

International Affairs Forum

A WORLD ON THE MOVE: Migration and Statelessness



Featuring interviews with
Dawn Chatty
James Hathaway
Hans ten Feld



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Special Themed Issue: Editors' Introduction

The theme “Migration and Statelessness” is a topical one, featured prominently in global news outlets. For some states, the primary focus on migration has been around the impact migration has to local (national) communities, services, and resources. At one extreme, migration in the national discourse has been a polarizing and divisive issue, creating an “us” versus “other” type of situation. On the other hand, the issue has also brought together diverse sectors of communities that are driven to provide for refugees and migrants. Across a number of states, recent debates and discussions about migration have revolved around the numbers, reasons, economic impacts, and origins of migrants seeking to enter a state’s borders due to civil war and conflicts. Another level of this debate centers on the actual impact to migrants themselves – issues about statelessness, of status in-transit and within a “host” state, of existing rights and the protections in place for migrants – and how these vary from state to state.

To this end, this issue draws together a set of thematically-related short essays, opinion-editorial pieces, and interviews with practitioners, academics, and affected parties discussing the complexities of migration. The pieces range from such subtopics as the status of refugees (as compared to migrants) under international law (Hathaway) to the impact of citizenship status for migrants (Pedroza). Other interviews and short essays further address this issue of status, examining refugeehood, displacement, and statelessness, and how the issue of status has an impact on those moving within and between borders. In one essay, H el ene Lambert examines the link between statelessness and refugeehood, and in other pieces, Ferris and Keetharuth each address aspects of the relationship between displacement and statelessness. Other contributors provide an “on the ground” view of these issues from within specific countries or from a regional perspective (Chatty’s discussion of the Middle East; Redcliff’s coverage of Bangladesh; Tazreiter’s focus on Australia; Ali Batoor’s account as an asylum seeker; the IOM on the Balkans; and Mekonnen’s discussion of the situation that has created a mass exodus from Eritrea). The remaining pieces address related concerns: the impact national structures and regimes have on immigration and how reform is needed (Marks); human rights and humanitarian assistance (ten Feld; Zera ); human trafficking (Moskoff; Reliance, Inc.); and the economic effects of migration (Gibson; Takougang). Collectively, the mix of interviews, short essays, and op-ed pieces represent a cross-section of the interesting work taking place on this topical subject.

The editorial team hopes the current collection in this issue provides further thought and new perspectives to the on-going and emotive debates about migration taking place in different corners of the globe.

There have been changes to the publication in the past several years, and the most recent ones provide the editorial team a new opportunity to reflect on our aims for the International Affairs Forum and to establish its position in relation to other outlets in the field of international relations and current affairs. The current issue demonstrates the publication’s unique place within the field, providing an outlet for academic-type research and discussion articles, short essays, and opinion-editorial pieces from researchers and practitioners, alongside

interviews with scholars and officials (from think tanks, international organizations, and academic institutions) who assist with informing and shaping the policy-making landscape.

The core values for the publication are:

- We aim to publish a range of op-ed pieces, interviews, and short essays, alongside longer research and discussion articles that make a significant contribution to debates and offer wider insights on topics within the field;
- We aim to publish content spanning the mainstream political spectrum and from around the world;
- We aim to provide a platform where high quality student essays are published (winners of the IA Forum Student Writing Competition);
- We aim to publish the journal bi-annually in hard-copy and to provide faster online dissemination of pieces at other times;
- We aim to provide submitting authors with feedback to help develop and strengthen their manuscripts for future consideration.

All of the solicited pieces have been subject to a process of editorial oversight, proof-reading, and publisher's preparation, as with other similar publications of its kind.

We also welcome unsolicited submissions for consideration alongside the solicited pieces. In addition, the publication holds a student writing competition, seeking the best student pieces for publication in the journal along with our distinguished contributors.

We hope you enjoy this issue and encourage feedback about it, as it relates to a specific piece or as a whole. Please send your comments to: editor@ia-forum.org

DISCLAIMER

International Affairs Forum is a non-partisan publication that spans mainstream political views. Contributors express views independently and individually. The thoughts and opinions expressed by one do not necessarily reflect the views of all, or any, of the other contributors.

