

Immigration Court Reform: Congress, Heed the Call

by Christine Lockhart Poarch



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The call for immigration court reform is an old refrain among immigration practitioners and judges, and Congress is beginning to add its voice to the chorus. In January 2016, in response to increasing and substantial immigration court backlogs, the House Judiciary Committee: Subcommittee on Immigration and Border Security¹ asked the Government Accountability Office (GAO) to investigate and report on the various proposals for immigration court reform. Those included the one proposed by the Federal Bar Association (FBA) in 2013.² In response, the GAO arranged interviews with a number of FBA Immigration Law Section members and other stakeholders immediately following the Committee's request. The GAO staff came to the discussion with experts in the field informed and educated about the current immigration court system, ready to mine the one-on-one discovery sessions with practitioners, judges, and academics for critical information about the immigration court reform proposals that began to emerge in the early 1980s when the U.S. Select Commission on Immigration and Refugee Policy first recommended an Article I immigration court.³

Of the existing proposals on the proverbial immigration court reform table, the FBA proposal makes the most practical sense. In summary,⁴ it calls on Congress to establish an Article I court that would assume the adjudicatory responsibilities currently performed by the Executive Office of Immigration Review (EOIR) in the Department of Justice (DOJ). The sections that follow outline not only the strongest support for Article I reform, but also the practical impact of an Article I immigration court on the practice of immigration law within the immigration court system.

The Promise of Judicial Independence and Why It Matters

Judicial independence—the idea that a court is free from political influences—remains the chief ideal among court systems and is the primary benefit of the FBA's Article I immigration court proposal. In certain foreign tribunals, the minister of justice (the equivalent of our attorney general) appoints judges and they serve at the minister's pleasure. In response to polit-

ical branches of government meddling with judicial independence in certain countries, the International Committee of Jurists espoused the ideal that:

From the perspective of their personal independence, it is crucial that judges are not subordinated hierarchically to the executive or legislative, nor that they are civil employees of these two powers. One of the fundamental requirements of judicial independence is that judges at all levels should be officers of the judiciary and not subordinate or accountable to other branches of government, especially the executive.⁵

We eschew judicial enmeshment with the political branches, and yet we tolerate it within our immigration court system. For example, at the Board of Immigration Appeals (BIA), 17 appointees preside with the assistance of staff attorneys over a docket of more than 34,000 cases.⁶ If a BIA decision is at odds with the attorney general's stated agenda, she occasionally certifies the case to herself and decides it differently.⁷ And if the attorney general is sufficiently incensed, she can remove the BIA members who decided it.⁸

Immigration judges only possess the public appearance of independence. The immigration courtroom mimics the traditional judicial model: a judge, robed in black, sits on the bench, with two parties opposed in the well of the courtroom. The Office of Chief Counsel represents the interests of Immigration and Customs Enforcement within the Department of Homeland Security (DHS) (the author of the charging document that initiates immigration court proceedings) while a respondent (sometimes an undocumented foreign national, but also U.S. lawful permanent residents or other visa holders) faces the possibility of removal from the United States. The immigration judge presides over a broad scope of quasi-judicial proceedings and holds the keys to a myriad of congressionally-created remedies. At first glance, it all seems a little "Perry Mason."

Dig a little deeper, however, and the mirage of judi-

cial independence fades. Both the immigration judge and the assistant chief counsel are employees of the executive branch.⁹ Although EOIR, responsible for administering the immigration court system, has tried to ameliorate this inherent conflict, immigration judges remain DOJ attorneys, organized within the same strata as the DHS attorneys who prosecute removal proceedings. The attorney general, “our nation’s chief prosecutor . . . acts as the boss of the judges who decide whether an accused noncitizen should be removed from the United States” while another executive branch attorney, representing DHS, prosecutes the case.¹⁰ In essence, the immigration judge and the DHS attorney both represent the United States in litigation. In fact, this is part of the ethics briefing that the immigration judges receive annually.

By the DOJ’s own admission, immigration judges are “[DOJ] attorneys who are designated by the attorney general to conduct [immigration court] proceedings, and they are subject to the attorney general’s direction and control.”¹¹ This diminution of immigration judge authority “drain[s] the administrative phase of the deportation process of all meaningful decisional independence.”¹² This fundamental internal conflict betrays appearances and undermines transparency within a court system that decides critical liberty interests. If one draws the curtain back on first impressions, the attorney general sits as the great and powerful Oz at the helm of the entire judicial enterprise.

