TESTIMONY OF DANA MARKS KEENER
President, National Association of Immigration Judges
Before the Senate Judiciary Committee
Subcommittee on Immigration
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Mr. Chairman, Members of the Subcommittee, I thank you for providing me this opportunity to testify before you regarding the Immigration Court.

I am appearing on behalf of the National Association of Immigration Judges (NAIJ) to provide you with our perspective on where the Immigration Courts should be located in the midst of the debate regarding the proper components to be included in a new Homeland Security Department and in light of the on-going efforts to reorganize the Immigration and Naturalization Service. I am the elected President of NAIJ, which is the certified representative and recognized collective bargaining unit representing the approximately 228 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 AFL-CIO. In my capacity as President, the opinions offered represent the consensus of our members, and may or may not coincide with any official position taken by the DOJ.

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, the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States. Many former Immigration Judges have been selected to serve as ALJs, whose qualifications have been compared with federal district judges.[1]

As you may be aware, in January of this year, the NAIJ published a position

[1] "The calibre 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).

paper advocating increased independence for the Immigration Courts. We are submitting that paper as part of today's written testimony for your full consideration. Today I would like to review the major premise of that paper and bring our views into a more current time frame in view of efforts to reorganize the INS and create a new Homeland Security Department.

When our position paper was drafted, we suggested the model recommended by the U.S. Commission on Immigration Reform ("the Commission"), as an exhaustively studied, thoroughly researched, bi-partisan proposal which was the culmination of years of research involving all parties and players in this complex area. In its final report in 1997, the Commission proposed that the functions of EOIR should be located in an independent executive branch agency.[2]

We do not believe it is the role of NAIJ to advise beyond the area of our direct experience, thus we do not address broader reform encompassing the Immigration and Naturalization Service or components of EOIR other than the Immigration Courts, although it would seem logical to keep EOIR's structure intact.

The Need for Independence for Immigration Courts

Our paramount concern is safeguarding the independence of the Immigration Court system so as to protect America's core, legal values. Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive one of that which makes life worth living.[3] When dealing with asylum issues, they can be death penalty cases, since an erroneous denial of a claim can result in the applicant's death.[4]

It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront the adverse evidence in an impartial forum. At present, there is at least the perception that this is not always provided. Increased public confidence and de facto independence of the decision-makers from the prosecuting authorities in the immigration enforcement arena is what we believe to be optimal. Not only would creating an independent agency or keeping EOIR at DOJ provide such a solution, but it would also serve to demonstrate an appropriate balance of powers in this

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[2] United States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 174 (September 1997)]

[3] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)

[4] These cases have also been analogized to criminal trials, because fundamental human rights are so involved in these enforcement type proceedings. See, John H. Frye lll, "Survey of Non-ALJ Hearing Programs in the Federal Government," 44 Admin. L.Rev. 261, 276 (1992).]

extremely sensitive context. In addition, we believe this move could also provide much needed oversight on various immigration related functions and become a vehicle for increasing efficiency.

Immigration Courts are the trial-level tribunals that determine if an individual ("respondent") is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under the Immigration and Nationality Act of 1952, as amended (INA).[5] The INS has virtually unfettered prosecutorial discretion to lodge charges with the Immigration Court, which sets the removal process in motion. The INS is represented in Immigration Court proceedings by an INS trial attorney (usually an Assistant District Counsel). Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. For a respondent in such proceedings, eligibility for relief from deportation or removal (through attaining a status such as lawful permanent residence through a relative's petition or asylum, for example) generally involves two aspects: a statutory eligibility component and a discretionary component. Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the INS, while others are discovered illegally in the U.S. (for example, after being witnessed crossing the border without inspection or after the commission of a crime while serving a criminal sentence in a State prison). Thus, Immigration Judges make many determinations regarding eligibility for relief as initial applications, others upon de novo review of an INS denial of an application, and still others upon review of whether an INS decision below was based on sufficient evidence.[6]

To understand our current posture within the Department of Justice and the reasons for our proposal, a bit of context and history is needed. In an effort to ameliorate concerns regarding a perceived lack of independence, several steps have been taken over the years to protect fundamental fairness. In 1956, Immigration Judges (then called Special Inquiry Officers or SIOs) were removed from the supervision of the INS District Directors and the position of Chief SIO was created.[7] In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom.[8] In 1983, the Attorney General formally separated the Immigration Court and the Board of Immigration Appeals

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[5] For a concise but comprehensive explanation of immigration court proceedings, see Kurzban's Immigration Sourcebook: A Comprehensive Outline and Reference Tool, 7th Ed. 2000, by Ira J. Kurzban.

