 101(a)(27)(J)(i).
5. 8 C.F.R. § 204.11(c)(1), (2).
6. INA § 101(a)(27)(J)(i).
7. USCIS Policy Manual, vol. 6, pt. J, ch.2.D.
8. USCIS Policy Manual, vol. 6, pt. J, ch.2.E.
9. USCIS Policy Manual, vol. 6, pt. J, ch.2.C.
10. USCIS Policy Manual, vol. 6, pt. J, ch.2.C.4 (petitioner must remain under jurisdiction of juvenile court at time of filing and adjudication of SIJS petition).
11. *Id.*
12. Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 471(a), 451(b), 462(c), 116 Stat. 2135 (2002).
13. Settlement agreement, *A.O. v. Jaddou*, No. 5:19-CV-06151-SVK (DMR) (N.D. Cal. Aug. 17, 2021).
14. *Id.*
15. *See* *Budhathoki v. Nielsen*, 898 F.3d 504, 511–12 (5th Cir. 2018).
16. Adopted Decision 2019-03 (AAO Oct. 11, 2019).
17. Mass. Gen. Laws ch. 119, § 39M (2018).
18. Adopted Decision 2019-04 (AAO Oct. 11, 2019).
19. *Id.*
20. *Id.* at 9.
21. *Id.*
22. *Id.*
23. *See, e.g.*, *Matter of D–Y–S–C–*, Adopted Decision 2019-02 (AAO Oct. 11, 2019) (concluding that USCIS's consent was warranted where juvenile court issued SIJS-related findings in child protection proceedings removing the juvenile from her abusive father's home and placing her in the custody of the state department of family and protective services).
24. *Matter of E–A–L–O–*, Adopted Decision 2019-04 (AAO Oct. 11, 2019).
25. 467 U.S. 837 (1984).
26. *Id.* at 842–43.
27. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974).
28. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

29. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069, codified at 25 USC §§ 1901–1963.

30. *See* 20 USC § 1412(a)(1)(A).

31. U.S. Const., art. 6, § 2.

32. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

33. *Id.*

34. *Id.*

35. 567 U.S. 387 (2012).

36. *Id.* at 406.

37. *Id.*

38. *Id. Matter of A–O–C–*, Adopted Decision 2019-03 (AAO Oct. 11, 2019). *See* Settlement agreement, *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. Dec. 15, 2010) ¶8 (defining "juvenile" for purposes of settlement agreement).

39. 898 F.3d 504, 513 (5th Cir. 2018).

40. INA § 101(b)(1).

41. Ala. Code § 26-1-1 (effective September 1, 2019).

42. Neb. Rev. St. § 43-2101 (effective September 1, 2019).

43. Miss. Code Ann. § 1-3-27 (effective July 1, 2021).

44. Jennifer Pokempner, *Know Your Rights Guide, ch. 10: Extended Foster Care and Re-entry* (May 13, 2020), https://jlc.org/resources/know-your-rights-guide-chapter-10-extended-foster-care.

45. Mariam Arain, et al., *Maturation of the Adolescent Brain*, 9 Neuropsychiatric Disease & Treatment 449, 452 (2013).

46. Charles E. Loeffler and Ben Grunwald, *Decriminalizing Delinquency: The Effect of Raising the Age of Majority on Juvenile Recidivism*, 44 J. Legal Stud. 361 (2015). *See* Madison Ard, Note, *Coming of Age: Modern Neuroscience and the Expansion of Juvenile Sentencing Protections*, 72 Ala. L. Rev. 511 (2020) (discussing different court rulings for those under age 18 based on modern neurological research and that research supports similar findings for those who are between ages of 18 and 21 as basis to reconsider adult sentencing for those between ages of 18 and 21).

47. TRAC's website is at https://trac.syr.edu.

48. TRAC Immigration, *About the Data*, https://trac.syr.edu/phptools/immigration/juvenile/about_data.html.

49. *Id.*

50. *E.C. v. Virginia Dep't of Juvenile Justice*, 283 Va. 522, 530 (Va. 2012).

51. *See Tazewell Cty. Sch. Bd. v. Brown*, 267 Va. 150, 157–58 (Va. 2004).

52. *See Matter of D–Y–S–C–*, Adopted Decision 2019-02 (AAO Oct. 11, 2019).

53. Adopted Decision 2019-03 (AAO Oct. 11, 2019).

54. *Id.*

55. *Council v. Commonwealth*, 198 Va. 288, 293 (Va. 1956); *see also Antisdel v. Ashby*, 279 Va. 42, 51 (Va. 2010).

