

CHARACTERISTICS OF AN IDEAL IMMIGRATION COURT (DRAFT)

Note: I prepared this short paper (gratis) in response to an interest of the National Association of Immigration Judges' leadership in identifying what an "ideal immigration" court would look like. I regard it as an initial effort, not a finished product. Names and numeric values (e.g., numbers of judges) are place holders. It contains internal contradictions (e.g., if all respondents had competent counsel there would be less need if any for judges to have available from the court information on country conditions).

The paper assumes readers will have basic familiarity with the Executive Office for Immigration Review, the immigration courts, and the Board of Immigration Appeals.

If the paper has a contribution to make it is in serving as a basis for further discussion and analysis by immigration removal adjudicators and stakeholders.

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INTRODUCTION

The Justice Department's Executive Office for Immigration Review (EOIR) supervises the nation's immigration courts and the Board of Immigration Appeals (BIA). The leadership of the National Association of Immigration Judges (NAIJ) believes immigration removal adjudication needs a different location, "restructured," wrote its president, "as real courts under Article I of the Constitution, similar to Tax and Bankruptcy Courts."¹

I. EXISTING ARTICLE I COURTS The idea of Article I immigration removal adjudication, supported by the American Bar Association² and the Federal Bar Association³ among others, traces back at least to 1980, well before the abolition of the Immigration and Naturalization Service and the bifurcation of removal prosecution and adjudication.⁴ But as "similar to" in the NAIJ president's call implies, existing Article I courts do not provide a template for a revamped immigration adjudication system. The 350-judge bankruptcy courts are units of the federal judicial branch's district courts, and while relocating immigration courts to the third branch may appeal to some, the chances of its occurring are more remote than an independent status. The 15-judgeship Court of Federal Claims is also part of the judicial branch and is much smaller than the roughly 265-judge immigration courts and the BIA.

¹ Marks, Let Immigration Judges be Judges, The Hill, May 9, 2013, available at <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>

² Bliss, ABA Supports Retooling Immigration Court System, Litigation News, April 19, 2010 available at http://apps.americanbar.org/litigation/litigationnews/top_stories/041910-immigration-court-removal-cases.html

³ Federal Bar Association, 2015 Issues Agenda, available at <http://www.fedbar.org/Advocacy/Issues-Agendas.aspx>

⁴ See, e.g., Levinson, "Specialized Court for Immigration Hearings and Appeals," 56 Notre Dame L. Rev. 644 (1981), Roberts, "Proposal: A Specialized Statutory Immigration Court," 5 Immig. & Nat'lity L.Rev. 183 (1981) and U.S. Immigration Policy and the National Interest, Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy (the Hesburg Commission) at 248 (March 1981). But see also, e.g., Juceam and Jacobs, Constitutional and Policy Considerations of an Article I Immigration Court, 18 San Diego L. Rev. 29 (1981)

The Tax Court is also much smaller (19 judgeships), but its organizational status may be instructive for an Article I immigration court.⁵ “The Tax Court,” said the Supreme Court in 1991, “remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President,” and are reviewed in the courts of appeals, not district courts. “The Tax Court’s exclusively judicial role,” the Court continued, “distinguishes it from other non-Article III tribunals that perform multiple functions.”⁶ There is currently legislative activity to clarify that the Tax Court is not within the executive branch.⁷

Congress has authorized the Court to prescribe its own rules of procedure and evidence within certain guidelines.⁸ The Court deals directly with Congress in the appropriations process and on administrative matters needing legislative authorization; by tradition, the Office of Management and Budget conveys the Court’s annual appropriations request to Congress without change. The Court handles administrative matters on its own, sometimes based on statutory authorization,⁹ although because of its small size, it seeks and the Administrative Office of the U.S. Courts provides advice on specific court administration matters. Its judges have adopted the Code of Conduct for United States Judges, and they seek and receive advisory opinions from the United States Judicial Conference’s Code of Conduct Committee. They file statutorily required financial disclosure reports with the Conference’s Committee on Financial Disclosure.

II. STARTING WITH FIRST PRINCIPLES Lacking a clear organization model, the NAIJ leadership asked me to “enumerat[e] the characteristics which an ideal Immigration Court should have,” at least as yardsticks to compare against what may be attainable. Characteristics here are mainly structural characteristics, broadly defined to include administrative behavior. The question at the moment is: “What characteristics are most likely to promote impartial and accountable removal adjudication?”, rather than “What are the characteristics of such adjudication (e.g., an average per-matter cost of \$_____ to dispose properly of an asylum petition?”

