

## PUBLIC CITIZEN LITIGATION GROUP

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August 23, 2016

Matthew Wiener, Executive Director  
Administrative Conference of the United States  
1120 20th St NW, Suite 706 South  
Washington, DC 20036

Dear Matt,

I am writing to update ACUS on a recent decision of the DC Circuit that bears on Recommendation 2012-3, Immigration Removal Adjudication, which was adopted on June 15, 2012. As made clear by a recent decision of the United States Court of Appeals for the D.C. Circuit, Recommendation 2012-3 erroneously assumes, in recommendation 7 and footnote 8, the existence of a statutory bar to disclosure of identifying immigration judges who have been disciplined.

Specifically, in recommendation 7 of Recommendation 2012-3, ACUS stated “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. Footnote 8, which follows recommendation 7, states: “The Conference takes no position on whether EOIR should identify judges upon whom it has imposed formal disciplinary action or on the statute barring such action.” The recommendation did not identify the statute to which it referred. The researchers’ report in connection with Recommendation 2012-3 likewise referred to but did not identify a statutory bar, saying only that “EOIR officials explained that they are barred by statute and executive branch policies from” identifying immigration judges who have been disciplined. Benson & Wheeler Report at 111.

In November 2012, the American Immigration Lawyers Association (AILA) sent a Freedom of Information Act (FOIA) request to EOIR, seeking complaints against immigration judges and various records related to those complaints. When EOIR did not respond to the request, AILA sued in U.S. District Court for the District of Columbia. In the course of the litigation, EOIR produced copies of complaint files, but with the names of the immigration judges redacted. EOIR cited FOIA exemption 6 as the basis for the redactions. Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The D.C. Circuit held that “EOIR’s across-the-board redaction of all judges’ names from all responsive documents was inadequately justified.” *AILA v. EOIR*, No. 15-5201, at 11 (D.C. Cir. July 29, 2016). The court explained that both the public and the private interests would vary with respect to each immigration judge, depending on considerations such as whether the judge was still on the bench, the number of complaints against the judge, and whether the complaints had been substantiated. *Id.* at 14. The court remanded the case to the district court with instructions that, if

EOIR continued to claim that exemption 6 justified withholding of the names of all the immigration judges, EOIR “should make a more particularized showing for defined subgroups of judges or individual judges.” *Id.* at 15.

The only statute on which EOIR relied in the AILA litigation was FOIA, and although FOIA exemption 3 would authorize EOIR to withhold information protected from disclosure by another statute, EOIR mentioned no such statute in the course of the litigation. Although the D.C. Circuit left open the *possibility* that EOIR could justify redacting all the names under exemption 6, the court’s opinion shows that possibility to be remote. Thus, the court’s analysis and EOIR’s position in the litigation make clear that ACUS Recommendation 2012-3 erred in its assumption that “the agency is barred by statute from identifying judges upon whom it has imposed formal disciplinary action.”

Sincerely,

A handwritten signature in black ink, appearing to read "Allison Zieve". The signature is fluid and cursive, with a prominent flourish at the end.

Allison Zieve  
Public member, ACUS  
Director, Public Citizen Litigation Group