Judge Denise Slavin on the Immigration Courts, the National Association of Immigration Judges, Article I, and the Leadership at EOIR

by Jason Dzubow May 22, 2019

Immigration Judge Denise Slavin recently retired after 24 years on the bench. The Asylumist caught up with her to ask about her career, her role as a leader in the National Association of Immigration Judges, and the state of affairs at the Executive Office for Immigration Review ("EOIR").

Asylumist: Tell me about how you got to be an Immigration Judge ("IJ"). What did you like and dislike about the job?

Judge Slavin: Before I became a Judge, I had some very different turns in my career. Early on, I worked for the Maryland Commission for Human Relations, where I prosecuted state civil rights complaints. I admired the hearing examiners, and I felt that I wanted to do that type of work. I knew [Immigration Judge] Larry Burman when I was in college, and he suggested I apply to the INS to become a trial attorney. I worked as a trial attorney from 1987 to 1990.

I then worked for the Department of Justice, Office of Special Investigations. This was maybe my favorite job. We investigated Nazi war criminals, and I worked on many interesting cases, including the case of **John Demjanjuk**. During my five years at the Office of Special Investigations, Judge Creppy became the Chief Immigration Judge. Since I knew him from my work in employer sanctions at INS, I called to

congratulate him, and he suggested that I apply for an Immigration Judge position. I applied and got the job.

Judge Denise Slavin

I started work as an IJ in 1995. My first assignment was in Miami doing non-detained cases. I loved it there–the city was exotic and multicultural. It almost felt like I wasn't living in the United States. It was also a good court for me to start my career on the bench. I hadn't practiced in Miami as a Trial Attorney, so there were no expectations of me. Also, it is a large court with many judges to learn from.

I did non-detained cases for 10 years in Miami, but the work started to become a bit tedious. An opportunity came up and I transferred to the detained docket at Krome Detention Center. I loved working on those cases. The legal issues were cutting edge. I remember one three-month period, where our cases resulted in three published BIA decisions. For detained cases, the law develops quickly, and it was very challenging to keep up to speed.

I would have been happy to remain in Miami, but family issues brought me to Baltimore. The DHS and private-bar attorneys in Baltimore are very professional, and my colleagues were excellent mentors. All this helped make my time there very enjoyable.

Asylumist: What could DHS attorneys and the private bar do better in terms of presenting their cases? Are there any common problems that you observed as an IJ?

Judge Slavin: There are a lot of good DHS attorneys in Baltimore. DHS attorneys get a lot of credit with judges if they narrow the issues and

stipulate to portions of the case. For example, it is so tedious when DHS inquires about every step the alien takes from her country to the United States. If there is no issue with the journey to the U.S., it is not worth going into all this, and it uses up precious court time. When DHS attorneys ask such questions, it would sometimes be frustrating for me as a Judge, since I do not know what they have in their file and what they might be getting at. But if there is nothing there, it is very frustrating to sit through. DHS attorneys should only explore such avenues of questioning if they think there is an issue there. When they focus on real issues, and don't waste time sidetracking, they gain credibility with the IJs.

As for the private bar, I appreciate pre-hearing briefs on particular social groups. Also, explaining whether the applicant is claiming past persecution and the basis for that, whether there is a time bar, and nexus. Of course, this can sometimes be straightforward, but other times, it is a bigger issue and a brief is more important.

I encourage both parties to work together to reach agreement on issues whenever possible. Court time is so valuable, Judges want to spend it on the disputed issues.

Asylumist: What about lawyers who are bad actors, and who violate the rules?

Judge Slavin: IJs are prohibited from reporting attorneys directly to bar associations. Instead, we report the offending lawyer to internal EOIR bar counsel, who then makes a decision about whether or not to go to the state bar. Personally, I have been hesitant to report private attorneys because I think the system is unfair–it allows you to report a private attorney, but not a DHS attorney. Although this is unfair (and it is another reason why Immigration Courts should be Article I courts), there were times when I had

to report blatant cases of attorney misconduct.

Asylumist: Looking at your **TRAC statistics**, your denial rates are much higher for detained cases. Some of this probably relates to criminal convictions and the one-year asylum bar, but can you talk about the difference in grant rates for detained vs. non-detained cases? Do IJs view detained cases differently? Perhaps in terms of the REAL ID Act's evidentiary requirements (since it is more difficult to get evidence if you are detained)?