III. SOURCES OF REFERENCE Rather than picking buffet-style from the ocean of analyses of particular deficiencies and alternatives to the immigration courts and BIA,¹⁰ I have relied mainly on more comprehensive sources that embody consensus recommendations: the American Bar Association Immigration Commission’s 2010 report on REFORMING THE IMMIGRATION SYSTEM,¹¹ the 2012 report that Professor Lenni Benson and I prepared for the Administrative Conference of the United States¹² (which relied in part on a 2012 high-response-rate survey of immigration judges nationally), and three sets of recommendations directed to state courts: the ABA’s 1990

⁵ Material about the Tax Court not otherwise references comes from telephone interviews with former Tax Court Chief Judge John Colvin, July 23, 2014 and March 4, 2015.

⁶ *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 891-92 (1991)

⁷ See “Description of the Chairman’s Mark of Various Proposals Relating to access and Administration of the U.S. Tax Court,” at 9 (Feb. 9, 2015), available at <https://www.jct.gov/publications.html?func=startdown&id=4706>

⁸ 26 U.S.C. § 7453

⁹ See, e.g., 28 U.S.C. § 7471 (“Employees”) and § 7472 (“Expenditures”).

¹⁰ See the abbreviated literature citations at notes 71-79 in Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* (prepared for the Administrative Conference of the United States, 2012), available at <http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7, 2012.pdf>

¹¹ Available at

http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.aut_hcheckdam.pdf

¹² *Supra* at note 9

standards for court organization,¹³ its 1992 standards for trial courts¹⁴ and the National Center for State Courts' 2012 "Principles for Judicial Administration."¹⁵

There are, as far as I can determine, no generic structural standards for immigration removal adjudicatory agencies in particular or administrative courts in general. The use of state-court-directed standards is not as curious as it may seem. Immigration courts, Professor Stacey Caplow notes, "basically look[], feel[], and operate[] like most other courts [even though] some of [their] characteristics strike even experienced litigators as foreign."¹⁶ Their comparatively large number of geographically dispersed judges are more than all but a handful of federal executive branch adjudicatory agencies, most of which are based exclusively in the Washington, D.C. area. Most of those agencies have comparatively small caseloads (albeit often of complex cases)¹⁷ compared to immigration judges' average caseloads of over 1,000 per judge.

The NCSC "Principles" draw from various state court reengineering projects and the National Center's performance standards and High Court Performance Framework.¹⁸ The performance standards are partly a response to the ABA's structural standards, on the view that what matters is how courts perform, however they may be structured. The "Principles" and the earlier structural standards, however, are generally consistent.

In footnotes I have referred generally to sources for the suggested characteristic (abbreviations are in this note¹⁹) but have not necessarily incorporated the source's recommendations precisely. Not all the characteristics in the outline below come from outside sources, and some are found in so many sources as to obviate citation, such as the need for more immigration judge law clerks.

IV. IMMIGRATION REMOVAL ADJUDICATION: EXECUTIVE OR JUDICIAL FUNCTION? The most significant principled barrier to an independent immigration court established under Article I is the view that immigration removal adjudication is inextricably linked to national security policy and the conduct of international relations and is, accordingly, properly a function of and under the control of an executive branch department. By contrast, recommendations about state courts naturally assume that the state courts should be independent of the executive branch. "[C]ourt leaders . . . should exercise management control over all resources that support judicial services within their jurisdiction."²⁰

A similar assumption necessarily underlies proposals for an Article I immigration court. Implicit in such proposals are concerns that executive agencies that administer courts—whether or not

¹³ American Bar Association, I Standards of Judicial Administration, Standards Relating to Court Organization (1990)

¹⁴ American Bar Association, II Standards of Judicial Administration, Standards Relating to Trial Courts (1992)

¹⁵ National Center for State Courts, Principles for Judicial Administration (2012)

¹⁶ Caplow, ReNorming Immigration Court, 113 NEXUS 85, 87 (2008), available at http://works.bepress.com/stacy_caplow/35/

¹⁷ For a discussion of these and other standards, see Wheeler, Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods," 59 Duke L. J. 1847, 1869-74 (2010).

¹⁸ See, generally, NCSC, Performance Measurement at <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Performance-measurement.aspx> and High Court Performance Framework at <http://www.ncsc.org/Information-and-Resources/High-Performance-Courts.aspx>

¹⁹ ABACOS for the ABA Court Organization Standards, cited above), ABATCS for the ABA Standards Relation to Trial Courts (cited above), ABAImmComm for the "Reforming" report (cited above), Principles for the NCSC "Principles for Judicial Administration" (cited above), and "BW" for the Benson and Wheeler report prepared for the Administrative Conference (cited above).

