

OUTLINE OF STUDY OF IMMIGRATION REMOVAL ADJUDICATION

DRAFT

Submitted by

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April 11, 2011

This outline was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees.

INTRODUCTION

This study for the Administrative Conference will examine the function and structure of immigration removal adjudication within the Department of Homeland Security (DHS) and the Justice Department's Executive Office for Immigration Review (EOIR).

What we will not study

We will not study other forms of adjudication related to immigration matters. They include, for example, the adjudication of immigration benefits such as family or employment-based petitions or the first stage of the asylum adjudication process, which occurs within the Citizenship and Immigration Service (CIS) division of DHS, unless that adjudication is directly related to later removal proceedings. There are several types of visa petitions and applications that require both CIS and EOIR to coordinate or interact during the adjudication within the immigration court. The most common of these applications is called "adjustment of status to permanent resident." In Fiscal Year 2010 the EOIR completed 8,475 adjustment of status petitions. (2010 Statistical Yearbook R3). Also beyond the scope of this study are federal criminal prosecutions of immigration crimes such as smuggling or unlawful entry after an administrative order of removal.

Recently, the most visible object of attention to immigration adjudication has been its proper site within the federal government. Some observers believe that relocating the immigration adjudication that now occurs in executive branch administrative tribunals to a statutory court, commonly called an Article I court, would enhance the adjudicators' professionalism and autonomy. There is debate about whether to establish such a court with the Department of Justice or elsewhere within the executive branch or even within another branch of government. That subject is not an object of this report, in part because it has been well analyzed and in part because the prospects for major structural alteration appear remote for the foreseeable future. We will, however, evaluate published reports' and academic studies' suggestions about immigration adjudication that could be incorporated short of creating a statutory (Article I) court.

What we will study

Immigration removal adjudication occurs in several fora. Congress has authorized DHS to make some removal determinations without any administrative hearing procedure and to refer other matters to the immigration courts. How DHS agents decide to initiate removal proceedings affects the workload of EOIR's immigration courts, where removal adjudication for most non-citizens occurs.

In recent years the courts' workload has been increasing, producing in some courts lengthy delays in processing cases. In fiscal year 2010 the immigration courts received almost 393,000 matters, an increase of more than 40,000 matters from fiscal year 2006. Immigration judges in 2009 averaged 1,251 completed proceedings per judge, with considerable variation among the courts—from 506 per judge in one court to 3,504 in another. These per judge figures are higher than those found in what are typically considered high-volume administrative courts. The ABA Immigration Commission's 2010 Report noted an average of 544 hearings per year in 2007 for Social Security

Administration ALJs, and 729 decisions per year in 2008 on average for Veterans Law Judges.

It appears that a small percentage of the immigration court removal orders are appealed to EOIR's Board of Immigration Appeals (BIA).¹ The BIA also has jurisdiction over some other forms of agency adjudication such as the review of denied marriage petitions; this review constitutes a smaller part of its docket. In fiscal year 2010, the appeals from DHS decisions represented nearly 24% of all appeals; 8,591 of 35,787 (Yearbook page S2). A non-citizen subject to a final order of removal may seek review in a federal court of appeals. The last decade saw a substantial increase in the number of such cases. The growth peaked at mid-decade.

Scope of analysis

This report will analyze procedural and structural aspects of immigration removal adjudication. Both subjects have been the object of popular and scholarly comment for over half a century, with heightened attention over the last decade or so as immigration policy in general has emerged as a major source of public controversy.

We will examine aspects of immigration adjudication in two stages. Stage one includes the origination of removal cases in the DHS and evaluating how the variety of cases and procedures used impact the immigration courts' intake. We also intend to focus on case management procedures—analogue to pretrial procedures in other courts—that immigration courts might use to conserve judicial time and effort.

Stage two includes the examination of several other aspects of immigration court procedure and structure, including video hearings, specialized immigration court staffing and alternative court management approaches, and the work of the BIA and its impact on the immigration courts. In this second stage we will also analyze obstacles to adequate representation in removal proceedings.

We will treat none of these subjects comprehensively. Instead we will summarize major findings from the literature, comment on recommendations in that literature that we believe ACUS should consider endorsing, and then identify some specific aspects in each topic area that have received less attention than they merit, frame questions about them that are amenable to research, seek answers to the questions, and, based on those answers, suggest new steps or procedures that might be implemented, at least on a pilot basis.

