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# An Interview with MaryBeth Keller, Former Chief Immigration Judge of the United States

BY JASON DZUBOW ON OCTOBER 15, 2019

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*MaryBeth Keller was the Chief Immigration Judge of the United States from September 2016 until July 2019. She was the first woman to hold that position. The Asylumist sat down with her to discuss her career, her tenure as CIJ, and her hope for the future of the Immigration Courts.*

**Asylumist:** Tell us about your career. How did you get to be the Chief Immigration Judge of the United States?

**Judge Keller:** I was appointed to the position by Attorney General Loretta Lynch in 2016. By that time, I had been at EOIR (the Executive Office for Immigration Review) for 28 years, and had a lot of experience with and knowledge of the entire organization, especially the Office of the Chief Immigration Judge (“OCIJ”) and the Board of Immigration Appeals (“BIA”).

After law school at the University of Virginia, I clerked for state court judges in Iowa. I wanted to return to DC, and in those days – the late 1980s – there were a lot of options. I submitted my resume to a federal government database and was selected to interview at the BIA for a staff attorney position (they liked the fact that I had taken an immigration law class with Professor

David Martin at UVA). At the interview, I knew it would be an incredible job. The BIA is the highest level administrative body in immigration law, and the people I met seemed happy to be there. I thought I would stay maybe two years and then move on, but I ended up remaining with EOIR for 31 years.

I was at the BIA for about 15 years, nine of those as a manager. In my early days as a staff attorney, I helped revitalize the BIA union, which was basically defunct when I arrived. Some employees had wanted to simply decertify the union, but a colleague and I convinced the majority of attorneys and staff that it could be a useful organization, so they voted to keep it. I was the union president for several years. After I later became a manager, my colleagues joked that my penance for having led the BIA union was to have to deal with the union from the other side. I helped then-Chairman Paul Schmidt revamp and restructure the BIA in the mid-1990s.

From there, I served as EOIR's General Counsel and was involved with many reforms, including the institution of the first fraud program and a program to address complaints about the conduct of Immigration Judges. This ultimately led to my appointment as the first Assistant Chief Immigration Judge ("ACIJ") for Conduct and Professionalism ("C&P"). At the time, David Neal was the Chief Immigration Judge, and we built the C&P program from whole cloth. In addition to responsibility for judge conduct, performance, and disciplinary issues, I supervised courts from headquarters and was the management representative to the judges' union. All of this experience led to me to the position of Chief Judge.

**Asylumist:** What does the CIJ do? How is that position different from the EOIR Director or General Counsel?

**Judge Keller:** I view the CIJ's job as leading the trial level immigration courts to execute the mission of EOIR, including, most importantly, managing the dockets to best deliver due process. In practical terms, this involved hiring and training judges and staff, determining the supervisory structure of the courts, directing the management team of Deputies, ACIJs, and Court Administrators, overseeing the Headquarters team that supports the field, including an administrative office, a business development team, legal advisers, an organizational results unit, and an interpreters unit. The CIJ also collaborates with the other senior executives such as the

Chairman of the BIA, the General Counsel, and the Director of Administration to coordinate agency activities on a broader scale. In years past, the CIJ acted as a high-level liaison with counterparts in DHS, the private bar, and other governmental and nongovernmental groups.

The regulations—specifically **8 C.F.R. 1003.9**—describe the function of the CIJ. I kept a copy of that regulation on my wall. The regulations set forth the CIJ's authority to issue operational instructions and policy, provide for training of the immigration judges and other staff, set priorities or time frames for the resolution of cases, and manage the docket of matters to be decided by the immigration judges.

