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75 Years of the Board of Immigration Appeals

by Jeffrey S. Chase

The Board of Immigration Appeals celebrated its 75th anniversary in 2015. The brief summary of its history that follows is intended to commemorate this milestone.[1]

Formation and Early Years

Interestingly, the Board's first precedent decision, *Matter of L-*, 1 I&N Dec. 1 (BIA 1940), was issued on August 29, 1940, the day *before* the Board of Immigration Appeals came into existence.[2] Some background about the Board's early history is required to explain this.

From 1922 until 1940, a five-member Board of Review existed within the Department of Labor to review all immigration cases. The Board of Review had no decision-making authority of its own; it could only recommend action to the Secretary of Labor. In 1933, the Immigration and Naturalization Service ("INS") was formed within the Department of Labor,[3] and from 1933 until 1939 the Board of Review made its recommendations to the Commissioner of Immigration and Naturalization.[4]

In 1939, the Board of Review returned to reporting directly to the Secretary of Labor after a study of administrative practices recommended separating the Board's adjudicatory role from the INS's investigative and advocacy functions.[5] Marshall Dimock, an academic who served as Assistant Secretary of Labor under Frances Perkins, chaired the committee that conducted an exhaustive 2-year study of administrative practices within the INS. It was pursuant to the Dimock Committee's recommendations that Ralph T. Seward was appointed chairman of the Board in 1939. According to Seward, Dimock "was heading up an effort to revise the Immigration and Naturalization procedures to give the aliens some form of due process. [He] asked me if I would come down and be Chairman of the Board of Immigration Appeals, [the] Board of Review they called it then, and supervise the change in rules and regulations."[6]

By 1940, World War II had commenced in Europe, causing a change in public opinion regarding immigration. According to Seward, "in the middle of all this, of course, the War had broken out, and the temperament of the times had changed from trying to help aliens to being suspicious of them, trying to guard against spies and all the rest of it. So, we had [a] tough going. We did put through at least a part of, a sound solid part of, our program, but not all of it by any means."[7]

President Roosevelt transferred the INS (and the Board of Review) to the Department of Justice in 1940.[8] This move coincided with security concerns elevated by the outbreak of war in Europe; that same year, Congress passed the Alien Registration Act of 1940 (also known as "the Smith Act"), which required foreign nationals to register with the INS and created severe penalties for subversive activities.[9]

The Board of Review's transfer to the Department of Justice became effective on June 15, 1940.[10] Just over 2 weeks later, on July 3, 1940, an order was published in the Federal Register delegating a degree of decision-making authority to the Board of Review, including the power to issue orders of deportation after proceedings and to consider and determine appeals from boards of special inquiry in exclusion cases.[11] It was pursuant to this authority that the Board of Review issued its decision in *Matter of L-*. Ironically, this first published decision under the Board's newly granted authority fell within a section of the July 3 order requiring its referral to Attorney General Robert H. Jackson as a "question of difficulty," rendering the Board's August 29, 1940, decision the equivalent of a recommendation that needed the Attorney General's approval.[12] A footnote in the decision recognized the August 30, 1940, inception of the new Board of Immigration Appeals.[13]

Seward retained his title through the above-described changes, making him the first chairman of the Board. Seward departed in 1941 to become Executive Secretary of the National Defense Mediation Board. He was succeeded by Joseph A. Fanelli, who also served 1 year as chairman. Fanelli resigned in August 1942 to become Special Assistant to Petroleum Coordinator Harold C. Ickes.[14] Thomas G. Finucane then held the post of chairman for 26 years until his retirement in 1968. Finucane's lengthy tenure would seem to have brought an element of stability to a component that had seen a transfer in departments and three leadership changes in just 2 years' time.

In a 1945 internal report, the Board discussed its wartime activities. The outbreak of war was accompanied by a surge in foreign seamen deserting their vessels in an attempt to remain in the United States. According to the report, "[t]he burden of returning deserting seamen to their vessels and to the life line of supplies by orders of deportation has rested on the Board of Immigration Appeals and has substantially increased its work-load."[15] The Board also realized, according to the report, that "an iron-bound rule requiring the deportation of every alien seaman who deserted his vessel would be unwise," and that some exceptions were warranted. The report also discussed how the war's drain on manpower through service in the armed forces necessitated the importation of foreign workers to boost agricultural and industrial production in support of the war effort. The Board helped accomplish this through its orders exercising the discretion accorded the Attorney General by the ninth proviso to section 3 of the Immigration Act of February 5, 1917.[16] According to the report, "As of August 1944 the Board had ordered the admission of 47,823 such laborers."[17]

Following the war, new procedures were enacted that impacted the Board's work. Between 1940 and 1945, the Board had issued the initial "final" decisions in deportation cases. As explained by Chairman Finucane in 1943, "Practically all records are received by the Board from the Central Office of the [INS], and in most instances with its recommendation as to the action it thinks appropriate."[18] In contrast, under the 1945 regulations, appeals from Special Inquiry Board decisions were initially reviewed by the INS Commissioner, and only then could the Commissioner's recommendation to exclude or deport be appealed to the Board.[19] Two years later, new regulations became effective that further refined the jurisdiction of the Board as a wholly appellate body, with finality afforded to the INS Commissioner's decision where no appeal was taken.[20]

In 1945, Patricia H. Collins became the first woman to serve as a Board member. Collins graduated second in her class at Emory University School of Law in 1931 (one of the school's first three women graduates) but was unable to find a paying job.[21] According to a senior partner at one law firm, "we couldn't possibly meet our clients and tell them that we were spending money out of the law

firm to pay a woman law school graduate."[22] Collins began volunteering her services at the Atlanta Legal Aid Society, where she impressed the director enough for him to request the Board of Directors to reimburse Collins the amount of $40 per month to cover meals and travel. "The chairman of the Board was so appalled at the idea of paying a woman that he stood up, put on his hat, and walked out—never to return."[23] She finally found employment at the Department of Justice, where she was hired to put together the Department's antitrust library. Her work during the "New Deal" era made her one of the founders of the field of administrative law. She conducted classified research for the Department leading up to World War II, and was then called to the White House to research President Franklin D. Roosevelt's "court-packing" plan. In 1949, she became one of the first female lawyers to argue a case before the Supreme Court. At the invitation of Chief Justice Warren Burger, she founded the Supreme Court Historical Society in 1974.[24] Collins spent approximately a year and a half of her Federal career as a Board member.

