

You Be the Judge

Who Should Preside Over Immigration Cases, Where, and How?

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As we write this chapter, some 242 Immigration Judges across the United States face approximately 408,037 pending cases (TRAC Immigration 2014).¹ These seemingly dry statistics relate to life-altering proceedings where the fates of innumerable noncitizens and their families (who may be citizens) lie in the hands of these Immigration Judges. Noncitizens come before the Immigration Court because the Department of Homeland Security has alleged that they have violated our country's immigration laws.² Immigration Judges determine at the trial level whether these individuals are in fact "deportable" from the United States. The array of possible charges is vast. Some noncitizens (referred to as respondents when in proceedings) face deportation (formally called removal) because they entered illegally. Others may have violated conditions of their authorized status or stayed beyond the period authorized for their lawful status. Hundreds of thousands of noncitizens in otherwise lawful status (such as legal permanent resident status) also have faced removal in recent years because of criminal conduct in the United States.

In these proceedings, Immigration Judges also frequently rule on applications from individuals who, although in the country unlawfully or subject to removal due to illegal conduct, may qualify for some discretionary "relief" which would allow them to remain here legally. One common example is a request for asylum, which requires a showing of either past persecution or a well-founded fear of future persecution in the country of intended deportation due to race, religion, nationality, political opinion, or membership in a particular social group. Another example is "cancellation of removal," a remedy available when an individual can show that removal would cause exceptional hardship to

certain specified immediate family members. In addition, immigration law—famous (or infamous) for its complexity—provides several other more esoteric remedies, too numerous to discuss here. Simply put, Immigration Judges are charged with the grave, complex, and multi-layered decisions about who should be deported and who should be granted lawful status in the United States.

The U.S. Supreme Court has called the effect of deportation the equivalent of banishment, a sentence to life in exile, loss of property or life or all that makes life worth living, and, in essence: a “punishment of the most drastic kind.” (See, e.g., *Fong Haw Tan v. Phelan* (1948); *Jordan v. DeGeorge* (1951); *Ng Fung Ho v. White* (1922); *Lehman v. United States* (1957).) An order of deportation can effectively amount to a death sentence, when an individual will be subject to persecution upon return to his or her country. Yet in the post-9/11 era, legitimate concerns regarding national security and terrorism also are crucial factors which can be implicated in these cases. Herein lies the inescapable challenge: The system has been changed in many ways since 2001 including, most significantly, having many immigration functions placed under the jurisdiction of the Department of Homeland Security, but the Immigration Courts are housed, as they have long been, within the Department of Justice. While this has enabled continuity, removing the Immigration Courts from a law enforcement agency would result in significant improvements that would allow this crucially important adjudications system to function better.

Despite their exceedingly high stakes, immigration cases are significantly complicated by mundane administrative realities. The complexity of the law and the paucity of resources available to the Immigration Courts contribute to a court system that has been widely described as overburdened and overwhelmed. Immigration law has been repeatedly recognized by the federal courts as being second only to tax law in its complexity. The statute itself is an ever-changing labyrinth of idiosyncratic terminology and seemingly conflicting provisions, which is continually generating circuit court and Supreme Court interpretations. Major decisions, such as *Padilla v. Kentucky* (2010), which affects the legal advice required for noncitizen criminal defendants, dramatically impact day-to-day proceedings in our courts. One must also add into the mix the myriad of languages and cultural contexts in which these

matters arise, the staggering numbers of cases on the docket, and the fact that less than half of the people who appear before the Immigration Courts are represented by an attorney.³ Only then can one begin to appreciate the full array of challenges faced by Immigration Judges, whose mission is to decide these cases fairly and expeditiously.

One goal of this chapter is to describe certain structural impediments that undermine the optimal functioning of these important tribunals. These systemic impediments range from such macro-level concerns as where Immigration Courts should be properly housed in our legal system, to such micro-level issues as how to alleviate workload pressures and ensure that judges have the ability to render decisions independently and expeditiously. In order to fairly assess the competing concerns, we will particularly examine the conflicting roles currently imposed on Immigration Judges.

What should an individual expect from the Immigration Judge who is to decide his or her future? An Immigration Judge is required by law to exercise independent judgment and discretion, consistent with the law and regulations, to render a decision (8 C.F.R. Section 1103.10(b)). The fundamental expectations of a judge in the United States are to be impartial and independent. Legal scholars would surely agree that without an independent and neutral decision-maker, due process cannot be achieved. The independence of the judiciary in our federal and state systems is of course mandated aspirationally by the separation of the judiciary from the legislative and executive branches. Although many are executive branch agencies, administrative tribunals provide a well-accepted and valuable method for high-volume adjudications by specialized adjudicators. These tribunals, most of which are governed by the Administrative Procedure Act, safeguard decisional independence by specific provisions to protect against any commingling of investigative and prosecutorial functions, thereby assuring impartiality and independence.⁴

The Immigration Courts, however, are unique. They lack clear statutory structure and provisions to safeguard impartiality and independence. They are not in the judicial branch of the government, nor does the Administrative Procedure Act clearly cover them. Despite this, *Judulang v. Holder* (2011) holds immigration decisions of the government to essentially the same standard of judicial review as applied to other agency action. Indeed, after the Administrative Procedure Act was en-

acted, Congress exempted deportation proceedings from its protections, concluding that adherence to the statute would be too costly or cumbersome (*see* Rawitz 1988 for a thorough history).

