

OUTLINE OF STUDY OF IMMIGRATION REMOVAL ADJUDICATION*
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Lenni B. Benson, New York Law School;
Russell R. Wheeler, Governance Institute and Brookings Institution

The Administrative Conference of the United States is conducting a study of potential improvements to the system of immigration adjudication. This outline briefly provides background and a summary of the proposed topics of study.

General Background on the Immigration Adjudication Process and General Scope of the ACUS Study

Department of Homeland Security agents may try to remove (deport) non-citizens whom they believe are in the country illegally. In some cases, the agents may ask the non-citizen to depart voluntarily or the agency is empowered to order removal administratively. More commonly removal is begun by initiating removal proceedings within the immigration courts within the Department of Justice's Executive Office for Immigration Review (EOIR). Fifty-seven immigration courts throughout the country are staffed by 267 immigration judges (IJs) appointed by the Attorney General. They are not administrative law judges under the APA.

IJs preside over proceedings between a government attorney and the non-citizen (respondent), who typically tries to assert some grounds to avoid removal, e.g., asking for discretionary relief such as asylum. By statute, any representation respondents receive must be "at no cost to the government." Over half the respondents proceed pro se; in detention the pro se rate may be as high as 90%. About half the respondents spend some time in DHS detention. In 2010, each immigration judge concluded, on average, 1,683 matters; caseload increases have been much larger than judgeship increases, creating lengthy delays from filing to disposition.

The government or respondent may appeal an IJ decision to EOIR's Board of Immigration Appeals, and the respondent may appeal an unfavorable BIA decision to the United States court of appeals with jurisdiction over the location of the removal hearing. The appeal rate from IJ decisions is apparently rather small. Appeals from BIA decisions, which shot up in 2002 and peaked in 2006, constitute 12 percent of all federal court appellate filings, still higher than the three percent they were in 2001 but down from 18 percent in 2006.

The immigration courts have been the object of significant attention and study over the last several years, resulting in many recommendations to restructure the immigration courts as a separate entity (e.g., an Article I court, within the executive branch) and to increase court resources, either directly (more judges, more law clerks) or indirectly (fewer oral, brief opinions, which are largely a function of workload pressures). We will comment on these and other recommendations that ACUS may wish to consider endorsing. Restructuring and additional resources in the current climate, though, are highly unlikely and thus we will direct our energies to some specific procedural and

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organizational aspects of removal litigation that have received less attention and that may be subject to remedy without additional resources and within the current structure.

Origination of Removal Cases

DHS prosecutorial policies drive IJ workload. The policies—per se—are outside the scope of our study, but we plan to assess the interplay between IJ workload and DHS agents' statutory authority to subject some non-citizens to "expedited removal" without IJ review unless the noncitizen seeks asylum.

We will seek to clarify why certain cases require immigration court review while others are appropriate for disposition by DHS, and whether other categories of cases now subject to immigration court adjudication could be efficiently resolved by non-adversarial adjudication with sufficient administrative review and record-keeping protections. We will also examine whether the IJ time that administrative removals save is greater than the time IJs spend on non-citizens' motions to reopen such proceedings in order to challenge the sufficiency or accuracy of such orders.

Preliminary Immigration Court Case Management Procedures and Staffing Alternatives

We will assess IJs' use of pretrial management techniques that other American courts use to narrow issues, and ask whether current staff resources within EOIR could afford some courts the assistance of "pro se law clerks," who in other courts screen pro se submissions and 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).

Representation of Non-Citizens

We will consider the feasibility of technological innovations that might enhance respondents'—especially detained respondents'—access to legal representation, including secure telephonic links in detention centers to allow pro bono, law school clinic, and other providers to counsel detainees; providing detainees access to voice-over-secured-Internet-protocols (VOIP) to facilitate communication such as calls to home countries for evidence; explaining basic rights to detainees by videos as a complement to non-profits' oral presentations under EOIR's "Legal Orientation Program."

We will assess the costs and benefits of non-lawyer representation of non-citizens, which EOIR currently allows in specific circumstances, and we will try to itemize the benefits *to the government* of enhanced representation of respondents (such as reduced detention costs for aliens whom counsel persuade have no prospect of gaining relief from removal).

Case Management Practices Generally; Video Hearings

We will assess the impact of the Chief Immigration Judge's 2008 *Immigration Court Practice Manual*, which sets forth presumptively required procedures for parties in removal litigation, including whether the *Manual* complicates the efforts of pro se respondents. We will assess the consequences of IJs' inability to impose sanctions on government attorneys for problematic behavior, and we will examine the costs and benefits of IJs use of video conferencing to conduct remote proceedings.

Immigration Court Management

IJs are supervised by nine Assistant Chief Immigration Judges, who each have responsibility for several of the 57 immigration courts nationwide. We will assess the feasibility of the more typical management structure in most American courts, i.e., a chief judge for each multi-judge court. Recent analyses of U.S. trial courts suggest strong links between effective chief judges and high performance. Also, judicial performance measures, while a touchy topic between EOIR and the IJs, are, if properly constructed, another key to high court performance.

Board of Immigration Appeals: Impact on Federal Court Filings and Immigration Court Implementation of BIA Decisions

The BIA has been the object of considerable attention since the attorney general in 2002 reduced its size and mandated truncated procedures (e.g., single member “affirmances without opinion”). One result, many believe, was the spike in appeals from the BIA to the courts of appeals. We will evaluate the literature and evaluations of BIA procedures and consider reforms that might improve BIA efficiency, improve immigration court adjudication, and/or lessen the rate of appeal to the federal courts. Given the extensive attention to BIA procedures in the literature, we do not intend to conduct a great deal of original research with respect to them.