Everyone who has given immigration adjudication more than a casual glance knows that lack of resources in the immigration courts and the BIA are a major hindrance to creating an immigration adjudication system that serves the legitimate interests of non-citizens, their U.S. family members and the United States. The resource situation is unlikely to

¹ It is difficult to assess the actual rate of appeal from the Statistical Yearbook. In fiscal year 2010 the BIA received 27,196 appeals from immigration judge decisions (S2). These appeals can be filed by either DHS or non-citizen respondents (the Yearbook does not break them out). At first blush, it appears that the 27,196 appeals represent approximately 10% of the total 287,207 completions (D1) made by the immigration judges. But the rate of appeal depends on the universe of immigration judge decisions eligible for or likely to be appealed. If the denominator is all IJ completions, the rate of appeal is 9.4% (27,196/287,707). But if the denominator is completions only in cases in which the respondent filed an application for relief from removal (reported at N1), the appeal rate is 37.8% (27,196/71,924). Knowing more about which and how many immigration judge completions are appealable will provide a firmer fix on the appeal rate.

improve in the foreseeable future and, given rising concern about the national debt, may well get worse. With that understanding, we seek recommendations that are practical and likely to be cost effective.

Method of analysis

Beyond reviews of the literature, we plan interviews with representative participants in the process, including immigration judges and staff, and others with knowledge of immigration adjudication or of analogous subjects that may inform immigration adjudication analysis. The interviews will be open-ended and semi-structured, designed to elicit and test ideas rather than produce quantifiable responses. We assume we will have ready access to officers of the National Association of Immigration Judges but will need cooperation from EOIR and DSH officials to go beyond those individuals. We will interview some of the attorneys who helped prepare the ABA Commission on Immigration's very detailed 2010 report. We will interview the leadership of other bar associations that specialize in immigration matters, e.g., the American Immigration Lawyers Association and the National Immigration Project. We may undertake as well some limited quantitative analysis.

Schedule

Subject of course to ACUS's preferences, and given the tight research and draft report preparation window between April and August we propose to submit draft and final report on stage one of the study by August 31 and November 1 of 2011, and draft and final reports on stage two by December 19 and February 1 of 2012.

Assessments

We will consider whether we can, and if so, how we can, answer the questions posed in clause 8 of the contract:

- whether the recommendations will achieve better agency compliance with existing laws/regulations; increased transparency; more robust public participation in immigration adjudication; better public understanding of the rules and regulations governing immigration adjudication; better communication; and administrative simplification, and better coordination with the other agencies responsible for aspects of connected immigration adjudication; and
- whether the recommendations' implementation will reduce costs to the government and taxpayers.

We will use qualitative measures principally but not exclusively to evaluate the likelihood that the recommendations we offer will achieve their policy objectives. EOIR does not break down, at least for public consumption, budget categories for its various components. Moreover, its published caseload data are in fairly general categories. We will also consider what other questions, if any, might illuminate how the recommendations might achieve their policy objectives.

IMMIGRATION ADJUDICATION: AN OVERVIEW

This section will briefly describe the DHS and DOJ agencies and what they do (and appellate access from their decisions). These are well-trod paths, and we do not propose to use a great deal of space to repeat what is available in many other reports and sources.

ASSESSMENTS AND RECOMMENDATIONS—STAGE ONE

Origination of Removal Cases

We envision a “bird’s eye view” of how removal cases originate, an approach for which ACUS is uniquely well situated. Immigration court workload is obviously affected by the discretion exercised by Homeland Security agencies that initiate removal proceedings in immigration courts and that, in some cases, can order removal without immigration court review. Starting at least in the late 1980s and continuing to the present, agency officials and outside observers have urged immigration enforcement agencies to establish prosecution policies that direct limited agency resources to the highest priority removal candidates, and to promote those policies’ consistent application within and across agency borders.

DHS prosecutorial policies—per se—are outside the scope of our study, but we think it proper to give some attention to two aspects of Homeland Security agencies’ exercise of their authority. The immigration courts’ ability to manage their workload starts with an understanding of factors that shape and feed the growth of that workload. With the creation of DHS and its three immigration related subdivisions—CIS, as well as Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE)—the coordination and uniformity of policy about the origination of removal proceedings is fractured and perhaps completely uncoordinated.