The Immigration Court system is part of the executive branch of government, located in an agency called the Executive Office of Immigration Review, which, in turn, is a component of the Department of Justice. Until March 1, 2003, the Department of Justice also housed the Immigration and Naturalization Service (INS), the same office that employed the prosecutors appearing before the Immigration Court. Since 2003, those prosecutors have been housed in the Department of Homeland Security. This has provided some important separation of functions for the Immigration Courts; however, as employees of the executive branch rather than the judicial branch of government, the Department of Justice characterizes Immigration Judges as “attorneys” employed by the U.S. government, rather than as judges.

This rather unique (and anachronistic) model causes actual and potential conflicts. The overarching issue is this: Immigration Judges are treated as attorneys working for or representing the U.S. government, while at the same time, their daily role and the duties they discharge mandate the traditional responsibilities that the title of “judge” implies. There is a deep, inherent tension between these conflicting functions. These tensions are apparent when you review the implementation and impact of case completion goals, the practical effects that placement of these courts in a law enforcement agency has had, the lack of even-handed sanctions authority that has resulted, and questions that are arising in the rapidly emerging area of post-deportation law. Finally, we will discuss the provisions relating to the Immigration Courts in Senate Bill 744 on comprehensive immigration reform, and provide an alternative blueprint for reform.

Case Completion Goals: Timeliness versus Quality

Consider the following typical scenario:

An Immigration Judge is instructed by her superior to conduct four “merits” (i.e., full hearings) cases in a day. In addition, she is tasked with completing all cases within a specified number of months after they ap-

pear on her docket. As an attorney working for the government, her performance is subject to performance evaluation and she is subject to the rules relating to employee insubordination if she fails to follow her supervisor's instructions.

As a judge, in her first case of the day, which has been long pending, she must decide whether to grant a continuance to a party who asserts he needs more time to obtain vital evidence from a foreign country. Then, during her third case of the day, she must decide whether an additional witness should be allowed to testify, although that would necessitate another hearing session at a later date or require her to reset the fourth case on her docket that day to a later date.

This judge faces a real dilemma: Should she act as an attorney or as a judge? How do the personal consequences to the judge differ based on whether she is considered a government attorney or a judge? Clearly, her answer will influence the choices she must make.

We believe that this dilemma is an all too common reflection of the systemic problem of placing the Immigration Court in an executive branch law enforcement agency. It is axiomatic that "justice delayed is justice denied." Litigants should be able to have their cases heard fairly and in a timely fashion. In federal, state, and local courts judges struggle to keep up with burgeoning caseloads. The same is true in Immigration Court, but because it is a court within a federal agency, there are unique mechanisms in place outside the control (and frequently outside the knowledge) of the litigants that impose timeliness constraints on Immigration Judges. These are called "case completion goals." In the Immigration Court system, these "goals" have become an undue and sometimes unseen pressure on an Immigration Judge's ability to render a thorough, well-reasoned decision.

In June 2000, the Immigration Court system began formulating the case completion goals, which were formally implemented in May 2002. They were the result of requirements imposed by the Government Performance and Results Act of 1993. Bound by its mandate, the Department of Justice had to quantify its achievements and provide accountability. To comply, the Department chose to establish "adjudication priorities" for the Immigration Courts and elected to measure its success by evaluating whether the court met case completion goals (U.S. GAO 2006:20-21).

The stated purpose of these goals is to assure that the Immigration Courts “adjudicate cases fairly and in a timely matter” (U.S. GAO 2006). To that end, a target time frame was established for the completion of every case, based on the existing resources and case type. Then the agency set expectations for the percentage of such cases to be completed within that time frame. Providing some flexibility, the Executive Office for Immigration Review (EOIR) determined that, for the most part, completing 90 percent of the cases within the established time frame would be an “acceptable result.” The agency monitors each local Immigration Court to identify cases that have not met the established time frames and takes action to assist courts that are not meeting the goals.

Clearly it is in the public interest to have measures that facilitate objective evaluation of the Immigration Court system as a whole. This is the core objective of case completion goals. In fact, the ability to evaluate how long cases remain pending on the docket is essential to any determination of the appropriate level of resources necessary to address the needs of a seemingly ever-increasing caseload. This is a considerable challenge, particularly in the current climate where ever-increasing resources are directed toward immigration enforcement efforts, while at the same time the impact these increased enforcement measures have on the caseload at our Immigration Courts is consistently overlooked. However, when case completion goals are implemented and increased numbers of cases are fed into the system without a concomitant increase in resources, the goals do not serve as “resource allocation tools.” Instead, they are perceived as performance measures, and individual judges are placed in the untenable position of potentially being forced to choose between their personal interest to maintain their own job security and the competing due process needs of a given case.