56. Gregory E. Catangay, *Abandoning the Status Quo: Towards Uniform Application of Special Immigrant Juvenile Status*, 20 U.C. Davis J. Juv. L. & Pol'y 39 (2016). *See also* Meghan Johnson and Yasmin Yavar, *Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, 33 Child. Legal Rts. J. 64 (2013); Richard F. Storrow, *Unaccompanied Minors at the U.S.-Mexico Border: The Shifting Sands of Special Immigrant Juvenile Status*, 33 Geo. Immigr. L.J. 1 (2018).

The United States Is at Risk of Failing Our Afghan Allies

Here's How the Biden Administration Can Prevent That[1]

Mahsa Khanbabai and Parastoo Zahedi*

When the United States withdrew from Afghanistan in August 2021, we left tens of thousands of Afghan allies behind. For many who had worked alongside Americans for the past two decades, Afghanistan has become a death trap. But the United States has the means—and more importantly, an obligation—to help them get out.

Twenty years ago, America helped Afghans build a new reality for themselves, from training a cadre of women judges to supporting the blossoming of girl's schools. Across every aspect of society, those Afghans who were launching their dreams are now hiding in fear as the Taliban go door-to-door, searching for high-value targets.

We personally know many of these targets. As immigration attorneys, we represent hundreds of Afghans whose lives are at risk since the Taliban took control of Afghanistan.

One of our clients fearlessly advocated for women's rights and education in Afghanistan for over ten years working at The Ministry of Women Affairs, recently renamed by the Taliban as the Ministry of Virtue. She would visit young women hospitalized for terrible domestic violence injuries offering help and a safer future, but now she is in hiding.

Another client worked at the central bank monitoring money flow to ensure it didn't get into the hands of terrorist organizations. His name, picture, and other key biometric data are now in the hands of the very people who he had been working to thwart.

Two teenage daughters had patiently waited for years to be reunited with their parents in the United States while the arcane immigration system processed their papers. They are still waiting for a U.S. embassy to issue their visas.

Each of these individuals faced great obstacles as they tried to evacuate—getting past Taliban checkpoints, violent beatings and gunfire, and dangerously large crowds—but they were turned away at the airport gate.

We are haunted by the pain, fear, and grief we see in our clients and their families as we work on not only their immigration cases, but with help finding them safe houses and possible escape routes.

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The United States has tools in its arsenal to ease the plight of Afghans who desperately need to leave their homeland. We need to use these tools immediately.

As co-chairs of the Afghan Task Force for the American Immigration Lawyers Association, we call on the Biden administration to help Afghan nationals seek protection in the United States and to ensure the safety of those who remain.

Specifically, the Department of Homeland Security (DHS) should devote resources to streamline and expedite the humanitarian parole application process, a pathway for Afghan nationals seeking protection in the United States. Expanding access to humanitarian parole will help thousands of people, including women who are pioneers in human rights work, journalism, or higher education, but who do not qualify for other legal options. It will also facilitate the reuniting of families who were ripped apart when some made it onto flights to the United States while others did not.

Further, DHS should ease related administrative processes, such as facilitating fee waivers for Afghan nationals applying for humanitarian parole and simplifying the bureaucratic forms financial sponsors must complete.

The Department of State (DOS) should also be funded to replenish its visa-processing capacity, which was greatly diminished under the Trump administration. DOS needs staff who can review applications and the resources to conduct remote visa interviews after successful background clearance. Without these resources, vulnerable Afghans, including those who have been approved for humanitarian parole, will be unable to evacuate.

Finally, the Biden administration and its allies must develop additional solutions to evacuate the remaining vulnerable Afghans, such as expanding visa-upon-arrival options or allowing parole processing at friendly nations' embassies inside Afghanistan. If more nations allowed Afghans to apply for a visa online or once they arrive at their destination it would facilitate their safe travel to the United States. What good will it do to have thousands of approved humanitarian parole applications if people can't leave Afghanistan?

The Afghan men and women who risked their lives on behalf of the United States now face serious threats under the Taliban. They were instrumental in helping American servicemen and women stay safe for 20 years and deserve our loyalty and protection.

There is precedent for accepting our Afghan allies just as we did when we welcomed more than 100,000 Vietnamese refugees in 1975 or when, in 1979, we doubled the number of refugees from Vietnam, Cambodia, and Laos to 14,000 per month.

The United States has a moral obligation to evacuate our Afghan allies, and a chance to continue our humanitarian legacy.

