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COMMENT BY THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Re: Proposed Rule - Proposed Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review
85 Federal Register 36264
[EOIR Docket No. 18-0002; RIN 1125-AA94]

This comment in opposition to the proposed rule is being submitted by the National Association of Immigration Judges (NAIJ). NAIJ is a non-profit, voluntary organization of United States immigration judges. NAIJ was founded in 1971 and in 1979 was designated the recognized collective bargaining representative for this group. Our mission is to promote independence and enhance the professionalism, dignity, and efficiency of the immigration courts. NAIJ speaks on behalf of all non-managerial immigration judges, and this comment represents the opinions of our members.

On June 15, 2020, Attorney General William Barr and Acting Secretary of Homeland Security Chad Wolf published a sweeping set of proposed regulations that would impact almost every aspect of asylum and humanitarian protection law. The Departments of Justice and Homeland Security allowed thirty days for public comments. NAIJ advocates against the promulgation of this proposed rule. The rule should be withdrawn.

Our nation's immigration judges routinely decide cases of noncitizens in removal proceedings and review credible and reasonable fear determinations made by asylum officers employed by the Department of Homeland Security. NAIJ believes it is important to share our perspective and expertise regarding some of the predictable repercussions of this proposed regulation. As neutral arbiters in these cases, we observe the ethical codes which are set out by the American Bar Association's Model Code of Judicial Conduct. These canons remind judges that it is our responsibility to respect and honor the public trust placed upon us and to strive to maintain and enhance confidence in the legal system. The proposed rule cripples the ability of immigration judges to adjudicate asylum and other humanitarian claims fairly and efficiently and continues the unfortunate politicization of the immigration courts.

As a starting point, the thirty-day public comment period is too short for a proposed rule of such wide scope. While comment periods of 30 or 60 days are typical, in complex rulemakings comment periods of up to 180 days may be appropriate. The proposed rule is especially complex. In part it defines, in many cases for the first time, the meaning of terms enacted into law over the past 40 years as part of the Refugee Act of 1980 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The proposed regulation includes definitions of concepts, such as what acts constitute "persecution," that have been at the foundation of American immigration law over the past four decades. In order to ensure that all interested parties have the ability to evaluate the proposed rule and prepare comprehensive and meaningful comments, NAIJ urges the Attorney General and the Acting Secretary to extend the comment period.

While the proposed rule would impact many other substantive and procedural aspects of asylum and protection law, we want to focus on three major issues. First, the rule severely limits the discretion historically afforded to immigration judges in deciding asylum claims. Under current law, even when an applicant *qualifies* to be granted asylum, the law has long-entrusted to immigration judges the duty to determine whether that person (or family) *should* be given asylum in the United States. The proposed rule would establish cumbersome and unworkable lists of perceived negative behaviors and presumptions that would constrain the ability of the immigration judge to consider the entire picture in this analysis. In this way, it would encroach on the role traditionally afforded immigration judges.

Second and more importantly, based on the collective experience of our members, the likely effect of this rule will be a significant, extended period of chaos in the immigration law world. The regulation will create a flurry of litigation over whether the rule itself was properly implemented, what Board of Immigration Appeals (the "Board") precedents are still valid, and

what federal circuit court decisions are based on the statutory text rather than prior regulations or Board decisions. As a consequence, fundamental aspects of immigration law will remain uncertain for many years. This will only complicate our task at the immigration court level, producing confusion, obfuscation, and disparate application of the law.

Third, the rule shines a further light on the need for an independent immigration court because of the politicization of the immigration courts and immigration law. For many years now, through Republican and Democratic administrations, NAIJ has called for an independent Article I Immigration Court, encompassing the trial level immigration courts and the appellate level Board of Immigration Appeals, insulated from the control of the political branches of our government. As both entities are currently housed within the Department of Justice, political influence has interfered with the neutral decision making we are charged to dispense. An Article I structure would protect the trial level and appellate immigration courts from the politically charged policies of any party and allow politics to remain in the legislative and executive branches of government, where citizens express their desires through their elected representatives. Unfortunately, because the immigration courts are currently housed within the executive branch, they have been subject to the political whims of the day, which has resulted in unfair and unpredictably changing case outcomes. Take, for example, the strange history of the treatment of asylum claims based on domestic violence:

- In 1999, the Board issued a decision holding that, in general, claims based on domestic violence do not support a grant of asylum. *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999).
- On January 19, 2001, Attorney General Janet Reno vacated the Board's decision in favor of a proposed formal rulemaking that would clarify the issue.
- New Attorney General John Ashcroft abandoned that rulemaking and, in 2005, remanded *Matter of R-A-* back to the Board.
- On September 25, 2008, Attorney General Michael Mukasey authorized the Board to issue a new precedent decision in *Matter of R-A-*, revisiting the issue of domestic violence-based asylum claims. 24 I&N Dec. 629 (A.G. 2008). On remand to the immigration judge for further consideration, the applicant in *Matter of R-A-* was granted asylum, and that decision was not appealed by the government. So, the Board did not have the opportunity to issue a precedent decision.
- In 2014, the Board issued a precedent decision holding that under certain circumstances, private domestic violence may give rise to an asylum claim. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).
- In 2018, Attorney General Jeffrey Sessions referred *Matter of A-B-* to himself for further review and found that *Matter of A-R-C-G-* had been wrongly decided.
- *Matter of A-B-* is itself the subject of litigation, currently on appeal at the Court of Appeals for the D.C. Circuit, which may (or may not) uphold the ruling as binding precedent.
- Finally, this proposed regulation would turn the standards set out in *Matter of A-B-* into binding regulations which in many instances would be in conflict with circuit court precedent.

As is obvious from this example, the fate of asylum-seekers fleeing domestic violence has ping-ponged over the years with changes in administrations. The consequence of this legal back-and-forth has been uncertainty in the law, unfairness to asylum seekers, and delay in case resolutions. All of this arises from the vulnerability of our immigration court system because it is located in the executive branch of government and has been subject to the decision making and rulemaking of law enforcement agencies. And, unfortunately, the frequent changes in domestic violence asylum law is just one example of the problems inherent in the structural flaw of having a court system housed in a law enforcement agency.

NAIJ's comment to the proposed rulemaking takes no position on what the law should be or how it is to be interpreted. Our concerns are basically two-fold. First, that the short timing of the comment period makes impossible thorough consideration of the vast changes contemplated by the rule. Second, that the entire structure in which this change is being contemplated is deeply and fundamentally flawed. The regulation is just the latest example of how different administrations with different views on immigration have been able to quickly change immigration law to meet their political interests. This creates vast uncertainty in the law and an equal amount of unfairness over time. The solution is to create an independent immigration court outside the political branches of government where the law will not quickly change with different administrations and where judges are not pressured to appease their law-enforcement managers.

The proposed rule should be withdrawn.