Two Generations of BYU Law

By Rebecca Walker Clarke

Left to right: Anne Newton McFadden, Kleinhenz's cousin and associate dean of placement at Indiana University's Maurer School of Law in Bloomington, Indiana; Hillary Newton Kleinhenz; and Judge Christopher Newton.

When Hillary Newton Kleinhenz, '18, was sworn in to the Indiana State Bar on May 14, 2019, it was "powerful and special," Kleinhenz recalls. "Walking into the Indiana Roof Ballroom before the Indiana Supreme Court justices, magistrates, and federal judges felt intimidating and yet comfortable." It was made even more memorable for her when Chief Justice Loretta Rush asked Kleinhenz to stand and then introduced her to the other inductees and the entire audience. Judge Rush used this introduction to make sure everyone knew why Judge Christopher Newton, '89, had been chosen to swear in the 2019 inductees: Judge Newton is Kleinhenz's father.

Following in Her Father's Footsteps

Growing up, Kleinhenz had a lot of interaction with attorneys and judges because of her father's profession. She felt a pull toward law school, so after earning a bachelor's degree from Utah State University, Kleinhenz followed in her father's footsteps and attended BYU Law.

She explains that the opportunities to serve during law school were the most valuable aspect of her education: "I believe BYU Law excels in preparing students to enter the workforce and be thoughtful, intentional, and hardworking attorneys, and it goes beyond that by encouraging pro bono and volunteer efforts. Participating in the Public Interest Law Foundation for three years, [taking] two trips to Dilley, Texas, and working under Professor Carl Hernandez to open the Community Legal Clinic are among my most valuable experiences at BYU Law."

Kleinhenz has most recently been the recipient of a BYU Public Service Fellowship for her work at the Office of the Federal Public Defender in Del Rio, Texas, and at the Vigo County Public Defender's Office in Terre Haute, Indiana. In addition to criminal defense, she hopes to do more public interest work. As a military spouse, Kleinhenz wants to help each state provide better benefits, both legal and nonlegal, to spouses of veterans and those serving in active duty and the reserves. She belongs to the Military Spouse JD Network, which is an organization that advocates for licensing accommodations

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for military spouse attorneys, provides education about the challenges of military life, and offers a network of support. Her hope is to use her law degree "to be an advocate each day."

A Life-Changing Experience

Almost three decades before his daughter Hillary walked through the doors of the J. Reuben Clark Law School, Judge Newton began creating his own path through the law. Newton describes his BYU Law education as a "marvelous experience." He was the vice president of the Student Bar Association and worked closely with then dean Bruce C. Hafen and then associate dean H. Reese Hansen. Because of his involvement in student government, Newton knew almost everyone in his class. "Some I'm still very close to, and we still speak on a weekly or monthly basis," he says. "The professors and administrators were excellent and truly cared about us, and we loved them too."

After graduating from BYU Law in 1989, Newton became an associate and partner in the Indiana law firm Wright, Shagley & Lowery PC until his election as Vigo Superior Court Division IV judge in 2004. Newton was reelected and unopposed in 2010 and 2016 and has served for three terms as chief judge of the Vigo Superior Courts. He is now the longest-serving judge in Vigo County.

As much as BYU Law prepared him for the rigors of his professional life, one of Newton's law professors, Ray J. Davis, taught Newton a life-changing lesson: "[Davis] told us the purpose of the Law School wasn't to prepare us as lawyers but to eventually prepare us for service to the Church." That principle has been a guiding one in Newton's life. Newton has remained a devoted and service-oriented member of The Church of Jesus Christ of Latter-day Saints. He has served as Young Men president at both the ward and stake levels, as a bishop, and as a counselor in a stake presidency. He is currently the second counselor in the Indiana Indianapolis Mission presidency, serving with Darryl Carlson, '78, also a BYU Law graduate.

The Greatest Honor

Newton says that although a life in the law is rewarding, there are difficulties that accompany it: "I've had a lot of great things happen in my career. Much of what I do as a judge, however, is sad. People are losing their liberty, their families, their money, and their property." Newton offsets some of this sadness by performing more marriages in the county than anyone else—"in part because it allows me to do something happy," he says. This has earned him the nickname "Love Judge" among his staff.

He recounts that the experience of swearing in Kleinhenz was one of the happiest things he has been able to do. "I was seated next to the Indiana attorney general, Curtis Hill. He turned to me and asked, 'What was the better day: her birth or today?' I thought for a moment and said, 'Today. It was wonderful when she was born. She was the third of four children, and at that time we only had hope. We didn't know what she would do with her life,'" he remembers.

Newton appreciates his daughter and the chance to be a part of her career and life. "Hillary is a beautiful person, inside and out," he says. "She is kind, faithful, fun, talented, hard-working, and efficient. Watching her go through the process of taking the bar was excruciating. It was the hardest thing ever for both of us, but it was worth it. Swearing her in to the Indiana Bar has truly been the greatest honor of my professional career. It was a great day for our entire family."