EOIR has not stated publicly that actions can be taken against an individual Immigration Judge for failure to meet a goal in any given case and repeatedly asserts in meetings and discussions relating to discipline cases that the goals are aspirations, not inflexible mandates. However, narrative responses from Immigration Judges in a recent study revealed that they perceive these goals to be mandatory, and frequently in conflict with ideal conditions for adjudicating cases fairly and independently (Lustig et al. 2008). Immigration Judges noted: “In those cases where I would like more time to consider all the facts and weigh what I have

heard I rarely have much time to do so simply because of the pressure to complete cases”; and: “What is required to meet the case completions is quantity over quality.” The agency’s monitoring of case completions has been described as:

the drip-drip-drip of Chinese water torture that I hear in my mind (i.e. in my mind I hear my boss saying: “more completions, more completions, bring that calendar in, you are set out too far, you have too many reserved decisions, why has that motion been pending so long, too many cases off calendar.” (Lustig et al. 2008:64–65)

Based on these reports, the way in which these goals are being imposed by Immigration Judges’ supervisors may not comport with what is expected of an independent and fair judge, even though they may be in line with appropriate expectations for an attorney for the government. Judges, who are accustomed to succeeding and achieving, may well fear disapproval or even discipline from their supervisors if they fail to meet expectations. Certainly each situation is different. Yet perhaps most problematic is the fact that litigants might not be aware of these goals or the pressures they place on Immigration Judges, since these internal management directives are not “on the record” with regard to how they may apply to a particular case.

The reality of this pressure and the role it can play is illustrated in a published 2008 case. In *Hashmi v. Attorney General of the United States* (2008), an Immigration Judge referenced the case completion goals and noted that the goal for this case type had been exceeded when he denied an unopposed motion to continue the case. The Circuit Court found that: “the sole basis for the Immigration Judge’s exercise of discretion was the Immigration Judge’s perceived ‘obligation []’ to ‘manage [his] calendar’ []” (*Hashmi v. Attorney General of the United States* 2008:261). The court cautioned:

Case completion goals are ordinarily implemented as guidelines to promote reasonable uniformity and to help judges schedule and effectively manage their caseloads. As guidelines, they should not be read as an end in themselves but as a means to prompt and fair dispositions, giving due regard to the unique facts and circumstances of the case. (ibid.)

Finding that the Immigration Judge had reached the decision on whether to grant or deny the motion based “solely” on case completion goals, the Circuit Court found that the decision was “impermissibly arbitrary” and an abuse of discretion (*Hashmi v. Attorney General of the United States* 2008).

One would think that such criticism from “above” would be compelling. On remand, however, the Board of Immigration Appeals apparently disagreed with the Circuit Court’s characterization of the Immigration Judge’s decision. The Board noted it had affirmed the initial decision to deny a continuance because it agreed with the Immigration Judge that “a further continuance was unwarranted in light of the numerous continuances already granted” (*Matter of Hashmi* 2009). It further held that there was no prejudice to the respondent and the delay was caused, in part, by the respondent’s failures. Nevertheless, the Board went on to articulate factors to be considered in determining if a continuance was warranted, and noted that while “other procedural factors” may be considered, “[c]ompliance with an Immigration Judge’s case completion goals, however, is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances” (*Matter of Hashmi* 2009).

This illustrates well the conflicts Immigration Judges face. They are torn between their classification as government attorneys and their duties as judges. While the Circuit Court made clear that case completion goals should not be a factor in a decision, the comments of the judge in that case and the comments of the judges in response to the survey noted above reveal that case completion goals *are* often a factor in the decision-making process. Reinforcing the mixed message that judges receive, it is noteworthy that the Board referenced “the *Immigration Judge’s* case completion goals,” reflecting an agency view that these goals are imposed on individual judges, not on the courts as a whole. The admonition not to *cite* them merely hides the dilemma.

Such mixed messages cannot help but create further unease for Immigration Judges who only recently have become subject to performance evaluations after years of exemption from this process (U.S. Department of Justice 2006). Under these circumstances, and in light of the fact that the Department of Justice has made it clear that these goals are essential to its compliance with the Government Performance and Results Act, it is

easy to understand how an Immigration Judge would have uppermost in her mind the concern for the agency's success in meeting case completion goals. How this consideration is weighed when competing against other fundamental due process concerns is a choice that plays out daily, unfolding on a case-by-case basis. The questions are: Does this tension have to exist, and could structural reform resolve this conflict once and for all?

It is certainly necessary for a court to establish a system to estimate the time needed to complete cases in order to assure proper resource allocation and timely completion of cases. However, judges should not be made to feel that these are quotas or goals for them, and they should be consulted as to how the goals are set. Indeed, the federal judiciary has done this, but in a much different manner. In determining how to measure the time needed for case processing, the Federal Judicial Center, in cooperation with the Administrative Office of U.S. Courts, used over one hundred district court judges as consultants, reviewers, and study participants. To our knowledge, not a single sitting Immigration Judge was consulted in setting the Department of Justice case completions goals, and the Department has not revealed if any "study" was done to set them.

