Immigration Removal Adjudication

Committee on Adjudication

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The U.S. immigration removal adjudication agencies and processes have been the objects of critiques by the popular press, organizations of various types, legal scholars, advocates, U.S. courts of appeals judges, immigration judges, Board of Immigration Appeals members and the Government Accountability Office. Critics have noted how the current immigration adjudication system fails to meet national expectations of fairness and effectiveness. One of the biggest challenges identified in the adjudication of immigration removal cases is the backlog of pending proceedings and the limited resources to deal with the caseload. A study reports that the number of cases pending before immigration courts within the U.S. Department of Justice's Executive Office for Immigration Review ("EOIR") recently reached an all-time high of more than 300,000 cases and that the average time these cases have been pending is 519 days.[1] A February 2010 study by the American Bar Association's Commission on Immigration reports that the number of cases is "overwhelming" the resources that have been dedicated to resolving them.[2] Another challenge identified is the lack of adequate representation in removal proceedings, which can have a host of negative repercussions, including delays, questionable fairness, increased cost of adjudicating cases, and

[1] Transactional Records Access Clearinghouse, *Comprehensive, independent and nonpartisan information about U.S. federal immigration enforcement*, Syracuse Univ., *available at* http://trac.syr.edu/phptools/immigration/court_backlog/.

[2] American Bar Association Commission on Immigration, *Reforming the Immigration System, Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, 1-49 (2010) *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf.

risk of abuse and exploitation. More than half of respondents in immigration removal proceedings and 84 percent of detained respondents are not represented.[3]

The numerous studies examining immigration removal adjudication have focused on the two agencies principally involved: EOIR and the U.S. Department of Homeland Security ("DHS"), specifically two of its components: the United States Citizenship and Immigration Services ("USCIS") and Immigration and Customs Enforcement ("ICE"). Prior studies about EOIR have noted the limited resources available to the agency and called for more resources to hire more immigration judges and support staff and thus ease the backlog of cases; criticized immigration judge hiring standards and procedures, and recommended enhanced orientation, continuing education, and performance monitoring.

Consultants for the Administrative Conference of the United States conducted a comprehensive and detailed study of potential improvements in immigration removal adjudication.[4] Following the study and consistent with the Conference's statutory mandate of improving the regulatory and adjudicatory process, the Conference issues this Recommendation directed at reducing the caseload backlog, increasing and improving representation, and making the immigration adjudication system more modern, functional, effective, transparent and fair. This Recommendation urges a substantial number of improvements in immigration removal adjudication procedures, but does not address substantive immigration reform. A pervading theme of this Recommendation is enhancing the immigration courts' ability to dispose of cases fairly and efficiently. Many of the reforms are aimed at structuring the pre-hearing process to allow more time for immigration judges to give

[3] *Id.*

[4] *See* Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication: A Draft Report*, (Interim Draft April 23, 2012) *available at* http://www.acus.gov/wp-content/uploads/downloads/2012/04/Updated-ACUS-Immigration-Removal-Adjudication-Draft-Report-for-4-23.pdf.

complex cases adequate consideration. This Recommendation is directed at EOIR and DHS components' USCIS and ICE. A few parts of this Recommendation would also impact the practices of United States Customs and Border Protection ("CBP"), another component of DHS.

RECOMMENDATION

PART I. Immigration Court Management and Tools For Case Management

A. Recommendations to EOIR Regarding Immigration Court Resources, Monitoring Court Performance and Assessing Court Workload

1. To encourage the enhancement of resources, working within and through the U.S. Department of Justice ("DOJ"), the DOJ's Executive Office for Immigration Review ("EOIR") should:

    a. Continue to seek appropriations beyond current services levels but also plan for changes that will not require new resources;

    b. Make the case to Congress that funding legal representation for respondents (*i.e.*, non-citizens in removal proceedings), especially those in detention, will produce efficiencies and net cost savings; and

    c. Continue to give high priority for any available funds for EOIR's Legal Orientation Program ("LOP") and other initiatives of EOIR's Office of Legal Access Programs, which recruit non-profit organizations to provide basic legal briefings to detained respondents and seek to attract pro bono legal providers to represent these individuals.