Despite the regulation, under the current Administration, much of the CIJ's authority has been assumed by the Director's Office or the newly created Office of Policy. Court operational instructions, court policy, the provision of training, setting priorities and time frames for case disposition, and many other matters are now being performed by the EOIR Director's Office, with minimal input from the CIJ and OCIJ management. I do recognize the regulation setting forth the authority of the Director, as well as the fact that the CIJ's authority is subject to the Director's supervision. However, reliance on career employees and specifically the career senior executives (Senior Executive Service or SES) at the head of each EOIR component is significantly diminished now. I believe that is compromising the effectiveness of EOIR as a whole. Senior Executives have leadership skills and incredible institutional knowledge and experience that should bridge that gap between policy and operations. They should be a part of developing the direction of the agency and its structure to most effectively accomplish its functions, but are instead largely sidelined and relegated to much more perfunctory tasks. I worry that people with valuable skills will not be satisfied with decreased levels of responsibility, and will leave the agency. This will make it more difficult for EOIR to meet the challenges it is facing.

To answer the question as to how the CIJ position is different from the Director and General Counsel, the EOIR Director manages all the components of the Agency (BIA, OCIJ, Administration, and OGC) and reports to the Deputy Attorney General. The EOIR General Counsel provides legal and other advice to the EOIR component heads and the Director.

**Asylumist:** What were your goals and accomplishments as CIJ? Is there anything you wanted to

do but could not get done?

**Judge Keller:** I was fortunate to serve as the CIJ at a time of many changes: Hiring an unprecedented number of IJs, finally beginning to implement electronic filing, and creating new ways to effectively complete cases. At the same time, we faced challenges, such as the ever-changing prioritization of certain types of cases, an increased focus on speed of adjudication, and the creation of the new Office of Policy within the agency, which was given far-reaching authority.

Amid these changes, one of my goals was to use my experience at the agency and my credibility to reassure judges and staff that, despite any changes, our mission of delivering fair hearings and fair decisions would remain unchanged. I always told new classes of judges that their primary responsibility was to conduct fair hearings and make fair decisions. Due process is what we do. And if we don't get that right, we are not fulfilling the mission of the immigration court. I had the sense that my presence as CIJ gave people some level of security that we were holding on to that mission during all of the change.

Another goal was to hire more staff. I thought I would have more control over hiring and court management than I ultimately did. In terms of hiring, while we greatly increased the number of IJs, it is important to remember that IJs cannot function without support staff: Court administrators, legal assistants, clerks, interpreters, and others. The ratio is about 1-5, judges to support staff. Our hope was also to have one law clerk per IJ and we made some major progress in that regard. It might be wiser for EOIR to take a breather from hiring more judges and focus on hiring support staff, because that is imperative for the court to function. Overall, I was not able to prioritize staff hiring as I would have liked, nor was I confident that my office's input had much impact on hiring decisions.

Aside from hiring many more judges, some of the positive changes we made while I was there included implementing shortened oral decisions—we do not need a 45-page decision in every case. Shorter decisions, where appropriate, are vital to increasing efficiency. We also encouraged more written decisions. It seems counterintuitive, but written decisions can actually be more efficient than oral decisions. If you have the written material available, as well as law clerks, and

the administrative time to review the decision, written decisions save the time that would be spent delivering the oral decision and that time can be used for additional hearings. For this purpose, we greatly increased the accessibility of legal resources for both judges and staff through the development of a highly detailed and searchable user-friendly electronic database of caselaw, decisions, and other reference material.

Importantly, we were also working on ways to replace the standard scheduling based on Individual and Master Calendar Hearings. Instead, in a manner more like other courts, we would schedule cases according to the particular needs of the case, including creating, for example, a motions docket, a bond docket, a short-matters docket. Cases would be sent to certain dockets depending on what issues needed to be addressed, and then move through the process as appropriate from there. Different judges might work on one case, depending on what was needed. During the course of this process, many cases would resolve at the earliest possible point, and some would fall out—people leave the country, they obtain other relief, etc. But in the meantime, such cases would not have taken up a normally-allotted four hour Individual Calendar hearing block in the IJ's schedule. We were looking to do at least three things: Secure a certain trial date at the start of proceedings, allot time judiciously to each matter, and reduce the time between hearings. If the immigration courts could successfully transition to this model, it would improve the timeliness and rate of completion of final decisions.