²⁰ NCSC, Principles for Judicial Administration at 5 (2012)

they litigate in those courts—may use, or be perceived as using, administrative favors and sanctions to influence judicial decision in favor of executive branch policies. Moreover, judges probably have a greater self-interest in effective management of the courts in which they serve full time than do executive officials, for whom the courts within their departments or agencies are but one of many responsibilities. A former BIA chairman over thirty years ago wrote that Justice Department “interest has been focused largely on components with greater ‘sex appeal,’—the F.B.I., the Antitrust Division and the Criminal Division, for example,” leading him to “doubt that any Attorney General in recent years would have suffered a real feeling of loss if the immigration function were taken out of the Department of Justice.”²¹ Finally, executive branch administration can subject courts to executive branch personnel regulations that are inconsistent, incompatible, or otherwise impractical for judicial institutions.

Whatever the origin of immigration removal adjudication as an executive function,²² the characteristics listed below assume that although the legislative and executive branches make immigration policy and prosecute removal cases (as well as civil and criminal violations of immigration laws), adjudicating conflicts over those prosecutions is an independent judicial function. The difficulty of getting this assumption embodied in a statute is likely to be the most significant principled barrier to an Article I immigration court. A current BIA member wrote that “[g]iven the close connection of many immigration issues to matters of national security, public safety, and foreign relations, proposals to jettison the immigration adjudication function entirely from the political branches of government are unwise and unlikely to be enacted.”²³ The Department of Justice, citing the INA,²⁴ insists that although “immigration judges and the [BIA] members exercise very important functions, making adjudicatory decisions and exercising discretion on behalf of the Attorney General. . . , they are Executive Branch adjudicators and do not serve in purely a judicial capacity.”²⁵

STRUCTURAL CHARACTERISTICS OF AN IDEAL IMMIGRATION COURT

I. ORGANIZATION

A. Underlying Requirements: Achieving the characteristics described in this paper is contingent upon:

1. Congress’s establishing the United States Immigration Court pursuant to its Article I, section 8 authority “[t]o constitute Tribunals inferior to the supreme Court”). This outline assumes a single Immigration Appellate Court (IAC) and a geographically dispersed Immigration Trial Court (ITC). [N.B. Names are placeholders.]
2. The Immigration Court’s accountability. The Court:

²¹ Roberts, “Proposal: A Specialized Statutory Immigration Court,” 5 *Immig. & Nat’lity L.Rev.* 183, 187 (1981)

²² See, e.g., Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 *Cath. U. L. Rev.* 923, 936-37 (2006).

²³ Grant, *Laws of Intended Consequences* at 929 (2006). See also *INS v. Abuda*, 485 U.S. 94, 110 (1988) and *Matthews v. Diaz*, 426 U.S. 67, 81 (1976) as quoted in Benedetto, “Crisis on the Immigration Bench: An Ethical Perspective,” 28 *Journal of the Nat. Assoc. of Administrative Law Judiciary*, 471, 475 (Fall 2008)

²⁴ 8 U.S.C. § 1101(b)(4).

²⁵ 72 *Fed. Reb. No.* 82 at 53673-74 (Sept. 20, 2007), citing (citing , *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999), in which the Supreme Court held that a court of appeals wrongly found deficient a BIA statutory interpretation to which it owed *Chevron* deference).

- a. Understands that its “institutional independence and self-governance . . . entails the obligation to be open and accountable for the use of public resources.”
 - b. Bases its appropriations requests “solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models and the application of appropriate performance measures.”²⁶
3. Adequate funding, to enable the characteristics described below, which Congress provides based on such appropriations requests.
- B. The Immigration Appellate Court²⁷
1. Composition: The IAC consists of a Chief Judge and _____ associate judges.
 2. Jurisdiction: The IAC has authority to review on appeal filed by respondents or the government all justiciable controversies terminated by the Immigration Trial Court but not by executive agencies.²⁸
 3. Process characteristics²⁹
 - a. The IAC has a differentiated case tracking procedure by which a screening panel of judges [or of staff], using rules developed by the court, assigns cases to either a single-judge or three-judge panel track. Three-judge panel disposition is the “default mode of disposition.” Judges assigned a case for single-judge disposition may order its reassignment to a three-judge panel.³⁰³¹
 - b. IAC opinions respond to all non-frivolous arguments raised by the parties.³²
 - c. IAC judges/panels may undertake de novo review of ITC judges’ factual findings and credibility determinations³³ if the record below is inadequate.
 - d. The IAC publishes all precedential decisions and maintains an accessible inventory of non-precedential decisions.³⁴
 - e. Time and clearance goals are aspirational but are used as part of the IAC’s performance monitoring program.
 4. Further review. Respondents may seek review of IAC decisions on appeal to the U.S. Court of Appeals for the circuit in which the removal hearing took place [to the U.S. Court of Appeals for the Federal Circuit].
- C. The Immigration Trial Court (ITC)
1. Composition: The ITC comprises single-level first instance courts consisting of _____ ITC judges, nationally distributed to places of holding court. The number of judges assumes a per judge weighted caseload of _____.