The second woman to serve as a Board member, Louisa Wilson, remained in that position significantly longer, serving some 27 years from her appointment in 1948 until her retirement in 1975. A former Board staff attorney remembered Wilson as being possessed of both kindness and an institutional knowledge based on her years of experience, as well as being skilled at mediating conflicts between other Board members.[25] The American Immigration Lawyers Association presented Wilson with its Founders Award in 1978, which is awarded "to the person or entity who has had the most substantial impact on the field of immigration law or policy in the preceding period."[26]

The 1950s

The Immigration and Nationality Act of 1952[27] created new procedures that had an impact on the Board's caseload. Under the new procedures, decisions of the INS Special Inquiry Officers (now Immigration Judges) were given a measure of finality.[28] Furthermore, intermediate appeals to the INS Commissioner were eliminated, meaning that all appeals (including those by the INS) were now taken directly to the Board.[29] This change significantly increased the Board's caseload: a 1952 management study found that within a few months of the change the Board received some 4,000 cases that were either with or in transit to the Commissioner for appellate adjudication.[30]

An article in the July 1957 issue of the INS publication *I&N Reporter* offers a glimpse of the Board's caseload at that time. The article stated that, "During calendar year 1956, the Board acted upon 3,234 appeals and 902 motions."[31] By comparison, the Board completed 30,822 cases in FY 2014.[32] The INS article also mentioned that the Board heard oral arguments 5 days a week beginning at 2:00 p.m., with as many as six cases scheduled for a single afternoon.[33]

It was in connection with one such oral argument that Chairman Finucane's name was mentioned in a recent article on the Stanford Law School website about the Honorable Carlos Bea, a Stanford alumnus who is presently a judge on the U.S. Court of Appeals for the Ninth Circuit. A basketball player at Stanford, Judge Bea competed in the 1952 Olympics as a member of the Cuban basketball team. After the Olympics, his application for lawful status in the United States was denied and he was ordered deported. The article claims that Judge Bea "got lucky" while pursuing his appeal to the Board when Finucane "turned out to be an avid basketball fan and began quizzing him [during oral argument] on what position he had played at Stanford." The article states that the Board reinstated Bea's residency status, thus clearing the pathway to Bea's eventual citizenship.[34]

Finucane subsequently made a much less favorable impression on Congressman Francis Walter (co-sponsor of the Immigration Act of 1952, also known as the McCarran-Walter Act). According to a 1955 news article: "Rep. Walter (D-Pa) shouted to Chairman Thomas Finucane . . . that he was unfit to hold his job. 'I mean that,' Walter told Finucane, who was testifying across the table from him at a hearing before Walter's judiciary subcommittee . . . . 'It disturbs me that you should sit as chairman of this board.'"[35]

Walter's ire was in part a response to the Board's decision 3 months earlier staying the deportation of Frank Brancato, a reputed organized crime figure. Walter demanded to know why the Board had granted relief when Brancato had "a criminal record a mile long."[36] Walter added, "It was your duty to the citizens of the United States to look at the record."[37] When Finucane responded that the Board did look at the record, Walter retorted, "Well, you ought to have your glasses changed."[38]

1960s and 1970s

Finucane nevertheless remained chairman for another 13 years. He was succeeded in 1968 by Maury Roberts, who served as chairman until 1974. Roberts subsequently became editor of *Interpreter Releases*. He held the title of Editor Emeritus until his death in 2001 at the age of 91.[39] Roberts served as a mentor to two future Board chairmen: Paul Schmidt, who began his career at the Executive Office for Immigration Review as an attorney at the Board in 1973, and Juan Osuna, who succeeded Roberts as editor of *Interpreter Releases*. In a 1991 tribute to Roberts' 50 years in the field of immigration law, the late Senator Edward Kennedy referred to Roberts as "Mr. Immigration," noting that he and staff members of the Senate Subcommittee on Immigration and Refugee Affairs called on Roberts for advice for decades.[40]

During Roberts' tenure as chairman, the Board decided *Matter of Jolley*, 13 I&N Dec. 543 (BIA 1970), a case that received significant public attention at the time. Thomas Jolley fled to Canada to evade mandatory military service during the Vietnam War. After obtaining landed immigrant status there, he renounced his American citizenship at the U.S. Consulate in Toronto. He subsequently returned illegally to the U.S., where he was arrested and placed in deportation proceedings. The Board upheld the INS Special Inquiry Officer's order of deportation (with one lengthy dissent). The majority found that while Jolley's desire to avoid military service "may have been based on conscientious scruples," such motivation did not make his renunciation "any the less deliberate or voluntary."[41] The *Chicago Tribune* reported that the case was believed to be the first involving the deportation of an American-born citizen who evaded the Vietnam War-era draft.[42] The Board's decision was upheld by the Fifth Circuit the following year.[43] Although Jolley designated Canada for deportation, he was deemed to have abandoned his status there.[44] As no country agreed to accept him, Jolley lived the rest of his life in the United States without status. He died in 2014 in Asheville, North Carolina.[45]

In 1973, Roberts was responsible for hiring the first class of Department of Justice Honors Program graduates to work as attorneys at the Board. That first class included future chairman Paul Schmidt and future Board member Lauri Filppu (the two shared an office). At the time, the Board (which was located in the since-demolished International Safeway Building at 12th and F Streets in Washington, D.C.) consisted of 25 people in total, including 5 Board members and 9 attorneys.[46]

In 1974, the Board decided perhaps the most high profile case in its history, *Matter of Lennon*, 15 I&N Dec. 9 (BIA 1974). John Lennon (described in an April 1972 memo sent from the FBI to President Nixon's chief of staff, H.R. Haldeman, as "a British citizen and former member of the Beatles singing group") was one of the most iconic figures of the 1960s.[47] As background, the 1972 presidential election was the first in which 18-year-olds were able to vote; 21 had been the minimum voting age in prior elections. As a result of the "baby boom," 18- to 20-year-olds comprised a significant percentage of the population. In early 1972, the FBI believed that Lennon, an outspoken critic of the Vietnam War, planned on participating in an anti-war concert tour.[48] In a February 1972 memo forwarded by the late Senator Strom Thurmond to the Attorney General, it was suggested that Lennon be deported to prevent him from engaging in such political activity.[49]

An Immigration Judge in New York City ordered Lennon deported in 1973. Lennon was the beneficiary of an approved visa petition based on his extraordinary ability in the arts. The record contained letters written to the INS in support of his artistic merit from Bob Dylan (who wrote that Lennon and Ono's artistic contributions help "put an end to this mild, dull taste of petty commercialism which is being passed off as artist art by the overpowering mass media"), New York City mayor John Lindsay, Leonard Bernstein, Joyce Carol Oates, Jasper Johns, Joan Baez, Tony Curtis, John Updike (whose two-sentence letter concluded that Lennon and Ono "cannot do this great country any harm . . . and might do it some good"), and others.[50] However, the Immigration Judge ruled that Lennon was ineligible to adjust his status because of a 1968 British conviction for possession of cannabis.