[6] Once in removal proceedings, many respondents are eligible for release on bond. The INS sets the initial amount of bond and generally an Immigration Judge may redetermine if custody is mandatory or desirable and the proper amount of any bond.

[7] From Wong Yang Sung to Black Robes, Sidney B. Rawitz, Vol. 65 Interpreter Releases No. 17 (May 2, 1988) at 458.

[8] 8 C.F.R. 1.1(1) (1973), Rawitz at 48.

from the INS, creating the EOIR, the agency within the Department of Justice which houses these functions to this day.[9]

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today, and now militate toward retaining EOIR at DOJ if all components of the INS are moved to the newly created Homeland Security Department. Just short months ago, the United States Supreme Court reminded us that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."[10] Yet the need to safeguard due process has long been seen as at odds with the demands for productivity in this high volume realm. The Immigration Courts handle more than 260,000 matters annually.[11] It is undisputed that administrative efficiency is a practical necessity in this area. With this enormous caseload, the need for public confidence in the integrity and impartiality of the system is all the more pronounced. Without it, unnecessary appeals and last-ditch, legal maneuvering flourish.

Unfortunately, there have been many instances where public cynicism was justified. Prior to 1983, Immigration Judges were dependent on INS District Directors, the direct line boss of the prosecutors who appeared before them daily, to provide their hearing facilities, office space, supplies and clerical staff. More recent examples of equally disturbing encroachments on judicial independence regrettably occur and these were detailed in our previous position paper.

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[9] See, e.g. Rawitz at 458-459; Education and Training Service, Major Issues in Immigration Law, A Report to the Federal Judicial Center, 1987, David A. Martin; The United States Immigration Court in the 21st Century, Institute for Court Management, court Executive Development Program, Phase III Project, May 9, 19999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens.

[10] Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001)

[11] See, "In the Spotlight: the Hon. Michael J. Creppy, Chief Immigration Judge of the United States" in Lateral Attorney Recruitment, Office of Attorney Recruitment and Management, U.S. Department of Justice.

Perhaps the most blatant example of this susceptibility to improper interference relates to the failure to implement the Congressional enactment of contempt authority for Immigration Judges. In 1996, contempt authority for Immigration Judges was mandated by Congress.[12] However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested the lengthy delay in implementation, it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges.[13] Because of this impasse, NAIJ has suggests that legislation be passed mandating prompt implementation of such contempt authority. See Appendix A.

Indeed, promulgation of contempt authority could provide the Immigration Court with an important tool to enforce INS compliance with its orders and to assure that terrorists in Immigration Court proceedings comply with orders closing those proceedings for national security reasons. The Attorney General has issued new regulations for protective orders in national security cases, but the sanctions for violation of those orders are ineffective where they are needed most. The prompt issuance of regulatory authority for contempt power could resolve this problem. At present, the sanction of mandatory denial of any discretionary relief when a protective order is violated is a toothless sanction in those cases where it matters most. Some of these cases will involve aliens engaged in terrorist activities. In a case where an alien has been involved in such activities, he or she will not be eligible for any discretionary relief as a matter of law.[14] The threat of denial of discretionary relief to a terrorist is meaningless; he is not statutorily eligible for such relief in any event. The irony is that the only people that will be deterred by this sanction is those for whom discretionary relief is available, and in those cases it would be unlikely that the Government would have much of an interest in enforcing a protective order. Unless and until the Department of Justice promulgates regulatory authority for the contempt power given to the Immigration Court by Congress, there is no real sanction for a terrorist who flaunts a protective order of the Immigration Court.

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[12] See §240(b)(1) of the INA, as amended by §304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA).

[13] "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than [six] years since the enactment of IIRIRA, the Executive Office for Immigration Review (EOIR) and the INS have failed to resolve this issue. Consequently, the Attorney General has not published regulations implementing contempt authority for Immigration Judges," despite the Congressional mandate. The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens, at page 109, n.313.

[14] About the only form of relief available to an alien engaged in terrorism is deferral of removal under the Convention Against Torture, which is not discretionary.

Both due process and administrative efficiency will be fostered by a structure where the Immigration Courts continue to be a neutral arbiter. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of our larger and more powerful sibling, the INS. The Immigration Courts would continue to impartially scrutinize the allegations made by the INS, endorsing those determinations which are correct, and providing vindication to those who are accused without sufficient objective proof, without the need to apologize to the public for the close alignment with the INS. The separation of the Immigration Court from the agency which houses INS will also aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the INS mandate is being carried out in a fair, impartial and efficient manner.[15] In addition, such a structure will provide a needed safeguard against possible prosecutorial excesses.

