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COMMENT BY THE NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

Re: Proposed Rule - Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure
85 Federal Register 52491
[EOIR Docket No. 19-0022; RIN 1125-AA96]

This comment in response 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 August 26, 2020, Attorney General William Barr published a proposed rulemaking entitled "Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure." The bulk of the proposed rule deals with proceedings before the Board of Immigration Appeals. However, certain key provisions of the proposed rule would have a significant impact on proceedings before immigration judges, and NAIJ believes it is important to share our perspective and expertise regarding some of the predictable repercussions of these aspects of the proposed rule. We therefore focus on four main areas of concern: (1) the elimination, by regulation, of administrative closure of cases, a critical case management tool that is essential as immigration judges diligently work through an unprecedented backlog of over 1.2 million pending cases nationwide; (2) the virtual elimination of the authority of immigration judges to reopen cases on their own motion when faced with reason to believe that a decision was made without full understanding of the circumstances surrounding a case, or when a key change in circumstances compels a second look at a case; (3) the elimination of the ability of Immigration Judges to review transcripts of their decisions to correct transcription mistakes, thereby avoiding problematic or confusing records that make meaningful appellate review difficult or even impossible; and (4) a provision of the proposed rule that would, on its face, create a procedure by which Immigration Judges may seek additional clarification when faced with an order of the Board of Immigration Appeals remanding a case for further proceedings, but which in practice would bypass the Board entirely and vest case decision-making authority in a non-judicial officer, the politically appointed Director of the Executive Office for Immigration Review. Individually, these provisions diminish the ability of neutral trial court and appellate Immigration Judges to manage their dockets and make decisions based only on the law and the facts of the cases before them; collectively, these provisions continue a disturbing pattern of increased politicization of the immigration adjudicatory process--a politicization that is at odds with the proper purpose and functioning of our Immigration Courts, and that can only undermine the public perception of fairness essential to any court system.

1. Elimination of Administrative Closure.

Administrative closure has been an important tool for Immigration Judges to efficiently and fairly manage their dockets. Efficient and fair management of a docket is at the heart of a court's responsibility to the parties before it. Administrative closure allows for cases to be held in abeyance, without unnecessary use of court time and resources, when preliminary matters need to be completed for the case to become ripe for further adjudication. This issue is of paramount importance to us as this will facilitate the reduction of the huge backlog of cases in our courts while ensuring that due process is not compromised.

All courts require some case management tool, by which proceedings may be held in abeyance or placed on an inactive docket, to await the action of one of the parties. In the complex interaction between the Immigration Judge, Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), Customs, and Immigration Services (CIS), and sometimes state courts and other authorities, often the Immigration Judge cannot complete the case until some action is taken over which the court has no direct control. The use of

administrative closure, to put a short term hold on cases that are not ready for completion, permits the Immigration Judge to attend to and resolve cases that are ready for resolution and allows immigration judges to complete more cases. Removing administratively closed cases from the active docket allows the immigration judge to focus on cases which are truly ripe for his or her review; granting a continuance in these situations is often not efficient. When a case is continued, it still occupies a position on our overcrowded dockets, and generates workload for judges and staff, and unnecessary time and expenditures for the parties before the court. As a practical matter, the fact that the case is still active often causes the Immigration and Customs Enforcement (ICE) trial attorney to hold onto the Department of Homeland Security's official case file, thereby impeding action by ICE's sister agency, U.S. Citizenship and Immigration Services (USCIS). It is not uncommon to continue a case for a USCIS adjudication of a petition in favor of a respondent in Immigration Court, only for the immigration judge to discover at the rescheduled hearing that no action has even started on the application because ICE had neglected to forward the DHS file to USCIS, which contributes to even greater delay in final adjudication.

Examples of the effective use of administrative closure in this manner are: (1) administrative closure of a case of an unaccompanied minor when his/her application for asylum is pending before USCIS; (2) administrative closure of a case of a minor applying for special immigrant juvenile status before a state court; (3) administrative closure of a case with a U visa application for which the USCIS has found the alien is prima facie eligible; (4) administrative closure of a matter in which a visa petition for an immediate relative has been filed for which an alien appears prima facie eligible. If the Court were to insist on proceeding on such cases to a final decision on immediately available relief, it runs the real likelihood of reversal on appeal, if not by the Board of Immigration Appeals, then by the circuit court of appeals. *See, e.g., Bull v. INS*, 790 F. 2d 869 (11th Cir. 1986) (refusal of continuance for processing of petition for immediate relative visa is an abuse of discretion). Even when that is not a problem, proceeding to an adjudication that results in deportation or denial of relief becomes a waste of precious hearing time, since in the vast majority of such cases the appeal process is not completed before other relief becomes available; this typically results in the case being remanded for further proceedings. It is precisely because of this experience that immigration judges resort to administrative closure in these circumstances.

