

IN BORROWED ROBES¹

A Day in the Life of an

IMMIGRATION JUDGE

By Judge Dorothy A. Harbeck

It was a Sunday afternoon of particular autumn splendor when I found myself trying on vampire capes for work. I had been three-quarters of the way to the York County Correctional Facility in Pennsylvania, a detention center, for my week-long detail of hearing removal cases of noncitizens when I realized I had forgotten my judicial robe. I was supposed to be on the bench in the immigration court the next morning. I was a new immigration judge (IJ), assigned to a detention facility in Elizabeth, New Jersey, and I did not want any problems on my detail to York. I figured forgetting my robe was a rookie move, and I wanted to project authority. Also, there is a specific Operating Policy and Procedure Memorandum (OPPM) on the subject.² That OPPM requires that I wear a robe when presiding over cases so that I convey the proper dignity of the court and foster the aims of due process and a fair hearing.

Immigration law and its various regulations all stem from the Immigration and Nationality Act (INA). After September 11, 2001, American immigration bureaucracy was radically restructured. One significant change was the dissolution of the Immigration and Naturalization Service (INS) and creation of the U.S. Department of Homeland Security (DHS),³ whose responsibilities include prosecuting





THIS PHOTO OF SECTION 13, CALLED "THE MOVING," IS A PIECE OF THE GATEWAYS TO NEWARK PORTRAITS MURAL, A 1.39-MILE-LONG PAINTING ALONG ROUTE 21 (MCCARTER HIGHWAY) IN NEWARK, NEW JERSEY.

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the removal cases in the immigration courts before the IJs.

The U.S. Department of Justice (DOJ)–Executive Office for Immigration Review (EOIR) handles the adjudicatory function in removal cases. The EOIR’s Office of the Chief Immigration Judge oversees the immigration courts, where IJs conduct formal removal/deportation hearings, adjudicating whether to deny entry, remove, or grant relief to noncitizens facing removal.⁴ Currently, there are more than 300 IJs in immigration courts nationwide.⁵ This is where I work. IJ decisions are final unless timely appealed or certified to the Board of Immigration Appeals (BIA). The decisions of the BIA can be appealed to the U.S. Circuit Courts of Appeals.⁶

IJs are not judges under Article III of the Constitution; we are not part of the traditional judicial branch. We are not judges empowered by Congress under Article I of the Constitution, such as territorial courts, U.S. Courts of Military Appeals, or the U.S. Court of Federal Claims. Instead, as employees of the executive branch rather than of the judicial branch, IJs arguably are “attorneys” employed by the United States,⁷ which presents a challenge to us being seen as true judges.⁸ In 2002, the National Association of Immigration Judges (NAIJ), also known as the IJ union, began an effort to have IJs reclassified as Article I judges in an attempt to give us independence from the DOJ.⁹ These efforts have garnered the support of many prestigious legal organizations and scholars and continue to the present date.¹⁰ So, the robe is a big deal. I have a few robes. I have a nice silk one I proudly bought when I first was sworn in back in September 2006, the day before my birthday; I have a backup polyester robe

with tight sleeves that I have never liked; and I have my graduation robe from Seton Hall Law School in 1989. This last one I refer to as the “emergency robe” because it has stripes on the arms and looks totally wrong for court. But it is a big black robe hanging in a closet in my house.

However, there I was in rural Pennsylvania on a Sunday afternoon, with none of the robes. So, when I saw a sign on the highway for a choir college, I took the exit and drove toward it, but the bookstore there was closed. Then I saw Auntie Anna’s Costume Closet in a strip mall and thought that seemed to be a perfect place to find a long black robe. I debated getting a Dracula cape, but with its high collar and red lining, it seemed to send the wrong type of message. I ultimately settled on a long black ghoulish shroud, and with the assistance of scissors and electrical tape, I cut off the *Morticia Addams* sleeves and opened up the shroud down the front. Then I taped up the hems so it looked somewhat like a judicial robe. I thanked providence I would mostly be behind the bench sitting down.



