The State of Our Courts: A View From The Inside

by the National Association of Immigration Judges

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Debate and discussion are increasing nationwide about the need for omnibus immigration reform. Yet, talk is largely silent about a critical component of the U.S. immigration system: the role and functioning of the Immigration Courts. Without an effective and efficient immigration court system, omnibus immigration reform will not fulfill its promise.

The National Association of Immigration Judges is the certified representative and recognized collective bargaining representative of the more than 250 Immigration Judges who preside over our 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.

FAR-REACHING REFORM IS NEEDED NOW

The Immigration Court system is an essential part of the immigration law enforcement process. Because of increased enforcement priorities over recent years, more and more individuals are detained and the quasi-criminal nature of immigration law has never been more apparent. Public outcry has focused on detention conditions and lengthy incarceration,[1] yet once again public policy discussions fail to focus on the crucial role performed by the Immigration Courts.

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. Without adequate resources and iron-clad independence, the Immigration Courts cease to function efficiently and fairly. When that condition becomes chronic and entrenched, as it is now, it is like a cancer threatening the health of the entire removal process. We fear that without immediate far-reaching reform, the courts will be overwhelmed to the point of collapse.

The problems plaguing the Immigration Court system have been documented for years.[2] ln 1983, the Executive Office for Immigration Review (EOIR) was created to provide independence and insulation for the immigration courts from the enforcement functions of the Immigration and Naturalization Service (INS).[3] During the comprehensive reform of immigration law in 2002, virtually all immigration functions were consolidated within the Department of Homeland Security (DHS); however, the EOIR remained at the Department of Justice (DOJ).[4] The issue of the proper placement and support for the Immigration Court system was raised at that time, and the National Association of Immigration Judges (NAIJ) argued then that it would be prudent to allow the EOIR to remain within the DOJ. The NAIJ hoped that this modest step towards additional independence would be sufficient to cure the ills which persisted while the EOIR was overshadowed by the INS's enforcement mission.

However experience has proven that this step was insufficient. The time has come to implement the far-reaching reform recommended by bipartisan commissions more than thirty years ago: an Article I Immigration Court is the answer.[5]

STRUCTURAL FLAWS IN THE CURRENT SYSTEM

The history of the Immigration Court system reflects a gradual shift towards a structure that has increasingly insulated the Court from encroachments on decisional independence and political manipulation. Over the past 60 years, the Immigration Courts have evolved from a system internal to, and at the mercy of, the prosecutors of the INS, to the status of an independent component of the enforcement agency (the DOJ) to a component of an Executive Branch agency whose primary mission is law

enforcement.[6] However, these gradual steps have proven inadequate to safeguard true independence and quality decision-making.

The Immigration Courts' caseload is spiraling out of control, dramatically outpacing the judicial resources available and making a complete gridlock of the current system a disturbing and foreseeable probability. The morale of the immigration judge corps is plummeting.

As a component of the DOJ, the Immigration Courts remain housed in an executive agency with a prosecutorial mission that is frequently at odds with the goal of impartial adjudication. A stark example of this incongruity is the fact that illegal, politicized hiring occurred subsequent to the last major step to reform the Immigration Courts in 2002.[7]

Moreover, independence is essential to ensure that the Immigration Courts are funded adequately to accomplish their mission. Instead, the EOIR has been subjected to the department- wide budget initiatives by the DOJ, rather than tailored responses appropriate to its unique circumstances. As with other federal courts, the core functions of the Immigration Court are statutorily required. There are virtually no discretionary programs which can be eliminated or projects that can be postponed without reducing the quality of judicial services.

