2018

Immigration Law: Evidentiary Challenges for Appellate Adjudication in the Digital Age

By:

Ilana J. Snyder

Judicial Law Clerk*

Board of Immigration Appeals

*updated by OCIJ Attorney Advisor Krista Blumenberg

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    b. The scope of administrative notice is broader than judicial notice because administrative agencies maintain a specialized experience in a subject matter area and are subject to repetitive and similar administrative proceedings and are thus able to take notice of technical or scientific facts within that area or expertise. *Id.; see also Burger v. Gonzales*, 498 F.3d 131, 134-35 (2d Cir. 2007)

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    2. The Service
        a. *Matter of S-M-J-,* 21 I&N Dec. 722, 727 (BIA 1997) (en banc) ("As a general matter, therefore, we expect the Service to introduce into evidence current country reports, advisory opinions, or other information readily available from the Resource Information Center.").
    3. Circuit Court Modifications: Who *Must* Introduce this Evidence
        a. Immigration Judges
            i. Notably, the **First, Second, Seventh, Eighth, and Ninth Circuits** have explicitly found that the IJ has a duty to develop the record, and part of that duty is an obligation to take administrative notice of country conditions
                1. *See Shao v. Mukasey,* 546 F.3d 138, 165 (2d Cir. 2008); *Liu v. INS,* 508 F.3d 716, 723 (2d Cir. 2007) (per curiam); *accord Al Khouri v. Ashcroft,* 362 F.3d 461 (8th Cir. 2004) (concluding that IJs maintain an affirmative duty to develop the record because "unlike an Article III judge, [an IJ] is not merely the fact finder and adjudicator but also has an obligation to establish the record"); *Hasnaj v. Ashcroft,* 385 F.3d 780, 783 (7th Cir. 2004) ("An IJ, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.") (internal quotation marks and citation omitted); *Ageyman v. INS,* 296 F.3d 871, 877 (9th Cir. 2002) (concluding that the IJ has a particular duty where the alien is pro se); *Jacinto v. INS,* 208 F.3d 725, 732-33 (9th Cir. 2000) (holding that the duty of the Immigration Judge is "analogous to that of an administrative law judge in [a] social security [hearing]" to conclude that immigration judges must fully develop the record in asylum proceedings where respondent is pro se); *see also Richardson v. Perales,* 402 U.S. 389, 410 (1971) (finding that an ALJ "acts as an examiner charged with developing the facts"); *cf. Serrano-Alberto v. Att'y Gen. of U.S.,* Nos. 15-3146 & 16-

1586, 2017 WL 2628019, at *12 fn. 8 (3d Cir. June 12, 2017) ("To be clear, we do not hold today that due process imposes on an IJ an affirmative obligation to develop the record or to gain a particular level of familiarity with a petitioner's case before presiding over her hearing.").

ii. However, while the regulations "empower" the Board to take administrative notice, it is not "compelled" to do so.

1. *See Yang-Zhao-Cheng v. Holder*, 721 F.3d 25, 28 (1st Cir. 2013) (concluding that the Board is empowered to take administrative notice, but not compelled to do so); *Hoxhallari v. Gonzales,* 486 F.3d 179, 186 n. 5 (2d Cir. 2006); *see also Al Khouri v. Ashcroft,* 362 F.3d 461 (8th Cir. 2004) (concluding that the Board like IJs maintain an affirmative duty to develop the record because "unlike an Article III judge, [an IJ] is not merely the fact finder and adjudicator but also has an obligation to establish the record").

4. Authority

a. Explicit regulatory authority exists for the Board.

i. After 2002—and the Attorney General's regulation entitled *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 FR 54878-01, 54892 (Aug. 26, 2002)—the Board is prohibited from engaging in fact-finding, but may "tak[e] administrative notice of commonly known facts such as current events or the contents of official documents." 8 C.F.R. § 1003.1 (d)(3)(iv).

b. Similar explicit authority does not exist for Immigration Judges.

i. However, the Board and circuit courts have acknowledged that Immigration Judges may/must take administrative notice of some evidence.

1. *See, e.g., Vasha v. Gonzales,* 410 F.3d 863, 874 fn. 5 (6th Cir. 2005) (noting that "[s]everal courts of appeals, including ours, have upheld the practice of an IJ or the BIA taking administrative notice of commonly known facts"); *Medhin v. Ashcroft,* 350 F.3d 685, 690 (7th Cir. 2003) (concluding that an IJ "may take administrative notice of changed conditions in the alien's country of origin"); *McLeeod v. INS,* 802 F.2d 89, 94 (3d Cir. 1986) (upholding IJ administratively noticing commonly known fact); *see also, generally,* 8 C.F.R. § 1003.36 ("The Immigration Court shall create and control the Record of Proceedings.").

5. Of What May IJs and Board Members Take Admin Notice?

a. Commonly Known Facts

i. As stated above, the regulations allow the Board to take administrative notice of "commonly known facts such as current events or the contents of official documents." 8 C.F.R. § 1003.1 (d)(3)(iv).

b. The 3 Cs of Commonly Known Facts: Changes in Foreign Governments, Content of Official Reports, and Current events

i. IJs and the Board may take administrative notice of **changes in foreign governments**.