Congress has granted two of these DHS agencies—CBP and ICE—the authority, in some instances, to order aliens’ departure under an order of “expedited removal” without filing a Notice to Appear (NTA), which transfers jurisdiction to the immigration courts. If an inspector or border patrol agent, after interviewing a non-citizen, believes the individual lacks entry documentation or has used misrepresentation or fraud to seek entry, the officer may order the non-citizen removed with no further process other than the approval of a supervisory inspector. The statute does oblige the agencies to afford the non-citizen a chance to demonstrate a “credible fear” of persecution if returned to his or her home country. An inspector’s belief that the individual has met the credible fear standard briefly delays expedited removal to allow an interview with a member of the CIS asylum corps. If an asylum officer believes the individual is likely to be able to establish asylum eligibility, the case is referred to an immigration judge for determination. If the asylum corps does not make this finding, the non-citizen is given the option of seeking review in the immigration court or waiving the review and submitting to expedited removal. There is no appeal to the BIA of a refusal of asylum in these expedited cases.

Similarly, ICE may use a form of “hearingless” or expedited removal by serving notice of intent to remove non-citizens who have been convicted of an aggravated felony and do not already have permanent resident status. The individual has a chance to rebut the allegations by written submission only and must do so within fourteen days or may waive rebuttal. There is no immigration court role in these § 238 removals.

In 2008, according to the ABA Immigration Commission, 32 percent of removals did not engage the immigration courts’ attention. The Commission said these non-judicial removals implement Congress’s intention to alleviate immigration court workload by allowing administrative removals of individuals whose lack of authorization to be in the United States is, in the words of the legislative history of the 1996 Act, “indisputable.”

However, establishing “indisputability” in the removal context is hardly a simple task. Moreover, expedited removal is not limited to the border. It is used within the interior of the U.S. as to persons apprehended without documentation who are within 100 miles of an international border and cannot establish that they entered more than fourteen days previously. Expedited removal also covers persons whom the officer believes entered by sea without inspection and cannot establish that the entry was greater than two years before. Both of these expansions were made by Notice published in the *Federal Register*.

We will seek to clarify why, from an implementation standpoint, certain removal cases require immigration court review while others are appropriate for disposition by DHS. And, on that basis, we will ask whether there are other categories of cases now subject to immigration court adjudication that could be efficiently resolved by non-adversarial adjudication if there were sufficient administrative review and record-keeping protections.

We will also examine what effect, if any, the existing expedited removal or stipulated removal procedures, including in absentia proceedings, have on the efficiency and operation of the immigration courts. In some situations, the immigration judges spend a significant amount of time considering motions to reopen earlier proceedings because there are few, if any, remedies or opportunities that afford the individual the ability to challenge the sufficiency or accuracy of such an expedited order. The ultimate time savings in court resources provided by administrative removals in the first instance may disrupt court procedures in collateral attacks.

In some removal cases, the adjudication procedures require holding the immigration court proceedings in abeyance while segments of the adjudication are reassigned to DHS’s Citizenship and Immigration Service. Granting CIS greater authority to complete the adjudication in these cases or undertake it as an alternative to initial adjudication within the immigration courts could have significant impact on the workload of those courts. For example, allowing the CIS asylum corps to complete the asylum adjudication in expedited removal cases without immigration court review unless the application was denied might help reduce periods of detention and free court resources. Another area may be allowing CIS authority to adjudicate applications for adjustment of status raised as a defense to removal and to terminate or stay the immigration court proceedings while the CIS makes an initial determination of statutory eligibility for such relief. At the current time, there are many procedural hurdles because both EOIR and CIS have to coordinate to complete adjustment of status adjudications and there can be significant docket and paperwork delays inherent in the dual agency participation in these adjudications.

Methods of analysis

- a. Review of the literature and other commentary since the 1980s on how the prosecutorial functions now lodged in DHS are carried out and how they might be refined. We hope to compare the ways that other federal agencies prioritize enforcement actions and how they train agency personnel in implementing formal adjudication.
- b. Interviews with DHS officials on how decisions to file NTAs are made, and with immigration judges and others on the workload created by challenges to expedited removals.

c. Review of the immigration courts' dockets, processing times and patterns of adjudication based on statistics compiled by EOIR, interviews with agency personnel, and random selection of files, if time allows.

c. Other, to be determined.