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It actually looked relatively normal, and I was all set to hear the cases that Monday morning at the detention center in York, Pennsylvania. First, I had a number of bond hearings. The purpose of a bond hearing is to ensure that the alien or noncitizen¹¹ will return to court if released from detention. A noncitizen should not be detained unless he or she presents a threat to national security or is a flight risk.¹² I routinely explain to noncitizens that if they obey all the orders of the court and return to court when they are supposed to, the bond amount will be returned to whoever posted it. If they do not, the bond is forfeited and I would have to enter an Order of Removal in their absence.¹³

DHS makes its initial custody determination, issues a Notice of Custody Determination Form, and files it with the immigration court. A noncitizen who comes into DHS custody can request that immigration court review this DHS determination. There is no “statute of limitations” for DHS/ U.S. Immigration and Customs Enforcement (ICE) to take a noncitizen into immigration custody following the noncitizen’s release from criminal detention.¹⁴

I must consider flight risk factors such as a history of failures to appear in any court, the ability and understanding of the noncitizen of the need to return to court, family ties, incentives to return to court depending on the likelihood that relief from removal is available, and whether the noncitizen has a criminal record.¹⁵ Less significant factors that I may consider include the amount of the bond in any criminal proceeding, DHS’s difficulty in executing a final order,¹⁶ and the noncitizen’s ability to pay.¹⁷

Sometimes, I may take testimony at bond proceedings, but because these hearings are abbreviated and have lower evidentiary standards, a letter or proffer of testimony may suffice. Bond determinations may be appealed to the BIA by either the noncitizen or the DHS within 30 days of my order.¹⁸

That day, I held about 15 bond motions in my makeshift robe. The following scenarios, while not the actual cases I heard, are representative of the types of cases that were before me:¹⁹

1. Jose Fabregas is a 28-year-old man from Mexico. He has been in the United

States for two years. He has two U.S. citizen children under the age of five with a woman he is not married to; she also is without status. He works in construction; he has never paid taxes. He was driving his employer’s truck with the employer’s permission. He was picked up pursuant to a New Jersey Attorney General’s directive at a traffic stop in Morristown, New Jersey, where the police routinely set up roadblocks to check for DWI and registration issues. He had no other driving infractions. He had no criminal or driving record. He had a valid Pennsylvania driver’s license, but he never actually lived in Pennsylvania. He had five family members in New Jersey, all living in the same town as he does—all without status. His priest came to court on his behalf.

2. Mei Lu Wan is a Chinese woman who claims to be 23 years old. She has no identity documents. She claims that she was kidnapped from her home in Fuzhou and smuggled into the United States through Canada about three years ago. She has a tattoo of a bird on her right arm, which the DHS attorney is convinced is a gang marking. She was apprehended by ICE at a massage parlor. She was the person working the cash register.

3. Angel Rafael is a 31-year-old Guatemalan man. He was picked up when ICE raided a restaurant where he was working in the kitchen. He had been arrested months earlier by the local police for shoplifting. He applied for and was accepted into the state pretrial intervention program in the county in which he lives. He did not plead guilty but was placed on probation and has been complying. He has not missed a single probation appointment. He has been going to Alcoholics Anonymous and has stopped drinking. His job at the restaurant was actually obtained through a Work First incentive through the governor’s office to help the immigrant community integrate into American society. The local press is following his immigration case and is writing a series of articles on how the system fails people who are striving to achieve the American dream. His probation officer and the press reporter were in court.

4. Sukwinder Singh is a 55-year-old Indian man. He entered the United States

illegally through Canada in 1985 after fleeing Mumbai because the police were arresting all Sikhs following the assassination of Indira Gandhi. His brother was beaten and set on fire by the police. He has never filed for any status or relief. He owns a taxi. He had a lawfully issued New Jersey driver's license but has not been able to renew it since 2001. He has no family in the United States but owns a house in Linden and rents out rooms to other Sikhs, who all call him uncle.