1. *See Matter of J-J-,* 21 I&N De. 976 (BIA 1997) (taking note of Charles Taylors' election); *Matter of R-R-*, 20 I&N Dec. 547, 551 n. 3 (BIA 1992) (taking administrative notice "that the Sandinista Party no longer controls the Nicaraguan Government Effective April 25, 1990"); *see also Matter of Chen,* 20 I&N Dec. 16, 18 (BIA

1989); *accord Rivera-Cruz v. I.N.S.*, 948 F.2d 962 (5th Cir. 1991) (finding that the Board did not abuse its discretion by taking official notice that the Sandinistas are no longer in power); *Wojcik v. I.N.S.,* 951 F.2d 172 (8th Cir. 1991) (same but in Poland); *Janusiak v. I.N.S.*, 947 F.2d 46, 48 (3d Cir. 1991); *Kapcia v. I.N.S.*, 944 F.2d 702, 705 (10th Cir. 1991).

ii. IJs and the Board may take administrative notice of the **content of official reports**.

1. *See Matter of H-L-H- & Z-Y-Z-,* 25 I&N Dec. 209 (BIA 2010) (holding that the Board may take administrative notice of official documents prepared by the Department of State); *Matter of S-E-G-,* 24 I&N Dec. 579, 587 fn.4 (BIA 2008) (same); *Matter of C-C-*, 23 I&N Dec. 899, 902 fn.3 (BIA 2006)(taking administrative notice of a research report of the Immigration and Refugee Board of Canada providing information on China's then one-child policy); *Matter of G-D-,* 22 I&N Dec. 1132, 1144 (BIA 1999) (taking administrative notice of the Lautenberg Amendment and a Seventh Circuit decision); *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (taking administrative notice of the 1996 Department of State country reports on human rights practices for Ukraine without admission before the IJ); *Matter of M-D-,* 21 I&N Dec. 1180, 1193 & fn. 5 (BIA 1998); *Matter of B—,* 21 I&N Dec. 66, 72 & fn. 3 (BIA 1995) (taking administrative notice of a Congressional report); *accord Ying Chen v. Att'y Gen. of U.S.,* 676 F.3d 112, 115 n. 2 (3d Cir. 2011) (finding no error in Board's consideration of the State Department's human rights report even without admission before the IJ); *Enriquez-Guiterrez v. Holder,* 612 F.3d 400 (5th Cir. 2010) (concluding that it is permissible for the Board to take administrative notice of its own files and records which can include transcripts of previous proceedings); *Jian Hui Shao v. Mukasey,* 546 F.3d 138, 166-68 (2d Cir. 2008) (concluding that the Board did not err in adding more updated State Department reports because it did not base its determination *solely* on these administratively noticed facts); *Yang v. McElroy,* 227 F.3d 158, 163 n.4 (2d Cir. 2002) (same).

iii. IJs and the Board may take administrative notice of **current events**.

1. *See, e.g., Matter of R-R-*, 20 I&N Dec. 547, 551 n. 3 (BIA 1992) (taking administrative notice that the new President of Nicaragua "announced a general amnesty covering hostilities between the former Contra resistance and the Nicaraguan Government and an end to military conscription"); *see also Chhetry v. U.S. Dep't of Justice,* 490 F.3d 196 (2d Cir. 2007) (finding no error in Board's administratively noticing newspaper articles to evidence current events in Nepal); *Meghani v. INS,* 236 F.3d 843, 847-48 (7th Cir. 2001); *Gafoor v. INS,* 231 F.3d 645, 654-57, 664 (9th Cir. 2000), *superseded by statute on other grounds by* REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302 (concluding that the record of proceeding was "hopelessly out of date" and that the immigration court "would be abdicating [its] responsibility were it to ignore" the well-publicized coup in Fiji"); *de la Llana-Castellon v. INS,* 16 F.3d 1093, 1095-96 (10th Cir. 1994); *Matter of M-D-,* 21 I&N Dec. 1180, 1193 & fn. 5 (BIA 1998); *Matter of B—,* 21 I&N Dec. 66, 72 & fn. 3 (BIA 1995) (taking administrative notice of newspaper articles); *Matter of Joseph,* 13 I&N Dec. 70 (BIA 1968) (taking "administrative

notice that conditions in Haiti have not improved to any extent since 1964").

iv. Commonly Known Facts: Recurrent facts deemed commonly known and properly administratively noticed at the Board

a. **Conviction Documents.** *See Matter of Carrachurri-Rosendo,* 24 I&N Dec. 382 (BIA 2007) (recognizing that conviction documents are properly administratively noticed provided that they are subject to other evidentiary rules), *overruled on other grounds by* 560 U.S. 563 (2010). **Board's Own Records.** *See Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 410–11 (5th Cir. 2010) (holding that the Board did not abuse its discretion in taking administrative notice of transcripts of prior proceedings, the authenticity of which have not been challenged); *Acewicz v. INS,* 984 F.2d 1056 (9th Cir. 1993) (same). **Birth, Death, Marriage Certificates.**

b. **Judicial Experience.** *See Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 n.2 (BIA 2002) (concluding that it is "unclear" whether an Immigration Judge may take administrative notice of a regional INS policy affording more favorable treatment to alien families arriving together).