Assessments of likely results of implementation

To be determined

Preliminary immigration court case management procedures and staffing alternatives

Preliminary case management procedures

Most American courts use status conferences and pretrial motions to eliminate or narrow issues that the judge must resolve or to identify novel issues that might require special briefing. Motion practice in the immigration courts is largely limited to motions for reconsideration or motions to reopen—both of which require vast amount of court resources and are perhaps made necessary by inadequate or no representation in the first instance.

We will assess the extent to which immigration judges use basic tools of pretrial case management adaptable to the immigration court setting—including tools not mentioned in the Chief Immigration Judge's "Immigration Court Practice Manual"—to identify cases that might be fairly disposed of without the full panoply of proceedings and hearings now employed. We will also consider the adaptability of some other pretrial measures to the immigration courts.

Staffing alternatives

As we note below, staffing alternatives for immigration courts, although likely precluded by lack-of-funds, are worthy at least of mention. For example, U.S. trial courts employ staff attorneys as "pro se law clerks" to screen pro se submissions to identify their legal merit for the judge's consideration and to respond orally and in writing to questions posed by pro se litigants about legal procedure and other process in the court (but not substantive legal questions). We will assess whether such positions could provide efficiencies in immigration adjudication, which is pro se-intensive.

Methods of analysis

We will assess the fairly diverse and detailed literature about immigration court practices available in sources such as the studies by the GAO, the Inspector General, the OMB, the American Immigration Lawyers Association, the National Immigration Project, the ABA Commission on Immigration Reform and the training materials and annual conferences of the EOIR. We will supplement that review with interviews with immigration judges and immigration court staff, and assessments of staff support positions in other courts.

Assessments of likely results of implementation

To be determined

ASSESSMENTS AND RECOMMENDATIONS – STAGE TWO

Representation of Non-Citizens

About half the individuals, known as respondents, in immigration court removal proceedings are not represented by counsel, in part because of the statutory mandate that any representation that they receive be at no cost to the government. The private immigration bar and pro bono organizations provide representation that varies considerably in its quality. This matter has been the subject of extensive literature and numerous efforts to enhance representation. It is a topic of interest on one level because immigration adjudication implicates fundamental human rights and adequate representation is essential to protecting those rights. We take that point, but, given the attention it has received and is still getting, do not intend to make it the focus of our research. We want, instead, to deal with some unstudied or understudied practical aspects of providing representation.

Adequate representation of non-citizens is stymied by factors other than the ban on government funding. One is the difficulty of providing representation to people in detention, especially if the detention site is remote and subject to change without notice to the respondent's lawyer. Another factor is the reluctance of public officials to facilitate representation in removal proceedings if the only perceived beneficiary of the representation is the non-citizen, especially those under criminal charges.

Enhancing telephonic access to counsel for people in detention

We will investigate suggestions made to us by ACUS staff that audio links established and maintained by DHS could enable private attorneys, pro bono groups, and law school clinics to provide legal advice to immigrants in pre-removal detention. Even where non-profit organizations post information about free phone lines, the hours and availability of help is severely limited due to the limited resources of those organizations. If ACUS wishes us to pursue this suggestion, we will try to learn: (1) DHS's interest in implementing, probably on a pilot basis, the technology for secure audio links that representation providers could use, (2) what types of providers might be willing to use the technology, and (3) what kind of representation might they provide using the technology. Would they use it only to answer detainees' procedural questions or use it more extensively, to provide substantive advice or design litigation strategies, for example.

Creating even this simple enhanced technology in detention centers, however, faces considerable hurdles, including objections that government-funded links would violate the ban on use of government funds for representation for those in removal proceedings, even if users paid for service time. The proposal may be doomed as well by realities on the ground, including the refusal of detention facilities, including state and local facilities, in which DHS rents space, to allow such links. A newly released report of the Migration Policy Institute cited a 2010 National Immigrant Justice Center study that said 78 percent of the over 25,000 detainees it surveyed were in facilities that prohibited attorneys from scheduling private calls with their clients.

Even DHS-installed phone links may not ease some current barriers to communication with counsel or the necessary follow-up, such as calling abroad to seek documents

counsel may have advised the detainee to secure. In some detention centers it is very expensive for the detainees to purchase phone cards. Detention center rules often prohibit gifts of cards and the prices are much higher than for cards commercially available outside the prison. Detainees often have to make collect calls. In some centers, phone calls must be made in an open setting, lacking all privacy and making it very difficult to have confidential conversations.