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Now is the Time to Reform the Immigration Courts

Hon. Dana Leigh Marks
National Association of Immigration Judges

Overwhelmed and struggling to meet our mission due to pervasive underfunding for more than a decade, our nation's immigration courts, located in the Executive Office for Immigration Review (EOIR) in the United States Department of Justice, are in a state of crisis. A startling number of legal experts from all sides of the political spectrum agree on this.¹ In fact, our courts have garnered the dubious distinction of being dubbed by one expert as “the most broken part of our immigration system.”² Perhaps the most sobering aspect of that assessment is the fact that immigration judges on a daily basis are adjudicating death penalty cases (where individuals are at risk of future persecution if expelled from the United States) in settings that most closely resemble traffic courts. Fixing our broken immigration courts should be the first order of business as our country tackles myriad, thorny issues involved in immigration policy. The fix for the courts is neither difficult, nor do we believe it will be unduly controversial or expensive.

A bit of background on the courts is helpful. The immigration courts are the trial level tribunals that determine whether or not an individual is a citizen of the United States, whether or not that person is present in violation of our immigration laws, and, if so, whether or not that person qualifies to obtain an immigration status that would allow him or her to remain in the United States legally. The law we apply in our proceedings has the complexity of the Internal Revenue Code and can have consequences that can implicate all that makes life worth living or threaten life itself.³ In addition to asylum seekers, those who may be required to appear before the immigration courts include lawful permanent residents who have lived virtually their entire lives in the United States but have been convicted of a crime here; vulnerable unaccompanied minors who have crossed the border fleeing violence or who have been neglected, abandoned or abused; adults who are mentally incompetent and whose immigration status is unknown; and sometimes U. S. citizens, who may not realize that they derived such status through operation of law, or who may have difficulty mustering the necessary evidence to provide the factual basis for their claim.

Although people who come to court have the privilege of having an attorney's help, such assistance only becomes a reality if one can pay or find a willing volunteer. Despite that disadvantage, all undocumented migrants in removal proceedings bear the burden of proof – the legal obligation to

The best solution to the myriad problems caused by the current structural flaw is the creation of an immigration court under Article I or, as an alternative, the establishment of an immigration court in an independent agency outside the DOJ.

prove they are eligible to remain in the U.S. or qualify for a remedy under our complicated immigration laws – once the government shows that they are not U.S. citizens. Last fiscal year, just over 85% of people in immigration detention were unrepresented in their court proceedings, a figure which fortunately dropped to roughly 40% when non-detained dockets are also factored in.⁴ This number remains problematic, as legal representation greatly aids the court in fairly and expeditiously deciding cases.

The vast majority of proceedings, 83% in 2014, were held in a language other than English, yet any respondent has to persuade a judge that his testimony is worthy of belief, despite the linguistic and cultural barriers he or she may face. This is particularly important because witnesses to events that occurred in foreign countries are rarely available to testify in court, and obtaining documentation of individual circumstances from far off lands can be quite difficult and even potentially dangerous. Sometimes, well-prepared cases sound more like university lectures on the political realities of some little-known dictatorship or a psychology class on the etiology of domestic violence and post-traumatic stress, rather than a typical courtroom “he said, she said.” In other cases, judges must make a decision with only the testimony of a single, illiterate and extremely traumatized individual, based on a record that is devoid of the quality of evidence that is usually presented in more formal court settings. For judges, all these cases present a challenge to assure that he or she does not inadvertently make cultural assumptions about people or places that are unsubstantiated.

The delicate balance that has allowed this complicated system to function in the past has begun to unravel due to the crushing caseloads currently facing the courts. EOIR is facing record high dockets: at the end of Fiscal Year (FY) 2015, the immigration courts had over 456,000 pending cases being adjudicated by an immigration judge corps of approximately 250 judges, more than double the number of cases pending in 2010.⁵ If evenly divided among all judges, each immigration judge would have a pending docket of more than 1,800 cases, but more than 15 judges perform exclusively or primarily management functions.⁶ This huge caseload has been one of the contributing causes to an increase in the average time during which cases remain pending, which has now reached 635 days.⁷ Further complicating the docketing dilemma, the cases of recent arrivals and detainees are being prioritized so that non-priority cases are being set for hearings in November 2019, even though many have already been pending for years.⁸ These delays are extremely troubling to many, creating lengthy separation from family abroad and painful limbo for already-stressed refugees who can neither travel nor sponsor their spouses or children who may be stranded in harm’s way. Ironically, these delays benefit only those individuals whose claims are least likely to prevail when their case is finally decided, thereby undermining the integrity of the removal system as they may be able to remain in the United States for years simply awaiting their court date.

