



Governmental Affairs
Office

STATEMENT

of

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PRESIDENT

of the

AMERICAN BAR ASSOCIATION

for the

SUBCOMMITTEE ON BORDER SECURITY AND IMMIGRATION

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

on

**“Strengthening and Reforming America’s Immigration
Court System”**

April 18, 2018

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Chairman Cornyn, Ranking Member Durbin and members of the Subcommittee:

My name is Hilarie Bass and I am the President of the American Bar Association (ABA) and Co-President of the international law firm Greenberg Traurig. The ABA appreciates this opportunity to share our views for this hearing on “Strengthening and Improving America’s Immigration Courts.”

The American Bar Association is among the world’s largest voluntary professional organizations, with over 400,000 members, including a broad cross-section of lawyers, judges, academics, and law students. The ABA continuously works to improve the American system of justice and to advance the rule of law throughout the world. Through its Commission on Immigration, the ABA advocates for modifications in immigration law and policy; provides continuing education to the legal community, judges, and the public; and develops and assists in the operation of pro bono legal representation programs.

The health of all our nation’s court systems is of paramount importance to the ABA. One of the distinctive hallmarks of our democracy is our tradition of an independent judiciary – the principle that all those present in our country are entitled to fair and impartial consideration in legal proceedings where important rights and privileges are at stake. The immigration courts issue life-altering decisions each day that may deprive individuals of their freedom; separate families, including from U.S. citizen family members; and, in the case of those seeking asylum, may be a matter of life and death. Yet, this system lacks the basic structural and procedural safeguards that we take for granted in other areas of our justice system.

Due to the importance of this issue, the ABA, in 2010, released a report entitled *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. The report was the result of a multi-year study that surveyed relevant literature and interviewed an array of governmental, non-profit, and private-sector stakeholders. The findings of this report led the ABA to adopt a series of recommendations for incremental reforms for every level of the removal adjudication process, from the decision to initiate removal proceedings through potential federal judicial review. Ultimately, however, we determined that the most promising means through which to address many of the systemic issues was to create an independent adjudicatory body, with a preference for the creation of an Article I court.

Since the release of the 2010 report, some progress has been made, and we particularly appreciate that Congress has in recent years increased resources for the immigration court system, including for a sizeable increase in the number of judges and support staff and some technological improvements. However, most of the factors that led us to determine that the immigration removal adjudication system needed fundamental reform still exist. The case backlog has risen to an all-time high, public confidence in the fairness of adjudications appears to be further declining, and the rate of legal representation for those in the system remains abysmal.

While the majority of our previous recommendations for improvements throughout the system are still relevant, we focus our comments here on the need for major restructuring, recent

challenges created by the lack of independence, and the importance of improving access to counsel and legal information.

System Restructuring

There is nothing sacrosanct about the current structure of our immigration adjudication system. In fact, the system and its structure have evolved numerous times in recent history.¹ However, there has been no major structural change since 1983, when the Executive Office for Immigration Review (EOIR) was established.² The evolution of immigration removal adjudication generally reflects a slow progression in the direction of greater professionalism and independence. However, the immigration court's continued existence within the Department of Justice, with its personnel and operations subject to direct control by the Attorney General, is a fatal flaw to the reality – and perception – of independence.

Immigration judges serve as career attorneys in the Department of Justice with no fixed term of office and are subject to the discretionary removal and transfer authority of the Attorney General. They have no statutory protection against removal without cause or reassignment to less desirable venues or dockets. This erodes judicial independence and provides a basis to undermine public confidence in the competence and impartiality of immigration judges. It is time to take the final step and restructure the system to be fully independent of any executive branch agency.

The ABA's recommendation to create an Article I court to replace the current immigration adjudication system is not a new or novel proposal. In 1981, the congressionally created Select Commission on Immigration and Refugee Policy made such a recommendation in its final report. Legislation was introduced in the House of Representatives in the late 1990s.³ More recently, many other experienced and respected organizations and individuals have reached a similar conclusion. These include, among others, the American Immigration Lawyers Association⁴, the Federal Bar Association, and the National Association of Immigration Judges. While these proposals may differ somewhat as to specific details, the core goal is the same; to establish an independent court under Article I to house both trial- and appellate-level tribunals.

