CONFLICTING ROLES OF IMMIGRATION JUDGES: DO YOU WANT YOUR CASE HEARD BY A "GOVERNMENT ATTORNEY" OR BY A "JUDGE"?

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The views expressed here are those of the authors in their individual personal capacities and as Vice President and President of the National Association of Immigration Judges (NAIJ), formed after extensive consultation with the membership of the NAIJ. The NAIJ is a professional association of immigration judges and also the certified representative and recognized collective bargaining unit that represents the immigration judges of the United States. The views expressed herein do not purport to represent the views of the U.S. Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR), or the Office of the Chief Immigration Judge.

INTRODUCTION

As these words are written, approximately 275,000 cases are pending before about 265 immigration judges (IJs) across the United States.[1] These matters are not just dry statistics or theoretical "widgets." Rather these are life-altering proceedings where people's fates lie in the hands of IJs. Simply put, immigration judges are charged with the grave decision of deciding who should be removed and who should be granted the benefits of lawful status in the United States.

The U.S. Supreme Court has called the effect of deportation (or removal) the equivalent of banishment, a sentence to life in exile, loss of property or life or all that makes life worth living, and, in essence: a "punishment of the most drastic kind."[2] An order of deportation can effectively amount to a death sentence when an individual will be subject to persecution upon return to his or her country.[3] Yet in this post-9/11 era, legitimate concerns regarding national security and terrorism are also crucial factors that can be implicated in these cases. Herein lies the inescapable challenge posed by these cases. There are, however, improvements that could be made to allow this system to function better.

Despite these exceedingly high stakes, immigration cases are further complicated by mundane administrative realities. The complexity of the law and the paucity of resources available to the Immigration Court contribute to a court system that has been widely recognized as overburdened and overwhelmed.[4] Immigration law has been repeatedly recognized by the federal courts as being second only to tax law in its complexity.[5] Add into the mix the staggering number of cases on the docket, the myriad of languages and cultural contexts these potential immigrants bring, and the fact that less than half of the people are represented by an attorney.[6] Then you begin to appreciate the full array of challenges faced by immigration judges, whose mission is to fairly and expeditiously make decisions in each case.

One goal of this article is to identify the structural impediments that undermine the optimal functioning of this important tribunal. Issues of concern in the system range from the macro level (such as questions over which branch of our government should administer the

1. Transactional Records Access Clearinghouse, New Judge Hiring Fails to Stem Rising Immigration Backlogs, http://trac.syr.edu/immigration/reports/250/; s*ee also* Executive Office for Immigration Review, U.S. Dep't of Justice, FY 2010 Statistical Year Book, at Y1 (Jan. 2011), www.justice.gov/eoir/statspub/fy10syb.pdf; News Release, EOIR, The Executive Office for Immigration Review Swears in Nine Judges, Judge Corps Reaches 270 Serving in 59 Courts (Dec. 20, 2010), *available at* www.justice.gov /eoir/press/2010/IJInvestiture12172010.pdf.

2. *See, e.g.*, Lehman v. United States, 353 U.S. 685, 691 (1957); Jordan v. DeGeorge, 341 U.S. 223 (1951); Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); Ng Fung Ho v. White, 259 U.S. 276 (1922).

3. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); Padilla-Augustin v. INS, 21 F.2d 970, 978 (8th Cir. 1994).

4. Todd Etshman, *Immigration courts face backlog,* N.Y. Daily Record, March 7, 2011.

5. Castro-O'Ryan v. U.S. Dep't of Immigr. & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" (quoting Elizabeth Hull, Without Justice for All 107 (1985))).

6. For an inside perspective from an IJ on the topic of attorney representation, including the laudable efforts by New York pro bono programs, see Noel Brennan, *A View From the Immigration Bench*, 78 Fordham L. Rev. 623 (2009).

Immigration Court) to the micro level (how to alleviate workload pressures and ensure that judges have the ability to independently and expeditiously render decisions).