For almost a decade, the scarcity of human resources in the immigration courts has been roundly criticized by a wide range of experts and former government officials. Sources ranging from organizations such as the American Bar Association (ABA) and the Administrative Conference of the United States (ACUS), to the editors of such well respected newspapers as the *Houston Chronicle*, *The Monitor*, *The Dallas Morning News*, *Bloomberg Views*, *The New York Times*, and *The LA Times* have decried the lack of resources and funding provided to the immigration courts.¹⁰ These diverse officials and experts have long called for increased staffing for the immigration courts. Attorney General Alberto Gonzales announced in August of 2006 that the Department of Justice (DOJ) would

seek budget increases starting in FY 2008 to hire more immigration judges and judicial law clerks.¹⁰ The ABA's Commission on Immigration in 2010 concluded EOIR was underfunded, resulting in too few judges and insufficient support staff to handle the caseload.¹¹ ACUS confirmed in 2012 that the case backlog and limited resources of the immigration courts presented significant challenges.¹² In 2014, two expert roundtables convened by Georgetown University's Institute for the Study of International Migration called for increased resources for immigration judges and the court system to reduce the growing backlog.¹³ In a 2015 article, The Bipartisan Policy Center stated its belief that by adding more judges to reduce the backlog, "the enforcement system [would] function more efficiently and help migrants receive a fairer hearing."¹⁴

While the immigration enforcement budgets have been skyrocketing, increasing to more than \$18.5 billion in FY 2015, the immigration courts have been left so far behind as to resemble a distant speck on the horizon. Human Rights First recommends that the overdue right-sizing of the immigration courts would require adding 280 immigration judge teams, and cost about \$223,357,500, which would still amount to only 3.4 percent of an \$18.5 billion immigration enforcement budget.¹⁵

There is no doubt that a dramatic increase in the number of immigration judges is an essential part of the solution.¹⁶ However, as each day passes it becomes equally obvious that this step alone is just a band-aid, not a cure. An equally important step to resolve the crisis in our immigration courts, one that is essential to provide a lasting solution that will have continued efficacy in the future, is to establish an independent immigration court under Article I of the Constitution. Here is a brief overview of why this is an imperative next step towards a durable solution to the problems that have long plagued our courts.

The immigration courts are still suffering from the historical legacy of their position as a part of the Immigration and Naturalization Service (INS). In an effort to increase independence, EOIR was created as a separate agency within the DOJ in 1983, but it remained dramatically overshadowed by the INS. It was then that we nicknamed ourselves legal "Cinderellas," feeling like the immigration courts were the mistreated and less loved stepchild, relegated to leftovers and rags.¹⁷ Hoping to prevent this from occurring again, the National Association of Immigration Judges fought to keep the immigration courts separate when the Department of Homeland Security (DHS) was created and given primary authority for immigration law enforcement, and due to these efforts the immigration courts remained in the DOJ.¹⁸

Unfortunately, time has shown that the immigration courts are still relegated to an afterthought despite our essential role in the removal process, and that our placement in the DOJ, a law enforcement agency, remains highly problematic. By law, immigration judges are required to "exercise ... independent judgment and discretion" when deciding cases and also to take actions consistent with the law and regulations in their decision-making.¹⁹ The DOJ, with its strong identity and admirable work, is nevertheless an agency whose mission does not always align comfortably with neutral adjudication, nor does it provide the immigration courts with the independence we require.²⁰

The stark reality is that the immigration courts have been chronically resource-starved for years. We have reached a stage where we must acknowledge that our dockets too often prove true the

adage that justice delayed is justice denied. To be efficient, to operate economically and to guarantee fairness, our courts need to be independent from both law enforcement and the respondents who come before us. To withstand the political firestorms which undoubtedly will continue to occur in the future, we need the protection of judicial independence upon which all other courts rely and the transparency necessary to provide us the funds we need.