²⁶ Principles at 12

²⁷ Generally, ABACOS at 37-38

²⁸ BW 50-52

²⁹ Items b-d are drawn directly from ABAImmComm 3-28-3-29.

³⁰ BW, 103-04

³¹ ABAImmComm 3-28

³² ABAImmComm 3-29

³³ ABAImmComm 3-29

³⁴ ABAImmComm 3-30

2. Jurisdiction over all removal and related proceedings. Congress has transferred matters (e.g., certain asylum determinations³⁵) better adjudicated at least initially by administrative agencies (but that may have been heard by the ITC's EOIR predecessor courts) to executive agencies.³⁶

2. Process characteristics-- ITCs operate under national procedural rules promulgated pursuant to statutory authority by the Chief Judge of the IAC, supplemented by local rules that are not inconsistent with the national rules.³⁷

a. The ITCs “demonstrate[] procedural fairness,” realizing that “[p]erceptions that procedures are fair and just influence a host of outcome variables, including satisfaction with the process, respect for the court, and willingness to comply with rulings and orders.”³⁸

b. ITC judges issue oral or written opinions, depending on the complexity of the case, that are “sufficiently clear to allow respondents and counsel to understand the bases of the decision and to permit meaningful . . . review” by the IAC and courts of appeals.³⁹

c. ITC judges, not the lawyers or parties, are the “managers of their caseloads.”⁴⁰ “Effective management of [a court's] entire caseload demands that judges, with the assistance of court administrative staff, manage and control the flow of cases through the court . . . , establishing a set of meaningful events, adopting a realistic schedule, creating expectations that events will occur as scheduled, exercising firm control over the granting of continuances,” and “monitor[ing] compliance with established case processing goals.”⁴¹

ITC judges regularly use pre-hearing conferences in appropriate cases as part of their active case management, among other things, to narrow issues, obtain stipulations, exchange information, and set dates for future events, including merits hearings..⁴²

d. The national rules authorize judges to impose monetary or other sanctions on parties or attorneys, for actions meriting sanctions in United States civil litigation.⁴³

e. Time and clearance goals are aspirational but are used as part of each ITC's performance management system.

f. The chief judge of each ITC reviews internal, non-public administrative data on grants and denials of relief from removal and encourages judges with grant rates

³⁵ BW, 39-50

³⁶ ABAImmComm 1-61-64, BW, 41ff

³⁷ ABATCS 77ff

³⁸ Principles 10

³⁹ Adapted from ABAImmComm 2-38

⁴⁰ First Chief Immigration Judge William Robie, “The Purpose and Effect of Proposed Rules of Procedure for Proceedings Before Immigration Judges,” 1 Geo. Imm. L. J. 269, 272-73 (1986), quoted in BW 69.

⁴¹ Principles 8-9, ABA TCS 76ff

⁴² AB ImmComm, 2-41ff, BW, 69-73

⁴³ BW, 85-88

noticeably higher or lower than the mean rate for the court to confer with one another about possible causes of these outlier phenomena.⁴⁴

g. Lawyers from the agency that prosecutes removal orders in ITCs review proposed “Notices to Appear” before filing to determine prosecutorial merit and conformity with prosecution policies.⁴⁵

3. Technology

(a) Proceedings conducted by video transmission

(1) ITC proceedings in which video transmission connects the court and parties use state of the art equipment.

(2) Video transmissions are used principally in proceedings that do not involve witness testimony.⁴⁶

(3) Accompanying technology to provide for contemporaneous electronic transmission of litigation documents.

(4) The ITCs make their video facilities available to lawyers who wish to communicate remotely with their clients in removal litigation.

(b) The record in ITCs is taken through state-of-the-art digital audio recording equipment⁴⁷ operated by a designated staff person.

(c) Foreign language interpretation is by interpreters certified under standards and methods equal to those used by the Administrative Office of the U.S. Courts.

4. Counsel and legal assistance:

a. Representation

(1) Immigration judges overwhelmingly agree that they can conduct adjudications more effectively and quickly when respondents are represented by competent counsel.⁴⁸ To promote procedural fairness all respondents are represented by

(a) Competent counsel, either privately retained or, for those financially unable, funded by the government or by certified pro bono providers,

(b) Non-attorney representatives whom the Immigration Court Administrative Office has certified as competent to provide representation.