2. To monitor immigration court performance, EOIR should:

a. Continue its assessment of the adaptability of performance measures used in other court systems;

b. Continue to include rank-and-file immigration judges and U.S. Department of Homeland Security ("DHS") agencies in the assessment of the court's performance;

c. Continue to incorporate meaningful public participation in its assessment; and

d. Publicize the results of its assessment.

3. To refine its information about immigration court workload, EOIR should:

a. Explore case weighting methods used in other high volume court systems to determine the methods' utility in assessing the relative need for additional immigration judges and allowing more accurate monitoring and analysis of immigration court workload;

b. Expand its data collection field, upon introduction of electronic filing or other modification of the data collection system, to provide a record of the sources for each Notice to Appear form ("NTA") filed in immigration courts;

c. Continue its evaluation of adjournment code data, as an aid to system-wide analysis of immigration court case management practices and devise codes that reflect the multiplicity of reasons for an adjournment;

d. Evaluate the agency's coding scheme to consider allowing judges or court administrators to identify what the agency regulations call "pre-hearing conferences," sometimes known as "status conferences;" and

e. Authorize, as appropriate, a separate docket in individual courts for cases awaiting biometric results with a special coding for these cases to allow later

measurement of the degree to which such security checks are solely responsible for the delays.

B. Recommendations to EOIR Regarding Immigration Court Management Structure and Court Workforce

4. EOIR should consider assembling a working group of immigration judges and others familiar with court management structures to assist in its ongoing evaluation of alternatives to the current Assistant Chief Immigration Judge structure used by the agency.

5. To increase the immigration court workforce, EOIR should:

   a. Consider the use of temporary immigration judges where permitted by its regulations. If temporary immigration judges are used, EOIR should use transparent procedures to select such judges and usual procedures for monitoring judges' performance;

   b. Consider the National Association of Immigration Law Judges' ("NAIJ") proposal for instituting senior status (through part-time reemployment or independent contract work) for retired immigration judges;[5] and

   c. Consider using appropriate government employees as temporary immigration court law clerks.

[5] *See Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary,* 112th Cong. (2011) (statement of NAIJ), *available at* http://dl.dropbox.com/u/27924754/NAIJ%20Written%20Statement%20for%20Senate%20Judiciary%20Cmte%205-18-11%20FINAL.pdf (*citing* the National Defense Authorization Act for FY 2010, Public Law 111-84 where Congress facilitated part-time reemployment of Federal employees retired under CSRS and FERS on a limited basis, with receipt of both annuity and salary).

6. To promote transparency about hiring practices within the agency and consistent with any statutory restrictions to protect privacy, EOIR should periodically publish summary and comparative data on immigration judges, Board of Immigration Appeals members, and support staff as well as summary information on judges' prior employment.[6]

7. EOIR should expand its webpage entitled "Immigration Judge Conduct and Professionalism" that discusses disciplinary action to include an explanation of why the agency is barred by statute from identifying judges upon whom it has imposed formal disciplinary action.

8. EOIR should consider incorporating elements of the American Bar Association's and the Institute for the Advancement of the American Legal System's Judicial Performance Evaluation models into its performance evaluation process, including the use of a separate body to conduct agency-wide reviews.[7]

C. Recommendations to EOIR Regarding Enhancing the Use of Status Conferences, Administrative Closures and Stipulated Removals

9. To enhance the utility of status conferences, EOIR should:

    a. Assemble a working group to examine immigration judges' perceptions of the utility, costs and benefits of such conferences;

[6] Some examples of the types of data that may be published include: year of law school graduation, graduate education, languages spoken, past employment with DHS, past employment representing respondents in immigration cases, military experience, gender and race/ethnicity composition.