Notes

* Mahsa Khanbabai is Co-Chair of the AILA Afghan Taskforce and in private practice in Massachusetts. Parastoo Zahedi is Co-Chair of the AILA Afghan Taskforce and in private practice in Virginia.

1. This piece was originally published on MsMagazine.com and reprinted with permission.

A Personal Note on Pro Bono

Nguyen D. Luu

My partner and I had the tremendous opportunity to volunteer at legal clinics to support the Afghan resettlement efforts at Fort McCoy, Wisconsin, during November 2021. As a Vietnamese-American, my family's personal refugee stories mirrored those of the families I met at the legal clinic—stories of separation from family, permanent displacement, and hope for a new life in America. It was a rewarding pro bono experience that continues to reaffirm my belief that immigration attorneys have the ability to give back and impact the lives of so many families. I am proud to be a member of AILA and grateful for the opportunities to give back.

Nguyen Luu, member AILA-SCV, and Mai D. Luu (Past Chapter Chair, AILA-SCV '08) leading an Asylum workshop on Veteran's Day 2021 at Fort McCoy.

The legal team and volunteers at Fort McCoy OAW, Operation Allies Welcome.

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The Birding Immigration Lawyer

Tahmina Watson

During the COVID-19 pandemic, I dubbed myself "the birding immigration lawyer." Here's how it unfolded.

As immigration lawyers, we have been through so much. As if four years of the Trump administration weren't enough, the COVID-19 global pandemic really took it out of us. Suddenly, not only were we grappling with finding new ways to work from home, Zoom-school our kids, and live under lockdown, we were suddenly dealing with unprecedented and nuanced immigration situations.

Every case seemed complicated. Whether clients were stuck inside or outside the United States, whether cases were delayed because of the previous administration's policies compounded by COVID-19 standstills, each one seemed to present a challenge. Our stressful days seemed to have no end.

Little did I know that out of all that stress and turmoil I had develop an odd and unrelated new passion that would all but consume me and even get me thinking about changing careers. And it would start with something as simple as the chirping of a bird outside my window.

During those fraught Trump years, I had been leading the Response Committee of the AILA Washington Chapter and began daily meditations to help me find some sanity. The incessant need for immigration lawyers in frightened communities, all the while dealing with unprecedented changes in our caseloads, was overwhelming and left many of us feeling stressed and drained. It took time but I eventually developed a meditation practice that helped bring me a sense of peace and calm.

When COVID-19 hit, changing all our lives in dramatic ways, mediation didn't seem to be enough anymore—simply because life routines and the goalpost of stress had shifted. It was during this time that I happened by chance one morning to hear a bird chirping outside my home-office window. It was an unfamiliar sound, though I must have heard it hundreds of times before. My ears perked up. Listening to them inspired a curiosity in me to see the birds as they sang and flew from one bird feeder to another. My husband, who always worked from home, had been feeding birds for three years and had a system of feeders set up in the trees around the house. It attracted all types of birds. But life was so busy for me that during all that time, I had never really taken note. But now I was noticing. I listened to their melodious sounds, noticed their colors, the shapes of their beaks, their eyes, their wings as they flitted about. I felt inspired.

I found myself taking pictures, first with my cell phone before upgrading to a DSLR camera. I was photographing all the birds in my backyard and

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on my front yard porch. We had different types of feeders that attracted all kinds of birds.

I realized that my backyard birds—the sparrows, chickadees, woodpeckers, and others—left me feeling peaceful and calm. That made it easier for me to process all the anxiety from my clients and from my own life. I found myself less reactionary. It made me realize that nature really does heal.

What has been interesting is that my birding habit has now taken me beyond my yards. I have joined several Facebook birding groups in which ordinary people like me share photos of birds, their locations, and encourage and support each other, praising a photo of that rare or first-in-the-season kind of bird, or the angle in which a shot was taken, or just the simple beauty.

I am inspired now to go to places I have never been before, like the parks in my neighborhood or a notoriously good birding spot like La Connor, Washington, 90 minutes from my home. I'm inspired to walk through nature, something that before never really held much interest for me. Suddenly, through this emerging love for birding, I am walking miles through various parks. Sometimes my daughters go with me. I have friends who have accompanied me on my birding walks, which is a perfect way to hang out, given COVID concerns. On a recent trip to Arizona, I traveled with my camera for the first time and had the thrill of discovering new species of birds, like the road runner and a great egret that I photographed on one of our outings. Recently, when my mum visited from London after the Biden administration lifted the travel ban, I couldn't wait to take her on my walks to bird watch and take pictures. It was special to share this new love with her.