Technology is reducing the cost of domestic and international phone calling and it might be possible to provide detainees access to voice over secured internet protocols (VOIP) that might greatly facilitate communication. Accessibility to text or SMS messaging and allowing incoming calls prearranged by reservation might also be worth evaluating.

Other technological possibilities

In some parts of the country non-profit organizations visit detention centers and provide “Know Your Rights Presentations” and some are able to do some screening of cases for later referral for full representation. These presentations fall within EOIR’s federally funded “Legal Orientation Program,” which Attorney General Holder has described a “critical tool for saving precious taxpayer dollars.” But many of the detention centers are in locations that are not easily accessible by attorneys or nonprofit representatives. Moreover detainees may miss a presentation because they are moved from a facility before they can listen to the relevant program or meet with any potential representative. Language accessibility can also be a problem. Many “know your rights” presentations are made only in English or Spanish yet the detained population may have dozens of other languages. It might be possible to provide some of this information through prerecorded video with foreign language captioning. The technology to facilitate this is widely used on such websites as You Tube. If the detained population had access to these recordings, then later in-person visits or telephone consultation by non-profit organizations could spend more time on case by case assessment and counseling.

Greater use of “accredited representatives”

EOIR allows “accredited representatives” to appear in the court to represent non-citizens. Accredited representatives are non-attorney employees of nonprofit organizations, who apply to serve based on their experience and training. We will assess the value of these services and whether their expansion can realistically enhance representation’s availability.

Estimating representation’s benefit to the government

Some studies refer to, but do not necessarily fully investigate, how the government might benefit from greater availability of representation to aliens. Government receptivity to even modest programs to facilitate representation in removal proceedings may be informed by a straight-on, honest cataloging of such benefits, which include:

- reducing detention costs when detained people learn that they have no grounds for relief, leading them to accept removal rather than oblige the use of tax dollars to detain them until their hearing;
- shortening immigration removal proceedings, and thus in some cases detention costs, by (a) relieving the immigration judge of the obligation of affirmatively

informing the respondent of opportunities for relief and taking court time to build a record of adequate notice and advisories; (b) avoiding or reducing EOIR-permitted continuances that immigration judges grant to allow respondents to seek representation;

- helping to develop the administrative record by preserving important issues for further agency or judicial review;
- educating judges— The INA is a very complex statute, and a significant number of cases present varying statutory interpretations about which the courts of appeals are frequently in conflict. Immigration judges and others cite inefficiencies created by a lack of judicial education programs. Such programs are essential components of any well-administered court system. The adversary system, though, is itself a form of judicial education. Two competent, opposing lawyers’ arguing a point provides a judge assurance that she has the best information she’s likely to have on which to make a decision;
- ICE Trial Attorneys— when the respondent is represented, ICE counsel can handle a higher volume of cases and focus on the complex or difficult cases.

Methods of analysis

- a. Technological innovations—It appears the literature contains little exploration of detainees’ telephonic access to counsel, but we will assess what is there. There has been somewhat more attention to aspects of the Legal Orientation Program, although, as far as we are aware, not the DVD possibilities raised above. The key research method will be interviews with the interests identified above. We doubt there would be time actually to establish and evaluate a pilot project.
- b. Benefits of representation—We will base this part of the report primarily on our literature review and interviews with representation providers to try to get some sense of how often professional advice leads non-citizens to abandon efforts to avoid removal, and how much time immigration judges devote to research in cases where the respondent is pro se that might be unnecessary if the individual were represented by competent counsel.

Assessments of likely results of implementation

To be determined. (NB: Any assessment must recognize that even a very tentative positive prospective evaluation might be misused by some to argue that audio links can solve all problems created by remote detention.)

Case management practices generally; video hearings

Case management generally

In 2008, the Chief Immigration Judge issued an “Immigration Court Practice Manual” for the parties who appear before the immigration courts. The Chief Immigration Judge described the manual as “a comprehensive guide that sets forth uniform procedures, recommendations, and requirements for practice” in the courts. He, and the manual itself, said its “requirements . . . are binding on the parties who appear before the Immigration Courts, unless the Immigration Judge directs otherwise in a particular case.” On its face,

though, the manual, while freely using the word “requirements”, does not seem to distinguish a precise category of “requirements” from “recommendations” and the “uniform procedures” it “sets forth.” The unrepresented respondent may not find the manual readily understandable. Moreover, the procedural rules, if enforced mechanically, may serve as barriers to the filing and preparation of necessary applications. Anecdotal reports suggest, for example, that in some parts of the country, court administrative staff pretermits or prevents the filing of materials due to technical errors such as failing to sequentially number all of the pages in an application.