On appeal, the Board affirmed the Immigration Judge's order. In response to the respondent's arguments, the Board found that: (1) the law under which Lennon pled guilty, as interpreted by the British courts, "contained a sufficient knowledge requirement to ensure that persons whose possession was entirely innocent would not be convicted"; (2) Lennon's claim to have pled guilty on counsel's advice that lack of knowledge was not a defense

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CIRCUIT COURT DECISIONS FOR JANUARY AND FEBRUARY 2016

by John Guendelsberger

The United States courts of appeals issued 158 decisions in January 2016 in cases appealed from the Board. The courts affirmed the Board in 139 cases and reversed or remanded in 19, for an overall reversal rate of 12.0%. There were no reversals or remands from the First, Second, Third, Fourth, Fifth, Eighth, Tenth and Eleventh Circuits. In January 2015, by way of comparison, the courts of appeals issued 122 decisions and reversed or remanded in 23 (18.9%).

The chart below shows the results from each circuit for January 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	23	23	0	0.0
Third	6	6	0	0.0
Fourth	3	3	0	0.0
Fifth	7	7	0	0.0
Sixth	4	3	1	25.0
Seventh	4	3	1	25.0
Eighth	7	7	0	0.0
Ninth	91	74	17	18.7
Tenth	4	4	0	0.0
Eleventh	7	7	0	0.0
All	158	139	19	12.0

The 158 decisions included 84 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 40 direct appeals from denials of other forms of relief from removal or from findings of removal; and 34 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	84	71	13	15.5
Other Relief	40	35	5	12.5
Motions	34	33	1	2.9

The 13 reversals or remands in asylum cases involved credibility (5 cases), past persecution (2 cases), nexus, internal relocation, the 1-year filing bar for asylum, corroboration, withholding of removal, and a frivolousness finding. The five reversals or remands in the "other relief" category included application of the categorical or modified categorical approach (three cases) and two Ninth Circuit decisions finding 18 U.S.C. § 16(b) to be too vague to support an aggravated felony crime of violence finding. The motion to reopen case involved ineffective assistance of counsel.

The United States courts of appeals issued 186 decisions in February 2016 in cases appealed from the Board. The courts affirmed the Board in 164 cases and reversed or remanded in 22, for an overall reversal rate of 11.8%, compared to last month's 12.0%. There were no reversals from the First, Sixth, Eighth, Tenth, and Eleventh Circuits.

Circuit	Total	Affirmed	Reversed	% Reversed
First	4	4	0	0.0
Second	49	44	5	10.2
Third	13	11	2	15.4
Fourth	12	11	1	8.3
Fifth	9	8	1	11.1
Sixth	4	4	0	0.0
Seventh	3	2	1	33.3
Eighth	13	13	0	0.0
Ninth	71	59	12	16.9
Tenth	5	5	0	0.0
Eleventh	3	3	0	0.0
All	186	164	22	11.8

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The 186 decisions included 114 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 38 direct appeals from denials of other forms of relief from removal or from findings of removal; and 34 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	114	99	15	13.2
Other Relief	38	34	4	10.5
Motions	34	31	3	8.8

The 15 reversals or remands in asylum cases involved credibility (6 cases), relocation (2 cases), nexus, level of harm for past persecution, well-founded fear, corroboration, firm resettlement, Convention Against Torture, and termination of asylum status. The four reversals or remands in the "other relief" category addressed application of the categorical approach to drug conviction cases, retroactivity of a change in eligibility requirements for adjustment of status, and a drug paraphernalia conviction. The three motions cases involved credibility, changed country conditions, and full faith and credit to state adoption orders.

The chart below shows the combined numbers for January and February 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	7	5	2	28.6
Ninth	162	133	29	17.9
Sixth	8	7	1	12.5
Third	19	17	2	10.5
Second	72	67	5	6.9
Fourth	15	14	1	6.7
Fifth	16	15	1	6.3
First	6	6	0	0.0
Tenth	9	9	0	0.0
Eleventh	10	10	0	0.0
Eighth	20	20	0	0.0
All	344	303	41	11.9

Last year's reversal rate at this point (January and February 2015) was 13.7%, with 234 total decisions and 32 reversals or remands.

The numbers by type of case on appeal for the first 2 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	198	170	28	14.1
Other Relief	78	69	9	11.5
Motions	68	64	4	5.9

John Guendelsberger is a Member of the Board of Immigration Appeals.

RECENT COURT OPINIONS

First Circuit:

Valdez v. Lynch, 813 F.3d 407 (1st Cir. 2016): The First Circuit denied the petition for review of the denial of a "good faith" hardship waiver under section 216(c)(4) of the Act, 8 U.S.C. § 1186a(c)(4). The court concluded that "reasonable, substantial, and probative evidence" supported the Immigration Judge's and Board's determinations that the petitioner did not meet his burden to establish that his marriage was entered into in good faith. The court noted that the petitioner's testimony lacked sufficient detail regarding the circumstances under which the couple met; the wedding ceremony itself; and the couple's subsequent living and financial arrangements. The court concluded that the documentary evidence submitted did not satisfy the petitioner's burden where only one tax return contained the wife's signature and no documents were presented to demonstrate that the couple comingled their funds. The court noted that the record was devoid of documentary evidence showing that the couple lived together. Additionally, affidavits offered from friends did not mention the petitioner's marriage. The court did not agree with the petitioner's argument that he was held to an unreasonable evidentiary standard. In response to the petitioner's claimed difficulty in documenting events that had occurred a decade earlier, the court observed that the petitioner, who was represented by counsel, could "hardly claim to have been unaware" of the need for documentation given that "[t]he requirement to present

documentary evidence to corroborate an applicant's testimony has existed for decades." The court noted that the petitioner had not requested a continuance from the Immigration Judge to obtain additional documents or argued on appeal to the Board that he could not obtain such evidence.

Second Circuit:

Wu Lin v. Lynch, 813 F.3d 122 (2d Cir. 2016): The Second Circuit granted the petition for review of the Board's decision reversing an Immigration Judge's credibility finding. The petitioner had provided three different accounts as to why he feared return to China. At a border interview following his apprehension, the petitioner claimed that he had worked for the birth control department in China and that he had let two women go without having a required procedure. At a subsequent credible fear interview, the petitioner claimed that he feared to return to China because he was arrested and fined after he went to reason with family planning officials after they forced his girlfriend to have an abortion. Before the Immigration Judge, the petitioner claimed that he was detained and beaten by the Chinese government for practicing Falun Gong. The Immigration Judge credited the petitioner's explanation that he had provided the first two claims based on the instructions and threats of smugglers (or "snakeheads"). The Board reversed, finding that the Immigration Judge had "committed clear error in crediting [the petitioner's] explanation for his repeated lies to immigration officials" and in finding the petitioner's third asylum claim to be credible. The court considered at length the "clear error" standard employed by the Board with respect to factual findings made below and the significance of terminology employed by courts during review, including the semantics of the verb "to find." The court distinguished its review of the Board's "clear error" standard from "somewhat analogous" court/agency review in other contexts, such as decisions by the Tax Court and Court of Appeals for Veterans' Claims. The court ultimately concluded that the Board "did not provide . . . a supportable basis" for ruling that the Immigration Judge committed clear error. The court noted that prior false testimony may often form the basis for an adverse credibility finding, but it was not for the Board to determine whether the petitioner told the truth about his third asylum claim, which was an issue of fact for the Immigration Judge. The court stated that the issue for the Board "was whether it had sufficient justification for ruling that the [Immigration Judge] had clearly erred" in finding the petitioner's third claim to be truthful. The court therefore remanded for the Board "to either accept the [Immigration Judge's] findings, or, if it can, provide a supportable basis for rejecting them." The court's decision included a concurring opinion, which found "ample reason" for the Board's conclusion that clear error was committed but saw "no harm" in remanding to the Board to provide further specificity.