(2) The ITC permits limited appearances (representation for parts but not the entirety of the litigation) under regulations promulgated by the chief judge of the ITC.

b. Legal orientations—As a supplement to advice from counsel, not in lieu of it, the administrative office provides grants to permit all detained respondents to receive a “know-your-rights” presentation prior to their initial appearances.

⁴⁴ Ramji-Nogales, Schoenholtz, and Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.*, 295, 382 (2007)

⁴⁵ ABAImmComm1-61

⁴⁶ ABAImm.Comm. 2-41, BW, 95-100

⁴⁷ ABAImmComm 2-40 to 2-41

⁴⁸ BW, 56

D. Judges

1. Qualifications generally:⁴⁹ IAC and ITC judges possess the basic requisites for the judicial office in the United States, including bar membership, judicial temperament, good character, emotional stability, and substantial experience as lawyers, judges, or teachers. Knowledge of and experience litigating or teaching immigration law is a desirable but not mandatory qualification, but those without such knowledge demonstrate the ability to master this area of the law expeditiously.

a. IAC judges have a variety of viewpoints and experiences, including some who have been first instance judges, a capacity to entertain contrary views and adjust opinions as appropriate, judicial temperament, expository writing skills, and sensitivity to cultural differences and ability to avoid making implicit judgments based on respondents' national origins.

b. ITC judges have had experience in the adversary system either prosecuting removal orders and defending respondents or both, or experience in other litigation settings; familiarity with standard rules of procedure and evidence and ability to apply variations of both as demanded by the rules governing removal litigation; and ability to produce well-reasoned decisions that respond to all nonfrivolous arguments and evidence presented. ITC judges exhibit judicial temperament, and sensitivity to cultural differences and ability to avoid making implicit judgments based on respondents' national origins and ability to keep an open mind when making credibility determinations.

2. Selection method⁵⁰

a. IAC judges are appointed by the President upon confirmation by the Senate

b. ITC judges are appointed by the Chief Judge of the IAC, with the concurrence of a majority of the IAC. In processes somewhat analogous to those used to select U.S. bankruptcy judges⁵¹ and magistrate judges,⁵² the Chief Judge selects nominees from lists maintained by a broad-based "Standing Referral Committee"⁵³ comprising [examples] representatives of the Departments of Homeland Security and of Justice, the ABA Section on Immigration, the American Immigration Lawyers Association, the Immigration Section of the Association of American Law Schools, and appointees of the chair and ranking member of the House and Senate Judiciary Committees. Membership on the approved-candidate list is through a competitive process that is as rigorous as that used to select Administrative Law Judges,⁵⁴ "who, arguably make less consequential decisions."⁵⁵

3 Terms⁵⁶: IAC and ITC judges

⁴⁹ Generally, ABACOS at 47ff and ABAImmComm at 2-29

⁵⁰ Generally ABACOS at 47ff and ABAImmComm 6-27-6-28

⁵¹ See 28 U.S.C. § 152(a) (1)

⁵² See 28 U.S.C. § 631(a).

⁵³ ABAImmComm 6-27 to 6-28

⁵⁴ ABAImmComm at 6-20

⁵⁵ Refugee Roulette, 380

⁵⁶ Generally, ABACOS at 63

- a. Serve ___ year (IAC) and ____ (ITC) fixed, renewable terms
 - [b. Probationary period?
 - c. Must retire at age _____
 - d. Temporary service: IAC and ITC judges, if retired, whether voluntarily or having reached the mandatory retirement age, may be recalled to service by the Chief IAC Judge for a period not to exceed one year, which may be renewed.
 - e. The Chief IPA judge does not authorize pro tempore judges⁵⁷ who have not served previously as IAC or ITC judges.
4. Compensation
- a. Salaries:
 - (1) IAC judges receive a salary equivalent to ___% of the salary of a U.S. circuit judge.
 - (2) ITC judges receive a salary equivalent to ___% of the salary of a U.S. district judge.
 - b. Retirement/Benefits are determined under the Immigration Court's personnel plan, not by the Office of Personnel Management.
5. Education⁵⁸
- a. New immigration judges receive orientation education of _____
 - b. All immigration judges are able to attend, each year on a national or regional basis, at least one continuing education seminar with emphasis on making credibility determinations, detecting fraud, changes in immigration statutory and case law, elements of procedural fairness (including active case management), and use of video technology
 - c. The administrative office provides immigration judges electronic and hard copy access to reference manuals and bench books suggesting best practices.
 - d. The administrative office maintains and/or has arranged with other government agencies involved in asylum adjudication on-line access to information on country conditions and the status of human rights, of which judges may take judicial notice.
6. Performance Evaluation and Monitoring.
- a. The Immigration Court recognizes that judicial performance evaluation and monitoring are not forms of judicial discipline and the results of such evaluation and monitoring are not appropriate materials for any disciplinary processes.
 - b. Judicial Performance Evaluation Each judge undergoes, at ___-year intervals, a judicial performance evaluation in which a broad-based standing committee of judges, lawyers, and members of the public—selected by multiple appointing authorities— evaluate each judge on criteria such as command of relevant substantive

⁵⁷ ABACOS, 70.