In our view, any major system restructuring should be aimed at attaining the following goals: (1) Independence – Immigration judges at both the trial and appellate level must be sufficiently independent, with adequate resources, to make high-quality, impartial decisions without any improper influence, particularly where that influence makes the judges fear for their job security, (2) Fairness and perceptions of fairness – Not only must the system actually be fair, it must appear fair to all participants, (3) Professionalism of the immigration judiciary – Immigration judges should be talented and experienced lawyers who treat those appearing before them with

¹ <https://www.justice.gov/eoir/evolution-pre-1983>.

² <https://www.justice.gov/eoir/evolution-post-1983>.

³ See H.R. 185, United States Immigration Court Act of 1999, 106th Cong. (1999); H.R. 4107, United States Immigration Court Act of 1998, 105th Cong. (1998); H.R. 4258, United States Immigration Court Act of 1996, 104th Cong. (1996).

⁴ RESOLUTION ON IMMIGRATION COURT REFORM, AILA Board of Governors, Winter 2018. See <http://www.aila.org/File/DownloadEmbeddedFile/74919>.

respect and professionalism, and (4) Increased efficiency – An immigration system must process immigration cases efficiently without sacrificing quality, particularly in cases where noncitizens are detained.

With these goals in mind, we examined three basic restructuring options and reviewed existing examples of each model.

Article I Court: An independent Article I court system to replace all of EOIR (including the immigration courts and Board of Immigration Appeals), which would include both a trial-level and an appellate-level tribunal. The models we examined were the United States Tax Court, the United States Bankruptcy Court, the United States Court of Federal Claims, and the Court of Appeals for Veterans Claims.

Independent Agency: A new executive adjudicatory agency, which would be independent of any other executive department or agency, to replace EOIR and contain both trial-level administrative judges and an appellate-level review board. The models we examined were the Occupational Safety and Health Review Commission, the Merit Systems Protection Board, and the National Labor Relations Board.

Hybrid: A hybrid approach placing the trial-level adjudicators in an independent administrative agency and the appellate-level tribunal in an Article I court. The model examined was the system for granting and assessing veterans' benefits, which consists of an agency within the executive branch for trial-level proceedings and an Article I court for appellate review.

We believe all three models would have advantages over the current system. However, in the process of examining the different models, it became apparent that the least-attractive option was the hybrid approach, as it likely would be the most complex and least cost-efficient relative to the other two options. Although the case between an Article I court and an independent agency was a closer call, we determined that the Article I model presented the best option for meeting the goals and needs of the system. The Article I model is likely to be viewed as more independent than an agency because it would be a true judicial body; is likely as such to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government. Given these advantages, in our view, the Article I court model is the preferred option.

The primary benefit of each of the models is to provide a forum for adjudication that is independent from any executive branch department or agency. Removing the adjudication system from the Department of Justice, whose primary function is a law enforcement agency, is vital to assuaging concerns about fairness and the perception of fairness. As a wholly judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication.

An Article I court also should attract highly-qualified judicial candidates and help to further professionalize the immigration judiciary. History has shown the potential for the politicization of the hiring process and an inherent bias toward the hiring of current or former government

employees. Removing the hiring function from the Department of Justice also may increase the diversity of the candidate pool. Providing for a set term of sufficient length, along with protections against removal without cause, will similarly protect decisional independence and make Article I judgeships more attractive.

By attracting and selecting the highest quality lawyers as judges, an Article I court is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decision without the need to appeal to a higher tribunal. When appeals *are* taken, more articulate decisions should enable the reviewing body at each level to be more efficient in its review and decision-making and should result in fewer remands requesting additional explanations or fact-finding.

These improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during the proceedings.

Of course, independent does not mean unaccountable. To some degree, accountability to the political branches is the flip side of independence. Thus, the trial judges in an Article I court with fixed terms generally would be more accountable than those in an independent agency where they would have the equivalent of life tenure. As the court would also undertake the administrative functions such as budgeting and personnel management, the court would be accountable to Congress for the responsible and effective use of its resources.