5. Mathieu Salmon-Barbieu is a 27-year-old man from Ghana. He came to the United States with fraudulent documents 12 years ago. After turning 21, he filed an affirmative asylum claim based on his fear of return to Ghana because he is a gay man. He had a wife in Ghana to whom he was married in a tribal ceremony (no legal ceremony) when he was 14 years old. He never lived with her. He was whipped by tribal elders for having male pornography and was cast out of his tribe. His sympathetic uncle helped him go to South Africa, where he then purchased papers to come to the United States. His asylum claim was denied, and he never appealed the denial. He has since been married to a U.S. citizen man in Massachusetts. They have two children, biologically fathered by his partner because the respondent is incapable of fathering children since the whipping incident. Respondent is in the process of adopting the children. He is a stay-at-home dad.

6. Niklas Kretowicz was arrested while sitting in a parked car drinking beer. He is a 50-year-old Polish man. He came to the United States on a tourist visa, got a job laying tile, and never left. He was completely drunk and singing at the top of his lungs when apprehended. The car was not turned on and the keys were in Kretowicz's jacket in the back seat. Nevertheless, he has been charged with criminal driving while intoxicated and has not had his municipal court trial yet. He had a lawyer for the criminal charge but not for the immigration case.

7. Pilar Agosin is from Ecuador. She is 42 years old and has three children who are all in the United States illegally. She was abandoned by her husband many years ago. She and her children entered without



THE STATUE "JUSTICE" SITS IN FRONT OF THE MARTIN LUTHER KING JR. FEDERAL COURTHOUSE IN NEWARK, NEW JERSEY, AND SYMBOLIZES THE BLINDFOLDED HEAD OF THEMIS, THE GREEK GODDESS OF JUSTICE. © 2017 BY D. HARBECK

inspection about eight years ago. She was detained waiting for her daughter at Newark Airport. Her daughter was returning to New Jersey from Florida. Respondent has a pending products liability lawsuit in superior court because she lost her left hand in an incident involving a commercial mixing bowl with an alleged design defect. She also has received some workers' compensation benefits and knows if she wishes, she can keep reopening that case to get more. She was present with her products liability lawyer, who has never been in immigration court before and had made a motion for summary judgment based on racial profiling at the airport, clearly not understanding the jurisdiction or purpose of the immigration court.

After these bond hearings and a trial readiness calendar call we refer to as the "master calendar," which took another two hours, I had 20 minutes to have lunch and get back to the courtroom. I ate the banana I bought at the gas station and a handful

of Halloween candy corn from Auntie Anna's Costume Closet.

In the afternoon, I had two asylum hearings. Asylum cases, where noncitizens ask to remain in the United States because they claim to fear life-threatening violence if they return home, can be extremely complex. An asylum applicant must show that he or she was persecuted or will be persecuted in his or her home country on account of his or her race, religion, nationality, membership in a particular social group,²⁰ or political opinion. Critically, there has to be a nexus between the fear of harm and one of the protected classes.²¹ As with the description of the bond hearings, the asylum scenarios I describe below are not the actual cases I heard that day, but rather the descriptions are representative of a type of case.

In asylum cases, I have to assess the witnesses' credibility. Credibility determinations are frequently based on the testimony of only one witness, the noncitizen seeking to remain in the United States.

On the day of the handmade robe, I had one asylum case from a country on the African continent. The applicant was a French speaker, and he was represented by a very well-prepared pro bono lawyer from a nongovernment organization in Philadelphia. We used an in-person interpreter who had come in from New York City the night before. This case was a straightforward, well-corroborated political claim. The pro bono lawyer had submitted a 60-page, well-indexed compendium of supporting material explaining the chaos following the elections that gave rise to the applicant's arrest in his country, and affidavits regarding his escape from detention and proof of his political opposition. After a 70-minute hearing, I immediately dictated a 25-minute extemporaneous oral decision into the record. I could not refer to a transcript when rendering my decision, as written transcripts of the proceedings are created only after my decisions are appealed. So, I take really good notes and I had plenty of coffee. The DHS prosecutor reserved his right to appeal my ruling.

