



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Adjudication  
Meeting Minutes  
May 7, 2012

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Members Attending

Judge John Vittone (ret.) (Chair)	Judge Edward Kelly	Fred Alvarez (by telephone)
Rosslyn Cotes (attending on behalf of Susan Tsui Grundman)	Judge Robert Lesnick	Judge Randal Frye (by telephone)
Ivan Fong	Nadine Mancini	Susan Tsui Grundman (by telephone)
Robert A. Giannasi	Doris Meissner	Glenn E. Sklar (by telephone)

ACUS Staff Attending

Paul Verkuil, Chairman	Jeffrey Lubbers, Acting Director of Research & Policy	Funmi E. Olorunnipa, Staff Counsel
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Jennifer M. Hendricks,  
Intern

Invited Guests Attending

Lenni D. Benson,  
Consultant, ACUS Immigration Adjudication Project

Russell Wheeler,  
Consultant, ACUS Immigration Adjudication Project

Members of the Public Attending

Karen Grisez, ABA Commission on Immigration  
Judge Dana Marks, National Association of Immigration Judges (by telephone)  
Nicholas Perry, U.S. Department of Homeland Security  
Ted Kim, U.S. Citizenship and Immigration Services  
Jean King, Executive Office for Immigration Review



The meeting commenced at 1:30 pm in the conference room of the Administrative Conference.

### **Meeting Opening**

Judge Vittone made opening remarks and took attendance. He then called for approval of the April 23, 2012 minutes. Chairman Verkuil thanked the committee for their energy and dedication on the project. Mr. Lubbers added his appreciation. Ms. Olorunnipa noted that there were some additional changes that would be made to the preamble that were not included in the current draft, however no substantive changes that would be made to the preamble after the meeting.

Judge Vittone then noted that the committee had received comments from U.S. Department of Homeland Security (DHS), U.S. Department of Justice's Executive Office for Immigration Review (EOIR), and the American Immigration Lawyers Association (AILA) after the last meeting and stated that he would like to go through each recommendation commented on individually. Mr. Fong noted that DHS felt very strongly opposed to some of the recommendations. Judge Kelly added that he would not be able to affirmatively support a recommendation that contained provisions that DOJ was opposed to, even at the committee level, and that if controversial provisions were retained he would feel comfortable abstaining. After some discussion regarding how to approach consideration of controversial recommendations, the committee agreed to first discuss the revisions and comments on Part I of the Draft Recommendation, which had been discussed at the previous meeting. The committee would then discuss each recommendation in Part II of the Draft Recommendation. The committee would then vote on the revised recommendations individually before proceeding to vote on whether to adopt the recommendation as a whole.

### **Discussion of Additional Revisions and Comments on Part I. of the Draft Recommendation**

The committee proceeded to discuss the recommendations raised in the submitted comments.

#### *Discussion of Recommendation 5*

There was some discussion regarding the language of recommendation 5(c). Ms. Benson asked whether the term "law clerk" was too narrow. Judge Marks suggested that the narrow class of government employees described in the recommendation may result in overburdening of immigration judges. The committee agreed to amend the language in recommendation 5(c) to expand the class of applicable government employees.



*Discussion of Recommendation 9*

There was some discussion regarding recommendation 9. Mr. Fong stated that, while previous amendments improved recommendation 9, DHS remained concerned about the imposition of mandatory pre-hearing conferences. Mr. Fong explained that the general objection to status conferences is that they are unnecessary, overburden Immigration and Customs Enforcement (ICE) attorneys, and create a strain on agency resources. Mr. Fong expressed a need for a study on the use of status conferences and proposed that recommendation 9(b) should be amended to include more neutral language to provide for consideration of the feasibility of mandatory pre-hearing conferences. With regards to recommendation 9(c), Mr. Fong also noted that recent case law suggests there may be no procedural requirement to produce certain information. He added that DHS would not oppose the entire report based on the agency's objection to recommendation 9.

