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IMMIGRATION COURT NEEDS: **PRIORITY SHORT LIST OF THE NAIJ** **February 2013**

1. The Number 1 short-term problem is the urgent need for more judges.

Immediate hiring of more Immigration Judges is essential to alleviate the stress caused by overwork, which leads to many problems that undermine the optimal functioning of the Immigration Court system. Former Attorney General Gonzales acknowledged this problem in 2006 following a comprehensive review by the Department of Justice (“DOJ”) of the Immigration Courts, but nevertheless contributed to its perpetuation. Since the lack of judicial capacity was identified and despite a recommendation that 40 more judges be added to the existing corps, the Courts have not had meaningful additions to judge capacity. Figures show that there were 230 Immigration Judges in August of 2006, including several with full time administrative duties. It was not until April of 2009, when ten new Immigration Judges were brought on board, that the number of Judges finally exceeded that level. After reaching an all-time high of 272, the corps currently stands at approximately 252 Immigration Judges, including sixteen supervisory Immigration Judges who have dramatically reduced case loads or no docket at all. Moreover, the DOJ has repeatedly failed to keep pace with an annual 5% attrition rate for Immigration Judges.

Meanwhile, case receipts and case backlogs have grown exponentially. By January 2013, the number of cases pending before the Immigration Courts reached more than 323,000, a 23% increase since the end of September 2010. The average time a cases remain pending on the docket have now risen to 550 days. The docket strain on individual judges is overwhelming: in fiscal year 2010, it is estimated that about 230 Immigration Judges were responsible for completing over 350,000 matters during the fiscal year, which averages more than 1500 completions per judge per year. With increased retirements and few new hires to replace them, that number is not likely to decline.

The Fix:

- a. **Hire more Immigration Judges immediately** so that the corps of judges is increased to a number where a reasonable ratio of pending cases to Immigration Judges can be achieved.

- b. **Fill vacancies promptly**, preferably with candidates who possess strong immigration law or judicial backgrounds and who will be able to “come up to speed” quickly.
- c. **Promulgate regulations to implement the phased retirement provisions** of the Moving Ahead for Progress in the 21st Century Act signed into law by the President on July 6, 2012. This would allow retirement eligible Immigration Judges to work part time and collect a partial annuity. Phased retirement would provide an ideal mechanism to permit experienced Immigration Judges to complete a larger portion of their remaining docket prior to retirement, while at the same time allowing a smoother transition of their docket by providing training and mentoring to their successors.
- d. **Institute senior status** (through part-time reemployment or independent contract work) for retired Immigration Judges. In the National Defense Authorization Act for FY 2010, Public Law 111-84, Congress facilitated part-time reemployment of Federal employees retired under CSRS and FERS on a limited basis with receipt of both annuity and salary. Assuming the Act’s applicability to retired Immigration Judges, reemployment would provide an immediately available pool of highly trained and experienced judges who could promptly help address pressing caseload needs in a cost-efficient manner.

2. The Number 2 problem is the persistent lack of resources to help judges perform their jobs adequately in light of changing expectations by the federal courts and frequent changes in the law which have pushed the system to the breaking point. This problem can expeditiously be resolved.

Public confidence that the Immigration Courts are functioning properly and fulfilling their stated mission of dispensing high quality justice in conformity with the law can only be assured by giving judges the tools to do their jobs properly. Currently, complex and high stakes matters, such as asylum cases which can be tantamount to death penalty cases, are being adjudicated in a setting which most closely resembles traffic court. Providing increased resources to improve the quality of the performance of the Immigration Courts is the only realistic way to earn and retain public confidence in this system. It is also widely believed that it would have the enormous collateral benefit of reducing the number of immigration cases that are appealed to the federal circuit courts of appeals.

The Fix:

- a. **Provide the Courts with adequate support staff and tools:** that is, sufficient law clerks (at least a 1/2 ratio of law clerks to judges), bailiffs, interpreters, laptops, and off-site computer access. Recent budget cuts have resulted in restrictions so severe as to eliminate the purchase of such essential tools as the

nationally recognized guide to immigration law, *Kurzban's Immigration Law Sourcebook*. Every Immigration Judge and judicial law clerk should be provided a current version of this fundamental resource book.