Administrative closure also provides a critical tool for handling certain unique circumstances before the Immigration Court. It is not uncommon for Immigration Judges to administratively close cases at the DHS's request in which there are concerns about proper service of charging documents. *See, e.g., Penn-America ins. Co. v. Mapp*, 524 F.3d 290, 293-296 (4th Cir, 2008) (discussing placing a case on the "inactive docket" as "administratively closing" a case in federal district court). Similarly, cases are routinely administratively closed when the respondents are being held in State or Federal criminal custody. In its absence, the case may have to be terminated, which may result in application of *res judicata* or issue preclusion against DHS when they initiate proceedings again. It would also create unnecessary work for the Court staff in processing a new Notice to Appear, creating a brand new case, rather than reusing an

existing one which has already been entered into the docketing database. Thus, administrative closure allows for DHS to cure a defect or allow the necessary time for the respondent to be released from custody to face pending charges.

Additionally, some forms of relief are simply not available to respondents unless the matter is administratively closed. Respondents who have obtained the benefit of an approved immediate relative petition (Form 1-130) and are not eligible to adjust status in the United States have an opportunity to complete consular processing in their country of citizenship. Consular processing is required to secure the immigrant visa, but the respondent needs a waiver for unlawful presence under INA section 212(a)(9(B)(v) to ensure expeditious processing abroad for purposes of family unity. This is accomplished by filing a Form I-601A with USCIS. See 8 CFR 8.212.7(e), Pursuant to 8 CFR 212:7(e)(4)(iii), an alien in removal proceedings may not apply for the waiver unless the case is administratively closed. If administrative closure is not available, a respondent cannot avail himself/herself of this form of relief. In the past, ICE readily agreed to administratively close the case, or the judge granted the respondent's request, if the alien demonstrated *prima facie* eligibility for the waiver: the waiver was then adjudicated by USCIS and was generally granted within about 6 to 12 months. Respondents could then move to recalendar the case to apply for voluntary departure, or termination of proceedings, in order to enable the respondent to return to his/her home country for consular processing. The matter at this point was completed in the Immigration Court.

In fact, the process of consular processing is so burdensome that without the benefit of the advance waiver many Respondents simply will not embark on it. They will be far more likely to proceed with other, more burdensome and time consuming, applications for relief before the Court, which they are entitled to pursue but may not have the greatest likelihood of success, such as asylum and cancellation of removal. Thus, denial of administrative closure in this situation will contribute to the voluminous backlog currently clogging the court's docket by adding years of unnecessary litigation when the case might have been resolved quickly, fairly, and expeditiously by administrative closure and subsequent recalendaring for voluntary departure or termination.

It is important to note that administrative closure is not synonymous with the exercise of prosecutorial discretion. The use of administrative closure became controversial during the last Administration, when DHS moved to administratively close many cases expressly as an exercise of its prosecutorial discretion. The use of administrative closure at the request of DHS is an entirely different procedure even though the same term is used for docket control by the Immigration Courts. The use of administrative closure as a docket management tool by the Immigration Courts far predates the novel use of that vehicle in furtherance of prosecutorial discretion; whether or not one agrees with that use, there is no reason to eliminate administrative closure in its historical sense simply because of its use as a DHS (*not* EOIR) initiative was met with controversy.

Finally, as the Board of Immigration Appeals noted in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), it is essential that neither party have sole control over administrative closure, but rather that the decision be committed to the sound discretion of the Immigration Judge in the proper management of his or her docket. No one party should be given a veto power over the Court. It is the Immigration Court which must be fully empowered to administer our immigration laws in a fair and neutral manner. History has shown us that the federal courts will intervene if we do otherwise. Several Circuits have already asserted jurisdiction over administrative closure: e.g., *Vahora v. Holder*, 626 F.3d 907 (7th Cir. 2010); *Garza-Moreno v. Gonzales*, 489 F. 3d 239 (6h Cir. 2007); *Alcaraz v. INS*, 384 F.3d 1150 (9th Cir. 2004). All of these cases were decided before *Matter of Avetisyan* was issued.