Judge Slavin: There were two detention centers in the Miami area—Krome and Broward Transitional Center–and they produced two different types of cases. At Krome, detainees mostly had convictions and had been in the U.S. for years. It is very difficult to win asylum if you have been here for that long. It's hard to show that anyone would remember you, let alone persecute you, if you return to your country after a decade or more. BTC held newly arriving individuals who were claiming asylum. They generally had more viable claims.

As a Judge, I did account for people being detained. I didn't want to deprive someone of the right to get a piece of evidence, but I didn't want to keep the person detained for an extra three months at government expense to get the document. If there is no overriding reason to require corroboration, I would not require it for detained applicants. In many cases, corroboration that you would normally expect, you cannot get in the 30-day time-frame of a detained case. I have continued cases were there was needed corroboration, but I generally tried to avoid that.

Also, in adjudicating detained cases, it is important to consider the spirit of the asylum law, which is generous. But for people with convictions, we have to balance the need to protect an individual from persecution against the

competing interest to protect the United States from someone who has committed crimes here. In a non-detained asylum case, the potential asylee should be given the benefit of the doubt, but–for example–in a detained case where the applicant has multiple criminal convictions, the person may not receive such a benefit of the doubt, and a Judge would rather err, if at all, on the side of caution and protect the community.

Asylumist: Again, looking at the TRAC statistics, your grant rates tend to be higher than other IJs in your local court. What do you think accounts for that? How do different IJs evaluate cases so differently?

Judge Slavin: In asylum cases, we don't have a computer to input information and come up with an answer. The immigration bench does and should reflect the diverse political backgrounds of people in our country. I am more on the liberal side, but I will defend colleagues who are more conservative. We don't want only middle-of-the road judges; we want the immigration bench to reflect our society.

As far as the TRAC numbers, it's true that people who are represented by attorneys are generally more successful in court. However, if you have a bad case, most decent lawyers won't take it. Such cases would be denied even with a lawyer. Since people with weak cases have a harder time finding lawyers, the disparity between represented and unrepresented individuals is not as dramatic as the TRAC statistics suggest.

Asylumist: One idea for reducing disparities between IJs is to hold training sessions where "easy" and "hard" judges evaluate a case and discuss how they reach different conclusions. Do you think this is something that would be helpful? What type of training do IJs need?

Judge Slavin: We have not had this type of training, but it would be interesting. EOIR has not been consistent about training. In-person trainings

come and go. They do hold video training sessions, but these are horrible. Judges would get some time off the bench to watch the videos, but due to the pressing backlog, we would usually do other work while we were watching.

Also, looking at talking heads is not a good way to learn new information. In addition, the social opportunities to talk to other Judges with different backgrounds and different judicial philosophies that occur only during in-person trainings are invaluable.

The **National Association of Immigration Judges** ("NAIJ") has tried to get EOIR to hold different types of trainings, such as regional conferences–where, for example, all the IJs in the Eleventh Circuit would get together–but unfortunately, EOIR has not gone for that approach.

In my experience, the more interactive trainings are more helpful. I've learned the most from talking with other IJs and from in-person trainings. This was one of the advantages of serving on a big court like Miami–the opportunity to interact with many other judges and see how they handled their dockets.

Another idea is to give IJs "sabbatical time" off the bench, to observe the cases of other judges. Seeing and talking to other judges about how they handle different issues is very helpful.

Asylumist: You mentioned the NAIJ, the National Association of Immigration Judges, which is basically a union for Immigration Judges. How did you get involved with the NAIJ? What did you do as a member and leader of that organization?

Judge Slavin: I had two mentors–Judge Bruce Solow and **Judge John Gossart**–who were both past presidents of NAIJ. They encouraged me to

get involved with the organization. I ran for Vice President with Judge Dana Leigh Marks, who ran for President. I call Judge Marks my sister from another mother. I love her to death. Prior to becoming VP, I had done some secretarial-type duties for the NAIJ, like taking the minutes. I originally joined NAIJ to help improve the Immigration Court system.

As they say, bad management makes for good unions. When management is good, the number of NAIJ members falls, and when management is bad, more judges join. The situation these days is not good. In particular, the politicization of the Immigration Courts has been outrageous. This has been going on in several administrations, but has reached a peak in the current Administration.

Another issue is that we have judges doing more and more with less and less. It's crazy. When I was in Miami and we had a thousand cases per judge, we were hysterical. When I left the court in Baltimore, I had 5,000 cases! Despite this, management at EOIR thinks that judges are not producing. The idea of this is absurd. Management simply does not recognize what we are doing, and this is bad for morale.