v. Commonly Known Facts: facts that courts have been recurrently found to be "generally known" under Fed. R. Evid. 201(b)(1)

a. Scientific Facts. Generally. "[J]udicial notice of scientific facts can be taken only when facts are generally recognized…" Charles T. McCormick, Judicial Notice, 5 Vand. L. Rev. 296, 301-03 (1952). **Medicinal substances and Scientific Procedures.** *Gilbert v. Klar,* 228 NY.S. 183, 184 (App. Div. 1928); *State Bd. Of Pharmacy v. Matthews,* 90 N.E. 699, 967 (N.Y. 1910). **Course of nature, revolutions of the solar system, seasons, envisions of time, ordinary gestation period**. David Nasmith, The Institutes of English Adjective Law 87 (1879); James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 279 n. 52, at 30.

b. **Time.** *See Matter of Munroe,* 26 I&N Dec. 428 (BIA 2014).

c. **Monetary Amounts.** *See, e.g., Matter of S-K-,* 23 I&N Dec. 936, 945 fn. 13 (BIA 2000)

d. **Facts to fulfill judicial responsibility.**

i. **Laws including local, state, federal and international statutes and constitutions**. *See Matter of Cuellar-Gomez,* 25 I&N Dec. 850, 865 fn.15 (BIA 2012) (taking notice of a Kansas statute); *Matter of G-D-,* 22 I&N Dec. 1132, 1144 (BIA 1999) (taking notice of a Seventh Circuit case); *Matter of Grijalva,* 19 I&N Dec. 713, 714 fn.1 (BIA 1988) (taking notice of an Arizona statute); *see also Lamar v. Micou*, 114 U.S. 218, 223 (1885) ("The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."); *but see Matter of G-Q-,* 7

I&N Dec. 195 (BIA 1956) (concluding that a special inquiry officer's administratively noticing sections of the Mexican Agrarian Code and Constitution to conclude that respondent had lost his United States citizenship was in error).

e. **Local Facts. Judicial Experience.** *See Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 n.2 (BIA 2002) (concluding that it is "unclear" whether an Immigration Judge may take administrative notice of a regional INS policy affording more favorable treatment to alien families arriving together).

f. **Historical Facts**.
   i. **Almanacs and calendars**. James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 279 n. 24, at 307. **Wars.** *See, e.g., Sargent v. Lawrence,* 40 S.W. 1075, 1076 (Tex. Civ. App. 1897).

g. **Geographic Facts**.
   i. **Maps and distances**. *See, e.g., Pahl v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of Google Maps to illustrate general location of relevant events).
   ii. **Rivers, mountain ranges, counties, cities, towns, divisions and territories**. *See, e.g., El Paso Elec. Ry. Co. v. Terrazas,* 208 S.W. 387, 390 (Tex. Civ. App. 1919).

6. What Inferences May IJs and the Board Permissibly Draw From Administratively Noticed Facts?

1. The IJ and Board may draw reasonable inferences—ones that are not based on assumption or conjecture—from administratively noticed facts.

a. *See Matter of Chairez-Castrejon,* 26 I&N Dec. 819, 824 (BIA 2016) (citing 8 C.F.R. § 1003.1(d)(3)(iv) to review Utah's jurisprudence on second-degree murder and "reasonabl[y] infer[]" that Utah does not require jury unanimity for the demonstration of a mental state for violation of section 76-10-508.1(1)(a)); *Matter of C-,* 6 I&N Dec. 20, 33 (BIA 1953) (declining to infer that a subscription to *People's Daily World* meant that respondent was a member in a Communist front organization without evidence linking the IWO and the Communist Party, and concluding that finding such an affiliation would "be based only on assumption and conjecture"); *accord Mustafa v. INS,* 4 F.3d 985 (4th Cir. 1993) ("The BIA may [] draw reasonable inferences from the evidence which 'comport with common sense.'"); *Gebremichael v. INS,* 10 F.3d 28, 37 n.26 (1st Cir. 1993) (same); *Kapica v. INS,* 944 F.2d 702 (10th Cir. 1992) (same); *Kaczmarczyk v. INS,* 933 F.2d 588, 594 (7th Cir. 1991) (same); *Rivera-Cruz v. INS,* 948 F.3d 962 (5th Cir. 1991) (same); *see also Haddad v. Ashcroft,* 127 F. App'x 800 (6th Cir. Apr. 4, 2005) (collecting Sixth Circuit cases citing this rule approvingly).

2. The degree to which an IJ or Board Member may consider his or her "judicial experience" to inform his or her decision remains restricted.

a. *See Vasha v. Gonzales*, 410 F.3d 863, 874 n.5 (6th Cir. 2005) (noting that an Immigration Judge may consider "commonly known facts" derived from his or her "judicial expertise" in adjudicating asylum cases); *Paredes-Urrestarazu v. I.N.S.*, 36 F.3d 801, 819 (9th Cir. 1994) ("'Immigration judges retain broad discretion to accept a document as authentic or not' and may rely on their judicial experience in considering whether a document is trustworthy." (Internal citation omitted)); *accord Vatyan v. Mukasey,* 508 F.3d 1179, 1185 & n. 4 (9th Cir. 2007) (same); *Lin v. Gonzales,*

434 F.3d 1158, 1164 (9th Cir. 2006) (same); *see also Dao Lu Lin v. Gonzales,* 434 F.3d 1158, 1164 (9th Cir. 2006) (concluding that judicial experience with obvious warning signs articulated on the record may satisfy the substantial evidence requirement to sustain an ACF, but since the IJ failed to indicate whether her suspicion of 3 documents on review of numerous other documents was based upon her review of numerous other documents purportedly issued by the same agency, it could not withstand review); *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 n.2 (BIA 2002) (concluding that it is "unclear" whether an Immigration Judge may take administrative notice of a regional INS policy affording more favorable treatment to alien families arriving together); *cf. Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951) (explaining that a hearing examiner's findings should not be "given more weight than in reason and in light of judicial experience they deserve").