As we explain in our suggestions for reform that follow, we propose a solution that would alleviate much of the tension and resolve these conflicts.

Potential Conflicts for Judges Working in a Law Enforcement Agency

Picture an Immigration Judge who is presiding over a case where the individual is applying for asylum because he was jailed and tortured for engaging in a protest against the ruling party of his homeland. In his country, the judicial branch is corrupt and widely seen as a "puppet" of the government.

How should the Immigration Judge convincingly assure the asylum applicant that the U.S. Immigration Court is not a "puppet" or "rubber stamp" for the Department of Homeland Security, which had previously denied his asylum application?

One predominant theme that permeates the conflicts facing Immigration Judges on a day-to-day basis is the placement of the court within the

Department of Justice, a law enforcement agency.⁵ Many of the conflicts this creates involve perceptions and appearances; but some are much more tangible and specific. Unfortunately, the history of the Immigration Court system is rife with instances where undue law enforcement pressures were placed on Immigration Judges. Judges in the Immigration Courts are aware of that history and mindful of it. In its early years, when the Immigration Court and the prosecutor's office (then the Immigration and Naturalization Service) were both housed within the Department of Justice, Immigration Judges were dependent on the INS District Directors (in essence the client of the prosecutors) for hearing facilities, office space, and supplies. Even today, many Immigration Courts remain located inside detention centers operated and/or controlled by the Department of Homeland Security (DHS) and many other courts are located in the same building as DHS offices and prosecutors. All Immigration Judges are familiar with the old rumor that a Texas Immigration Judge lost his parking space when the INS District Director was upset with his decision. While this rumor may seem laughable, the discomfort among the Immigration Judges who were at the mercy of the INS for worksite conditions was all too real and contributed to a desire to not "rock the boat." A similar uneasiness still exists today while the Immigration Courts remain housed in the Department of Justice, which is closely aligned with DHS and shares with it the primary mission of law enforcement rather than neutral adjudications.

In addition, there is the day-to-day problem of the perception of being housed inside the same building as the prosecutor, and using some of the same resources. The public and even members of the press all too frequently refer to the Immigration Courts as the "INS Courts" and fail to note that they are part of the Department of Justice, a completely separate department. Many of the respondents appearing before the Immigration Courts come from countries "where a courtroom is not an institution of justice, but rather an extension of a corrupt state" (Appleseed 2009:7). It is not infrequent in Immigration Court for an unrepresented individual to assume that the Immigration Judge works for the same entity as the DHS prosecutor. Frequently in Court, a respondent will indicate that he gave a document to an Immigration Judge "before." Further inquiry will reveal that the document was actually given to a DHS representative. Many respondents come to court with the percep-

tion that their deportation is a foregone conclusion, claiming that's what the DHS representatives told them. It is difficult to elicit cooperation and forthrightness from a respondent who believes the deck is already stacked against him or her. These perceptions are even more difficult to dispel when the Immigration Judge's courtroom door is located directly across from the prosecutors' door. This is most difficult in the detained setting, when the guard providing security for the courtroom may be the same guard who is watching over the respondent in his or her "barracks."

It is not just the co-location of Immigration Courts with a prosecutorial party that has caused charges that the Immigration Court is subject to undue pressure from the government. Allegations also have persisted that government prosecutors have had inappropriate *ex parte* contact with the Immigration Court system. The allegations that the Immigration Court has undue bias toward the government persist to this day. A report from the Chicago Appleseed Fund for Justice (2009) noted, "[t]he Immigration Courts and the BIA [Board of Immigration Appeals] [have] never enjoyed a stellar reputation for impartiality. But that reputation fell to a new low after a deliberate effort to stack the Immigration Courts . . . in favor to the government between 2004 and 2006."⁶ The report also claimed that the composition of the Immigration Courts favors the government, stating that "almost 80 percent of Immigration Judges have professional backgrounds that tend to cause them to find in favor of the government significantly more often than judges without those backgrounds" (Appleseed 2009).

This public perception of the Immigration Court affects the ability of Immigration Judges to do their jobs. As noted above, an Immigration Judge is expected to use his or her independent judgment and to be impartial. As the Appleseed Report (2009) noted, "John Adams urged that judges should be 'impartial and independent as the lot of humanity will admit.'" Immigration Judges are aware of the public perception that they are partial toward the government, and have been subjected to incredibly increased scrutiny as a result. Specifically, in 2006, the Attorney General created a "performance evaluation" process for judges, and in 2010, created a process for filing complaints against Immigration Judges online (U.S. Department of Justice 2010). Unfortunately, this process has not been patterned after judicial performance evaluations, which pro-

vide safeguards against political influence and retribution for good faith legal decisions, but instead includes factors such as success or failure to achieve agency goals, a factor that may at times be at odds with the due process concerns raised in a particular case. In addition, this process is internal and not disclosed to the public. At this time, there is a real concern that these allegations of government bias could cause Immigration Judges to over-compensate, to “bend over backwards,” or worse, exhibit a bias against the government, to avoid being the object of complaint or discipline. As noted in a letter to the Attorney General from Ranking House Minority Member Lamar Smith:

Under its practice, OPR [Office of Professional Responsibility] will usually investigate immigration judges only in cases in which they deny relief that is later granted by the federal courts. The course of least resistance is therefore for immigration judges to grant relief in many cases despite their beliefs about the merits of the cases. . . . This perceived pressure ultimately frustrates the integrity of our immigration laws and the American people’s interest in the laws being enforced in a fair and orderly manner.⁷

This perception and the complaint process certainly create pressure for Immigration Judges. Responses by Immigration Judges to the survey noted above indicate that the negative perception of the public and fear of investigation is a driving and stressful force in the decision-making process (Lustig et al. 2008). One description of these pressures aptly captures the essence of this concern:

Fear that every decision or proceeding may trigger a “personalized” and scathing published criticism from the reviewing circuit court and/or an Office of Professional Responsibility investigation into the judge, which may destroy the judge’s professional reputation and career without the ability to rebut or defend. (ibid.)

Another judge noted that he or she was “demoralized by being made the ‘whipping boy’ by the press and public, when it is the system we are forced to follow that contributes so greatly to the errors I make” (Lustig et al. 2008). These comments reveal that the negative perception of the Immigration Court system, coupled with the mechanisms the Depart-

ment of Justice has put in place to deal with these perceptions, create a potentially coercive influence on Immigration Judges. At a minimum, they indisputably have been found to be corrosive to morale and have increased stress and burnout in the Immigration Judge corps. While we fully endorse a transparent evaluation process modeled on accepted standards for the judicial branch of government, the system currently in place unfairly places Immigration Judges at personal peril for good faith legal decisions, an unnecessary and counterproductive situation.

Thus, being housed within the Department of Justice creates several conflicts for Immigration Judges on a daily basis. Because many of the workplace resources for the Court are inextricably tied to those of the Department of Homeland Security, a sister agency, the public perception of the independence of the Immigration Court system is harmed, the Immigration Judges' ability to do their jobs is impaired, and a chilling effect on them is created. In addition, the inescapable impression of government bias created by being housed in a law enforcement agency may actually cause a backlash and encourage appeals by respondents who may have accepted a decision by a court perceived to be truly independent. Taking the Immigration Court out of the Department of Justice and making it an Article I court, as discussed below, would resolve these problems.

Concerns about the Lack of Even-Handed Sanctions Authority

With the mountain of cases facing Immigration Judges every day, judges need to run their courtrooms as efficiently as possible; this necessarily requires the power to discipline all attorneys who come to court unprepared (Appleseed 2009:11).

Imagine an Immigration Judge who has had numerous problems with two attorneys who appear before her regularly. They are both routinely late, unprepared, rude, and belligerent, and have even made misrepresentations in court. One is a government attorney, and one is a private attorney. This Immigration Judge can refer the private attorney for possible sanctions, but cannot take such action against the government attorney. What can or should the judge do in order to maintain control of her court in a fair manner? (Appleseed 2009:11)

While Immigration Judges have had statutory authority to sanction attorneys by civil monetary penalties since 1996, the Department of Justice has failed to promulgate the regulations needed to implement this authority (*See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Section 304, 110 Stat. 3009, 3009-589 (IIRIRA) codified as amended at Section 240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. Section 1229a(b)(1)). This lack of an appropriate sanctions mechanism for attorneys appearing before the Court has led to pressures that may contribute to stress and intemperate behavior by Immigration Judges.

The current procedures available to Immigration Judges for sanctioning lawyers appearing before the Immigration Court are one-sided. The procedures for sanctioning “practitioners” before the Immigration Court for “criminal, unethical, or unprofessional conduct” apply only to an attorney “who does not represent the federal government” (8 C.F.R. Sections 1292.3(a)(1) and (2)). Since this process can only be used against a private attorney, some Immigration Judges are reticent to use it, believing it may create the appearance of a lack of impartiality. Yet, without the ability to impose sanctions, an Immigration Judge lacks a vital tool to address attorney misconduct. This situation leaves Immigration Judges without a mechanism to punish recalcitrant private attorneys, short of resorting to punitive rulings which may harm the respondent far more gravely than his attorney. Judges are also unable to punish recalcitrant government attorneys, short of bestowing an immigration benefit on a respondent who may not deserve it. The danger of employing one-sided procedures against the private bar is that such actions could be viewed as another example where Immigration Judges are providing preferential treatment to government attorneys.