Establishing an Article I court should also have a positive impact on Article III courts, since greater independence is likely to lead to greater confidence in results, which in turn is likely to reduce the number of appeals to the circuit courts. This is no small matter. In 2017, appeals from the Board of Immigration Appeals accounted for 82 percent of administrative agency appeals and constituted the largest category of administrative agency appeals filed in every circuit except the DC Circuit.⁵

There have been various proposals for specific features of an Article I system. To address judicial selection, our proposal would create a Standing Referral Committee to screen and recommend candidates for judicial appointments. The Chief Trial Judge, Chief Appellate Judge, and other appellate judges should be appointed by the President and with the advice and consent of the U.S. Senate. The trial judges should be appointed by the Chief Trial Judge or by the Assistant Chief Trial Judges. Both Trial and Appellate judges would have fixed terms and may be removed by the appointing authority only for incompetency, misconduct, neglect of duty, malfeasance, or disability. Details regarding other proposed features, such as supervision and evaluation, discipline, and transition are provided in the appendix to this statement.

Of course, we recognize that restructuring alone would not immediately solve all the challenges facing the immigration courts. Regardless of the structure of the system, the immigration courts

⁵Federal Judicial Caseload Statistics 2017, Administrative Office of the U.S. Courts, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017>.

will have to deal with a number of matters outside their immediate control, such as changing enforcement policies. In addition, issues such as funding, hiring personnel, managing technology, and day-to-day management are challenges faced by courts at every level around the country. While there may be some short-term costs and inconveniences, we believe that transitioning the system to an Article I court will bring long-term benefits to the government and those in the system.

Recent actions necessitating a renewed call for independence

As noted earlier, proposals for the creation of an independent Article I court for the immigration adjudication system are long-standing, some dating back nearly forty years. In our case, the ABA adopted its initial position more than twelve years ago. However, there has been renewed urgency expressed by some due to several recent actions taken by the Department of Justice that many believe are incompatible with sustaining the decisional independence of immigration judges.

The most recent of these actions was the announcement of the pending imposition of case production quotas and deadlines as individual performance measures for immigration judges.⁶ This development prompted an outcry from former immigration judges, national organizations, and policy-makers. The National Association of Immigration Judges has previously warned of the potential consequences of rating judges on the basis of number or time-based standards, noting that it “interferes with judicial independence and clearly will put Immigration Judges in a position where they could conceivably violate their legal duty to fairly and impartially decide cases in a way that complies with due process.”⁷

Strict implementation of these production quotas also may result in an increase in the number of appeals to the Board of Immigration Appeals and the federal courts. Individuals who feel that their cases were summarily decided because of an arbitrarily imposed deadline may be more likely to appeal, which would result in simply shifting the caseload burden. Or worse, because immigration judges feel pressured to rush decisions to meet their deadlines and case quotas, quality may suffer, resulting in an increased number of remands from the federal courts. Such a rebound effect could exacerbate the case backlog in the immigration courts.

The ABA instead has recommended a judicial performance review model based on the ABA’s Guidelines for the Evaluation of Judicial Performance⁸ and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System. These models stress judicial improvement as the primary goal, emphasize process over outcomes, and place a high priority on maintaining judicial integrity and independence. While the Guidelines provide for the evaluation of administrative capacity, it is only one of five criteria that must be

⁶ Immigration Judge Performance Metrics, memorandum from EOIR Director James McHenry, March 30, 2018. EOIR PERFORMANCE PLAN Adjudicative Employees 3. Job Element: Accountability for Organizational Result. See <http://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>.

⁷ National Association of Immigration Judges, “Threat to Due Process and Judicial Independence Caused by Performance Quotas on Immigration Judges,” Oct. 1, 2017, <http://www.aila.org/infonet/naij-states-that-performance-quotas-on-immigration>.

⁸ https://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe.authcheckdam.pdf.

given equal consideration along with legal ability, integrity and impartiality, communication skills, and professionalism and temperament. The Guidelines also specifically require that “evaluation programs should be structured and implemented so as not to impair judicial independence and should be free from political, ideological, and issue-oriented considerations” and that evaluations “should not be used for judicial discipline.” We encourage EOIR to abandon its myopic focus on numerical metrics and instead institute a judicial performance evaluation based on these models.

The Department of Justice had earlier issued a separate memo establishing EOIR’s specific priorities and goals in the adjudication of immigration court cases.⁹ The memo cited the ABA Standards Relating to Trial Courts¹⁰ to support the proposition that “[c]ourt performance measures and case completion goals are common, well-established, and necessary mechanisms for evaluating how well a court is functioning at performing its core role of adjudicating cases.”