⁵⁸ ABAImmComm generally at 2-39

law and procedural rules; impartiality and freedom from bias; clarity of oral and written communications; judicial temperament that demonstrates appropriate respect for everyone in the courtroom; administrative skills, including competent docket management; and appropriate public outreach. The results are provided to the judge to encourage self-improvement and to the public to promote transparency and the Administrative Office's curriculum design unit.⁵⁹

c. Court performance monitoring: The IAC and the ICTs understand that "institutional independence and self-governance . . . entails the obligation to be open and accountable for the use of public resources." The Immigration Court's components are in a "constant process of self-assessment and public scrutiny . . . Courts . . . continually monitor performance [to] know exactly how productive they are . . . and what parts of the system and services need attention and improvement." The Court's assessments use "objective data and [are] methodologically sound."⁶⁰

(1) It uses surveys and analyses of case processing to evaluate court performance on such criteria as access and fairness; public trust and confidence; aggregate results of judicial performance evaluations; clearance rates; average time to disposition; hearing date certainty, age of active pending cases; costs per case, and court employee satisfaction.⁶¹

(2) The Court posts performance measures of each court on its public website.

7. Judicial Misconduct and Disability

a. Code of Conduct—The immigration Court's Code of Conduct is based on the ABA Model Code, adapted as appropriate.

b. Mechanism⁶² Congress has established a small, independent and separately staffed Immigration Court Judicial Conduct Commission, comprising judges designated by the chief judge, lawyers designated by _____, and lay persons designated by _____ to receive, investigate, and, as necessary, initially adjudicate complaints alleging judicial misconduct and performance-degrading disability.

(1) Complaints about the merits of a judge's decision or procedural rulings are not grounds for a complaint.

⁵⁹ Adapted from "Judicial Performance Evaluation, "in The O'Connor Judicial Selection Plan (Institute for the Advancement of the American Legal System, June 2014) available at <http://iaals.du.edu/initiatives/quality-judges-initiative/oconnor-advisory-committee/model-selection-process/performance-evaluation/>. See also ABA COS 71ff, ABAImmComm 2-32 to 2-34, and BW 106-07

⁶⁰ Principles, at 11. See also, e.g., The Evaluation of European Judicial Systems on the website of the European Commission for the Efficiency of Justice (CEPEJ) available at http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp and The International Framework for Court Excellence, available at <http://www.courtexcellence.com/>.

⁶¹ Adapted from National Center for State Courts, CourTools, available at <http://www.courtools.org/> and Utah State Court Performance Measures, available at <https://www.utcourts.gov/courtools/>.

⁶² Adapted from the description of state judicial discipline bodies in Table 11, "Judicial Discipline: Investigating and Adjudicating Bodies," in State Court Organization (Bureau of Justice Statistics, 2004) available at <http://www.bjs.gov/content/pub/pdf/sco04.pdf> and ABA ImmComm. at 2-35-2-36.

- (2) The Code of Conduct, as interpreted by the Commission, is the basis for determining misconduct and disability.
- (3) The Commission publishes decisions on such complaints so as to develop a body of case law to inform the Code.
- (4) The Commission provides judges advisory opinions, on request, about its application to actions the judge may be contemplating; it redacts and posts on the Court's public website opinions likely to be of general interest.
- (5) When the Commission does not dismiss a complaint, the Commission adjudicates it, imposes authorized sanctions if appropriate, and posts the sanction and the name of the judge on the Court's public website.
 - (a) Sanctions range from private reprimands to removal from office.
 - (b) The complainant or subject judge may appeal the result to the IAC

c. The Court website contains:

- (1) Precedential decisions interpreting the Code of Conduct, redacted as necessary
- (2) Sanctions imposed in individual cases and the name of the sanctioned judge (unless sanction is a private reprimand)
- (3) Redacted advisory opinions likely to be of general interest
- (4) Summary statistics on complaints filed and dismissed, basis and nature of complaint, number and types of complainants, reasons for dismissal, and action on non-dismissed complaints.