Fourth Circuit:

Oxygene v. Lynch, 813 F.3d 541 (4th Cir. 2016): The Fourth Circuit denied the petition for review of the Board's decision affirming an Immigration Judge's denial of deferral of removal under the Convention Against Torture ("CAT"). Because the petitioner was convicted of an aggravated felony, the court also dismissed the petition for review of the Board's denial of his motion to reopen for lack of jurisdiction. The primary issue considered was whether *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), upon which both the Immigration Judge and Board relied, erred in stating the legal standard for government "intent" in CAT claims. As in *Matter of J-E-*, the petitioner in the instant case claimed that he would face indefinite detention as a criminal deportee upon return to Haiti and that the terrible conditions in Haitian prisons would amount to torture. Acknowledging that the CAT requires an applicant to show that torture will be intentionally inflicted, the petitioner argued that he would be intentionally detained upon return and that the Haitian government's knowledge of prison conditions and the harm that he would likely suffer satisfied the specific intent requirement. The Board had concluded that knowledge alone was insufficient to establish intent. The court reviewed the legislative intent of the CAT, concluding that while "every entity responsible for the progress of the CAT from treaty to domestic law" made the requirement of intent clear, none offered a definition of specific intent. The court noted that in *Matter of J-E-*, the Board specifically required evidence establishing that Haitian authorities "are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture." The court joined several other circuits in according deference to the Board's interpretation, stating that its interpretation is consistent with the prevailing meaning of "specific intent" and "reflects the likely wish of the President and Senate to incorporate that meaning into the CAT regulations."

Seventh Circuit:

Sehgal v. Lynch, No. 15-2334, 2016 WL 696565 (7th Cir. Feb. 22, 2016): The Seventh Circuit affirmed the district court's summary dismissal of a challenge to the Government's denial of a visa petition (Form I-130) filed by the United States citizen petitioner on behalf of her beneficiary husband. Although there was no question as to whether their current marriage was legitimate, U.S. Citizenship and Immigration Services ("USCIS") found that the visa petition could not be approved under section 204(c) of the Act, 8 U.S.C. § 1154(c), because the husband had previously entered into a fraudulent marriage in order to obtain immigration benefits. USCIS relied on the husband's sworn statement and also an unsworn statement from his prior wife, both of which admitted to such fraud. The Board affirmed. The court concluded that the inaccurate characterization by USCIS and the Board of the prior wife's statement as sworn, rather than unsworn, was harmless error in this case because both statements supported the finding of fraud. The court was unpersuaded by assertions that the husband's sworn statement was coerced, finding such allegations to be "too vague and inconsistent to undermine his confession of fraud." The court further found no "egregious conduct" where USCIS had informed the petitioner that it had forwarded her appeal to the Board but, in fact, did not do so for another year. The court stated that while the circumstances were unfortunate, no violation of a regulation had been identified. The court cited case law holding that delay alone does not rise to the level of affirmative misconduct on the part of the Government.

Eighth Circuit:

Godfrey v. Lynch, 811 F.3d 1013 (8th Cir. 2016): The Eighth Circuit denied the petition for review of the Board's decision affirming an Immigration Judge's denial of adjustment of status. The petitioner was found to be ineligible to adjust status because he was inadmissible under section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), as the result of having misrepresented himself as a United States citizen on multiple I-9 Employment Eligibility Verification forms provided to employers. The petitioner's case had previously been remanded to the Board to determine whether an I-9 form is admissible evidence in removal proceedings. In the interim, both the circuit court, in *Downs v. Holder*, 758 F.3d 994 (8th Cir. 2014), and the Board, in *Matter of Bett*, 26 I&N Dec. 437 (BIA 2014), held that an I-9 form could be used as evidence in removal proceedings. Citing these two cases, the Board held that the Immigration Judge properly considered the I-9 forms in the petitioner's case. The petitioner had checked a box on an I-9 form indicating that he was *either* a citizen (which would support a section 212(a)(6)(C)(ii) charge of inadmissibility) *or* a national (which would not support such charge). However, the court concluded that the Immigration Judge did not err in finding the petitioner to be inadmissible where the petitioner testified that, although he did not understand the difference between the two, he believed that being a citizen "was better than being a national" and that it was necessary for him to be a citizen to remain employed. Further, the petitioner had checked the same box in a second I-9 form completed 11 months after removal proceedings had commenced, by which time the petitioner was aware of the difference between a citizen and national. The court concluded that although a waiver may exist for the general misrepresentation of a material fact, there is no waiver under the Act for misrepresenting citizenship. The court also concluded that the Immigration Judge's admission of the I-9 form did not violate the petitioner's due process rights because the petitioner had ample opportunity to address the allegation and submit his own evidence.

Ninth Circuit:

Shouchen Yang v. Lynch, No. 12-71773, 2016 WL 760626 (9th Cir. Feb. 26, 2016): The Ninth Circuit granted the petition for review of the Board's denial of a motion to reopen. An Immigration Judge had previously denied the petitioner's asylum application based on an adverse credibility finding. The Board affirmed on appeal. The Board then denied the petitioner's timely motion to reopen to apply for asylum based on his new claim that he had converted to Christianity after he was ordered removed. The Board's basis for denying the motion to reopen was that the petitioner had not shown why his new claim should be found credible when his prior statements were not. The circuit court recognized its prior holding that an Immigration Judge may apply the maxim *falsus in uno, falsus in omnibus* to discredit the testimony of a witness previously found to lack credibility. However, the court did not follow the Second Circuit in recognizing the Board's ability to apply this maxim, noting that the Board's role differs from an Immigration Judge's because the Board is not permitted to make findings of fact, including credibility determinations. The majority of the panel concluded that the Board had impermissibly made such a finding in denying the motion to reopen.

BIA PRECEDENT DECISIONS

In *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016), the Board determined that a violation of section 260.10(1) of the New York Penal Law, a child endangerment statute that is violated by defendants who knowingly act in a manner likely to be injurious to the physical, mental, or moral welfare of a child, is categorically a "crime of child abuse, child neglect, or child abandonment" under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i).