As a stand-alone proposition, that is correct. What the memo fails to point out is that the ABA Standards were specifically designed for state trial courts, which are sited in the judicial branch of state governments and are therefore independent from executive control. State trial judges are either appointed or elected for set terms and generally cannot be removed without cause. This stands in stark contrast to the current status of immigration judges. In addition, we would emphasize the significant difference between the adoption of case completion goals which are intended to measure the performance of the court according to certain standards, and the imposition of numeric case production quotas upon which individual judges will be evaluated. The latter has serious implications for decisional independence.

If the immigration courts were transitioned into an independent Article I court, it could utilize more effectively court management tools such as the Standards without engendering fear that there was impermissible influence or pressure being placed on judges to sacrifice accuracy for the sake of speed. The core principle of any fair adjudication system must be that independent and impartial judges decide cases on the merits, evaluating the facts and the law, after a hearing that comports with due process. The ability of judges to use their discretion to manage their dockets and caseloads in a manner that accomplishes this goal without fear of reprisal is essential to due process.

These memos and other recent pronouncements by the Department of Justice create the perception that the primary consideration for immigration adjudications is to ensure the rapid disposition of cases. Certainly, effective docket management and timely completion of cases are necessary to ensure justice, but must be carefully balanced against any potential effects on the full and fair consideration of cases.

⁹ Memorandum from James McHenry III, Director, Executive Office of Immigration Review, U.S. Department of Justice on Case Priorities and Immigration Court Performance Measures to the Office of the Chief Immigration Judge, et al. (Jan. 17, 2018), available at <http://www.aila.org/infonet/eoir-updates-its-case-priorities-and-immigration>.

¹⁰ Am. Bar Ass'n, Standards Relating to Trial Courts § 2.51 (vol. II 1992), available at <https://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/MO/MemberDocuments/trialcourtstandards.authcheckdam.pdf>.

Timeliness and efficiency are important but must not come at the cost of fairness and due process. The Department of Justice must make it unequivocally clear to immigration judges and the public that the first and overriding priority is to ensure that cases are decided on their merits.

Access to counsel and legal information play a critical role in ensuring fairness and efficiency in the adjudication system

In our view, the fair and efficient operation of the immigration court system is fundamentally linked to the issue of access to counsel and legal information. The ABA has consistently emphasized the importance of representation in removal proceedings, where a lawyer's assistance is essential for a noncitizen to fully understand and effectively navigate the complexities of the U.S. immigration system. Removal proceedings can be especially difficult and intimidating where the individual is detained or is a member of a vulnerable population, such as an unaccompanied child or asylum-seeker. Unfortunately, recent statistics show that only about 37% of those in removal proceedings – and 14% of those detained – are represented by counsel.¹¹

Pro se litigants are usually unfamiliar with immigration laws and court procedures, which can create delays that impose a substantial financial cost on the government. The presence of competent counsel helps to clarify the legal issues, allows courts to make better informed decisions, and can speed the process of adjudication. Immigration judges otherwise are forced to try to develop facts and identify potential claims for relief during expensive on-the-record proceedings. Increased representation for noncitizens thus would facilitate the more efficient processing of claims and lessen the burden on the immigration courts.

Moreover, whether a person has legal representation also has been shown to significantly impact the outcome of proceedings. A recent study noted that noncitizens who were detained were twice as likely to obtain relief if they had representation; noncitizens who were not detained were five times more likely to obtain relief.¹² Previous reports had found that legal representation was the single most important factor affecting whether asylum-seekers were successful in their claims.¹³

For these reasons, the ABA supports the right to appointed counsel for vulnerable populations, such as unaccompanied children and the mentally ill and disabled, as well as for those who are indigent. However, we recognize that budgetary and other challenges make this unlikely in the near future. It is therefore critically important to retain and expand services such as those provided by EOIR's Office of Legal Access Programs (OLAP). In 2000, OLAP was established "to improve access to legal information and counseling and to increase representation rates for foreign-born individuals appearing before the immigration courts and Board of Immigration Appeals (BIA)."

¹¹ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L.Rev. 1 (2015), available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=9502&context=penn_law_review.

