Administrative Notice

A. Terminology and Overview

1. Judicial notice is the means by which courts make factual findings without the adversarial presentation of evidence. *See* Fed. R. of Evid. 201.

2. Official or administrative notice is the means by which agencies make factual findings without benefit of the adversarial presentation of evidence. *See Matter of R-R-*, 20 I&N Dec. 547, 555 (BIA 1992); *see also* 8 C.F.R. § 1003.1(d)(3)(iv). Like judicial notice, administrative notice is an exception to the requirement that decisions be based solely upon evidence adduced at a hearing.

a. The purpose of allowing official notice is to enhance adjudicative efficiency without sacrificing adjudicative accuracy. *See* McCORMICK ON EVIDENCE § 359 at 1029 (3d ed. 1988) The primary thrust behind official notice is to simplify or ease the process of proof.").

b. The Code of Federal Regulations allows the Board of Immigration Appeals and, by implication, the Immigration Courts, to take administrative notice of commonly known facts such as current events or the contents of official documents. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

3. There are three separable issues with regard to notice: (1) whether notice may be taken at all, (2) whether a warning must be given before notice is taken, and (3) whether rebuttal evidence must be allowed against the proposition of which notice is taken. *See Castillo-Villagra v. INS*, 972 F.2d 1017, 1028 (9th Cir. 1992).

B. Facts Subject to Notice

1. The doctrine of administrative notice is predicated on the observation that the use by adjudicators of some facts not put into evidence is not only ubiquitous but ;unavoidable and desirable. *See* K.C. Davis, *Judicial Notice*, 55 Colum. L. Rev. 945 (1955). Such facts better off living with their parents. On the other hand, other factual determinations are obviously not appropriate candidates for being noticed, but must be made by consulting the evidence presented by the parties.

2. The appropriate scope of notice is broader in administrative proceedings than in trials. *Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981). The distinctions between legislative and adjudicative facts, and between facts generally known, and those known only to some, used in the Federal Rule of Evidence 201, are but factors to be weighed in the administrative context. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1028 (9th Cir. 1992).

a. A case before an administrative agency, unlike one before a court, is rarely an isolated phenomenon, but is rather merely one unit in a mass of related cases which often involve fact questions that have been frequently explored by the same tribunal. The tribunal learns from its cases. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1026 (9th Cir. 1992).

b. "The broader notice available in immigration hearings may, if properly used, facilitate more genuine hearings, as opposed to 'hearings' in which the finder of fact hears, but cannot, because of repetition, listen." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1027 (9th Cir. 1992). Because of the quantity of similar cases before an agency such as EOIR, if notice is not taken more broadly in immigration hearings, litigants may have an uphill battle maintaining the attention of the immigration judges. *Id.* Hearings may degenerate into an empty form if the adjudicators cannot focus attention upon what is noteworthy about the particular case. *Id.*

3. The Ninth Circuit has thus adopted a "rule of convenience" with respect to the taking of administrative notice: the immigration judge at the hearing should take notice of adjudicative facts whenever the an immigration judge "knows of information that will be useful in making the decision." *Castillo-Villagra v. INS*, 972 F.2d 1017, 1027 (9th Cir. 1992) (quoting *Banks v. Schweiker*, 645 F.2d 637 (9th Cir. 1981)).

a. The Ninth Circuit has pointed out a number of factors which govern the appropriateness of notice of particular facts. They include whether the facts at issue are: (1) narrow and specific or broad and general; (2) central or peripheral; (3) readily accepted or controversial; (4) purely factual or mixed with judgment, policy or political preference; (5) readily provable or provable only with difficulty or not at all; or (6) facts about the parties or unrelated to them. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1027 n.5 (9th Cir. 1992). An IJ's determination whether to take administrative notice is reviewed for abuse of discretion. *Id.*

4. It is important to bear in mind that notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden or resorting to the usual forms of evidence. The fact that an immigration judge has taken notice of a fact does not mean that the opponent is prevented from disputing the matter by evidence.

C. Warning to the Parties and Opportunity to Offer Rebuttal Evidence

1. While the "rule of convenience" provides that an immigration judge is not limited to considering extra-record adjudicative facts that are "not subject to reasonable dispute," *see* Fed. R. of Evid. 201, an "essential concomitant" of the informality permitted by the rule of convenience is the requirement that immigrants in deportation proceedings receive notice and an opportunity to respond to the extra record facts the judge intends to consider. *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) ("Corollary to the right to a hearing before deportation is the right to a deportation decision based on the record created during and before the hearing. Therefore, due process requires the [immigration judge] to refrain from taking administrative notice of facts not in the record unless the procedures it follows are fair under the circumstances.").

2. The majority of case law in this area concerns administrative notice of "changed circumstances." In these cases a change of government in an asylum seeker's home country from one hostile to one tolerant of the applicant's political views after the applicant's asylum hearing but prior to issuance of the immigration judge's decision. *See, e.g., Circu v. Gonzales*, 450 F.3d 990 (9th Cir. 2005).

a. An immigration judge need not notify applicants before taking administrative notice of events that occurred before the hearing, provided that the applicants are allowed an opportunity to argue that their fear of persecution remained well-founded. *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993). Due process is satisfied by allowing the applicant an opportunity to rebut the noticed fact at his removal hearing.

b. By contrast, an Immigration Judge must at least warn the asylum applicant before taking notice of significant events that occurred *after* the deportation hearing. *Castillo-Villagra v. INS*, 972 F.2d 1017, 1029 (9th Cir. 1992).

i. A warning is all that is required where the facts in question are legislative, indisputable and general." *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994). An example of such a fact would be which party has won an election in the immigrant's home country. *Id.*

ii Other more controversial or individualized facts require *both* notice to the applicant and an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts. *See Getachew v. INS*, 25 F.3d 841, 846 (9th Cir. 1994). An example of such a fact would be whether a particular group remains in power after an election. *Id.*

D . Instances Where Administrative Notice May Be Required

1. The Ninth Circuit Court of Appeals has in the past reversed an adverse credibility determination based upon the failure to corroborate administratively noticeable facts. *See Singh v. Ashcroft*, 393 F.3d 903 (9th Cir. 2004). In *Singh v. Ashcroft*, a petitioner seeking asylum claimed that he was targeted for death by an organ of the government of India known as the Research and Analysis Wing (RAW). *Id.* The petitioner failed to present corroborative evidence of the existence of this agency and the Immigration Judge, finding that the petitioner was not credible, denied his application of asylum and the Board of Immigration Appeals affirmed the decision. *Id.* at 904. The Appellate Court reversed, finding that the RAW did, in fact, exist and that the Board erred by failing to take administrative notice of its existence. *Id.* at 906.

2. Note that the above case was prior to the passage of the REAL ID Act and is thus of dubious precedential value.