

Administrative Conference of the United States 56th Plenary Session

DHS Proposed Amendments

Recommendation No. 2: ACUS Committee on Regulation

Midnight Rules

Amendment: Recommendation 6, p. 4:

DHS offers the following technical edits, to clarify that under the Recommendation, the agency should request comments not only on legal or policy issues broadly, but also on how the agency ought to move forward.

The comment period should enable the public to express views on the legal policy issues raised by the rule as well as whether the rule should be amended, rescinded, suspended pending further review by the agency, or allowed to go into effect. The administration should then take account of the public comments in determining whether to the rule should be amended, rescinded, or suspended pending further review by the agency the rule, or allow ed the rule to go into effect.”

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DHS Proposed Amendments

Recommendation No. 3: ACUS Committee on Adjudication

Immigration Removal Adjudication

Amendment: Recommendation 10(b), page 7:

- (1) DHS offers an amendment that strikes Recommendation 10(b).
- (2) This provision should be struck from the Recommendation because it would (1) infringe upon the prosecutorial discretion of the Department of Homeland Security (DHS), (2) alter the neutral role of Executive Office for Immigration Review (EOIR) immigration judges, (3) result in substantial inefficiencies, and (4) limit the ability of DHS to successfully prosecute complex immigration cases. Notably, this provision would substantially alter the longstanding system under which, by regulation, DHS may amend the Notice to Appear (NTA) – the charging document – at any time while removal proceedings remain pending.
- (3) Recommendation 10(b) would infringe upon DHS’s prosecutorial discretion, in terms of deciding what charges and allegations should be pursued against an alien in removal proceedings, including when charges should be lodged. This prosecutorial prerogative has existed for DHS, and the legacy Immigration and Naturalization Service before it, for 60 years. *See* Miscellaneous Amendments, 27 Fed. Reg. 9646, 9647 (1962) (concerning former 8 C.F.R. § 242.16(d) (1962), currently codified at 8 C.F.R. §§ 1003.30 and 1240.10(e)).
- (4) Recommendation 10(b) runs counter to the core purpose for the creation of EOIR, which was to better insulate its adjudicators (immigration judges) from prosecutorial functions. *See, e.g.,* Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. Rev. L. & Soc. Change 433, 441 n.19 (1992/1993) (“The EOIR was created in 1983 as a separate agency from the INS. Prior to that time, the immigration judges were part of the INS. The purpose of the separation was to remove any perception of prosecutorial bias from the performance of the adjudicatory function of the immigration court.”).
- (5) Recommendation 10(b) would result in net inefficiencies in the removal system.
 - a. This provision would encourage DHS, in order to ensure it would be able to pursue all relevant charges, to “pile on” charges and allegations in every NTA, so as to avoid being potentially precluded from pursuing such later in a case. *See De Faria v. INS*, 13 F.3d 422, 424 (1st Cir. 1993) (“Yet there is no requirement that the INS advance every conceivable basis for deportability in the original show cause order. As the IJ explained, such a rule would needlessly complicate

proceedings in the vast majority of cases.”). The provision would be particularly problematic in jurisdictions where res judicata case law would prevent the filing of new charges in later proceedings. *See Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009) (prohibiting DHS from initiating new proceedings on the basis of charges that could have been brought initially).

- b. Should an immigration judge decline to permit DHS to lodge an additional charge, DHS may file a motion to reconsider or an interlocutory appeal. Conversely, if an immigration judge permits DHS to lodge an additional charge, the alien may file a motion to reconsider or an interlocutory appeal (as well as raise the issue during any subsequent federal court review). This additional collateral litigation would substantially impact the resources of DHS, EOIR and the federal courts.
- (6) Recommendation 10(b) fails to take into account that in complex removal cases, including those involving national security, the most serious charges and related allegations may necessitate intensive review and vetting, and that the basis for such may well be uncovered or triggered, in the first instance, by testimony or other evidence proffered during the course of removal proceedings. This provision would effectively constrain U.S. Immigration and Customs Enforcement (ICE) counsel to make use of whatever charging theory U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, or ICE operational personnel include in the NTA as originally prepared (often under intense time pressures). Indeed, an analogous recommendation, made in conjunction with rulemaking proceedings, suggesting that immigration charges should be brought all at one time, was rejected by the Attorney General as “overly restrictive,” emphasizing the “flexibility” of civil immigration proceedings. *See Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges*, 52 Fed. Reg. 2931, 2934 (1987) (concerning former 8 C.F.R. § 3.28 (1987), currently codified at 8 C.F.R. §§ 1003.30 and 1240.10(e)).

