NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

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Statement of

National Association of Immigration Judges

Before the Senate Committee on the Judiciary

on

"Improving Efficiency and Ensuring Justice in the Immigration Court System"

May 18, 2011

Chairman Leahy, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a written statement on behalf of the National Association of Immigration Judges ("NAIJ") to the Committee on the important topic of "improving efficiency and ensuring justice in the Immigration Court system." The NAIJ has long been on record explaining why far-reaching structural reform and reorganization of this system is long overdue and desperately needed.[1] In light of the focus of the current hearing, we direct our comments on actions that can be taken immediately to greatly improve the efficiency of the Courts while also ensuring justice.

Who We Are

The NAIJ is the certified representative and recognized collective bargaining unit representing the approximately 262 Immigration Judges presiding in 59 courts throughout the U.S. states and territories.[2] NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, which in turn is an affiliate of the AFL-CIO. The opinions offered represent the consensus of our members, and may or may not coincide with any official position taken by the U.S. Department of Justice ("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 U.S. Supreme Court. Some 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.

What We Do

The proceedings over which we preside rival the complexity of tax law proceedings, with consequences that 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. The people who appear before our court include lawful permanent residents who have lived virtually their entire lives in the United States, vulnerable unaccompanied minors, and sometimes 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 their 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. Circuit courts 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 testimony 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 that 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 which 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 created only after their decision is appealed.

The Problem

The system has been struggling to accommodate the evolving demands of circuit courts’ holdings, which require more in-depth rationales, at a time when the 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. To put this in context, it should be noted that while the average district court judge has a pending caseload of 400 cases and three law clerks to assist, in Fiscal Year ("FY") 2010 Immigration Judges completed over 1500 cases per judge on average, with a ratio of one law clerk for every four judges.[4] Under these circumstances, it is not surprising that recent studies found that 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 for 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 requires a significant amount of additional judicial time to conduct hearings and evaluate such cases.[6] Simply put, Immigration Judges continue to be inundated as they struggle with chronically inadequate resources.

Changes (or Lack Thereof) in the Last Five Years

On August 9, 2006, then Attorney General Alberto Gonzales proposed 22 specific measures he deemed necessary to improve the quality of performance by the Immigration Courts. An essential element of that proposal was the stated intention to seek budget increases to hire more judges and judicial law clerks, acknowledging that improved performance and service to the public are dependent upon adequate resources. Disappointingly, when this effort was evaluated at the two-year mark, there were actually eight fewer Immigration Judges than had been employed at the time of the Attorney General's proposal, with a total of 28 Immigration Judge positions vacant.[7] It was only by December of 2010 that 23 of those 28 positions were filled.[8] In addition, the DOJ has repeatedly failed to keep pace with an annual 5% attrition rate for Immigration Judges.

Because of the sluggish pace of hiring, by the end of December 2010 the number of cases pending in the Immigration Courts reached an all-time high of 267,752 and the length of time matters remained pending increased by an estimated 20%.[9] This pending caseload represented a 44% increase over the number of cases pending at the end of FY 2008.[10]

Although the pace of hiring improved somewhat, during this same time waves of new cases are buffeting the immigration courts, especially in the detained settings, with more expected to follow. In the first nine months of FY 2010, the policies of the current administration and the "Secure Communities" program, which is rapidly expanding, have resulted in almost a doubling of the rate of removals that have taken place in the past five

years.[11] While these "removals" include some cases that are not brought before the Immigration Court, there has been a major impact on Court dockets. The Department of Homeland Security ("DHS") has "prioritized criminal aliens for enforcement action," but such "criminal" aliens include those convicted of traffic violations.[12] In addition, a recent unpublished Ninth Circuit Court of Appeals case has called the procedures for "stipulation orders of voluntary removal" into serious question.[13] As a result, both DHS and Immigration Judges are hesitant to use this mechanism, at least without taking significant additional precautions that result in added time to the docket. When the effects of these trends are combined, the impact results in longer processing times for vulnerable populations such as asylum seekers and juveniles.[14]

Additionally, the need for annual, in-person training conferences was another crucial element contained in the proposed improvement measures, based on an acknowledgment of the inferiority of other training mediums. Unfortunately, this proposal has also failed to materialize. Two out of five conferences since 2007 have not been held in person. The annual Immigration Judge Training Conference was cancelled in 2008 and 2011, once again substituting a far inferior alternative, CD audio lectures.[15] The cancellation of in-person training conferences neither improves efficiency nor ensures justice.