Most times, however, I go alone, taking in the sounds of the birds around me or the quiet of the morning air. I now have a zoom camera with a lens that weighs quite a bit. That heavy equipment has motivated me to exercise more and engage in strength training so that I can capture better pictures and not get too tired on these long walks.

I have also been drawing many of the birds that I photograph. I hadn't drawn much since I was a child. Now these birds and my photographs of them have uncovered this hidden talent and inspired me to start sketching for the first time in my life. And if I do say so myself, I have gotten good at that too.

I credit this newfound birding love to having had one of the most accomplished years of my career. I can focus better on the task at hand. In addition to managing my practice

and team, dealing with unprecedented legal challenges, meeting deadlines, successfully closing cases, presenting at several AILA webinars, and sitting on several committees, I am also proud to say that I have written a book (my second in six months), published two audiobooks, managed a podcast while launching a second, and published about 30 articles in different publications.

I share all of this because we are living in unprecedented and unpredictable times when our clients have never needed us more. But most of us are exhausted. When we board airplanes, they tell us in the preflight instructions that we need put on our own oxygen mask before attending to others. Birding has become my oxygen mask.

I hope you can find your own in the form of whatever drives your passion. AILA now has a Lawyer Well-Being Center and committee, which is a wonderful resource for finding ways of getting centered while at the same time finding like-minded friends. Find something outside of your daily practice of immigration law to feed your soul. I promise it will reinvigorate you and make you a calmer, more understanding lawyer who can better take on the anxiety of your clients, or the frustrations of USCIS, or simply the uncertainty of life.

The Children Who Didn't Grow Up to Save the Future

A Poem by a Former ORR Case Manager

Eric Esqueda*

They were scared,
Saying goodbye
To everyone &
Everything they knew
Living in a country,
That hates them

They were boys, scoundrels
Told to work
Never to cry
And never to quit
Living in a country,
That hates them

They were girls, young things
Told to work
It's ok to cry
And never to speak
Living in a country,
That hates them

He was a stranger in a land
That police held at arm's length
Until their leader
Their Sergeant
Said,
It's ok, let them through
Living in a timeline, doomed to die

He was a son,
Wanting to do his father
Proud
Trying to contribute

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To his family's welfare
Living in a timeline, doomed to die

She was a daughter
Wanting to escape abuse
Afraid
Trying to show her child
Strength, in adversity
Living in a timeline, doomed to die

He was a student, a slacker
The teachers said
He'd never amount to
Anything, except labor
That's ok, he likes work
Living in a timeline, doomed to die

She was a student, a star
The teachers said
She could have,
Done so much
It's ok, she found a man
Living in a timeline, doomed to die

An arrogant father, A stressed mother
These are the ingredients
To induce stress & trauma
Living with unhealed scars
Passed down, from those long dead
Living in a timeline, doomed to die

The border patrol denied entry,
They stay at the border
Praying and hoping
That they change their minds
Knowing only lawyers, might help
Living in a timeline, doomed to die

The local gangs, demand
Payment from them
The local politicians,
Apathetic to their plights
It's ok, we'll be saved
Living in a timeline, doomed to die

Let us pray, let us meditate
They'll come, they'll help
The lawyers, they'll come
Fighting for a future, doomed to die

He was a boy, that just wanted
To play, and love, and work
He didn't think his adventure,
Would turn into a nightmare,
This definitely isn't Dragonball Z
Fighting for a future, doomed to die

She was a girl, that just wanted
To love, eat, and have a family
She didn't think,
The Americans would be
This Cruel
Fighting for a future, doomed to die

They were the state, the authority
That just wanted to serve their country
They didn't think, they'd be sending
Children to die
They didn't sign up for that
Snuffing out a future, doomed to die

He was a boy, taught to trust
The state, merely for existing
He didn't think
They'd see him
As a threat
Fighting for future, doomed to die

He was a girl, who knew
Not to trust men
She didn't think
They'd see her, and her child
As threats
Fighting for a future, doomed to die

They were parents,
Uncles, aunts & family
Who were ready to receive them
With open arms, provided

They help in the home
Fighting for future, doomed to die

They were a people, descended
From ancestors with great tales
And great conquests
They had never known, the state
And it's rules, only their people
No longer living,

No longer accepting the state's rules
Instead learning them, bending them
So, they can survive,
So, the people can survive

Living in a time, Not doomed
Asking others to help them
Asking others to help them,
To save their future

To save our future,
And now look at them
Wearing the uniform,
Accepting the embrace of the state.