In order to understand the depth of the tensions caused by our current placement in a law enforcement agency, a few examples are helpful. Each demonstrates how the current structure of the immigration courts contributes to the diminution of the court's ability to fairly, impartially and expeditiously adjudicate the thousands of cases pending before us.²¹

For example, although the law considers immigration judges to be administrative judges, the DOJ relegates our stature to that of agency attorneys representing the United States government.²² This interpretation places judges in untenable conflict: we are asked to serve two masters, each with different priorities. A judge is required to be an independent and fair arbiter, yet how can this be done if at that same time he or she is "an attorney representing" an agency of the same government as one of the parties appearing before us? This conflict has become apparent in many ways.²³

One example is the fact that immigration judges lack contempt authority, despite the fact that Congress passed legislation in 1996 providing judges with that tool.²⁴ We continue to await implementing regulations to this day.²⁵ Another is the fact that communication about pending cases between supervisory immigration judges and supervising attorneys with DHS who prosecute the cases in our courts is commonplace; because we have the same client, the United States government, such discussions are not technically prohibited as *ex parte*. Yet another example is the recent change in docketing practices brought about by the surge of unaccompanied minors at our southern border. There is no other court that would turn the docket "on its head" at the request of one party or for politicized priorities, yet the immigration courts "flipped" the docket by moving the cases of new arrivals to the front of the line, despite the objection of immigration judges who are in the best position to control their dockets on a case-by-case basis, which allows them to make decisions based on the individual factors bearing on each case.

Some consider the most troubling aspect of relegating immigration judges to mere agency attorneys to be the lack of transparency regarding discipline. The current system places immigration judges in the unenviable position of being treated as attorney employees subject to multiple, often conflicting codes of conduct, while at the same time depriving the public of an open discipline process which is the judicial model nationwide. At present, immigration judges can be disciplined or downgraded in a performance review for insubordination to a supervisor and thereby punished for their good faith interpretation of the law. Because these steps are characterized as personnel actions taken against government attorneys, the public does not have the right to know whether or not any action has been taken against an individual judge, let alone what sanction, if any, has been imposed.²⁶ In contrast, the judicial discipline systems advocated by the National Association of Immigration Judges (NAIJ) (based on ABA and other national court models) protect judges from discipline for their legal interpretations. At the same time, they provide greater transparency for the public by allowing access to information about investigations and any sanctions.²⁷

The confusion created by the current problematic structure is rampant. The public and even members of the press all too frequently refer to the “INS courts” and are unaware that the immigration courts are now part of a completely separate agency than the prosecutors in our courts. This public perception of the immigration court affects immigration judges’ ability to do their jobs. The public’s skepticism regarding immigration judges’ independence and impartiality makes it extremely difficult, if not impossible at times, to establish the trust and cooperation necessary to obtain all the relevant evidence that is essential for making determinations that are fair. Where there is a concern that due process is being denied, class action lawsuits are filed.²⁸ There is economy in timeliness. When cases move through a court system without undue processing delays, the outcomes are more accurate and costs of repetitive reconsiderations disappear. Anecdotal evidence strongly supports the conclusion that public distrust leads to increased numbers of appeals of immigration judge decisions, resulting in unnecessary pressure on the under-resourced federal circuit courts of appeal. It is cheaper to resolve these cases in the trial level immigration courts instead of clogging our appellate courts.

The best solution to the myriad problems caused by the current structural flaw is the creation of an immigration court under Article I or, as an alternative, the establishment of an immigration court in an independent agency outside the DOJ. NAIJ recommends an Article I tribunal consisting of a trial level immigration court and an appellate level immigration review court.²⁹ An aggrieved party should have resort to the regional federal circuit courts of appeal following the conclusion of these proceedings. This model is based on the U.S. Tax Court. Implementation of this proposal would satisfy the need for independence in an area of adjudicative review while retaining the efficiency of a specialized tribunal. It would create a forum with the needed checks and balances to ensure due process. The DOJ would be free to focus all its efforts on its primary mission, the prosecution of terrorists and other law enforcement activities, an increasingly compelling focus. Both due process and judicial economy would be fostered by a structure where the immigration courts’ status as a neutral arbiter is enhanced. The immigration courts’ credibility would be strengthened by a separate identity, one clearly outside the imposing shadow of the DHS or the law enforcement priorities of the DOJ. Such structural reform would benefit Congress and the American people by providing an independent source of statistical information to assist them in determining whether the mandate of immigration adjudication is being carried out in a fair, impartial, and efficient manner, and it would also allow an independent funding request to Congress to assure the courts’ budget is not shortchanged.

The idea is far from novel; it has been seriously considered for over 30 years.³⁰ The merits of this solution have been endorsed recently by comprehensive studies commissioned by the American Bar Association (ABA) and the Chicago Appleseed Fund for Justice.³¹ Prestigious organizations such as the National Association of Women Judges and the American Judicature Society have endorsed the concept as well.