3. **The Board should not rely solely or too exclusively on the State Department Country condition reports.**
    a. *See, e.g., Ai Hua Chen v. Holder*, 742 F.3d 171, 179 (4th Cir. 2014) (cautioning the Board to avoid "treating these Country Reports 'as Holy Writ' immune to contradiction."); *Qiu Yun Chen v. Holder*, 715 F.3d 207, 209-10 (7th Cir. 2013) (criticizing the Board for relying heavily on (or misinterpreting) selected passages from the State Department's Country Report while continuing to "systematically ignore[] the annual reports of the Congressional-Executive Commission on China."); *Seck v. U.S. Att'y Gen.*, 663 F.3d 1356, 1368 (11th Cir. 2011) (noting that although the Board is permitted to rely heavily on State Department reports, it must still engage in an individualized analysis of the particular applicant's claim); *Jun Lin v. Holder,* 620 F.3d 807 (7th Cir. 2010) (concluding that the Board did not improperly rely upon the State Department report because it focused on the relevant portions and other evidence adduced); *Amouri v. Holder*, 572 F.3d 29, 35 (1st Cir. 2009) (noting that while State Department reports are "generally deemed authoritative in immigration proceedings," they do not "always supplant the need for particularized evidence in particular cases."); *Sheriff v. Att'y Gen. of U.S.,* 587 F.3d 584 (3d Cir. 2009); *Shao v. Mukasey,* 546 F.3d 138, 166-68 (2d Cir. 2008) (concluding that the Board did not err in adding more updated State Department reports because it did not base its determination *solely* on these administratively noticed facts); *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008) ("General deference to the Department of State cannot substitute for an adequate evaluation of the reliability of a document, especially when the document . . . provides practically no information upon which a reliability determination can be made."); *Burger v. Gonzales*, 498 F.3d 131, 134-35 (2d Cir. 2007); *Tambadou v. Gonzales*, 446 F.3d 298, 302 (2d Cir. 2006) (granting a petition for review where the Board placed excessive reliance on the State Department's Country Report in reaching this conclusion.); *Zarouite v. Gonzales*, 424 F.3d 60, 63 (1st Cir. 2005) (noting that the "State Department's regular country reports are generally persuasive of country conditions . . . but are open to contradiction."); *Koval v. Gonzales*, 418 F.3d 798, 807 (7th Cir. 2005) (noting that although the agency may reasonably rely upon State Department reports for current country conditions, the court had previously cautioned against "chronic over reliance on such reports."); *Tu Kai Yang v. Gonzales*, 427 F.3d 1117 (8th Cir. 2005) ("Though these reports are recognized as persuasive, use of such official reports does not substitute for an analysis of the facts of each applicant's individual circumstances.") (internal quotation marks omitted); *He Chun Chen v. Ashcroft*, 376 F.3d 215 (3d Cir. 2004) (noting that the Third Circuit has previously questioned the Board's wholesale reliance on the country reports); *Yang v. McEelroy,* 227 F.3d 158, 163 n.4 (2d Cir. 2002); *Woldemeskel v. INS,* 257 F.3d 1185 (10th Cir. 2001) (Board many not base its decision *primarily* on facts not contained

within the record unless applicant provided notice and opportunity to rebut any inferences drawn from facts).

4. **Circuit Courts will review inferences by an IJ or the Board for abuse of discretion**
   a. The definition of when the Board abuses its discretion varies slightly by circuit.
      i. **First Circuit.** *See Wang v. Ashcroft,* 367 F.3d 25, 27 (1st Cir. 2004) ("An abuse of discretion will be found where the BIA misinterprets the law, or acts either arbitrarily or capriciously."); **Second Circuit.** *See Kaur v. BIA,* 413 F.3d 232, 233-34 (2d Cir. 2005) (per curiam) ("An abuse of discretion may be found in those circumstances where the Board's decision provides no rational explanation, inexplicably departs from established policies is devoid of any reasoning, or contains only summary or conclusory statements."); **Third Circuit.** *See Sotto v. INS,* 748 F.2d 832 (3d Cir. 1984) (stating that it reviews Board decisions to determine whether it "followed proper procedures and considered and appraised the material evidence before it"); **Fourth Circuit**. *See Yee Dai Shek v. INS,* 541 F.2d 1067, 1069 (4th Cir. 1976) ("The Board . . . must act in accordance with its own regulations, and failure to do so is an abuse of discretion."); **Fifth Circuit.** *See Diaz-Resendez v. INS,* 960 F.2d 493 (5th Cir. 1992) ("[T]he Board's decision may be reversed as an abuse of discretion when it is made without rational explanation, or inexplicably departs from established policies." (Internal citation omitted)); **Sixth Circuit**. *See Balani v. INS,* 669 F.2d 1157, 1161 (6th Cir. 1982) (defining abuse of discretion as "made without a rational explanation, inexplicably depart[ing] from established policies, or rest[ing] on an impermissible basis such as invidious discrimination against a particular race or group"); **Seventh Circuit.** *See Achacoso-Sanchez v. INS,* 779 F.2d 1260 (7th Cir. 1985) ("The Board 'abuses its discretion' when it acts for a forbidden reason or for a reason that a court *can* determine is erroneous . . . Similarly, if the Board violated the procedural rights required by law, a court could act intelligently."); **Eighth Circuit.** *See Zeah v. Lynch,* 828 F.3d 699, 702 (8th Cir. 2016) (holding that the Board abuses its discretion when it "gives no rational explanation for its decision, departs from its established policies without explanation, relies on impermissible factors or legal error, or ignores or distorts the record evidence."); **Ninth Circuit.** *See Tadevosyan v. Holder,* 743 F.3d 1250, 1252-53 (9th Cir. 2014) ("The B[oard] abuses its discretion when it acts arbitrarily, irrationally, or contrary to the law, and when it fails to provide a reasoned explanation for its actions." (Internal citation and quotation marks omitted)); **Tenth Circuit.** *See Woldemeskel v. INS,* 257 F.3d 1185 (10th Cir. 2001) (requiring a "rational connection between the facts found and the choice made."); **Eleventh Circuit.** *See Ruiz-Turcios v. U.S. Att'y Gen.,* 717 F.3d 847, 849 n.2 (11th Cir. 2013).
5. **In jurisdictions requiring notice and opportunity to rebut the significance afforded to the noticed facts as applied to the particular situation, the IJ and or Board should comport with the notice and opportunity rules.**