¹² *Id.*

¹³ See <https://www.acslaw.org/files/RefugeeRoulette.pdf>.

One of the most impactful and successful initiatives under OLAP is the Legal Orientation Program (LOP). The LOP contracts with nonprofit organizations to provide services at 38 detention facilities around the country. Under this program, an attorney or paralegal meets with the detainees who are scheduled for immigration court hearings to educate them on the law and to explain the removal process. Based on this orientation, the detainee can decide whether he or she potentially qualifies for relief from removal. Persons with no hope of obtaining relief – the vast majority – typically submit to removal. The ABA has two projects that provide LOP services in California and Texas and we can unequivocally attest to the value of the program to the detainees and the courts.

We recognize that immigration judges are required to give certain advisals to respondents in court.¹⁴ It has been suggested that these advisals render LOP services redundant. We strongly disagree. LOP programs engage in a range of activities, including a group legal-rights presentation, individual one-on-one orientations, self-help workshops, and pro bono referrals. This information is usually provided before the first master calendar hearing to allow detainees to make an informed decision on how to proceed in court. In addition, LOP presenters employ proven adult-education techniques, utilize physical props and sample documents, all to ensure that the detainees fully comprehend the information they are provided. This stands in stark contrast to the stress and confusion detainees may feel while being addressed by a judge in a court proceeding and being asked to make an immediate decision about their future. It is important that judges ensure that respondents are aware of their rights, but when respondents have had the advantage of LOP services they are able to come into court more prepared, and judges should be able to spend less court time on advisals.

Another distinction is that LOP services are provided by nongovernmental organizations, neutral third parties that are more likely to engender trust on the part of the detainees, many of whom fled countries where law enforcement agencies and the judiciary are corrupt and cannot be trusted to provide accurate information. While the immigration judge is required to provide to the detainee a list of pro bono providers, securing a pro bono lawyer for oneself from a detention facility is an incredibly difficult task. Facilities are often located in remote areas with little to no pro bono or low-cost legal services providers available. Detainees are limited in their ability to make phone calls, do not have internet access for research purposes, and face language barriers. LOP providers do not engage in direct legal representation to detainees. However, pro bono coordination can be an essential asset to both the respondent and the court.

The beneficial impacts of LOP have been apparent since the inception of the program. In 1989, EOIR funded short-term pilot projects at three detention facilities and found that they “resulted in a nearly 20 percent reduction in detention time while increasing the percentage of detainees able to obtain legal representation.”¹⁵ Several reports since that time have confirmed that LOPs improve the administration of justice and save the government money by expediting case

¹⁴ See [8 C.F.R. § 1240.10\(a\)](#) and [8 C.F.R. § 1240.11\(c\)\(1\)](#)

¹⁵ New Legal Orientation Program Underway To Aid Detained Aliens, U.S. Department of Justice, March 11, 2003, <https://www.justice.gov/sites/default/files/eoir/legacy/2003/03/14/LegalOrientationProgramRelease0311.pdf>. The ABA’s Pro Bono Asylum Representation Project, which provides LOP services at Port Isabel Detention Facility, was among the original three pilot projects and continues to provide LOP services today.

completions and leading detainees to spend less time in detention.¹⁶ The latest report, completed in 2012, found that cases for persons participating in LOPs move an average of 12 days faster through the immigration court system, resulting in six less days in detention, and a net savings to the U.S. government of \$17.8 million – a return of \$4 for every \$1 spent on the program.¹⁷

The LOP has been shown to be a wise investment of government resources that yields significant returns to the government and helps to ensure due process for immigration detainees. The program also has enjoyed ongoing and consistent bipartisan congressional support.¹⁸ We were thus dismayed and baffled by EOIR’s recent decision to suspend the program pending completion of a new cost-benefit analysis. While continuing examination of program effectiveness is important, we see no need to suspend program activities while the analysis is being completed, particularly since the program was fully funded for FY 2018. That decision has raised concerns regarding whether EOIR may have pre-determined the outcome of this process. We encourage the subcommittee to ensure that the anticipated cost-benefit analysis is released to the public and subjected to independent scrutiny. We believe that a fair evaluation will reaffirm the benefits that LOP brings to detainees, detention facilities, and the immigration courts.