Not So ‘Civil’ Proceedings

Why does judicial independence *really* matter in the context of removal proceedings, which are defined by Congress as civil (rather than criminal)—a definition that most lawyers associate with Social Security or bankruptcy hearings? Because, in fact, immigration court proceedings are not really civil at all. The immigration courts preside daily over countless dockets of detained individuals housed in government or private facilities that have attracted widespread public attention over the last two years for grave civil rights violations, inhumane treatment, and other abuses.¹³ The immigration courts decide whether a detainee receives bond¹⁴ and whether non-detained individuals will remain in the United States at all. These decisions have lifelong impact on countless U.S. citizen wives, husbands, children, and employers. The immigration court system touches the most fundamental liberty interests imaginable—such as, the right of a parent to raise a U.S. citizen child, the integrity and security of a U.S. citizen’s marriage, or the economic livelihood of U.S. employers who can do little within the current immigration system to provide a valuable employee with lawful immigration status. The immigration court, and its independence or lack thereof, has consequences not just for the foreign nationals who are subject to its mandates, but for the lives of ordinary U.S. citizens affected by the outcomes.

Justice Delayed, Justice Denied

In 2013, when the Immigration Law Section of the FBA made its initial proposal for Article I reform, practitioners within our section were beginning to see the first signs of a border surge that would increase the numbers of cases before the immigration court by nearly 46 percent over the next three years.¹⁵ In January 2013, when the FBA was dotting the i’s in its proposed legislation, approximately 325,000 cases were pending before 50 immigration courts nationwide. By January 2016, the immigration court docket had expanded to over 475,000 cases, divided among 250 judges. When the FBA included the Immigration Law Section’s proposal in its legislative

agenda for the 2013-2014 legislative calendar, final immigration hearings (known as individual hearings) were being set out on the court’s calendar for, at most, a year and a half after the initial (master calendar) hearing. This year, cases pending before certain immigration judges are being scheduled for 2023.

The current immigration court backlog has many causes, and the FBA’s Article I proposal doesn’t promise a panacea. On the other hand, the solution cannot be a simple game of numbers—adding more judges to the same, broken system. In fact, this tactic has proven ineffective in light of the fact that EOIR’s new appointments are barely staying ahead of the number of retirees and administrative appointments within EOIR. The immigration court backlogs are more a symptom of the global dysfunction of the immigration court, rather than the cause.

Recently, EOIR, the DOJ branch that supervises and manages the immigration court system, sought a budget increase of \$29 million that was earmarked, among other things, to hire 25 additional judges.¹⁶ According to the Administrative Office of the U.S. Courts, the cost of operations for one U.S. district judge (including staff, office, and courtroom) is \$1.1 million. Although EOIR is far less transparent, the budgeted numbers indicate that cost for an immigration judge is roughly equivalent. Yet in spite of the negligible difference in cost to sit a judge on the bench with attendant staff in either court, the services, resources, and efficiency of the two courts are widely disparate.

In 2014, the computer system that managed immigration court cases was down for a month due to a hardware failure (without a backup), requiring the courts to revert to antiquated technology and severely diminishing productivity, halting electronic hearing notification systems, and creating general havoc in the immigration courts.¹⁷ Just a few years ago, immigration courts were still recording proceedings on old cassette tape decks, and the court still lacks an effective e-filing system for anything other than entries of appearance by counsel.

Under the FBA’s Article I proposal, the U.S. immigration court would be administered by the Administrative Office of the U.S. Courts, as is the bankruptcy court. Judges will have greater control over their cases. Judges will be able to devote their time to deciding cases rather than finding files, making copies, and performing clerical duties. Now, judges lack authority to supervise law clerks and support personnel. Rather than being an administrative bureaucracy as it is now, the immigration court clerk’s office will run like a typical federal court. Regional courts wouldn’t face the technology mishaps of the past, and electronic filing would ease the paper burden and permit greater organization and transparency, as it has for the federal district courts.

Finally, the FBA proposal would fund court efficiency and reform by generating court filing fees. The immigration court fails to collect fees for many adjudications. Rather, DHS collects and retains them. The fees that the immigration courts do collect—such as for appeals and motions to reopen—have not been increased in two decades and are clearly inadequate.