On the other hand, some local variation from the manual’s provisions are not only likely but—in an adjudication system embracing over 50 courts and 230 judges nationwide—desirable in order to accommodate local needs and conditions. By analogy, procedures in federal courts, and preferences of individual federal judges, around the country vary from some of the national procedural rules in response to local legal cultures, and can be effective and fair.

We will assess, at least preliminarily:

- the extent to which the immigration courts require compliance with the manual’s provisions and how the courts enforce them may affect the ability of uncounseled individual to represent themselves;
- as with pre-trial case management procedures, whether immigration judges are using other case management procedures that judges in other court systems use to manage litigation effectively and that might be adaptable to immigration court litigation;
- the feasibility of some sort of forum—other than annual judicial education conferences—in which immigration judges can describe case management techniques they have found to be effective, efficient, and fair.

Enhancing Immigration Judge Authority by Evaluating Accountability of ICE Trial Attorneys

Some of the problems or significant delays within the immigration courts are created by government counsel, largely ICE Trial Attorneys. Under the current regulatory model there are no disciplinary procedures within EOIR for ICE Trial Attorneys’ failure to meet deadlines or other problematic behavior. Some of these matters may be separately referred to the Office of Professional Responsibility within ICE. The EOIR manual refers complaints to the District General Counsel for ICE. The AILA website refers people with complaints about ICE counsel to the Office of Bar Counsel in Washington. It is unclear if immigration judges ever make such a referral. There appears to be a clear problem of inconsistent and nontransparent accountability for government counsel. Although respondents’ having counsel is more likely to help address failure or inappropriate behavior by the government counsel (which leads to reform of bad actors), the immigration judges’ long-sought goal of contempt authority merits some assessment in considering case management efficiencies. Further, increasing professionalism and accountability in the ICE Trial Attorneys help develop the administrative record by preserving important issues for further agency or judicial review. Cooperation with the removal orders of the EOIR rests in part on the respect the public has for the proceedings

held within the tribunal and abuse by government counsel can be a problem. The current system may be damaging the court's overall operations.

Video hearings

Immigration courts increasingly conduct proceedings by video hookups that link the judge, the respondent, and counsel, some or all of whom are not in the same place. Video hearings obviously reduce EOIR's transportation costs and those of the parties and may achieve more timely resolutions. They are, however, controversial, especially because credibility assessments are often key to an immigration judge's ruling and the video format may not provide adequate means for assessing credibility. Use of video conferencing may be more appropriate during motion hearings and status conferences.

Video hearings are increasingly common in other litigation arenas. Congress encourages their use, for example, for federal court actions filed by prisoners alleging civil rights violations. In 2002, the Judicial Conference amended Federal Rules of Criminal Procedure 5 and 10 to permit initial appearances and arraignments by video conferencing with the consent of the defendant. The committee Notes described the benefits that such methods might provide defendants. The Supreme Court, however, declined to forward to Congress an amendment to Rule 26 to permit witness trial testimony by video, citing confrontation clause problems.

Criminal procedure due process concerns do not transfer to immigration removal proceedings, which are civil, although the underlying dynamics affecting fairness are relevant. As recently as 2006, moreover, researchers in the Federal Judicial Center's project to examine the impact of technology on the adversary process reported that despite the rights involved in criminal proceedings and the strong differences of opinion over video hearings, "little empirical information" was available about the extent of its use or its effects on participant behavior.

Method of analysis

We will summarize current research about use of video hearings in state and federal courts—much of it by psychologists—and assess its applicability to immigration removal adjudication. We will also look for comparative lessons in video's use in other agency adjudication systems including a review of recent ACUS reports. On this basis, we will try to assess the costs and benefits of video's use in immigration adjudication and steps that can increase benefits and decrease costs (monetary and other).