Accordingly, we suggest an amendment that strikes Recommendation 10(b) in its entirety.

Amendment: Recommendation 21(a)-(b), page 11:

- (1) At their core, these provisions urge EOIR to assume greater authority over the discipline of DHS/ICE personnel, which raises several issues (discussed below). DHS therefore offers amendments to limit the scope of the Recommendation to private practitioners. In the absence of these changes, DHS proposes an amendment that strikes this Recommendation.
- (2) The Executive Branch has consistently opposed the substance of this recommendation when raised in other contexts. For example, in its 2000 final rule implementing EOIR's disciplinary rules, Attorney General Reno chose not to provide EOIR with disciplinary authority over INS trial attorneys. *See* Department of Justice, Immigration and Naturalization Service, Professional Conduct for Practitioners—Rules and Procedures, 65 Fed. Reg. 39513, 39522 (June 27, 2000); *see also* Department of Justice, Executive Office for Immigration Review, Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances, 73 Fed. Reg. 76914, 76917 (Dec. 18, 2008).
- (3) As is manifestly clear from the prior U.S. Department of Justice (DOJ) rulemaking in this area, immigration judge sanction authority over ICE attorneys is wholly unnecessary. DHS and ICE have already established avenues for addressing poor performance and attorney misconduct. Specifically, unlike private bar attorneys, ICE attorneys are subject to extensive disciplinary and performance standards. For example, the ICE Office of Professional Responsibility (OPR) investigates any allegations that ICE attorneys have engaged in serious misconduct (such as perjury, material falsification, or other violations of law, rule, or regulation). Once OPR has conducted an investigation, the Agency has authority to take appropriate disciplinary action against the employee, including removal from federal service. *See* 5 U.S.C. § 7513; *Byrnes v. Dep't of Justice*, 91 M.S.P.R. 552 (2002) (sustaining the removal of an agency attorney for dishonest conduct and failure to follow office policies). Additionally, ICE attorneys are subject to the Agency's performance appraisal system. Title V of the United States Code mandates that each agency establish a performance appraisal system for its employees. 5 U.S.C. § 4302. As required by law, the Agency holds its attorneys to specific performance standards and conducts appraisals of attorney performance. If an ICE attorney fails to perform the critical elements of his or her position, the Agency has authority to remove the attorney from federal service. *See, e.g., Bohannon v. Dep't of Homeland Security*, 99 M.S.P.R. 307 (2005) (sustaining the removal of an agency attorney for unacceptable performance). ICE attorneys are also subject to the Standards of Ethical Conduct for Employees of the Executive Branch. 5 C.F.R. § 2635.
- (4) Moreover, it is not at all clear that, in giving the Attorney General authority to promulgate immigration judge contempt regulations, *see* 8 U.S.C. § 1229a(b)(1), Congress intended to empower immigration judges to sanction then-INS trial

attorneys, let alone attorneys who now report to the leadership of a subsequently created Department. The conference committee report for this legislation says nothing about whether this provision was intended to apply to both aliens' attorneys and then-INS "government" counsel appearing in removal proceedings, and there have been efforts to amend the legislation to expressly include DHS attorneys. *See* "Civil Liberties Restoration Act of 2004," S.B. 2528, sec. 204(d)(6)(B), 150 Cong. Rec. S6884-01 (unsuccessful attempt to amend section 1229a(b)(1) to specifically apply immigration judge contempt authority to "all parties appearing before the immigration judge ... [to] be imposed by a single process applicable to all parties." *Id.*). This suggests that the current statutory grounding for a contempt regulation applicable to ICE trial counsel is dubious.

- (5) Finally, strong prudential reasons weigh against this provision. The provision would effectively give immigration judges unreviewable authority to sanction ICE attorneys with civil monetary penalties, thereby supplanting the existing means of addressing performance and conduct issues and interfering with ICE's ability to manage its own attorneys. Moreover, such sanction authority would dramatically shift the balance of power in the Immigration Courtroom, and place ICE attorneys in the impossible position of either capitulating to incorrect immigration judge rulings or facing sanctions from their fellow Executive Branch attorneys.