What should an individual expect from the immigration judge who is to decide his or her future? In deciding cases, an immigration judge is required by law to "exercise ... independent judgment and discretion" and to take actions consistent with the law and regulations to decide a case.[7] American society's most fundamental expectation of any judge is independent judgment. Most legal scholars would agree that without an independent and neutral decisionmaker, due process cannot be achieved. The independence of the judiciary in our federal and state systems is ensured by separation of the judicial from the legislative and executive branches.[8] Administrative tribunals, as executive branch agencies, also provide a valuable method for high-volume adjudications by specialized adjudicators. These tribunals, most of which are governed by the Administrative Procedure Act, safeguard decisional independence by specific provisions to protect against any commingling of investigative and prosecutorial functions, thereby assuring impartiality and independence.[9]

The immigration courts are unique. They are not courts with either of those structural protections. They are not in the judicial branch of the government, and they are not covered by the Administrative Procedure Act. Congress decided to exempt deportation proceedings from the protections of the Administrative Procedure Act, accepting the argument that adherence to the statute would be too costly or cumbersome.[10] The Immigration Court system is part of the executive branch of government, located in an agency called the Executive Office for Immigration Review,[11] which is a component of the Department of Justice. Until the last decade, the DOJ also housed the Immigration and Naturalization Service (INS), the same office that employed the prosecutors appearing before the Immigration Court; now those prosecutors are housed in a sister agency, the Department of Homeland Security (DHS).[12] As employees of the executive branch rather than the judicial branch, immigration judges are arguably "attorneys" employed by the U.S. government, rather than true judges.

This article also will explore in depth a few of the actual and potential conflicts that this unique structure has caused. Our choice of title comes from one fundamental, overarching issue: the fact that on one hand there are circumstances where immigration judges are treated as "attorneys working for or representing the U.S. Government," while on the other hand, their daily role and the duties they discharge mandate the traditional responsibilities that the title of "judge" implies. The following examples and discussion are intended to highlight the inherent tension between these conflicting functions. Finally, a solution to this problem is proposed.

I. Case Completion Goals: Timeliness Versus Quality

Immigration Judge X is instructed by her superior to schedule four cases for final hearings in a day. In addition, she is tasked with completing all cases within a specified number of months after they appear on her docket. As she is an attorney working for the government, her performance is subject to performance evaluations and she is subject to the rules relating to employee insubordination if she fails to follow her supervisor's instructions.

As a judge, in her first case of the day, a long-pending case, she must decide whether to grant a continuance to a party who asserts that he needs more time to obtain vital evidence from a foreign country. Then, during her third case of the day, she must decide whether an additional witness should be allowed to

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7. 8 C.F.R. §1103.10(b).

8. 16A Am. Jur. 2d *Constitutional Law* §239:

> The primary purpose of [separation of powers] doctrine is to prevent the commingling of different powers of government in the same hands. The doctrine is premised on the belief that too much power in the hands of one governmental branch invites corruption and tyranny, and thus, the doctrine prevents one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another. The separation of powers prevents any one governmental branch from aggregating unchecked power which might lead to oppression and despotism.

9. The Administrative Procedure Act, 5 U.S.C. §553(a)(1), requires that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. Morton v. Ruiz, 415 U.S. 199 (1974).

10. For a thorough history of these times, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 Interpreter Releases 453 (1988).

11. INA §101(b)(4), 8 U.S.C. §1101(b)(4).

12. Homeland Security Act, Pub. L. No. 107-296, §1517, 116 Stat. 2135, 2311 (Nov. 25, 2002) (codified at 6 U.S.C. §557).

testify, although that would necessitate either delaying the case to another date or in rescheduling the fourth case on her docket to a later date.

Should she act as an attorney or as a judge? How would her role influence the choice she must make? How do the personal consequences to Judge X differ based on whether she is considered a government attorney or a judge?