Two years ago, Attorney General Sessions overruled not just *Matter of Avetisyan*, but the entirety of nearly 40 years of established Immigration Court practice by essentially eliminating administrative closure as a docket control mechanism. *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). As the Department recognizes, the lawfulness of that decision has been questioned by federal appeals courts. *See* 85 Fed.Reg. at 52497, citing *Romero v. Barr*, 937 F.3d 282 (4th Cir. 2019); *Morales v. Barr*, 963 F.3d 629 (7th Cir. 2020). NAIJ urges the Department to reconsider the Attorney General's decision in *Castro-Tum* and to restore *Matter of Avetisyan* and decades of established sound docket management practice. The alternative is to require a wooden and inflexible rule in which the immigration judge is forced to commit valuable hearing time to cases that cannot be fairly completed because of some delay outside the court's (or the alien's) control. All of these considerations are perhaps best summed up by the maxim that when everything is a priority, nothing is a priority. Eliminating administrative closure as a means by which Immigration Judges may manage their limited hearing time has not created new efficiencies; it has eliminated one of the key efficiency mechanisms Immigration Judges have at their disposal to ensure that their hearings will result in clear, enforceable decisions (be it an order that a respondent must leave the country or an order that a respondent be allowed to remain) rather than further uncertainty as pending collateral petitions are approved or denied. There is no basis in fact to support any claim that Immigration Judges have abused the authority to administratively close proceedings. *Matter of Avetisyan* set forth a thoughtful, clear, transparent, and comprehensive analytical framework governing administrative closure. In doing so, the Board of Immigration Appeals properly recognized the authority of the immigration judges to administratively close proceedings, but also recognized that the decision must be on a case by case basis, considering a number of key factors. In reaching a decision on a request for administrative closure, the Immigration Judge is required to set forth the rationale of his or her decision and address the specific factors the Board set forth. If either party is dissatisfied with the decision, the party may seek an interlocutory appeal before the BIA, which will then conduct an independent review of the judge's decision. There may be many aspects of the Immigration Court system which could benefit from review and reform; this is not one of them. The current framework operated well, and it should be restored rather than eliminated nationwide.

2. Virtual Elimination of *Sua Sponte* Reopening Authority.

The proposed rule would essentially eliminate the authority of the immigration judge to reopen or reconsider a decision on his or her own motion. It allows for just two exceedingly narrow exceptions: to correct a scrivener's error or an error in service of an order. This too is a solution in search of a problem.

The proposed rule first states that *sua sponte* reopening and reconsideration authorities are bedeviled by "few standards to ensure consistent application" such that the continued existence of those authorities is, again, "subject to inconsistent application or even abuse." 85 Fed.Reg. at 52493. One might expect such an extravagant claim to be followed by a parade of horribles documenting such inconsistencies or even abuses; one would be sorely disappointed. Indeed, the proposed rule fails to note any instances of inconsistent application or abuse. Rather, what follows is a cite to the precedent decisions that set forth the very standards the Department just found lacking. 85 Fed.Reg. at 52497 (citing *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *Matter of Beckford*, 22 I&N Dec. 1216, 1221 (BIA 2000) (*en banc*) (all setting forth and refining the rule that *sua sponte* reopening or reconsideration should not be used to circumvent the statutory restrictions on motions to reopen or reconsider, but rather must be reserved for truly exceptional situations). Contrary to the Department's argument, the Board's reference to truly exceptional circumstances in no way creates a vague standard or one that is difficult to apply. Rather, the immigration laws that judges apply on a daily basis are replete with these terms – "extreme hardship" for 212(h) and 212(i) waivers, "exceptional and extremely unusual hardship" for cancellation of removal for non-lawful permanent residents, and "extraordinary circumstances" for an exception to the statutory requirement to file an asylum application within a year of arrival in the United States. The *sua sponte* reopening/reconsideration standard is no different. There is no evidence that immigration judges cannot properly apply this standard.