7. How to Comport with Due Process rules to Provide Notice and Opportunity to an Alien so that He or She May Respond to an Administratively Noticed Fact?
   1. All circuits agree that immigration proceedings must conform to the Fifth Amendment's Due Process requirement so that an alien "who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *See, e.g., Colemnar v. INS,* 210 F.3d 967, 971 (9th Cir. 2000).
   2. The circuits also agree that part and parcel of this reasonable opportunity is the possibility to present rebuttal information to any evidence administratively noticed by the court, "which might bear upon the…truth of the matter noticed." *See, e.g., Banks V. Schweiker*, 654 F.2d

637, 641 (9th Cir. 1981); *Carson Prods. Co. v. Califrano*, 594 F.2d 453, 459 (5th Cir. 1979).

a. However, the circuits are split over whether an alien must be provided with an opportunity to respond prior to the issuance of a decision or whether petitioner's ability to file a subsequent motion to reopen can cure a DP violation arising out of the lack of notice.

i. The **Second, Ninth and Tenth Circuits** may require an Immigration Judge provide the alien an opportunity to respond *before* the issuance of a decision. *See Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991); *Abraham v. INS,* 39 F.3d 1191 (10th Cir. 1993) (unpublished) (clarifying that where the Board intends on overturning an Immigration Judge's asylum decision based upon an administratively noticed fact it *must* provide the applicant notice and opportunity to be heard); *Burger v. Gonzales*, 498 F.3d 131, 134-35 (2d Cir. 2007); *accord Woldemeskel v. INS,* 257 F.3d 1185 (10th Cir. 2001) (Board many not base its decision primarily on facts not contained within the record unless applicant provided notice and opportunity to rebut any inferences drawn from facts); *de la Llana-Castellon v. INS,* 16 F.3d 1093, 1095-96 (10th Cir. 1994); *Circu v. Gonzales,* 450 F.3d 990, 994-95 (9th Cir. 2006); *Gonzalez v. INS,* 82 F.3d 903, 912 (9th Cir. 1996) (noting that "[t]aking notice of . . . undebatable facts . . . does not require notice and an opportunity to be heard, but taking administrative notice of post-hearing, debatable adjudicative facts without warning and an opportunity to offer rebuttal denies due process of law.").

1. These circuits use Fed. R. Evid. 201 as additional support. Notes of Advisory Committee on 1972 Proposed Rules ("Basic considerations of procedural fairness demand an opportunity to be heard on the *propriety* of taking notice." (Emphasis added)).
2. Since these analyses are always going to be individualized, providing the notice in opportunity in these jurisdictions is primarily to "giv[e] [the alien] the opportunity to rebut the significance of the noticed facts as applied to his particular situation." *Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196, 200 (2d Cir. 2007)

ii. The **Fifth, Seventh, Fourth and DC Circuits** do not require such a pre-decision opportunity, but have concluded instead that a *post-order motion to reopen* is a curative action that satisfies due process in this context. *See Guiterrez-Rogue v. INS,* 954 F.2d 769, 773 (D.C. Cir. 1992) (recognizing that petitioner should have had the opportunity to challenge the significance of the officially noticed fact, but concluding that "[t]he availability of the petition to reopen secures [petitioner's] due process right to a meaningful hearing"); *Rivera-Cruz v. INS,* 948 F.2d 962, 968 (5th Cir. 1991) (same); *Kaczmarczyk v. INS*, 933 F.2d 588, 597 (7th Cir. 1991) (finding a motion to reopen mechanism sufficient to satisfy an applicant's Fifth Amendment right to a fair asylum hearing); *see also Cruz-Aguilar v. INS,* 135 F.3d 769 (4th Cir. 1998) (unpublished) (same).