It is axiomatic that "justice delayed is justice denied." Litigants should be able to have their cases heard fairly and promptly. In federal, state, and local courts judges struggle to keep up with burgeoning caseloads. The same is true in Immigration Court, but because it is a court within a federal agency, there are mechanisms in place outside the control of the litigants that impose timeliness constraints on immigration judges: "case completion goals." In the Immigration Court system, these "goals" have become an undue and sometimes unseen pressure on an immigration judge's ability to render a thorough, well reasoned decision.

In June 2000, the Immigration Court system began formulating "case completion goals," which were formally implemented in May 2002.[13] They were the result of requirements imposed by the Government Performance and Results Act of 1993. Bound by its mandate, the Department of Justice had to quantify achievements and accountability. To comply, the Department chose to establish "adjudication priorities" for the Immigration Court, and elected to measure its success by evaluating whether the Court met case-completion goals.[14]

The stated purpose of these "goals" is to assist the immigration courts in "adjudicat[ing] cases fairly and in a timely manner."[15] To that end, a time frame was established for the completion of every case, based on the case type, and the agency set expectations of the percentage of cases to be completed within that time frame.[16] Providing some flexibility, EOIR determined that, for the most part, completing 90% of cases within the established time frame is an "acceptable result."[17] The agency monitors each local immigration court to identify any that have not met the established time frames and takes action to assist courts that are not meeting the goals.[18]

While EOIR has not stated publicly that actions can be taken against an individual immigration judge for failure to meet a goal in any given case and repeatedly asserts they are only aspirational goals, not inflexible mandates, narrative responses from immigration judges in a recent study revealed that judges perceive these goals to be mandatory and frequently in conflict with ideal conditions for adjudicating cases fairly and independently.[19] Judges noted: "In those cases where I would like more time to consider all the facts and weigh what I have heard I rarely have much time to do so simply because of the pressure to complete cases." and "What is required to meet the case completions is quantity over quality."[20]

The agency's monitoring of case completions has been described as:

the drip-drip-drip of Chinese water torture that I hear in my mind (i.e. in my mind I hear my boss saying: "more completions, more completions, bring that calendar in, you are set out too far, you have too many reserved decisions, why has that motion been pending so long, too many cases off calendar.").[21]

Based on these reports, the way in which these "goals" are being imposed by supervisors of IJs may not comport with what is expected of an independent and fair judge, even though they may be in line with appropriate expectations for an attorney for the government. Or perhaps the IJs, being accustomed to succeeding and achieving, fear disapproval or even discipline from their supervisors if they fail to meet these expectations. Certainly each situation is different. Yet perhaps most problematic is the fact that litigants

13. U.S. Gov't Accountability Office, GAO-06-771, Executive Office for Immigration Review Caseload Performance Reporting Needs Improvement 20-21 (Aug. 2006) (Report to the Chairman, S. Comm. on Finance).

14. *Id.*

15. *Id.*

16. *Id.*

17. EOIR, Fiscal Years 2008-2013 Strategic Plan 8 (Jan. 2008), www.justice.gov/eoir/statspub/EOIR%202008-2013%Final.pdf.

18. *Id.*

19. Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Geo. Immigr. L.J. 57, 64-65 (2008) [hereinafter *Stress Survey*].

20. *Id.*

21. *Id.*

might not be aware of these goals or the pressures that they place on immigration judges, since these are internal management directives that are not "on the record" with regard to how they apply to a particular case.