Reviewing its jurisprudence in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008), and *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010), the Board stated that its broad interpretation of the term "crime of child abuse" under the Act includes offenses committed through "an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being." *Velazquez-Herrera*, 24 I&N Dec. at 512. Further, the definition of "crime of child abuse" extends beyond offenses that require proof of harm or injury to the child and encompasses crimes of child neglect and abandonment. The Board noted that its interpretation was deemed reasonable and accorded deference by the Second Circuit, in whose jurisdiction the case arose, in *Florez v. Holder*, 779 F.3d 207 (2d Cir. 2015).

The respondent argued that his offense was not categorically "a crime of child abuse, child neglect, or child endangerment" because section 260.10(1) sweeps more broadly than the generic offense described in section 237(a)(2)(E)(i) of the Act. The Board concluded that since a conviction under section 260.10(1) requires a showing that a defendant knew that his actions were likely to result in physical, mental, or moral harm to a child, the elements of the crime fit within the section 237(a)(2)(E)(i) definition of child abuse.

According to the Board, for the respondent to prevail in his argument that the statute is overbroad, he must demonstrate a "realistic probability," as described in *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013), that the statute would be applied to conduct that is not within the ambit of child abuse, as it is defined in section 237(a)(2)(E)(i) of the Act. The Board found it significant that none of the respondent's proposed examples of prosecutions under section 260.10(1) for behavior that would be outside the Act's definition of child abuse had actually resulted in a conviction. Further, the Board noted the Second Circuit's approval of a definition of child abuse that does not require actual harm to a child where there is, as an element, a sufficiently high risk of harm presented. Concluding that the respondent had been convicted of a categorical "crime of child abuse, child neglect, or child abandonment" under section 237(a)(2)(E)(i) of the Act, the Board dismissed the appeal.

In *Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016), the Board held that a State offense qualifies as a crime of violence under 18 U.S.C. § 16(a) only if it requires as an element the use, attempted use, or threatened use of *violent* physical force. The Board concluded that the respondent's conviction under Puerto Rico's third-degree aggravated battery statute does not categorically constitute a § 16(a) crime of violence because that offense can be committed by means not involving violent physical force.

The Immigration Judge determined that the respondent was removable as charged under section 237(a)(2)(A)(iii) of the Act for having committed an aggravated felony crime of violence as set forth in section 101(a)(43)(F) of the Act, which is, in turn, defined in reference to 18 U.S.C. § 16. After finding the Puerto Rico statute underpinning the respondent's conviction to be divisible, the Immigration Judge conducted a modified categorical inquiry and concluded that he had been convicted of an aggravated felony crime of violence.

The respondent argued that the Immigration Judge was limited to conducting a categorical analysis of the statute of conviction. The Department of Homeland Security did not disagree but contended that the respondent's offense was categorically a crime of violence. Neither party asserted that the modified categorical approach was applicable in the case. In conducting the relevant categorical inquiry, the Board explained that it must presume that the conviction is based on the least culpable conduct criminalized under the State statute and then determine whether that conduct is encompassed in the generic Federal offense.

On appeal, the DHS cited to *Matter of Martin*, 23 I&N Dec. 491 (BIA 2002), for its holding that assault involving the intentional infliction of physical injury includes as an element the use of physical force contemplated by § 16(a). However, the Board observed that the Supreme Court subsequently prescribed in *Johnson v. United States*, 559 U.S. 133 (2010), and *Leocal v. United States*, 543 U.S. 1 (2004), that the term "physical force" means violent force capable of causing physical pain or injury. Further, the First Circuit, in whose jurisdiction the case arose, rejected *Matter of Martin* in *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015), holding that physical injury to the victim is insufficient to establish the use of "physical force," which must be violent physical force for the purposes of § 16(a). In light of these cases, the Board withdrew from its holding in *Matter of Martin* to the extent that it is inconsistent with *Johnson* and *Leocal*.

Observing that the Puerto Rico statute proscribes a battery resulting in the infliction of bodily injury by "any means or form," the Board reasoned that the statute could be violated by means other than violent force. The Board therefore concluded that Puerto Rico's aggravated battery statute is not categorically a crime of violence under § 16(a) and remanded the record for the Immigration Judge to consider whether the respondent's conviction was for a crime of violence pursuant to 18 U.S.C. § 16(b).

In *Matter of Villalobos*, 26 I&N Dec. 719 (BIA 2016), the Board held that although the DHS has exclusive jurisdiction over applications for adjustment of status under the legalization provisions of section 245A of the Act, 8 U.S.C. § 1255a, Immigration Judges and the Board have jurisdiction to determine whether an alien was, in fact, admissible at the time of a prior adjustment under section 245A(b)(1). If the alien was inadmissible at the time he adjusted status from temporary resident to permanent resident under section 245A(b)(1) of the Act, he or she was not lawfully admitted for permanent residence and is thus removable and ineligible for a waiver of inadmissibility under former section 212(c) of the Act.

After being admitted as a temporary resident under section 245A(a) of the Act, the respondent sustained convictions for multiple offenses, including two convictions for possession of cocaine. He subsequently adjusted to lawful permanent resident status under section 245A(b)(1) of the Act. When he applied for a replacement resident alien card, the DHS discovered his criminal history and initiated removal proceedings. Of relevance here, the DHS charged the respondent with removability under section 237(a)(1)(A) of the Act as an alien who was inadmissible at the time that he adjusted his status. The Immigration Judge sustained the charge based on the respondent's controlled substance convictions and determined that he was ineligible for a waiver under former section 212(c) of the Act.

The Board first determined that it had jurisdiction under the Act, regulations, and its precedent to decide whether the respondent was removable under section 237(a)(1)(A) of the Act as an alien who was inadmissible at the time that he adjusted his status under section 245A(b)(1) of the Act. Turning to the question of the respondent's removability, the Board explained that the legalization provisions of section 245A govern the respondent's adjustment of status from temporary to permanent resident. Those provisions require an applicant to file two applications: one to obtain temporary resident status pursuant to section 245A(a) of the Act and a second to adjust to permanent resident status under section 245A(b)(1). The statute and implementing regulations require that the applicant establish his admissibility at the time each application is filed. Thus, the Board concluded that the respondent was required to establish that he was admissible at the time of his section 245A(b)(1) adjustment.

Because the respondent had previously sustained controlled substance convictions, he was inadmissible under section 212(a)(2)(A)(i)(II) of the Act at the time he adjusted status to lawful permanent resident. He was therefore removable under section 237(a)(1)(A) of the Act as an alien who was inadmissible at the time of adjustment of status. Since the respondent had not been lawfully admitted for permanent residence, under well-established case law he was ineligible for a waiver under former section 212(c) of the Act. The appeal was dismissed.

