Written Statement of

Hon. Dana Leigh Marks

President

National Association of Immigration Judges

Before the

Subcommittee on Immigration, Citizenship,

Refugees, Border Security, and International Law

of the

House Committee on the Judiciary

on

Oversight Hearing on the Executive Office

For Immigration Review

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Madame Chairwoman, Mr. Ranking Member, and distinguished members of the Subcommittee, thank you for the opportunity to testify before you on the occasion of Congressional oversight of efforts by the Executive Office for Immigration Review ("EOIR") to improve the Immigration Courts.

My name is Dana Leigh Marks. I am appearing today on behalf of the National Association of Immigration Judges ("NAIJ") to provide our perspective on current challenges facing the Immigration Courts. While we have long been on record explaining why far-reaching structural reform and reorganization of the court system is needed,[1] in light of the focus of the current hearing, I will limit my comments to actions that can be taken immediately which would greatly improve the efficiency of the Courts while in their current structure.

I am the elected President of NAIJ, which is the certified representative and recognized collective bargaining unit representing the approximately 237 Immigration Judges presiding in the 50 states and U.S. territories. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of the AFL-CIO. In my capacity as President, the opinions offered represent the consensus of our members. The views expressed herein are not those of EOIR or the Department of Justice ("DOJ").

Who We Are

Immigration Judges are a diverse corps of highly skilled attorneys whose backgrounds include representation in administrative and federal courts and even successful arguments at the United States Supreme Court. Some of us are former INS prosecutors, others former private practitioners. Our ranks include former state court judges, former U.S. Attorneys, and the former national president of the American Immigration Lawyers Association ("AILA"), the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct professors at well-respected law schools throughout the United States. Many former Immigration Judges have been selected to serve as Administrative Law Judges ("ALJs"), whose qualifications have been compared with Federal district judges.[2]

What We Do

The proceedings over which we preside rival the complexity of tax law proceedings, with consequences which can implicate all that makes life worth living, or even threaten life itself.[3]

At first blush, any observer can appreciate the high stakes of an asylum case. But immigration court determinations are far more intricate than most people, even lawyers, imagine. Those appearing before our court also include lawful permanent residents who have lived virtually their entire lives in the United States, vulnerable unaccompanied minors, and sometimes even individuals who are actually United States citizens although they might not realize that they derived such status through operation or law or may have difficulty mustering the necessary evidence to prove the factual basis of a claim. Credibility determinations are frequently based on the testimony of only one witness, the applicant. The immigration judge must evaluate that testimony through the proper lens selected from a myriad of diverse political, cultural, and linguistic contexts. Federal circuit courts of appeals are asking for an increasingly intricate credibility analysis: mandating that an applicant be provided an opportunity to explain each and every inconsistency that is noted, often a painstaking and confusing process. Political scientists, academic scholars, and psychologists are being presented as expert witnesses in increasing numbers in these proceedings, and their complicated testimonies must be synthesized, analyzed and appropriately weighed by an immigration judge.

Most legal observers are stunned to see the Spartan conditions under which immigration judges hold hearings. We have no court reporters, no bailiffs in non-detained settings and, in addition to our judicial duties, we are responsible for operating the recording equipment which creates the official administrative record of the proceedings. While digital audio recording has finally been implemented nationwide, it is no panacea for many of the shortcomings that have long plagued our transcripts.

At the conclusion of hours of painstaking direct- and cross-examination, immigration judges render an extemporaneous oral decision, often lasting 45 minutes or more. These decisions are generally rendered without the benefit of a judicial law clerk's research or drafting assistance because the ratio of judges to law clerks remains inadequate for the task. Immigration judges cannot refer to a transcript when rendering their decisions, as written transcripts of the proceedings are only created after their decision is appealed.

The system is struggling to accommodate the evolving demands and criteria set forth in circuit court holdings, which require more in-depth rationales, at a time when immigration judges are facing increased pressures to complete more cases at a faster pace without sufficient law clerks or the necessary time off the bench to research and draft decisions. Moreover, it is not just the number of cases in the system as a whole that cause this adjudicative crisis but also the pressures to continue to adjudicate historically high numbers of complex cases on a daily basis so as to forestall and reduce backlogs.[4] To put this in context, while the average Federal district court judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year ("FY") 2009 immigration judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges. Under these circumstances, it is not surprising that a recent study found immigration judges suffered greater stress and burnout than prison wardens or doctors in busy hospitals.[5]

Despite the complexity of the task for immigration judges, resources for the Immigration Courts have not kept pace with the meteoric rise in allocations for the Border Patrol and Immigration and Customs Enforcement ("ICE") or the increased DOJ focus on enforcement of

criminal laws relating to immigration violations. As ICE's budget rises and provides better-prepared prosecutions in immigration court, the private bar and applicants respond as well with more voluminous and better-prepared cases. The increasing formality of the evidence being proffered presents a huge challenge for the 85% of respondents who are unrepresented and require a significant amount of additional judicial time to conduct hearings and evaluate such cases. Simply put, immigration judges have found themselves behind the curve due to struggles with chronically inadequate resources.