All of these problems – delays in hiring new judges, increased backlogs, significant enhancement of DHS enforcement efforts, doubts cast on the legitimacy of stipulated removal orders, and a lack of training for judges – are coalescing to create another "perfect storm": a court system that is incapable of handling the cases before it in an efficient and competent fashion. Absent immediate steps, this "storm" will overwhelm the Immigration Court system and undermine public confidence.

Steps to Take Now To Improve the Immigration Court System

1. Senior Status Judges

The immediate hiring of more Immigration Judges and judicial law clerks is essential to alleviate case backlogs and the stress caused by overwork, which lead to many problems that undermine the optimal functioning of the Immigration Court system.

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. While we acknowledge that the Executive Office for Immigration Review ("EOIR") has rededicated itself to this task, a hiring freeze mandated by the DOJ coupled with a cumbersome hiring and clearance process continue to jeopardize any enduring success on this front. In addition, recent instances where Immigration Judges have been unable to survive their probation period may very possibly dissuade high quality lawyers from leaving stable jobs or law practices to become Immigration Judges.

NAIJ strongly advocates 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 ("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 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. Their institutional memory, depth of knowledge of immigration law and procedure and their 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 changing needs of the immigration justice system.

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 Court system. Long-term planning for Immigration Court growth 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. Despite this provision, no discernible results have been forthcoming. This is a crucial project that must be pursued in order to provide a durable solution to this persistent problem.

The 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 the 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 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 and program improvement.

3. Chronic Shortage of Resources

The persistent lack of resources to help judges perform their jobs adequately in light of changing expectations by the federal appellate 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 that most closely resembles traffic court. Providing increased resources to improve the quality of performance of the Immigration Courts is the only realistic way to earn and retain public confidence in this system, and it would be cost effective. 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 several areas where resources need to be augmented. 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.

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 away from the bench, to issue written decisions in any case where they deem it appropriate. This expenditure

would be cost-effective; it 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.

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

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, 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.

4. Sanctions Authority

With the crushing volume of cases facing Immigration Judges, they need to be able to run their courtrooms as efficiently as possible; this necessarily requires the ability to discipline attorneys who come before the court unprepared.[16] Despite legislation that provides Immigration Judges with the authority to sanction attorneys by civil monetary penalties, the DOJ has failed to promulgate implementing regulations for over fifteen years.[17] Current procedures for attorney discipline apply only to respondents' representatives who engage in "criminal, unethical or unprofessional conduct" and do not apply to attorneys who represent the federal government.[18] Since this process is one-sided, some Immigration Judges are reluctant to use it, believing it would create the appearance of a lack of impartiality. The end result is that Immigration Judges are without a viable, even-handed mechanism to punish recalcitrant attorneys. This omission deprives Immigration Judges of a critical tool necessary for them to assure maximum effectiveness in the adjudication of cases.

5. Legislative Action Needed

The 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 of judges. Disciplinary actions against Immigration Judges have become more frequent, and are often over petty matters. DOJ has informed Immigration Judges that they are, as a matter of legal ethics, to consider themselves as attorneys who represent the U.S. Government in litigation, even as it presents Immigration Judges to the public as impartial adjudicators. One official ethics opinion flatly stated that "an Immigration Judge is not truly a judge of any court." This position is in constant tension with the judicial role, which requires Immigration Judges to be fair and impartial. The strain of personal ramifications from individual discipline and ethical ambiguities are undermining morale and interfering with judicial performance at the very time that the workload for Immigration Judges has become overwhelming.