Assessments of likely results of implementation

To be determined

Immigration court management and staffing

Immigration court staffing and support

Immigration judges have high workloads not simply because of the high case-to-judge ratio but because of the dearth of personnel assistance in managing those cases. The judges share pool clerks, most of whom are hired immediately out of law school. In some cities eight judges may share one clerk. The Board of Immigration Appeals has approximately 125 staff attorneys, but immigration courts have no similar resources. It is

possible that some of these resources should be redeployed to support the trial level and that might in turn further reduce rates of appeal to the BIA.

As we noted earlier as to pro se law clerks, freezes on domestic spending probably doom any prospects for increased staff assistance for immigration judges. We will, though, itemize some of the most obvious innovations that, while common place in other courts, have received little attention in studies of immigration courts. Innovations include:

- Para-judicial officers who might relieve the judges of the time-consuming task of processing technical aspects of in absentia cases, tasks that do not need an immigration judge's attention but that can consume a great deal of their time. Twelve percent of the FY 2010 workload of the EOIR was in absentia cases. (In that regard, we may also undertake a limited inquiry to learn why the level of absentia cases has dropped from its much higher number five or six years ago.)
- A small number of regional or centralized staff attorneys to help judges—with full disclosure to the parties—with specialized matters unique to immigration adjudication, such as whether a criminal conviction meets the statutory criteria of a conviction that renders a person subject to removal. A Texas immigration judge is not in a good position to evaluate a conviction determined in Nebraska or Ecuador.

Alternative approaches to immigration court management

At arm's length, immigration courts in their basic structure resemble courts in the judicial branches of the state and federal government much more than the typically small administrative adjudication agencies in the executive branch. Immigration courts, however, lack most of the structural and many of the management characteristics of judicial branch courts.

We will assess whether characteristics associated with excellence in judicial branch courts are transferable to immigration courts and what effect they might have on the performance of immigration adjudication.

In most U.S. court system, for example, multi-judge courts each have a chief judge, chosen through a diverse array of methods. The immigration courts, by contrast, are served by nine assistant chief immigration judges, each with responsibility for several of the over 50 immigration courts (two of the nine also have centralized responsibilities for “conduct and professionalism” and for training and education). There is evidence in the court administration literature that chief judges can help build morale and improve performance on multi-judge courts. It's not obvious that such arrangements are feasible in immigration courts; talk of regular court meetings, for example, is probably fanciful in immigration courts in which the judges' workload means they rarely see their colleagues.

Successful courts also measure judge performance, a very sensitive topic within the immigration courts. Immigration judges are not “Administrative Law Judges” as defined in federal law. Immigration judges resist being evaluated as attorneys rather than as judges and perceive an undue overemphasis on the rate of case closings in evaluations. But whatever problems have characterized EOIR performance evaluations; those problems do not negate the soundness of measuring judicial performance or its link to effective adjudication. We will also endeavor to learn how BIA members and their staff attorneys are evaluated as well.

Methods of analysis

As to staffing, we will assess the literature referred to above (in connection with pro se law clerks), and conduct at least rudimentary cost-benefit assessments of the value of adding specialized support staff.

As to court management, in addition to literature reviews and interviews with immigration judges and other immigration court personnel, we will try to convene a panel—in person or perhaps through some virtual forum—of successful state chief trial judges, who can, in consultation with immigration judges, assess the management of immigration courts and whether innovations successful in other courts might be implemented in immigration courts, perhaps on a pilot basis. The president-elect of the American Judges Association, Kevin Burke (Minnesota), has offered to assist in such an effort. We will assess whether it can be done in a format consistent with the project's very limited travel budget.

Assessments of likely results of implementation

To be determined

Board of Immigration Appeals: impact on federal court filings and immigration court implementation of BIA decisions*Relation of changes in BIA case disposition practices to the rate of appeal to the federal appellate courts*

Individuals dissatisfied with a decision of the Board of Immigration Appeals may seek review in the federal court of appeals with jurisdiction over the site of the removal hearing. Early in the last decade, the attorney general reduced the size of the Board and introduced summary procedures, which most observers believe helped initiate a dramatic increase in BIA appeals to the courts of appeal.