Four Steps to Take Now to Improve the Immigration Courts

1. Senior Status Judges

The immediate hiring of more Immigration Judges is essential to address backlogs and to alleviate the stress caused by overwork, which leads to many problems that undermine the optimal functioning of the immigration courts system. Former Attorney General Alberto Gonzales acknowledged this problem in 2006 following a comprehensive review by the DOJ of the Immigration Courts, but nevertheless contributed to its perpetuation. Since the lack of judicial staffing was identified and despite a recommendation that 40 more judges be added to the existing corps, the Courts have not had meaningful additions to the immigration judge corps. 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, reaching the present total of 237, hardly a significant increase and not close to the 40 additional judge positions suggested by Attorney General Gonzales. Moreover, the DOJ has repeatedly failed to keep pace with an annual 5% attrition rate for immigration judges. Meanwhile, case backlogs have grown by 23% in the last eighteen months, and a staggering 82% over the last ten years.[6] The docket strain on judges is overwhelming: in FY 2009, it is estimated that about 229 Immigration Judges were responsible for completing over 350,000 matters during the fiscal year, which, as stated above, averages more than 1500 completions per judge per year.[7]

There are several ways that this problem can be addressed. The first is obvious: 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. We commend EOIR for its rededication to this task and the promising effort it is currently making in this regard. We are also grateful to Congress for increased fiscal resources and to this Subcommittee for its support in this regard.

We strongly advocate an additional approach to address this long standing problem: 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 the Civil Service Retirement System and the Federal Employees Retirement System on a limited basis with receipt of both annuity and salary. Assuming the Act's applicability to retired immigration judges, reemployment under those provisions 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. The benefits of such an approach are numerous and would be

enormous. The immigration judge corps would not lose the expertise and talent of retired judges. The institutional memory, depth of knowledge of immigration law and procedure and hands-on judicial experience would be particularly valuable during this period of rapid expansion and assimilation of new judges. Creating senior status for retired immigration judges would provide the Immigration Courts with access to trained judges who could comprise a flexible, rapid-response team, available to address unexpected caseload fluctuations, or to assist in training or mentoring new immigration judges. We firmly believe it would be a highly effective way to keep the immigration judge workforce nimble and responsive to the DOJ's changing needs. It would also borrow from a time-tested and successful system utilized in the Federal courts.

2. Development of a Principled Methodology for Budget Requests and Resource Allocations

Unfortunately, operating in a resource starved environment is nothing new for the Immigration Courts. For years, there has been a persistent lack of correlation between allocations for increased enforcement actions which generate larger dockets and funding for the Immigration Courts. Long-term planning for the growth of Immigration Courts has either been absent or ineffective. In the April 2009 Omnibus Appropriations Act (Public Law 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 to develop a method to create defensible fiscal linkages between the DOJ and Department of Homeland Security ("DHS"). This is a crucial project which must be pursued.

NAIJ also strongly endorses implementation of a closely related tool: a case weighting system, modeled after the one employed by the Federal district courts. Such an approach would provide insight into how to maximize the resources that are allocated to EOIR. It is well recognized that different case types present different levels of burden on the adjudicating courts, so that the mix of cases filed in a court is an important factor in determining the amount of work required to process the court's caseload. For more than thirty years, Federal district courts have utilized case weights derived from detailed studies of the different events that a judge must complete to decide a case (*e.g.*, hold hearings, read briefs, decide motions, and conduct trials) and the amount of time required to accomplish those events. The tasks performed by immigration judges are virtually identical to those of other trial level judges and justify the application of this approach in our administrative structure. We believe that this type of analytical approach would prove to be an invaluable tool in identifying the level of resources needed by individual Immigration Courts to meet their caseload burdens as well as clarifying the needs of our court system as a whole. We also advocate study of other factors which have been found by the Federal judiciary to influence their workload in addition to mere caseload measures, such as the economies that can be achieved through automation, technology, education, and program improvements.

3. Increased Resources

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 have pushed the

system to the breaking point. This problem can be dramatically improved within the present organizational structure through consistent, adequate funding.

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. Additional resources would contribute greatly towards reducing the costs of detention of respondents in proceedings, and it is 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.

There are six principal areas where resources need to be augmented. First, NAIJ believes that the prevailing norm regarding support staff and tools is inadequate. There should be a ratio of no less than one judicial law clerk for every two Immigration Judges. Additional resources also need to be devoted to increasing the number of bailiffs, interpreters, and clerical support staff. State of the art equipment such as laptops, printers, and off-site computer access are still not provided routinely to immigration judges and should be mandated.

Second, the problem with inadequate hearing transcripts is so pervasive that court reporters should be used instead of recorders. The long-awaited digital recording equipment has serious technical reliability and computer interface issues which persist and has not been shown to have produced the high-quality transcripts needed. Although digital audio recording is superior to tape recordings, voice recognition software is unsuitable for use with diverse speakers, particularly those with accents, and the varied foreign language terms that are frequently encountered in the Immigration Court setting continue to militate strongly in favor of the use of court reporters.