Despite repeated calls for resources, the Immigration Courts have been operating for years in a resource starved environment.[8] History shows a chronic lack of correlation between allocations for increased enforcement actions by the DHS, despite the fact that they generate larger dockets for the Immigration Courts. Long-term planning for Immigration Court growth has been either absent or ineffective. In the April 2009 Omnibus Appropriations Act (Public Law No. 111-8), Congress recognized that there has been a lack of a consistent, principled methodology to address the needs of the Immigration Courts. Funds were allocated to the National Academy of Sciences (NAS) to develop a method to create defensible fiscal linkages between the DOJ and the DHS. Despite this provision, and a 2011 NAS Report – "Budgeting for Immigration Enforcement – A Path to Better Enforcement" – no discernible results have been forthcoming. Nonetheless, the NAS Report contains advice and invaluable insights for policy makers.

- "DOJ's budget history shows a striking capacity to adapt or 'make do' with the available resources. Making do, while admirable, can affect the system in perverse ways as noted throughout this report. Ad hoc adaptations in one arena may impinge elsewhere and generate inefficiencies." (page 119)

- "While initially this adaptive behavior is useful, there comes a time when the ripple effects cause additional dysfunction." (page 103)

- "[T]he flow of people to DOJ's portions of the immigration enforcement system is almost beyond the agency's control; in addition to strictly exogenous factors in the broader immigration system, it depends on policy choices and policy implementation by multiple actors in DHS." (pages 107-108)

- "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." (page 110)

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.[9] For perspective, the average caseload of a U.S. district court judge is 440.[10] Moreover, despite these crushing dockets, Immigration Judges lack staff support, conducting their proceedings with the assistance of only 1/4 a judicial law clerk's time, without bailiffs or court reporters.[11] Perhaps most challenging of all, 60% of respondents are unrepresented by counsel, a figure which rises to 85% when only detained respondents are counted.[12]

Despite the fact that the DOJ does not control the flow of people into the immigration court system, it has become a serious impediment to the effective functioning of the courts as the DOJ has repeatedly failed to advance their most essential need: independence. The DOJ has contributed to selling the Immigration Courts short rather than defending their independence or enhancing their stature. At every possible juncture, in rulemaking and policy announcements, the DOJ insists on reminding the public that Immigration Judges are merely attorneys employed by the Attorney General at will.[13] This has serious and insidious repercussions.

Despite legislation passed over 15 years ago, Immigration Judges have no contempt authority because the DOJ lacks the political will to overrule the DHS's objections.[14] Immigration Judges' subpoenas go unenforced because U.S. Attorneys will not pick sides between sibling agencies, essentially stacking the deck in favor of the DHS against private litigants. Issues of *ex parte* communications are hopelessly muddled, as both Immigration Judges and the DHS prosecutors who appear before them have the same client, the United States government, according to DOJ ethics opinions. [15]

Exacerbating the situation, Immigration Judges face personal discipline when making good faith legal decisions because the DOJ acts on "complaints" from disgruntled parties when the appropriate recourse would be an appeal.[16] The basis of most of the complaints against Immigration Judges is the Immigration Judge's decision or how it was arrived at, not allegations of conflict of interest, personal gain or criminal activity by the

judge. In addition, Immigration Judges are subject to non-transparent performance review and disciplinary processes as DOJ employees. They can be subjected to personal discipline for not meeting the administrative priorities of their supervisors and are frequently placed in the untenable position of having to choose between risking their livelihood and exercising their independent decision-making authority when deciding continuances.

MOST SALIENT EXAMPLES OF IMPAIRED FUNCTIONING

Surging case backlogs

At the end of March 2013, the Immigration Court backlog stood at 327,483,an all-time high.[17]

Lengthy delays

The average number of days a case was pending on the Immigration Court docket at the end of March 2013 was 555 days, up from 531 days at the end of Fiscal Year 2012.[18]

Failure to meet predictable staffing needs in a timely fashion

At the end of 2012, the number of sitting Immigration Judges slipped to 245, with 15 additional judges serving in either primarily or exclusively supervisory or administrative capacities.[19]

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.[20] Recently agency management decided to stop providing *Kurzban's Immigration Law Sourcebook*, an extremely useful quick-read treatise 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 Congressional authorization of contempt power for Immigration Judges in 1996, the DOJ still has not promulgated implementing regulations. Without the authority to impose civil monetary sanctions for attorney misconduct, Immigration Judges lack an important tool in controlling the proceedings over which they preside.