While I was CIJ, we also looked to see how other courts dealt with issues such as technology. For example, we went to see the electronic systems at the Fairfax County, Virginia court. That system is more advanced than EOIR's, and it would, for example, allow a judge to give advisals that are simultaneously translated into different languages for different listeners. This would eliminate the time it takes to do individual advisals, without sacrificing the face-to-face time with the judge. We also investigated video remote interpreting, which is having the interpreter in the courtroom via video, so everyone can see and hear each other as if they were in the same place. IT infrastructure to properly support such initiatives is very expensive, but is obviously currently available and used by other court systems. Changes like improving the interpretation system and implementing e-filing and a user friendly electronic processing system would make a profound difference in how the courts operate.

I believe that some of these ideas are still being considered, but the problem is that there does not seem to be much patience for changes that are not a quick fix. I had hoped to move things further than we were able to, but we did make progress as I discussed.

As another example of a positive accomplishment, EOIR is now very effectively using more contractors for administrative support. This was started by Juan Osuna when he was Director of EOIR, and it has been highly successful. Because our growth has been so rapid, contract employees allow us to get top-notch people quickly, and gives us the flexibility to easily replace someone whose performance is not up to speed. Contractors are not a substitute for permanent employees, but can bridge the gap between a vacancy and a new hire. Once contractors have some experience, they can apply for permanent positions and by then, we have good knowledge of their skills and can hire experienced workers.

Finally, a major accomplishment was that I was the first female Chief Immigration Judge. Even though my experience was extensive, I still had to fight to get the job, including nine hours of interviews. At the time, I think I underestimated how much the workplace was still unaccustomed to women in particular positions. The emails I received after I left the job were astounding. Men and women alike wrote to tell me how much it meant to them to have a female CIJ.

**Asylumist:** How did things at EOIR change between the Obama Administration and the Trump Administration?

**Judge Keller:** Things now are unlike any time in the past. As I think we have been seeing throughout government during this Administration, the difference seems to be that there is now a fundamental distrust of people and organizations in the federal government. Over three decades, I have worked through a variety of administrations at all points on the political spectrum. Long-time federal employees are very accustomed to altering course when new administrations come in, whether or not the political parties change. Many employees and executives like me welcomed change as an opportunity to move their organizations forward and make the delivery of their services better. But if those in political power do not trust their subordinates and the functions of the agencies they run, it's a very different and difficult scenario.

Some of the "small p" political pressure was happening by the end of the Obama Administration.

For example, we saw this with children's cases and the instruction we received from Justice Department leaders in political positions to prioritize those cases on our dockets. Still, in that instance, once the political goal was set, the best way to accomplish the goal, and even its ongoing feasibility, was largely left to senior staff in the agency with operational expertise to implement or to ultimately advise superiors that a different course of action might be needed. Now, very often both the political and the operational decisions down to the smallest details are dictated from above. For example, even my emails and communications to staff were edited from above. Aside from the very questionable advisability of having operational determinations made by persons with no operational expertise, this approach subjects the court process to claims that it is not neutrally deciding cases but instead deciding cases in the manner that political leaders would like.

Until recently, I had never really thought very hard about an Article I court for immigration cases. I thought that the line between politics and neutral adjudication was being walked. There was no major concern from my perspective about EOIR managers navigating that line. Now, the level of impact of political decisions is so extraordinary that I wonder whether we do need to remove the immigration courts from the Department of Justice. I've just started to seriously consider the validity of this idea and I need to do more research and thinking about it. The **American Bar Association's recommendations** are very persuasive and of significant interest to me. Before, I would not have thought it necessary.

Of course, moving the Immigration Courts to Article I status would not solve all our problems, but it could free us from some of the questions that have been raised over the years about politicized hiring, how cases are being politically prioritized, and whether that is appropriate for a court.