Third, 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. 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 off the bench, to issue written decisions in any case where they deem it appropriate. This would likely yield the collateral benefit of reducing the number of appeals and remands, as the quality of decisions is virtually certain to rise with the additional time for considered deliberation.

Fourth, immigration judge schedules need to be modified to provide adequate time off the bench for meaningful, ongoing training for judges, with sufficient follow up time to assimilate the knowledge gained, to implement the lessons learned, and to research and study legal issues.

Fifth, the current system of “case completions goals” and “aged case” prioritization should be eliminated 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. 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. Cases should be decided in accordance with due process principles. If case processing is taking too long, then more judges should be hired. 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. It is clear that the toll such stress is taking on immigration judges is a large contributing factor to retirement at the earliest possible opportunity, which then exacerbates the pressing need to hire new judges and undermines judicial corps stability.

Finally, a transparent complaint process for parties and the public which does not cut off or supplant the legitimate appeals process needs to be developed. While it is undisputed that the rare instances of problems with intemperance or unethical behavior must be addressed, the proper mechanism to do so should be modeled after proven judicial solutions. NAIJ believes that immigration judges should be held to the high standards set forth by the Model Code of Judicial Conduct of the American Bar Association (“ABA”). Performance reviews for Immigration Judges should be based on the ABA and Institute for the Advancement of the American Legal System guidelines. The judicial discipline and disability mechanism enacted by Congress -- under the leadership of the House and Senate Judiciary Committees -- for the Federal judiciary could also serve as a model. *See* 28 U.S.C. §§ 351-364. Judicial accountability, with transparent standards and consistent procedures, promotes judicial independence and is the only true solution to restoring public confidence in the system.

4. Legislative Action Needed

Although beyond the scope of today’s hearing, NAIJ would be remiss if we failed to briefly mention the most important, overarching, and durable priority for our nation’s Immigration Courts: the need to provide an institutional structure which will ensure judicial independence and guarantee transparency. The current structure is fatally flawed and allows for continuing new threats to judicial independence, a condition exacerbated by current DOJ 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 solution we propose, which is also advocated by the American Bar Association and AILA, is to remove the EOIR from the DOJ and the oversight of the Attorney General. The current court structure is marked by the absence of traditional checks and balances, a concept fundamental to the separation of powers doctrine. Because terrorism issues are being increasingly raised in immigration court proceedings and the Attorney General has broad prosecutorial authority in that realm, the situation creates an inescapable structural conflict which calls into question the wisdom of leaving the Immigration Courts within the DOJ. NAIJ firmly believes the time has come to establish an Article I Immigration Court.

Regardless of where the Immigration Court is ultimately located, the definition of "immigration judge" in the Immigration and Nationality Act ("INA"), §101(b)(4), should be amended 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.

Conclusion

Madame Chairwoman, thank you for the opportunity to convey NAIJ's views. We deeply appreciate the work of the subcommittee and stand ready to assist in any way we can to improve the Immigration Courts.

NAIJ, as a collective bargaining unit, represents all the immigration judges. We are all public servants with an important mission -- to apply the statutory provisions of INA in an expeditious, consistent, and cost-effective manner. Our mission is rendered more difficult, as is that of the DOJ and DHS, because we operate in an environment where the globe appears to be shrinking and border security is more difficult. We feel that we are an important part of the U.S. judicial system, and, in that context, we depend on Congress to give the Immigration Courts the necessary resources to achieve our statutory mission. Thank you for your leadership on those issues which affect not only our professional livelihoods but the nation as well.

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[1] *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 Bender's Immigration Bulletin 3 (2008), *An Independent Immigration Court: An Idea Whose Time Has Come*, Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary, 107th Cong., 2nd Sess. 15 (2002).

[2] "The caliber of administrative law judges … is certainly as high as those of federal district judges…" Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings

on S.1275 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

[3] *Ng Fung Ho v. Whlte* 259 U.S. 276, 284 (1922). These cases have also been analogized to criminal trials, because fundamental human rights are so inextricably tied to these enforcement-type proceedings. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government,* 44 Admin. L. Rev. 261, 276 (1992).

[4] To understand better the personal toll these working conditions have wrought on immigration judges, *see Burnout and Stress Among United States Immigration Judges*, 13 Bender's Immigration Bulletin 22 (2008); *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Georgetown Immigration Law Journal 57 (Fall 2008 CQ ed.) <https://articleworks.cadmus.com/geolaw/zs900109.html>.

[5] *Id.*

[6] Transactional Records Access Clearinghouse, *Criminal Immigration Prosecutions are Down but Trends Differ by Offense* (3-17-10) <http://trac.syr.edu/immigration/reports/227/>.

[7] Transactional Records Access Clearinghouse, *Backlog in Immigration Cases Continues to Climb* (3-12-10) <http://trac.syr.edu/immigration/reports/225/>.

[8] *See Executive Office for Immigration Review, U.S. Department of Justice, FY 2009 Statistical Year Book,* at B2 fig.1, B3, tbl.1 (2009), available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.