GAO STUDY NEEDED

March 2014

Debate and discussions are raging nationwide about how to reform our immigration system. Yet without an effective and efficient immigration court system, any immigration reform will not fulfill its promise.

A diverse group of experts agree that an Article I Immigration Court should be established. The crucial next step is a thorough, independent study by the General Accounting Office to determine the costs of establishing an Article I Court.

The National Association of Immigration Judges (NAIJ) is the certified representative and recognized collective bargaining representative of the almost 250 Immigration Judges who preside over the nation's 58 trial-level Immigration Court tribunals. Our courts decide whether an individual is a citizen of the United States, whether or not that person is here in violation of our immigration laws, and if so, whether or not that immigrant qualifies for a status which would allow the person to remain here legally.

WHY A GAO STUDY IS NEEDED NOW

For years experts have been criticizing our nation's immigration removal system despite enormous expenditures devoted to it. Last year, it was reported that $18 billion was spent, more than the budgets of the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, and the Secret Service, combined.[1] The removal system is comprised of several Department of Homeland Security (DHS) components, such as Customs & Border Protection, Immigration and Customs Enforcement, and Citizenship & Immigration Services, as well as several components of the Department of Justice (DOJ), including Executive Office for Immigration Review (EOIR), which houses 58 trial-level Immigration Courts and the appellate-level Board of Immigration Appeals.[2] Even with this record spending, a critical component of the removal system has been chronically ignored and underfunded: the Immigration Courts. Our nation's Immigration Courts have been repeatedly described as overwhelmed, overburdened, and in crisis. Since the Courts are merely a small component within the DOJ, it is unclear at this time how much of the budgetary resources devoted to the immigration removal system are allocated to the Immigration Courts and how they are used there.

Whether detained or not, the individuals served by the Immigration Courts deserve timely decisions, as the old adage is irrefutable: justice delayed is justice denied. Delay generally hurts noncitizens, the government seeking to remove them, and the public. Without adequate resources and iron-clad independence, the Immigration Courts cannot function efficiently and fairly. When that condition becomes chronic and entrenched, as it is now, the effectiveness of the entire removal process is compromised. Without immediate and far-reaching reform, the courts are becoming overwhelmed to the point of complete dysfunction.

The Immigration Courts' caseload has spiraled out of control in recent years, dramatically outpacing the judicial resources available and making a complete implosion of the current system a disturbing and foreseeable probability. The morale of the immigration judge corps is falling, and a wave of retirements is looming on the horizon.

Immigration Judges struggle with an average caseload unmatched by any U.S. court system. Tasked with applying a body of law compared most often to tax law in its complexity, Immigration Judges carry an average docket of more than 1500 cases.[3] For perspective, the average caseload of a U.S. district court judge is 440.[4] Moreover, despite crushing dockets, Immigration Judges lack adequate staff support, conducting their proceedings without bailiffs or court reporters and being forced to share a judicial law clerk with three or more other judges.[5] Perhaps most challenging of all, 60% of respondents is unrepresented by counsel, a figure which rises to 85% when only detained respondents are counted.[6]

HISTORICAL LESSONS TO BE LEARNED

History shows a chronic lack of correlation between allocations for increased enforcement actions by the DHS and for removal adjudications by the Immigration Courts, despite the fact that DHS enforcement policies are the primary generator of the Immigration Courts' dockets. Long-term planning for Immigration Court growth has been either absent or ineffective. "If providing funds for the work of highly visible border patrols is somehow more politically attractive than funding the work of customs agents or immigration judges, U.S. marshals, or construction of new courtrooms, then temporary or chronic resource imbalances may arise in the system."[7]

Moreover, DOJ lacks transparency in disclosing the costs associated with employing and hiring Immigration Judges. After the 2009 Appropriations Act allocated an additional five million dollars to the DOJ for more Immigration Judges, only five judgeships were created. The cost of one million dollars per immigration judgeship appears excessive, because the cost of a federal district judgeship is reportedly about the same.

GAO's most recent study of the Immigration Courts was conducted in 2006, and focused only on the accuracy of performance measures used to assess the courts.[8] No reasoned metric has been employed to ascertain the appropriate amount of resources needed to enable the Immigration Courts to adjudicate the cases it receives in a timely manner consistent with due process. Nor has an effective method been devised to allow the Courts to rapidly adapt to surging case filings through, for example, weighted caseload measurements. With an 85% increase in cases experienced over the past five years, the importance of such measures cannot be overstated.

Judicial independence is essential to ensure that the Immigration Courts are funded adequately to accomplish their mission: to be an independent, fair and impartial judicial system. Instead, the EOIR has been subjected to department-wide budget initiatives by the DOJ, rather than tailored responses appropriate to its unique circumstances. Resources directed to the Immigration Courts should be better allocated, better managed and given a higher priority than they currently are under the DOJ. As with other federal courts, the core functions of the Immigration Courts are statutorily required. There are virtually no discretionary programs that can be eliminated or projects that can be postponed without reducing the quality of judicial services. A traditional Court structure can more readily address those needs and reduce inefficiency and dysfunctional operations as the courts would be insulated from the prosecution agendas.