In *Matter of Adeniye*, 26 I&N Dec. 726 (BIA 2016), the Board held that an "offense relating to a failure to appear by a defendant for service of sentence" is an

aggravated felony as defined in section 101(a)(43)(Q) of the Act if the underlying offense was "punishable by" imprisonment of 5 years or more, regardless of the penalty that was actually ordered or imposed. The respondent was convicted of the Federal offense of possessing stolen mailbox keys, which is punishable by a maximum term of 10 years' imprisonment. He was sentenced to 24 months of imprisonment but absconded and was later convicted of failing to surrender for service of his sentence. The Immigration Judge determined that the respondent had sustained an aggravated felony conviction under section 101(a)(43)(Q) of the Act and found him to be removable and ineligible for any relief from removal.

On appeal, the Board rejected the respondent's argument that his underlying offense was "punishable by" the 24-month sentence actually imposed, rather than the maximum 10 years prescribed by statute. The Board acknowledged that the term "punishable by" used in section 101(a)(43)(Q) of the Act differs from the phrase "may be imposed" that is employed in two other sections defining aggravated felonies. The Board explained that under controlling circuit court precedent, the plain meaning of the term "punishable by" denotes a focus on the maximum penalty that may be imposed, rather than the penalty that was actually imposed. Further, the Board noted that in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), the Supreme Court interpreted the term "punishable by" to refer to the maximum possible sentence that may be imposed.

Finding it appropriate to interpret the term "punishable by" according to its ordinary meaning, the Board reasoned that the respondent was convicted of an offense for which the maximum penalty was 10 years' imprisonment, notwithstanding the 24-month sentence that he actually received. Concluding that the respondent had been convicted of an aggravated felony as defined under section 101(a)(43)(Q) of the Act, the Board dismissed the appeal.

75 Years of the Board of Immigration Appeals
continued

was not supported by the record; and (3) cannabis satisfied the Immigration and Nationality Act's definition of "marihuana." *Matter of Lennon*, 15 I&N Dec. at 23–26, *overruled by Matter of Esqueda*, 20 I&N Dec. 850 (BIA 1994). While stating that it was "not unsympathetic to the plight of the respondent and others . . . who have committed only one marihuana violation for which a fine was imposed," the Board concluded that "arguments for a change in the law must be addressed to the legislative, rather than the executive, branch of government."[51] The *Washington Post* reported on the Board's decision in its "Style" section.[52]

The following year, the Board's decision was vacated by a panel of the U.S. Court of Appeals for the Second Circuit, which concluded (with one dissent) that Lennon "was convicted under a statute which made guilty knowledge irrelevant," and that the statute therefore did not satisfy the knowledge requirement of what was then section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(23) (1975).[53] While the court reversed for this reason only, Judge Irving R. Kaufman added that the court did not take lightly the petitioner's alternate constitutional argument that he was selectively prosecuted on account of secret political grounds (an argument that the Board had found itself without jurisdiction to address) and indicated that a lower court might properly consider such argument should the adjustment application be denied as a matter of discretion. By this time, the 1972 election was long concluded (which Nixon, ironically, won in a landslide) and Nixon had recently resigned from office following the Watergate scandal. Lennon was allowed to adjust his status to permanent residency without further opposition.

1980s

David Milhollan (who had been INS Appellate Counsel) was appointed as Roberts' successor in February 1975, and he served as the Board's chairman throughout the 1980s. In 1983, the Board and the Office of the Chief Immigration Judge were moved to the newly created Executive Office for Immigration Review. Milhollan was appointed director of the new agency while continuing to serve as Board chairman; he held both positions simultaneously until his retirement from Government service in 1993. Milhollan's dual role meant that the Chief Immigration Judge reported to the chairman of the component reviewing his charges' decisions.[54] Following Milhollan's retirement, Attorney General Janet Reno appointed two individuals to fill the posts of EOIR director and Board chairman.

Between 1983 and 1985, the Board issued three precedent decisions involving respondents accused of assisting the Nazis in the persecution of others during World War II. There was a reason that these cases first arose four decades after the war. In 1973, a mid-level INS official informed then Congresswoman Elizabeth

Holtzman that the INS had a list of Nazi war criminals living in the United States and was "doing nothing about it."[55] When the INS commissioner testified before Holtzman and the House Subcommittee on Immigration, Citizenship, and International Law several months later, he acknowledged the list and agreed to allow Holtzman to review the files.[56]

It was ultimately discovered that thousands of Nazi war criminals had been admitted to the United States. The Office of Special Investigations ("OSI") determined that some were knowingly granted entry to this country, with government officials having knowledge of their past.[57] Holtzman subsequently sponsored legislation, often referred to as the Holtzman Amendment, which created a deportation ground for individuals involved in Nazi persecution. Holtzman was also a driving force in the creation of the OSI, which was charged with identifying and seeking the removal of persons who assisted the Nazis and their allies in the persecution of civilians, within the criminal division of the Department of Justice.

In *Matter of Laipenieks*, 18 I&N Dec. 433 (BIA 1983), the Board found the respondent, a Latvian native, deportable under the Holtzman Amendment based on his activities between 1941 and 1943 with the Latvian Political Police. However, the decision was overturned by the U.S. Court of Appeals for the Ninth Circuit.[58] The following year, the Board decided *Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984), holding that a former prisoner of war forced to serve as a concentration camp guard was deportable even if his actions were coerced and he harbored no animosity towards Jews. Prior to his deportation hearing, Fedorenko had been subject to denaturalization on the grounds that his guard service would have made him ineligible for a visa under the Displaced Persons Act of 1948, which barred those who had assisted the Nazis in persecuting civilians. After a district court judge ruled in favor of Fedorenko, the U.S. Court of Appeals for the Fifth Circuit reversed and ordered his denaturalization.[59] The circuit court's order was upheld by the Supreme Court.[60] Fedorenko became the first Nazi war criminal deported to the former Union of Soviet Socialist Republics ("Soviet Union"), where he was executed in 1988 after being tried and convicted for his war crimes.[61]

In *Matter of Linnas*, 19 I&N Dec. 302 (BIA 1985), the issue of the respondent's deportability under the Holtzman Amendment was not contested; the issue concerned the country to which he would be deported. The respondent designated the "free and independent Republic of Estonia." He argued that the United States had never recognized the annexation of his native Republic of Estonia ("Estonia") by the Soviet Union and that it would therefore violate United States' foreign policy to deport him there. He further argued that the appropriate place for deportation would be the offices maintained in New York City by Estonia. Holding that such offices did not satisfy the definition of "country" set forth in the Act, the Board upheld the Immigration Judge's designation of the Soviet Union. The Second Circuit denied the subsequent petition for review.[62]

The *Linnas* case played out during the Cold War and was further complicated by the fact that the Soviet Government had tried Linnas in absentia in 1962; his death sentence was reported by the Soviet press before the trial took place.[63] This combination of factors created discussion and disagreement as to whether Linnas should be deported to the Soviet Union. Linnas was eventually deported to Estonia in April 1987; he died less than 3 months later and was buried in Long Island, New York.[64]

1990s – Present

Chairman Milhollan retired in 1993. Soon thereafter, a series of headline-grabbing events, including a shooting at CIA headquarters and terrorist attack on the World Trade Center, led the Clinton Administration to undertake an immigration reform initiative. In addition to increasing the number of Immigration Judges nationwide, the number of Board members was increased for the first time from 5 to 12, with the new appointments taking place in 1995.[65] While many of the Board members continued to be career Federal Government employees,[66] some new appointees had varied experiences outside of Government. The new chairman, Paul W. Schmidt, had previously served as INS General Counsel but had also spent the 8 years immediately preceding his appointment practicing immigration law in the private sector. Another of the new Board members had been the director of the American Immigration Law Foundation's Legal Action Center, while another was a law professor. In addition, two of the new appointees had been Immigration Judges.