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

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ENDNOTES

1. *See, e.g.*, AM. CIVIL LIBERTIES UNION, PRISONERS OF PROFIT: IMMIGRATION DETENTION IN GEORGIA (May 2012); HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO YEAR REVIEW (2011); LUTHERAN IMMIGRATION & REFUGEE SERV., UNLOCKING LIBERTY: A WAY FORWARD FOR U.S. IMMIGRATION DETENTION POLICY (2011); IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, SPECIAL REPORT, LOCKED UP WITHOUT END: INDEFINITE DETENTION OF IMMIGRANTS WILL NOT MAKE AMERICA SAFER (2011); INTER-AM. COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS (2010); HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON (2009); AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA (2008) [hereinafter JAILED WITHOUT JUSTICE].

2. *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 14-16, 70-98 (2002) (statement and written submissions of Hon. Dana Marks Keener, President, National Association of Immigration Judges). Included in the NAIJ submission was a position paper entitled *An Independent Immigration Court: An Idea Whose Time Has Come*. *Id.* at 79-98 (written statement of Hon. Dana Marks Keener and Hon. Denise Noonan Slavin, Vice President, National Association of Immigration Judges). *See also* Hon. Dana Leigh Marks, *Still a Legal "Cinderella"? Why the Immigration Courts Remain an Ill Treated Stepchild Today*, FED. LAW., Mar. 2012, at 27 [hereinafter *Still a Legal "Cinderella"?*]; Hon. Denise Noonan Slavin & Hon. Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785, 1787-88 (2011) [hereinafter *Conflicting Roles of Immigration Judges*]; *Executive Office for Immigration Review: Oversight Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 111th Cong. 26-39, 53-61 (2010) (testimony and written statement of Hon.

Dana Leigh Marks, President of National Association of Immigration Judges), *available at* http://judiciary.house.gov/hearings/printers/111th/111-111_56955.PDF; Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 9 & n.39 (2008) [hereinafter *An Urgent Priority*], *available at* http://law.psu.edu/_file/Urgent%20Priority.pdf.

3. Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,056 (Feb. 25, 1983) (codified at 8 C.F.R. § 1003.0); *see also* COMM'N ON IMMIGRATION, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 2-6 (2010) [hereinafter REFORMING THE IMMIGRATION SYSTEM]; Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 458-59 (1988).

4. Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, § 1101(a), 116 Stat. 2135, 2273 (2002).

5. 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).

6. The DOJ mission statement is as follows: "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 controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans." U.S. Dep't of Justice, http://www.justice.gov/about/about.html (last visited Mar. 3, 2013). *See also*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 3, at 2-6 to 2-7; Rawitz, *supra* note 3, at 453-59;

7. REFORMING THE IMMIGRATION SYSTEM, *supra* note 3, at 2-10, 2-16; APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 7 (2009) [hereinafter ASSEMBLY LINE INJUSTICE]; *An Urgent Priority*, *supra* note 2, at 9; OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 69-124 (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf.

8. *Still a Legal "Cinderella"?*, *supra* note 2, at 27-28; REFORMING THE IMMIGRATION SYSTEM, *supra* note 3, at 2-16 to 2-18; ASSEMBLY LINE INJUSTICE, *supra* note 7, at 10-11; *An Urgent Priority*, *supra* note 2 at 14.

9. *Still a Legal "Cinderella"?*, *supra* note 2, at 27; Editorial, *Immigration Court Overload*, L.A. TIMES, Nov. 14, 2012, *available at* http://www.latimes.com/news/opinion/editorials/la-ed-immigration-courts-20121114,0,7571214.story?fb_action_ids=3894238839936&fb_action_types=og.recommends&fb_source=aggregation&fb_aggregation_id=246965925417366.