8. Staff to assist judges (in addition to appropriate office support staff)

a. IAC judges

- (1) Each IAC judge has ___ law clerks
- (2) A central legal staff administers the IAC case-screening program and prepares draft memorandum opinions and other tasks assigned by the court.

b. ITC

- (1) Each ITC judge has ___ law clerks
- (2) In courts with substantial proportions of pro se litigants, a pro se law clerk prepares memoranda and other materials about specific cases to assist the judges in their disposition.⁶³

II. IMMIGRATION COURT ADMINISTRATION AND MANAGEMENT⁶⁴

A. Overall administration

1. The Chief Judge of the IAC.

⁶³ BW, 66ff.

⁶⁴ Generally, ABACOS 83ff

a. Selection: The President designates one of the IAC judges who is less than seventy years of age to serve as Chief Judge,⁶⁵ seeking a judge with “skills and experience required to govern complex organizations.”⁶⁶

(1) The Chief Judge may continue to serve as Chief Judge until reaching the age of seventy or until the president designates another judge to serve as Chief Judge.⁶⁷

(2) While serving as Chief Judge, the Chief Judge receives a salary ___ % higher than that of the other IAC judges.

b. Major administrative responsibilities. The Chief Judge, with assistance of the Court’s Administrative Office and Advisory Conference, is responsible for the overall administration of the Immigration Court’s components. Responsibilities include:

(1) Establishing administrative rules and regulations, and making clear to those who work in the system and to interested publics “how the governance structure operates, who has authority to make decisions, how decisions are made, and how all component parts relate.”⁶⁸

(2) Procedural rule-making: Maintaining, pursuant to statutory authority, a program to develop and amend the procedural and evidence rules of the IAC and ITC through committees of judges and lawyers. Committee meetings, materials, and records of proceedings of which are open or available to public observation and/or inspection. The objective of the national rules is uniformity of procedure.

(3) Budget: Preparing the Court’s annual appropriations request using Congressionally-mandated formats, for submission through the Office of Management and Budget to the Congress, and defending the request as necessary before OMB and the appropriations committees.

(a) The Immigration Court’s appropriations requests are “based solely upon demonstrated need supported by appropriate business justification, including the use of workload assessment models and the application of appropriate performance measures.”⁶⁹

(b) The Chief Judge administers the funds provided according to accepted financial management practices, with controls and periodic audits.

(4) Representation: Maintaining lists of competent pro bono counsel to assist respondents in removal proceedings.

(5) Personnel: Establishing and maintaining the Court’s personnel policies for judges and supporting personnel, including but not limited to position classifications and salary/benefit levels, personnel development programs, and disciplinary policies. The Court has its own personnel plan and is not subject to the Office of Personnel Management.

⁶⁵ From 28 U.S.C. §171 (b) (re designation of chief judge of U.S. Court of Federal Claims)

⁶⁶ Principles at 4

⁶⁷ From 28 U.S.C. §171 (b) (re designation of chief judge of U.S. Court of Federal Claims)

⁶⁸ Principles at 3

⁶⁹ Principles at 12

(a) Establishing processes for temporary transfer of active judges and temporary recall of retired judges.

(b) Judicial Selection

[1] Providing logistical support to the Standing Referral Committee

[2] Publishing annual comparative descriptive statistics on the racial, ethnic, and gender composition of both courts (and their staffs) and the pre-appointment vocational backgrounds of the judges.

(c) Education

[1] Primarily for judges

[a] Developing programs of orientation and continuing education for judges and court staff.

[b] Maintaining deskbooks and other best-practices suggestions

[c] Providing fora to allow judges to post and share case-management techniques and innovations.

[2] Primarily for those representing respondents and respondents⁷⁰

[a] Providing, in consultation with pro bono groups, continuing education programs, formats, and model curricula to assist pro bono attorneys and others providing representation to respondents⁷¹

[b] Providing pro se versions of practice manuals developed for judges

(d) Providing logistical assistance to the Judicial Performance Evaluation Commission and assists individual courts in their performance monitoring

(6) Facilities and technology:

(a) Working with external agencies to secure facilities that are both safe and accessible, whether or not the hearing location is within a detention facility, and state-of-the-art technology.

(b) The Administrative Office regularly evaluates the costs and benefits of video transmission proceedings, including realistic accounting of monetary savings attributable to its use.⁷²

(7) Statistics and analysis: Establishing and maintaining a transparent program of quantitative descriptions of IAC and ITC matters (by type) received and disposed and methods of disposition.

(a) Developing and maintaining a method to assign differentiated weights to various matters in terms of the judge-time reasonably necessary for proper disposition and uses the resulting weighted caseloads as one part of the

⁷⁰ Generally BW at 62-68

⁷¹ See, e.g., the U.S. Tax Court's "Clinical, Student Practice & Bar Sponsored Calendar Call Program," available at <https://www.ustaxcourt.gov/clinics.htm>

⁷² BW 94-95

Court's appropriations justification, and to compare and analyze individual ITC performance and needs.⁷³

(b) Regularly assessing the per judge weighted caseloads of each ITC and determining whether to transfer (temporarily or permanently) judgeships and staff among the ITCs, whether to close hearing locations or open new locations and seek additional judgeships and staff for them.