In 1996, the Board's decision in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), drew international attention.[67] In the case, the Board granted asylum to a woman from Togo based on her fear of being forced to undergo female genital mutilation ("FGM") if returned

there. The decision constituted the first precedent decision granting asylum based in part on gender (specifically, the particular social group was defined as "young women of the Tchamba-Kunsuntu Tribe who have not had FGM . . . and who oppose the practice"). It was a significant decision.

The following day, the Board published a precedent decision granting suspension of deportation to a young man who was found to have demonstrated "extreme hardship" based on factors including his integration into American society, his strong community ties, and "depressed economic conditions and the volatile political situation throughout Nicaragua." *Matter of O-J-O-*, 21 I&N Dec. 381, 384–87 (BIA 1996). The difficulty in achieving consensus in applying this hardship standard was reflected in the decision, which contained three separate concurrences, as well as a dissent that was joined by several Board members. While immigration advocates welcomed the decision, critics cited it as motivating illegal immigration by sending the message that "if they get in, they're going to be able to stay."[68]

Similar criticism of Board decisions led to strong reactions from enforcement-oriented members of Congress and later President Bush's Administration. In response to criticism of the suspension of deportation standard applied in *Matter of O-J-O-*, Congress in 1996 eliminated this form of relief entirely for new applicants and replaced it with the much stricter requirements for cancellation of removal. In 2002, Attorney General John Ashcroft twice issued precedent decisions reversing grants of relief by the Board. *See Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002); *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). The Attorney General also oversaw a reduction in the size of the Board from 23 members to 11.[69] New regulations eliminated the Board's de novo review of factual issues; findings of fact would henceforth be reviewed for clear error.[70]

In 2003, Chairman Schmidt departed the Board to become an Immigration Judge in Arlington, Virginia, where he remains on the bench at present. His successor as chairman, Lori Scialabba, held that position until 2006, when she departed to join U.S. Citizenship and Immigration Services, where she currently serves as deputy director. She was succeeded as chairman by Juan Osuna, who is now the director of EOIR. The current chairman, David L. Neal, was appointed in 2012. Chairman Neal is the first Board chairman to have previously served as Chief Immigration Judge. In December 2006, regulations increased the size of the Board from 11 to 15 members.[71] An interim rule announcing the addition of two additional Board members was published in late 2015, increasing the Board to its current allocation of 17.[72]

As can be seen from the Board's 75-year history, change has been a relative constant in the field of immigration law. As the Board looks to the future, it may expect to encounter challenges that are unexpected, as well as issues that have analogs in the past. The Board has much to draw on from its history as it addresses those challenges.

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2. *BIA Celebrates 50th Anniversary*, 67 Interpreter Releases 1221 (1990).

3. Section 14 of Exec. Order 6166 (1933), *available at* http://www.archives.gov/federal-register/codification/executive-order/06166.html.

4. *BIA Celebrates 50th Anniversary*, 67 Interpreter Releases 1221 (1990).

5. From an untitled, uncredited report of the Board, circa 1945 (hereinafter "1945 Board Report"), at 4-5 (on file with author).

6. Interview by Gladys Gruenberg with Ralph T. Seward, President, National Academy of Arbitrators, *available at* http://www.naarb.org/interviews/RalphSeward-undated.PDF.

7. *Id.* (internal brackets omitted).

8. Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940).

9. Ch. 439, 54 Stat. 670 (June 28, 1940).

10. Reorganization Plan No. V, 5 Fed. Reg. 2223 (June 14, 1940).

11. Order No. 3888, 5 Fed. Reg. 2454 (July 3, 1940).

12. *See id.*

13. *Matter of L-*, 1 I&N Dec. 1, 3 n.1 (BIA 1940).

14. *Federal Diary*, Wash. Post, Aug. 19, 1942.

15. 1945 Board Report, *supra* note 5, at 22.

16. *Id.* at 22–23. The ninth proviso to section 3 accorded the Attorney General and the Commissioner of Immigration authority to issue rules and prescribe conditions for the admission of otherwise inadmissible aliens for temporary admission when necessitated by emergent conditions. 39 Stat. 874, 878 (Feb. 5, 1917).

17. 1945 Board Report, *supra* note 5, at 23.

18. Thomas G. Finucane, *The Board of Immigration Appeals*, INS Monthly Rev. (Dep't of Justice, Washington, D.C.), Nov. 1943, at 3, *available at* https://www.uscis.gov/history-and-genealogy/historical-library/our-collection/periodicals (further link to U.S. Citizenship and Immigration Services History Office and Library site).

19. 10 Fed. Reg. 8096 (July 3, 1945); INS Monthly Rev., Aug. 1945, at 191; *see also* Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 San Diego L. Rev. 29, 35 (1977).

20. 12 Fed. Reg. 4781 (July 18, 1947); INS Monthly Review, Aug. 1947, at 17.

21. Martha W. Fagan, *Paying Tribute to a Pioneering Spirit of the Law*, Like the Dew: A Journal of Southern Culture & Politics (June 13, 2009), *available at* http://likethedew.com/2009/06/13/paying-tribute-to-a-pioneering-spirit-of-the-law/#.Vt8wHDb2b3g.

22. *Id.*

23. *Id.*

24. *Id.*

25. Conversation with Paul W. Schmidt, former staff attorney and former Chairman of the Board of Immigration Appeals (Jan. 5, 2016).

26. *The Founders Award*, American Immigration Lawyers Assoc., *available at* http://www.aila.org/about/annual-awards/the-founders (last visited Feb. 23, 2016).

27. Ch. 477, 66 Stat. 163 (June 27, 1952).

28. *Deportation and Due Process*, 5 Stan. L. Rev. 722, 730–31 (1953).

29. Griffenhagen & Assoc., Report on a Management Study of the Board of Immigration Appeals, at 2 (Dec. 1952) (on file with author); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 San Diego L. Rev. 29, 35 (1977).

30. Griffenhagen & Assoc., Report on a Management Study of the Board of Immigration Appeals, at 3 (Dec. 1952) (on file with author).