10. *Immigration Court Overload*, *supra* note 9.

11. *See, e.g.*, Transactional Records Access Clearing House (TRAC), Syracuse University, Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow (June 2009), http://trac.syr.edu/immigration/reports/208/.

12. JAILED WITHOUT JUSTICE, *supra* note 1.. According to the EOIR, between October 1, 2006, and September 20, 2007, approximately 84% of completed detained immigration court proceedings involved unrepresented individuals. NINA SIULC, ZHIFEN CHENG, ARNOLD SON, & OLGA BYRNE, VERA INST. OF JUSTICE, REPORT SUMMARY, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM(May 2008). *See also* NEW YORK IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS (2011).

13. INA § 101(b)(4), 8 U.S.C. § 1101(b)(4); 8 C.F.R. § 1003.1(a)(1); EXEC. OFFICE FOR IMMIGRATION REVIEW, ETHICS AND PROFESSIONALISM GUIDE FOR IJS (2011), *available at* http://www.justice.gov/eoir/sibpages/IJConduct/EthicsandProfessionalismGuideforIJs.pdf (explicitly instructing Immigration Judges to comply with the standards of conduct applicable to all attorneys in the Department of Justice); *see also* OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 70 (2008), *available at* http://www.justice.gov/oig/special/s0807/final.pdf ("An immigration judge is an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review . . . . All IJs are career Schedule A appointees. Consequently, the civil service laws set forth at 5 U.S.C. §§ 2301 and 2302 apply to the appointment of IJs." (internal citations and quotation marks omitted)).

14. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009-589 (codified as amended at INA § 240(b)(1) (2007), 8 U.S.C. § 1229a(b)(1)); *Still a Legal "Cinderella"?*, *supra* note 2, at 30; *Conflicting Roles of Immigration Judges*, *supra* note 2, at 1791; CHIEF IMMIGRATION JUDGE MICHAEL CREPPY ET AL., COURT EXEC. DEV. PROGRAM, INST. FOR COURT MGMT., THE UNITED STATES IMMIGRATION COURT IN THE 21ST CENTURY 109 n.314 (1999).

15. REFORMING THE IMMIGRATION SYSTEM, *supra* note 3, at 6-5; *Still a Legal "Cinderella"?*, *supra* note 2, at 29; *see also* Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510, 35,511 (June 28, 2007) ("An immigration judge's

communications with other employees of the Department of Justice shall not be considered ex parte communications unless those employees are witnesses in a pending or impending proceeding before the immigration judge and the communication involves that proceeding.").

16. OFFICE OF PROF'L RESPONSIBILITY, A GUIDE FOR IMMIGRATION JUDGES ON INVESTIGATIONS BY THE OFFICE OF PROFESSIONAL RESPONSIBILITY (2006); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 27-28 (2006), *available at* http://www.gao.gov/new.items/d06771.pdf; *see also* REFORMING THE IMMIGRATION SYSTEM, *supra* note 3, at 2-14 to 2-15.

17. TRAC, Latest Immigration Court Numbers, as of March, 2013, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php

18. TRAC, Latest Immigration Court Numbers, as of March, 2013, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php

19. Exec. Office for Immigration Review, Dep't of Justice, http://www.justice.gov/eoir/sibpages/ICadr.htm (last visited Jan. 14, 2013).

20. *Still a Legal "Cinderella"?*, *supra* note 2, at 27 ("The Immigration Judge Training Conferences have been cancelled in 2008, 2011, and 2012 and have been once again substituted by a far inferior alternative: CD audio lectures."); TRAC, Bush Administration Plan to Improve Immigration Courts Lags (Sept. 8, 2008), trac.syr.edu/immigration/reports/194; REFORMING THE IMMIGRATION SYSTEM, *supra* note 3, at 2-20 ("[T]he annual national conference of immigration judges has been cancelled due to lack of funding several times in the past decade, including 2003, 2004, 2005, and 2008.").