Another large change came in our ability to talk to those we serve. To best function, you have to talk to stakeholders on both sides: The Department of Homeland Security (DHS) and the private bar/respondents. This used to be standard procedure in past administrations, and it was done at both the upper and ground levels. Recently, such conversations were much more limited, and took place primarily at higher levels, often above my position and that of my Deputies. This change was touted as a way to streamline the Agency's messaging system, but cutting off other forms of communication is detrimental, and I think EOIR has been hampered by our inability to

talk at different levels to stakeholders.

We previously had a great relationship with the American Immigration Lawyers Association (“AILA”). For example, when I was working on conduct and professionalism for Immigration Judges, AILA was a great help. At the time, AILA’s message was the same as our message (poor conduct of adjudicators and representatives should be addressed), and we successfully partnered for a long time. Similarly, the CIJ previously had regular interactions with DHS’s Principal Legal Advisor and others in the DHS management chain, but that is no longer the case. Another change to the management structure that I believe was ill-advised was abolishing the “portfolio” ACIJs who bore targeted responsibility for several very important subjects to immigration court management: Judge conduct and professionalism, training, and vulnerable populations. In my experience, having officials whose specialized function was to oversee programs in these areas increased the integrity, accessibility, credibility, and efficiency of the court.

**Asylumist:** While you were CIJ, EOIR implemented quotas. IJs are now supposed to complete 700 cases per year. Can you comment on this?

**Judge Keller:** Many different court systems have performance goals and I am generally in favor of those. But the question is, How do you establish and implement them? Are you consulting the managers and IJs about it? How do you come up with the goals? Should they be uniform across the courts? The current requirements were not developed by me or my management team. Numeric expectations alone are not going to fix things. Timeliness is more important in my view than specific numbers. Moreover, the way that the emphasis is being placed on these numbers now sends the wrong message to both the parties and our judges and court staff. Also, court staff and stakeholders would more likely buy into such a change if they understood how the goal was developed, and why. My experience is that IJs are generally over-achievers and they want to do well and will meet or exceed any goals you set. In my view, completing 700 cases may be an appropriate expectation for some judges and dockets, and might be too high or even too low for others. Courts, dockets, and cases are vastly different from the southern border to the Pacific Northwest to the bigger cities, so I’m not sure about a one-size-fits-all approach.

**Asylumist:** What about the Migrant Protection Protocols (“MPP”), also known as the Remain in Mexico policy. Can you comment on the effectiveness or efficacy of this program?

**Judge Keller:** The MPP began right before I left EOIR. In the MPP, as with all dockets, the role of the immigration court is simply to hear and resolve the cases that DHS files, but there were and still are, many legal and procedural concerns about the program. For example, what is the status of a person when they come across the border for their hearing, are they detained or not? Also, there were significant practical considerations. If you bring people across the border and plan to use trailers or tents for hearings, you need lines for IT equipment, air conditioning, water, bathrooms, etc. All that needs to be taken care of well in advance and is a huge undertaking. My impression of the MPP was that it was a political policy decision, which, even if an appropriate DHS exercise, is evidence of how asking the court to prioritize political desires impacts the overall efficiency of the court. The resources it required us to commit in terms of planning, and the resources it took away from the remaining existing caseload will likely contribute to further delay in other cases.

**Asylumist:** According to **press reports**, you and two other senior EOIR officials—all three of you women—were forced out in June 2019. What happened? Why did you leave?

**Judge Keller:** Unless there is something I don’t know about my two colleagues, none of us was forced out. I was not. We could have stayed in our same roles if we had chosen to do so. At the same time, I would not necessarily say that our departures were completely coincidental. I do know that the nature of our jobs had changed considerably.