*Discussion of Recommendation 10*

There was extensive discussion regarding recommendation 10. Mr. Fong expressed concerns regarding the use of "administrative closure," in recommendation 10(b), explaining it may be unnecessary to have a broad rule given a recent Board of Immigration Appeals (BIA) decision. Ms. Benson discussed the impact of recent BIA decisions on administrative closure and explained there were several issues which were left open by the decision. She argued that guidance is appropriate here for gap-filling the issues left open by the BIA decision. Judge Kelly stated that EOIR would prefer to allow use of administrative closure to develop on a case-by-case basis. The committee discussed changes to the language of recommendation 10 that would place some parameters in the use of administrative closure. Judge Kelly reiterated that EOIR would prefer the use of administrative closure to be used in the discretion of the immigration judge to be resolved in cases or controversies. Mr. Fong and Judge Kelly remained opposed to recommendation 10(b). With regard to recommendation 10(c), Judge Marks added that amending the recommendation to allow the immigration judge discretion would be an effective tool. The committee discussed the potential amendments to language of recommendation 10(c).

*Discussion of Recommendation 16*

The committee then proceeded to discuss recommendation 16. Mr. Fong noted that DHS remains opposed to imposition of standards of conduct on government employees by immigration judges. The committee discussed amending the requirement so that it applies to all trial counsel rather than government trial counsel, and should be documented "clearly in" the record rather than "on" the record. Judge Kelly noted that EOIR does not oppose recommendation 16 as amended.

*Discussion of Recommendation 19*

The committee agreed to amend recommendation 19 in order to make the language more precise.



*Discussion of Recommendation 22*

The committee proceeded to discuss comments to the amendments to recommendation 22. Mr. Fong expressed that DHS is strongly opposed to the imposition of obligations and standards of conduct on government attorneys by immigration judges. Mr. Fong noted that DHS would oppose the entire report based on opposition to recommendation 22's application to government attorneys. Ms. Benson explained that recommendation was originally meant to apply to all attorneys, including government attorneys, and strongly advocated the benefit of supplying immigration judges with autonomy to control the conduct of attorneys in their courtroom. Judge Marks noted that Congress had provided immigration judges with the authority outlined in recommendation 22, but the authority had yet to be utilized through regulation. Mr. Fong clarified that his strongest concern is with recommendation 22(c), which suggests that immigration judges should have the authority to order government attorneys to obtain additional training. The committee agreed to revise the recommendation to allow immigration judges to refer government attorneys to the appropriate authority with a recommendation that the attorney receive additional training.

**Discussion of Part II of the Draft Recommendation**

The committee proceeded to discuss Part II of the Draft Recommendation.

*Discussion of Recommendation 25*

Mr. Fong noted that DHS would abstain from consideration of recommendation 25 due to litigation issues. Judge Vittone noted that EOIR would also be abstaining from recommendation 25 due to pending litigation

*Discussion of Recommendations 26-30*

Mr. Fong noted DHS's strong opposition to recommendation 26(a) based on the potential for it to shift the burden of processing asylum applications so that the United States Citizen and Immigration Services (USCIS) would share the cost of adjudicating such proceedings even where the removal proceeding has not been completing. Mr. Fong suggested that this recommendation be removed due to the strong opposition of USCIS. There was some discussion as to whether opposition to recommendation 26(a) is chiefly a matter of the limited resources of USCIS. Ms. Meissner stated that, absent limited resources, USCIS can provide a non-adversarial setting, overseen by experts, to adjudicate certain asylum cases and that USCIS represents a potentially underutilized resource for adjudication of these cases. Mr. Kim noted that USCIS resources have become increasingly strained over the past ten years. He also noted that one purpose of the current system of adjudication of defensive asylum cases was to incentivize applicants to come forward. Ms. Benson objected to the consideration of the motivation of defensive asylum applicants. Mr. Fong expressed that this is an area that may require further study to determine whether the current framework is working to achieve policy goals. Judge