[7] *See* Institute for the Advancement of the American Legal System, *Quality Judges Initiative*, U. Denv., *available at* http://www.du.edu/legalinstitute/jpe.html (providing Judicial Performance Evaluation resources); American Bar Association, Black Letter Guidelines for the Evaluation of Judicial Performance (2005), *available at* http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf (providing JPE resources).

b. Consider a pilot project to evaluate the effectiveness and feasibility of mandatory pre-hearing conferences to be convened in specified categories of cases;

c. Evaluate situations in which the judge should order the trial attorney to produce essential records from the respondent's file;

d. Evaluate the use of EOIR's Form-55[8] and consider creating a new form (similar to scheduling orders used in other litigation contexts); and

e. Recommend procedures for stipulations by represented parties.

10. To clarify the proper use of techniques for docket control in immigration removal adjudication cases, EOIR should:

a. Amend the Office of the Chief Immigration Judge's ("OCIJ") Practice Manual to specifically define "Motions for Administrative Closure;" and

b. Amend appropriate regulations so that once a respondent has formally admitted or responded to the charges and allegations in an NTA, the government's ability to amend the charges and allegations may be considered by the immigration judge in the exercise of his or her discretion.

11. EOIR should expand its review of stipulated removals by considering a pilot project to systematically test the utility of stipulated removal orders (provided that respondents have been counseled by independent attorneys) as a mechanism to (a) reduce detention time, (b) allow judges to focus on contested cases, and (c) assess whether and when the use of stipulated removals might diminish due process protections.

[8] *See* "Record of Master Calendar Form" in "Tools for the IJ" *available at* http://www.justice.gov/eoir/vll/benchbook/index.html.

12. In jurisdictions where DHS routinely seeks stipulated removal orders and asks for a waiver of the respondent's appearance, EOIR should consider designing a random selection procedure where personal appearance is not waived and the respondent is brought to the immigration court to ensure that the waivers were knowing and voluntary. If undertaking such a project, EOIR should encourage one or more advocacy organizations to prepare a video recording (with subtitles or dubbing in a number of languages) that explains the respondent's removal proceedings, general eligibility for relief, and the possibility of requesting a stipulated order of removal should the respondent wish to waive both the hearing and any application for relief including the privilege of voluntary departure.

D. Recommendation to EOIR and DHS Regarding the BIA

13. EOIR should finalize its 2008 proposed regulations to allow greater flexibility in establishing three-member panels for the Board of Immigration Appeals ("BIA").

PART II. Immigration Removal Adjudication Cases and Asylum Cases

A. Recommendations to EOIR Regarding Prosecution Arrangements and the Responsibilities of Trial Counsel

14. EOIR should not oppose unit prosecution, which DHS's Immigration and Customs Enforcement ("ICE") Chief Counsel has devised for prosecution in some immigration courts.[9]

15. EOIR should consider providing immigration judges with additional guidance directed at ensuring that trial counsel are prepared and responsible for necessary actions that the parties must complete between hearings. Specifically, EOIR should consider:

[9] The term "unit prosecution," also sometimes known as "vertical prosecution," is used in this Recommendation to refer to a practice used in some immigration courts, whereby the ICE Chief Counsel organizes ICE trial attorneys into teams and then assigns the teams to cover the dockets of specific judges.

a. Amending the OCIJ's Practice Manual to explicitly include best practices for the activities of trial counsel in immigration removal proceedings;

b. Instructing judges to document, in the record, the responsibilities, commitments, actions and omissions of trial counsel in the same case; and

c. Clarifying the authority for judges to make conditional decisions on applications for relief where trial counsel has not provided necessary information.

B. Recommendations to EOIR Regarding Representation

16. To increase the availability of competent representation for respondents, EOIR should:

a. Undertake a more intensive assessment of the paraprofessional programs that provide legal representation and the accreditation process for such programs;

b. Continue its assessment of the accuracy and usefulness of the pro bono representation lists provided at immigration courts and on the agency's website; and

c. Develop a national pro bono training curriculum, tailored to detention and non-detention settings:

i. The training curriculum should be developed in consultation with groups that are encouraging pro bono representation.

ii. The training curriculum should be offered systematically and in partnership with educational, CLE and/or non-profit providers.