The Department expresses concern that a *sua sponte* reopening or reconsideration by *the Board* is unreviewable. But that provides no basis for the elimination of *sua sponte* authority as it applies to immigration judges. As is the case with administrative closure, if a party believes that an Immigration Judge improperly reopened or reconsidered a case *sua sponte*, the remedy has always been to seek immediate correction by the Board through the filing an interlocutory appeal. The Department also faults the *sua sponte* reopening authority because "eleven federal circuit courts agree that, as a general matter, no meaningful standards exist to evaluate the BIA's decision not to reopen or reconsider a case" under that authority. 85 Fed.Reg. at 52505 (citing fourteen circuit court decisions upholding the refusal by the Board to reopen *sua sponte*). The Department's citations to fourteen different circuit court decisions upholding the *denial* of a request for *sua sponte* reopening certainly does not support the Department's concern that the *sua sponte* authority is being abused by immigration judges or a Board regularly circumventing ordinary motion to reopen standards; rather, it shows that immigration judges and the Board are applying the Board's precedents limiting the use of that authority to truly exceptional situations.

It is, of course, impossible to try to imagine every extraordinary circumstance that might warrant *sua sponte* reopening even when a standard motion to reopen would be unavailable. Immigration Judges have used their *sua sponte* authority in various situations to ensure that due process is afforded to all and that any potential miscarriage of justice is undone in a timely and efficient manner. NAIJ members have noted some situations in which *sua sponte* reopening authority has been critical. For example, respondents receive a Notice of Hearing advising them of when and where their hearing will be held. The respondent may quite properly go to the courtroom listed on his Notice of Hearing, only to find that the courtroom was changed without the respondent's knowledge. However, if the respondent is not present in court when his case is called, he may be ordered removed *in absentia*. Later that same day, the immigration judge may learn that the respondent was present at the Immigration Court but, through no fault of his own, he was not in the courtroom that was hearing his case. In such situations immigration judges may then use their *sua sponte* authority to reopen the case. By using its *sua sponte* authority, the immigration judge has quickly resolved the matter efficiently while ensuring that the Court's resources were not further taxed through the filing of a motion and a response, replete with declarations, proposed documentary exhibits, and the filing of a fee. And more importantly, the immigration judge's use of his *sua sponte* authority has prevented the perpetuation of a mistake that may result in more profound consequences if not immediately remedied -- consequences that may include the arrest and detention (and perhaps even the removal) of the respondent improperly ordered removed. Other immigration judges have used their *sua sponte* reopening authority to reopen cases in which a respondent has been found to have forfeited an application for relief from removal by not filing it on time (resulting in issuance of an order of removal) only to later discover that the respondent's attorney had been suspended from the practice of law at the time the filing was due. While there is an established process for filing a motion to reopen based on ineffective assistance of counsel, that process may not be available in time to prevent a miscarriage of justice, or it may not be reasonably available at all: consider the case of an attorney who died shortly before a filing deadline. The point here is not that a *sua sponte* reopening regulation may be narrowly tailored to address not just scrivener's errors and service errors, but also "wrong courtroom" errors and "deceased attorney" errors. Rather, the point of preserving *sua sponte* reopening authority is that we simply cannot predict the many ways in which something may clearly go wrong such that reopening or reconsideration is the only practical way to undo an error or prevent a miscarriage of justice. In a court system where tens of thousands of hearings are being held on a daily basis with multiple moving parts, a judge's *sua sponte* reopening authority is critical as a safeguard against the inevitable matters that just fall through the cracks. The proposed rule suggests that joint motions, not subject to time and number limitations, may provide an alternative mechanism that can be used to reopen or reconsider a case. However, the joint motion process is not a substitute for the immigration judge's *sua sponte* authority. The joint motion process places the ultimate authority to reopen or reconsider a case on the Department of Homeland Security, a law enforcement agency. In the end there is no equity or parity with this mechanism if only one party is really making the decision, especially considering that the same time and numerical limitation on filing a motion expressly does not apply to DHS. Eliminating the *sua sponte* authority of judges provides yet another example of how the immigration court is treated as

subordinate to DHS. It is also curious that the Department, having previously suggested that the *sua sponte* authority is problematic because "no meaningful standards exist to evaluate the BIA's decision not to reopen a case," suggests the joint motion process as an alternative; that process too results in a decision that is unreviewable by the Article III courts because "the regulation lacks criteria or standards limiting official discretion, the government has unfettered discretion to deny the requested relief for no reason at all." *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1293 (10th Cir. 2001). The Department does not explain the logic by which it considers unreviewability as a feature in the joint motion process, but as a bug in the *sua sponte* process. The different reopening vehicles are best suited to different situations, and the Department provides no persuasive reason for why one of them should be eliminated.

Therefore, NAIJ urges the Department to leave *sua sponte* reopening and reconsideration authority for Immigration Judges undisturbed.