1. These circuits dispute the underpinnings of the comment to Fed. R. Evid. 201 above, concluding that where a fact is commonly known, whose accuracy is verifiable and whose source is reliable, and alien does not need the opportunity to respond because these are facts being admitted into evidence—whose propriety cannot be reasonably questioned.
    a. Indeed, this dispute traces back to the philosophical debates of the underpinnings of the evidentiary rules themselves. *Compare, e.g.,* James B. Thayer, Judicial Notice and the Law of Evidence, 3 Harv. L. Rev. 285, 309 (1890)

("Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a prima-facie recognition, leaving the matter still open to controversy.") *with* Edmund M. Morgan, Judicial Notice, 57 Harv. L. Rev. 269, 283-87 (1944) (positing that judicial notice is limited to facts that are indisputable and therefore irrefutable).

8. Notable Cases Either Finding or Not Finding a DP Violation Based on Either Impermissible Inferences or Failure to Provide the Alien with Adequate Notice

1. Immigration Court Context

a. *Caushi v. Att'y Gen. of U.S.*, 436 F.3d 220 (3d Cir. 2006) (noting that although the "IJ's reliance on these articles was not error, we agree with [petitioner] that the IJ inappropriately neglected to place the complete articles in the record," and should do so on remand).

b. *Ogayonne v. Mukasey,* 530 F.3d 514, 518-20 (7th Cir. 2008) (IJ did not err in relying on recent BBC and other News articles to conclude that backers of a coup had been granted amnesty "because they merely stated commonly acknowledged facts that were amenable to official notice . . .[a]nd the IJ gave the parties an opportunity to respond to the documents that he entered").

c. *Sy v. Mukasey*, 278 F. App'x 473, 476 (6th Cir. 2008) (finding no error with the IJ's reliance on internet articles including the UN Office for the Coordination of Humanitarian Affairs and BBC News to find changed country conditions)

2. Board Context

a. *Chhetry v. U.S. Dep't of Justice*, 490 F.3d 196 (2d Cir. 2007) (concluding, in the context of a motion to reopen for changed country conditions that the Board properly took administrative notice of *yahoo.com* articles which were of unquestionable "accuracy or verifiability," but improperly inferred that there were no changed circumstances based on this evidence without providing the alien an "opportunity to rebut the significance of the noticed facts *as applied to his particular situation.*").

b. *Qun Yang v. McElroy*, 277 F.3d 158, 161-62 (2d Cir. 2002) (concluding that the Board erred in not taking administrative notice of China's contemporary treatment of persons with circumstances similar to petitioner's, and affirming that the Board has an obligation to develop the record in this regard).

c. *Zeah v. Lynch,* 828 F.3d 699 (8th Cir. 2016) (concluding that the Board did not err in not providing the alien with notice and opportunity that it was taking administrative notice of facts contained in a 2009 country report about Nigeria where petitioner had filed a motion to reopen for changed country conditions and the regulations allow the Board to compare current country evidence with the evidence that existed at the time of the merits hearing below).

3. Circuit Court Context

a. *Yusupov v. Att'y Gen. of U.S.*, 650 F.3d 968, 986 fn. 23 (3d Cir. 2011) (taking judicial notice of a website's description as a "Chechen internet agency which is independent, international and Islamic" to conclude that the Board's conclusion that the video from this website originated from Al Jazeera without any further evidence was not based on a reasonable inference).

b. *Margos v. Gonzales,* 443 F.3d 593 (7th Cir. 2006) (concluding that the circuit may take judicial notice of the recent State Department country reports on Iraq).

4. Credibility Context

a. IJ must first determine the credibility of the applicant for relief from removal

b. The consistency of applicant's testimony with other record evidence can be taken into account, for a credibility determination. *See* INA § 240(c)(4)(C).

c. Indeed, after the REAL ID Act of 2005, these inconsistencies may be the sole basis

of a credibility determination, and the IJ may make this determination "without regard to whether an inconsistency, inaccuracy or falsehood goes to the heart of the applicant's claim, or any other relevant factor." *Id.*

i. Courts have used internet evidence ("e-evidence") in assessing an applicant's credibility.

1. *Tawvo v. Lynch*, 799 F.3d 725 (7th Cir. 2015) (concluding that an IJ's credibility determination was supported by substantial evidence where the IJ expressed "particular concern[] about text in [petitioner's] second affidavit that previously had appeared nearly verbatim in articles on the Internet site Wikinews, and where the IJ rejected petitioner's explanation as having "personally wrote articles" about his experiences that someone may have placed onto Wkinews as unreasonable.)
2. *Li v. Mukasey*, 529 F.3d 141, 148-49 & n.6 (2d Cir. 2008) (concluding that the IJ's determination that petitioner was not credible "because her testimony as to the position she held within Falun Gong was contradicted by information downloaded from a website" was unsupported by the record because the sites "affirmatively suggest[ed]" that the movement does in fact have some type of leadership structure" as petitioner had asserted in testimony).
3. *Dao Lu Lin v. Gonzales*, 434 F.3d 1158, 1164 (9th Cir. 2006) (remanding because IJ's adverse credibility finding based upon his speculation and conjecture that the issuing numbers on Family Planning Operation Certificates ought to be sequential was not supported by substantial evidence); *Jin Chen v. US Dep't of Justice,* 426 F.3d 104, 115 (2d Cir. 2005) (same).

II. Challenges and Trends in Utilizing Electronic Resources

i. What is the Internet?

