Federal Bar Association

November 6, 2017

The Honorable Raul Labrador
Chairman, Subcommittee on
Immigration and Border Security
Committee on the Judiciary
U.S. House of Representatives
6320 O'Neill House Office Building
Washington, DC 20515

The Honorable Zoe Lofgren
Ranking Member, Subcommittee on
Immigration and Border Security
Committee on the Judiciary
U.S. House of Representatives
6320 O'Neill House Office Building
Washington, DC 20515

Re: Subcommittee Hearing of November 1, 2017: Oversight of the Executive Office for Immigration Review

Dear Chairman Labrador and Ranking Member Lofgren:

We write in connection with the Subcommittee's hearing of November 1, 2017, concerning oversight of the Executive Office for Immigration Review (EOIR), and respectfully request that this correspondence be included in the official record of that hearing.

The November 1 hearing underscored a broad consensus that EOIR suffers from inefficient management and long-standing administrative and operational deficiencies. Congressional expectations for timely and impartial immigration adjudication clearly are not being satisfied. Skyrocketing immigration caseloads continue to generate greater backlogs and delays, even with the hiring of additional immigration judges. Hearings are now being scheduled into 2022 and, according to EOIR, the backlog has now reached 640,000 cases. This state of affairs represents "justice delayed"—contrary to public expectations of timeliness and efficiency in the immigration system.

In its June 2017 report on EOIR management practices (GAO-17-438), the Government Accountability Office (GAO) further documented case backlogs of epic size, costly and inefficient case management practices, and outdated courtroom technologies. Politically-motivated decisions and changing priorities under administrations of both parties have further degraded EOIR's ability to administer justice and manage taxpayer resources effectively. Overstaffed with headquarters personnel, it is a bloated bureaucracy and a pale reflection of a well-administered adjudicative system. Indeed, the actual resources allocated to hearing and deciding cases are but a fraction of the overall EOIR budget.

Though EOIR recently announced a series of actions to tackle the backlog with additional resources and more robust hiring and workforce planning, significant concerns remain about its institutional capacity to effectuate these reforms. Immigration judges and Board of Immigration Appeals (BIA) members are still potentially subject to discipline if the Attorney General disagrees with their decisions, depriving those officials of the independence necessary to freely adjudicate the matters before them. As long as immigration cases are heard by "attorneys representing the United States in litigation" – and not independent judicial officers -- serious concerns will remain about the fairness of the existing adjudicative process at that level.

During the November 1 oversight hearing, Judiciary Committee Chairman Robert Goodlatte observed that the true solution to EOIR's problems may lie in Congressional establishment of "clear statutory parameters" to ensure efficient, consistent justice "no matter what administration is in charge and what their principles may be." We embrace that view, but believe that Congress should go further than providing legislative guidance to EOIR. Instead, we recommend a more thorough overhaul in which EOIR's trial-level immigration courts and appellate-level BIA are converted into a new, statutorily-established Article I court with trial and appellate divisions. That court would take its place beside other Article I courts (like the Court of Appeals for Veterans Claims and the Tax Court) as an independent, specialized tribunal. Confirming the necessity of this approach, the recent GAO report documented the many immigration court experts and stakeholders who support a fuller restructuring of EOIR's trial and appellate functions.

We enclose a summary of the Federal Bar Association's proposal to replace EOIR with an Article I immigration court, and we remain available for further discussion of its specific terms.

Under our proposal, the substantive law of immigration and the corresponding enforcement and policy-determining responsibilities of the Departments of Homeland Security and Justice under the Immigration and Nationality Act (INA) would remain unchanged, and a newly-established "United States Immigration Court" would discharge the same judicial functions presently exercised by EOIR, but cases would now be decided in a manner independent of political influence. Final decisions of the new court would be subject to review in the regional U.S. courts of appeals (as currently occurs with EOIR's administrative decisions), but only with respect to constitutional claims, issues of statutory or regulatory interpretation, or other questions of law. Findings of fact by the new court would be final and unreviewable.