In the survey noted above, one Immigration Judge commented, “We have been intentionally deprived by the Department [of Justice] and DHS of the tools and rules necessary to make DHS function in court in a reasonably professional and competent manner” (Lustig et al. 2008). This belief that the DHS has obstructed the implementation of contempt authority rules is not unfounded. It appears that the situation remains unresolved, at least in part because of historical opposition of the Department of Homeland Security. As one commentator noted, “The INS has generally opposed the application of the [contempt] authority to its

attorneys. In more than three years since the enactment of IIRIRA, the [EOIR] and the DOJ have failed to resolve this issue, apparently still paralyzed by the legacy of their relationship with INS” (Creppy et al. 1999). Lamentably, the continued lack of implementing regulations demonstrates that no progress has been made in this regard despite the establishment of DHS more than a decade ago.

While Immigration Judges repeatedly have protested the lengthy delay (eighteen years) in enacting regulations to enforce the contempt power, the regulations remain stalled, as the DOJ continues to view Immigration Judges and DHS prosecutors as equivalent, i.e., attorneys whose client is the U.S. government. Because of this inaction, the Immigration Judges lack a vital tool to do their jobs. Federal and state court judges are not so constrained. NAIJ is unaware of any administrative law judges who have contempt power, but such authority is not as necessary in their setting since the government is rarely represented by an attorney in most other tribunals. This fact exemplifies how the classification of Immigration Judges as both attorneys and judges has contributed to dysfunction in an already overburdened system.

Post-Removal Bars to Immigration Judge Authority

Among the most difficult cases encountered by Immigration Judges are post-deportation matters. These involve exceptionally complex statutory and regulatory interpretations, and various types of discretion. Here is a scenario that exemplifies the complexities with which Immigration Judges must grapple.

Respondent Y became a lawful permanent resident at age two years when he immigrated with his entire nuclear family. At age 19, while attending a fraternity party at the university where he was a freshman, he was arrested for possession with intent to sell marijuana. Afraid that his parents would find out and that he would miss his final exams, he pled no contest to the charges, thinking this is a good deal because his harried public defender told him the judge would “withhold adjudication” and he would be sentenced to time served and immediately released.

On the day of his release from state custody, Y was picked up by Immigration and Customs Enforcement officials. He was told he would

be subject to mandatory detention and removal as an aggravated felon. Overwhelmed by the jail experience and embarrassed for having jeopardized his chance to be the first college graduate in his family, he told Immigration Judge X that he wanted to be deported to Mexico immediately. He was ordered removed and put on the bus to Mexico that afternoon.

Months later, when Y's predicament is discovered by his family, they retain an attorney who relies on the U.S. Supreme Court case of *Padilla v. Kentucky* to file a motion to vacate the conviction. The motion is granted and the charges are dropped. Y's attorney immediately files a motion to reopen the removal proceedings in Immigration Court before Judge X.

Should Judge X grant such a motion? What process should be followed? Can Judge X order DHS to return Y to the United States to appear again in Immigration Court?

The effects of deportation on possible subsequent claims of right to reenter the United States is itself deserving of in-depth analysis. In fact, it is the subject of entire books. For our purposes, however, it will be explained only briefly in this chapter. Nonetheless, it is an important topic to consider as it provides an excellent example of the relative lack of authority and power of Immigration Judges versus that of government prosecutors as compared to how that balance is struck by other courts.

The congressional trend in immigration law over the past few decades has been to deformatize deportation proceedings and to move increasingly toward more administrative, fast-track models. Such mechanisms as administrative removal, expedited removal, and reinstatement of prior deportation orders take thousands of cases out of the Immigration Courts entirely. Some argue that such expeditiousness comes at an unacceptably high cost. At least one study of the expedited removal process found serious flaws with the implementation of the idea of streamlining cases out of the hands of Immigration Judges. That report found that asylum seekers in expedited removal proceedings were at risk of being returned to countries where they may face persecution. Some asylum seekers who succeeded in obtaining referrals to Immigration Court were plagued by problems created by unreliable documents generated in the expedited removal process.

Such problems—and many other difficulties in the immigration adjudication system—have led to a rise in post-deportation claims for relief for a

wide variety of reasons. For example, some allege evidentiary error (e.g., incorrect criminal records, incorrect assessment of immigration status). Others base their claims on judicial holdings that the government's theory of prosecution in a class of cases was incorrect, such as the long-standing debate over whether drunk driving could be considered a "crime of violence."

For many years, however, such claims were completely barred in Immigration Courts. A regulatory rule known as the "departure bar" has long provided a definitive ending point for possible review of deportation or removal orders. Dating its reasoning back to a 1952 regulation, the BIA consistently has held that "reopening is unavailable to any alien who departs the United States after having been ordered removed." While at first blush this may seem like a sensible and straightforward bright line for jurisdiction, changes in the statute wrought by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have led to successful legal challenges of this regulation and the Board's interpretation in many circuit courts.