The previous Director of EOIR, Juan Osuna, appreciated the court and the judges, even if there were some political issues. When you have someone who does not appreciate what you are doing, and who gives you production quotas, it creates a very difficult environment.

These days, I do worry, especially for the newer judges. If you have to focus on getting cases done quickly, it will cause other problems–some cases that might have been granted will be denied if the applicant does not have time to gather evidence. Also, while many decisions can be made from the bench, for others, the Judge needs time to think things through. For me, I had to sleep on some of my cases–they were close calls. I needed time to

decide how best to be true to the facts and the law. I also had to think about how my decision might affect future cases—most IJs want to be consistent, at least with their own prior decisions. To make proper decisions often takes time, and if judges do not have time to make good decisions, there will be appeals and reversals. For these reasons, production quotas will be counter-productive in the long run.

Other problems with the court system include the aimless docket reshuffling, which started with the Obama administration. IJs should determine on their own how cases are set on their dockets. Cases should be set when they are ready to go forward, not based on the priorities of DHS.

The main issue here is that DHS [the prosecutor] is very much controlling EOIR [the court]. The ex-parte communication that occurs on the macro level is unheard of–the priorities of DHS are communicated through backdoor channels to EOIR, and then EOIR changes its priorities. Have you ever heard of a state prosecutor's office telling a state court which cases to set first? This re-shuffling affects IJs' dockets–we would receive lists of case numbers that we had to move to the front of the queue. We had no control over which cases had to be moved. Instead, cases were advance based on DHS priorities.

Maybe one silver lining of the politicization under the current Administration is that it has helped people realize the need for an Article I court.

Asylumist: Bad management makes for good unions. What is your opinion of the leadership at EOIR today? What more could they do to support judges?

Judge Slavin: It's hard to think about EOIR in this political environment. Former Director Juan Osuna was wonderful. He spent a lot of time

minimizing damage to the court by the Department of Justice and Congress; for example, by explaining how judicial independence and due process prevented placing artificial constraints on the number or length of continuances granted. These concepts seem to elude the current leadership of EOIR, and the administration has moved to strip us of the tools we need (such as administrative closure) to control our dockets.

The court has many needs that are not being addressed. We need more and better training. We need larger courtrooms–it drives me crazy that we cannot get courtrooms the size we need; with children, families, and lawyers–we need more space.

Also, we need more judges. I retired, and a lot of people coming up behind me are getting ready to retire. It is hard to keep up with the numbers. One idea is to implement phased retirement for IJs, so judges could work two or three days per week. This was approved four years ago, but not implemented. I do not know why.

Judge Marks [former President of the NAIJ] and I talked to EOIR about hiring retired IJs back on a part-time basis. We asked about this 10 years ago, and they are finally getting around to it. That will help, and hopefully, EOIR can step up that program.

Recent changes that affected judges directly, such as limiting administrative closure, are not good for case management.

The NAIJ leadership and I have talked to EOIR Director James McHenry about some of this. He is not getting it. He is very young, and he thinks he has a new approach, but he does not know the history or background of EOIR, and he does not seem to grasp what the agency needs to do. He also does not understand how overworked judges have been for such a long time, and seems to think the problems with the court are based on lack of

commitment and work ethic of the judges. Nothing could be farther from the truth.

Asylumist: How would it help if Immigration Courts became **Article I courts**?

Judge Slavin: Article I courts would still be part of the Executive Branch. Immigration is a **plenary power**, but when it comes to case-by-case adjudication, that issue disappears. The bottom line is that people are entitled to due process, and that requires judicial independence. I don't think you can have due process without judicial independence. This is one of the hallmarks of the America legal system. Even arriving aliens are entitled to due process. If we change that, we are starting to give up who we are. If we are trying to save the U.S. from terrorists by eliminating due process for all, what are we saving? It is taking away an important tenant of our democratic system.

There is a plan to transition the Immigration Courts to Article I courts. The Bankruptcy Court did it. The plan allows for grandfathering of sitting IJs for a limited period. The sooner this is done, the easier it will be. And in fact, it must be done.

If we had Article I courts, we would eliminate aimless docket reshuffling and political priorities. Judges would control their own dockets, and this would lead to better morale and better efficiency.

Asylumist: Thank you for talking to me today.

Judge Slavin: Thank you