Acknowledgement is long overdue that incremental modifications to the immigration court system cannot resolve the pernicious problems that plague it, and that additional resources alone are insufficient. History has clearly shown that surges in the immigration court caseload are cyclical and bound to reoccur, yet time after time the courts have found themselves unprepared. Enduring change must be implemented to meet this predictable challenge. From the thorough study of a bipartisan commission over 30 years ago to the recent exhaustive study of all stakeholders by the ABA, the solution has been agreed upon and is clear: we must establish an Article I court or a separate

agency. Prompt action is needed now. It is only through this structural reform that the independence of the immigration courts will be guaranteed, providing optimal fairness and efficiency for all parties. Through meaningful structural reform, our immigration courts will be equipped to meet and overcome the challenges which we now face and be prepared for those which will surely continue to arise in the future. The time for reform is here – urge Congress to act.



Dana Leigh Marks is a graduate of University of California Berkeley and Hastings College of the Law, and she has served as an Immigration Judge in San Francisco since January of 1987. Judge Marks is currently in her 14th year as President of the National Association of Immigration Judges, the recognized collective bargaining unit for the approximately 250 member corps of immigration judges nationwide. In that capacity, she has published numerous articles and testified to Congress regarding the need to restructure our nation’s immigration courts so as to safeguard judicial independence. She has also spoken and published regarding the job related burnout and secondary traumatic stress suffered by immigration judges working in the current system. She discusses immigration court issues regularly with print, radio, and TV journalists in English and Spanish.

Judge Marks taught Immigration Law for over a decade and has lectured extensively on various immigration law topics to judges and attorneys at local and national continuing legal education seminars throughout her career. While in private practice, Judge Marks served as lead counsel and successfully orally argued the landmark asylum case of *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which established the liberal standard that persons applying for asylum need only prove a reasonable possibility of future persecution instead of the higher standard of clear probability advocated by the INS.

For more information, Judge Marks can be reached through the NAIJ website: www.naij-usa.org.

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¹ Chatty, D. (2010). *Displacement and dispossession in the modern Middle East*. New York: Cambridge University Press.

The Unequal Chances of Migrating and Belonging

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Now is the Time to Reform the Immigration Courts

¹ American Bar Association, *Reforming the Immigration Court System* (2010), p. 2–16 available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.

authcheckdam.pdf; Administrative Conference of the United States (ACUS), “Immigration Removal Adjudication, Committee on Adjudication, Proposed Recommendation, June 14-15, 2012,” available at <http://www.acus.gov/report/immigration-removal-adjudication-report>.

² Law 360, Opinion: The Most Broken Part of Our Immigration System, Steven H. Schulman (October 30, 2015), <https://www.law360.com/immigration/articles/721259/opinion-the-most-broken-part-of-our-immigration-system>.

³ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). These cases have also been analogized to criminal trials, because fundamental human rights are so inextricably tied to these enforcement-type proceedings. See John H. Frye III, *Survey of Non-AIJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 276 (1992).

⁴ EOIR Statistical Yearbook, <http://www.justice.gov/eoir/statistical-year-book>

⁵ TRAC, Immigration Court Backlog Tool, available at http://trac.syr.edu/phptools/immigration/court_backlog/

⁶ EOIR publishes a list of Immigration Courts nationwide, including a list of managerial and supervisory judges as well as their current judge staff at <http://www.justice.gov/eoir/eoir-immigration-court-listing>

⁷ *Supra* at note vi.

⁸ ABC- KSAT 12, Non-priority Immigration Cases Won’t be Heard until 2019, available at <http://cuellar.house.gov/news/documentsingle.aspx?DocumentID=398186>

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¹⁰ U.S. Department of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals, August 9, 2006, available at http://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html. Note that despite this plan, by September 2008, no new Immigration Judge positions had yet been funded. TRAC, *Bush Administration’s Plan to Improve Immigration Courts Lags*, September 8, 2008, available at <http://trac.syr.edu/immigration/reports/194/>.

¹¹ American Bar Association, *Reforming the Immigration Court System* (2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

¹² Administrative Conference of the United States (ACUS), “Immigration removal Adjudication, Committee on Adjudication, Proposed Recommendation, June 14-15, 2012,” available at <http://www.acus.gov/report/immigration-removal-adjudication-report>.