In the second asylum case, the applicant was from a country in Central America and was not represented by counsel. The scheduled in-person Spanish interpreter had car trouble so we began the hearing using a different Spanish interpreter over the telephone. There are no public defenders in immigration court. In the immigration context, courts have historically viewed access to counsel at one's own expense as required to ensure "fundamental fairness" in formal removal proceedings;²² however, the vast majority of detained respondents in removal proceedings do not have the right to legal representation because the Sixth Amendment right to counsel does not apply.²³

The Central American applicant had no supporting material and could not really understand the interpreter over the phone, so I had to adjourn his case. He requested a review of an earlier IJ's denial of his bond request. I held a new bond hearing for him, but he did not present any new evidence providing any basis for me to modify my colleague's earlier ruling, so I also denied bond.

Because this case ended early, the court administrator scheduled in two more smaller

hearings for me. The dockets are jammed and there are more and more cases. My colleague, Dana Leigh Marks, an immigration judge in San Francisco and president of NAIJ, described it best. She has often explained that with the pace of the work accelerating, immigration judges often feel asylum hearings are "like holding death penalty cases in traffic court."²⁴

So, that was Monday. And I had four more similar days that week. I then took the robe home, where it hung in my closet until two years ago when my nieces asked to have it to make a bat costume for Halloween. And other than the handmade robe, that's a typical day in the life of this immigration judge. It is a very busy job, with nearly no downtime. It is fascinating though because we are always on the cusp of developing law that impacts so many other areas of practice²⁵ and so many people. I am grateful every day that I have had the opportunity to serve in this capacity and it truly has been one of the great honors of my life. ■

The views expressed here do not necessarily represent the official position of the U.S. Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ. This article is solely for educational purposes, and it does not serve to substitute for any expert, professional, and/or legal representation and advice.

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Endnotes

1. WILLIAM SHAKESPEARE, *MACBETH*, act 1, scene 3, ll. 113–15 (Macbeth to Banquo, "The Thane of Cawdor lives; why do you dress me/In borrow'd robes?").

2. OPPM 94-10 (Oct. 17, 1994): "To enhance the solemnity of the proceedings, the Judge's robe, a traditional symbol of dignity and authority, has been provided for each immigration judge. . . .

Therefore, it is the policy of the Office of the Chief Immigration Judge that each Immigration Judge shall wear a traditional black judicial robe when conducting a hearing where one or more parties are present, including hearings in detention centers, on details and in prisons."

3. See generally U.S. CUSTOMS & BORDER PROT., <http://www.cbp.gov/>; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/index.htm>.

4. See generally *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, <http://www.usdoj.gov/eoir/ocijinfo.htm>.

5. The U.S. Department of Justice–Executive Office for Immigration Review (USDOJ–EOIR) has a website at <http://www.justice.gov/eoir>.

6. See generally *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <http://www.usdoj.gov/eoir/biainfo.htm>.

7. See generally *EOIR v. Nat'l Assn. of Immigration Judges*, 56 FLRA No. 97 (Sept. 1, 2000), <https://www.flra.gov/decisions/v56/56-097.html>. IJs are appointed by the U.S. Attorney General to conduct formal, quasi-judicial proceedings involving the rights of aliens to enter or remain in the United States. As of 1973, incumbents of this position were formally authorized to use the title "Immigration Judge." In 1998, the Office of Personnel Management authorized the title of the classified position to be changed from Attorney/Advisor to Immigration Judge. *Ibid.*; Immigration and Naturalization Service Definitions: Immigration Judge, 38 Fed. Reg. 8590, 8590 (Apr. 4, 1973) (amending 8 C.F.R. § 1.1); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 97 n.45 (2007). Many thanks to Hon. John Gossart, IJ (ret.), one of the longtime unofficial "deans" of the IJ corps and past president of the National Association of Immigration Judges (NAIJ), for his extensive notes on the history of the immigration courts.