Conclusion

Ensuring a fair and effective system for adjudicating immigration cases is in the interest of both the government and those individuals within the system. While progress has been made in several areas, there is ample evidence that significant problems remain. In our efforts to solve these problems, we must not sacrifice or undermine the fundamental principles of fairness and due process that exemplify the American justice system. We believe that restructuring the immigration adjudication system into an independent Article I court and increasing access to counsel and legal information are the best solutions to promote independence, fairness, efficiency, and accountability in the system.

The American Bar Association looks forward to offering its assistance as a part of the effort to strengthen and reform the immigration court system. Thank you again for this opportunity to share our views.

¹⁶ https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/LOP_Phase_III_Report_6.22.09_FINAL.pdf; <https://www.justice.gov/sites/default/files/eoir/legacy/2008/05/15/LOPEvaluation-final.pdf>.

¹⁷ https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

¹⁸ S. Rept. 115-139 – Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2018 (The Committee's recommendation maintains the fiscal year 2017 level of no less than \$10,400,000 for LOP), <https://www.congress.gov/congressional-report/115th-congress/senate-report/139/1>; H. Rept. 115-231 – Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2018 (The recommendation sustains the current legal orientation program and related assistance, such as the information desk pilot.), <https://www.congress.gov/congressional-report/115th-congress/house-report/231/1>.

Appendix I

FEATURES OF AN ARTICLE I IMMIGRATION COURT

The American Bar Association supports the creation of an Article I court, with both trial and appellate divisions, to adjudicate immigration cases, which should have features substantially consistent with the following guidelines:

1. Selection of Judges

- (a) A Standing Referral Committee should be created to screen and recommend candidates for judicial appointments. The Committee should include certain appellate judges and trial judges from the Article I court. Other governmental and non-governmental stakeholders would be represented on the Committee or have an opportunity to comment on candidates before they are recommended for appointment.
- (b) The Chief Trial Judge, Chief Appellate Judge, and other appellate judges should be appointed by the President and with the advice and consent of the U.S. Senate.
- (c) The trial judges should be appointed by the Chief Trial Judge or by the Assistant Chief Trial Judges with the approval of the Chief Trial Judge.

2. Tenure

- (a) Appellate and trial judges should have fixed terms, which should be relatively long as in other Article I courts (e.g., 8 to 10 years for trial judges and 12 to 15 years for appellate judges).

3. Removal

- (a) Judges may be removed by the appointing authority only for incompetency, misconduct, neglect of duty, malfeasance, or disability.

4. Supervision and Evaluation

- (a) Each trial immigration judge would be supervised by the Assistant Chief Trial Judge responsible for the local court on which the judge serves. Each appellate judge would be under the supervision of the Chief Appellate Judge.
- (b) Performance would be reviewed based on a system using the ABA's Guidelines for the Evaluation of Judicial Performance and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System.

5. Discipline

- (a) Judges would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct, tailored as necessary to take into account any unique requirements for the immigration judiciary.

- (b) Complaints against immigration judges at the trial or appellate level would be made directly to a reviewing body established specifically for this purpose. The final decision on disciplinary action would rest with the Chief Appellate Judge as to appellate judges and the Chief Trial Judge as to trial judges. A trial judge would have the right to appeal the adverse action to the court of appeals for the circuit in which he presides, while an appellate judge could appeal to the DC Circuit.

6. Transition

- (a) Existing judges would serve out the remainder of the new fixed terms, which are deemed to have begun at the time of their prior appointment to current positions, and are eligible for reappointment thereafter.
- (b) The Chair of the Board of Immigration Appeals (“BIA” or “Board”) would serve as Chief Appellate Judge of the Article I court until replaced by Presidential appointment.
- (c) The current members of the BIA would become the appellate judges of the Article I court and would serve out the recommended fixed terms, which would be deemed to have begun at the time of their prior appointment to the BIA. Thereafter, these judges would be eligible for reappointment by the President with the advice and consent of the Senate.
- (d) The Chief Immigration Judge in Executive Office of Immigration Review (“EOIR”) would serve as Chief Trial Judge of the new Article I court until replaced by Presidential appointment.
- (e) The current Assistant Chief Immigration Judges would serve as Assistant Chief Trial Judges in the Article I court until replaced by the new method of appointment.