On Immigration and the Law

A CONVERSATION WITH ALICIA A. CALDWELL OF THE *WALL STREET JOURNAL* AND PROFESSOR SHOBA SIVAPRASAD WADHIA OF PENN STATE LAW

BYU Law hosted the Fifth Biennial Emerging Immigration Scholars Conference on June 7–8, 2019. The conference provides a forum for emerging immigration law scholars to receive and provide feedback on scholarship, attend panel discussions that focus on issues relevant to their careers, and connect with colleagues from across the country. The conference is especially geared toward immigration law professors who are pre-tenured. For the keynote, Alicia A. Caldwell interviewed Shoba Sivaprasad Wadhia about current immigration litigation. An excerpt of their conversation follows.

Caldwell: If I am honest, I hate doing this—I hate covering immigration right now. But I am happy to discuss this topic and interview Shoba to the degree that I can. She obviously knows more than I do. I like to describe my understanding of immigration as peeling an onion, and then I find a new onion and I peel again, and about four layers in, there's a kumquat. I don't know how the fruit got in there, but now it's a completely different animal. Then I have to start calling you all so that you can help me understand what just happened. And litigation is one of those topics because it is changing, as you all know, on a minute-by-minute basis some days.

We'll start with the travel ban. What's going on?

Wadhia: So as this room is most aware, we have a ban. Some call it the Muslim ban. We've had three versions, and the third version was operationalized on December 4, 2017, well before the Supreme Court had even made a decision about its legality or likely lawfulness. On June 26, 2018, Chief Justice Roberts, writing for a 5 to 4 Court, found that the ban was likely lawful, both under the immigration statute and under the U.S. Constitution. He premised his rationale on a couple of things. First, the statutory section that was used by the administration to enact the ban, section 212(f) of the Immigration and Nationality Act (INA), is something he found to be broad and to exude deference to the president in every clause. Second, he also found no conflict or clash between this broad statute, which gives the president authority to suspend the entry of any alien or any class of aliens, and another provision, section 202(a) of the INA, which says you cannot discriminate on the basis of sex, place of birth, nationality, and so on when it comes to the issuance of immigrant or permanent visas. And the likely constitutionality was upheld because he found in a new rational basis test that there was a legitimate purpose to the ban.

What's happening now is really interesting because the case was remanded. What that means is that lower courts have the opportunity to still hear challenges to the ban in light of the Supreme Court's decision in *Trump v. Hawaii*. There are right now at least two cases that are pending and percolating through the courts that the administration wants thrown out in light of *Trump v. Hawaii*, but judges have entertained the idea of having the cases move forward. One is in the Northern District of California and the other is in the state of Maryland.

I think one of the more interesting cases is *Emami v. Nielsen*. It relates to how the waiver process is working. Waivers are in some viewpoints a sham and in other viewpoints a safety valve that held the ban together. People who are covered by the ban can apply for a waiver if they can show that denying them entry would result in undue hardship, that their entry is in the national interest, and that they are not a danger to the national security.

Caldwell: Let's talk about the asylum ban and the Remain in Mexico policy, or Migration Protection Protocols (MPP)—although I do not understand them. No one does, if we're being honest. There is currently a backlog of 860,000 or 890,000 cases. Not all are asylum cases, but they are immigration cases. We know that the vast majority of people, family units in particular and unaccompanied children, are asking for asylum. Those apprehended at the border—and that's a weird way to describe it since most people are surrendering—are not getting credible fear screenings, by and large. But some are now being sent back to Mexico. What is happening there in terms of both the asylum ban litigation and the MPP, or Remain in Mexico, litigation? They seem tied together but just disparate enough.

Wadhia: There is a lot happening around asylum, and they are tied together in the overall agenda that this administration has with regard to our asylum system and our asylum laws. I'll take up the asylum ban first because it was rolled out earlier, in November 2018. It was issued through two tools: the first is known as an interim final rule, and the second is known as the proclamation, which is the same tool used in the travel ban. The asylum ban makes any person who arrives at a place other than a port of entry or in between a port of entry ineligible for asylum. That was controversial because it very explicitly clashes with our immigration statute in section 208 that says no matter how you enter the United States, any person may apply for asylum.

Just to get a little nerdy here: It's really hard to talk about these policies because they are not in the U.S. Constitution; this is an interim final rule. So what does that mean? For administrative law lovers in the room, that simply means that the rule will go into effect immediately and then the comment period will happen afterward. It's a recurring theme that administrative law has really been the hook for a lot of the litigation we are seeing around these policies. The asylum ban was challenged front and center on statutory grounds in a case called *East Bay Sanctuary Covenant v. Trump*. Now we have a nationwide injunction that has been put into place by Judge Jon Tigar in the Northern District of California, and it's pending appeal in the Ninth Circuit Court of Appeals. So right now the asylum ban is not operational.

Contrast that with Remain in Mexico, which is an even harder legal argument to wrap your head around. It is largely statutory—at least that's what the courts have chosen to focus on. You have this Byzantine statutory section, which is 235(b) of the INA, and (b)(1) says there are types of people who can be processed for speed deportation under expedited removal. In which case, if they have a "fear," they have to then be transferred to an asylum office for a fear interview, and if they pass that interview, they have to be put in full-fledged proceedings.