17. To enhance the guidance available to legal practitioners and pro se respondents, EOIR should:

a. Work with a pro bono organization to develop materials that explain the legal terms and concepts within the OCIJ Practice Manual;

b. Share supplemental instructions developed by individual immigration courts or judges to aid the parties in preparing submissions to the immigration court; and

c. Evaluate the cost and utility of developing access to electronically-available information in immigration court waiting rooms or similar spaces so that the respondents can access the court website and find instructional materials.

18. To enhance the number and value of know-your-rights ("KYR") presentations given to detained respondents, EOIR should:

a. Ensure that KYR presentations are made sufficiently in advance of the initial master calendar hearings to allow adequate time for detained individuals to consider and evaluate the presentation information (to the extent consistent with DHS requirements for KYR providers);

b. Consider giving LOP providers electronic access to the court dockets in the same manner as it is currently provided to DHS attorneys representing the government in cases (with appropriate safeguards for confidentiality and national security interests); and

c. Encourage local EOIR officials to obtain from detention officers aggregate data about new detainees (such as, where possible, lists of new detainees, their country of origin, and language requirements) at the earliest feasible stage for both the immigration courts and LOP providers.

19. EOIR should study and develop the circumstances where the use of limited appearances, (the process by which counsel represent a respondent in one or more phases of the

litigation but not necessarily for its entirety), is appropriate and in accordance with existing law. After further study, EOIR should consider taking appropriate action such as:

a. Modifying appropriate and underlying regulations as necessary;

b. Issuing an OPPM entry to explain to immigration judges the circumstances in which they may wish to permit limited appearances and the necessary warnings and conditions they should establish; and

c. Amending the OCIJ Practice Manual to reflect this modified policy.

20. EOIR should consider whether pro se law clerk offices would save costs, enhance fairness, and improve efficiency.

21. To encourage improvement in the performance of attorneys who appear in the immigration court, EOIR should:

a. Continue its efforts to implement the statutory grant of immigration judge contempt authority;[10]

b. Evaluate appropriate procedures (as supplements to existing disciplinary procedures) to allow immigration judges to address trial counsel's 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 to subsidize the cost of developing such materials.

[10] The Immigration and Nationality Act of 1952 ("INA"), § 240(b)(1) (2010); 8 U.S.C. § 1229a(b)(1) (2006).

C. Recommendations to DHS Regarding Notice to Appear Forms

22. DHS should consider revising the NTA form or instruct its completing officers to clearly indicate officer's agency affiliation, being specific about the entity preparing the NTA, in order to enhance the immigration court's ability to better estimate future workload.[11]

23. DHS should conduct a pilot study evaluating the feasibility of requiring (in appropriate cases) the approval of an ICE attorney prior to the issuance of any NTA. The pilot study should be conducted in offices with sufficient attorney resources and after full study of the efficiencies and operational changes associated with this requirement, DHS should consider requiring attorney approval in all removal proceedings.

D. Recommendations to EOIR Regarding the Asylum Process

24. To facilitate the processing of defensive asylum applications, EOIR should consider having the OCIJ issue an OPPM entry, which:

    a. Explains that appropriate procedures for a respondent's initial filing of an asylum application with the immigration court do not require the participation of the judge and oral advisals made on the record at the time of the initial filing;[12]

    b. Authorizes court personnel to schedule a telephonic status conference with the judge and ICE attorney in any situation where the respondent or his/her representative expresses a lack of understanding about the asylum filing and advisals;

[11] The purpose of this recommendation, coupled with Recommendation ¶ 3b, is to allow EOIR to better refine its information about immigration court workload by expanding its data collection field to include a record of the sources for each NTA form filed in immigration court.

[12] "Oral advisal" is a term used by immigration courts to mean warnings given by an immigration judge about the procedural and substantive consequences for various actions.

c. Notes that the immigration judge may renew, at the merits hearing, the advisal of the danger of filing a frivolous application and allow an opportunity for the respondent to withdraw the application; and

d. Makes clear that the filing with immigration court personnel qualifies as a filing with the court, satisfies the statutory one-year filing deadline in appropriate cases and for the purposes of commencing the 180-day work authorization waiting period.