When reduced to its simplest form, any structure, be it DOJ or Homeland Security, in which the same person supervises both the prosecutor and the judge in "court" proceedings is suspect. One does not need legal training to find this a disturbing concept, which creates, at the very minimum, the appearance of partiality. Thus, it is not surprising that the public perceives this system as "rigged."[16] NAIJ has also provided proposed language to clarify the independent nature of Immigration Judge decisions.[17]

An Independent Immigration Court Can be a Catalyst for INS Productivity

Keeping EOIR outside of the Homeland Security Department can provide much needed oversight on various immigration related functions and become a vehicle for increasing efficiency. On January 11, 2001, EOIR's Executive Director established case completion goals for the Immigration Courts and Board of Immigration Review. These goals set target times for the adjudication of various types of cases. When case completion goals were discussed recently at our annual immigration judges conference, there were several specific examples of recurrent situations where the INS is an impediment, rather than a facilitator, to timely case completions. For example, inordinate delays in INS processing of visa petitions, INS forensic evaluation of documents (some of

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[15] United States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 179 (September 1997).

[16] The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens at 100 - 105 (finding that 68% of those who were surveyed thought the Immigration Courts were part of the INS, while nearly 1/4 (22%) indicated that the close personal relationships between employees of the INS and the Immigration Courts were a factor in their conclusion that the Immigration Courts were not separate from the INS).

[17] In Appendix B to this testimony, NAIJ has provided a proposed amendment, consisting of merely two sentences, which if added to the current statutory language at INA section 101(b)(4), which would provide unequivocal statutory authority for the decisional independence of Immigration Judges in individual matters pending before them.

which may go to the identity of a respondent), INS investigations, and INS follow up after the FBI has determined that a respondent's prints show a criminal history are routine causes for INS requested delays of proceedings, sometimes for well over one year. It is not uncommon for the INS to take one year or longer to determine if a respondent has a bona fide marriage to a U.S. citizen, and thus is eligible to apply for lawful permanent resident status. Indeed, the Judges often feel that the current system is set up to let the immigration court act as a tickler system for INS case processing, as opposed to setting up its own internal system with oversight to check on these matters.

One obvious way to deal with these problems would be to require the INS to meet timely pre-trial deadlines to resolve these issues, or notify the court and parties of delays, so that matters move expeditiously before the court without wasting valuable docket time. However, the lack of any contempt powers hinders this approach.

Frankly, neither the Commission nor NAIJ anticipated that INS or DOJ reorganization would culminate in the departure of the INS from the DOJ. Now that this seems to be the approach favored by the White House, INS Commissioner Ziglar, and many others, NAIJ would like to make our position clear. In the absence of an independent agency status as recommended by the Commission, which remains our first choice, we believe that EOIR should remain in the DOJ. Were the INS to be transferred, (both enforcement and adjudications functions) to the newly created Department of Homeland Security, then an alternative where the Immigration Courts (and EOIR) remain in the DOJ could serve as an acceptable stop-gap solution. The same rationale we detailed in our initial position paper compels that conclusion under these new circumstances. In the present state of affairs, this would be the solution which is most likely to safeguard our most important guiding tenet: decisional independence. By keeping EOIR with DOJ while INS moves to the Department of Homeland Security, some modicum of judicial independence is achieved without the expense of creating an independent agency.

In addition to safeguarding and assuring judicial independence, retaining EOIR in DOJ in that circumstance would allow the Immigration Court to act as a catalyst for INS production in matters before it. Finally, that option would also assure that the individual who appoints immigration judges and who acts as the final arbiter in immigration cases, is a lawyer. To that end, we would propose that Section 802 of the Homeland Security Act of 2002 as proposed, be amended to add to the last sentence "**except that the Executive Office of Immigration Review shall not be transferred to the Department of Homeland Security."**

Under the current system, the Attorney General has the authority to review cases issued by the Board of Immigration Appeals, as the Board requests or as he or she deems appropriate. See 8 C.F.R. Section 3.1(h). Both in the past and in recent years, the Attorney General has used this powerful mechanism to oversee the administration of

immigration law.[18] A review of these decisions will show that, in the area of immigration law, which is an extremely complex legal field, it is very important to have a lawyer in this position, as the lines between matters of law and the proper exercise of discretion are not always easy to determine.