31. *Role of the Service Representative before the Board of Immigration Appeals*, I&N Reporter, July 1957, at 2.

32. Office of Planning, Analysis, & Tech., EOIR, FY 2014 Statistics Yearbook Q-1 (2015).

33. Herman Branse, *Role of the Service Representative Before the Board of Immigration Appeals*, I&N Reporter (Dep't of Justice, Washington, D.C.), July 1957, at 2, *available at* https://www.uscis.gov/history-and-genealogy/historical-library/our-collection/periodicals (further link to U.S. Citizenship and Immigration Services History Office and Library site).

34. Terry Nagel, *U.S. Court of Appeals Judge Bea to Focus on Religion in Constitution Day Lecture on Monday* (Sept. 12, 2014), https://law.stanford.edu/press/u-s-court-of-appeals-judge-carlos-bea-to-focus-on-religion-in-constitution-day-lecture-on-monday/.

35. *Walter Lashes Immigration Appeals Head*, Jamestown Post J., June 7, 1955.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Maurice A. Roberts*, *1910-2001*, AILA Doc. No. 01110531 (Nov. 5, 2001), http://www.aila.org/about/announcements/in-memoriam/maurice-a-roberts.

40. Hon. Edward M. Kennedy, *"Mr. Immigration": Maurice Roberts*, 5 Geo. Immigr. L.J. 199, 199–200 (1991).

41. *Matter of Jolley*, 13 I&N Dec. at 545.

42. *Draft Evader Gets Deportation Hearing*, Chi. Trib., Apr. 14, 1969, at 9.

43. *Jolley v. INS*, 441 F.2d 1245 (5th Cir. 1971).

44. Joan Zyda, *More Americans Shed Citizenship*, Sarasota Herald-Trib., Feb. 10, 1974; *see also Move to Escape Draft May Cost Him a Home*, Ottawa Citizen, May 9, 1971.

45. *Thomas Glenn Jolley Obituary*, Citizen-Times (Asheville, N.C.), Mar. 22, 2014, 2014 WLNR 7813028.

46. Hon. Paul Wickham Schmidt, *Lauri Steven Filppu: A Recollection with Appreciation*, The Green Card (Fed. Bar Ass'n, VA), Feb. 2012, at 2.

47. David Margolick, *Seeing F.B.I. Files on Lennon: A Hard Day's Night*, N.Y. Times, Sept. 6, 1991.

48. *Id.*

49. Bruce C. Pilato, *All You Need Is Litigation*, *The Beatles Play to Win*, 76-JUL A.B.A. J. 55, July 1990, at 55, 59.

50. Jon Wiener, *Help from his friends*, L.A. Times, Oct. 8, 2010, 2010 WLNR 20105435. As an editorial aside, one is left to wonder what impact the letters from Dylan and other artists, e.g., beat poet Gregory Corso ("Artisans are universal and megagalactic entities; ergo, let my people go – stay – etc.") had on Department of Justice officials who felt the need to attach the descriptor "singing group" to "Beatles," and to include with another dispatch a photo of Lennon (one of the most recognizable figures of the time), which in fact was not a photo of Lennon, but of a New York City street busker who,

aside from his round, wire-framed glasses and hair, did not bear much resemblance to Lennon.

51. *Matter of Lennon*, 15 I&N Dec. at 23-27. While it may be well known that Lennon was represented by Leon Wildes, the INS was represented in the case by the late Vincent Schiano, whose other claim to immigration court fame is as the co-creator (with the first Chief Immigration Judge, William Fliegelman) of the Master Calendar hearing (a fact that the author was fond of announcing whenever Schiano appeared before him at a Master Calendar hearing).

52. Judith Martin, *Lennon: 'Get Back to Where . . . ,'* Wash. Post, July 18, 1973, at B3. The author, Judith Martin, later created and wrote the "Miss Manners" column on etiquette.

53. *Lennon v. INS*, 527 F.2d 187, 192–95 (2d Cir. 1975).

54. *See* Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 Cath. U. L. Rev. 923, 937 n.86 (2006).

55. While a 2008 Department of Justice report stated that Holtzman could not remember the name of the INS official who alerted her, the report stated that it might have been Vincent Schiano and INS investigator Tony De Vito. Judy Feigin, Dep't of Justice, Crim. Div., *The Office of Special Investigations: Striving for Accountability in the Aftermath of the Holocaust* 15 n.7 (Mark M. Richard ed., Dec. 2008) [hereinafter "OSI Report"], *available at* https://www.justice.gov/sites/default/files/criminal/legacy/2011/03/14/12-2008osu-accountability.pdf.

56. Elizabeth Holtzman, *Who Said it Would be Easy?* 90–92 (Arcade Publ'g 1996). The author also moderated a panel on Nazi deportation issues at the 2002 EOIR Law Conference, on which Ms. Holtzman and Eli Rosenbaum, director of the Department of Justice's Office of Special Investigations, were speakers.

57. Eric Lichtblau, *Nazis Were Given 'Safe Haven' in U.S., Report Says*, N.Y. Times, Nov. 13, 2010, *available at* http://www.nytimes.com/2010/11/14/us/14nazis.html?_r=0; OSI Report, *supra* note 55, at 330; Holtzman, *supra* note 60, at 94.

58. *Laipenieks v. INS*, 750 F.2d 1427 (9th Cir. 1985).

59. *United States v. Fedorenko*, 597 F.2d 946 (5th Cir. 1979).

60. *Fedorenko v. United States*, 449 U.S. 490 (1981).

61. OSI Report, *supra* note 55, at 59.

62. *Linnas v. INS*, 790 F.2d 1024 (2d Cir. 1986).

63. OSI Report, *supra* note 55, at 274.

64. OSI Report, *supra* note 55, at 285–87.

65. 60 Fed. Reg. 29,469 (June 5, 1995).

66. *See, e.g.*, Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. Rev. 413, 448 n.156 (1993).

67. The author was made aware of the international reach of the decision while attending a January 1997 conference of the International Association of Refugee Law Judges in Nijmegen, the Netherlands.

68. Patrick J. McDonnell, *Man Ruled Too Americanized to Deport*, L.A. Times, July 12, 1996, at 1 (quoting Ira Mehlman, Federation for American Immigration Reform); *see also* James P. Pinkerton, *Terrorism Demographics*, Balt. Sun, Aug. 13, 1997.

69. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

70. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54878 (Aug. 26, 2002); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002); 8 C.F.R. § 1003.1(d)(3).

71. 71 Fed. Reg. 70,855 (Dec. 7, 2006) (interim rule amending 8 C.F.R. § 1003.1(a)(1)); 73 Fed. Reg. 33,875 (June 16, 2008) (final rule).

[72] 8 C.F.R. § 1003.1(a)(1); 80 Fed. Reg. 31,461 (June 3, 2015).