Heightened Standards of Professionalism

An Article I court will elevate the perception of the practice of immigration law within immigration courts to the true federal specialty that it is. The difficulties faced by the immigration court in appropriately sanctioning unauthorized practitioners will be managed by the existing licensure requirements of the U.S. federal court system,

which require appropriate court membership. Although EOIR made its practitioner discipline program more robust in the last few years, it still applies only to private practitioners. EOIR, the court's supervisory agency, lacks the ability to discipline DHS counsel who appear in immigration courts.¹⁸ In *Reimagining the Immigration Court Assembly Line*,¹⁹ Appleseed noted that "one of the most powerful tools given to judges is the ability to sanction attorneys who appear before them, . . . [which] allows judges to control their courtrooms by enforcing norms of fair play and decorum." Even when used sparingly, this authority protects the public and ensures greater accountability by immigration practitioners on both sides of the bar.

Conclusion

An Article I immigration court is hardly a new legislative proposal, but in the last 10 years, the reform initiative has gained increasing support among key stakeholders. The GAO report, slated to be published in the spring of 2017, will aid immeasurably in sorting out the benefits, costs, and viability of various proposals. In part due to the devoted advocacy within the immigration practice community and from other federal practitioners, the idea of an Article I immigration court is gaining momentum and, hopefully, will find its way to the floor of Congress in short order. ☉

Endnotes

¹⁸Re: Request for a GAO Study on the Costs and Cost-Effectiveness of an Article I Immigration Court," Letter from Reps. Trey Gowdy & Zoe Lofgren to Gene L. Dodaro, comptroller general, (Jan. 12, 2015), available at [najib-usa.org/wp-content/uploads/2016/03/Gowdy-Lofgren-](http://najib-usa.org/wp-content/uploads/2016/03/Gowdy-Lofgren-Letter-for-GAO-EOIR-Study1.12.15.pdf)

[Letter-for-GAO-EOIR-Study1.12.15.pdf](http://najib-usa.org/wp-content/uploads/2016/03/Gowdy-Lofgren-Letter-for-GAO-EOIR-Study1.12.15.pdf).

¹⁹Bruce Moyer, *Washington Watch: FBA 2014 Issues Agenda*, FED. BAR ASS'N (September 2013), www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2013/September-2013-FBA-2014-Issues-Agenda.aspx.

²⁰*U.S. Immigration Policy and the National Interest*, U.S. DEP'T EDUC. (Mar. 1, 1981), <http://files.eric.ed.gov/fulltext/ED211612.pdf>.

²¹For a detailed summary of the FBA's proposal, see Christine Poarch, *Immigration Update: Immigration Options for Undocumented Children: Moving from Technical Solutions to Adaptive Change*, FED. LAWYER 36-42 (Oct./Nov. 2014).

²²*International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, INT'L COMM'N OF JURISTS 1 (2004), www2.fjc.gov/sites/default/files/2015/ICJ%20Practitioner's%20Guide.pdf.

²³Office of Planning, Analysis, and Statistics, *Fiscal Year 2015 Statistics Yearbook*, DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGR. REV. (April 2016), <https://www.justice.gov/sites/default/files/pages/attachments/2016/04/08/fy15syb.pdf>.

²⁴8 CFR § 1003.1 (h).

²⁵"Five on Immigration Board Asked to Leave; Critics Call It a Purge," L.A. TIMES (March 12, 2003).

²⁶INA § 101; 8 U.S.C. § 1101(b)(4). The Office of Personnel Management has categorized career attorney positions as Schedule A. 5 C.F.R. § 213.3102. All immigration judges are career Schedule A appointees.

²⁷Dana Leigh Marks, *Room for Debate: An Independent*

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typical violation of the offense” based on the severity of the offense, the federal sentencing guidelines, and military-specific sentencing categories. Judges could impose a sentence outside a parameter based upon specific findings warranting a deviation. A special board would be formed to create the parameters. Criteria are “factors concerning available punishments that may aid the military judge in determining an appropriate sentence when there is no applicable sentencing parameter for a specific offense.” The recommendations would also require the military judge to sentence the accused separately for each offense he or she is convicted of. Under current practice, the accused receives a single sentence for all offenses of which he or she is convicted.¹⁰

The recommendations contain substantial revisions to the punitive articles of the UCMJ. Many of the punitive articles would be renumbered to more closely group related offenses. Many offenses currently contained in Article 134 (the catch-all provision prohibiting conduct that is prejudicial to good order and discipline or service discrediting)¹¹ would be moved to other portions of the UCMJ. These offenses would be given specific statutory definitions, rather than simply being defined by the president in the *Manual for Courts-Martial*. For example, the offense of false swearing would be moved from Article 134 and added to Article 107¹² (currently the provision prohibiting false official statements). The new offense of false swearing in Article 107 would no longer contain the terminal element of Article 134 (prejudice to good order and discipline or service discrediting conduct).