8. Denise Slavin & Dana Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785 (Nov. 15, 2011): "The immigration courts are unique. They are not courts with either of those structural protections. They are not in the judicial branch of the government, and they are not covered by the Administrative Procedure Act. Congress decided to exempt deportation proceedings from the protections of the Administrative Procedure Act, accepting the argument that adherence to the statute would be too costly or cumbersome. (For

a thorough history of these times, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453 (1988)). The immigration court system is part of the executive branch of government, located in an agency called the Executive Office for Immigration Review (INA § 101(b)(4), 8 U.S.C. § 1101(b)(4)), which is a component of the Department of Justice. Until the last decade, the DOJ also housed the Immigration and Naturalization Service (INS), the same office that employed the prosecutors appearing before the immigration court; now those prosecutors are housed in a sister agency, the Department of Homeland Security. Homeland Security Act, Pub. L. No. 107-296, § 1517, 116 Stat. 2135, 2311 (Nov. 25, 2002) (codified at 6 U.S.C. § 557).

9. See generally *NAIJ Publications*, NAT'L ASSN. OF IMMIGR. JUDGES, <http://naij-usa.org/publications/naij-publications>.

10. See generally *Article I and Independence Endorsements*, NAT'L ASSN. OF IMMIGR. JUDGES, <http://naij-usa.org/publications/article-i-and-independence-endorsements>. The American Bar Association, the Federal Bar Association, and the American Immigration Lawyers Association all support the NAIJ's quest for the creation of an immigration court system independent of the DOJ.

11. The word *alien* is sometimes used to denote non-U.S. citizens because that is how such persons are described in the Immigration and Nationality Act.

12. *Matter of Patel*, 15 I&N Dec. 66 (BIA 1976).

13. The EOIR online Benchbook contains a Bond Guide. http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf.

14. *Sylvain v. Att'y Gen.*, 714 F.3d 150 (3d Cir. 2013).

15. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

16. *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987).

17. *Hernandez v. Lynch*, No. EDCV1600620JG-BKKx (C.D. Cal. Nov. 10, 2016) (order granting preliminary injunction in part because the immigrant's ability to pay bond was not considered).

18. *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997).

19. Because all cases in the immigration courts are private, the descriptions provided in this article are fictitious but are based on general cases in this author's experience. The author wrote these descriptions for use in *pro bono* lawyer bond trainings, and they have been used for many other trainings.

20. *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (identify the social group—common, immutable characteristic that either cannot change or is so fundamental that he or she should not be required to change it); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582 (3d Cir. 2011); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

21. *S-P-*, 21 I&N Dec. 486 (BIA 1996).

22. *Brown v. Ashcroft*, 360 F.3d 346, 350 (2d Cir. 2004) (“The right . . . under the Fifth

Amendment to due process of law in deportation proceedings is well established.”).

23. *Leslie v. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010). See also, KATE M. MANUEL, CONG. RESEARCH SERV., R43613, *ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF* (2016), <https://fas.org/sgp/crs/homsec/R43613.pdf>.

24. Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/us/09immig.html>.

25. I have had the good fortune to be able to learn, write, and share my research on the intersection of immigration law with other areas of practice during my career as an IJ. See generally Dorothy Harbeck, *Does the New Jersey Bail Reform Affect the Immigration Court Bond Hearings?*, 44 RUTGERS L. REC. (forthcoming Winter 2017) (NAIJ capacity); Dorothy Harbeck et al., *Emerging from the Jungle: New Jersey Workers Compensation and Workers without Lawful Immigration Status*, 37 SETON HALL LEGIS. J. 262 (Spring 2013); Dorothy Harbeck et al., *How Padilla v. Kentucky Impacts the Immigration Courts*, 1 ST. JOHN'S J. INT'L. & COMP. L. 48 (Spring 2011); Dorothy Harbeck, *Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims—Immutable Characteristics and Concepts of Persecution Under U.S. Asylum Law*, 25 GEO. IMMGR. L.J. 117 (Fall 2010); Dorothy Harbeck et al., *Is the Internet “Voodoo?”: Evidentiary Weight of Internet-Based Material in Immigration Court*, 10 CONN. PUB. INT. L.J. 139 (Fall–Winter 2010).