Their ancestors still ask them,
Are you actually?
Are you saving?
Is this the future?
That you wanted? In your youth

Are you saving the future?
Or are you repeating the past?

—Eric Esqueda (Eskateerr)

Note

* Eric Esqueda (eric.esqueda84@outlook.com) (writer/poet for hire) is a former United States Marine Corps Veteran. He writes under the pen name "E.E. Devilman" and "Eskateerr" when he is not studying for law school and public policy school at the University of Houston. Eric strives to practice immigration law, alongside employment/labor law and e-sports law. He is a veteran of Operation Enduring Freedom, and a former case manager for an ORR-funded shelter. During his time as a U.S. Marine

Eric primarily worked on a variety of ordnance weapons/missile systems but decided later on in life that serving people in a more peaceful capacity was his true passion. He strives to lead with compassion, kindness, but in a way that expediates the communication efficiently between him and his coworkers. Eric has a passion for helping underprivileged immigrants in particular children. The only thing he asks of others, is for them to help him #SaveTheFuture.

Without flight or fight
Beaten into breathlessness
Martyrs make no sound

—Karl Krooth

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Three Poems

Mary Turck*

Magdalena

In Mississippi, Magdalena, eleven years old,
stands in front of television cameras
speaks into microphones
her message unstoppable as her tears.

Government, she pleads,
you have my parents
let them be free with everybody else.

We planned for a year,
government replies.
This is business as usual.

Government, she cries,
My dad didn't do nothing,
He's not a criminal,
I need my dad.
Government, please put your heart . . .
please.

Government has no heart,
no brain, no courage.
Government hides behind a curtain
pulling levers,
stealing parents,
crushing lives.

Magdalena has no ruby slippers,
no tin man, scarecrow, lion standing with her,
no magic,
only us.

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Hell Freezes Over

Are they coming?
Someone tell me, is it true?
Are they searching Cedar Avenue?
Is there a raid in Richfield?
Are they coming? Is it true?

Through the vacuum of cyberspace,
can you hear the tears
in Arizona where
Guadalupe García de Rayos
wife, mother, worker,
checked in at the immigration office
as she did last year and the year before and the year before that,
but this year:
    arrested
        deported
            that very day
because hell freezes over and turns to ICE

Are they coming?
Someone tell me, is it true?
Should I keep my children inside?
Lock my doors?
Stay home from work?

Through the vacuum of cyberspace,
can you hear the screaming
in El Paso, as
six ICE agents enter the county courthouse and
    drag out a woman:
    her protective order
    against domestic violence gives
    no protection from
hell freezing over and turning to ICE.

Are they coming?
Do you know is it today?
Is it tomorrow?
On the street or in my home?

Deportee

His carpenter's muscle and sweat earned
two thousand dollars
saved to send home to—
parents? children? a wife?
He carries creased photos in a wallet.

Afraid of questions from the bank
where he lives
where he works
his social security number,
two thousand dollars make him an easy target.

Un-
documented.
Un-
lucky.

Afraid of questions from the police
where he lives
where he works
a social security number
he does not report the robbery.

Close to broke, he takes a chance,
rides the Blue Line without paying.
Arrested for a dollar and seventy-five cents,
turned over to ICE.

Un-
documented.
Un-
lucky.

Here today,
gone tomorrow or the next day or the next month,
gone last month or last year or four years ago,
another deportee.
He will return.

Still
un-
documented,
un-
lucky.

Note

* Mary Turck (maryturck@gmail.com) lives and writes in St. Paul, Minnesota. She has published extensively as a journalist, after working in a variety of jobs ranging from gym teacher to attorney. Her poetry has been published in *Saint Paul Almanac*, *Cold Mountain Review*, *Gravitas*, *Poets Reading the News*, and other journals, and in two self-published chapbooks, *Forest City Poems* and *Pandemic Year One*. Her literary and journalistic blogs can be found at http://maryturck.com.

Remembering Valerie Anne Zukin

Friends and Colleagues of Valerie

Beloved colleague, mentor, and friend to many, Valerie Anne Zukin passed away peacefully at home on September 25, 2021, at the age of 41. She was surrounded by her family and her two giant dogs, Baxter and Sadie.