The reality of this pressure and the role it can play when it becomes a factor that impacts an IJ's decision is illustrated in a published 2008 case. In *Hashmi v. Attorney General of the United States*,[22] an immigration judge noted that the case-completion goal for the case type had been exceeded when he denied an unopposed motion to continue the case. The circuit court found that "the sole basis for the IJ's exercise of discretion was the IJ's perceived 'obligation[]' to 'manage [his] calendar[].'"[23] The court cautioned:

Case completion goals are ordinarily implemented as guidelines to promote reasonable uniformity and to help judges schedule and effectively manage their caseloads. As guidelines, they should not be read as an end in themselves but as a means to prompt and fair dispositions, giving due regard to the unique facts and circumstances of the case.[24]

Finding that the immigration judge had reached the decision on whether to grant or deny the motion based "solely" on case-completion goals, the circuit court found that the decision was "impermissibly arbitrary" and an abuse of discretion.[25]

On remand, the Board of Immigration Appeals seemed to have disagreed with the circuit court's characterization of the immigration judge's decision. The Board noted that it had affirmed the initial decision to deny a continuance because it agreed with the immigration judge that "a further continuance was unwarranted in light of the numerous continuances already granted," that there was no prejudice to the respondent, and that the delay was caused, in part, by the respondent's failures.[26] Nevertheless, the Board went on to articulate factors to be considered in determining whether a continuance is warranted, and noted that, while "other procedural factors" may be considered, "[c]ompliance with an Immigration Judge's case completion goals, however, is not a proper factor in deciding a continuance request, and immigration judges should not cite such goals in decisions relating to continuances."[27]

This illustrates the conflicts facing immigration judges tangled between their classification as government attorneys and their duties as judges. While the circuit court made clear that case-completion goals should not be a factor in a decision, the comments of the immigration judge in that case and the comments of the judges in response to the survey noted above reveal that case-completion goals frequently have become a factor in the decisionmaking process. Reinforcing the mixed message that IJs receive, the Board referenced "an *Immigration Judge's* case completion goals [emphasis added]," reflecting an agency view that these goals are imposed on individual immigration judges, not on the courts as a whole. The Department of Justice has made it clear that these goals are essential to its compliance with the Government Performance and Results Act. Under these circumstances, it is easy to understand how an immigration judge would have uppermost in his or her mind the concern for the agency's success in meeting case-completion goals. How this consideration is weighed against other fundamental due process concerns is a choice that plays out daily, unfolding on a case-by-case basis. The question is, does this tension have to exist, or could structural reform eliminate this conflict once and for all?

II. Potential Conflicts for "Judges" Working in a Law Enforcement Agency

Immigration Judge X is presiding over a case where the individual is applying for asylum because he was jailed and tortured for engaging in a protest against the ruling party of his homeland. In his country, the judicial branch is corrupt and seen as a "puppet" of the government. How does Judge X educate the respondent that immigration courts are not a "rubber stamp" for DHS, which previously denied his asylum application?

One of the conflicts facing immigration judges on a day-to-day basis deals with the court being "housed" within the Department of Justice, a law enforcement agency.[28] Many of these conflicts are simply perceived, but some are actual.

22. 531 F.3d 256 (3d Cir. 2008).

23. *Id.* at 261.

24. *Id.*

25. *Id.*

26. Matter of Hashmi, 24 I. & N. Dec. 785, 787 (BIA 2009).

27. *Id.* at 793-94.

28. The mission of the Department of Justice is

> to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and

Unfortunately, the history of the Immigration Court system is rife with instances where undue law enforcement pressures were placed on immigration judges. Judges in the Immigration Court are aware of that history and mindful of it. In its early years, the Immigration Court and the prosecutor's office (then the INS) were both housed within the Department of Justice, and the immigration judges depended on the INS District Directors (in essence the client of the prosecutors) for hearing facilities, office space, and supplies.[29] Many immigration courts remain located inside detention centers operated and/or controlled by DHS, and many others are located in the same building as DHS offices and prosecutors. Immigration judges are familiar with the old rumor that a Texas immigration judge lost his parking space when the INS District Director was upset with his decision.[30] While this rumor may seem laughable, the discomfort among the IJs who were at the mercy of the INS for worksite conditions was all too real and contributed to a desire not to "rock the boat." A similar discomfort persists today while the Immigration Court remains housed in the Department of Justice, which is closely aligned with DHS and shares with it the primary mission of law enforcement rather than neutral adjudication.