For me, the previous level of responsibility was no longer there, and I did not have the latitude to lead the OCIJ workforce. My experience and management skills were not being used and I was mostly implementing directives. Any time three experienced, high-level executives depart an agency, there should be cause for concern. The fact that we were all women certainly raises a question, but EOIR has always been pretty progressive in that regard. Nevertheless, appropriate equal respect for women in the workplace is something that unfortunately still needs attention everywhere.

Leaving EOIR was a hard decision for me to make, and I think it was a big loss for EOIR that all

three of us chose to exit.

The politicization of the court was also a concern for me. Historically, the Director of EOIR was always a career SES appointee, not a political SES. I viewed that as critically important, symbolically and practically, for a court system, especially one like the immigration court within the Executive Branch. Director James McHenry is in a career Senior Executive position. However, his path to the position was through the new Administration, which had detailed him from his position as a relatively new Administrative Law Judge to Main DOJ as a Deputy Assistant Attorney General for a while before he became the Director. It appears that the large majority of his career otherwise was at DHS in non-managerial positions.

Successfully overseeing or managing an organization the size of EOIR with all of its challenges today would be difficult even for a seasoned executive with a lot of management experience.

The question at this time for EOIR is, How does your mission of fair adjudication of immigration cases fit within the broader immigration goals of the government? It takes deft and nuanced management to ensure the integrity of a court of independent decision-makers while maintaining responsiveness to political leaders. A good manager listens to people with expertise and is skilled at motivating others, getting the most from each employee, developing well-thought-out operational plans to reach policy goals, and even changing course if necessary. Under Director McHenry, the advice of the agency's career executives was often not even solicited, and did not appear to be valued. His approach caused many to question the soundness of his operational decisions, and his commitment to the mission of the court, as opposed to accommodating the prosecutorial goals of DHS. I didn't think there was as much focus on improving how we heard cases, as there was on meeting numeric goals and adjusting to the priorities of the DHS.

**Asylumist:** The BIA recently added six new members. All are sitting IJs and all had lower than average asylum approval rates. Do you know how these IJs were selected? What was the process?

**Judge Keller:** This was stunning. I can't imagine that the pool of applicants was such that only IJs would be hired, including two from the same city. I think IJs are generally eminently qualified to be Board Members, but to bring in all six from the immigration court? I'd like to think that the

pool of applicants was more diverse than that. At both the courts and the BIA, we used to get applicants for judge positions from academia, the private sector, BIA, and other governmental entities. More recently, we also had experienced judges and adjudicators from various other administrative systems, the military, and state and local courts applying to be IJs. I find these recent BIA hires to be very unusual.

I do not know the process for selection, but suspect that Board Chairman David Neal\* had minimal input into these hires. I find this scenario very odd.

*\* Note: Since this interview took place, the Chairman of the BIA, David Neal, left his position and retired from the federal government. Before serving as Chairman of the BIA, David Neal held many other leadership positions at EOIR over many years, including the Vice-Chairman of the BIA and Chief Immigration Judge.*

**Asylumist:** EOIR has made some moves to decertify the IJ union. Do you know why? What do you think about this?

**Judge Keller:** This happened after I left, but of course, it is easier to run an organization without people questioning you. Good managers recognize that you want opposing viewpoints. Maybe I am biased because I was a union officer, but I was also a manager longer than I was a union leader, and I've seen both sides. When I first learned that attorneys and judges were unionized, I was surprised, but I have seen the value of that. As a manager, the union is a great source of information. There are inherent conflicts between management and any union, but the union often has goals similar to those of management. The relationship between a union and management must be carefully developed, managed, and maintained. In the end, I felt it was worth the extra effort.

Now, I think management is more comfortable without public questions. I think decertifying is a mistake, particularly now when there are so many other changes that demand focus.

**Asylumist:** When he was Attorney General, Jeff Sessions gave a speech to EOIR where he claimed that most asylum cases were fake. This is also a line we frequently hear from the Trump Administration. What was your opinion of that speech?