1. *See* The Invention of the Internet, The History Channel, http://www.history.com/topics/inventions/invention-of-the-internet (last accessed July 3, 2017 10:42am).

ii. Defining the Challenge

1. Growth of the Internet
   a. Number of searches per second, per day, per year
      i. http://www.internetlivestats.com/
   b. Growth of Google After its Launch
      i. First year, 17,000%
      ii. Nine months after its first year 1,000%
         1. Battelle, John, *The Search: How Google and Its Rivals Rewrote the Rules of Business and Transformed Our Culture*, New York: Portfolio (September 2005).

iii. Defining the Judicial Challenge

1. Overview
   a. The exponential growth and user-friendliness of the internet
   b. Coupled with the general sense of judicial curiosity
      i. Increases the temptation for judges to resolve questions through independent internet research
2. In the non-immigration context
   a. This raises evidentiary issues including: admissibility questions, hearsay rules and rules regarding expert witnesses. *See* Fed. R. Evid. §§ 402, 803, 702.
      i. For more information, *see* Thornburg, Elizabeth G., The Curious Appellate Judge: Ethical Limits on Independent Research, 28 rev. Litig. 131, 133-144 (Fall 2008).
   b. This also raises ethical considerations in the *ex parte communications* realm as well as, and in conjunction with, maintaining the appearance of neutrality.
      i. *See* Model Code of Judicial Conduct R. 2.9
         1. (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,*
            a. With 6 exceptions
         2. (C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.
         3. These prohibitions "extend[] to information available in all mediums, *including electronic*." *See* Model Code of Jud. Conduct, R. 2.9, cmt. 6.
      ii. Note that court staff, court officials and other subject to the judge's direction must comply with these rules as well. R. 2.12(A).
      iii. *See* American Bar Association, Formal Opinion 462, Judge's Use of Electronic Social Networking Media ("ESM").
3. In the immigration context
   a. EOIR, Ethics and Professionalism Guide for Immigration Judges, R. XXXIII (mirroring the language of Model Code of Judicial Conduct R. 2.9(A)).
   b. EOIR, Ethics and Professionalism Guide for Immigration Judges, R. IX, Acting with Judicial Temperament and Professionalism ("An Immigration Judge

should be patient, dignified, and courteous, and should act in a professional manner towards all litigants, witnesses, lawyers and others with whom the Immigration Judge deals in his or her official capacity, and should not, in the performance of official duties, by words or conduct, manifest *improper bias or prejudice*." (Emphasis added)).

i. Identifying Potential Solutions

1. **Looking to Administrative Law's "Common Law Counterpart:" Judicial Notice**

a. **Federal Rule 201(b) defines** a "commonly known fact" as one "not subject to reasonable dispute in that it is either (1) generally known or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed R. Evid. 201(b).

b. The rules governing judicial notice as defined by Fed. R. Evid. 201(b) are instructive, as it is administrative notice's "common law counterpart."

i. *See Burger v. Gonzales,* 498 F.3d 131 (2d Cir. 2007); *de la Llana-Castellon v. INS,* 16 F.3d 1093, 1096 (10th Cir. 1994) (administrative notice is a "close parallel" to judicial notice but administrative notice covers a "wider scope"); *see also Castillo-Villagra v. INS,* 972 F.2d 1017, 1026 (9th Cir. 1992) (explaining that the wider scope of administrative notice "emanates from . . . the agency's specialized experience in a subject matter area and its consequential ability to take notice of technical or scientific facts" of which it's familiar with from the repetitive nature of claims); *McLeod v. INS,* 802 F.2d 89, 93 n. 4 93d Cir. 1986 (same); *Matter of H--*, 7 I&N Dec. 186, 193 (BIA 1956) (concluding that administrative notice may not be taken of a fact reasonably open to dispute).

c. The Board has also incorporated the concept articulated in (b)(2) into its jurisprudence.

i. ***Matter of C—and S—***, 6 I. & N. Dec. 597, 605 (BIA 1955) (holding that the Agency will take notice of "facts so notorious as not to be the subject of reasonable dispute or of propositions of a generalized knowledge capable of immediate and accurate demonstration by easily accessible sources of indisputable accuracy") (citing A.L.I. Model Code of Evidence, R. 801-06 (1942); 9 Wigmore, *Evidence*, sec. 2565-83, 3rd ed.)); *see also* ***Matter of H—,*** 7 I&N Dec. 186, 193 (BIA 1956).

2. **Common Sites and the Software they Run Determined to be Reliable and Accurate**

a. Closed Source Software

i. Government Sites

1. *See Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013) (holding that a "document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself; and in this case it can be" and noting that "gov.cn is '[t]he Chinese Central Government's Official Web Portal"); *see also Fei Yan Zhu v. Att'y Gen. of U.S.*, 744 F.3d 268, 273 (3d Cir. 2014) (citing with approval to *Qui Yun Chen* for the proposition government websites are "presumptively authentic if government sponsorship can be verified by visiting the website itself").

ii. **Foreign Government Sites**

1. https://en.wikipedia.org/wiki/List_of_Internet_top-level_domains
2. *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013) (holding that documents posted on government websites are "presumptively authentic" if their sponsorship can be verified by an independent viewing of the website).