In addition, there is the day-to-day problem of the perception of being housed inside the same building as the prosecutor and using some of the same resources. The public and even members of the press all too frequently refer to the immigration courts as the "INS Courts" and fail to be aware that they are part of the DOJ, a completely separate department. Many of the respondents appearing before the Immigration Court come from countries "where a courtroom is not an institution of justice, but rather an extension of a corrupt state."[31] It is not infrequent in Immigration Court for an unrepresented respondent to assume that the immigration judge works for the same entity as the DHS prosecutor. Frequently in court, a respondent will indicate that he gave a document to a judge "before," yet further inquiry will reveal that the document was actually given to a DHS representative. Many respondents come to court with the perception that their deportation is a foregone conclusion, claiming that the DHS representatives told them that. It is difficult to elicit cooperation and forthrightness from a respondent who believes that the deck is already stacked against him. These perceptions are even more difficult to dispel when the judge's courtroom door is located directly across from the prosecutor's door. This is most difficult in the detained setting, when the guard providing security for the courtroom may be the same guard who is watching over the respondent in his "barracks."

It is not just the co-location of immigration courts with a prosecutorial party that has caused charges that the Immigration Court is subject to undue pressure from the government. Allegations also have persisted that government prosecutors have had inappropriate *ex parte* contact with the Immigration Court system.[32] The allegations that the Immigration Court has undue bias towards the government persist to this day. Recently, a report from the Chicago Appleseed Fund for Justice noted, "The Immigration Courts and the BIA [have] never enjoyed a stellar reputation for impartiality. But that reputation fell to a new low after a deliberate effort to stack the Immigration Courts . . . in favor of the government between 2004 and 2006."[33] The report also claimed that the composition of the Immigration Court bench favors the government, stating that "almost 80 percent of immigration judges have professional backgrounds that tend to cause them to find in favor of the government significantly more often than judges without those backgrounds."[34]

> controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

www.justice.gov/jmd/mps/strategic2007-2012/introduction.pdf.

29. *Immigration Reform and the Reorganization of Homeland Defense: Hearing before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 72-73, 85 (2002) (S. Hrg. 107-931, Serial No. J-107-90) (testimony and written statement (An Independent Immigration Court: An Idea Whose Time Has Come) of Dana Marks Keener, National Association of Immigration Judges).

30. *Id.* at 85.

31. Chicago Appleseed Fund for Justice, Assembly Line Injustice 7 (May 2009) [hereinafter Appleseed Report].

32. *See Immigration Reform and the Reorganization of Homeland Defense* 87.

33. Appleseed Report 7. This was based on a 2008 report by the DOJ Inspector General and the Office of Professional Responsibility that found a systematic campaign by members of the previous administration to pack the court with "good Republicans" who were "on the team."

34. *Id.* at 7-8.

This public perception of the Immigration Court affects the ability of immigration judges to do their jobs. As noted above, an immigration judge is expected to use his or her independent judgment and to be impartial. As the Appleseed report noted, "John Adams urged that judges should be 'impartial and independent as the lot of humanity will admit.'"[35] Immigration judges are aware of the public perception that they are partial towards the government, and have been subjected to incredibly increased scrutiny as a result.[36] Specifically, in 2006, the Attorney General created a "performance evaluation" process for judges, and in 2010, a process for filing complaints against IJs online.[37] At this time, there is a real concern that these allegations of government bias could cause immigration judges to overcompensate, to "bend over backwards" or, worse, exhibit a bias against the government to avoid being the object of complaint or discipline. As noted in a letter to the Attorney General from Ranking Member Lamar Smith:[38]

Under its practice, OPR will usually investigate immigration judges only in cases in which they deny relief that is later granted by the federal courts. The course of least resistance is therefore for immigration judges to grant relief in many cases despite their beliefs about the merits of the cases. ... This perceived pressure ultimately frustrates the integrity of our immigration laws and the American people's interest in the laws being enforced in a fair and orderly manner.