Accordingly, we suggest the following amendment to Recommendation 22:

To encourage improvement in the performance of ~~attorneys~~ private practitioners who appear in the immigration court, EOIR should:

- a. ~~Continue its efforts~~ Consider whether to implement the statutory grant of immigration judge contempt authority over private practitioners;
- b. Evaluate appropriate procedures (as supplements to existing disciplinary procedures) to allow immigration judges to address ~~trial counsel's~~ private practitioners' lack of preparation, lack of substantive or procedural knowledge or other conduct that impedes the court's operation; and
- c. Explore options for developing educational and training resources such as seeking pro bono partnerships with reputable educational or CLE providers and/or seeking regulatory authority to impose fines on private practitioners to subsidize the cost of developing such materials.

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DHS Proposed Amendments

Recommendation No. 5: ACUS Committee on Collaborative Governance

Improving Coordination of Related Agency Responsibilities

Amendment: Recommendation 1(a), page 6:

- (1) DHS offers a clarifying amendment, to acknowledge that agencies currently coordinate with each other on a regular basis, often via processes and procedures that are already documented.
- (2) As the Recommendation's preamble states, in many instances, the effect of this recommendation will be to urge agencies to "memorialize agency interactions and agreements" in documented policies.
- (3) We believe that in its current form, Recommendation 1(a) does not put sufficient emphasis on the importance of documenting, rather than merely "adopting," certain coordination policies and procedures.

Accordingly, we suggest the following amendment to Recommendation 1(a):

Federal agencies that share overlapping or closely related responsibilities should adopt policies and procedures ~~for facilitating~~ to document ongoing coordination efforts, or to facilitate additional coordination with other agencies.

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DHS Proposed Amendments

Recommendation No. 5: ACUS Committee on Collaborative Governance

Improving Coordination of Related Agency Responsibilities

Amendment: Recommendation 1(a), page 6:

- (1) DHS agrees that by “improving efficiency, effectiveness, and accountability, [agency] coordination can help overcome potential dysfunctions created by shared regulatory space.”
- (2) DHS is concerned, however, that the Recommendation may be read to require agencies to develop documented coordination policies for every instance of “shared, overlapping or closely related jurisdiction or operation that might require, or benefit from, interagency coordination.” Recommendation 1(a), page 5.
- (3) DHS believes that it would not advance the interests of efficiency, effectiveness, and accountability to document every such opportunity for coordination.
- (4) Many coordination practices are not sufficiently complex for documentation to be helpful; others are demonstrably successful, and others still involve shifting players and are not amenable to formal documentation.
- (5) DHS believes that given the need for agencies to prioritize scarce resources, and notwithstanding the non-binding nature of Conference recommendations, the Conference should explicitly acknowledge a role for agency discretion in this area.

Accordingly, we suggest the following amendment to Recommendation 1(a):

Federal agencies that share overlapping or closely related responsibilities should adopt policies ~~and~~or procedures, as appropriate, for facilitating coordination with other agencies.

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DHS Proposed Amendments

Recommendation No. 5: ACUS Committee on Collaborative Governance

Improving Coordination of Related Agency Responsibilities

Amendment: Recommendation 4(b), page 8:

- (1) DHS offers a substantive amendment, to account for the range of situations in which consultation requirements arise.
- (2) DHS engages in consultation pursuant to statutory and legal requirements on a regular basis, on matters ranging from environmental protection to immigration and intelligence policy.
- (3) DHS believes that the resources required to engage in such consultation are not always significant, and may not justify the administrative burden of sharing agency resources in every instance of consultation.
- (4) DHS also believes that legal consultation requirements usually operate to protect the equities of both the “consulting” and the “consulted” agencies. In light of the shared benefits of consultation, DHS does not believe it is appropriate for the “consulting” agency to bear a disproportionate burden in every instance.

Accordingly, we suggest the following amendment to Recommendation 4(b):

Further, an action agency, on whom a duty to consult with other agencies falls, should ~~commit to contribute~~ consider contributing a share of its resources, as appropriate and to the extent it possesses the discretion to do so, to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.