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Marks highlighted the problem of ICE attorneys refusing to stipulate to issues that had been resolved in asylum cases and suggested that further studies should be done to assess whether recommendations of the asylum office should be binding. Ms. Grisez noted that the ABA has made a similar recommendation to shift jurisdictions. She further noted that the incentive to come forward does not apply in the very specific context of expedited removals. Mr. Perry responded to Judge Marks's concern by explaining that the review of asylum decision is de novo by statute and that there are issues that are illuminated in the context of the adversarial setting of removal adjudication that may not have been revealed in the non-adversarial setting of asylum adjudications. The committee agreed to revise recommendations 26(a), 28, 29, and 30 to become recommendations for further study, including implications for agency resources, with the active participation of DHS and DOJ. The committee also agreed to place recommendations 25, 26(b), 27, and 31 in a separate section to accommodate agencies who choose to abstain.

### *Discussion of Recommendation 36*

Judge Marks noted that, while audio of removal adjudications are recorded and retained, video of removal adjudications conducted through video teleconferencing is not recorded. The committee discussed revising the recommendations to include a provision suggesting that video teleconferencing should be accompanied by full observation at the site of both parties.

### *Discussion of Recommendation 37*

Mr. Fong suggested changing revising recommendation 37 to clarify the role of DHS. Ms. Benson expressed preference for the language that expressed a firm commitment on the part of DHS. The committee agreed to adopt the language that Mr. Fong suggested.

### *Discussion of Recommendation 38*

With regard to recommendation 38, the committee agreed to revise the language to clarify the commitment of DHS to make available video versions of the KYR presentations. Additionally, the committee discussed refining the language concerning the DHS's obligation regarding the translation of legal reference materials. The committee also agreed to revise recommendation 37(b) to state that EOIR should assist and promote in the translation of legal reference materials in the major languages of the detained populations.

### **Vote on the Draft Recommendation and Approved Amendments**

The committee proceeded to vote on the amendments recommendations individually. Mr. Fong noted that DHS and EOIR would abstain 12, 14, 25, 26(b), 27, 31 based on pending litigation or rulemaking. Additionally, Mr. Fong stated that he would abstain from consideration of recommendation 22. The committee agreed to adopt recommendations 16 and 26(a) as amended.



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### *Vote on Motion to Delete Recommendation 10(b)*

The committee voted on whether to delete Recommendation 10(b) from the Draft Recommendation. Mr. Fong, Judge Kelly, Judge Lesnick, Mr. Giannasi, Ms. Grundmann, and Ms. Mancini all voted in favor of the motion to remove recommendation 10(b) from the Draft Recommendation. There were no votes opposed to the motion to remove recommendation 10(b). The motion passed 6-0.

### *Vote on Motion to Delete Recommendation 10(c)*

Mr. Fong moved to delete the former 10(c), which became 10(b) after revision. Judge Kelly seconded the motion to remove the former 10(c). Mr. Fong and Ms. Grundmann voted in favor of the motion to delete Recommendation 10(c). Ms. Mancini, Ms. Meissner, Judge Lesnick, and Mr. Giannasi voted in opposition to delete Recommendation 10(c). The motion failed 4-2.

### *Vote on Motion to Adopt the Draft Recommendation*

Ms. Mancini, Ms. Messier, Judge Lesnick, Mr. Giannasi, and Ms. Grundmann voted in favor of the committee adopting the Draft recommendation as revised. Mr. Fong and Judge Kelly voted in favor of adopting the Draft recommendation, subject to abstentions noted in the record. The motion passed unanimously.

### **Meeting Closing**

Judge Vittone thanked the committee and the team of consultants for their work on the project. The committee then agreed to delegate authority to make non-substantive edits to Chairman Verkuil. Judge Vittone then concluded the meeting shortly after 4:30pm.