(c) Publishing, by court, performance measurements in appropriate categories, including but not limited to clearance data.

(c) Distributing to the IAC and to each ITC aggregate and per judge data on grants and denials of requests for relief from removal.

(8) Maintaining and posting lists of disciplined attorneys and representatives

(9) Taking other actions as necessary to ensure the effective and expeditious administration of the business of the Immigration Court.

c. Major representational responsibilities: The Chief Judge is the Court's chief spokesperson and representative to the press, other government agencies (including the Congressional committees and subcommittees responsible for substantive legislation affecting immigration removal litigation and the Court's appropriations), and interested publics. This role does not preclude other judges' speaking to various entities.

2. Immigration Court Administrative Office⁷⁴

a. The Chief Judge of the IAC appoints the director of the Office [after consultation with the IAC] [after consultation with the Advisory Conference, see below]. The relationship between the Chief Judge and director is a collaborative one.

b. The Office develops, for the Chief Judge, proposals for administrative policies referenced above and implements the policies and programs determined by the Chief Judge in consultation with the Director.

c. The Office has a research staff to assist courts in performance evaluations, analysis of caseload data, and similar tasks.

d. The Office maintains its own educational staff but also seeks, as appropriate and subject to the resources of the Federal Judicial Center, the assistance of the Center pursuant to the Center's mandate to "present to other government . . . instrumentalities whose . . . activities relate to the administration of justice in the courts of the United States the recommendations for the improvement of such programs or activities"⁷⁵

3. Immigration Court Advisory Conference [Council] of judges and court administrators⁷⁶: The Immigration Court recognizes the "need for open communication with meaningful input from all court levels into the decision-making process. An

⁷³ BW 33-34

⁷⁴ Generally, ABACOS 89ff

⁷⁵ 28 U.S.C. §623 (a) (4)

⁷⁶ Generally, ABACOS 82

effective system of governance does everything possible to foster excellent communication and to keep information flowing.”⁷⁷

An advisory conference or council of ITC judges and court administrators, selected by _____ is representative of the Court’s components in respect to geography and the various types of matters dominating individual ITC dockets. The Conference meets periodically in person and or virtually or by mail with the Chief Judge and Administrative Office Director to receive updates on administrative developments and present recommendations.

B. Immigration Trial court administration

Each immigration court is subject to the authority of the IAC Chief Judge as the administrative head of the Immigration Court, but “has its own administrative structure so that it can manage its own business.”⁷⁸

1 Chief judge. Each multi-judge ITC has a chief judge.⁷⁹

a Selection/Term—Chief trial judges are appointed by the Chief Judge of the IAC for a term of _____.⁸⁰

b. Responsibilities⁸¹ (exercised with the ITC court administrator and appropriate consultation with the judges of the court), may include (depending on the size of the court):

- (1) Setting judicial and administrative performance examples
- (2) Fostering agreement and appropriate cultures within the court for effective case management and judge-staff cooperation⁸²
- (3) Appointing court committees and presiding over court meetings
- (4) Initiating policy review and development of internal operating procedures
- (5) Counseling other judges in their performance of administrative, including case management, responsibilities
- (6) Overseeing the court’s performance monitoring program
- (7) Reviewing internal, non-public administrative data on grants and denials of relief from removal and encouraging judges with grant rates noticeably higher or lower than the mean rate for the court to confer with one another about possible causes of these outlier phenomena.⁸³
- (8) Representing the court in relations with public agencies, the bar, the news media, and others interested or involved in immigration removal adjudication

⁷⁷ Principles at 3

⁷⁸ ABACOS at 20, Principles at 3

⁷⁹ BW 111-116

⁸⁰ Generally, ABACOS at 84, Principles at 4

⁸¹ Generally, ABATCS 44ff

⁸² Ostrom et al, Trial Courts as Organizations 127 ((2007); see also, Wheeler, supra note at 1874-1878.

⁸³ Refugee Roulette, 382

- d Consultation⁸⁴—All judges meet at regular intervals and when necessary to discuss and formulate court policy
- 2. Support staff and resources⁸⁵
 - a. Each court has a court administrator appointed by the chief judge with advice and approval of the judges of that court and Director of the Administrative Office, with education and experience consistent with standards promulgated by the director..
 - b. Responsibilities including staffing all court committees and assisting the chief judge in the exercise of that office’s functions and responsibilities.

⁸⁴ Generally, ABATCS 49ff

⁸⁵ Generally, ABACOS 91ff