3. Review of Transcripts of Oral Decisions.

The Department also proposes to eliminate the regulation providing Immigration Judges 14 days to review and approve (or, in rare cases, not approve) transcriptions of their oral decisions. 8 C.F.R. 1003.5(a). It is curious that a proposed rule that ostensibly seeks to improve "quality assurance" would seek to eliminate this critical--and time-limited--quality assurance step. NAIJ polled its bargaining unit members, and well over 90 percent of Immigration Judges oppose elimination of the oral decision review process. This is not surprising given the wide variance in the quality of transcriptions. Judges report the following recurring transcription errors:

- Words or phrases transcribed as "indiscernible" where the Immigration Judge, reviewing a transcript of his or her decision, is clearly able to determine the word or phrase that he or she used;
- Mistranscription of common terms of art in immigration law that are rendered incorrectly by transcribers who lack training in immigration law and procedure;
- Missing words or syllables that completely change the meaning of the judge's decision; for example, an Immigration Judge pointed to decisions in which the phrase, "there is no reason to believe the notice of hearing was *not* properly served" failed to transcribe the word "not," thereby calling into question whether jurisdiction vested with the court;
- Improperly or inconsistently rendered personal and place names that may be remedied by the judge who took testimony in the case, avoiding confusion in the record.

This is not to place blame at the hands of the transcribers who must reduce hours of testimony (including oral decisions) to a written transcript while operating under intense time pressures and with no specialized training in immigration law and procedure. Rather, it is to point out that it is inevitable that the transcription of the often technical and context-dependent language in a

judge's oral decision will include gaps and errors, some of which may provide the Board of Immigration Appeals or a federal Court of Appeals with a muddy record that renders meaningful review difficult or even impossible. Given typical appeal times--something on the order of at least six months from Immigration Judge decision to Board decision in detained cases, and closer to two years in non detained cases--the elimination of the 14 day oral decision review process sacrifices far too much quality control in service of speed, and runs the risk that errors that could be caught and corrected at an early stage in the appeal process will necessitate a remand and further delay after months or even years of the pendency of an appeal. Therefore, NAIJ urges the Department to retain oral decision review as a necessary component of quality control in the appeals process.

4. Certification of Remanded Cases to the Director.

The Department, referring to "quality assurance" in Board decisions, also proposes to create a process by which Immigration Judges may refer a remanded case to the EOIR Director for further review when the Immigration Judge believes the Board's decision is contrary to law or confusing. While the concept of allowing Immigration Judges to seek clarification regarding the basis and scope of a remand order may have value, the proposed remedy -- certification to the Director, rather than to the Board itself -- is flawed, and it threatens to undermine the integrity of the appellate process rather than assuring quality in appellate decision making.

As a starting point, the position of the EOIR Director is not a judicial one. Rather, it is primarily administrative, involving the day-to-day operation of one of the agencies of the Department of Justice. By statute and/or regulation, the immigration adjudicative functions of the agency are committed to the Immigration Judges and to the Chair of the Board of Immigration Appeals. Indeed, the Director of the agency is not even required to be an attorney, much less a judicial official. See 8 C.F.R. 1003.0 (establishing the position of the Director and outlining his duties). In accord with the necessity for judicial independence, the Board of Immigration Appeals is subject only to the "*general* supervision of the Director" and is composed of attorneys appointed by the Attorney General. 8 C.F.R. 1003.1(a) (emphasis added). The regulatory structure of the Board is further explained and refined through the establishment of a Chairman of the Board of Immigration Appeals (under a recent revision to the rule also known as the Chief Appellate Immigration Judge), and it is this *judicial* officer who shall (subject to his or her general supervision of the Director) "direct, supervise, and establish internal operating procedures and policies of the Board." 8 C.F.R. 1003.1(a)(2)(i). While the internal structure of the Executive Office for Immigration Review has been subject to regulatory changes over the years (including, most notably, just one year ago in an interim final rule effective August 26, 2019; see 84 Fed.Reg. 44537 (August 26, 2019)), the clear division between agency administrative and adjudicative functions should be preserved. That distinction is important, as the Board of Immigration Appeals has traditionally functioned as an expert tribunal, with its reasoned

decisions accorded deference by the federal courts of appeals and, in turn, the Supreme Court. *See, e.g., Matter of A-S-*, 21 I&N Dec. 1106, 1114 (BIA 1998) (Schmidt, Chairman, dissenting); Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 Bender's Immigration Bulletin 3 (1998) (outlining the history and purpose of the expert tribunal in federal agency adjudicatory systems in general and in the Board of Immigration Appeals in particular).