¹³ Georgetown University, Institute for the Study of International Migration, *Detention and Removal: What Now and What Next?*, Report on expert’s roundtable held in October 2014, available at <https://isim.georgetown.edu/sites/isim/files/upload/Detention%26Removalv10%20%281%29.pdf>.

¹⁴ Bipartisan Policy Center, *Funding Immigration Courts Should Not be Controversial*, May 20, 2015, available at <http://bipartisanpolicycenter.org/blog/funding-immigration-courts-should-not-be-controversial/>

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¹⁶ United States House of Representatives, Committee on the Judiciary, Hearing on “Oversight of the Executive Office for Immigration Review”, December 3, 2015, available at <http://judiciary.house.gov/index.cfm/hearings?ID=DB5DABA5-ABA0-44E3-8918-D22603B9D2F7>

¹⁷ Dana Leigh Marks, Still a Legal “Cinderella”? Why the Immigration Courts Remain an Ill Treated Stepchild Today *The Federal Lawyer*, March 2012 at 25.

¹⁸ See *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on*

Immigration of the S. Comm. on the Judiciary, 107th Cong. 14-16, 70-98 (2002) statement and written submissions of Dana Marks Keener, President, National Association of Immigration Judges. Included in the NAIJ submission was a position paper entitled *An Independent Immigration Court: An Idea Whose Time has Come*, See *id.* at 79-98 (written statement of Dana Marks Keener, president, and Denise Noonan Slavin, vice president, NAIJ) also available at <http://naij-usa.org/wp-content/uploads/2014/06/An-Independent-Immigration-Court-An-Idea-Whose-Time-Has-Come-January-2002.pdf>.

¹⁹ 8 C.F.R. § 1003.10(b)

²⁰ The DOJ's mission statement is: "To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." <http://www.justice.gov/about>.

²¹ For a comprehensive discussion of the history of these issues, why the establishment of an Immigration Court under Article I is desperately needed, see Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, 13 BENDER'S IMMIGRATION BULLETIN 3 (Jan. 1, 2008).

²² While charged with impartiality, the immigration courts lack the structural protections for independence which are provided to the judicial branch of government or tribunals under the Administrative Procedure Act. Rather, immigration judges are governed by the provisions of the Immigration and Nationality Act. See INA §101(b)(4), 8 U.S.C. §1101(b)(4). The Office of Professional Responsibility relies for that proposition on the provisions of 8 U.S.C. § 1101(b)(4) and 8 C.F.R. § 1001.1(1), which require Immigration Judges to be attorneys. Such a narrow reading of these provisions flies in the face of the nature of the duties performed by Immigration Judges and the standards to which they are rightfully held by the circuit courts of appeals.

²³ See Denise Noonan Slavin and Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGRATION BULLETIN 1785 (Nov. 15, 2011).

²⁴ See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)*, Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009-589 (IIRIRA) (codified as amended at INA § 240(b)(1) (2007), 8 U.S.C. § 1229a(b)(1)).

²⁵ Nineteen years after Congressional action, the state of limbo persists. "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than three years since the enactment of IIRIRA, the [EOIR] and the DOJ have failed to resolve this issue, apparently still paralyzed by the legacy of their relationship with INS." Michael J. Creppy et al., *Court Executive Dev. Project, Inst. for Court Mgmt., The United States Immigration Court in the 21st Century* 109 n.313 (1999). Because of this opposition, the Attorney General still has not published regulations implementing contempt authority for Immigration Judges.

²⁶ In EOIR's response to a contentious Freedom of Information Act case now on appeal before the D.C. Circuit, "The agency further argued that immigration judges are not high-level employees, but rather the career government attorneys who 'fit snugly' with the kinds of low-level workers who privacy interests in job matters the court has upheld." Allissa Wickham, *Disclosure May Cause Stigma, EOIR Tells DC Circ.*, *Law 360*, Dec. 4, 2015.

²⁷ The NAIJ believes that Immigration Judges should be held to the high judicial standards set forth by the American Bar Association's Model Code of Judicial Conduct. On July 25, 2007, NAIJ formally responded to EOIR's proposed rulemaking on the issue announced at 72 Fed. Reg. 35,510 (June 28, 2007), and recommended that EOIR adopt our proposed code, which is closely patterned after the ABA provisions.