The recommendations would also create some completely new

offenses. The new offenses include Article 93a, prohibited activities with military recruits and trainees; Article 121a, fraudulent use of credit and debit cards; Article 123, offense concerning government computers; and Article 132, retaliation.

Conclusion

Many of the recommendations mentioned above were included in drafts of the Fiscal Year 2017 National Defense Authorization Act. While the act was still under consideration at the time this article was drafted, many of the above proposals may become law in the near future. These proposals have the potential to significantly change the landscape of military justice practice. ☉

Endnotes

¹10 U.S.C. § 920 (2015).

²10 U.S.C. § 839 (2015).

³10 U.S.C. § 829(c) (2015).

⁴10 U.S.C. § 846 (2015).

⁵10 U.S.C. § 829 (2015).

⁶10 U.S.C. § 852(a)(2) (2015).

⁷10 U.S.C. § 827 (2015).

⁸See 10 U.S.C. §§ 851(a) and 856 (2015).

⁹10 U.S.C. § 856 (2015).

¹⁰*Id.* Rule 1006, MANUAL FOR COURTS-MARTIAL: UNITED STATES, U.S. DEP'T OF DEFENSE (2015).

¹¹10 U.S.C. § 934 (2015).

¹²10 U.S.C. § 907 (2015).

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Immigration Court Is Needed, N.Y. TIMES, (July 12, 2011), www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed.

¹¹Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish An Article I Immigration Court*, BENDER'S IMMGR. BULL. (Jan. 1, 2008), naij-usa.org/wp-content/uploads/2014/06/Urgent-Priority_1-1-08.pdf (citing authorities delegated to the director of the executive office for immigration review and the chief immigration judge, 72 Fed. Reg. 53,673, 53,673 (Sept. 20, 2007)); see also Dana Leigh Marks, *Mischaracterization of Immigration Judges by the United States Department of Justice*, NAT'L ASS'N IMMIGR. JUDGES (May 15, 2016), naij-usa.org/wp-content/uploads/2016/05/NAIJ-position-paper-May-2016-classification-of-IJs.pdf.

¹²*Id.*, see also Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370 (2006).

¹³Stephen Dinan, *Illegal Immigrant Detention Centers Rife With Abuses, U.S. Civil Rights Commission Report Finds*, WASH. TIMES (Sept. 17, 2015), www.washingtontimes.com/news/2015/sep/17/illegal-immigrant-detention-centers-rife-abuses-us.

¹⁴For non-mandatory custody aliens, immigration judges may continue to detain or release on bond of not less than \$1,500. INA § 236(a). Immigration judges do not have authority to consider or review DHS parole decisions. 8 C.F.R. §§ 1003.19 and 1236.1.

¹⁵*Latest Immigration Court Numbers, as of January 2013: Immigration Court Backlog Continues to Inch Upward in*

January, TRAC IMMGR. (January 2013), trac.syr.edu/immigration/reports/308/#backlog.

¹⁶*Fiscal Year 2017 Commerce, Justice, Science Funding Bill Released*, U.S. HOUSE OF REPRESENTATIVES COMM. ON APPROPRIATIONS (May 17, 2016), appropriations.house.gov/news/documentsingle.aspx?DocumentID=394535.

¹⁷Tovin Lapan, *Computer Problems Lead to Immigration Court Hassles, Scrutiny on Resources*, GOV'T TECH. (May 14, 2014), www.govtech.com/public-safety/Computer-Problems-Lead-to-Immigration-Court-Hassles-Scrutiny-on-Resources.html.

¹⁸See 8 C.F.R. § 1292.3 (2007); Professional Conduct for Practitioners: Rules and Procedures, 65 Fed. Reg. 39,513, 39,522 (June 27, 2000) (“Many commenters expressed their concern that the proposed rule applies only to private practitioners and not to ... service trial attorneys.”); see also Marks, *An Urgent Priority*, *supra* n.11.

¹⁹*Reimagining the Immigration Court Assembly Line: Transformative Change for the Immigration Justice System*, APPLESEED (2012), www.appleseednetwork.org/wp-content/uploads/2012/03/Reimagining-the-Immigration-Court-Assembly-Line.pdf.