Before 1996, motions to reopen removal proceedings, which were based on regulations, were generally disfavored for the same reasons that a petition for rehearing or motion for new trial is disfavored. Motions to reopen were especially disfavored in immigration proceedings, "where, as a general matter, every delay was to the advantage of the deportable alien who wishes merely to remain in the United States." The motion to reopen was statutorily codified for the first time in 1996, with certain evidentiary requirements. Such motions are circumscribed by strict statutory numerical and time limits. However, the old 1952 departure bar rule was *not* part of the new statute. The Attorney General nevertheless determined that the bar survived, and reissued it in regulatory form. Because Immigration Judges are part of the Department of Justice they were bound to apply this interpretation, whether they agreed it was legally correct or not.

For a variety of reasons, the circuit courts have now split on the issue of post-departure jurisdiction, leaving crucial rights hanging in the balance. There is an understandable need for finality in the removal process. However, consider the fact that the statute, which had previously provided automatic stays during the appeal process, has now been repealed. Thus, after an Immigration Judge issues an order of removal and the Board of Immigration Appeals affirms the order (if the respondent has sought such administrative review), the noncitizen will in all likeli-

hood now be physically removed. Some challenges to deportation in the courts may proceed from abroad as “direct” appeals. But motions to reopen based on later-discovered factual errors or changes to the law have been barred once removal takes place. Thus, a potentially meritorious challenge to deportation can be forestalled by the actions of one party, i.e., the government’s execution of a removal order.

Further complicating the analysis in these cases, the split structure of authority for these motions has led some circuit courts to differentiate between “statutory” motions and those potentially authorized by regulation. Nowhere is this more stark than in the regulation that allows Immigration Judges to grant motions to reopen or reconsider on their own, i.e., *sua sponte*, and not based on a motion from either party (8 C.F.R. §1003.23(b)(1)). Although authorized by regulation, this remedy places Immigration Judges in an extremely challenging position, particularly since the extent of their authority has not been clearly defined.

It is not uncommon for motions to reopen to implicate weighty due process concerns. For example, cases present issues of “equitable tolling” due to allegedly ineffective assistance of counsel when respondents were not properly advised of available relief or when their lawyer’s alleged negligence has caused applications to go unfiled. In other cases, changes in accepted interpretations of the governing law can mean that a respondent is removed only to discover later that he or she was not removable had the law been properly understood. For example, *Vartelas v. Holder* (2012) held that IIRIRA’s changes to the INA’s treatment of returning lawful permanent residents did not apply retroactively to people who were convicted prior to IIRIRA’s effective date. Strict time limitations on such motions can limit the ability of a respondent to obtain review of a previously denied application for relief, notwithstanding significant changes in personal circumstances, such as the vacature of his or her criminal conviction or an illness threatening the health or life of someone in respondent’s immediate family. Simply put, neither the law nor the lives it affects are static, and it is not uncommon for circumstances to arise that cry out for a second look by the decision-maker. Who better than the Immigration Judge to be in a position to review such circumstances and issue a decision based on all the facts?

Cases such as these thus present thorny issues deserving of solutions which can more effectively be crafted by a decision-maker acting with

traditional judicial tools rather than a government attorney with limited authority or a deportation officer with no legal background. For now, more issues exist than solutions in this evolving legal context. With scarce resources creating lengthy dockets at the Board of Immigration Appeals and circuit courts, how should changes in personal circumstances, such as marriage or illness or changes in country conditions, be properly addressed to assure that fairness is achieved? Although equitable tolling to address time bar issues has been widely accepted in our legal system, should it apply to the numerical limitation on motions (allowing only one motion) now imposed by statute?

These cases also implicate enormous practical complications. What tools does an Immigration Judge have to compel the government to return a respondent to the United States after a conviction has been vacated? This issue has received considerable scrutiny in light of an ongoing controversy regarding exactly what steps the government is willing to undertake in these situations. Indeed, there has been some controversy about the government's representations about its ability to locate and return deported noncitizens. For example, following the Supreme Court decision in *Nken v. Holder* (2009), District Court Judge Jed Rakoff found that materials obtained under the Freedom of Information Act showed that the government had provided the Supreme Court a "distorted or inaccurate factual representation" on this issue.

These are but a handful of examples of the difficult issues Immigration Judges routinely confront that directly implicate the dimensions of their proper authority and the tools at their disposal—including discretion—necessary to assure that the impact of their decision provides respondents with the fundamental fairness that the Constitution guarantees them. We posit that whatever procedural or substantive parameters are applied, the integrity of these decisions will be greatly enhanced by having them made by a judge rather than a government attorney.

How Can Congressional Action Address These Problems?

Comprehensive immigration reform is all the talk these days. No one can predict what shape or form comprehensive immigration reform will take, or even if any immigration reform measure will become law. As of this writing, the Senate has passed an immigration reform package

which in part attempts to address crushing caseloads of the court by providing more judges and law clerks. While the provision of resources to the Immigration Courts is a laudable first step, the Immigration Courts need both adequate resources and iron-clad independence to function fairly and efficiently.