25. EOIR should consider seeking enhanced facilitation of defensive asylum applications by amending its current procedure of having judges "adjourn" asylum cases involving unaccompanied juveniles while the case is adjudicated within the DHS Asylum Office and instead have the judge administratively close the case. If the Office subsequently cannot grant the asylum or other relief to the juvenile, the Office can refer the case to ICE counsel to initiate a motion to re-calendar the removal proceeding before the judge.

26. EOIR should give priority to the use of adjournment codes for the purpose of managing immigration judges' dockets and stop using these codes to track the number of days an asylum application is pending.

E. Recommendation to DHS Regarding the Asylum Process

27. DHS should consider revising its regulations and procedures to allow asylum and withholding applicants to presumptively qualify for work authorization provided that at least 150 days have passed since the filing of an asylum application.[13]

F. Recommendations Regarding Further Study of Immigration Adjudication and the Asylum Process

[13] *See Immigration Removal Adjudication Rept. (Apr. 2012)*, *supra* note 1, at 54-55 (describing in detail how these revised regulations would work under this recommendation).

28. With the active participation of DHS and EOIR and with input from all other relevant stakeholders, a comprehensive study of the feasibility and resource implications of the following issues related to proposed changes to the asylum process should be conducted:

    a. Whether DHS should direct some appeals currently in the BIA's jurisdiction to more appropriate forums and subject to the availability of resources by:

        i. Seeking statutory and regulatory change to allow all appeals of denied I-130 petitions to be submitted to the United States Citizenship and Immigration Services' Administrative Appeals Office ("AAO");

        ii. Amending regulations to send all appeals from United States Customs and Border Protection ("CBP") airline fines and penalties to AAO; or alternatively consider eliminating any form of administrative appeal and have airlines and other carriers seek review in federal courts; and

        iii. Creating a special unit for adjudication within the AAO to ensure quality and timely adjudication of family-based petitions, which should:

            1. Formally segregate the unit from its other visa petition adjudications;

            2. Issue precedent decisions with greater regularity and increase the unit's visibility; and

            3. Publicize clear processing time frames so that potential appellants can anticipate the length of time the agency will need to complete adjudication.

b. Whether EOIR should seek enhanced facilitation of defensive asylum applications by amending its regulations to provide that where the respondent seeks asylum or withholding of removal as a defense to removal, the judge should administratively close the case to allow the respondent to file the asylum application and/or a withholding of removal application in the DHS Asylum Office; and if the Office does not subsequently grant the application for asylum or withholding, or if the respondent does not comply with the Office procedures, that office would refer the case to ICE counsel to prepare a motion to re-calendar the case before the immigration court.

c. Whether the United States Citizenship and Immigration Services ("USCIS") should expedite the asylum process by:

i. Amending its regulations to provide an asylum officer with authority to approve qualified asylum applications in the expedited removal context;

ii. Allocating additional resources to complete the asylum adjudication in the expedited removal context; as there may be significant net cost savings for other components of DHS and for EOIR;

iii. Amending its regulations to clarify that an individual, who meets the credible fear standard, could be allowed to complete an asylum application with an asylum officer instead of at an immigration court; and

iv. Allowing an asylum officer to grant an applicant parole into the U.S. where the officer believes the individual has a well-founded fear of persecution or fear of torture and permit the officer to recommend that DHS allow the individual to be released from detention on parole pending completion of the asylum process.

d. Whether USCIS should clarify that an asylum officer may prepare an NTA and refer a case to immigration court where an officer determines that a non-citizen meets the credible fear standard but the officer believes that the case cannot be adequately resolved based on the initial interview and the asylum application prepared in conjunction with that interview, or in cases where an officer believes there are statutory bars to full asylum eligibility.

e. Whether DHS should facilitate the DHS Asylum Office's adjudication of certain closely related claims by:

i. Amending its regulations to authorize the Office to adjudicate eligibility for withholding of or restriction on removal providing also that if the Office grants such relief, there would be no automatic referral to the immigration court;

ii. Amending its regulations to authorize the Office to grant "supervisory release," identity documents, and work authorization to individuals who meet the legal standards for withholding or restriction on removal;

iii. Developing a procedure in cases where withholding or supervisory release are offered requiring the Office to issue a Notice of Decision explaining the impediments to asylum, informing an applicant of his or her right to seek de novo review of the asylum eligibility before the immigration court, and explaining the significant differences between asylum and withholding protections; and

iv. Developing a procedure to allow such applicants to request immigration court review, whereupon the Asylum Office would initiate a referral to the immigration court.