The solution we propose, which is also advocated by the American Bar Association and the American Immigration Lawyers Association, is to remove 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. The 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, §101(b)(4), must be amended to guarantee decisional independence and insulation from retaliation or unfair sanctions for judicial decision making. The new statutory definition should include specific language that makes it clear that traditional employee performance evaluations may not be utilized because of the impartial, adjudicative duties of the position. The statute should provide that Immigration Judges will be held to the ethical standards established by the American Bar Association Model Code of Judicial Ethics. Finally, it is essential that the statute explicitly state that no discipline or adverse action may be taken against a judge for the judicial exercise of independent judgment and discretion in the adjudication of cases. Should it be helpful to the Committee, the NAIJ would be pleased to offer proposed language for this purpose.

Closing

Mr. Chairman, the NAIJ deeply appreciates the work of the Committee and stands ready to assist in any way that we can to improve the Immigration Courts so that efficiency is improved and justice ensured. Thank you.

Dana Leigh Marks, President, NAIJ

[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., 2d Sess. 15 (2002).

[2] Last December, the Executive Office for Immigration Review ("EOIR") announced that the Immigration Judge Corps had reached 270 members. News Release, *The Executive Office for Immigration Review Swears in Nine Judges, Judge Corps Reaches 270 serving in 59 Courts* (Dec. 20, 2010) <http://www.justice.gov/eoir/press/2010/IJInvestiture12172010.pdf>. However, it should be noted that, at present, 13 members of the corps serve as managers and supervisors, either full- time or for the majority of their time. In addition, since that announcement was made, several Immigration Judges have retired or left EOIR. Although five more judges did come on board since the announcement, DOJ has now imposed a hiring freeze. Hence, the actual number of full time Immigration Judges is 262, virtually the same number that Attorney General Gonzales said should have been immediately in place five years ago.

[3] *Ng Fung Ho v. White*, 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] U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, prepared by the Office of Planning, Analysis and Technology, January 2011, <www.justice.gov/eoir/statspub/fy10syb.pdf>.

[5] To better understand 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 Immigr. L.J. 57 (Fall 2008 CQ ed.) <https://articleworks.cadmus.com/geolaw/zs900109.html>.

[6] For an inside perspective from an Immigration Judge on the topic of attorney representation, including the laudable efforts by New York pro bono programs, *see*, Noel Brennan, *A View From the Immigration Bench*, 78 Fordham L. Rev. 623 (2009).

[7] Transactional Records Access Clearinghouse ("TRAC"), *Efforts to Hire More Immigration Judges Fall Short* (July 28, 2008), <http://trac.syr.edu/immigration/reports/189/>.

[8] TRAC, *Immigration Courts Taking Longer to Reach Decisions* (Nov. 1, 2010), <http://trac.syr.edu/immigration/reports/244/>.

[9] TRAC, *Backlog in Immigration Cases Continues to Climb* (Mar. 12, 2010), <http://trac.syr.edu/immigration/reports/225/>.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *United States v. Ramos*, No. 09-50059 (9th Cir. Sept. 24, 2010.)

[14] EOIR's statistics show a 42% decrease in the number of asylum applications filed with the Immigration Courts from FY 2006 to FY 2010. U.S. Department of Justice, Executive Office for Immigration Review, FY 2010 Statistical Yearbook, prepared by the Office of Planning, Analysis and Technology, January 2011, <www.justice.gov/eoir/statspub/fy10syb.pdf>. Nevertheless, when not detained, they are the applicants most dramatically impacted by longer case processing times, an outcome which can be especially difficult for individuals suffering from anxiety or Post Traumatic Stress Disorder or those separated from family members who may remain at risk in their homeland.

[15] EOIR already announced that its 2011 Immigration Judges' Training Conference scheduled for July will not be an in-person conference. *See also*, TRAC, *Bush Administration Plan to Improve Immigration Courts Lags* (Sept. 8, 2008) <http://trac.syr.edu/immigration/reports/194/>.

[16] *Assembly Line Injustice, Blueprint to Reform America's Immigration Courts*, Chicago Appleseed Fund for Justice, May 2009, at 11.

[17] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009-589 (1996), codified as amended at § 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(1) (2006).

[18] *See* 8 C.F.R. §§ 1292.3(a)(1)-(2).