iii. Online Maps

1. *See, e.g., Dancy v. McGinley,* 843 F.3d 93, 110 n. 15 (2d Cir. 2016) (taking judicial notice of Google Maps); *Dukane Precast, Inc., v. Perez,* 785 F.3d 252, 254 (7th Cir. 2015) (taking judicial notice of Google Maps); *Pahl v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of Google Maps to illustrate general location of relevant events); *United States v. Perea-Rey,* 680 F.3d 1179, 1182 n. 1 (9th Cir. 2012); *United States v. Espinal-Almeida,* 699 F.3d 588 (1st Cir. 2012) (considering GPS technology behind Google Maps and admitting evidence despite no expert testimony because it is commonly known); *but see, Jackson v. Allstate Ins. Co.,* 785 F.3d 1193 (8th Cir. 2015) (concluding that the district court did not abuse its discretion in not taking judicial notice of Google Maps because the printout constituted hearsay when being used to determine an estimated driving time).

iv. Online Newspaper Articles

1. *Oliveira v. Holder*, 564 F.3d 892, 897 (7th Cir. 2009), as modified (June 24, 2009) (concluding that the IJ erred in not considering online newspaper articles because they are self- authenticating—absent any evidence of tampering or forgery— and are therefore reliable).

b. Social Networking Sites

i. Generally

1. United States v. Browne, 834 F.3d 403, 408 (3d Cir. 2016), *cert. denied by,* 137 S. Ct. 695, (2017) (describing the challenge for social media networks as one of relevance to ensure that the information garnered from the individual's profile or chat history was, indeed, communicated by the defendant at issue); *see also United States v. Vayner,* 769 F.3d 125, 132 (2d Cir. 2014) ("[T]here is no evidence that [petitioner] himself had created the page or was responsible for its contents.").

ii. Facebook

1. *Kwadjo Akyaw Osei-Wusu* v. Holder, 562 F. App'x 48, 49 (2d Cir. 2014) (noting that the agency properly noted that Osei–Wusu had failed to present any evidence showing that his Facebook group page was widely viewed and therefore properly denied his motion to reopen for changed country conditions); *see Hongsheng Leng v. Mukasey*, 528 F.3d 135, 143 (2d Cir.2008) ("[T]o establish a well-founded fear of persecution in the absence of any evidence of past persecution, an alien must make some showing that authorities in his country of nationality are either aware of his activities or likely to become aware of his activities.").

iii. Twitter

1. *Sirbu v. Holder*, 718 F.3d 655, 657 (7th Cir. 2013) (Seventh Circuit taking administrative notice of a New York Times article relying on twitter posts to report Moldovan protests); *Porras v. Holder*, 543 F. App'x 867, 874 n.7 (10th Cir. 2013) (concluding that the Board did not err, even if "slightly overstat[ing] the case" when describing the sources of Twitter threats as "unknown" or undisclosed" because petitioner failed to provide meaningful information about these Twitter users sufficient to establish the likelihood of future persecution.).

3. **Common Sites and the Software they Run Determined to be Unreliable**
   a. Open Source Software
      i. **Wikipedi**a
         1. *Matter of L-A-C-*, 26 I. & N. Dec. 516, 526–27 (BIA 2015) (noting that Wikipedia articles "lack indicia of reliability and warrant very limited probative weight in immigration proceedings"); *Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008) (holding that an article from the online encyclopedia Wikipedia is not a reliable source for evidence in immigration proceedings); *Tawuo v. Lynch*, 799 F.3d 725, 727–28 (7th Cir. 2015) (finding that it was reasonable for the IJ to consider the alien's apparent plagiarism of two Wikinews articles (in conjunction with his weak explanations for the plagiarism) as evidence of a lack of credibility); *Bing Shun Li v. Holder*, 400 F. App'x 854, 857–58 (5th Cir. 2010) (agreeing with courts that have found Wikipedia to be an unreliable source of information); *but see Fuller v. Lynch*, 833 F.3d 866, 872 (7th Cir. 2016) (referencing Wikipedia to uncover what the term "batty man" means: "On another occasion he was robbed at gunpoint by a man who called him a 'batty man,' which is a Jamaican slur for a homosexual. And he didn't make that up: see 'Batty boy,' Wikipedia, https://en.wikipedia.org/wiki/Batty_boy (last visited Aug. 17, 2016, as were the other websites in this opinion")).

      ii. Blogs
         1. *See In re Stevens*, 119 Cal. App. 4th 1228, 1236 (2004) *as modified* (July 28, 2004) (providing a description of blogs and their limitations in the non-immigration context; "[w]ith the Internet, the average computer blogger has, in effect, his or her own printing press to reach the world"); *see also Shan Ze Zhang v. Holder*, 443 F. App'x 609, 611 (2d Cir. 2011) (without further evidence of contributions to blogs they did not bolster petitioner's claim); *Rodriguez v. U.S. Att'y Gen.,* 447 F. App'x 74 (11th Cir. 2011) (ruling that the Board did not err in concluding that, without more, petitioner's personal blog opposing the Venezuelan government and her employment with an organization that opposes it, did not suffice for a showing of future persecution); *Patel v. Att'y Gen. of U.S.,* 263 F. App'x 244, 245-46 (3d Cir. 2008) (unpublished) (finding no error with Board's conclusion that a printout from blog detailing persecution of Christians "have not been shown to have any relevance to respondent's claim or demonstrate any increased threat to respondent").

4. **Three factors to consider when determining reliability and accuracy for websites**

that are NOT described above

i. Knowledge of the subject matter; Independence from relevant bias; and; Incentive to ensure accuracy. **Jeffrey Bellin, Andrew Guthrie Ferguson, Trial by Google: Judicial Notice in the Information Age, 108 Nw. U. L. Rev. 1137, 1167-68 (2014).**