This perception and the complaint process certainly create pressure for immigration judges.

Responses by immigration judges to the recent survey noted above indicate that the negative perception of the public and fear of investigation is a driving and stressful force in the decisionmaking process.[39] For example, one cited "Fear that every decision or proceeding may trigger a 'personalized' and scathing published criticism from the reviewing circuit court and/or an Office of Professional Responsibility investigation into the judge, which may destroy the judge's professional reputation and career without the ability to rebut or defend."

Another judge noted that he/she was "demoralized by being made the 'whipping boy' by the press and public, when it is the system we are forced to follow that contributes so greatly to the errors I make."[40] These comments reveal that the negative perception of the Immigration Court system, as well as the mechanisms the Department of Justice has put in place to deal with these perceptions, are a potentially coercive influence on immigration judges. At a minimum, they have indisputably found to be corrosive to morale and have increased stress and burnout in the immigration judge corps.[41]

Thus, being housed within the Department of Justice creates several conflicts for immigration judges on a daily basis. First, many of their workplace resources are inextricably tied to those of the Department of Homeland Security, a sister agency. At the very least, this harms the perception of the Immigration Court system, impedes the IJs' ability to do their jobs, and may have a chilling effect on them. In addition, the inescapable impression of government bias created by being housed in a law enforcement agency may actually cause a backlash.

III. Concerns About the Lack of Even-Handed Sanctions Authority

Immigration Judge X has constant problems with two attorneys who appear before her regularly. They are both routinely late, unprepared, rude, and belligerent, and have even made misrepresentations in court. One is a government attorney, and one is a private attorney. Judge X can refer the private attorney for possible sanctions, but cannot take such action against the government attorney. What should Judge X do in order to maintain control of her court in a fair manner?

"With the mountain of cases facing Immigration Judges every day, judges need to run their courtrooms as efficiently as possible; this necessarily requires the power to discipline all attorneys who come to court

35. *Id.* at 7.

36. *See, e.g.,* Press Release, Department of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug 9, 2006).

37. Press Release, EOIR, The Executive Office for Immigration Review Announces New Process for Filing Immigration Judge Complaints (May 9, 2010), *available at* www.justice.gov/eoir/press/2010/IJConductProfComplaints05192010.pdf.

38. Letter from Lamar Smith, Ranking Member of the H. Comm. on the Judiciary, to Eric Holder, U.S. Attorney General (May 26, 2010) (on file with the authors).

39. *Stress Survey* at 71-72.

40. *Id.*

41. *Id.*

unprepared."[42] While immigration judges have had authority to sanction attorneys by civil monetary penalties since 1996,[43] the Department of Justice has failed to promulgate the regulations needed to implement this authority. This lack of an appropriate sanctions mechanism for attorneys appearing before the Court has lead to pressures that may contribute to stress and intemperate behavior by immigration judges.[44]

The current procedures for sanctioning lawyers appearing before the Immigration Court are one-sided. The procedures for sanctioning practitioners before the Immigration Court for "criminal, unethical, or unprofessional conduct" or "frivolous behavior" apply only to an attorney or representative "who does not represent the federal government."[45] Since this process can be used only against a private attorney, some immigration judges are reticent to use it, believing that it may create the appearance of a lack of impartiality. Yet, without the ability to impose sanctions, an immigration judge lacks a vital tool to address attorney misconduct. This situation leaves immigration judges without a mechanism to punish recalcitrant lawyers, short of resort to punitive rulings that may harm the respondent far more gravely than his private attorney, or benefit a respondent who may not deserve it, rather than really affect the government attorney. These procedures also could be viewed as another example where immigration judges are providing preferential treatment to government attorneys who escape discipline.