The table on the next page shows court of appeals caseload figures for 2001, 2002, 2006 (the peak year) and 2010. BIA appeals hit a high point in 2006 but since then have declined noticeably—by 43 percent in all circuits and by 38 and 46 percent in the courts of appeals that saw the sharpest increases, those of the Second and Ninth circuits. In 2010, BIA appeals still constituted over around 90 percent or more of all agency appeals, but BIA appeals' share of all appeals has declined—from 18 percent to 12 percent nationwide and 38 to 23 percent in the Second circuit and 40 to 26 percent in the Ninth. BIA appeals nationwide and in the Ninth Circuit's Court of Appeals are, as a percentage of all appeals, only slightly higher than they were in 2002, although that difference is more pronounced in the Second Circuit's Court of Appeals. They are, however, still well above the 2001 levels, which predated the attorney general's changes.

To the degree that the level of appeals from its decisions is a measure of adequate BIA performance, the data suggest that serious performance difficulties have abated. The rate of appeal, though, is affected by factors other than BIA performance, such as the state of the economy and costs of pursuing appeals; discipline of abusive attorney's who filed frivolous cases; developments in the doctrinal law that have refined issues frequently litigated in the court; and perhaps an increase in pre-appeal opportunities to remain in the U.S. ranging from granting of motions to reopen to the use of deferred departure.

BIA APPEALS IN 2002, 2006, 2010 AND AS A PERCENT OF ALL AGENCY APPEALS AND TOTAL APPEALS+

	2001	2002	2006	2010	<u>2010 over</u>		
					2001	2002	2006
All CA filings	57,464	57,555	66,618	55,992	-3%	-3%	-16%
All CA agency appeals	3,300	5,789	13,102	7,813	137%	35%	-40%
All BIA appeals	1,760	4,449	11,911	6,750	284%	52%	-43%
BIA as % of agency appeals	53%	77%	91%	86%			
BIA as percent of all appeals	3%	8%	18%	12%			
CA2 filings	4,519	4,870	7,029	5,371	19%	10%	-24%
CA2 agency appeals	262	603	2,752	1,357	418%	125%	-51%
CA2 BIA appeals	na	533	2,640	1,229		131%	-38%
BIA as % of agency appeals	na	88%	96%	91%			
BIA as percent of all appeals*	6%	11%	38%	23%			
CA9 filings	10,324	11,421	14,636	11,982	16%	5%	-18%
CA9 agency appeals	1,159	2,899	6,040	3,325	187%	15%	-45%
CA9 BIA appeals	na	2,670	5,862	3,169		19%	-46%
BIA as % of agency appeals	na	92%	97%	95%			
BIA as percent of all appeals*	11%	23%	40%	26%			

+ Source: Table B-3, Administrative Office of the U.S. Courts, Annual Report of the Director, Judicial Business of the United States Courts, 2010.

* For 2001, the figure shown as the BIA percentage of all appeals is the percentage of all agency appeals of all appeals. Until 2002, the Administrative Office did report separate BIA appeals figures for each regional court of appeals. Thus, actual BIA percent figures are those lower than those shown.

In recent years, some of the federal courts have severely criticized the BIA for allowing a single member of the BIA to affirm the immigration judge order or to issue a decision called an “affirmance without opinion.” We will investigate whether the BIA is continuing this and other practices that might be disproportionately contributing to the increased rate of appeal to the federal courts.

We will evaluate the existing literature and evaluation of BIA procedures and, if appropriate, will make recommendations for reforms that might improve efficiency within the BIA, especially those reforms that might improve the adjudication below in the immigration courts or lessen the rate of review sought in the federal courts. In any event, given the extensive attention to BIA procedures in the literature, we do not intend to devote a great deal of attention to them.

Immigration court implementation of BIA decisions:

One aspect of the BIA performance that has received little attention is how the EOIR responds to and implements BIA rulings. One of the classical roles of administrative appellate review is to improve the quality and consistency of agency trial level adjudications. We will consider how we might assess the effectiveness of the BIA and

EOIR in serving this goal, something that implicates good management of the EOIR adjudications.

Methods of analysis

Interviews with managerial staff about existing procedures and continuing legal education support throughout the adjudication agency; interviews with samples of immigration judges and BIA members; review of any internal reports or statistics that are available about the performance of any particular immigration judge. We will also learn from federal judges who have considered the management of immigration cases within the appellate docket and the specialized staff attorneys in some of the courts of appeals who focus exclusively on immigration cases.

Assessments of likely results of implementation

To be determined

SUMMARY AND CONCLUSIONS

To be determined