²⁸ See, e.g. *Settlement agreement in Abadia-Peixoto, et al. v. United States Department of Homeland Security, et al.*, Case No.:3:11-cv-4001 RS (4/40/14)(class action asserting deprivation of due process to adult immigration detainees forced to appear in immigration court shackled at the wrists, waist, and ankles, regardless of their history or capacity for disruption), available at <https://www.aclunc.org/our-work/legal-docket/uelian-de-abadia-peixoto-et-al-vs-united-states-department-homeland-security>

²⁹ *Supra* at note xxii.

³⁰ See, e.g., *Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy With Supplemental Views by the Commissioners* (1981).

³¹ *Comm'n on Immigration, Am. Bar Ass'n, Executive Summary, Reforming the Immigration System, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE*

ADJUDICATION OF REMOVAL CASES at ES-39 (Feb. 2010); Chicago Appleseed Fund for Justice, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts at 35-36.

³² See Resolution of the National Association of Women Judges, passed on April 16, 2002 (on file with author); American Judicature Society, The Crisis in the Immigration Courts, available at http://naj-usa.org/wp-content/uploads/2014/06/American-Judicature-Society-Immigration-Court-Editorial_10-24-11.pdf

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¹ United Nations Human Rights Council (UN HRC). (2014). Resolution adopted by the Human Rights Council: 26/24—Situation of human rights in Eritrea. Geneva, Switzerland: UN HRC. Retrieved January 13, 2016, from http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/24.

² UN HRC. (2015). Report of the Commission of Inquiry on Human Rights in Eritrea. Geneva, Switzerland: UN HRC. Retrieved January 13, 2016, from http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/42.

³ Stevis, M., & Parkinson, J. (2015, October 20). African dictatorship fuels migrant crisis: Thousands flee isolated Eritrea to escape life of conscription and poverty. Wall Street Journal. Retrieved January 13, 2016, from <http://www.wsj.com/articles/eritreans-flee-conscription-and-poverty-adding-to-the-migrant-crisis-in-europe-1445391364>.

⁴ VOA News. (2015, November 11). France's Hollande: Eritrea "becoming empty" as residents leave. Voice of America. Retrieved January 13, 2016, from <http://www.voanews.com/content/eu-offers-african-nations-1-8-billion-but-some-question-response/3052919.html>.

⁵ <http://www.unhcr.org/print/3ae68ccd10.html>.

Eritrea at the Center of the International Migration Crisis

¹ Full version of the report is available here: http://unhcr.org/556725e69.html#_ga=1.105409091.1165959019.1449518198.

² See the following chart by the International Organization for Migration (IOM): <https://twitter.com/tcraigmurphy/status/510044413314482176>. It is also reported that out of almost 500, 000 people who came to Europe in 2015, most came from Syria, Libya and Eritrea. See <http://uk.reuters.com/article/uk-europe-migrants-eritrea-idUKKCN0RH1MU20150917>.

³ Pastoral Letter of the Catholic Bishops of Eritrea, "Where is Your Brother," 25 May 2014, p. 14 [emphasis added]. A Tigrinya version of the letter is available here: <http://asmarino.com/alewuna/2093-the-most-daring-message-to-come-out-of-eritrea->. English translation is available here: <http://amecea.blogspot.no/2014/06/eritrea-nuncio-for-eritrea-appointed.html>.

⁴ See "Thousands Flee Isolated Eritrea to Escape Life of Conscription and Poverty," 20 October 2015, <http://www.wsj.com/articles/eritreans-flee-conscription-and-poverty-adding-to-the-migrant-crisis-in-europe-1445391364?alg=y>.

⁵ Police Headquarters in Agritento, "List of Lampedusa Survivors," http://download.repubblica.it/pdf/2013/cronaca/sopravvissuti_lampedusa.pdf, 4 October 2013. The only non-Eritrean survivor happens to be the captain of the capsized boat.

⁶ "Victim Gave Birth as She Drowned," 10 October 2013, available at <http://www.dailymail.co.uk/news/article-2451746/Lampedusa-boat-tragedy-victim-gave-birth-drowned.html>.

⁷ Report of the Commission of Inquiry on Human Rights in Eritrea, A/HRC/29/42, 4 June 2015 (hereafter "COIE Report"), paragraph 38.

⁸ COIE Report, paragraph 96.

⁹ European Commission - Press release, "EU announces support for poverty eradication in Eritrea," 11 December 2015, http://europa.eu/rapid/press-release_IP-15-6298_en.htm.

¹⁰ For instance, sub-article 1 of the same provision provides: "Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development" [emphasis added].