- b. **Written decisions should become the norm**, not the exception, in a variety of matters, such as asylum cases, cases involving contested credibility determinations, and cases that raise complex or novel legal issues. The present system relies almost exclusively on oral decisions rendered immediately after the conclusion of proceedings while written decisions are the exception to this rule. These oral decisions are no longer adequate to address the concerns raised by Federal courts of appeals regarding the scope and depth of legal analysis. Immigration Judges should be provided the necessary resources, including judicial law clerks and sufficient time away from the bench, to issue written decisions where they deem it appropriate. Speech recognition software should be provided to all Immigration Judges to facilitate their ability to prepare and issue cogent written decisions.
- c. **Provide for meaningful, ongoing training** for judges, with time provided off the bench to assimilate the knowledge gained, to implement the lessons learned and to research and study legal issues.

3. The Number 3 problem is actually the most important, overarching, and durable priority for our nation's Immigration Courts: the need to provide an enduring institutional structure which will ensure judicial independence and guarantee transparency. Resolution of this problem will require more time to implement.

The current structure is fatally flawed and allows for continuing new threats to judicial independence, a condition exacerbated by current U.S. Department of Justice policies and practices. This problem manifests itself in several ways -- from unrealistic case completion goals to an unfair risk of arbitrary discipline for judges.

The Fix:

- a. **Remove the Executive Office for Immigration Review ("EOIR") from the U.S. Department of Justice** and the oversight of the Attorney General who has broad prosecutorial authority in the realm of terrorism, which is inappropriate, as terrorism issues are being increasingly raised in immigration court proceedings. The NAIJ firmly believes the time has come to establish an Article I Immigration Court.
- b. **Amend the definition of "immigration judge"** in the Immigration and Nationality Act ("INA"), §101(b)(4), to achieve the above and to guarantee decisional independence and insulation from retaliation or unfair sanctions for judicial decision-making.

The following statutory definition (or something close to it), in lieu of the extant definition, is recommended:

The term “immigration judge” means an attorney appointed under this Act or an incumbent serving upon the date of enactment as an administrative judge qualified to conduct specified classes of proceedings, including a hearing under section 240 [of the INA]. An immigration judge shall be subject to supervision of and shall perform such duties as prescribed by the Chief Immigration Judge provided that, in light of the adjudicative function of the position and the need to assure actual and perceived decisional independence, an immigration judge shall not be subject to performance evaluations. Immigration judges shall be held to the ethical standards established by the American Bar Association Model Code of Judicial Ethics. No immigration judge shall be removed or otherwise subject to disciplinary or adverse action for judicial exercise of independent judgment and discretion in adjudicating cases.

- c. **Provide a transparent complaint process** for parties and the public which does not supplant the legitimate appeals process, but rather addresses the rare instances of problems with intemperance or unethical behavior. The judicial discipline and disability mechanism enacted by Congress for the Federal judiciary could serve as a model. See 28 U.S.C. §§ 351-364. Judicial accountability, with transparent standards and consistent procedures, promotes judicial independence.
- d. **Eliminate the current system of “case completions goals” and “aged case” prioritization** because it is fundamentally flawed. There are so many priorities assigned that judges, who are those in the best position to manage their dockets effectively, have lost the ability to do so. The statute should be amended to eliminate the asylum clock (180-day requirement to adjudicate), as there is no evidence to show this system has reduced abuses or improved service to the public. Rather the asylum clock has been manipulated and distorted. Case completion goals have not been aspirational, as they were alleged to be when implemented, nor have they been tied to resource allocation, which is the only legitimate function they might serve. Instead, with every case a priority, the stress on judges has reached unbearable levels, contributing greatly to questionable conduct in court and arguably fostering ill-conceived decision making. Cases should be decided in accordance with due process principles. If case processing is taking too long, more judges should be hired.

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