Under the proposal, the Article I immigration court judges would have fixed terms of office that facilitate judicial decisions without fear or favor. The new court's trial and appellate divisions would be self-managed, like other federal courts, thereby eliminating the massive "supervisory" bureaucracy of EOIR. Under the control of its own judges and professional staff, a well-administered immigration court would operate with greater efficiency and cost-effectiveness, and its decisions would be entitled to greater respect. By affording both sides to an immigration case the right to appeal to the regional circuit courts of appeals, the Article III courts could develop guiding precedents in a more balanced

context. Aside from start-up costs, a more efficient, responsive immigration court would not necessarily entail additional expense and should achieve actual savings, in part through updating the current fee schedule and implementing a modern electronic case filing system. In sum, these changes should in time produce a sound institution whose effectiveness is equal to that of the federal court system.

In conclusion, we believe that the government's responsibility to fairly, expeditiously and uniformly adjudicate immigration cases will be best fulfilled through an Article I court charged with independently interpreting and applying the Nation's immigration laws. No less than a systemic restructuring of this kind will reverse the shortcomings, mismanagement and wasteful use of resources long associated with the current arrangement.

Thank you for your leadership and the Subcommittee's consideration of these comments.

Sincerely yours,

Kip T. Bolin
National President

Elizabeth Stevens
Chair, Immigration Law Section

Attachment

Summary of Proposed "Immigration Court Act"

Purpose of Legislation

To transfer to an independent court established under Article I of the Constitution the adjudicative functions under the Immigration and Nationality Act (INA) that were performed, prior to the legislation, by the Executive Office for Immigration Review (EOIR) in the U.S. Department of Justice.

Basic Features

The legislation establishes a "United States Immigration Court" with responsibility for functions of an adjudicative nature that had been performed under the INA and Justice Department regulations by EOIR's immigration judges, administrative law judges, and Board of Immigration Appeals (BIA).

The new court is comprised of a trial division operating at various locations within the United States, and an appellate division based in the Washington, D.C. area.

The judges of the court have fixed terms of office and are removable only for cause. The judges in the appellate division are appointed by the President subject to Senate confirmation, and the judges in the trial division are appointed by the appellate division using a merit-selection process.

The substantive law of immigration and the corresponding enforcement and policy-determining responsibilities of the Departments of Homeland Security and Justice under the INA are unchanged. However, the legal precedents established in decisions of the new court's appellate division are binding on those departments as well as other executive branch authorities with administrative responsibilities under the Act and other immigration-related laws.

Final decisions of the new court are subject to review in the regional U.S. courts of appeals under the same circumstances as EOIR's administrative decisions had been reviewed by those courts, but only with respect to constitutional claims, issues of statutory or regulatory interpretation, or other questions of law. Findings of fact by the new court are not subject to further judicial review.

Jurisdiction

Jurisdiction is transferred to the new court with respect to all hearings, quasi-judicial decision making, and first-level appellate review authorized by pre-existing statute or regulation for proceedings arising under titles I and II of the INA.

The court's trial division has jurisdiction generally corresponding to matters of the kind previously addressed in EOIR by immigration judges and administrative law judges.

The court's appellate division has jurisdiction generally corresponding to matters of the kind previously addressed by the BIA, including appeals in proceedings that originate in the trial division.

Court Administration and Operations

Cases in the appellate division are heard by the judges sitting *en banc*, in panels of two or more members, or individually. Cases in the trial division are heard by individual judges. The appellate division sits *en banc* to exercise its administrative authority.

The appellate division has overall governance responsibility for the court, with specific authority to prescribe the court's rules of practice and procedure, determine the geographic areas served by judges in the trial division, establish operating procedures with respect to the timing and location of court sessions and other matters, and participate in court staff appointments and management of the court's budget.

The chief judge of the court is a judge in the appellate division determined by seniority and serves for a 5-year term. The chief judge takes a leading role with respect to appointing non-chambers court staff and, in general, is responsible for overseeing the court's administrative operations in addition to discharging his or her regular judicial duties.

Each geographic area served by the court's trial division has a chief trial judge who is also determined by seniority and, in addition to discharging his or her regular judicial duties, may exercise administrative authority locally as delegated by the appellate division, and is consulted on court administrative and governance issues directly affecting the trial division.