The proposed rule would continue to blur the distinction between the adjudicatory functions of the Board of Immigration Appeals as an expert tribunal and the political and administrative functions of the agency implemented through its Director. The result would be a loss of respect for the integrity of the neutral decision making of the Board and a concomitant weakening of the persuasive force of Board decisions on review before the Article III federal courts. The Department appears to acknowledge the problem, and responds to it by suggesting that the Director would not actually be making final decisions on matters referred to him by Immigration Judges, but somehow would act as a "neutral arbiter" between the Immigration Judge and the Board, as if this were some matter of petty interoffice politics rather than a question of the interpretation of the law and the meaning of a remand order from an appellate body to a trial court judge:

> To ensure a neutral arbiter between the immigration judge and the Board, such certification orders would be reviewed by the Director. In reviewing such orders, the Director would have delegated authority from the Attorney General similar to the Board but would be limited in deciding the merits of the case. For a case certified to the Director, the Director would be allowed to dismiss the certification and return the case to the immigration judge or to remand the case back to the Board for further proceedings; the Director, however, would not issue an order of removal, grant a request for voluntary departure, or grant or deny an application for relief or protection from removal. Finally, the Department's quality assurance certification process would make clear that it is a mechanism to ensure that BIA decisions are accurate and dispositive--and not a mechanism solely to express disagreements with Board decisions or to lodge objections to particular legal interpretations.

85 Fed.Reg. 52502-03.

The injection of the Director--who serves at the pleasure of the Attorney General--into the process is not typically what one means when one appeals to the Solomonic wisdom of a "neutral arbiter." And while the Director would not be issuing a decision on the merits in a given case, this is a distinction without a difference; a remand to the Board following a certification by an Immigration Judge necessarily finds fault with the Board's decision and agrees (at least in part) with the immigration judge's objections to that decision. There is no way to avoid the

involvement of the Director in the adjudication of a case under the proposed certification process.

While the certification process is fatally flawed in its proposed design, NAIJ believes that the *concept* of certification *to the Board* by immigration judges faced with unclear remand orders has value. A process allowing the Immigration Judge to seek clarification of confusing Board or Attorney General remand orders could improve the adjudicatory process. *See, e.g., Matter of A-B-*, 27 I&N Dec. 247 (A.G., March 30, 2018) (in an interim order, Attorney General Sessions chided the immigration judge for improperly certifying a question of law back to the Board). The existing certification process, properly construed, would allow an immigration judge to seek clarifying instructions from *the Board*--not the Director--regarding the scope or basis for the remand; it would also allow the Board to reconsider a possibly defective decision by a three-member panel or by the full Board sitting *en banc* if appropriate. This is also well within the scope of the Board Chair's defined duties. The Department's concerns regarding quality assurance could therefore be addressed without the need to disrupt the integrity of the adjudications process through the intervention of a non-judicial officer.

Finally, NAIJ would be remiss in its duties to its bargaining unit members if it failed to mention a particularly offensive rationale for the proposed process allowing certification to the Director. Specifically, the Department also suggests that this new *uber*-Board certification process is for the Immigration Judge's own good:

> Additionally, an erroneous remand by the BIA inappropriately affects an immigration judge's performance evaluation by affecting that judge's remand rate, which is a component of the judge's performance evaluation.

85 Fed.Reg. at 52502.

Not satisfied with grading Immigraton Judges by case completion quotas and remand rates, the Department now wishes to incentivize them to report possible Board errors to the Director for corrective action to avoid the consequences of a poor performance evaluation. The proper response to a perceived lack of quality assurance in Board adjudications is to eliminate arbitrary grading factors such as remand rates, which may depend on all manner of events beyond the Immigration Judge's control, including changes in Board or Attorney General precedent, and federal circuit court and Supreme Court decisions. (And, of course, regulatory changes such as the one contemplated by this proposed rule.) Instead, the Department proposes to double down on the political control of the immigration adjudications process--a process in which the Immigration Judge will now be indirectly graded by the Board through the arbitrary remand rate measure, and Board members will in turn be graded by Immigration Judges referring their alleged mistakes to the Director. This is not "quality assurance"; it is one more giant step in the devaluation of judicial independence.

In conclusion, we reiterate our objection to these proposed changes as they impede the authority of the immigration judges to properly manage their dockets and to ensure a fundamentally fair hearing.