**Judge Keller:** I think you may be referring to a **press conference the Attorney General held at EOIR** in October 2017. In a speech that day, the Attorney General said that the asylum system was “subject to rampant abuse and fraud.” That was disheartening. Fraud is not a factor in the large majority of cases. We know about fraud and we have been dealing with it probably since the inception of the immigration court. But it is not true that overwhelming numbers of asylum seekers are coming to immigration court trying to fraudulently obtain benefits. Whether the majority of their claims ultimately lack merit is a different question. But it is the very fact that we have a robust system to examine and decide asylum claims that makes our country a role model to others. I do not think statements like that made by the Attorney General are helpful to the court’s credibility. If IJs had that speech in mind in court, they would be labeled as biased, and bias is not a good thing for a judge or a court.

For the current Administration, I think there is an underlying skepticism about the extent to which the system is being manipulated. The process is indeed imperfect. But if you think that there are inappropriate “loopholes,” then we need to fix the law or the process. That is why comprehensive, or at least extensive, immigration reform has been discussed for so long. The Attorney General articulated some potential improvements he wanted to make, but also unfortunately focused in that speech on fraud and abuse, as if it was a problem greater than I believe it is.

When I would give my speech to new IJs, I would tell them that they would see the best and the worst of human nature in immigration court. As an IJ, you see persecutors and those who were persecuted; courageous individuals and liars. It is a huge responsibility. Therefore, you can’t go into court as an IJ and be thinking either that everyone is telling the truth, or that everyone is manipulating the process. You have to have an open, yet critical mind. It seems to me that Attorney General Sessions did not have a full appreciation for our particular role. This again brings us back to the idea of an Article I court, or some other solution to solidify the independence of immigration court adjudicators.

**Asylumist:** What do you think should be done about asylum-decision disparities? Does something need to be done?

**Judge Keller:** Yes. I think that asylum decision disparities should be evaluated by immigration

court managers as they may be a sign of an underlying problem that may need to be addressed. However, I do not believe that they can or should be entirely eliminated.

If a judge is significantly out of line with his or her colleagues in the local court, it might be a red flag. Sometimes, simple things impact grant rates. For example, did the IJ miss some training in a particular area and is that affecting the grant rate? Is the judge assigned or does a court have a docket that by its nature (detained, criminal) will result in a higher or lower grant rate? Court managers should be alert to and manage those issues.

We've been looking at this issue for a long time. I remember talking about it with many EOIR leaders and judges over the last 10 years. But each case is different from the next and you don't want decisions on asylum made according to mathematical formulas as if by computers. Decisions on such important human matters should be made by people who know the legal requirements, and can exercise sound judgment.

One way we thought about addressing seemingly significant disparities was temporarily assigning IJs with high or low grant rates to courts where the grant rates are different. Sometimes, the best way to evaluate your own opinions is to think through them with people who have different views. The hope was that judges would have the time and opportunity to reflect on their approach to asylum.

Once, former Director Osuna and I went to Chicago to visit the judges of the Seventh Circuit, which was at the time highly critical of our judges. We met with several of the Circuit Judges and talked about many things, including disparities in immigration court. We explained our approach to disparities, namely, addressing training needs, addressing any inappropriate conduct via discipline, and improving resources. One of the Circuit Judges mentioned that he was appreciative of our approach, and suspected that if anyone looked at it, there are probably similar disparities at the circuit court level too. As long as human beings are deciding immigration cases, there will always be some disparities. However, significant disparities should be evaluated and action taken only if the disparity is the result of something inappropriate, that is, something other than the proper exercise of independent legal judgment.

**Asylumist:** What is your hope for the future of EOIR?

**Judge Keller:** I hope EOIR can hold onto its core focus of hearing and deciding cases fairly and impartially. I also hope that the parties in the process know that we are listening to them. Parties in any court should feel that they've received a fair shake and a fair decision. They should understand the reasons why their cases were decided a certain way, and should not have to wait for years to get resolution. That is our reason for being – to deliver that service.

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