The court is empowered to use its appropriations to satisfy its administrative needs directly (i.e., through funding of its own employees, operations, and facilities), or to secure administrative support services on an agreed-upon, reimbursable basis from the Administrative Office of the U.S. Courts, another Article I court, or any executive agency.

The clerk of the court is appointed by the chief judge with the concurrence of a majority of the other appellate division judges, and the clerk appoints other (non-chambers) court staff with the approval of the chief judge and a majority of the other appellate division judges.

Each judge appoints chambers staff (secretaries and law clerks) to serve at his or her pleasure.

Judges

The appellate division consists of 18 "immigration appeals judges" with no more than 9 judges belonging to the same political party. These judges are appointed for 15-year terms that are staggered so that 6 judges come up for appointment every 5 years.

The number of "immigration trial judges" in the trial division is determined by the appellate division, subject to the availability of funding. The appellate division establishes for each geographic area served by the trial division a merit selection panel that is responsible for advertising vacant positions, reviewing applications, conducting interviews, and recommending applicants to the appellate division for appointment as immigration trial judges for 15-year terms.

Immigration appeals judges receive the same salary as a U.S. district judge, and immigration trial judges receive a salary equivalent to 92% of the district judge salary (i.e., the same salary paid to bankruptcy judges and full-time magistrate judges in the judicial branch).

All judges of the court may elect to participate in retirement and survivor benefits that are equivalent to those afforded judges of the U.S. Court of Appeals for Veterans Claims (another Article I court) and similar to those available to bankruptcy judges and magistrate judges in the judicial branch.

Retired judges may be recalled, as needed, to temporary service on the court, and non-retired judges in the trial division may be designated, as needed, to sit temporarily on the appellate division.

Court Authorities and Responsibilities

The court's rulemaking authority includes power to regulate its own bar and establish procedures for admission of non-governmental attorneys and others to practice before it.

The judges of the court may punish contempt of the court's authority by imposing civil money penalties (monetary fines) in accordance with rules prescribed by the appellate division.

The court may impose filing and similar fees that do not exceed in amount the analogous fees imposed in the district courts or by the Department of Homeland Security.

The records of the court are open to the public, but the court has authority to protect confidential information and is responsible for preserving confidentiality as otherwise required by law.

The court is generally required to publish its appellate decisions, but may make exceptions (e.g., for rulings without precedential value), and may authorize publication of trial decisions as appropriate. It must also submit annual statistical reports to the Senate and House Judiciary Committees.

The court has authority to hold periodic bench/bar conferences, similar to those authorized by other federal courts.

Technical, Conforming, and Transitional Provisions

Pre-existing references in the INA and Justice Department regulations to the BIA, immigration judges or administrative law judges, or to proceedings before such officials, are generally deemed to refer to the successor judges and/or proceedings in the new court.

The Attorney General's statutory authority to regulate EOIR adjudicators and proceedings is transferred to the new court's appellate division, and pre-existing Attorney General regulations that are consistent with the legislation remain in effect until modified or revoked by the appellate division.

The legislation takes effect on October 1 in the year immediately following the year in which it is enacted, or a year after enactment, whichever occurs later. At that time, EOIR is abolished and that office's personnel and assets (including funding) are transferred to the new court.

The permanent BIA members and the immigration judges and administrative law judges in office immediately before the effective date continue in office as immigration appeals judges and immigration trial judges, respectively, until successors are appointed under the legislation, and the immigration trial judges may continue for four years to ensure appropriate continuity and permit sufficient time for the appellate division to make new appointments systemwide. Immigration appeals judges must be nominated by the President within 90 days after the legislation takes effect, and the merit selection process for immigration trial judges must be established by the appellate division within 180 days after the effective date. The legislation includes a "sense of Congress" statement that all qualified former BIA members, immigration judges, and administrative law judges who carry over to the new court and wish to continue serving should be fully considered for appointment to the court for 15-year terms.

Study

Beyond establishing a new Article I court to perform the adjudicative functions heretofore performed by EOIR, the legislation requires the Justice Department, in consultation with the Departments of State, Labor, and Homeland Security, to study and, within two years, report to Congress on the potential for consolidating within the new court all adjudications of immigration-related matters currently performed by federal agencies other than EOIR.