In the survey noted above, one IJ commented that "We have been intentionally deprived by the Department [of Justice] and DHS of the tools and rules necessary to make DHS function in court in a reasonably professional and competent manner."[46]

42. Appleseed Report at 11.

43. Pub. L. No. 104-208, div. C., §304, 110 Stat. 3009, 3009-589, codified as amended at §240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. §1229a(b)(1).

44. *See, e.g.*, Press Release, Department of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006) ("By better enabling judges to address frivolous submissions and to maintain an appropriate atmosphere in their courtrooms, we will reduce the pressures that may have contributed to intemperate conduct in the past.").

45. 8 C.F.R. §1292.3(a)(1) and (2). Under §1292.3(i), OPR handles discipline of government attorneys.

46. *Stress Survey* at 70.

This belief the DHS has obstructed the implementation of contempt authority rules is not unfounded. It appears that the situation remained unresolved at least in part because of historical opposition of DHS. "The INS has generally opposed the application of the [contempt] authority to its attorneys. In more than three years since the enactment of IIRIRA, the [EOIR] and the DOJ have failed to resolve this issue, apparently still paralyzed by the legacy of their relationship with INS."[47] Thus, the placement of the Immigration Court within the Department of Justice created an internal, and later interagency, barrier to enactment of regulations to implement contempt power.

While immigration judges have protested the lengthy delay (fifteen years) in enacting regulations to enforce the contempt power, they remain stalled. From this inaction, the immigration judges lack a vital tool to do their jobs. While attorneys routinely function in their jobs without contempt authority or sanctions powers, judges are rarely so constrained, thus providing another example of how the lack of a structure that treats immigration judges as judges has contributed to dysfunction in an already overburdened system.

CONCLUSION

This article has attempted to explore some of the real and potential conflicts created for immigration judges in their dual roles as "attorneys" for or representing the U.S. government and as "judges." Immigration judges face several pressures that are inherent to the unusual placement of the Immigration Court within a federal law enforcement agency: (1) case completion "goals" that are perceived to be mandatory and frequently in conflict with adjudicating cases fairly; (2) the public perception of a government bias of the Immigration Court and the effect that this perception has on an immigration judge's ability to do his or her job; and (3) the lack of even-handed tools to deal with misconduct by government attorneys appearing before them.

The NAIJ believes that the best solution to these and other problems caused by this structural flaw is the creation of an Article I Immigration Court, or the establishment of an Immigration Court in an independent agency outside the Department of

47. Michael J. Creppy et al., Court Executive Dev. Project, Inst. for Court Mgmt., The United States Immigration Court in the 21st Century 109 n.313 (1999).

Justice.[48] This idea has been seriously considered for more than twenty-five years.[49] The same conclusion has been reached recently by the comprehensive study commissioned by the American Bar Association and the Chicago Appleseed Fund for Justice.[50] The National Association of Women Judges has endorsed the concept as well.[51] History has shown that incremental modifications to the Immigration Court have not resolved these pernicious problems. After years of thorough study, the bipartisan Select Commission came to this conclusion in 1981. Almost thirty years later, after exhaustive study of all stakeholders, the nation's largest bar association, the American Bar Association, has again come to the same conclusion. We applaud many of the efforts that the Department of Justice has made over the years and continues to make to provide for fair and full adjudications in the Immigration Court system. Nevertheless, it is only through an Article I court or separate agency that complete independence and impartiality can be achieved, both in reality and in public perception.

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48. Hon. Dana Leigh Marks, *An Urgent Priority, Why Congress Should Establish an Article 1 Immigration Court*, 13 Bender's Immigr. Bull. 3, 15-17 (Jan. 1, 2008).

49. *See, e.g.*, Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by the Commissioners (1981).

50. Commission on Immigration, American Bar Association, Reforming the Immigration System ES-9 (Feb. 2010); Appleseed Report 35-36.

51. See its Resolution passed on April 16, 2002.