But there is another section, 235(b)(2), that says that any of these people, and more, can just be placed in regular removal proceedings. And this is not only allowed under the statute but, long before MPP, was allowed as a matter of prosecutorial discretion. Customs and Border Protection (CBP) has always had prosecutorial discretion to decide to place somebody who is legally eligible for expedited removal in full-fledged removal proceedings, and, in fact, that's something I've argued for in my work. But here is the "Trumpian twist," a twist that is also in section 235(b)(2): the administration has discretionary authority to return people who have notices to appear in full removal proceedings to Mexico while their claim is pending.

The crux of the legal argument has been this question: If you are legally eligible for expedited removal under (b)(1) but you are processed under (b)(2), can you fall under this return provision under (b)(2)? The Ninth Circuit Court of Appeals has agreed enough that it stayed an injunction. This is what makes the Remain in Mexico policy alive today and makes the statutory conversation really confusing. It also ignores the other legal and policy concerns people

Alicia Caldwell (left) interviews Shoba Wadhia (right) about current immigration litigation.

have—including people in this room. For example, what about international norms and obligations? What about access to counsel? What about conditions in Mexico?

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Caldwell: The argument we are hearing from the administration is that this will stop the flow of migrants coming irregularly—illegally, in their words—and crossing the border between the ports of entry. And yet the numbers keep going up. There has been a relative trickle back to Mexico, just a few thousand people. That's going to expand. They are going to go from San Diego, California, to Brownsville, Texas. In theory, everybody will be eligible for MPP—except for those who are not eligible, and it is unclear to me who those other people are, other than non–Central Americans and Mexican nationals, and I think that might be it. Technically, there are some other rules in there, but it seems a little bit arbitrary. It also is not working.

Is the rhetoric coming from the White House that has been used in other litigation something that can be used here? In other words, the president has essentially said, "This will stop it. I'm using this as a punitive effort effectively." He did not use the word *punitive*, but I will, because that's the goal. It is not working. About 84,000 people in family units crossed the border illegally last month, which is a record high and eclipses previous single-year totals in a 31-day period. So something is going on.

Wadhia: Well, there are a few things here, right? I guess we should question how much should rhetoric even be involved in what the outcome in litigation looks like. We clearly have seen some combination and overlap in this administration. I think we are going to continue to see that the goals of MPP, assuming they are even legitimate, are not being met. We even saw that critique coming out of one of the judges, who sounded like he was dissenting but in fact agreed with the stay of the injunction.

I think it will be a failed experiment—if in fact the administration believes it is going to deter people. I have a very narrow window into the world of the people who are coming from Central America through Mexico to the border and ending up in the Keystone State of Pennsylvania, and they're either non-detained or they are detained in a family detention facility in Berks, a residential county. A policy like MPP is not going to deter any of the people I have spoken to or have met or consulted with because they're fleeing for their lives. Again, without acknowledging or thinking about the root causes for why people are leaving, we're not going to end up with a policy that's working. But we haven't had an administration that actually wants to meet the people who are affected by policy changes.

Caldwell: There's been lots of criticism by the administration about nationwide injunctions. A single sitting judge can say no and thus block the effort nationwide. Is that good or bad?

Wadhia: There's been a lot of crankiness around the use of nationwide injunctions. I have a few thoughts. First, I fall in the camp that our immigration law is federal. If we're in the midst of litigation being the rapid response to policies—because we do live in a world of checks and balances—we should have a uniform application. I'm okay with a nationwide injunction treating a policy similarly for the sake of uniformity. I also think it adheres with some of the administrative law values I support, like consistency and uniformity. I also think it's a little inaccurate to say that a single judge makes a decision because we've had a lot of policies that we just discussed in this hour where there have been multiple courts and judges issuing nationwide injunctions, so it's not necessarily by a single judge. Finally, I would say that I don't think the long-term solution is nationwide injunctions. I think those are necessary for responding to policy changes that violate our law, but ultimately, we're going to need a legislative solution.

This all makes for a great way to teach civics, like when my grandmother was studying for her citizenship test. You can sit down with your grandmother or kid and really do a close study of the three branches of government: where the executive is coming in with a policy, where courts are coming in to protect checks and balances and prevent overreach, and where Congress is trying to respond with either the American Dream and Promise Act or the No Ban Act to really respond to what is needed in the long-term legislatively.

Shoba Sivaprasad Wadhia, a professor at Penn State Law, is an expert on immigration law whose research focuses on the role of prosecutorial discretion in immigration law and the intersections of race, national security, and immigration. She has published more than 30 law review articles, book chapters, and essays on immigration law.

Alicia A. Caldwell covers immigration for the Wall Street Journal, *focusing on everything from border security to the impacts of immigration in the United States. She came to the* Wall Street Journal *from the Associated Press in August 2017 and has reported on immigration since 2005 from both El Paso, Texas, and Washington, DC.*

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