History has shown that incremental modifications to the Immigration Courts have not resolved the pernicious problems created by placement of the Court within a law enforcement structure. There has been a gradual shift toward 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 a sibling component of the primary immigration law enforcement agency to a component of an executive branch agency whose primary mission is law enforcement, ostensibly removed from direct immigration law prosecutions (American Bar Association 2010, ES-9; U.S. Department of Justice 2014; Rawitz 1988:453–459). However, these gradual steps have proven inadequate to safeguard true independence and quality decision-making. Indeed, illegal, politicized hiring of Immigration Judges occurred subsequent to the last major step to reform the Immigration Courts in 2002.

The idea of an independent agency or Article I Court has been seriously considered for more than 25 years. Many have concluded that the creation of an Article I Immigration Court, or the establishment of an Immigration Court in an independent agency outside the Department of Justice, is needed. After years of thorough study, the bipartisan Select Commission came to this conclusion in 1981. The same conclusion was reached recently by the comprehensive study commissioned by the American Bar Association and the Chicago Appleseed Fund for Justice. The National Association of Women Judges (NAWJ) has endorsed the concept as well. The American Immigration Lawyers Association also reportedly backs the creation of an independent court. Most recently, the Federal Bar Association has endorsed the creation of an Article I Immigration Court and has taken steps to lobby for its creation.

Comprehensive immigration reform presents the ideal opportunity for reforming the Court. In our experience, immigration reform that creates new applications for relief or paths to citizenship usually results

in a short-term decrease in cases pending at the Immigration Court while these applications are being processed but a subsequent spike in cases when unsuccessful applicants return to the court system. This brief calm before the storm is the perfect time to restructure the court without unduly burdening those appearing before it, also providing the optimal opportunity for the court to respond in real time to any changing needs which unexpectedly may result as reform is implemented.⁸

Senate Bill 744 would create at least one new discretionary application for relief. For decades Immigration Judges had the authority to grant discretionary relief from deportation to immigrants with lawful status in the United States (e.g., people with “green cards”) who had committed crimes making them deportable, based on a consideration of countervailing positive factors such as U.S. military service, family ties, medical issues, and rehabilitation. In the 1990s, Congress severely curtailed this discretion. Senate Bill 744 would restore some of this discretion, and many are saying that even more discretion should be returned to Immigration Judges. Restoring discretion to Immigration Judges would result in an improved system with more efficient checks and balances.

Conclusion

This chapter has explored some of the real and potential conflicts created for Immigration Judges, in their dual roles as U.S. government “attorneys” and as “judges.” Immigration Judges face several pressures due to the unusual placement of the Immigration Court within a federal law enforcement agency: (1) case completion “goals” that are perceived to be mandatory deadlines and frequently are perceived to be in conflict with adjudicating cases fairly; (2) the pressures of exposure to personal discipline for good faith legal decisions; (3) the public perception of a “government bias” of the Immigration Court and the effect that this perception has on the Immigration Judges; and (4) the lack of even-handed tools to deal with misconduct by government attorneys appearing before them.

We believe that the best solution to these and other problems caused by this structural flaw would be the creation of an Article I Immigration Court, or, as an alternative, the establishment of an Immigration Court in an independent agency outside the Department of Justice. We applaud many of the efforts that the Department of Justice has made and

continues to make over the years to provide for fair and full adjudications in the Immigration Court system. Nevertheless, it is only through an Article I court or separate agency that complete independence and impartiality can be achieved, both in reality and in public perception.

NOTES

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- 1 The views expressed here are those of the authors in their individual personal capacities and as executive vice president and president of the National Association of Immigration Judges (NAIJ), not as official spokespersons for the U.S. Department of Justice (DOJ). The NAIJ is a professional association of Immigration Judges, and also the certified representative and recognized collective bargaining unit that represents the Immigration Judges of the United States. The views expressed herein do not purport to represent the views of the U.S. DOJ, the Executive Office for Immigration Review, or the Office of the Chief Immigration Judge. Rather, they represent the personal opinions of the authors, which were formed after extensive consultation with the membership of the NAIJ.
- 2 Before April 1, 1997, proceedings before the Immigration Court were either “deportation” or “exclusion” proceedings, depending on the manner in which an individual had come to the United States. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009, changed the terminology from “deportation” and “exclusion” proceedings to “removal” proceedings, but for purposes of clarity since the general public is more familiar with the term of “deportation,” this term will be used throughout.
- 3 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 Brennan (2009), U.S. Department of Justice (2012).
- 4 The Administrative Procedure Act, 5 U.S.C. Section 553(a)(1), requires that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations (*Morton v. Ruiz* 1974).
- 5 The mission statement of the Department of Justice is “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. Department of Justice 2014).

- 6 This was based on a 2008 report by the DOJ Inspector General and the Office of Professional Responsibility that found a systematic campaign by members of the previous administration to pack the court with “good Republicans” who were “on the team.”
- 7 Letter of May 26, 2010 to the Honorable Eric Holder, Attorney General from Lamar Smith, Ranking Member, House of Representatives, on file with the authors.
- 8 The rise of prosecutorial discretion initiatives in recent years could in fact be a reaction to the stripping of discretionary authority from the Immigration Courts, which has left us with a system where, ironically, the prosecutors have more discretion than the judges.

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