[18] See, e.g., Matter of N-J-B-, 21 I&N Dec. 812 (AG 7/9/97); Matter of Soriano, 21 I&N Dec. 516 (AG 2/21/97); Matter of Farias-Mendoza, 21 I&N Dec. 269 (AG 3/27/97); Matter of Cazares-Alvarez, 21 I&N Dec. 188 (AG 6/29/97); Matter of De Leon-Ruiz, 21 I&N Dec. 154 (AG 6/29/97); Matter of Hernandez-Casillas, 20 I&N Dec. 262 (AG 3/18/91); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (AG 7/27/84).

The primary impetus behind the universal call for INS reorganization is the need to restore accountability to the system.[19] Implementation of our proposal will satisfy this need in the circumscribed area of adjudicative review, while retaining the efficiency of an administrative tribunal. The removal of the immigration review functions from the same agency as the INS will create a forum which will provide the needed checks and balances. The Homeland Security Department will be free to focus its mission on the prosecution of those in the United States illegally -- an increasingly compelling focus – while the Attorney General can employ the legal expertise of his agency to assure that due process and fundamental fairness prevail.

The optimal balance of efficiency, accountability and impartiality would be achieved by adopting the USCIR's proposal of an independent executive branch agency. This carefully considered recommendation was offered after years of thorough study of all aspects of this intricate process by a bipartisan panel of experts. However, at the very minimum, this rationale, modified to meet current reorganization plan, would require maintaining EOIR as an agency within the DOJ. Establishment of an independent Immigration Court in this manner would achieve meaningful reform of the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, while providing insulation from any political agenda.

We strongly urge you adopt this approach.

[19] The cries for accountability in recent months have been virtually deafening. See, e.g.,:"Secret Evidence Invites Abuse," Red Bluff Daily News Editorial, 1/9/02; "Questions Raised About Detainees," by Mae M. Cheng, NewsDay, 12/7/01; "U.S. Has Overstated Terrorist Arrests for Years," by Mark Fazlollah and Peter Nicholas, Miami Herald, 12/14/01; "Secret Justice: Ashcroft Orders Closed Courts," by Josh Gerstein, ABCnews.com, 11/28/01; "Ashcroft Offers Accounting of 641 Charged or Held - Names 93" by Neil Lewis and Don Van Natta Jr, New York Times, 11/28/01; "Analysis- Ashcroft Does an About-Face on Detainees," by Todd S. Purdum, New York Times, 11/28/01; "INS Can Overrule Judges' Orders to Release Jailed Immigrants," by David Firestone, New York Times, 11/28/01; "Cases Closed," by Josh Gerstein, ABCnews.com, 11/19/01; "US Issues Rules to Indefinitely Detain Illegal Aliens Who Are Potential Terrorists," by Jess Bravin, The Wall Street Journal, 11/15/01; "INS to Stop Issuing Detention Tallies," by Amy Goldstein and Dan Eggen, Washington Post, 11/9/01; "Count of Released Detainees is Hard to Pin Down," by Dan Eggen and Susan Schmidt, Washington Post, 11/6/01; "Justice Department Cannot Confirm How Many Detainees Released," by Terry Frieden, CNN.com, 11/6/01; "Opponents' and Supporters' Portrayals of Detentions Prove Inaccurate," by Christopher Drew and William Rashbaum, New York Times, 114/3/01; "U.S. Holds Hundreds in Terror Probes; Who Are They?," by Chris Mondics, The Record, 11/3/01; "Detentions After Attacks Pass 1000, U.S. Says," by Neil A. Lewis, New York Times, 10/30/01; "Detention and Accountability," New York Times Editorial, 10/19/01; "A Need for Sunlight," Washington Post Editorial, 10/17/01.

APPENDIX A: (language to mandate promulgation of contempt regulations)

NAIJ proposes that Congress enact the following provision:

> Within 120 days of enactment, the Department of Justice shall promulgate regulations implementing the contempt authority for immigration judges provided by INA Section 240(b)(1). Such regulations shall provide that any contempt sanctions including any civil money penalty shall be applicable to all parties appearing before the immigration judge and shall be imposed by a single process applicable to all parties.

APPENDIX B: (language to ensure decisional independence)

NAIJ would propose that Congress act to amend the definition of Immigration Judge at INA Section 101(b)(4) as follows (by adding language in underline to the current statutory definition as shown in full):

> The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under Section 240. In deciding the individual cases before them, Immigration Judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases. Animmigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, except that no immigration judge shall be sanctioned or disciplined for the exercise of his or her independent judgment and discretion in the disposition of a case before him or her. An immigration judge shall not be employed by the Immigration and Naturalization Service. [Amendments are underscored].