G. Recommendations to EOIR and DHS Regarding the Use of VTC and Other Technology

29. EOIR and DHS should provide and maintain the best video teleconferencing ("VTC") equipment available within resources and the two agencies should coordinate, where feasible, to ensure that they have and utilize the appropriate amount of bandwidth necessary to properly conduct hearings by VTC.

30. EOIR should consider more systematic assessments of immigration removal hearings conducted by VTC in order to provide more insights on how to make its use more effective and to ensure fairness. Assessments should be periodically published and include:

    a. Consultation with the DHS Asylum Office regarding its use of VTC equipment and review of its best practices for possible adoption and integration into EOIR procedures;

    b. Random selection of hearings conducted by VTC for full observation by Assistant Chief Immigration Judges and/or other highly trained personnel;

    c. Formal evaluation of immigration removal hearings conducted by VTC;

    d. Gathering information, comments and suggestions from parties and other various stakeholders about the use of VTC in immigration removal hearings; and

    e. A realistic assessment of the net monetary savings attributable to EOIR's use of VTC equipment for immigration removal hearings.

31. EOIR should:

    a. Encourage its judges, in writing and by best practices training, to (a) be alert to the possible privacy implications of off-screen third parties who may be able to see or hear proceedings conducted by VTC, and (b) take appropriate corrective

action where procedural, statutory or regulatory rights may otherwise be compromised; and

b. Consider amending the OCIJ Practice Manual's §4.9 ("Public Access") to remind respondents and their representatives that they may alert the judge if they believe unauthorized third parties are able to see or hear the proceedings.

32. EOIR should direct judges to inform parties in hearings conducted by VTC who request in-person hearings of the possible consequences if the judge grants such a request, including, but not limited to, delays caused by the need to re-calendar the hearing to such time and place that can accommodate an in-person hearing.

33. To facilitate more effective representation in removal proceedings where VTC equipment is used, EOIR should:

a. Provide more guidance to respondents and their counsel about how to prepare for and conduct proceedings using VTC in the OCIJ Practice Manual and other aids it may prepare for attorneys, and for pro se respondents;

b. Encourage judges to permit counsel and respondents to use the courts' VTC technology, when available, to prepare for the hearing; and

c. Encourage judges to use the VTC technology to allow witnesses to appear from remote locations when appropriate and when VTC equipment is available.

34. To improve the availability of legal consultation for detained respondents and help reduce continuances granted to allow attorney preparation, DHS should consider:

a. Providing VTC equipment where feasible in all detention facilities used by DHS, allowing for private consultation and preparation visits between detained respondents and private attorneys and/or pro bono organizations;

b. Requiring such access in all leased or privately controlled detention facilities where feasible;

c. In those facilities where VTC equipment is not available, designating duty officers whom attorneys and accredited representatives can contact to schedule collect calls from the detained respondent where feasible; and

d. Facilitating the ability of respondents to have private consultations with attorneys and accredited representatives.

35. To improve the availability of legal reference materials for detained respondents:

a. DHS should make available video versions of the KYR presentations on demand in detention facility law libraries; and where feasible, to be played on a regular basis in appropriate areas within detention facilities; and

b. EOIR should assist in or promote the transcription of the text of relevant videos into additional languages or provide audio translations in the major languages of the detained populations.

36. EOIR should encourage judges to permit pro bono attorneys to use immigration courts' video facilities when available to transmit KYR presentations into detention centers and subject to DHS policies on KYR presentations.

37. EOIR should move to full electronic docketing as soon as possible.

a. Prior to full electronic docketing, EOIR should explore interim steps to provide limited electronic access to registered private attorneys, accredited representatives, and ICE trial attorneys; and

b. EOIR should consider the interim use of document cameras in video proceedings prior to the agency's full implementation of electronic docketing and electric case files.