Valerie dedicated her life to pursuing justice for the most marginalized immigrants, especially those who were detained. She dedicated the latter part of her career to collaborative-building, mentorship, and training new immigration advocates. Valerie waged a fierce battle with metastatic breast cancer for 7.5 years, and despite illness and constant treatments, she both lived life to its fullest and remained a tenacious advocate, sharing her vast knowledge with others as she built and strengthened the immigration bar and fought for countless immigrants herself and through programs she built.

Valerie's impact on her community and the detained representation space in California and beyond was immense. Shortly after she passed, the San Francisco Board of Supervisors adjourned its October 19, 2021, meeting out of respect to her memory.

Most recently, Valerie was a Special Projects Attorney at Immigrant Legal Resource Center (ILRC) from June 2020, where she led implementation and training for the first cohort of the California Immigrant Justice Fellowship. The fellowship is the first state-funded immigration law training program of its kind. Valerie inspired, grounded, and mentored the inaugural fellowship class, a cohort of ten diverse new immigration attorneys placed at nonprofit organizations in underserved regions of the state. Her impact will echo throughout the fellows' careers.

Valerie was also a pro bono attorney for her last client—"Don Juve"—through Immigrant Legal Defense (ILD). She continued to fight for his return to the United States even in her last days. Don Juve learned how to use Zoom for the first time in order to speak at her memorial service. He remembered Valerie as "the first person to see something in me and my case, and someone who always treated me like family."

Prior to ILRC, Valerie worked at the Justice & Diversity Center of the Bar Association of San Francisco beginning in 2017, as the founding Lead Attorney for the Northern California Collaborative for Immigrant Justice (NCCIJ), and then as the first Legal Director of the California Collaborative for Immigrant Justice (CCIJ). In these positions, Valerie convened, coordinated, and fostered significant growth of the pro bono detained representation community in Northern and Central California. "Valerie mentored a generation of detention lawyers and built a detention legal service infrastructure that has and will free

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thousands," one colleague wrote in a tribute. Valerie also served as a founding board member of CCIJ as it grew into an independent nonprofit organization.

From 2011 to 2017, Valerie practiced as an Associate at Van Der Hout, Brigagliano & Nightingale (now Van Der Hout LLP), where she developed the vast knowledge of immigration law and litigation skills she later passed on to younger lawyers. She represented a wide range of clients in complex matters, both in and out of detention, from USCIS to Immigration Court to the Ninth Circuit. Valerie offered her endless energy equally to circuit court oral arguments and the mundane details of improving office templates. One of the many clients Valerie fought tirelessly for while at Van Der Hout was Iyabo, who also spoke at her memorial service. Iyabo shared: "Valerie, thank you for the love you've shown to me. You rescued me and gave me new wings. I am forever grateful."

Valerie started her law career at Northwest Immigrant Rights Project (NWIRP) from 2007 to 2011, focused on defending immigrants who were locked up at the Northwest Detention Center—then the fourth largest detention center in the country. From the beginning of her career Valerie demonstrated the grit and determination for which she will always be remembered. She exhausted all defenses and created new ones when nothing else was available. She formed lasting bonds with her small group of colleagues in NWIRP's Tacoma office, through both their tireless work defending clients and time spent enjoying life and the Pacific Northwest to the fullest.

Valerie earned her J.D. from Tulane University School of Law, and her B.A. from Haverford College. During high school, she spent her summers in Morelia, Mexico, where she made lifelong friendships and developed the Spanish fluency that helped her connect so deeply with future clients. She grew up alongside her beloved sister, Heather Zukin, and was fortunate to be raised with the support of Myrna Gregory, a Jamaican immigrant woman who Valerie loved and admired deeply.

Outside of work, Valerie was an incredible and devoted friend, partner, daughter, sister, and dog mom. Valerie was known to host extraordinary dinner parties and brunches alongside her husband, Josh Rosenthal. She was a talented cook and baker, but her warmth, care, and humor made her a most unforgettable hostess. She was also a thoughtful gift-giver, passionate traveler, avid camper, hiker, and city explorer, and always knew where to find (and insisted upon visiting) the best restaurants. She is survived by her husband and sister mentioned above; her father, Stephen Zukin; her mother, Suzanne Zukin; her grandmother, Marilyn Hindin; and a widespread community of extended family and friends.

Prior to her passing, close friends and colleagues shared with Valerie that a fund would be established in her honor to advance the development of more fierce immigration lawyers like her. The Valerie Zukin Memorial Fellowship will support law students who would not otherwise be able to accept non-profit

summer internships in the immigrants rights field. Valerie's family asks that donations in her honor be directed to bit.ly/ValerieZukinMemorialFellowship.

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