MOST SALIENT EXAMPLES OF IMPAIRED FUNCTIONING

Surging case backlogs

As of December 2013, the Immigration Court backlog stood at 357,167, an 85% increase in the last five years.[9]

Lengthy delays

The average number of days a case was pending on an Immigration Court docket as of December 2013 was 570.[10]

Failure to meet predictable staffing needs in a timely fashion

Despite recognition in 2006 that 230 Immigration Judges was a woefully inadequate number,[11] and despite efforts by the DOJ to obtain resources for more judgeships, at the end of 2013, the number of sitting Immigration Judges is currently 233, with 15 additional judges serving either primarily or exclusively in supervisory or administrative capacities.[12] So while caseload has increased by 85%, the number of judges has remained stagnant.

Failure to provide sufficient training for existing staff

Despite being charged with applying a notoriously complex and rapidly changing body of law, training and educational opportunities for Immigration Judges have fallen to an all-time low, with in-person training conferences becoming non-existent.[13] Recently agency management decided to stop providing *Kurzban's Immigration Law Sourcebook*, a treatise many judges have found to be an indispensable resource that has always been provided in the past. This is an example of the short-sighted cost savings currently employed by the DOJ.

Failure to provide essential tools for adjudications

Despite express congressional authorization of contempt power for Immigration Judges in 1996, the DOJ still has not promulgated implementing regulations. Without authority to impose civil monetary sanctions for attorney misconduct, Immigration Judges lack an important tool in controlling the proceedings over which they preside.

Judges pushed to the brink

More than five years ago, Immigration Judges reported stress and burnout at higher levels than prison wardens or doctors at busy hospitals.[14] After continuing to struggle in an environment of decreased resources and skyrocketing caseloads for so long, morale is at an all-time low and stress at an all-time high. An unprecedented number of retirements is looming.[15]

RESOURCES ALONE ARE NOT THE ANSWER

While additional resources are clearly needed, it would be foolhardy indeed to direct money to a dysfunctional system without considering the clear need for reform. Since the 1981 Select Commission on Immigration, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced. In the intervening years, a strong consensus has formed supporting this structural change.[16] An Article I court is created by Congress pursuant to its authority under Article I of the Constitution, as opposed to

Article III courts, which are in the Judicial branch of our government Article I judges are not appointed to serve for life-time terms of office, and their decisions are subject to review by Article III judges. The focus of this paper is not to rehash the myriad arguments as to why this is the logical next step needed to reform the Immigration Courts, as NAIJ has extensive materials should one wish to delve deeper into those considerations.[17]

Prestigious legal organizations such as the American Bar Association, Federal Bar Association, and American Judicature Society wholeheartedly endorse this reform. An ABA report recommended an Article I court because "[t]he Article I model is likely to be viewed as more independent than an agency because it would be a wholly 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 arguably offers the best balance between independence and accountability to the political branches of the federal government."[18] While not as certain as to the exact form of change desired, reorganization has also been endorsed by the American Immigration Lawyers Association, and increased independence by the National Association of Women Judges.

In light of the expert consensus, the logical and necessary next step is an independent study of the start-up and long-term operation costs of an Article I Immigration Court system, and a comparison of these figures to current operations. This information is critical to a realistic assessment of how to move forward to meet this need. Additionally, such a study must consider improvements such as potential savings from reduced costs of detention when cases are more efficiently and quickly processed and the reduction in lawsuits against the court, as several expensive suits have been brought in the recent past regarding shackling of respondents, proceedings for mentally incompetent respondents, and vulnerable individuals such as unaccompanied minors. Moreover, while one cannot put a price tag on due process, the savings from reduced appeals to Article III courts can translate to economic terms and enhanced efficiency.

For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now "[m]ost immigration judges and attorneys agree the long term solution to the problem is to restructure the immigration court system..."[19] The time has come to take a concrete step toward resolving this persistent and obstinate crisis in our courts. Good government suggests exploring the costs and benefits of an alternative structural arrangement that many have endorsed. Simply put, we need the facts. A GAO study will provide important information necessary to end stalemate on this issue.

SUGGESTED QUESTIONS FOR GAO TO ADDRESS

1. What would be the start-up and transition-related costs of establishing an Article I Immigration Court system?

2. How would the on-going operational costs of an Article I Immigration Court compare to the on-going operational costs of the current structure (assuming sufficient resources are being provided to assure an effective court system under present cost figures)?
3. Can the present Immigration Court system with its current caseload to resource ratio meet its goal of being an effective court system? What metrics should be employed to measure that ratio? If resources are inadequate, how much more would it cost to operate under the current structure in order to achieve the effective and expeditious administration of justice?
4. How do Immigration Judge caseloads compare to those of other courts and administrative tribunals?
5. How do the staffing levels and resources of other courts and administrative tribunals compare to the Immigration Courts?
6. Does the current court structure unnecessarily duplicate other court administrative structures? For example, would the immigration courts be more efficiently and cost-effectively managed by their placement in another court system, such as the Administrative Office of the U.S. Courts?
7. From a budgetary perspective, what linkages have been developed between the DHS and DOJ to promote adequate funding for the current Immigration Court system? Do these linkages work?
8. Fees for appeal and motions have not been increased for over 20 years. How would funding to the Immigration Court System be improved if the fee structure were modernized?

For additional information and suggestions on actions to take to improve these important tribunals, please contact:

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ENDNOTES

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